

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INCOME TAX APPEAL NO. 2220 OF 2013

The Commissioner of Income-Tax-3 ..Appellant

Vs.

M/s. Parrys(Eastern)Pvt Ltd ..Respondent

Mr. Ashok Kotangale a/w Ms. Padma Diwakar, for the Appellant.

CORAM :- **M.S.SANKLECHA &**
B.P.COLABAWALLA, JJ.

DATE :- **FEBRUARY 18, 2016.**

P. C.:

This Appeal under Section 260-A of the Income Tax Act, 1961 (“Act”) challenges the order dated 13th February, 2013 passed by the Income Tax Appellate Tribunal (the Tribunal). The Assessment Year involved is A. Y. 2005-2006.

2 The Appellant urges the following questions of law, for our consideration:-

(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?

3 The respondent-assessee had for the subject assessment year inter alia disclosed an amount of Rs.7.12 Crores as deemed short term capital gain under Section 50 of the Act. This deemed short term capital gain arose on account of the sale of depreciable assets. This deemed short term capital gain was set off against brought forward long term capital losses and unabsorbed depreciation. The Assessing Officer by his order dated 8th October, 2009 passed under Section 143(3) of the Act held that in view of Section 74 of the Act, such set off on short term capital gain against the long term capital gain is not permitted. Thus, disallowed the set off of brought forward long term capital loss and unabsorbed depreciation against the deemed short term capital

gain of Rs.7.12 Crores.

4 In appeal, the Commissioner of Income Tax(Appeals) ('CIT[A]') allowed the respondent's appeal holding that the issue stand concluded by the decision of this Court in the case of *CIT v/s ACE Builders(P)Ltd reported in 281 ITR 210*. On further appeal by the Revenue, the Tribunal by the impugned order upheld the order passed by the CIT(A). This by placing reliance upon the decision of this Court in the case of *ACE Builders(P)Ltd(supra)* and by following its own order in the case of *Komac Investments and Finance Pvt Ltd v/s Income Tax Officer reported in 132 ITD 290*.

5 Mr. Kotangale, learned counsel for the Revenue submits that in view of the clear mandate of Section 74 of the Act, no set off of the carry forward long term capital loss against the deemed short term capital gain under Section 50 of the Act is permissible. In the above view, it is submitted that the appeal does raise substantial question of law and merits admission.

6 We find that the issue stands concluded by the decision of this Court in *ACE Builders(P)Ltd(supra)* in favour of the

Respondent-Assessee. Moreover, the impugned order relies upon the order of the Tribunal in Komac Investments and Finance Pvt Ltd(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 the Tribunal in Komac Investments and Finance Pvt Ltd(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 in ACE

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Builders(P)Ltd (supra). Therefore, no substantial questions of law arise for consideration.

8 Accordingly, the appeal is dismissed. No order as to costs.

(B. P. COLABAWALLA, J.) (M. S. SANKLECHA, J.)