THE INCOME TAX APPELLATE TRIBUNAL
"E" Bench, Mumbai
Before Shri Shamim Yahya (AM) & Shri Amarjit Singh(JM)

I.T.A. No. 6817/Mum/2014 (Assessment Year 2010-11)

Mr. Sonu Nigam Namah, Next to Jade Building Juhu Versova Link Road,7 Bunglow Andheri West Mumbai-400 053. PAN : AAAPN3947K	Vs.	ACIT 11(1) Room No. 439 4th Floor Aayakar Bhavan M.K. Road Mumbai-400 020.
(Appellant)		(Respondent)

Assessee by	Shri Sanjeev M. Jain
Department by	Shri Chaudhary Arun Kumar Singh
Date of Hearing	21.2.2019
Date of Pronouncement	16.5.2019

O R D E R

Per Shamim Yahya (AM) :

This appeal by the assessee is directed against the order of learned CIT(A) dated 18.9.2014 and pertains to A.Y. 2010-11.

2. Ground of appeal reads as under :-

1. *On the facts and circumstances of the case in law, The Commissioner of Income Tax (Appeals) erred in confirming that Rs.67,06,0747- as Short Term Capital Gain on sale of premises in Amarnath Tower.*

2. *Without prejudice the above and on the facts and circumstances of the case and in law the CIT(A) has erred in confirming that the excess sale consideration of the Amarnath properties is hit by the provisions of section 50.*

3. *On the facts and circumstances of the case and in law, the Commissioner of Income Tax (Appeals) erred in confirming that disallowance of Rs. 1,60,0607- out of depreciation on car.*

4. *The orders of the Learned CIT(A) and the Learned AO are bad in law and on facts.*

3. Apropos ground relating to short term capital gain :-

Brief facts of the case are as under :-

During the course of assessment proceedings the AO noted that the assessee had sold flat -No. 1203 and 1204 in Amarnath- Towers for a sum of Rs.161,75,480/-; out of which the appellants 50% share was Rs.80,87,740/-. The AO noted that in the block of depreciable assets the WDV of these assets was only Rs. 3,81,661/-. Therefore, as per the provisions of section 50 of the Act short term capital gains of Rs,67,06,074/- were assessable. During the course of assessment proceedings the assessee objected to the proposed addition on the grounds that the said block was not extinguished as during the year the assessee had purchased property worth Rs.1,24,68,460/- in Lakhani Centrium'. Moreover If was submitted that the assessee was using a part of his residential premises (Namah building) for office purposes, which was purchased in earlier years for Rs. 1,02,49,0407-, and the cost of the said building was also part of the depreciable block, The AO however, rejected the explanation on the grounds that both the properties were not part of the depreciable block. The AO noted That the income from 'Lakhani Cenfrium" was being offered under the head 'income from house property' and on the 'Namah' building the assessee had not claimed any depreciation in the past or in the present, in the circumstances the AO concluded that the provisions of section 50 were attracted as the block of assets ceased to exist.

4. Against the above order the assessee appealed before learned CIT(A). Learned CIT(A) referred to the provisions of section 2(11), section 43 and section 50. Thereafter learned CIT(A) confirmed the action of the Assessing Officer. The learned CIT(A)'s order reads as under :-

> *1.2 I have examined the facts of the case, the submissions of the appellant and the order of the AO, in order to appreciate the issue the provisions of section 50 and section 2(11) of the Act and section 43 need to be reproduced:*

"Section 2(11)

2(11) "block-of assets" means a group of assets failing within a class of assets comprising—

(a) tangible assets being buildings, machinery, plant or furniture;
(b) intangible assets, being Know-how, parents, copyrights, trade-marks., licences, franchises or any other business or commercial rights of similar nature, in respect of which the same percentage of depreciation is prescribed;)"

"Section 43

(6) "written down value" means —

(a) in the ease of assets acquired in the previous year, the actual cost to the assessee;

(b) in the case of assets acquired before the previous year, the actual' cost to the assessee less all depreciation actually allowed" to him under this Act or under the Indian Income-tax Act, '922 (11 of 19221, or any Act repealed by that' Act, or under any executive orders issued when the Indian income- fox Act 1886 (2 of 1886), was in force;

[Provide that in determining the written down value in respect of buildings, machinery or plant for the purposes of clause (ii) of subsection (1) of section 32, "depreciation actually allowed" shall not include depreciation allowed under sub-clauses (a), (b) and (c) of clause (vi) of sub-section (2) of section 10 of the Indian Income-tax Act, 1922 (1) of 1922, where such deprecation was not deductible in determining the written down value for the purposes of the said clause (vi).

Section 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 the 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 failing 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.]

1.3 Section 50 clearly stipulates that where the consideration received on transfer of an asset exceeds me WDV of the block then the excess shaft be deemed to be capital gains from transfer of short term capital assets. The section begins with the non-obstante clause that the capital asset should form part of a block of assets in respect of which deprecation has been allowed. In other words, section 50 would not apply to non-depreciable assets. Likewise section 2(11) defines block of assets, being assets having the same percentage rate of depreciation. Section 43(6) defines the written down value of a block of assets. Thus, what is common between all the three sections i.e., 50 2(11) & 43(6) is that the asset should be depreciable: If an asset is not depreciable, it would not come within the definition of block of assets, as it would not have any rate of depreciation. By that logic it would not be hit by the provisions of section 50 as there would be no written down value and the machinery provision of section 50 would fail. Now, it is appellant's contention that the properties at Namah bunglow and Lakhani Centrium, even though they are not depreciable, would still form part of the depreciable block of assets and by that contention even after the sale of the Amarnath Property the block would have a WDV. Hence, it is sought to be argued that, the provisions of section 50 would fail. I am afraid the arguments of the appellant are incorrect. The very fact that the Namah bunglow and the Lakhani Centrium properties never depreciated by the appellant; the same being claimed as SOP and rented property, their values could never have formed part of the block of assets, as defined in section 2(11). The depreciable

block gets extinguished after the sale of the Amarnath properties. Hence, I am in agreement with the AO that the excess sole consideration of the Amarnath Properties is hit by the provisions of section 50. This ground of appeal is therefore dismissed.

5. Against the above order assessee is in appeal before us. We have heard both the counsel and perused the records.

6. Learned Counsel of the assessee submitted that assessee has sold a depreciable asset and purchased commercial property. He further stated that the flat purchased enters the block on acquisition, and it is not dependent upon the user. In this regard he referred to following case laws :

- CIT Vs. GR Shipping (ITA No. 822/Mum/05 dated 17.7.2008)
- CIT Vs. Oswal Agro Mills Ltd. & Others (341 ITR 467)
- Nirma Vs. ACIT (390 ITR 302)
- E-City Vs. ACIT (24 ITR 73)
- CIT Vs. Yamaha (328 ITR 297)

7. Per contra, learned Departmental Representative relied upon the orders of authorities below. He referred to the following decisions :-

- ACIT Vs. Rishiroop Polymers (P) Ltd.(102 ITD 128)
- Dinesh Kumar Gulabchand Agrawal Vs. ACIT (267 ITR 768)

8. We have carefully considered the submissions and perused the records. Upon careful consideration we note that assessee in this case has sold flat on which depreciation was claimed earlier. The written down value of the flat was Rs. 3,81,661/- the sale value of the flat was Rs. 80,87,740/-. The Assessing Officer has computed short term capital gain as per section 50 of the I.T. Act. The assessee has objected in as much as it is the claim of the assessee that the block of asset did not cease to exist. It is the claim of the assessee that the assessee was already having a residential premises “Namah”, part of which is claimed was used as his office. We find that this premises was treated as self occupied property. When the property was self occupied property, it cannot enter into the block of depreciable asset. Hence, this claim of the assessee is

not at all sustainable. Assessee has also pleaded that assessee was using the part of the said premises for office purposes. Hence it is claimed that the property cannot be said to be not forming part of depreciable asset. We find that firstly there is no basis of this claim. Secondly since assessee has not claimed any depreciation on the same in earlier period the assessee's claim of the part of the building used for official purposes can only be said to be an afterthought.

9. Further it is the claim of the assessee that subsequent to the sale of flat on which depreciation was claimed assessee has purchased a flat the income from which has been offered under the income from house property and that the new flat enters into the block of asset irrespective of the use. When the income from the new flat is being offered as income from house property by no stretch of imagination it can be said that it falls into the block of depreciable asset.

10. Learned Counsel of the assessee contended that claim of depreciation on an asset is not dependent upon its user and that asset is entitled for depreciation the moment it enters the block. We find that assessee's counsel has also placed reliance on several case laws wherein it was held that once of asset enters into the block of asset it is entitled to depreciation claim irrespective of the fact that it was not used subsequently or for part of the period on the plank that there was passive user.

11. In the present case we find that the flats which never entered into the block of depreciable assets as income from the same were being offered under the head income from house property can by no stretch of imagination be said to be entitled for automatic entry into the block of depreciable asset. In this view of the matter, the reference to section 2(11), 43(6) & 50 by learned CIT(A) is germane and support the case of the Revenue. Section 2(11) defines block of asset as a group of asset falling within the class of asset…….. in respect of which the same percentage of depreciation is permissible. The income from

'Namah' building and the premises in 'Lakhani Centrium' was falling under the head 'income from house property' and hence these premises cannot be said to be falling under any asset group on which any rate of depreciation is prescribed as on such asset no depreciation is permissible.

12. The case laws referred by learned Counsel of the assessee as mentioned by us here in above are not applicable on the facts of the case. We have already noted that the 'Namah' building and property in 'Lakhani Centrium' never entered the block of depreciable asset as income from them was falling under the head income from house property. In this view of the matter in our considered opinion learned CIT(A) has passed well reasoned order which does not need any interference on our part.

13. Apropos ground relating to depreciation on car

Brief facts on this issue are as under :-

During the course of assessment proceedings the AO noted that the assessee had claimed deprecation of Rs, 10,67,065/- on Audi motor car, costing Rs.71,13,769/-. The AO noted that the said car had been registered in the assessee's name on 04-02-2009 and the invoice was also dated 12-01-2009. In response to query the assessee submitted that the car was gifted by one Shri Sunil Waswani on 19-06-2009, and therefore the car was first put to use in A.Y.2010-11, The assessee filed copies of the gift deed and also letter from Shreyans Automobiles stating that the car was delivered on 19-06-2009, The AO however held that this was second year of the car use and therefore the assessee should have claimed deprecation for the first time in A.Y.2009-10. The AO therefore reduced the WDV of the car as on 31-03-2010 to Rs.60,46,704/- and allowed depreciation of Rs.9,07,005/-, as aqainst claim of Rs.10,67,065/-.

14. Upon assessee's appeal learned CIT(A) confirmed the action of the Assessing Officer by holding as under :-

2.2 I have examined the facts of the matter. In the books of accounts the appellant has capitalized the Audi car in the F.Y.2009-10, The appellant has also offered the gift value for taxation in the A. Y. 2010-11 .On the contrary the invoice and the registration for the car are for the F.Y.2008-09, Both these documents are in the name of the appellant and not in the name of the donor. It is the appellant's contention that the delivery of the car was received only in the F.Y.2009-10, i.e. 19-06-2009 and till that time the car was lying in the possession & Shreyons Automobiles, in support of this the appellant has filed copies of the gift deed, delivery checklist challan and insurance certificate. As far as the insurance certificate on page 29 of the paper-book is concerned, this is for a 'Range Rover Car' and not for an 'Audi', The gift-deed is on a plain piece of paper. The fact that the invoice is in the name of the appellant and the fact that the appellant has offered the purchase value for taxation would not leave any importance with the gift deed. The only other document is the 'customer delivery checklist dated 19-06-2009. I have perused this document. Nowhere does this document specify that the delivery of the said car is being made for the first time. I agree with the AO that it is hard to believe that a car sold on 12-01-2009 and registered on 04-02-2009, would be delivered on 19-06-2009. In my opinion appellant has not been substantially able to prove that he was not in possession of the car in the F.Y. 2008-09. In the circumstance I have no reason to disturbed the computation of the AO on this ground. On the other hand there is every reason to believe that the car was ready to use in the F.Y. 2008-09. Therefore, in terms of Explanation 5, to section 32(1), the car was depreciable in A.Y.2009-10. In the circumstances the AO has rightly reduced the deprecation for A. Y, 2009- 10, in order to arrive at the WDV as on 01-04-2009. The AO may also consider taxing the gift in AY 2009-10, by that logic. However, I agree with the appellant that as the car was purchased in January 2009, it was entitled to only 50% of the eligible depreciation in A.Y.2009-10 and therefore the WDV as on 01-04-2009 should be Rs.65,80,236/-, Hence, the allowable depreciation would be Rs.9t87,035/.

15. Against the above order assessee is in appeal before us. we have heard both the counsel and perused the records.

16. Upon careful consideration, we find that the main issue in dispute is that authorities below are disputing the genuineness of the delivery document of Shreyons Automobiles which mentions that the vehicle was delivered on 19/6/2009. The genuineness is doubted solely on surmise and conjecture. The plea is that invoice is dated 12/1/2009 and registration date is 4/2/2009,

hence it is claimed that it is hard to believe that it was delivered on 19/6/2009. Why it is so hard to believe that the assessee took delivery after four-month is not specified, the learned CIT-A has even suggested that it may not be the first time that the vehicle was delivered, signifying that the vehicle was delivered earlier used by the assessee, it went back, and it was again delivered on 19/6/09. We find that this is too much for a preposterous presumption dihors any cogent material. The assessee has got the delivery from recognised seller in the city of Mumbai. There is no doubt on the existence or the address of the seller. Nothing prevented the authorities below from making enquiry from the said seller before summarily rejecting the veracity of delivery document on mere surmise.

17. Accordingly we set aside the order's of authorities below and decide the issue in favour of assessee.

18. In the result, assessee's appeal is partly allowed.

Order has been pronounced in the Court on 16.5.2019.

Sd/-	Sd/-
(AMARJIT SINGH)	(SHAMIM YAHYA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai; Dated : 16/5/2019

Copy of the Order forwarded to :

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

BY ORDER,

//True Copy//

(Assistant Registrar)

PS ITAT, Mumbai