

IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH 'I' MUMBAI

**BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER AND  
SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER**

ITA No.2296/Mum/2011  
Assessment Year- 2007-08

M/s. Jai Hind Rubber Products Pvt.Ltd., 391, Tilak Market, Opp. Novelty Cinema, Grant Road, Mumbai-400 007  PAN-AAACJ 1734D	Vs.	The ACIT, Cir 5(2), Aayakar Bhavan, Mumbai-400 020
(Appellant)		(Respondent)

Appellant by: Shri S.C. Tiwari &  
Ms. Natasha Mangat  
Respondent by: Shri K.S. Kutty

Date of Hearing :30.07.2012  
Date of pronouncement:03.08.2012

**ORDER**

**PER N.K. BILLAIYA (AM):**

With this appeal the assessee has challenged the correctness of the order of Ld. CIT(A)-9, Mumbai dt. 23.12.2010 for assessment year 2007-08.

2. The assessee has raised following effective grounds:

"1. *The Ld. CIT(A) has erred in upholding the action of the AO in treating sale of factory building (Basement ground) as asset held for less than 36 months before the date of its transfer and consequently denying exemption u/s. 54EC of Rs. 50,00,000/-. On the basis of facts and in the circumstances of the case, factory building ought to be treated as long term assets being assets held for more*

*than 36 months before the date of its transfer and exemption u/s. 54EC ought to be allowed.*

2. *The Ld. CIT(A) has erred in upholding the action of the AO in treating sale of property let out (upper floor) as asset held for less than 36 months before the date of its transfer and consequently treating capital gain as short term gain. On the basis of facts and in the circumstances of the case, property given on rent being held for more than 36 months before the date of its transfer the capital gain arising on its transfer ought to be treated as long term capital gain.*

3. *Without prejudice to the grounds 1 & 2 above, the Ld. CIT(A) has erred in not giving direction to allow exemption u/s. 54EC of Rs. 50,00,000/- against Long Term Capital Gain of Rs. 75,53,773/- assessed on sale of land. On the basis of facts and in the circumstances of the case and in law, exemption u/s. 54EC of Rs. 50,00,000/- ought to be allowed against long term capital gain on sale of land."*

3. Briefly stated the facts of the case are that the assessee is a Private Limited Company engaged in manufacturing of Rubber products and having manufacturing unit at Andheri and Grant Road. For the year under consideration, the appellant company declared total income at Rs.1,62,25,595/- on 30.10.2007. The return was selected for scrutiny assessment and accordingly statutory notices u/s. 143(2) and 142(1) were issued and duly served upon the assessee.

4. During the course of assessment proceedings, the Assessing Officer observed that the assessee has sold unit at Andheri on 29.6.2005 and the sale proceeds have been offered as capital gain. The AO sought explanation in respect of capital gain from the sale of industrial unit. The assessee replied that it has received Rs. 2,62,11,800/- as total receipt on sale of industrial unit and has offered for taxation under 3 categories as Long Term Capital Gain. The AO accepted the contention of the assessee. So far as the sale of plot of land is concerned and accepted, the capital gain offered as Long Term Capital gain. The AO observed that the consideration of Rs.

1,78,62,400/- for the building has been allocated equally between ground and upper floor. The basement and ground floor were used for the purpose of business and depreciation has been claimed on the same. As the basement plus ground floor was in use for the purpose of business for more than 3 years and accordingly, the assessee treated the capital asset as Long Term in nature. However, the gain has been deemed to be short term capital gain as per Section 50 of the Act. The upper floor was given on rent to Shemaroo Videl Pvt. Ltd. And the rent income was shown under the head "income from house property" in earlier years. It was the contention of the assessee that as the period of holding was more than 3 years, capital gain arising from the sale of upper floor has been offered for tax as long term capital gain. However, the contentions and submissions by the assessee were not accepted by the AO in toto. The AO accepted the capital gain offered on the sale of the plot of land as Long term capital gain as per computation. However, the factory building was demarcated Factory Bldg 'A' (rented) and factory building 'B' (SOP), as the factory building marked as 'B' (SOP) was used for business purposes on which depreciation has been claimed. The gain on sale of this is treated as Short Term Capital gain. So far as remaining property i.e. factory building marked 'A' (rented), according to the AO, no details were made available on record showing exact date of completion of the building, which prompted the AO to take on 1.10.2003 as the date of completion. As the assessee company has sold this on 19.4.2006, according to the AO, the property was held less than 36 months and accordingly treated the proceeds of it as Short term capital gain. The AO further rejected the claim of the assessee u/s. 54EC of the Act since the building given on rent and the factory building were held by the assessee company for less than 36 months, according to the AO, exemption as per provisions of Sec. 54EC cannot be allowed in case of Short Term Capital gain. The AO completed the assessment accordingly.

5. The assessee carried the matter before the Ld. CIT(A) and submitted that the holding period of both the land and the factory building is more than

36 months and therefore the asset should have been treated as Long Term Capital asset. Further even because of the deeming provision of Sec. 50 of the Act wherein the gain arising out of the transfer of depreciable asset is treated as Short term capital gain, the benefit of exemption u/s. 54EC cannot be denied. However, the arguments and the submissions made by the assessee did not find any favour from Ld. CIT(A) who confirmed the finding of the AO.

6. Aggrieved by this, the assessee is in appeal before us. The Ld. Counsel for the assessee reiterated the submissions made before the lower authorities and contended that the evidences on record clearly show that the factory building is more than 3 years old. The Ld. Counsel further submitted that inspite of the deeming provision of Sec. 50, the benefit of Sec. 54EC cannot be denied in the light of the decision of the Hon'ble Jurisdictional High Court in the case of CIT Vs ACE Builders Pvt. Ltd. (2006) 281 ITR 210 (Bom).

7. The Ld. Departmental Representative strongly supported the findings of lower authorities.

8. We have heard the rival submissions and perused the orders of the lower authorities and the paper book submitted by the assessee. The whole dispute revolves around to the treatment of capital gain arising out of the transfer of factory building. So far as the treatment of the capital gain arising out of the transfer of the plot is concerned, there is no dispute. The dispute is in relation to the factory building which is partly used for business and partly rented out. It is the contention of the assessee that the factory building was under construction since 1995-96. To substantiate, the Ld. Counsel drew our attention to exhibit page 37 to 41 of the Paper Book which are copy of the ledger account of the factory building and pointed out that the assessee is adding towards the cost of construction since F.Y. 1995-96 till the year under consideration. We find that at page-12 of the paper Book which is a copy of NOC dt. 6.3.1997 given by the Office of the Chief Fire

Officer, Mumbai Fire Brigade granting the assessee to occupy and use the factory building. Referring to this, the Ld. Counsel has rightly stated that the factory building is more than 36 months old. At page-35 of the paper book, we find that there is a Municipal Corporation Tax receipt dt. 25<sup>th</sup> September, 1997 which also substantiate the claim of the assessee. It appears that the AO has wrongly taken the date as 1.10.2003 only because the assessee claimed depreciation for the first time during the year under consideration on the amount apportioned between the factory building (rented) and factory building (SOP). We have also considered the schedule of fixed assets since 1996 to March, 2004 exhibited from page 42 to 50 of the Paper Book. We find that in each of these years, the assessee has showed the factory building under the head "building account under consideration". Considering all these facts in totality, we have no hesitation to hold that the factory building in dispute is more than 36 months old which make it as Long Term capital asset. We accordingly reverse the findings of Ld. CIT(A).

9. The second dispute is in relation to the denial of exemption u/s. 54EC of the Act. We find that the case relied upon by the Counsel i.e. CIT Vs ACE Builders (supra) is well founded. In that case the Hon'ble High Court has held as follows:

*"In our opinion, the assessee cannot be denied exemption under section 54E, because, firstly, there is nothing in section 50 to suggest that the fiction created in section 50 is not only restricted to sections 48 and 49 but also applies to other provisions. On the contrary, section 50 makes it explicitly clear that the deemed fiction created in sub-sections (1) and (2) of section 50 is restricted only to the mode of computation of capital gains contained in sections 48 and 49. Secondly, it is well established in law that a fiction created by the Legislature has to be confined to the purpose for which it is created. In this connection, we may refer to the decision of the apex court in the case of State Bank of India v. D. Hanumantha Rao reported in [1998] 6 SCC 183. In that case, the Service Rules framed by the bank provided for granting extension of service to those appointed prior to July 19, 1969. The respondent therein who had joined the bank on July 1, 1972, claimed extension of service because he was deemed to be appointed in the bank with effect from October 26, 1965, for the purpose of seniority,*

*pay and pension on account of his past service in the army as Short Service Commissioned Officer. In that context, the apex court has held that the legal fiction created for the limited purpose of seniority, pay and pension cannot be extended for other purposes. Applying the ratio of the said judgment, we are of the opinion, that the fiction created under section 50 is confined to the computation of capital gains only and cannot be extended beyond that. Thirdly, section 54E does not make any distinction between depreciable asset and non-depreciable asset and, therefore, the exemption available to the depreciable asset under section 54E cannot be denied by referring to the fiction created under section 50. Section 54E specifically provides that where capital gain arising on transfer of a long-term capital asset is invested or deposited (whole or any part of the net consideration) in the specified assets, the assessee shall not be charged to capital gains. Therefore, the exemption under section 54E of the Income-tax Act cannot be denied to the assessee on account of the fiction created in section 50.*

*It is true that section 50 is enacted with the object of denying multiple benefits to the owners of depreciable assets. However, that restriction is limited to the computation of capital gains and not to the exemption provisions. In other words, where the long-term capital asset has availed of depreciation, then the capital gain has to be computed in the manner prescribed under section 50 and the capital gains tax will be charged as if such capital gain has arisen out of a short-term capital asset but if such capital gain is invested in the manner prescribed in section 54E, then the capital gain shall not be charged under section 45 of the Income-tax Act. To put it simply, the benefit of section 54E will be available to the assessee irrespective of the fact that the computation of capital gains is done either under sections 48 and 49 or under section 50. The contention of the Revenue that by amendment to section 50 the long-term capital asset has been converted into a short-term capital asset is also without any merit. As stated hereinabove, the legal fiction created by the statute is to deem the capital gain as short-term capital gain and not to deem the asset as short term capital asset. Therefore, it cannot be said that section 50 converts a long-term capital asset into a short-term capital asset."*

10. As the facts in issue under consideration are identical with the facts in issue of CIT Vs ACE Builders (P) Ltd (supra), respectfully following the

finding of the Hon'ble Bombay High Court, we direct the AO to allow exemption u/s. 54EC of the Act as per law.

11. In the result, the appeal filed by the assessee is allowed.

Order pronounced on this 3<sup>rd</sup> day of July, 2012

**Sd/-**

(VIJAY PAL RAO)  
Judicial Member

**Sd/-**

(N.K. BILLAIYA )  
Accountant Member

Mumbai, Dated 3<sup>rd</sup> August, 2012

Rj

*Copy to :*

1. *The Appellant*
  2. *The Respondent*
  3. *The CIT-concerned*
  4. *The CIT(A)-concerned*
  5. *The DR 'I' Bench*
- True Copy*

*By Order*

*Asstt. Registrar, I.T.A.T, Mumbai*