

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH "A" KOLKATA**

Before **Shri N.V.Vasudevan, Judicial Member** and
Shri Waseem Ahmed, Accountant Member

ITA No.588/Kol/2011 Assessment Year :2007-08
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DCIT, Circle-1, 7 th Floor, Aayakar Bhawan, Kolkata-600 069	V/s.	M/s Ajanta Fine Foods Pvt. Ltd., 121/34A, J.N.Mukherjee Road, Howrah-711207 [PAN No.AACCA 1693 E]
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

अपीलार्थी की ओर से/By Appellant	Shri Sallong Yaden, ACIT-Sr-DR
प्रत्यर्थी की ओर से/By Respondent	Shri p.J.Bhide, FCA
सुनवाई की तारीख/Date of Hearing	10-05-2016
घोषणा की तारीख/Date of Pronouncement	05-07-2016

आदेश /ORDER

PER Waseem Ahmed, Accountant Member:-

This appeal by the Revenue is arising out of order of Commissioner of Income Tax (Appeals)-I, Kolkata in appeal No.328/CIT(A)-I/C-1/09-10 dated 31.01.2011. Assessment was framed by DCIT, Circle-1, Kolkata u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') vide his order dated 25.11.2009 for assessment year 2007-08.

Shri P.J.Bhide, L'd Authorized Representative appeared on behalf of assessee and Shri Sallong Yaden, L'd Departmental Representative appeared on behalf of Revenue.

2. First issue raised by Revenue in ground No.1 is that Ld. CIT(A) erred in deleting the addition made by Assessing Officer for ₹62,07,472/- on account of Short Term Capital Gains (STCG for short). For this, ground reproduced below:-

“1. That on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in deleting the addition of Rs.62,07,472/- on account of Short Term Capital Gain arising out of transfer of cost of improvement being addition to building by observing that se company was not the owner of the asset when such cost towards addition to building was incurred by the assessee company, capitalized the same in its accounts, depreciation was claimed in the returns and was allowed in assessment.”

3. Facts in brief are that assessee is a Private Limited Company engaged in the business of fruit processing. During the assessment proceedings, assessee has filed its return of income declaring “Nil income”. The Director of the assessee-company purchased land with godown on 08.11.1990 for a consideration of ₹1.65 lakh with stamp duty charges ₹20,625/- which comes to total cost ₹1,85,625/-. Thereafter assessee has incurred various expense such as flooring, construction of partition, painting etc. in different financial years, as detailed below:-

Financial year 1998-99	Rs.2,74,071/-
Financial year 1999-00	Rs.2,60,443/-
Financial year 2000-01	<u>Rs. 89,000/-</u>
Total	<u>Rs.6,23,514/-</u>

The assessee capitalized in its books of account the aforesaid expenses by making additions to the block of buildings, the assessee claimed depreciation allowance on the aforesaid amounts in its books of account.

4. In the instant case, Director of assessee-company was the owner of the land with godown but assessee was the owner of the expense incurred on flooring etc., as discussed above.

The Director of assessee-company has sold land with godown along with the renovation work carried out by assessee for a consideration of ₹1,05,08,013/-. The sale consideration was written as a whole in the registered deed of conveyance without bifurcation the sale value attributable to the land and attributable to the building. During the course of assessment proceedings, AO observed that the sale consideration received by the Director of assessee-company has two components:-

- i) Sale proceeds towards the land
- ii) Sale proceed towards the building

As the sale price was not differentiated between the land and building then AO has differentiated the same by adopting the some basis which have been detailed on page 6 of the assessment order. However the details of the bifurcation between land and building stand as under :-

Particulars			Indexed cost of acquisition/improvement	Amount
Land & godown purchased by Shri M.N Mitra on 08.11.1990 for a total consideration of Rs.1,85,625/-			Rs.1,85,625/- x 519 / 182	5,29,337/- (A)
Addition to building / godown made by assessee company in different years	F.Y 1998-99	Actual cost Rs.2,74,071/-	Rs.2,74,071/- x 519 / 351	4,05,250
	F.Y 1999-00	Actual cost Rs.2,60,443/-	Rs.2,60,443/- x 519 / 389	3,47,480/-
	FY 2000-01	Actual cost Rs.89,000/-	Rs.89,000/- x 519 / 426	1,08,430/-
			Total	8,61,160/- (B)
A:B	1:1.62			
Market value of the property determined by the Stamp Valuation Authority which is considered here for the purpose of capital gain u/s. 50C of the IT Act.				1,05,08,013/-
Share of "addition to building" in the market value of Rs.1,05,08,013/- on the basis of above ratio (it is the consideration of sale attributable to assessee company)				64,97,321/-

As per the working of AO a sum of ₹64,97,321/- out of the sale proceeds of the land & building was pertaining to the building expenses incurred by assessee on which the assessee claimed the depreciation on the building. Therefore, there was arising STCG which worked out as under :-

Sale price of the building of Rs.64,97,321/-

Less cost of acquisition of Rs. 2,89,849/-

Balance STCG of Rs. 62,07,472/-

Accordingly, AO worked out STCG of Rs.62,07,472/- and added to the total income of assessee.

5. Aggrieved, assessee preferred an appeal before Ld. CIT(A) who has deleted the addition by observing as under:-

“2.4 The appellant has submitted a copy of the balance sheet and profit & loss for the year ended 331.3.2007, conveyance deed for purchase of the said Ghusuri property by the appellant’s Managing Director Mr. M.N.Mitra and the sale thereof by him, which have been duly scrutinized. The facts stated above are fully supported by these two deeds. In the sale deed between Shri M.N.Mitra and the purchaser M/s Rajendra Trading Co., the appellant’s name does not appear at all. The sale deed clearly states that it is Mr. Mitra and not the appellant who was the owner of the said property. The sale consideration was agreed and paid at ₹40.00 Lacs. The memo of sale consideration clearly states that a sum of ₹27,60,00/- was paid by the purchaser to the State bank of India, Commercial Branch ,NS.Road, Howrah by four different cheques and the balance amount was paid by the said Mr. Mitra. The contention of the appellant that Section 50C of the Act as maintained w.e.f. 01.010.2009 has been wrongly applied by the AO is correct. It cannot be denied that the appellant was not the owner of any portion of the capital asset, being the building at premises No. 121, J.N.Mukherjee Road, Ghusuri, Howrah and therefore, there was no question of the appellant transferring the same so as to attract Provision of Section 2(47) and Section 45 of the Act. I therefore, hold that the AO was not justified in holding that the appellant earned capital gain of ₹62,07,472/- and adding the same to the income of the appellant. The addition is therefore deleted.”

Being aggrieved by this order of Ld. CIT(A) Revenue is in appeal before us.

6. Before us both the parties relied on the orders of Authorities Below as favourable to them. L’d AR submitted paper book which is running pages from 1 to 125 and decision of Hon'ble jurisdictional High Court with the record. Ld AR submitted that assessee has incurred a small amount of money in connection with building and assessee was never owner of that land and

building but was treated a deemed owner by virtue of the Explanation 1 to Section 32 for the limited purpose of claiming depreciation on the expense incurred by assessee-company. Therefore the question of taxing the capital gain in the hands of the assessee does not arise.

7. We have heard the rival contentions and perused the materials available on record. From the aforesaid discussion, we find that Director of assessee-company has purchased a piece of land for a consideration which was given on rent free basis to the assessee. The assessee has incurred several renovation expenses and used that place as factory. We find that in the present case, the Director of assessee-company never charged any rent from the assessee in the year under consideration. The director sold land and building and entire consideration was retained by Director of assessee-company himself. The assessee was never owner of the said land and building but was the deemed owner by virtue of explanation 1 to Sec 32 of the Act for the limited purpose of claiming depreciation under the Act. As a result of sale the AO apportioned the sale proceed received by Director of the assessee-company by adopting some basis and worked out sale consideration for Rs.64,97,321/- for the building. The AO treated the sale proceed as towards the building of which the assessee was deemed owner and he worked out STCG for Rs.62,07,472/- (649732 – 289849/-). However, same was deleted by L'd CIT(A) on the ground that assessee was not the owner of the land and building. Now issue before us arise so as to whether the sale proceed received by Director of assessee-company was also forming part of the sale against the building occupied by assessee-company.

From the facts of the case, we find that the assessee, after having incurred renovation expense on the land and building belonging to the Director of assessee-company, made the place as usable for the purpose of its manufacturing activities. The assessee was treated as deem owner for the limited purpose of claiming of depreciation. As such, assessee-company

never became the owner of the land and building. Therefore in our considered view sale proceeds received by Director of the assessee-company is taxable in the hands of Director and not in the hands of assessee-company. In view of above, we uphold the order of Ld. CIT(A). Revenue's appeal is dismissed.

8. Next issue raised by Revenue in Ground No. 2 & 3 is that Ld. CIT(A) erred in not adopting the value assessed by Stamp Valuation Authority as sale consideration. For this, Revenue's grounds reproduced below:-

"2. That on the acts and in the circumstances of the assessee the Ld. CIT(A) has erred in law by holding that provisions u/s. 50C is not applicable in this case as it has come into force w.e.f. 01.10.2009 when the provision has been introduced in the statute by the Finance Act, 2002 w.e.f. 01.04.2003 and when the market value adopted and assessed by the Stamp Valuation Authority has been taken as consideration of sale of capital assets for the purpose of determining assessable capital gain.

3. That on the facts and in the circumstances of the case and on Ground No.2 above, the Ld. CIT(A) has erred in directing to accept the agreed price of Rs.51,00,000/- as the consideration of sale in respect of capital asset being unit-2 when the stamp valuation Authority has adopted and assessed the market value of the property at Rs.57,36,000/- which was considered in assessment as consideration of sale for the purpose of computing assessable capital gain."

9. The assessee during the year has sold its land and building of its unit No.2 in Barasat by an agreement dated 26.12.2006 to M/s Santex Mills Ltd. As per the agreement, the sale price was determined at Rs.51 lakh. It was to be executed on or before 31st January, 2007. However, on account of certain difficulties the deed of sale could not be registered on the appointed date. However, the assessee handed over the possession of the aforesaid property to the buyer on 28.03.2007. Accordingly, assessee recognized the transfer of property in the FY 2006-07 in terms of provision of Sec. 2(47) of the Act. Thus the assessee worked out the capital gains by taking the sale consideration of ₹ 51 lakhs and declared the income in the FY 2006-07 corresponding to AY 2007-08. However the property was finally registered in the name of the buyer

on 09.04.2007 which is corresponding to the next FY. The AO during the course of assessment proceedings, observed that market value as determined by Stamp Valuation Authority as per the registered conveyance deed at Rs.57.86 lakh. The AO accordingly, opined that sale consideration for the purpose of working out the capital gains should be the valuation as assessed by Stamp Valuation Authority in terms of Sec. 50C of the Act. The AO has worked out the capital gains by taking sale consideration of Rs.57.86 lakh and added to the capital gains to the total income of assessee.

10. Aggrieved, assessee preferred an appeal before Ld. CIT(A) whereas assessee submitted that the provision of Sec.50C of the Act empowering to the AO to consider and substituting the Stamp Valuation for the sale consideration as stated in the conveyance deed came into force on 01.10.2009 and therefore same is not applicable for the year under consideration. Ld. CIT(A) after considering the contention of assessee has deleted the addition made by AO by observing as under:-

"4.3 I have carefully considered the app's submission including the agreement for sale, Deduction of Conveyance, copies of which have been submitted along with the appeal. It is a fact that the appellant sold its Unit No.2 comprising of Land 7 Building in terms of agreement dated 26.12.2006 and handed over the possession thereof in the month of March, 2007 and received net consideration of ₹48,11,000/- only as against agreed price of ₹51,00,000/-. The AO has accordingly assessed the income under the head Capital Gain in the financial year 2006-07 as the transfer of capital asset has been completed by the appellant u/s 2(47) of the Act in that year itself. The appellant's submission that the provision of Section 50C of the Act amended by the Finance (2) Act, 2009 have come into force only on 01.10.2009 and were not at all applicable for any transfer of capital asset, which has taken place prior to that date,, in this case, on 28.3.2007 is correct. I, therefore, direct the Assessing Officer to determine Long Term and Short Term Capital Gain for the assets arising to the appellant on sale of its Unit No. only with reference to the agreed sale price of ₹51,00,000/- and determine capital gains after allowing the index cost of land and written down value of the building . Accordingly the grounds 4 & 5 are allowed partly."

Being aggrieved by this order of Ld. CIT(A) Revenue is in appeal before us.

11. The Ld. DR before us submitted that provision with regard to Sec. 50C of the Act has been introduced in the statute by the finance Act 2002 w.e.f. 1-4-2003. As per the provision of Sec. 50C of the Act the market value as assessed by Stamp Valuation Authority has to be taken as sale consideration of capital assets for the purpose of determining assessable capital gains. He, in support of his contention, relied in the order of Hon'ble jurisdictional High Court in the case of *M/s Bagri Impex Private Ltd. vs. ACIT* in GA No. 3302 of 2012, wherein it was held that amendment made in Sec. 50C of the Act came into force on 1.10.2009 vis-à-vis to make the provisions ease and simple but the intention of legislature was very clear that the value for the purpose of income tax shall be same as the value for stamp duty. By adopting devices to defeat the provision and the assessee cannot be heard to contend that Sec. 50C of the Act would not be applicable merely because the deed of conveyance has not at that time being executed or registered and Ld DR vehemently relied on the order of AO.

In rejoinder Ld. AR submitted that order of Hon'ble jurisdictional High Court (supra) has been stayed by the Hon'ble Supreme Court in its SLP petition No. 17138 of 2012 dated 24.03.2014 and the order passed by Hon'ble jurisdictional High Court in the case of *M/s Bagri Impex Private Ltd.* (supra) is no longer applicable to the instant case. He relied on the order of Ld. CIT(A).

12. We have heard rival contentions and perused the materials available on record. At the outset it was observed that this issue is pending before Hon'ble Supreme Court in the case of *Bagri Impex Pvt. Ltd.* in civil appeal no. 17138/2013 and subsequently Hon'ble Supreme Court has stayed this judgment of Hon'ble jurisdictional High Court vide order 10-05-2013 by following observations:-

“ Interim order of stay granted on 10th May 2013, shall continue until further orders”.

In view of the above, Ld. counsel for the assessee fairly stated that let Hon'ble Supreme Court decide the issue and by that time the matter can be remitted

back to the file of AO for fresh adjudication in term of the decision of Hon'ble Supreme Court. On this, Ld. CIT DR has not objected to the same. Accordingly, we set aside this issue to the file of the AO to await the decision of Hon'ble Supreme Court and decide the issue accordingly. This issue of assessee's appeals is remitted back to the file of AO and allowed for statistical purposes.

13. Next issue raised by Revenue is that Ld. CIT(A) erred in deleting the addition made by AO for ₹ 7,19,336/- on account of damaged opening stock. For this, Revenue has raised the following ground:-

"4. That on the facts and in the circumstances of the case Ld. CIT(A) has erred in directing to allow loss of Rs.7,19,336/- claimed by the assessee on account of damage / destruction of entire opening stock of finished goods when he himself observed that local sale was made by the assessee out of opening stock of finished goods without appreciating the facts that the claim of loss was disallowed in assessment on identical factual observation."

14. During the year, assessee has written off its finished goods at Rs.7,19,336/- by debiting in its profit & loss a/c as loss of stock. On query raised by AO it was submitted that assessee is a manufacturer and exporter of fruit and vegetable products. The raw materials used for the purpose of such production are green mango slices which are highly perishable. In the earlier year, assessee was maintaining stock of the raw materials as it was able to do the export business but the export business has gradually reduced and therefore the stock was piled up with the assessee. Besides, this there was a fire broke out in office building which has severely affected assessee's business. As a result, raw materials which were stored could not be utilized for the purpose of production. The assessee also submitted that due to poor export performance, the cash credit account has become, NPA. There was a lot of pressure from the side of the bank and accordingly assessee had disposed of its property in distress with the poor overall performance. The assessee could not make the effective utilization of the raw materials and as a result it has become unfit for home consumption, finally, it was destroyed.

However, AO during the course of assessment proceedings observed that assessee has made sale on 03.04.2006 and which was out of the available stock of finished goods of the earlier year. Therefore, the contention of assessee was not accepted by AO, accordingly, disallowed the same and added the sum of Rs. 7,19,336.00 to the total income of assessee.

15. Aggrieved, assessee preferred an appeal before Ld. CIT(A), whereas assessee submitted that some local sale were made in the month of April, Aug, 2006 and Feb. 07 out of old stock and working progress which was found fit for human consumption and it was for just an amount of Rs.24,501/-. The assessee destroyed all the stock of finished goods became unfit for human consumption. Therefore, it was written off in its books of account. Accordingly, L'd CIT(A) observed that the local sale claimed by assessee it was a meager amount and the claimed that it was made out of the opening finished goods appears reasonable. Accordingly, L'd CIT(A) deleted the addition made by AO.

Being aggrieved by this order of L'd CIT(A) Revenue is in appeal before us.

16. Before us L'd DR vehemently relied on the order of AO whereas L'd AR relied on the order of L'd CIT(A)

17. We have heard the rival submissions and perused the materials available on record. From the aforesaid discussion, we find that assessee has written off its stock of finished goods on the ground it became unfit for human consumption and for this reason stock of finished goods was for an amount of ₹7,19,336/- was destroyed. However the AO found that some sale out of the opening stock of finished goods was made during the relevant year. Therefore the claim of assessee was declined by AO. However, L'd CIT(A) deleted the addition made by AO as the amount involved of meager amount of ₹24,501/- only. We find that assessee has written off the closing stock of finished goods

by debiting in its profit and loss a/c. We also find that business of assessee was of fruit and vegetable and raw materials used for the business was of green mango which was highly perishable. The business of assessee was severely affected for the reason discussed above. From the facts we also find that assessee had to sale its property under distress to repay the loan of the bank. As such, we find that the business of assessee as decreasing on year-to-year basis. Accordingly, we agree with the contention of L'd AR that the opening stock of finished goods became unfit for human consumption and same was duly debited in the profit and loss a/c of assessee. L'd DR has not brought anything contrary to the find of L'd CIT(A). Hence, we uphold the order of Ld. CIT(A) and this ground Revenue's appeal is dismissed.

18. Next ground raised by Revenue in ground No.5 of this appeal is that L'd CIT(A) erred in deleting the addition made by AO for Rs.3,75,123/- on account of damage/destruction of entire opening stock of packing material. For this, Revenue has reproduced below:-

"5. That on the facts and in the circumstances of the case Ld. CIT(A) has erred in directing to allow loss of Rs.3,75,123/- claimed by the assessee on account of damage / destruction of entire opening stock of packing materials by observing that the export sale have been made only of purchase specifically made for export without appreciating the fact that no such fact is brought into record and when assessee itself admitted that green mango was purchased as raw material."

19. During the year as written off packaging materials for Rs.3,75,123/- by debiting in profit and loss a/c as loss of stock. On question by AO, assessee submitted that business of assessee came down drastically and as such the stock of cupboard, cartoon which were used for the export sales and local sales could not be used. Besides due to long storage the packing materials became spoiled and had to be thrown out as it was having low commercial value. However, AO observed that during the year assessee made domestic sales of ₹24,501/- and export sale of ₹16,87,665/- without debiting any amount in the name of packing materials. The exports of finished goods were

not possible without using packaging materials. Therefore, claim of assessee for the loss of packing material is disallowed and added to the total income of assessee.

20. Aggrieved, assessee preferred an appeal before L'd CIT(A) whereas assessee submitted that goods were exported and purchased by assessee for an amount of ₹13,72,500/- in duly packed condition and ready for export. The assessee in support of its claim has submitted purchase and sales account. The assessee also submitted that exported goods were purchased in complete packed condition and the same were supplied to the foreigner buyers even without opening the containers. Accordingly, L'd CIT(A) deleted addition made by AO.

Being aggrieved by this order of L'd CIT(A) Revenue is in appeal before us.

21. Both the parties relied on the orders of authorities below as favorable to them. We have heard the rival contentions and perused the materials available on record. From the facts of the case, we find that assessee has written off packing materials by debiting its profit and loss a/c for ₹3,75,123/- on the ground that these materials became spoil due to long storage and it was not for any use. Therefore, it was written off in its books of account. However, AO observed that assessee during the year has made export sale and no corresponding expenses in relation to packing materials were written off in its books of account. Therefore, AO apprehended that assessee has used packaging materials in the export of goods and also written off in its books of account as unusable. However, L'd CIT(A) granted relief to assessee by holding that the goods exported by assessee during the year were purchased in readymade packed condition for the export purpose. Now the question before us arises so as to whether packing materials written off by the assessee were used in the export business of assessee in the aforesaid facts and circumstances. From the facts of the case, we find that assessee has

purchased goods for the purpose of export from Mida & Co. and same goods were exported/ sold to Harima Chemicies. There was no defect observed in assessee's books of account.

On the contrary, L'd DR has also not brought anything to the finding of L'd CIT(A).

22. From the above, we find that the AO made the addition on surmise and conjecture without bringing any evidence on record. The AR has submitted the ledger copies of the parties for the purchase and sale of goods which is placed on page 88 of the paper book. In this view of the matter, we uphold the order of L'd CIT(A) and ground raised by Revenue is dismissed.

23. In the result, Revenue's appeal is partly allowed for statistical purpose.

Order pronounced in the open court 05/07/2016

Sd/-

(न्यायिक सदस्य)

(N.V.Vasudevan)

(Judicial Member)

Kolkata,

*Dkp

दिनांक:- 05/07/2016 कोलकाता ।

Sd/-

(लेखा सदस्य)

(Waseem Ahmed)

(Accountant Member)

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. अपीलार्थी/Appellant-DCIT-Circle-1, 7th Fl, Aayakar Bhawan, Kolkata-69
2. प्रत्यर्थी/Respondent-M/s Ajanta Fine Foods Pvt. Ltd., 121/34A, J.N.Mukherjee Road, Howrah-711 207
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश से,

/True Copy/

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता ।