

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX APPEAL NO.3731 OF 2010

Commissioner of Income Tax, Central III]
Room No.109, Aayakar Bhavan,]
M.K. Road, Mumbai – 400 020.] ...Appellant.

Versus

M/s. Cello Plast,]
5 – Vakil Industrial Estate, Walbhat Road,]
Goregaon (E), Mumbai – 400 063.] ...Respondent.

Mr. Suresh Kumar i/b Ms. Padma Divakar for the Appellant.

Dr. K. Shivram with Mr. Rahul Hakani i/by Mr. A.R. Singh for the Respondent.

**CORAM : S.J.VAZIFDAR &
M.S. SANKLECHA, JJ.**

DATE : 27th JULY, 2012

ORAL JUDGMENT : (Per M.S.Sanklecha, J.)

This appeal by the revenue under Section 260(A) of the Income Tax Act, 1961 (hereinafter referred to as the “said Act”) challenges the order dated 19/1/2010 passed by the Income Tax Appellate Tribunal (hereinafter referred to as the “Tribunal”) in ITA No.2200 of 2009 relating to the assessment year 2006-07.

2) The appeal is admitted on the following substantial questions of law :-

a) Whether on the facts and in the circumstances of the case, the Tribunal in law was right in not sustaining the order of the CIT(A) in confirming the disallowance of the legal and professional charges of Rs.1,37,500/- ?

b) Whether on the facts and in the circumstances of the case the Tribunal in law was right in directing the A.O. to allow the claim of depreciation ?

c) Whether on the facts and in the circumstances of the case, the Tribunal in law was correct in directing the A.O. to allow the claim of deduction u/s. 54EC ?

At the instance and request of the Advocates for both the parties, the appeal is itself taken up for final disposal.

Re Question(a) :

3) The respondent assessee had filed its return of income inter alia seeking a deduction of an expenditure of Rs.1.37 lacs on the ground that the same was incurred towards the legal and professional charges.

The Assessing Officer, by an order dated 26/9/2008, disallowed the the above expenditure as no details in respect thereof had been furnished. On appeal, the Commissioner of Income Tax (Appeals) by an order dated 5/2/2009 upheld the order of the Assessing officer and disallowed the expenses of Rs.1.37 lacs towards the legal and professional charges. The Tribunal by its order dated 19/1/2010 allowed the respondent's appeal on the ground that the details of legal and professional charges had been submitted before the Commissioner of Income Tax (Appeals).

4) Mr. Suresh Kumar, the learned counsel for the appellant submits that the finding of the Tribunal is perverse as respondent had not furnished the details of the expenses incurred on account of legal and professional charges either before the Assessing officer or before the Commissioner of Income Tax (Appeals). As against the above, Dr. Shivram learned counsel for the respondent submits that the details of legal and professional expenses were submitted by a letter dated 26/9/2008 before the Assessing Officer and in support thereof produced a copy of the letter dated 26/9/2008 for the perusal of this Court. The relevant extract of the letter dated 26/9/2008 is as under:

“c) Legal & Professional Charges :Rs.137500/-
During the year 2005-06 the firm has paid a sum of Rs.137500/- towards legal & professional fees to different professionals for consultation on various Income tax, Excise, Custom matters”.

5) We find that the respondent has not submitted the details of the legal and professional expenses allegedly incurred by it. The

letter dated 26/9/2008 merely states that the expenses were incurred towards payment of fees for professional consultation in Income Tax, Excise and Customs matters. However, no details were furnished of the said consultation charges such as the reasons for consultation, the dates of consultation and names of the Consultants. In the circumstances, the Assessing Officer and the Commissioner of Income Tax (Appeals) were correct in disallowing expenditure of Rs.1.37 lacs as the same was not duly supported by evidence. The Tribunal while passing the impugned order has ignored the fact that the details of expenditure was not furnished by the respondent to the department.

6) In view of the above question (a) is answered in the negative i.e. in favour of the appellant – revenue and against the respondent –assessee.

Re Question (b) :

7) It is an admitted position between the parties that question(b) is covered by the decision of this court in the matter of Commissioner of Income Tax v. G. R. Shipping Ltd. in Income Tax Appeal No.598 of 2009 dated 28/7/2009. In view of the above, question (b) is answered in the affirmative i. e. against the appellant–revenue and in favour of the respondent–assessee.

Re Question (c) :

8) On 22/3/2006, the respondent sold its factory building earning a long term capital gain of Rs.49.36 lacs. The respondent

sought to avail of the exemption from payment of tax on long term capital gain of Rs.43.36 lacs under Section 54EC of the said Act by purchasing bonds of the Rural Electrification Corporation Limited (hereinafter referred to as "REC Bonds"). Section 54EC, insofar as it is relevant, reads as under :-

"54EC. (1) Where the capital gain arises from the transfer of a long -term capital asset (the capital asset so transferred being hereafter in this section referred to as the original asset) and the assessee has, at any time within a period of six months after the date of such transfer, invested the whole or any part of the capital gains in the long-term specified asset, the capital gain shall be dealt with in accordance with the following provisions of this section, that is to say,-

(a) if the cost of the long-term specified asset is not less than the capital gain arising from the transfer of the original asset, the whole of such capital gain shall not be charged under section 45;

(b) if the cost of the long-term specified asset is less than the capital gain arising from the transfer of the original asset, so much of the capital gain as bears to the whole of the capital gain the same proportion as the cost of acquisition of the long-term specified asset bears to the whole of the capital gain, shall not be charged under section 45:

Provided that the investment made on or after the 1st day of April, 2007 in the long-term specified asset by an assessee during any financial year does not exceed fifty lakh rupees.

.....

Explanation. - For the purpose of this section, -

(a) “cost”, in relation to any long-term specified asset, means the amount invested in such specified asset out of capital gains received or accruing as a result of the transfer of the original asset;

(b) “long-term specified asset” for making any investment under this section during the period commencing from the 1st day of April, 2006 and ending with the 31st day of March, 2007, means any bond, redeemable after three years and issued on or after the 1st day of April, 2006, but on or before the 31st day of March, 2007, -

(i) by the National Highways Authority of India constituted under section 3 of the National Highways Authority of India Act, 1988 (68 of 1988); or

(ii) by the Rural Electrification Corporation Limited, a company formed and registered under the Companies Act, 1956 (1 of 1956)

and notified by the Central Government in the Official Gazette for the purposes of this section with such conditions (including the condition for providing a limit on the amount of investment by an assessee in such bond) as it thinks fit;

Provided that where any bond has been notified before the 1st day of April, 2007, subject to the conditions specified in the notification by the Central Government in the Official Gazette under the provisions of clause (b) as they stood immediately before their amendment by the Finance Act, 2007, such bond shall be deemed to be a bond notified under this clause;”

9) To avail of the exemption under section 54EC, the respondent had to invest the sale proceeds in the REC bonds within six months from the date of the sale of the factory building i.e. on or before 21/9/2006. However, the respondent purchased the REC bonds only on 31/1/2007. The question is whether despite the same, the respondent is entitled to the benefit of section 54EC in the facts and circumstances of the case.

10) It is useful to set out the relevant facts chronologically.

22/3/2006	The respondents sold their factory building.
22/3/2006 to 1/7/2006	During this period, REC bonds were not available.
30/6/2006	CBDT Circular extending the time to invest in the Section 54EC bonds upto 31/12/2006
1/7/2006 to 3/8/2006	REC bonds became available during this period as stated in a letter dated 10/4/2008 from REC Ltd. filed with the AO by the respondents.
04/08/06 to 22/1/2007	REC bonds were not available during this period.
21/9/2006	Six months from the date of sale of the property by the respondents. In normal course, therefore, the last date for the respondents to invest in bonds to avail of the benefit under Section 54EC.

30/10/2006	As the REC bonds were still not available, the respondents invested Rs.50,00,000/- in fixed deposits issued by the State Bank of India. The respondents by a letter dated 30/10/2006 instructed the State Bank of India to invest Rs.50,00,000/- in FDs stating that the same will be withdrawn and invested in bonds when available.
31/12/2006	Last date for investing in bonds to avail of the benefit under Section 54EC as per the CBDT Circular dated 30/6/2006.
22/1/2007 to 31/1/2007	REC bonds once again available (as stated in a letter dated 10/4/08 from REC Ltd. to the respondent.)
31/1/2007	Respondents purchased REC bonds.

11) In their return of income the respondents appended a Note stating some of the above facts.

12) The Assessing Officer by his order dated 26/9/2008 disallowed the benefit of Section 54EC to the respondent and subjected to tax to entire capital gain of Rs.49.36 lacs.

13) The Commissioner of Income Tax (Appeals) by an order dated 5/2/2009 dismissed the respondent-assessee's appeal and upheld the order dated 26/9/2009 of the Assessing officer. He held that even in terms of the said Circular the investments in the bonds for the benefit of Section 54EC of the Act had to be made on or before 31/12/2006, whereas the respondent admittedly purchased the REC bonds only thereafter on 31/1/2007.

14) The Tribunal by its order dated 19/6/2010 allowed the respondent's appeal. The Tribunal held that it was impossible for the

respondent to comply with the condition of Section 54EC of the said Act as the REC bonds were not available and for that reason the CBDT had issued the Circular dated 30/6/2006 extending the time. Further, the Tribunal held that the fact that the respondent had deposited the amount of Rs.50/- lacs with the State Bank of India with a specific direction that the bonds would be purchased out of the aforesaid amount as soon as they were available, supported the stand of the respondents that the REC bonds were not available.

15) Mr. Suresh Kumar, the learned counsel for the revenue submitted that the Tribunal could not have extended the benefit of Section 54EC to the respondents for three reasons.

16) Firstly, he submitted that the respondents purchased the bonds beyond the period of six months from the date of sale of the factory building and even beyond the extended period viz. 31/12/2006 granted by the said CBDT Circular. Secondly, he submitted that the bonds were available during the period from 1/7/2006 to 3/8/2006 as stated in REC's letter dated 10th April, 2008. The respondents could, therefore, have purchased the bonds before 3/8/2006 in case they were desirous of availing the benefit of Section 54EC. Having failed to do so, they are not entitled to the benefit of Section 54EC.

17) The submissions are not well founded. The REC bonds could not be purchased as they were not available throughout the period of six months commencing from the date of the sale of the factory by the respondents and even thereafter till the extended date of 31/12/2006 under the CBDT Circular. That the bonds were available for

a limited time during this period between 1/7/2006 to 31/8/2008, makes no difference. The respondents had time till 21/9/2006, to invest in these bonds to avail the benefit under section 54EC. Section 54EC entitles a person to avail of the right conferred thereby at any time during the period of six months from the date of sale of the asset. The respondents cannot be deprived of this right conferred by the Act for no fault of theirs. Thus, the availability of the bonds only for a limited time during this period cannot prejudice the assessee's right to exercise the same upto the last date. The bonds were admittedly not available except during the said period.

18) *Lex not cogit impossibila* (law does not compel a man to do that which he cannot possibly perform) and *impossibilum nulla obligatio est* (law does not expect a party to do the impossible) are well known maxims in law and would squarely apply to the present case. The statute viz. Section 54EC of the Act provides for exemption from tax to long term capital gain provided the same is invested in bonds of Rural Electrification Corporation Limited or National Highway Authority of India. However, as the bonds were not available, it was impossible for the respondent-assessee to invest in them within six months of the sale of their factory building. Therefore, in the circumstance one would have to interpret Section 54EC of the Act to ensure that it does not lead to injustice. The Apex Court in the matter of **Directorate of Enforcement Vs. Deepak Mahajan reported in 1994(3) SCC 440** observed as under:

“Though the function of the Court is only to expound the law and not legislate, none the less the legislature cannot be asked to sit to resolve the

difficulties in the implementation of its intention and the spirit of the law. In such circumstances, it is the duty of the Court to mould or creatively interpret the legislation by liberally interpreting the statute”.

Therefore, in the present facts, the six months provided for investing in bonds may be reasonably extended in view of the non availability of bonds till 22/1/2007.

19) The contention of the appellant revenue that Rural Electrification bonds were available upto 3/8/2006 and the respondent assessee should have purchased the bonds before 3/8/2006 is not sustainable as the time given by the statute to invest in bonds under Section-54EC of the Act is six months from the date of sale and, therefore, the respondent was entitled in law to wait till 21/9/2006 to invest in the bonds.

20) There remains an important aspect of some difficulty to be considered viz. the extent to and precise period during which the extension ought to be granted to avail the benefit of the provisions of section 54EC when the bonds referred to therein are not available. These aspects would have to be determined, based on two factors - the duration when the bonds were not available, and the period during which to wit the point of time during the six months or the extended period, if any, when they were not available. For instance, the bonds may not have been available at the commencement of the six months period or for a broken period or periods during the six months or towards the end of the six months.

21) It is difficult to lay down any particular rule in this regard.

We think it both prudent and proper to consider only the case before us and only to the extent where the bonds were not available prior to the expiry of the six month period, including the last day. A person is entitled, as we have held earlier, to invest in the said bonds upto the last available date. If that be so, it must follow that the extension ought to be granted at least for the period prior to the expiry of six months when the bonds were not available and upto the date on which they were ultimately made available. In any event, in such a case an assessee would be entitled to a reasonable extension which must then be decided, depending upon the facts of each case. A person cannot be expected to make the investment on the first possible date on which the bonds were made available after the expiry of the six months period or any extended date prescribed by the CBDT. During the period the bonds were unavailable a person is likely to invest the amount elsewhere. To expect or require him not to do so would be unjust for reasons too obvious to state. He cannot then be expected at a day's notice to break the investment and transfer the same to the bonds stipulated in Section 54EC.

22) In the present case, the bonds were not available from 4/8/2006 to 22/1/2007. The last date for investment in the normal course would have been 21/9/2006 which was extended upto 31/12/2006. The respondents ought to be entitled to an extension of the number of days between 4/8/2006 to 21/9/2006 at the very least and, in any event, to a reasonable extension. The respondents admittedly invested in the bonds on 31/1/2007 i.e. within nine days of their being available once again from 22/1/2007. Considering that the bonds were not available for such a long period, an extension of

merely nine days is extremely reasonable in the present facts.

23) The first two grounds are, therefore, rejected.

At the cost of repetition, we make it clear that we have not expressed any opinion as to the extent and specific period of extension in any other situation, including where the bonds may not have been available only for a day or two prior to the expiry of the six months period.

24) Thirdly, Mr. Suresh Kumar submitted that the respondent in any case could have purchase the bonds of the National Highway Authority which was an alternative mode of investment provided for availing the benefit of Section 54EC. As the respondent-assessee has not chosen to purchase the bonds of National Highway Authority of India it cannot claim the benefit of Section 54EC of the said Act and the amount of Rs.49.36 lacs is correctly chargeable to capital gain tax.

25) This submission is also not well founded. Section 54EC of the Act having given the respondent a choice of investing either in the bonds of Rural Electrification Corporation Limited or the National Highway Authority, the revenue cannot insist that the respondent ought to have invested its capital gain on sale of property in the bonds of the National Highway Authority.

26) The statue itself provides that the assessee, who is subject to long terms capital gain tax, can avail of exemption under Section 54EC of the Act if he invests in bonds of either the National Highway

Authority of India or the Rural Electrification Corporation Limited. The choice of investing in one of the two organizations is with the respondent and the appellant revenue contrary to the statute cannot force the respondent to invest only in the bonds of one in preference to the other. The choice of which bonds to purchase is entirely with the respondent and in case the bonds of respondent's choice are not available as is proved in the present case, the time to invest in the bonds get automatically extended till the bonds are available in the market and the assessee can purchase the same.

27) In view of the above we answer question (a) in the negative i.e. in favour of the appellant revenue and against the respondent. So far as questions (b) and (c) are concerned the same are answered in favor of the respondent assessee and against the appellant-revenue.

28) The appeal is disposed of in the above terms. No order as to costs.

(M.S. SANKLECHA, J.)

(S. J. VAZIFDAR, J.)