IN THE INCOME TAX APPELLATE TRIBUNAL, 'Special BENCH' MUMBAI

BEFORE: SHRI AMIT SHUKLA JUDICIAL MEMBER

SHRI VIKAS AWASTHY, JUDICIAL MEMBER
&
SHRI OM PRAKASH KANT, ACCOUNTANT MEMBER

ITA No.7544/Mum/2011
(**Assessment Year:2000-01**)

SKF India Limited Mahatma Gandhi Memorial Building, N.S. Road, Charni Road, Mumbai- 400002	Vs.	Dy. Commissioner of Income Tax Range 4(3) AayakarBhavan, Mumbai
PAN/GIR No.AAACS0684H		
(Appellant)	..	**(Respondent)**

Assessee by	Ms. Sailee Gujarathi
Revenue by	Shri Bishwanath Das
Date of Hearing	**24/06/2024**
Date of Pronouncement	**03/10/2024**

आदेश / O R D E R

PER AMIT SHUKLA (J.M):

In the aforesaid appeal, reference has been made by the Hon'ble President, Income-Tax Appellate Tribunal, to Special Bench to decide the following question:

"Whether, on the given facts and circumstances of the case and in law, the capital gains under section 50 of the Act arising out of sale of long term capital asset is chargeable at the rate applicable to short term capital gains or rates applicable to long term capital gains under section 112 of the Act?"

2. Brief facts qua the question referred are that, in the return of income, assessee has offered capital gain at Rs. 2,62,63,582/-as short term capital gains computed as per section 50 of the Act. Assessee paid the tax on such capital gain at the rate of 20% as prescribed u/s 112 of the Act plus applicable surcharge. In response to the show cause notice by the AO as to why rate of 30% should not be applied which is applicable on short term capital gain, the assessee submitted that its claim was based on decision of **ITAT Mumbai, Bench in the case of Ace Builders Pvt. Ltd vs. ACIT (76 ITD 389)**. However, the Ld. AO rejected the assessee's contention after holding as under:-

12.3 A plain reading of the provisions of section 50 shows that the provisions are applicable in respect of an asset forming part of block of assets on which depreciation has been claimed under this act. The gain resulting on account of transfer of such asset will be short term capital gain disregarding the provisions of Section 2(42A) of the I.T. Act, 1961 and the provisions of section 48 and 49 shall be subject to modifications as enumerated in clause 1 of section 50 of 1.T. Act, 1961. Since the instant case the assessee company has transferred immovable properties which formed part of block of assets on which the depreciation has been claimed by the assessee company, the capital gains on transfer of these assets shall naturally be taxed as short term

capital gains. The transaction in question is squarely covered by the provisions of section 50(1) of I.T. Act, 1961)

12.4 The only reason for the assessee company treating the capital gain on transfer of the assets in question as Long Term Capital Gain is that it takes shelter behind the decision of Bombay Tribunal in the case of Ace Builders Pvt. Ltd. Vs. ACIT (76 ITD 389). I have gone through the decision of the Hon'ble Tribunal and feel that the said decision is not applicable in the instant case due to vast difference in facts of the two cases. The decision of the Bombay Tribunal has not been delivered in the context of applicability of provisions of section 54E. Therefore, it would amounts to stretching the said decision too far to apply it in the instant case, the facts of which have no similarity whatsoever with the facts in the case of Ace Builders Pvt. Ltd.

12.5 The assessee company has stretched the facts of the case as prevailing in Ace Builders Pvt. Ltd. to suit its convenience. It is a settled principle of interpretation of statutes that the judgment of a court has to be understood in the case of Ace Builders Pvt. Ltd. cannot be stretched to make it applicable to the facts present in the assessee's case.

12.6 The assessee company has conveniently quoted certain portions of the decision which it has found suitable to its interest. It is again reiterated here that selective quoting of certain parts of decisions is not relevant and the ratio of a case is applicable only where the circumstances and the facts tally. This has been the well settled and consistent view of several High Courts and Supreme Court laid down in the following decisions:

1. CIT Vs. Sun Engineering Works (198 ITR 227, 297) (Supreme Court)

2. CWT Vs. Dr. Karan Singh & Others (200 ITR 614) (Supreme Court)

3. Chamber of Income Tax consultants Vs. CBDT (209 ITR 660) (Bombay)

4. SRF Finance Ltd. Vs. CBDT (211 ITR 861) (Delhi)

12.7 In view of the above, the contention of the assessee company is not acceptable and accordingly, the capital gains are taxed as short term capital gains as per the provisions of section 50(1) of I.T. Act, 1961.

3. The Ld. CIT (A) had confirmed the order of AO in the following manner:-

"*The issue has already been decided in the appellant's own case for A. Yrs 2001-02 and 2002-03 as has been pointed out by the appellant itself in its letter dated 07.02.2011. Following the same, the issue for the current year is decided against the appellant. As regards the appellant's reliance on the decision in the case of Manali Investment, I find that it is not the contention of the appellant that the relevant facts in its case were similar to those in the case of Manali Investment. In the case of Manali Investment, the block of assets ceased to exists whereas it is not the contention of the appellant that the relevant block of assets that extinguished as a result of sale. The decision in the case of Manali Investment is, therefore, not applicable in the instant case. The appeal on this ground is, therefore, not allowed.*

4. It has been pointed out that, the Tribunal in assessee's own case for the assessment year 2001-02, had decided this issue against the assessee after holding as under:-

20. We have heard the rival contentions. Section 50 of the Act, reads as follows:-

SECTION 50

769 [Special provision for computation of capital gains in case of depreciable assets.

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.]

769. Subs. by Taxation Laws (Amendment and Misc. Provisions) Act, 1986, s. 9 (w.e.f. 1-4-1986). Prior to that, it stood as under:

"50. Special provision for computing cost of acquisition in the case of depreciable assets.-Where the capital asset is an asset in respect of which a deduction on account of depreciation has been obtained by the assessee in any previous year either under this Act or under the Indian Income-tax Act, 1922 (11 of 1922), or any Act repealed by that Act or under executive orders issued when the Indian Income-tax Act, 1886 (2 of 1886), was in force, the provisions of sections 48 and 49 shall be subject to the following modifications:-

(1) The written down value, as defined in clause (6) of section 43, of the asset, as adjusted, shall be taken as the cost of acquisition of the asset.

*(2) Where under any provision of section 49 read with sub-section (2) of section 55, the fair market value of the asset on the *[1st day of April, 1974,] is to be taken into account at the option of the assessee, then, the cost of acquisition of the asset shall, at the option of the assessee, be the fair market value of the asset on the said date, as reduced by the amount of depreciation, if any, allowed to the assessee after the said date, and as adjusted.".*

21. On plain reading of the above section shows that the excess in question shall be deemed to be the capital gains arising from the transfer of a short term capital asset. Both the section 54EC and section 74, do not speak about short term capital gain or long term capital gain. These sections deal with capita gains / loss arising from transfer of long term capital assets. Section 112, also deals with income arising from transfer of long term capital assets. Section 112(b)(i) and (ii) specifically mentions "long term capital gain". When section 50 deems that income earned from a depreciable asset has to be deemed as short term capital gain, the question of applying the rate of tax specified in section 112(1) does not arise. This is what the Hon'ble Jurisdictional High Court stated at para-26 of its judgment in the case of Ace Builders (supra). We extract the same for ready reference:-

> *"26. It is true that s. 50 is enacted with the object of denying multiple benefits to the owners of depreciable asset. 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 s. 54E, then the capital gain shall not be charged under section 45 of the Act. To put is simply, the benefit of s. 54E will be available to the assessee irrespective of the fact that the computation of capital gains is done either under section 48 and 49 or under section 50. The contention of the Revenue that by amendment to s. 50, the long term*

capital asset has been converted into a 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 s. 50 converts long term capital asset into a short term capital asset." [emphasis own]

22. Respectfully following the aforesaid judgment of the Hon'ble Jurisdictional High Court, the ground raised by the assessee is dismissed.

5. While hearing this matter in the appeal for the A.Y. 2000-01, the Division Bench observed that decision of the Tribunal in the case of **Smita Conductors Ltd vs. DCIT (2015) (152 ITD 417),** this precise issue was decided in favour of the assessee. Apart from this judgment, there were various other judgments of the Tribunal in the favour of the assessee on this point following Bombay High Court in the case of **CIT vs. Ace Builders Pvt. Ltd 281 ITR 210 (Bombay)**. Accordingly, the Bench after referring to the decision of the Bombay High Court in the case of **CIT vs. Ace Builders Pvt. Ltd (supra),** wherein the Hon'ble High Court has categorically held that deeming fiction of section 50 of the Act is restricted only to section 48 & 49 for the computation of capital gains and does not extend to other provisions or exemption provisions. Since the decision of the Tribunal in assessee's own case was contradictory to various decisions of the Tribunal following the decision of the Hon'ble High Court, therefore, reference was made to the special bench to decide the aforesaid issue.

6. Before us the Ld. Counsel for the assessee submitted now the issue that, section 50 is limited to the scope of only computation of capital gains of section 48 and 49 and does not extend to the other provisions of the Act, has been settled by series of the judgments of Hon'ble jurisdictional High Court and other High Courts. Ld. Counsel relied upon the following judgments in her support of her arguments:-

Sr.No	*Particulars*
1.	*Decision of the Bombay High Court in the case of CIT vs Ace Builders Pvt Ltd reported in [2005] 144 taxman 855.*
2.	*Decision of the Mumbai Bench of the Income-Tax appellate Tribunal in the case of DCIT vs Voltas Ltd. Dated 06 October 2020 [ITA No. 7029, 6613/Mum/2018, 3307 & 2257/Mum/2019]*
A	***Section 50 of the Income-Tax Act, 1961 does not change character of the long term capital asset to short term capital asset and hence loss on long term capital asset (which is depreciable asset) can be set off against brought forward long term losses:***
3.	*Decision of the jurisdictional Bombay High Court in the case of CIT vs Parrys (Eastern) Pvt Ltd reported in [2016] 66 taxmann.com 330*
4.	*Decision of the Bombay High Court in the Case of CIT vs Pursarth Trading Co. Pvt Ltd reported in [2013] 33 taxman.com 482*
5.	*Decision of the Bombay High Court in the case of CIT vs Manali Investment reported in [2013 39 taxmann.com 4*
B.	***Deeming fiction of a long term capital gain to be treated as short- term capital gain is restricted only to***

	section 50 and it would have no application to other provisions such as 54EC
	Decision of the Bombay High Court in the case of CIT vs United Paper Industries reported in [2014] 42 taxmann.com 79
7.	*Decision of the Bombay High Court in the case of CIT vs Cadbury India Ltd reported in [2015] 53 taxmann.com 227*
8.	*Decision of the Gujarat High Court in the case of CIT vs Polestar Industries reported in [2014] 41 taxmann.com 237*
9.	*Decision of the Gujarat High Court in the case of CIT vs Aditya Medisales Ltd reported in [2013] 38 taxmann.com 244*
10.	*Decision of the Gujarat High Court in the Case of DCIT vs Himalaya Machinery Pvt Ltd reported in [2013] 29 taxmann.com 380*
11.	*Decision of the Gauhati High Court in the case of CIT vs Assam Petroleum Industries (P.) Ltd reported in [2003] 131 taxman 699*
C.	***Decision of the High Court is a binding precedent only for the issue which was raised before the decided by it:***
12.	*Decision of the Bombay High Court in the case of HDFC Bank Ltd vs. DCIT reported in [2016] 383 ITR 529*
13.	*Decision of the Apex Court in the case of CIT vs Sun Engineering Works Pvt Ltd reported in [1992] 198 ITR 297*
D.	***Question as to whether gains computed on depreciable asset u/s 50 is to be given the benefit of lower tax rate u/s 112 of the Income Tax Act, 1961 admitted by the Bombay High Court:***
14.	*In Rathi Brothers Madras Ltd. Vs ACIT (ITA No. 871 of*

	2015) arising out of the decision of the Pune Bench of the Tribunal in ITA No. 707/Mum/2013.

7. Besides this she heavily relied upon the judgment of Hon'ble Supreme Court in the case of **CIT vs. Dempo Company Ltd., 387 ITR 354 (SC),**wherein the following decisions of the Hon'ble High Court have been approved;

i) *CIT v. Ace Builders (P). Ltd [2006] 281 ITR 210 (Bom);*

ii) CIT v. Polestar Industries [2014] 221 Taxman 423 (Guj); and

iii) CIT v. Assam Petroleum Industries (P.) Ltd [2003] 262 ITR 587 (Gau).

Thus, she submitted that once it has been categorically held that section 50 creates a deeming fiction only for the mode of computation of capital gains under sections 48 and 49 and not for other provisions, therefore, the rate of tax provided in section 112 of the Act which is applicable for transfer of a long term capital asset should be applied, even though the same is taxed as short term capital gain u/s 50 of the Act. Ld Counsel further submitted that, deeming fiction is about treatment of an asset appearing in the block of asset, is to be computed in the manner provided in section 50 and excess is to be taxed as capital gain arising from transfer of short term capital assets. Thus, asset forming part of block of asset, for the limited purpose is to be taxed (even if it is long term capital asset forming part of block of asset), as short term capital gain. This deeming fiction does not mean section 112 has no applicability

when tax rate has been provided on transfer of long term capital asset. This aspect has been clarified now by series of judgment.

8. On the other hand the Ld. CIT DR on behalf of the Revenue submitted that the Tribunal in assessee's own case for the immediately preceding year has interpreted judgment of Ace Builders Pvt. Ltd (supra) while holding that it is short term capital gain and rate of tax shall be same as is applicable for short term capital gain, that is 30% therefore, same should be followed. Apart from that, he submitted that section 50 is very clear that any asset which is part of the block of asset, whether held for a long term has to be treated as short term capital asset in terms of section 2 (42A) of the Act and it further provides mode of computation on such depreciable asset and if there is any excess, it is deemed to be capital gains arising from transfer of short term capital assets and once that is so, then tax should be levied at the rate on which a short team capital gains is charged, i.e., @ rate of 30% of the charge.

9. The ld. CIT-DR strongly relied upon the decision of the **Hon'ble Supreme Court in the case of M/s. Shakti Metal Depot vs. CIT (2021) 436 ITR 1(SC).** He submitted that in this case before the Hon'ble Supreme Court a flat was used by the assessee for business purposes and availed depreciation on this asset from the year of acquisition. However, assessee discontinued claim of depreciation for 2 years before the sale of the flat and showed capital gain out of transfer of this flat as Long-Term Capital Gain (in short LTCG).

Hon'ble Kerala High Court decided this issue referring the section 50 & 50A and held that character of the building can't be changed and converts to an investment due to non-use as business asset. Finally, profit arising on sale of said flat would be assessed as a Short- Term capital gain fin short STCG) under section 50.

10. He further submitted that non obstante clause of section 50 makes 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 would be treated as short-term capital asset. The assets covered by section 50 are depreciable assets forming part of block of assets as per section 2(11). Once the capital asset that has been transferred is found to form of a block of assets in respect of which depreciation has been allowed**,** the surplus if any computed under section 50 will be treated as STCG. Use of asset is important for the purposes of depreciation, but not for application of section 50. Once it is brought to use, it enters the block and once it enters the block, its identity gets submerged in block identity so that it is not necessary or possible to infer that any particular asset in the block is being used or not, as long as block is used.

11. Hon'ble Apex Court also held that the description of the asset by the appellant in the balance sheet as an investment asset is meaningless and is only to avoid payment to tax on STCG on sale of building. So long as the appellant 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 disentitlement the appellant for depreciation for these years.

12. The decision in Sakthi Metal is applicable to this case also. Main extract of this decision is excess out of transfer of any depreciable assets would be STCG and to be computed as per section 50 of the I. T. Act. Since treatment of capital gain is STCG and not LTCG, therefore section 112 is not attracted at all. Tax rate applicable for STCG will be applicable.

13. Ld. CIT DR submitted that in the assessee's case, the question before the Hon'ble Special Bench is already decided by the Hon'ble Co-ordinate Bench ITAT Mumbai in the assessee's own case for the A/Yrs. 2001-02 to 2005-06 in favour of the revenue citing the decision of Hon'ble Jurisdictional High Court in the case of Ace Builders (P) Ltd vs ACIT (2001) 76 ITD 389. Details of the appeals are given in a tabular form.

ITA No.	A/Yr	Date of order	Members of the Bench	Issue raised in Ground no	Decision in para no.
616/M/2006	2001-02	29.12.2011	Hon'ble Shri B. R. Mittal (JM) & .Hon'ble Shri J. Sudhakar Reddy (AM)	Gr-5	21

721/M/2006	2002-03	29.12.2011	Do	Gr-3	49
2660/M/2007	2003-04	29.12.2011	Do	Gr-3	71
4625/M/2008	2004-05	29.12.2011	Do	Gr-1	91
6461/M/2009	2005-06	24.02.2012	Hon'ble Shri Vijay Pal Rao (JM) & Hon'ble Shri Rajendra Singh (AM)	Gr-3	7&8

13. In all these years there was a common issue involved which was as under:-

"On the facts & in the circumstances of the case and in Saw the Id. CITA) erred in confirming Capital Gain under section 50 of the Act arising on sale of Long-term Capita! Asset is chargeable to tax at the rate applicable to STCG instead of the rate applicable to LTCG."

Hon'ble Bench held as follows:

"On plain reading of the section 50 shows that the excess in question shall be deemed to be the capital gain arising from the transfer of a short-term capital asset. Both the sections 54 EC & Section 74 do not speak about STCG or LTCG. These sections deal with capital gain / loss arising from transfer of long-term gain. Section 112 deals with income arising from transfer of long-term capital asset. Section 112(b)(i) & (ii) specifically mention "LTCG". When section 50 deems that income earned from a depreciable asset has to be deemed as STCG, the question of applying the rate of tax specified in section 112(1) doesn't arise."

14. Finally, he concluded that the decision of the Hon'ble Jurisdictional High Court in the case of Ace Builders in para 26, following points are relevant:-

"1. Section 50 is enacted with the object of denying multiple benefits to the owners of depreciable assets.

2. Restriction is limited to the computation of capital gain and not to the exemption provisions.

3. In other words, where the long-term capital asset has availed depreciation, then capital gain has to be computed in the manner prescribed u/s 50 and the capital gain tax will be charged as if such capital gain has arisen out of short-term capital asset.

Therefore, it is clear that excess earned from transfer of any depreciable assets will be treated as STCG and taxed as per rate applicable to STCG."

15. In rejoinder, ld. Counsel for the assessee submitted that the decision of Shakti Metal Depot (supra) is not applicable and she gave the following facts for distinguishing the case:

1.1. The appellant used a flat for business purposes and claimed depreciation on the same for 21 years from the year of its acquisition.

1.2. Thereafter, the appellant discontinued the claim of depreciation for 2 years and subsequently sold the flat. The appellant returned the income on sale of such flat as long-term capital gain.

1.3. In the said case, the appellant contended that the asset ceased to be a business asset since the asset was not being used for business purpose and was held as investment (i.e. personal

asset). In view of the same, the appellant offered the income on sale of the asset as long-term capital gains.

1.4. The Hon'ble Kerala High Court decided the matter by discussing section 50 and 50A of the Act. It concluded that the nature of building cannot change character and convert to an investment due to non-use as business asset. Accordingly, the Hon'ble High Court held the profit on sale of building to be as short-term capital gains. The Hon'ble Supreme Court affirmed the order of the Hon'ble Kerala High Court by reproducing the below extract of High Court order:

"In other words, in our view, the building which was acquired by the assessee in 1974and in respect of which depreciation was allowed to a 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."

Decision

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 **CIT v. 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 **CIT vs. 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 **CIT vs. Parrys (Eastern) Pvt. Ltd,** reported in **384 ITR**

264, 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 **CIT vs Pursarth Trading Co. Pvt Ltd in Income Tax appeal no. 123 of 2013 judgment an order dated 13.03.2013,**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 **CIT vs. Manali Investment reported in [2013] taxman 113,** 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(281 ITR 210) 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 CIT vs 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] 281 ITR 210/120051 144 Taxman 855 (Bom). 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 CIT vs. **United Paper Industries reported in [2014] 42 taxmann.com 79 and CIT vs. Cadbury India Ltd reported in [2015] 41 taxmann.com 227).** 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 **CIT vs. Dempo Company Ltd 387 ITR 354 (SC)** 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 CIT, Mumbai City-II, Mumbai vs. 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 CIT, Mumbai City-II, Mumbai vs. 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 vs. 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 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 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 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 short-term 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. V. DCIT (2016) 383 ITR 529, 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 CIT v/s. Sun Engineering Works (P.) Ltd. reported in 198 ITR 297 (1992) 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] reported in 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 vs/ ACIT (2022) 444 ITR 97** 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 **M/s. Velvet Holdings Pvt. Ltd. vs. ACIT in ITA No.6810/Mum/2008** vide order dated 26/06/2014 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., in ITA No.4004/Mum/2011 dated 17/09/2013**. 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 vs. ACE Builders Pvt. Ltd, reported in [2006] 281 ITR 210. The said judgment has been approved by the Apex Court in the case of CIT. Panji vs. 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 CIT vs. Ace Builders Pvt. Ltd. (supra) which in turn has been approved by the Hon'ble Supreme Court in the case of **CIT vs. Dempo Company Ltd reported in (2016) 74 Taxmann.com 15 (SC)** 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 section112 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.

	Sd/-	**Sd/-**
(OM PRAKASH KANT)	**(VIKAS AWASTHY)**	**(AMIT SHUKLA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**	**JUDICIAL MEMBER**

Mumbai; Dated 06/09/2024

Karuna, Sr. PS

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Asstt. Registrar)

ITAT, Mumbai

ITA No. 7544/Mum/2011

O R D E R

PER OM PRAKASH KANT, A.M :

In view of divergent opinion of coordinate benches of the Tribunal on the issue of application of tax rate provided u/s 112(1) of the Income-tax Act, 1961 (in short 'the Act') on Short Term Capital Gain (STCG) computed on transfer of depreciable capital asset invoking section 50 of the Act, the Division Bench in the case found itself unable to concur with the view adopted by the predecessor bench(s) in the assessee's own case for preceding assessment years 2000-01 to 2005-06, and made reference to the Hon'ble President ITAT for constitution of Special Bench. On such reference, on 21-10-2020, the Hon'ble President ITAT constituted a Special Bench u/s.255(3) of the Act for the captioned assessment year comprising of Learned Members , i) Shri Shamim Yahya, Ld.AM, ii) Shri Shaktijit Dey, Ld.JM and iii) Shri Vikas Awasthy, Ld.JM, for deciding the following question:

> *"Whether on the given facts and circumstances of the case and in law, the Tribunal is right in holding that the capital gains u/s. 50 arising out of the sale of long term capital asset is chargeable at the rate applicable to the Short Term Capital Gain or rate applicable to Long Term Capital Gain u/s. 112 of the Act."*

2. The Special Bench so constituted, in its order dated 15-06-2021 observed that the Hon'ble Bombay High Court in the case of Rathi Brothers Madras Ltd., (Income Tax Appeal No. 871/2015) vide order dated 13-02-2018, admitted substantial question of law involving identical issue for adjudication. The Special Bench deliberated on whether it could proceed to adjudicate the issue, given that the same was pending for adjudication before the jurisdictional High Court. In this context, the Special Bench acknowledged that a similar issue was pending before the larger Bench of the ITAT in the case of J.P. Morgan Chase Bank in ITA No. 9189/Mum/2004 and C.O. No. 139/Mum/2013. The Special Bench further took note of the fact that both the parties involved had expressed their agreement to defer proceedings until the outcome of the decision of the larger Bench in the case of J.P. Morgan Chase Bank (supra), consequently, the Special Bench deemed it appropriate to adjourn the proceedings *sine die*, pending the outcome of the larger Bench of the ITAT in the case of in the case of J.P. Morgan Chase Bank (supra).

3. Subsequently, in view of the transfer of the then, JM Shri Shaktijit Dey from ITAT, Mumbai, the Special Bench was re-constituted on 02-05-2022. The reconstituted Bench comprised of the Members, namely, Judicial Member Shri Amit Shukla, Judicial Member Shri Vikas Awasthy, and Accountant Member O.P. Kant. The reconstituted Special Bench convened hearings

during which both the assessee and Revenue were given ample opportunity to present their arguments over multiple dates. Thereafter, the Ld JM Shri Amit Shukla, having carefully considered submissions made, prepared a draft order, which has been circulated and placed before other members of Special Bench for deliberation.

4. I have read the draft order of my learned brother JM Shri Amit Shukla. In his draft order, the Ld. JM has expressed the view that notwithstanding the deeming fiction for treating excess arising on transfer of depreciable assets, which has been computed by the assessee as deemed to have arisen from transfer of short term capital asset u/s 50 of the Act, for the purpose of determining rate of tax, concessional rate of tax provided in section 112(1) would still apply. While I have utmost respect for the opinion proposed by the Ld. JM, I find myself unable to concur with the view expressed on the question referred to the Special Bench. The Ld JM has thoroughly addressed all the relevant facts necessary for adjudication of the question referred to the Special Bench and has captured submission of both parties succinctly in paragraphs 1 to 15 of the draft order. In the light of the comprehensive presentation, I deem it unnecessary to reiterate the same facts and submission here, and will therefore refrain from doing so for avoiding repetition.

5. In the instant case, in preceding assessment years, the assessee claimed depreciation on three residential properties i.e. flats, which formed part of block of assets, but in the assessment year under consideration, the assessee transferred/sold those properties. While computing the 'total income' for the purpose of filing return of income for the year under consideration, the assessee determined excess of sale consideration over the written down value (WDV) of the properties as Short Term Capital Gain(STCG) in terms of section 50 of the Act, which amounted to Rs. 2,95,55,888/-. Against said 'STCG', the assessee further adjusted loss amounting to Rs. 32,95,306/- under the head 'Capital Gain', which was carried forward from earlier assessment years and arrived at balance amount of Rs. 2,62,60,582/- as STCG for including to total income. However, before the Assessing Officer, the assessee sought to have this 'STGC' subjected to a concessional tax rate of 20% invoking section 112(1) of the Act. The assessee's argument was that under the provisions of section 112(1) of the Act, the gain arising from transfer of 'long term capital asset' is eligible for concessional tax rate of 20% and the three residential properties, though depreciable assets, but were held for more than 36 months, hence, being long-term capital asset, gain arising from transfer of those properties was to be subjected to tax rate of 20% under section 112(1) of the Act and deemed fiction under section 50 of the Act, which treats the

gain from transfer of depreciable asset as STCG , should not apply while determining the applicable tax rate under section 112(1)of the Act.

6. In paragraphs 16 to 21 of decision section of the draft order, the learned Judicial Member has referred to the provisions of section 50 of the Act. Under the provisions, the excess arising from transfer of depreciable asset, irrespective of their holding period, is deemed to be short-term capital gain by virtue of legal fiction created therein. It is pertinent to note that in the present case, the assessee itself has computed the excess or surplus arising from transfer of the depreciable asset comprising of three residential properties, as STCG, so to that extent, applicability of section 50 of the Act and treatment of excess or surplus arising from transfer of those depreciable assets as short term capital gain is not in dispute between the parties.

7. In paragraph 22 of the draft order, the learned JM has merely reproduced the provisions of section 112(1) of the Act. However in paragraph 23, the learned JM has proceeded to interpret the provisions of section 112 of the Act and concluded that for applicability of concessional tax rate of 20%, two conditions are to be satisfied. *Firstly*, there must be a long-term capital asset and, *secondly* income must arise from transfer of long-term capital asset. The Ld. JM accordingly, held that in the

instant case, the assessee satisfies both the conditions and therefore the short-term capital gain computed under section 50 should be considered as 'long term capital gain' for the purpose of section 112(1) of the Act and subjected to concessional tax rate provided under section 112 of the Act. With utmost respect to the views expressed by my learned brother, I find myself unable to agree with interpretation, for the following reasons:

8. ***Firstly***, the language of section 112(1) of the Act is unambiguous. It applies exclusively to income arising from transfer of a long term capital asset, which is chargeable under the head 'capital gain' as "long term capital gain", and is included in 'total income'. In the instant case, in the total income computed by the assessee, income arising from transfer of depreciable asset has been shown under the head "capital gain" as 'short term capital gain'. It is noteworthy that the assessee has not disputed application of section 50 of the Act for transfer of depreciable asset constituting three residential flats. The crux of dispute is the assessee's request for application of concessional tax rate of 20% provided under section 112(1) on gain from transfer of those residential properties. The assessee is claiming that deeming fiction of treating the capital gain arising from transfer of depreciable asset is limited to section 50 itself and for the purpose of section 112(1) of the Act, the assessee argues that the properties having been held for more than 36 months, qualify as 'long term capital

assets' and gain arising from their transfer should be taxed at concessional rate of 20%. Thus, the sole issue in dispute is whether section 112(1) of the Act is applicable on the income arising from transfer of depreciable assets consisting of three residential flats, notwithstanding that said excess on transfer of those properties is deemed to be short term capital gain under section 50 of the Act. For examining the issue, it is relevant to divide the section 112(1) in two parts, as under:

*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",*	***(First Part)***
*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,—* *xxxxxxxxxxxxxxx* *(b) in the case of a 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 twenty per cent;* *(c) in the case of a non-resident (not being a company) or a foreign company,—* *xxxxxxxxxxxxxxxxx* *(d) in any other case of a resident,—* *xxxxxxxxxxxxxxxxxxx* *Explanation.—[***]* *xxxxxxxxxxxxxxxxxxxxx*	***(Second part)***

8.1. As far as First Part is concerned, the 'income' arising from transfer of a 'long-term capital asset', which is chargeable under

the head 'capital gain', should be included in the '**total income'**. The word 'total income' has been defined under section 2(45) of the Act, *which means the total amount referred in section 5, computed in the manner laid down in the Act.* The section 5 refers to 'total income' of a resident *includes all income i.e. global income, from whatever sources derived and received or deemed to be received or accrues or deemed to accrues to such resident person*. Further, the sections 60 to 65 provide for inclusion of income of the other person to the total income of an assessee. Further as per section 66 of the Act, the total income shall also include income of the nature specified under chapter VII of the Act. Thereafter, the section 68 to section 69D provide for 'headless income', which are assessed by the AO in certain circumstances. Thus, the 'total income' refers to income computed under different 'heads of income' including 'income from salary', 'income from house property', 'profit and gains of the business and profession', 'income from capital gains', 'income from other sources', income as per section 60 to 66 of the Act and residual income or headless assessed by the AO under provisions 68 to 69D of the Act.

8.2. The First Part of the section 112(1) specifies that the 'income' arising from transfer of long-term capital asset, which is chargeable under the head 'capital gains', which means said income, whether classified as long-term capital gain or short-term capital gain, must necessarily be chargeable as under the

head 'capital gain' and forms part of 'total income'. Thus for invoking section 112(1), the *first condition* is that *income arising from transfer of a 'long-term capital asset' should be part of the 'total income'*.

8.3. Now, we come to the second part of section 112(1) which is relevant to the assessee i.e. in case of a domestic company, which is subsection 112(1)(b) of the Act

8.4. The Second Part of section 112(1) specifies the tax which is payable on the 'total income'. The *section 112(1)(b)(i)* of this part addresses to tax liability on the total income, excluding the portion attributable to the 'long-term capital gain'. The *section 112(1)(b)(ii)* of the part refers to calculation of the tax specifically on the 'long-term capital gain', which is part of the 'total income' as referred above in 'first part' of section 112(1) of the Act. Thus, it is essential that for application of the rate of the 20%, **firstly**, the gain must arise from transfer of a 'long-term capital asset', **secondly**, it must be chargeable under the head 'capital gain' as 'long-term capital gain' and , **thirdly**, the long term capital gain so computed should be part of the 'total income'.

8.5. Upon holistic reading of entire section 112(1) of the Act, the only reasonable interpretation emerges is that the 'long term capital gain', arising from transfer of 'long term capital asset' chargeable under the head "Capital Gain", which constitute part of 'total income', is only subject to concessional rate of 20%

provided u/s 112(1) of the Act. The legislative intent , as discernible form the plain language of the provision, clearly mandated that only such long term capital gain could be taxed at the concessional rate of tax prescribed in section 112(1) of the Act.

8.6. In the instant case before us, the assessee itself has computed income arising from transfer of depreciable assets as short-term capital gain in terms of section 50 of the Act under the head 'capital gains' as part of the total income, though, said assets were held for a period of more than 36 months. The relevant part of computation of total income filed by the assessee is reproduced as under:

SKF BEARINGS INDIA LIMITED
Income-tax Assessment Year 2000-2001
Previous Year Ended 31st March, 2000

STATEMENT SHOWING COMPUTATION OF TOTAL INCOME AND INCOME-TAX THEREON

I.	Profits and gains of business:	Rs.	Rs.
	Profit before tax as per Profit and Loss Account		139,236,441
Less:	Dividend received considered separately		3,414,010
			135,822,431
Add:	Disallowable/inadmissible:		
1.	Depreciation as per Books	403,861,177	
2.	Capital expenditure debited to Profit and Loss Account, as per Clause 17(a) of Form No. 3CD	667,789	
3.	Provision for wealth-tax	350,000	
4.	Disallowance under section 43B – as per Clause 21(i)(B)	11,325,910	

	and 21(ii)(B) of Form No. 3CD		
5.	Provision for doubtful debts	10,090,861	
6.	Donations	123,601	
7.	Interest payable to Small Scale Industries	1,228,979	427,648,317
			563,470,748
Less:	Allowance/Admissible		
1.	Depreciation under Section 32:		
	- As per Clause 14 of Form No. 3CD	367,538,537	
	- As per Note 1	135,317	
		367,673,854	563,470,748

		Rs.	Rs.
	B/f	367,673,854	563,470,748
2.	Sum duty, etc. offered for disallowance under section 43B in earlier years, but paid/reversed during the 'Previous year' as per Clause 21(i)(A) and 21(ii)(A) of Form No. 3CD:		
	- Paid	2,095,510	
	- Reversed	20,666	
3.	Book profit on sale of fixed assets credited to Profit and Loss Account	32,264,095	
4.	Interest under Section 36(1)(iii) – capitalized in Books	27,587,550	
5.	Reversal of interest payable to Small Scale Industries	1,545,634	
6.	Reversal of excess provision for interest under section 234C of the Income-tax Act, offered for disallowance in the assessment year 1995-96	110,120	
7.	Reversal of excess provision for technical knowhow fees payable to Aktiebolaget SKF, Sweden, disallowed in	196,600	

	A.Y.1999-2000		
8.	Reversal of provision for excise duty refundable to customers disallowed in A.Y. 1989-90 in case of Skefko India Bearing Co. Ltd. (merged with SKF Bearings India Ltd.)	92,485	
9.	Reversal of provision for customs duty disallowed under section 43B in A.Y.1990-91 in case of Skefko India Bearing Co. Ltd. (merged with SKF Bearing Co. Ltd.) (merged with SKF Bearings India Ltd.)	108,105	431,694,619
	Profit and gains of business		131,776,129
Less:	Set off of business loss/unabsorbed depreciation brought forward from A.Y. 1999-2000 to the extent of profits		131,776,129
	Profits and gains of business after set off of b/f loss		NIL
II.	**Capital gains:**		
	Short term capital gains under section 50 (Working enclosed vide Annexure-1)		**26,260,582**
III.	Income from other sources:		
	Dividend – as per Note 3		NIL
	Gross Total Income		26,260,582
Less:	Deductions under Chapter-VIA		
	As per Clause 26 of Form No. 3CD:		
	Section 80G	51,775	
	Section 80HHC	4,995,655	5,047,430
	Total Income		21,213,152
	Income-tax @35% of total income		7,424,603
Add:	Surcharge on above @ 10%		742,460
	Income-tax including surcharge		8,167,064
	Business loss of assessment		

	year 1999-2000 to be carried forward ofr set off in subsequent assessment year(s):- (please refer note 10)	
	Business loss as per return of income of assessment year 1999-2000	61,304,222
	Unabsorbed depreciation as per return of income of assessment year 1999-2000	3,69,065,328
		430,369,550
Less:	Set off of business loss/unabsorbed depreciation against current years business profits	131,776,129
	Unabsorbed depreciation to be carried forward for set off in subsequent assessment year/s	298,593,421

Annexure A-1

Statement showing computation of short term capital gains under Section 50:

Sale consideration on transfer of following residential properties:

	Rs.	Rs.
Flat no. 5 in Kismet Apt.		**20,500,000**
Flat no. 32 in Queens View		**3,000,000**
Flat no. A-171 in Twin Towers		**17,000,000**
		40,500,000
Less: Expenses incurred in connection with the transfer of above residential properties:		
1)Brokerage	**637,875**	
2) Transfer fees	**387,500**	
3) Legal fees	**950,235**	**(1,975,610)**
		38,524,390
Less: Written Down Value as on 1/4/99 of 'Residential buildings'		**(8,968,502)**
Short term capital gains under Section 50		**29,555,888**

<u>Less:</u> Loss under the head 'capital gains' brought forward from A.Y. 1997-98	**(3,295,306)**
Income from short term capital gains	**26,260,582**

8.7. Once the said excess on transfer of residential properties is admittedly part of the 'total income' in the character of 'short-term capital gain', clearly the provisions of section 112(1) would not apply, as for invoking of section 112(1), the component of the 'total income' should be first of all in the character of 'long-term capital gain' chargeable under the head 'capital gain' (i.e. from section 45 to section 55A) and secondly that 'long term capital gain' should be part of total income. Under the provisions of capital gain head, a capital asset otherwise may qualify as long term capital asset and transfer of same may give rise to long term capital gain, but once depreciation has been availed on said asset under the business of the assessee, express provision by way of section 50 gets attracted and any excess on transfer of said asset is deemed to be short term capital gain. But, in the facts of the case of assessee, it is not in dispute that assessee has availed depreciation on those three residential properties forming part of the block of asset, thus excess from their transfer is deemed to be 'short term capital gain' and can't be classified under section 112(1) of the Act as 'long term capital gain'.

8.8. ***Secondly***, the section 112(1) is designated for application of concessional tax rate on the income, chargeability of which has been determined under the head "Capital Gains", but it can't alter the character of the income itself. The section 112(1) of the Act cannot decide whether gain or excess arising from transfer of a long-term capital asset would be chargeable as 'long-term capital gain' or 'short-term capital gain'. The chargeability of gain or excess arising from transfer of a capital asset is governed by the provisions under the head "capital gain" u/s 45 to 55A of the Act and not by the section relevant for invoking of tax rate. The learned counsel for the assessee argued that the transfer of a capital asset held for more than 36 months, though it is depreciable asset and excess arising on the same has been computed by the assessee for the purpose of total income as 'short term capital gain' as per the provisions of section 50, but while application of section 112(1) of the Act, it should be treated as 'long term capital gain'. In my opinion, this argument of ld counsel is without appreciation of express language of section 112(1) of the Act.

8.9. ***Thirdly***, if interpretation of the assessee is accepted, then the entire provision of section 50 will be rendered otiose, because, if the excess or surplus arising from transfer of depreciable asset, held for more than 36 months, has to be held as 'long-term capital gain' invoking section 112(1) of the Act, then, there is no purpose of keeping the section 50 in the

statute. The entire purpose of introducing the deeming fiction of treating the surplus arising from transfer of the depreciable asset, irrespective of the holding period whether it is more than 36 month or less than 36 month, is not to grant benefit of concessional rate of long-term capital gain to the depreciable capital asset which has been exploited for business purpose and depreciation has already been claimed as revenue expenditure. The legislature has introduced section 50 with the objective to provide a level playing field for both, the depreciable capital asset forming part of the business and the other capital assets which may or may not be part of the business of an assessee. Once an assessee introduce a depreciable capital asset as part of the business, the assessee is entitled for benefit of depreciation on the same, and thus the value of the asset to the extent of the depreciation is already allowed to the assessee as deduction being revenue expenditure while computing its income under the head 'profit and gains of the business'. Therefore, any excess or surplus arising from transfer of such depreciable capital asset has been brought under the deeming fiction of 'short term capital gain' under section 50 of the Act. On the other hand, for other capital asset, which may or may not be a part of the business of an assessee, chargeability of the gain arising from their transfer is governed by the other provisions under the head 'capital gains' from sections 45 to 49 of the Act. If such a capital asset, is held for less than

prescribed period, then gain arising on transfer of such asset shall be liable for 'short-term capital gain' and if it is held for more than prescribed period, such gain arising shall be liable for 'long-term capital gain' and cost of acquisition or indexed cost of acquisition shall be reduced from sale consideration for computing capital gain as per mode provided in section 48 and 49 of the Act. Now, the question arises, whether a further benefit for concessional tax rate should be allowed for computing taxability under the head 'capital gain' while transfer of depreciable capital assets, when the part of cost of acquisition of such asset is already exhausted by the assessee as depreciation and, balance left over is the written down value (WDV) of asset, which is considered for reduction from sale consideration. Evidently, the legislature has not intended to give the benefit of concessional rate of tax on gain arising from transfer in case of the depreciable capital assets, which have been utilised for the purpose of the business and assessee exploited those assets for yielding income which is liable for tax under the head 'profit and gains of the business'. Accordingly, the legislature under section 50 of the Act, excluded the benefit of concessional rate of tax on excess arising if any from transfer of such depreciable capital asset, on which benefit of the depreciation has already been availed by the assessee, and proposed to be subjected to normal tax rates as 'short-term capital gain' under deeming fiction. Under section 50(1) of the

Act, out of sale consideration of depreciable assets, three items are reduced for computation of STCG. The *first item* is expenditure incurred wholly and exclusively in connection with transfer of such asset. This item is identical to the item allowed under mode of computation provided in section 48 of the Act while computing gain arising from other than depreciable capital assets. The *second item* is the opening written down value (WDV) of the block of asset out of the depreciable asset, which has been sold. The WDV is the residual value of the depreciable assets remained after claim of deprecation. Thus, in my view, the intent of the legislature was to not allow multiple benefit of deduction for cost of acquisition in respect of which depreciation has already been availed by the assessee and therefore, deduction is allowed for the remaining cost of the asset (i.e. WDV) only for computing capital gain on depreciable asset. The third item is the actual cost of any asset falling in same block of asset acquired during the year. So if an assessee purchase or acquire new depreciable capital asset under same block of asset against sale of old depreciable asset, the assessee may reduce his tax liability under capital gain. This is kind of an incentive to an assessee for investment in new assets for continuing the business activity. In the case of **CIT Vs Ace Builders (supra),** also it is held that section 50 is enacted with the object of denying multiple benefits to the owners of the depreciable assets.

9. Further, the learned JM has referred to the decisions relied upon by both the parties rendered by the Coordinate of Benches of Tribunal and decisions of various Hon'ble High Courts and Hon'ble Supreme Court. In the decisions of the Coordinate benches of the Tribunal, the specific issue concerning the applicability of concessional tax rate of 20% under section 112(1) on the short-term capital gain arising from transfer of the depreciable asset under section 50 of the Act has been decided upon.

9.1. The first set of decisions rendered by the Tribunal are in favour of the assessee. While referring the issue for consideration of special bench, the assessee had relied on the decision of the coordinate bench of the Tribunal in the case of **Smita Conductors Ltd in ITA No. 4004/Mum/2011 dated 17/09/2013**. In the said decision, the coordinate bench, relying on the decision of Hon'ble Bombay High Court in the case of CIT Vs Ace Builders (supra), ruled in favour of the assessee. During hearing before us, the Ld counsel for the assessee referred to another decision dated 26/06/2014 of coordinate bench in the case of **M/s Velvet Holdings Pvt Ltd Vs ACIT in ITA No. 6810/Mum/2008**, wherein, the Bench following the decision of coordinate bench in the case of Smita Conductors Ltd (supra), allowed the decision in favour of the assessee. The learned departmental representative in hearing dated 09/05/2024 brought to our attention, a decision **dated 19/07/2022** of the

coordinate bench of the Tribunal, Mumbai (constituted by Ld. JM Sh Amit Shukla and Ld. AM Sh Rifaur Rahman) , in the case of **M/s Reliance Transport & Travel pvt Ltd in ITA No. 5683/Mum/2017**. In the said decision also, the Bench followed the decision of the Hon'ble Bombay High Court in the case of CIT Vs Ace Builders (supra), and decided the issue of application of tax rate of 20% invoking section 112 of the Act on 'short-term capital gain' computed under section 50 of the Act in favour of the assessee.

9.2. The second set of decisions stands against the assessee. The learned departmental representative has relied on the decision of coordinate bench in the case of the assessee for **assessment years 2001-02 to 2005-06**, which have been listed by the learned JM in para 13 of his draft order. In those decisions also the coordinate benches have relied on the decision of the Hon'ble Bombay High Court in the case of CIT Vs Ace Builders (supra). Further, Pune bench of Tribunal in **ITA No. 707/Pun/2013 in the case of Rathi Brother Madras Limited in order dated 30.10.2014**, relying on Ace Builders (supra) decided the issue against the assessee. The appeal of the assessee against the said decision is pending before the Hon'ble Bombay High Court as noted by the Special Bench constituted of earlier members. The relevant finding of the Tribunal (supra) is reproduced as under:

"5.3 It is clear from the language used by the legislature that if the long term capital gain is computed then it will suffer the tax @20% as against the normal rate of income-tax. Moreover, in the Ace Builders Pvt. Ltd., (supra), their Lordships have explained that if the capital gain is computed as provided u/s. 50 then the capital gains tax will be charged as if such capital gain has arisen out of short term capital asset. We have to interpret the judgment or decision as a whole and we cannot interpret in the piecemeal to understand the ratio decidendi."

5.4. The Ld. Counsel has also relied on the decision in the case of M/s. P.D. Kunte & Co., (Regd.)(Supra). It is true that in said case the assessee had taken Ground No. 2 which is analogous to the plea of the assessee. But on perusal of the said order, we find that the said ground remained to be adjudicated and there is no decision on this issue. We are not therefore inclined to rely upon the decision in the case of M/s. P.D. Kunte & Co., (Regd.)(Supra). We accordingly approve the interpretation made by the Ld.CIT(A) of section 50 and section 112 and confirm the order on this issue before us. Accordingly, the grounds taken by the assessee are dismissed."

9.3. In the decisions of Hon'ble High Court's and Hon'ble Supreme Court relied upon by the parties , the specific issue of application of tax rate of 20% under section 112(1) on the short-term capital gain arising from transfer of the appreciable asset

under section 50 of the Act has not been decided. In all those cases, either the issue of claim of exemption/deduction under the head capital gain or set off of losses has been adjudicated. The assessee has relied on the decision of the Hon'ble Bombay High Court in the case of **CIT Vs Ace Builders P Ltd (supra)** and decision of Hon'ble Supreme Court in the case of **CIT Vs Dempo Company Ltd 387 ITR 354(SC)**, wherein the Hon'ble Supreme Court has upheld the finding in the case of CIT Vs Ace Builders (supra). The learned JM has further referred to the two decisions of Hon'ble Bombay High Court , firstly, in the case of CIT Vs Parrays (Eastren) Pvt ltd reported in 384 ITR 264 and secondly in the case of CIT Vs Pursarth Trding Co. P Ltd in ITA No. 123 of 2013 in order dated 13/3/2013, wherein set off of long-term capital loss against the gain arising from the depreciable asset under section 50 of the Act was allowed following the principle laid down in the case of CIT Vs Ace Builders (supra). The learned JM has further referred to the decision of the Hon'ble Bombay High Court in the case of United Paper Industries reported in (2014) 42 taxmann.com 79 and CIT Vs Cadbury India Ltd reported in (2015) 41 taxmann.com 227, wherein also the decision in the case of CIT Vs Ace Builders (supra) has been followed. The ld DR on the other hand relied on the decision of Hon'ble Supreme Court in the case of Shakti Metal Depot Vs CIT (2021) 436 ITR 1(SC). In that case the dispute was whether the provisions of section 50 would apply

on transfer of those residential properties, which were part of block of assets in earlier years and depreciation was availed but in the year under consideration the property was not put to business use. But in the instant case, the invoking of section 50 on excess or surplus arising on transfer of depreciable residential properties is not in dispute, hence said decision is not relevant to the facts of case.

9.4. Thus, in all the cases referred, the root or foundational decision which has been consistently followed is in the case of CIT Vs Ace Builders (supra). The finding of very same decision has been interpreted differently in the two sets of decisions of Tribunal. For ready reference, the question of law raised before the Hon'ble High Court is reproduced as under:

> *"Whether on the facts and in the circumstances of the case, sthe Tribunal was right in law in holding that the assessee is entitled to deduction under section 54E in respect of the capital gain arising on the transfer of a capital asset on which depreciation has been allowed and which is deemed as short-term capital gain under section 50 of the Income-tax Act, 1961."*

9.5. The Hon'ble high Court has decided the substantial question of law in para 25 of the judgment observing as under:

> *"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 extention 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 Income Tax Act cannot be denied to the assessee on account of the fiction created in section 50."

9.6. Thus, the Hon'ble High Court has decided that benefit of exemption under section 54E is allowed to the assessee on gain arising from transfer of depreciable asset also. The learned JM

in para 24 of the order has also reproduced the relevant part of said decision of Hon'ble High Court, where in it is held that *deeming fiction created under section 50 of the Act for treating surplus arising on transfer of the depreciable asset as short-term capital gain cannot be stretched while considering exemption provisions under section 54 E of the Act*. The assessee is relying on above part of the decision which says that deeming fiction under section 50 is limited for the purpose of considering the excess arising on transfer of the depreciable asset as short-term capital gain and can't be extended to section 112 of the Act, therefore for application of the tax rate of section 112, the gain has to be considered as arising from transfer of a long-term capital asset. The learned JM has endorsed this view of the assessee in his order. However the coordinate bench of the Tribunal in the case of the assessee for assessment year 2001-02 to 2005-06, has relied on the paragraph 26 of the decision in the case of CIT Vs Ace Builders (supra), wherein it is held that section 50 is enacted with the object of denying multiple benefits to the owners of the depreciable assets. The Hon'ble High Court has clearly held that *that restriction is limited to computation of the capital gains and not to the exemption provisions*. Hon'ble High Court further clarified that *in other words, when a 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 gain tax will be*

charged as if such capital gain has arisen out of a short-term capital asset. At the cost of repetition, said paragraph of Hon'ble High Court is reproduced as under:

> *"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)*

10. In the above judgment the Hon'ble Jurisdictional High Court has unequivocally held that under the legal fiction created by Section 50 of the Act, the 'capital gain' is deemed to be a 'short term capital gain' (even through it arises from transfer of depreciable asset held for more than 36 months). However, for the purpose of grant of exemption under Section 54E of the Act, which is available in respect of transfer of long term capital asset, the Hon'ble Bombay High Court rejected the

contention of the Revenue that capital asset transferred would also be deemed to be a short term capital asset by virtue of Section 50 of the Act. Thus, the Hon'ble High Court extended the scope of beneficial provisions contained in Section 54E of the Act even to a depreciable asset held for more than 36 months. Once the capital gain is deemed to be a short term capital gain, the provisions contained in Section 112 of the Act would not get attracted. The Section 112 was introduced by way of Finance Act. 1992 and was specifically designated for taxation of 'long term capital gain'. Clause 53 of the Notes to Clause to Finance Bill, 1992 clearly stated that section 112 was enacted for taxation of long term capital gain exclusively and other type of income would be taxable at normal rate of taxation. The relevant part of Finance Bill, 1992 , is reproduced as under:

> *"Clause 53 seeks to insert a new section 112 in Chapter XII of Income-tax Act.*
>
> *The* ***new section provides for taxation of long term capital gains at a flat rate of twenty per cent*** *in the case of individuals and Hindu undivided families at the rate of forty per cent in the case of companies, firms, association of persons and bodies of individuals and at the rate of thirty per cent in the case of others.* ***In respect of income other than long-terms capital gains income tax will be levied as per the normal provisions of the Act.*** *The assessee will not get any deduction under Chapter VI-A or tax rebate under section 88 on the income-tax in respect of long term capital gains.*

This amendment will take effect from the 1st April, 1993, and will, accordingly, apply in relation to the assessment year 1993-94 and subsequent years."

11. The section 50 of the Act has provided chargeability of income arising from transfer of depreciable assets. Since the sections related to exemptions/ deductions including section 54E of the Act under the head 'capital gains', are invoked only after computing of the capital gain and therefore those sections are independent from the sections which create chargeability of the capital gains. The exemptions provisions provided under the head capital gains from section 54 to 54GB of the Act , can be claimed once the chargeability of the gain arising on transfer of a capital asset is determined under the head of capital gains. Conversely, the section 112(1) of the Act is for invoking concessional rate of tax of 20 percentile on income arising from transfer of long-term capital asset, which is chargeable under the head 'capital gain' and included in total income. The section 112(1) of the Act is intended solely for prescribing concessional rate of tax and not for determining chargeability of income under the head 'Capital gain', therefore, the section 112(1) cannot decide character of capital gain whether it would be short term capital gain or long term capital gain. If the opinion of learned JM is followed, then a anomalous situation may arise, where the income under the head capital gain determined as 'short-term capital gain' under section 50 and included

under 'total income' would be rendered only as ornamental item, undermining the purpose of exercise for computing short term capital gain . Such an interpretation would contradict the legislative intent. The provision of section 50 in the statute has been provided for achieving particular purpose of denying multiple benefit of depreciation and any interpretation which frustrate that purpose, should be discouraged. In the case of the assessee, while adjudicating appeals for assessment years 2000-01 to 2005-06, the Co-ordinate Bench in ITA No. 720/Mum/2006 for AY. 2001-02 held as under:

> *"21. On plain reading of the above section shows that the excess in question shall be deemed to be the capital gains arising from the transfer of a short term capital asset. Both the section 54EC and section 74, do not speak about short term capital gain or long term capital gain. These sections deal with capital gains/loss arising from transfer of long term capital assets. Section 112, also deals with income arising from transfer of long term capital assets. Section 112(b)(i) and (ii) specifically mentions "long term capital gain". When section 50 deems that income earned from a depreciable asset has to be deemed as short term capital gain, the question of applying the rate of tax specified in section 112(1) does not arise. This is what the Hon'ble Jurisdictional High Court stated at para-26 of its judgment in the case of Ace Builders (supra). ....."*

11.1.In the light of foregoing, I am in complete agreement with the decision of the coordinate bench of the Tribunal (supra) in the case of the assessee that assessee is not entitled for concession rate of tax of 20% provided under section 112(1) of

the Act on the short term capital gain computed under section 50 of the Act and included by the assessee in its total income, which arose on transfer of three residential properties forming part of block of asset and on which deprecation was availed by the assessee in earlier years.

11.2. In view of above discussion, I am of the opinion that question of law referred to the special bench is liable to be answered against the assessee and in favour of the revenue.

12. Since the issue referred to the Special Bench has been adjudicated as above, for deciding other issues as raised in the cross appeals of the parties, the Registry may take up appropriate action for fixing the appeals before the regular Bench.

Order pronounced on 3rd October, 2024

Sd/-
(OM PRAKASH KANT)
ACCOUNTANT MEMBER

Place: Mumbai,
Date: 03-10-2024