

**आयकर अपीलीय अधिकरण "B" न्यायपीठ मुंबई में।**

**IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, MUMBAI**

श्री महावीर सिंह, उपाध्यक्ष एवं श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष ।

BEFORE SRI MAHAVIR SINGH, VP AND SRI MANOJ KUMAR AGGARWAL, AM

आयकर अपील सं./ ITA No. 3347/Mum/2018

(निर्धारण वर्ष / Assessment Year 2014-15)

M/s Nutech Engineering Technologies Ltd. 27, Vikas Centre, S.V. Road, Santacruz (W), Mumbai-400 054	बनाम/ Vs.	Dy. Commissioner of Income Tax, Circle 10(3)(1), 212, 2 <sup>nd</sup> Floor, Aayakar Bhavan, M.K. Road, Mumbai-400 020
(अपीलार्थी / Appellant)		(प्रत्यर्थी/ Respondent)
स्थायी लेखा सं./PAN No. AAACN0273B		

अपीलार्थी की ओर से/ Appellant by	:	Shri Ajay Singh, AR
प्रत्यर्थी की ओर से/ Respondent by	:	Shri Thavian Oommen, DR

सुनवाई की तारीख / Date of hearing:	23.02.2021
घोषणा की तारीख / Date of pronouncement:	19.04.2021

**आदेश / ORDER**

महावीर सिंह, उपाध्यक्ष के द्वारा /

**PER MAHAVIR SINGH, VP:**

This appeal of assessee is arising out of the order of the Commissioner of Income Tax (Appeals)-17, Mumbai, [in short CIT(A)], in ITA No. CIT(A)-17/IT-196/10878/16-17 dated 14.03.2018. The assessment was framed by the Asst. Commissioner of Income Tax, Circle 10(3)91) Mumbai (in short ACIT/ITO/ AO) for the A.Y. 2014-15 vide



order dated 19.12.2016 under section 143(3) of the Income-tax Act, 1961 (hereinafter 'the Act').

2. At the outset, the learned Counsel for the assessee has raised the additional ground in regard to computation of capital gains under section 50 of the Act which is a legal ground and goes to the route of the matter. The relevant ground raised read as under: -

*"1. The Ld. CIT(A) as well Assessing Officer failed to appreciate the computation of capital gain to be made under sec. 50 of the Act i.e. on Sale of any asset falling in the block of assets, the same has to be reduced for the WDV of the said block of Asset any not from the individual asset as done by Assessing Officer.*

*2. The Ld. CIT(A) as well Assessing Officer failed to appreciate that under section 50 of the Act the STCG arises only when the status of the block is negative."*

3. When these facts were confronted that the above ground relates to computation of capital gains under section 50C of the Act, this is purely a legal ground and goes to the route of the matter, the learned Sr. DR has not contested the admissibility of additional ground. Hence, we admit the ground and adjudicate.



4. The brief facts are that the assessee is engaged in the business of manufacturing of Air Handling Units, Air Washers, Dampers, Pre-fabricated Ducts and other Metal parts. The assessee has sold one unit out of seventeen units situated at Lunkard Sky Max, plot No. 94M, Viman Nagar, Village Lohengaon, Taluka Haveli. The assessee has acquired this property known as Lunkard Sky Max of 17 units. During the financial years 2009-10 & 2010-11, depreciation at the rate of 10% was claimed and allowed for AYs 2010-11 and 2011-12. Further, the assessee from Financial Year 2012-13, out of 17 units, 7 units were given on rent and accordingly, rental income was shown as income from house property. The assessee has not claimed depreciation for & from Financial Year 2012-13 on this property, out of those 17 let out units. Since, Financial Year 2011-12, One unit was sold during the Financial Year 2013-14 relevant to AY 2014-15 for a sum of Rs. 90 lacs and long term capital gain of Rs.45,22,358/- was declared. The assessee before Assessing Officer claimed that the property was held for more than 3 years and rental income was declared under the income from house property, hence, the assessee has rightly claimed the gain arising out of sale proceeds after indexation as Long Term Capital Gains. It was also submitted that no deprecation was claimed on these 17 units since Financial Year 2011-12. But the Assessing Officer treated the gain on sale of these units as short term capital gain under section 50C of the Act and computed the capital gain as Rs.63,93,920/- by observing in Para 3.5 as under : -

*"3.5 Considering the above mentioned facts,  
as assessee has claimed depreciation till*

*31.03.2011 @ 10% on this property. Hence, WDV of the property of Rs.26,06,080/- {1,27,86,502 X 39/191.35} as on 31.03.2011 shall be the cost of acquisition of the said property for the purpose of calculation of Capital Gain thereon and as the asset is a depreciable asset, hence the nature of Capital Gain will be 'Short Term Capital Gain' rather than 'Long Term Capital Gain'. Penalty proceedings u/s 271(1)(c) of I.T. Act 1961 are initiated separately for filing of inaccurate particulars of income/ concealment of income. The working of Capital Gain is as under:*

Working of STCG	Sale consideration
Date of Transfer (F.Y. 2013-14)	90,00,000
Financial year	Written down value as on 01.04.2011
2009-10	26,06,080
Capital Gain	63,93,920

*."*

Aggrieved assessee preferred the appeal before Commissioner of Income Tax (Appeals).

5. The CIT(A) confirmed the action of the Assessing Officer by observing in Para 4.2.2 as under: -

*"4.2.2 Thus, it is very clear that the user test is 'Block of assets". If a particular*



*property is a part of "block of assets" and subsequently transferred or sold then section 50 and 50A is automatically attracted irrespective of the fact that for certain years, depreciation has not been claimed. Hence, the Assessing Officer has justifiably invoked provisions of section 50 and computed Short term capital gain of Rs.63,93,920/- on transfer of depreciable asset. The ground of appeal on this issue is therefore dismissed."*

Aggrieved, now assessee is in appeal before Tribunal.

6. We have heard the rival contentions and gone through the facts and circumstances of the case. We noted that the assessee has claimed depreciation on the property sold as Lunkard Sky Max of 17 units in AYS 2010-11 and 2011-12. But from AY 2012-13 i.e. Financial Year 2011-12 out of 17 units 7 units were given on rent and accordingly rental income was shown as income from house property and no depreciation was claimed on this property. As argued by the learned Counsel for the assessee that once the property let out it loses its character as a business asset and no depreciation was allowable on it. This fact has not been denied by the Revenue. We noted that this issue has been decided by Co-ordinate Bench of Mumbai in the case of M/s Prabodh Investment & Trading Company Pvt. Ltd. vs. ITO in ITA NO. 6557/Mum/2008, wherein it is held as under:



" 7. The next contention of the assessee is the one based on the order of the Cochin Bench of the Tribunal cited supra. In that case the assessee stopped claiming depreciation on the flat from the assessment year 1995-96 onwards on the ground that it was no more used for the purpose of the business. In the books of account the flat was shown as an investment from 01.04.1995. In the previous year relevant to the assessment year 1998-99, the flat was sold and the surplus was declared as long term capital gains. The income tax authorities held that the capital gains should be assessed as short term capital gains on the footing that the flat might have been used for business purposes even in the assessment years 1996-97 and 1997-98. On further appeal to the Tribunal, it was held that the flat ceased to be a business asset or depreciable asset on and with effect from 01.04.1995 and its character during the accounting year ended on 31.03.1998 was that of a long term capital asset and, therefore, the capital gains should be computed as long term capital gains. In this order the provisions of section 50A were



*referred to. This section makes special provision for cost of acquisition in the case of depreciable asset. It says that where the capital asset is one in respect of which depreciation was allowed in any previous year; the provisions of sections 48 and 49 shall apply subject to the modification that the written down value of the asset, as adjusted, shall be taken as the cost of acquisition. Relying on this provision the Tribunal held that but for the difference in the cost of acquisition, a past claim of depreciation does not change the character of the asset as such. This order of the Tribunal supports the assessee's case before us. In the present case also the assessee had stopped claiming depreciation in the income tax return for the assessment years 1992-93 and 1993-94. It had claimed depreciation in respect of the flat only in the assessment years 1990-91 and 1991-92. For the assessment year 1994-95 and all subsequent years the assessee had made a Note in its accounts filed with the returns clarifying that no depreciation was provided in respect of the flat as the same was not used during the*



*year for the purpose of the business. From the assessment year 1994-95 up to the assessment year 2004-05, the flat was classified in the Balance Sheet as a fixed asset and shown at cost less depreciation. These facts are recorded in paragraph 8 of the assessment order. In the assessment years 2000-01 and 2001-02, the flat had been let out and the rental income was shown under the head "Income from house property". It would thus appear that after the assessment year 1993-94 no depreciation was provided even in the books of account and no depreciation had been claimed or allowed in the return or in the assessments. In this factual situation the order of the Cochin Bench of the Tribunal cited supra is applicable, in which it was held that if no depreciation had been claimed or allowed in respect of the asset, even though for an earlier period depreciation was claimed and allowed, from the year in which the depreciation claimed was discontinued, the asset would cease to be a business or depreciable asset and if the asset had been acquired beyond the period of thirty six*



*months from the date of sale, it would be a case of long term capital gains. In our humble understanding, the ratio of the order appears to be that the asset had ceased to be a business asset and had become an investment."*

7. Once, this is a fact that the moment assessee stopped claiming depreciation in respect of property and let out the same for rent, it ceases to be a business asset and thus, the profit or gain arising out of sale of property is to be considered as long term capital gain after indexation. We direct the Assessing Officer accordingly.

**8. In the result, the appeal of assessee is allowed.**

Order pronounced in the open court on 19.04.2021.

Sd/-

(मनोज कुमार अग्रवाल / MANOJ KUMAR AGGARWAL)

(लेखा सदस्य / ACCOUNTANT MEMBER)

Sd/-

(महावीर सिंह / MAHAVIR SINGH)

(उपाध्यक्ष / VICE PRESIDENT)

मुंबई, दिनांक/ Mumbai, Dated: 19.04.2021

सुदीप सरकार, व. निजी सचिव/ Sudip Sarkar, Sr.PS



**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /  
DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**