

आयकर अपीलिय अधिकरण "G" न्यायपीठ मुंबई मे ।

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

श्री महावीर सिंह, न्यायिक सदस्य एवं श्री एम. बालगणेश लेखा सदस्य के समक्ष ।

BEFORE SRI MAHAVIR SINGH, JM AND SRI M BALAGANESH, AM

आयकर अपील सं./ ITA No. 6443/Mum/2016

(निर्धारण वर्ष / Assessment Year 2011-12)

| | | |
|---|-----|---|
| The Income Tax Officer, Ward 2(2)(2), Room No. 477B, 4 th Floor, Aayakar Bhavan, M.K. road, Mumbai-20 | Vs. | M/s Smart Sensors & Transducers Ltd. 10A, Ialwan Industrial Estate, 14, G.D. Ambedkar Road, Wadala, Mumbai-31 |
| (अपीलार्थी / Appellant) | .. | (प्रत्यर्थी / Respondent) |
| स्थायी लेखा सं./PAN No. AAACA3902C | | |

अपीलार्थी की ओर से / **Appellant by** : Shri Chaudhary Arunkumar
Singh, DR
प्रत्यर्थी की ओर से / **Respondent by** : Shri Rakesh Mohan, AR

| | |
|---|-------------------|
| सुनवाई की तारीख / Date of hearing: | 28-02-2019 |
| घोषणा की तारीख / Date of pronouncement : | 6 -03-2019 |

आदेश / ORDER

महावीर सिंह, न्यायिक सदस्य/
PER MAHAVIR SINGH, JM:

This appeal filed by the Revenue is arising out of the order of Commissioner of Income Tax (Appeals)-14, Mumbai [in short CIT(A)], in Appeal No. CIT(A)-14/IT-200/14-15 vide order dated 31.08.2016. The



Assessment was framed by the Income Tax Officer, Ward-7(2)(4) (in short 'ITO/ AO') for the A.Y. 2011-12 vide order dated 30.03.2014 under section 143(3) of the Income Tax Act, 1961 (hereinafter 'the Act').

2. The only issue in this appeal of the revenue is against the order of the CIT(A) in allowing set off of brought forward business loss and brought forward long term capital loss against the deemed short term capital gain computed by the assessee. For this, the revenue has raised following two grounds:

"1. The Id CIT(A) has erred in not appreciating the fact that provisions under section.72 of the income tax act 1961 allows only business loss to be set off against business income and provisions us.74 of the income tax act, 1961 allows only LTCL can be set off against LTCG,.

2. The CIT(A) has erred on facts and in law in allowing set off claim of brought forward business loss ₹73,45,952/- and brought forward long term capital loss of ₹28,17,942/- against short term capital gain as per section 50 of the I.T.Act."

3. Briefly stated the facts are that the Assessing Officer during the course of assessment proceedings noticed that the assessee in the original return of income, has claimed long term capital loss of ₹1,50,48,444/- on account of sale of its factory building. The Assessing Officer noted that since the factory building is a depreciable asset, the resultant capital gain on the sale of such depreciable asset is to be treated as short term capital gain as envisaged by the provisions of section 50 of the Act. Consequent to this, the assessee revised its return of income and



offered the gain from sale of factory building as short term capital gain amounting to ₹2,71,01,255/-. The assessee revised the return of income within the time prescribed under section.139(5) of the Act. The assessee claimed set off of brought forward business loss of ₹73,45,952/- and brought forward long term capital loss of ₹28,17,942/- against the short term capital gain claimed in the revised return on account of sale of factory building at ₹ 2,71,01,255/-. The Assessing Officer noted that in view of the provisions of section 74 of the Act, only long term capital loss can be set off against long term capital gains. He also noted that as per the provisions of section 72 of the Act, the business loss can be set off against business income and not against short term capital gains computed by the assessee in terms of section 50 of the Act. Accordingly, the Assessing Officer disallowed the claim of brought forward business loss and brought forward long term capital gains. Aggrieved, the assessee preferred appeal before the CIT(A).

4. The CIT(A) after considering the submissions of the assessee and also considering the decision of Hon'ble Bombay High Court in the case of CIT vs. Manali Investments vs ACIT , 39 Taxman com.4 dated 13.3.2013 allowed the claim of brought forward business loss and brought forward long term capital loss to be set off against short term capital gain computed under section 50 of the Act. For this, the CIT(A) observed in para 4., 4.1, 4.2 & 4.3 as under:



“ 4. As regards ground No. 1, the facts are that the appellant has sold its factory building and claimed long term capital loss of Rs 1,50,48,444/-. During the course of assessment proceedings the appellant submitted revised computation showing short term capital gain of Rs 2,71,01,255/- which was found to be in order by the AO. In the revised computation, the appellant claimed set off of brought forward business loss of Rs 73,45,952/- and brought forward long term capital loss of Rs 28,17,942/-. The appellant relied on various decisions as mentioned in the Assessment order. However, the AO did not accept the claim .

4.1 The detailed submission of the appellant is reproduced above. I have considered the submissions made. It is noted that Hon'ble Jurisdictional ITAT, Mumbai in the case of Rajshree Roadlines Pvt. Ltd ITA No. 1627/Mum/2012 A.Y 2007-08 dated 20/3/2013 has discussed the issue in detail and held that the set off of unabsorbed depreciation and eligible business loss against short term capital gain computed u/s 50 of the Act is allowable. In this connection, Hon'ble ITAT has observed that post amendment on 1/4/2002 unabsorbed depreciation can be set off against any income and relied on the decision of Suresh Industries Pvt. Ltd. 27 Taxman.com 203 and Sri Padmavati Srinivas Cotton and Ginning Process Factory 125 TTJ 411. Similarly in the case of Digital Electronics Ltd vs Addl. CITG 135 ttj 419 (Mum), Mumbai Tribunal held that income earned by the assessee in the relevant year on sale of factory building, plant and machinery although not taxable as profits and gains of business or profession is an income in the nature of income of business though assessed as capital gains under section 50 and therefore the assessee is entitled to set off of brought forward business losses against the said capital gain.

4.2 Further the Hon'ble Bombay High Court in the case of CIT-9 vs. Pursarth Trading Company P. Ltd ITA NO. 123 of 2013 dated 13/3/2013, 33 Taxmann.Com. 482(Bom) also held that b/f long term capital loss can be set off against short term capital gain computed u/s 50C following the decision in the case of Manal Investments vs. ACIT (2011). Hon'ble Bombay High Court in the case of CIT-19 vs Manali Investments 39 Taxmann.Com. 4 dated 13/3/2013 held that in view of the decision in the case of CIT vs. ACE Builders Pvt. Ltd 281 ITR 210, short term capital gain computed u/s 50 on long term capital gain asset can be set off against long term capital loss u/s 74. Hon'ble Bombay High Court in the case of CIT v. Parys (Easter) (P) Ltd dated 18/2/2016 384 ITR 264 (Bom) held that the deeming fiction is restricted only to the mode of computation of capital gains and does not change the character of the capital gain from that of being long term capital gain.

4.3 Thus both the claims of the appellant are covered in its favour by the decision of Hon'ble Jurisdictional High Court and Jurisdictional Tribunal. As discussed in the submission of the appellant the decisions relied upon by the appellant are distinguishable on facts and by latest decisions of



Hon'ble Jurisdictional Tribunal/High Court. Therefore considering the facts of the case, the grounds taken by the appellant are allowed.”

5. Aggrieved against the order of the CIT(A) and allowance of set off of brought forward business loss and brought forward long term capital loss against short term capital gain computed under section 50 of the Act, the revenue came in appeal before the Tribunal.

6. Before us, Id Sr Departmental Representative heavily relied on the provisions of section 74 of the Act and stated that once the assessee itself has treated the gain arising out of sale of factory building as short term capital gain, brought forward business loss cannot be set off against such gain in terms of provisions of section 74 of the Act. Similarly, even brought forward long term capital loss cannot be set off against short term capital gain as per provisions of section 74 and 72 of the Act. According to him, the Assessing Officer has rightly disallowed the claim and the CIT(A) totally erred by allowing the claim of the assessee.

7. On the other hand, Id Counsel for the assessee relied on the order of the CIT(A).

8. We have heard the rival contentions and gone through the facts and circumstances of the case. We find that Hon'ble Bombay High Court in the given facts has considered this issue in the case of Manali Investments (supra), wherein, the question referred before the Hon'ble High Court reads as under:

“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



ITAs No. 6443/Mum/2016

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 (281 ITR 210) even though the said decision was rendered in the context of eligibility of deduction under Section 54E.”

9. Hon'ble Bombay High Court has considered the issue of allowance of set off of long term capital loss in terms of section 74 of the Act against the short term capital gain computed under section 50 of the Act. Hon'ble High Court has observed 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 and this deeming fiction is restricted only for the purposes of Section 50 of the Act but the benefit of set off of long term capital loss under section 74 of the Act is to be allowed. Hon'ble High Court has also followed its decision in the case of CIT vs.. *Ace Builders (P.) Ltd*, 281 ITR 210 (Bom),

10. As regards to set off of business loss against gain on sale of depreciable asset of factory building by the assessee, we find that the co-ordinate Bench of the Tribunal in the case of *M/s. Raj Shree Roadlines vs ITO* (ITA No.1627/Mum/2012) for A.Y . 2007-08 has considered the issue of business loss of unabsorbed depreciation and eligible business loss can be set off against short term capital gain computed under section.50 of the Act. We find that the Tribunal after considering the provisions of section 32(2), 72(2) and 73(3) of the Act opined that while deciding the issue of carrying forward of loss/unabsorbed depreciation and the amendment made in these section from time to time are applicable for carrying forward of depreciation/loss with effect from 1.4.2002. For this proposition, the Tribunal has relied on the decision of Hon'ble Bombay High Court in the case of *CIT vs. Hathway Investments (P) Ltd.*, in Income Tax Appeal



(L) No.405 of 2012 dated 341.3.2013. We find the above proposition is supported by the decision of Hon'ble Bombay High Court in the case of Manali Investment (supra), , wherein, it is held that short term capital gain computed under section.50 of the Act can be set off against brought forward capital loss and also brought forward business loss. Accordingly, we are of the considered view that the CIT(A) has rightly allowed the claim of the assessee and we affirm the same.

11. In the result, the appeal of the revenue is dismissed.

Order pronounced in the open court on 6 -03-2019.

(एम. बालगणेश / M BALAGANESH)
(लेखा सदस्य / ACCOUNTANT MEMBER)

(महावीर सिंह / MAHAVIR SINGH)
(न्यायिक सदस्य/ JUDICIAL MEMBER)

Mumbai, Dated: 6-03-2019.

BKP/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)
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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