आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'जे' मुंबई ।

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

सर्वश्री एच.एल. कार्वा ,अध्यक्ष **एवं** नरेन्द्र कुमार बिल्लैय्या, लेखा सदस्य के समक्ष

BEFORE SHRI H.L. KARWA, PRESIDENT AND SHRI N.K. BILLAIYA, AM

आयकर अपील सं./I.T.A. No.2956/Mum/2011

(**निर्धारण वर्ष /** Assessment Year : 2005-06

The ITO, 11(2)-4, Aayakar Bhavan, Mumbai-400 020	**बनाम**/ Vs.	Shri Jagdish R. Mookhey, 410 Anand Deep Chambers, 273/77 Narshi Natha Street, Mumbai-400 009

आयकर अपील सं./I.T.A. No.3152/Mum/2011

(**निर्धारण वर्ष /** Assessment Year : 2005-06

Shri Jagdish R. Mookhey, 410 Anand Deep Chambers, 273/77 Narshi Natha Street, Mumbai-400 009	**बनाम**/ Vs.	The ITO, 11(2)-4, Aayakar Bhavan, Mumbai-400 020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAGPM 6714C		
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

अपीलार्थी ओर से/ **Revenue by:**	Smt. Neeraja Pradhan
प्रत्यर्थी की ओर से/**Assessee by :**	Shri A.K. Lal

सुनवाई की तारीख **/ Date of Hearing : 16.4.2013**

घोषणा की तारीख /**Date of Pronouncement : 23.4.2013**

आदेश / O R D E R

PER N.K. BILLAIYA, AM:

These cross appeals by the Revenue and the assessee are directed against the very same order of the Ld. CIT(A)-3, Mumbai dt.28.1.2011 pertaining to A.Y. 2005-06. Since both these appeals were heard

together, they are disposed of by this common order for the sake of convenience and brevity.

ITA No. 2956/M/2011 – Revenue's Appeal

2. The Revenue has raised following effective grounds of appeal:

> *"1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) Mumbai erred in holding that the land has been transferred when the actual asset which has been transferred is the factory building which is apparent from the partnership deed dt. 2.4.2004 as per Para No. 3.*
>
> *2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) Mumbai erred in giving a direction to the AO to bifurcate the full value of the consideration of Rs. 95 lacs between land and the building when it is apparently clear that the full value of consideration of Rs. 95 lacs pertains to the factory building vide partnership deed dt. 2.4.2004 as per Para No. 3."*

3. In this case, the original assessment was completed u/s. 143(3) of the Act vide order dt. 12.12.2007 assessing the total income at Rs. 2,44,769/-. The assessment was reopened u/s. 147 of the Act after recording the reasons for the same and statutory notices u/s. 148 of the Act were issued and served upon the assessee. The assessee vide letter dt. 16.2.2009 has informed that the original return filed on 31.8.2005 for the year under consideration may be treated as return in response to notice u/s. 148 of the Act.

3.1. During the course of the reassessment proceedings, the Assessing Officer observed that the assessee purchased plot from CIDCO at Vashi, Navi Mumbai for Rs. 1,70,000/- in the year 1981 for conducting on the

business of cold storage in the name and style N/s. Raj Ice & Cold Storage Co. The AO further observed that the assessee could not get reasonable profit from the business and at the same time since the plot allotted by the CIDCO was for specific purpose and was non-transferrable, the assessee entered into a partnership with Shri Gopal Krishna Agarwal and Shri Kalrit K. Agarwal in the name and style M/s. Raj Ice & Cold Storage with assessee's capital introduction valued at Rs. 95 lakhs. According to the AO, the cost of factory was valued at Rs. 95 lakhs and the same was treated as assessee's capital for partnership business. The partnership was confirmed vide partnership Deed dt. 2.4.2004. The AO further observed that prior to entering in the partnership, the assessee had received Rs. 75 lakhs from Shri Gopal Krishna Agarwal and Shir Kalrit K. Agarwal on various dates as exhibited at page-2 of the assessment order. After the formation of partnership, the assessee received 20 lakhs on various dates as exhibited on page-2 & 3 of the assessment order. On 1.4.2005, the assessee retired from the partnership firm relinquishing all his rights in the firm. The AO was of the firm belief that at the time of original assessment, there was a single unit mentioned as factory whereas there is ambiguity in the working of capital gain in computation of total income filed with the return of income by the assessee wherein the assessee has claimed Short Term Capital Gains on transfer of factory building and Long Term Capital Gain on transfer of plot of land. The AO further observed that the assessee has claimed exemption u/s. 54EC of the Act on the ground that he has invested Rs. 73.50 lakhs in NABARD Bond on 30.8.2005. After considering the facts of the case at the time of original assessment as well as at the time of reassessment proceedings, the AO was of the opinion that the assessee could not produce any evidence to substantiate his claim that he has received consideration of Rs. 11.50 lakhs towards factory

building and Rs. 83.50 lakhs towards land. The AO sought explanation from the assessee by asking why the land and factory building should not be taken as one unit and why the capital gain should not be considered as Short Term Capital Gain as per the provisions of Sec. 50 of the Act. The assessee filed a detailed reply as under:

> *"The provision of section .50-C is applicable only to depreciable assets and the land is an independent and identifiable capital asset and continues to remain as an identifiable capital asset even after the construction of building. Therefore, the question of land & building as one unit as stated by your honour is not as per the provisions of the I.T. Act 1961. The work factory' in para 3 of the partnership deed dt. 02.04.2004 means 'the CIDCO Plot (i.e. the land) and the building standing thereon as without land no building can be erected/constructed. Therefore, what is transferred /converted into capital is the land and the building thereon. The balance sheets already filed with the Department even much before the initiation of reopening proceedings. the building and CIDCO Plot have separately been depicted therein. The contents of para 3 of the partnership deed dated 02.04.2004 cannot be read in isolation but to be considered on the basis of the facts of the case and the materials/documents filed with Department prior to the initiation of the proceedings under sec. 147/148 of the I.T. Act, 1961 and during the course of assessment proceedings. I submit that there arises no question of bringing the land within the ambit of the provision of section 50-C of the I.T.Act, 1961."*

3.2. The AO rejected the submissions of the assessee because in his opinion at para No. 3 of Partnership Deed dt. 2.4.2004, the Deed does not speak about the land and building as separate entities. The AO further observed that there is no acceptance by the firm on account of transfer of assets by the assessee as a factory building and a plot of building separately. The AO was convinced that the structure and the land are only one unit and as the factory building is a depreciable asset, the whole factory premises is considered as depreciable assets and the gain arising

out of such transfer has to be treated as Short Term Capital Gain as per the provisions of Sec. 50 of the Act and worked out the Short Term Capital Gains at Rs. 81,79,060/-. The AO further proceeded to disallow the claim of exemption u/s. 54EC of the Act as claimed by the assessee for investment in NABARD Bonds. According to the AO, since the transfer took place as on the date of execution of the Partnership Deed dt. 2.4.2004 by way of introduction of partner's capital, the assessee should have invested in the capital gain bonds within 6 months from the transfer of the assets. The AO sought explanation from the assessee. In response to which, the assessee submitted that he has received the final payment on 31.3.2005 therefore the period of investment should be considered from 31.3.2005 and as the assessee has invested in capital gains exemption bonds on 30.8.2005, therefore the investment in the bonds is within the time limit specified by the provisions of Sec. 54EC of the Act.

3.3. After considering the submissions in the light of the facts of the case, the AO was of the opinion that the assessee has not invested within 6 months from the date of the transfer which according to the AO was on 2.4.2004.

4. Aggrieved by this finding, the assessee preferred an appeal before the Ld. CIT(A). Before the Ld. CIT(A), the assessee challenged the reopening of assessment alongwith the merits of the case. The Ld. CIT(A) was convinced that the reopening u/s. 147 is valid and as per provisions of law. Coming to the merits of the case, the Ld. CIT(A) at para-2.2.6 and 2.2.7 at page-5 of his order held as under:

> *"2.2.6 Facts and material on record are considered. In so far as the computation of capital gain is concerned, land being a non-*

depreciable asset and on which depreciation had not been allowed to the Appellant in earlier years, cannot be considered within the provisions of Section 50. However, factory being a depreciable asset is rightly considered under Section 50 both by Appellant and AC. In so far as the cost of acquisition of both assets is concerned there is no dispute regarding the year in which the land was purchased, value thereof or the written down value of the factory. From the facts of the case it is apparent that capital gains in respect of land would be long-term capital gains but in respect of factory would be short-term capital gains as prescribed in Section 50. It is seen that the partnership deed mentions Factory at 29, Mafco Compound, APMC Yard, Vashi, Navi Mumbai. This contribution by the Appellant to the partnership firm was valued at Rs.95 lakhs. While it is correct that the partnership deed mentions only factory and does not mention land or its transfer separately, it is undeniable that the factory itself could not have exchanged hands or been transferred without the accompanying land in practical terms and also in view of CIDCO's rules, guidelines and compliances relating to land allocation, development and its use land would have transferred by Appellant with the structure. These have been brought out very clearly by Appellant and in fact have been submitted to be the reason for Appellant transferring the property to the partnership firm and then retiring from the same. In the facts and circumstances of the case therefore the sum of Rs.95 lakhs is to be considered as consideration for both the land and the factory building.

2.2.7 The remaining issue, therefore, is allocation of Rs.95 lakhs to the shares of value of land and factory building. The partnership deed throws no light on the issue and Appellants bifurcation is devoid of any evidence or basis for the bifurcation. In the facts and circumstances of the case, therefore, AO is directed to adopt the value per square mtr considered by CIDCO for allocation of land in the vicinity of Appellant's factory premises on the date of transaction in Appellants case and work out the amount pertaining to land accordingly. In the alternate, AC can ascertain the Stamp Valuation Authority's valuation for the said land on the date of transaction and adopt that value. This may be done while giving effect to this order. The balance from 95 lakhs would be considered to be against the factory building. AC is directed to accordingly re-compute both long-term capital gain on

account of land and short-term capital gain on account of factory while giving effect to this order."

5. So far as the claim of exemption u/s. 54EC is concerned, the Ld. CIT(A) was convinced that the assessee has made investment beyond the time specified and accordingly not entitled for the exemption.

6. The Revenue is in appeal before us in respect of the findings of the Ld. CIT(A) given under para 2.2.6 & 2.2.7 as exhibited hereinabove.

7. The Ld. Departmental Representative submitted that as per Clause-3 of the Partnership Deed dt. 2.4.2004, it is clear that what has been transferred is factory building and there is no mention of land and building being transferred separately. Therefore, the claim of the assessee that factory building should be subjected to Short Term Capital Gains and land should be treated as Long Term Capital gains is not tenable in law.

8. Per contra, the Ld. Counsel for the assessee reiterated what has been submitted before the lower authorities so far as the merits are concerned.

9. We have considered the rival submissions and perused the orders of the lower authorities and the material evidence brought on record. We have also the benefit of perusing the original assessment order alongwith its computation of Income and the working of capital gains. A perusal of the computation of income shows that the assessee has bifurcated the consideration of Rs. 95 lakhs into two parts, Rs. 11.50 lakhs has been treated as consideration for the transfer of building and Rs. 83.50 lakhs

has been treated as consideration for the land. Since no basis has been given by the assessee for such bifurcation, in our humble opinion, the Ld. CIT(A) has very rightly directed the AO to adopt the value per Sq. Mtr. Considered by CIDCO for allocation of land or in alternative the AO can also ascertain the Stamp Valuation Authority's valuation for the said land on the date of transaction and adopt that value. We do not find any infirmity or error in these directions of the Ld. CIT(A) which we confirm. Accordingly, Revenue's appeal is dismissed.

ITA No. 3152/Mum/2011 – Assessee's appeal

10. The assessee has assailed the order of the Ld. CIT(A) on the f grounds which are as under:

> *"1On the facts, circumstances of the case and in Law the Ld. AO has erred in reopening the assessment framed u/s. 143(3) dt. 12.12.2007 as the assessee has disclosed fully and truly all material facts necessary for his assessment.*
>
> *2. On the facts, circumstances of the case and in Law the Ld. AO has erred in bringing the land component within the ambit of the provisions of Sec. 50-C of the I.T. Act, 1961.*
>
> *3. On the facts, circumstances of the case and in Law the Ld. AO has erred in treating the entire consideration of Rs. 95,00,000/- u/s. 50 of the I.T. Act, 1961 without considering the land is an independent and identifiable capital assets and it continues to remain as an identifiable capital asset even after construction of the building (i.e. factory structure).*
>
> *4. On the facts, circumstances of the case and in Law the Ld. AO has erred in withdrawing the deduction u/s. 54EC of the I.T. Act, 1961."*

11. As we have dismissed the Revenue's appeal in ITA No. 2956/Mum/2011 holding that the directions given by the Ld. CIT(A) are correct and as per the provisions of law in the light of the facts of the case. Thus grievance of the assessee raised in ground No. 2 & 3 are accordingly dismissed.

12. As we have decided the appeal on merits, we do not find it necessary to decide assessee's grievance raised in ground No. 1 by which he has challenged the correctness of the reopening of the assessment.

13. In ground No. 3, the assessee has claimed that he is entitled for exemption u/s. 54EC of the Act. Section 54 EC of the Act provides that:

> *"Where the capital gain arises from the transfer of a long-term capital asset and the assessee has, at any time within a period of six months after the date of such transfer, invested the whole or any part of capital gains in the long-term specified asset, the capital gain shall be dealt with in accordance with the following provisions of this section, that is to say –*
>
> *(a) If the cost of the long-term specified asset is less than the capital gain arising from the transfer of the original asset, the whole of such capital gain shall not be charged u/s. 45.*
>
> *(b) If the cost of the long-term specified asset is less than the capital gain arising from the transfer of the original asset, so much of the capital gain as bears to the whole of the capital gain the same proportion as the cost of acquisition of the long-term specified asset bears to the whole of the capital gain, shall not be charged under section 45.*
>
> *Provided that the investment made on or after the 1st day of April, 2007 in the long-term specified asset by an assessee during any financial year does not exceed fifty lakh rupees."*

14. It is the say of the assessee that the asset stood transferred when he received the final payment i.e. on 31.3.2005 and as he has purchased the

Bonds on 30.8.2005, the Bonds have been purchased within the time limits specified. However, it is the contention of the Revenue that the transfer took place when the partnership Deed was executed by which the assets were transferred as capital contribution i.e. on 2.4.2004. Therefore the period of limitation for the purpose of investment in Bond should start from 2.4.2004 and as the assessee has purchased bonds on 30.8.2005 the same is beyond the permissible period.

15. We have considered the rival submissions and perused the orders of the lower authorities. It is not in dispute that the transfer took place on 2.4.2004. It is also not in dispute that the assessee has purchased Bonds on 30.8.2005 and since the investment is beyond the permissible range, the assessee's investment cannot be considered under the provisions of Sec. 54EC of the Act. The Ld. Counsel for the assessee pleaded that liberal approach should be adopted as sec. 54EC of the Act is a benevolent provision. This plea of the Counsel cannot be accepted. undoubtedly Sec. 54EC of the Act is a benevolent provision and at the same time the investment has to be made as per the provisions of the Act failing which no benefit could be conferred upon the assessee. In the instant case, the assessee has not made investment during the period of limitation provided u/s. 54EC of the Act therefore, the Ld. CIT(A) has rightly denied the exemption u/s. 54EC of the Act. Therefore, we do not find any reason to tamper with the findings of the Ld. CIT(A), accordingly assessee's appeal is dismissed.

16. Before parting, the assessee has also challenged the validity of reassessment by placing reliance on several judicial pronouncements. In defense to the Revenue, the Ld. DR also submitted certain judicial pronouncement. As we have decided this appeal purely on facts and

merits of the case, we do not deem it necessary to dwell into the legal issues raised by the Ld. Counsel.

17. In the result, the appeal filed by the Revenue as well as the assessee are dismissed.

Order pronounced in the open court on 23.04.2013 .

आदेश की धोषणा खुले न्यायालय में दिनांकः 23.4.2013 को की गई ।

Sd/-	Sd/-
(H.L. KARWA)	(N.K. BILLAIYA)
अध्यक्ष/PRESIDENT	लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 23 /04/2013

व.नि.स./ *RJ* , Sr. PS

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

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

(Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**