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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ ITA Nos. 601/2011 & 602/2011

CIT ..... Appellant
Through Mr. Abhishek Maratha, Sr. Standing Counsel.

Versus

ANSAL PROPERTIES & INFRASTRUCTURE LTD.
..... Respondent
Through Mr. Satyen Sethi, Advocate.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V.EASWAR

O R D E R

% 19.04.2012

Having heard learned counsel for the parties, we frame the following substantial question of law:

> "Whether in the facts and circumstances of the case the Income Tax Appellate Tribunal was right in holding that short terms capital gains tax is not payable as per Section 50 of the Income Tax Act, 1961?"

2. As we have heard learned counsel for the parties on the aforesaid question, we proceed to dictate our decision.

3. These appeals under Section 260A of the Income Tax Act,

1961 (Act, for short) have been preferred by the Revenue in tl case of Ansal Properties and Infrastructure Limited (respondent assessee) for the Assessment Years 1989-90 and 1990-91. Relevant facts may be noticed.

Assessment Year 1989-90

4. During the period relevant to the Assessment Year 1989-90, the respondent-assessee had sold the entire plant and machinery of their paper division and had stopped and ceased to carry on business in their paper division with effect from 2nd June, 1987. The Assessing Officer after examining the factual matrix came to the conclusion that the manufacturing activity in the paper division had stopped even before 30th April, 1987. The Assessing Officer noticed that furniture and fixture having written down value of Rs.2,39,459/- had been sold for a sum of Rs.1,50,000/- resulting in a shortfall/loss of Rs.89,459/-. Plant and machinery, including affluent tank, laboratory equipment, tube well etc. had been sold for Rs.2,31,94,888/- resulting in short term capital gain of Rs.1,33,22,068/- as the written down value of the said plant and equipment was Rs.98,72,820/-.

5. After setting off short term capital loss of Rs.89, 459/-on the sale of furniture and fixtures, the short term capital gains was

shown as Rs.1,32,32,609/- chargeable under Section 50 of tl Act. The Assessing Officer held that Section 50 of the Act is not applicable as the entire division, i.e., plant and machinery belonging to the paper division had been sold. He came to the conclusion that Section 50 including sub-section (2) of the Act was not applicable. Accordingly, the gain was taxable as short term capital gain and the new assets purchased by the assessee would not form part of the block of assets relating to the paper division. In other words, he differentiated between the block of assets belonging to the paper division and the block of assets relating to other divisions of the assessee.

6. The CIT(Appeals) confirmed the decision of the Assessing Officer and the matter was taken up in appeal before the tribunal. Tribunal by their order dated 22nd October, 2003 passed an order of remand, inter alia, recording that the matter require in depth and detailed scrutiny by the Assessing Officer at the first instance. The tribunal also referred to the case law referred and relied upon by the assessee.

7. The Assessing Officer vide assessment order dated 24th May, 2005 again held that the entire block, i.e., paper division had been sold and, therefore, Rs.1,32,32,609/- i.e. the gain was

chargeable as short term capital gain. He held that the paper division was a separate unit for which accounts were being maintained separately and the profits were being worked out separately. Thus, the respondent-assessee was claiming depreciation for each unit/division separately and when the entire unit itself had been sold, no block of assets was left. He further mentioned that the assessee for the purpose of Sections 80(IA) and 80(IB) was required to maintain separate accounts for each unit. Once plant and machinery relating to the paper division was sold, the block of assets, relating to the paper division ceased to exist and the entire amount was taxable as short term capital gains and it did not matter if the assessee had a block of assets relating to other units/divisions.

8. In the first appeal, the CIT(Appeal) reversed the decision of the Assessing Officer and observed that the approach adopted by the Assessing Officer was contrary to Section 50 of the Act and the addition was wrongly made by treating the sale proceeds as short term capital gains. He held that Section 50 did not permit the said approach adopted by the Assessing Officer. He also referred to Circular No. 464 dated 23rd September, 2006 issued by the Board.

9. The Income Tax Appellate Tribunal (tribunal, for short) by the impugned order has affirmed the decision of the Commissioner of Income Tax (Appeals). They have held that Section 2(11) defines the term "block of assets" to mean group of assets in respect of which same percentage of depreciation is prescribed. The definition does not make distinction between block of assets of one division or the other. The block of assets held by the assessee cannot be differentiated on this ground. Further income of an assessee under the Act was calculated under different heads and capital gains has to be computed as per the provisions contained in Chapter IV-E relating to capital gains and not in accordance with the provisions of Chapter IV-D relating to profit and gains of business or profession. Reference was made to Section 32, which provides for deduction of depreciation in respect of block of assets at such percentage as is prescribed provided the asset is owned by the assessee and was used for the purpose of business. Section 50 of the Act was referred to and it was held that the main provision and sub-section (2) were attracted to the facts of the present case. The tribunal referred to decision of the Supreme Court in ***Commissioner of Income Tax, Madras versus Express***

Newspapers Limited, (1964) 53 ITR 250 (SC) in support their reasoning and findings.

Assessment Year 1990-91

10. In the period relevant to the Assessment Year 1990-91, the assessee had sold factory land and the building of the paper division. In this appeal, we are not concerned with the sale consideration received and taxation of land, as the land is not a depreciable asset and did not form part of the block of assets. We are concerned with the building, which had formed part of the block of assets and on which deprecation was claimed. The Assessing Officer vide order dated 24th May, 2005 for identical reasoning as given for the Assessment Year 1989-90 held that the sale consideration received and gain on sale of the building amounting to Rs.2,49,07,806/- was taxable as short term capital gains nand Section 50(2) of the Act was not applicable. We may note that in this assessment year also there was an order of remand by the tribunal. However, the Revenue, the appellants before us, have not placed on record the orders passed in the first round.

11. The CIT(Appeals) for the same reasoning as given for the

Assessment Year 1989-90 accepted the appeal filed by tl assessee and held that Section 50(2) was applicable. The tribunal by their order dated 13th August, 2010 following their order passed for the Assessment Year 1989-90 has affirmed the decision taken by CIT(Appeals) and dismissed the appeal of the Revenue.

Appreciation of the legal provisions and findings.

12. In order to decide the question of law, we have to refer to the expression “block of assets” defined in Section 2 sub-section (11) of the Act and also refer and interpret Section 50. The two provisions are reproduced below:

> “**2. Definitions**.—In this Act, unless the context otherwise requires,—
>
> (11) "block of assets" means a group of assets falling within a class of assets comprising-
> (a) tangible assets, being buildings, machinery, plant or furniture ;
> (b) intangible assets, being know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature,
>
> in respect of which the same percentage of depreciation is prescribed;”
>
> **Section 50. Special provision for computation capital gains in case of depreciable assets.**--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 assets during the previous year, exceeds the aggregate of the following amounts, namely:--

(i) expenditure incurred wholly and exclusively in connection with such transfer of 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 falling 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.

13. The expression “block of assets” means group of assets falling within the assets enumerated in clauses (a) and (b). The clause (a) refers to tangible assets, including building, machinery, plant and clause (b) refers to intangible assets like copyright, know how, trade mark etc. The aforesaid Section does not make any distinction between different units or different type of businesses, which may be carried on by an assessee. The term “business” mentioned above refers to different type of business activities carried on by the assessee. The only requirement is that in respect of assets which form the block of assets, same percentage of depreciation should be prescribed. The word “same percentage” shows that the block of assets refers to same rate of depreciation which is prescribed under the Rules. All assets, which may be of different types, but in respect of which same percentage of depreciation is prescribed, are to be treated and form part of the block of assets.

14. Appendix-I under Rule 5 of the Income Tax Rules, 1962

(Rules, for short) prescribes and states the table of rates ... which depreciation is admissible and is divided into different parts and sub headings. Rates of depreciation have been prescribed. Assets of different types which have been prescribed same rate of depreciation have been clubbed and put together. Appendix does not stipulate and provide that each unit or division of assessee has to be separately accounted for and shown or forms a separate block of assets. The table in fact does not postulate and require any such division or bifurcation. The bifurcation is made between tangible assets and intangible assets and then under various sub headings as per the rate of depreciation mentioned in the said appendix.

15. Section 50 of the Act, which has been quoted above, states that notwithstanding anything contained in Section 2(42A) where capital asset is an asset forming part of the block of assets on which depreciation has been allowed, then provisions of Sections 48 and 49 of the Act will be applicable, subject to the modification made by the section. The full value of the consideration received or accruing as a result of the transfer of the said asset or any other asset falling within block of the asset shall be taxable as short term capital gain if it exceeds the

aggregate value of the following:

(1) Expenditure incurred wholly and exclusively in connection with the transfer of the assets.

(2) Written down value of the block assets at the beginning of the previous year.

(3) Actual cost of the assets falling within the block of assets acquired during the previous year.

16. Thus, under Section 50 short term capital gains is payable in case after adding the three amounts/values and subtracting the same from the value of consideration received/accruing on the transfer of asset and other assets in the block of assets, there is an excess or surplus. In case there is no excess, then nothing is payable as short term capital gains.

17. The phrase “block of assets” being a term of art, which has been specifically defined in Section 2(11) of the Act, will refer to the block of assets on which the same rate of depreciation is prescribed. As long as there is no surplus on sale of assets which form part of the block of assets, i.e., assets carrying the same rate of depreciation, short term capital gain would not be payable. However, if there is surplus, then short term capital gain would be payable. The block of assets will mean the

assets carrying the same rate of depreciation.

18. Section 50(2) applies where any block of assets ceases to exist. The term “block of assets” therein will mean the assets carrying same rate of depreciation fixed in the schedule. In case the block of assets, i.e., all assets exigible to same rate of depreciation in the schedule ceases to exist because of transfer/sale, sub-section (2) to Section 50 gets initiated and is accordingly applied. The requirement and pre-condition stipulated is that the block of asset should cease to exist. The block of asset should stand completely depleted and no asset should remain in the block.

19. In the present case, there is no finding of the Assessing Officer or the appellate authorities that the block of assets carrying the same rate of depreciation ceased to exist or that after adding the three elements mentioned in Section 50, there was surplus on the full value of consideration received or accruing as a result of transfer of plant and machinery or the building. It is not the finding of the Assessing Officer that the block of assets entitled to the same percentage of depreciation ceased to exist or there was a surplus in the block of assets carrying the same rate of depreciation. The Assessing Officer

has proceeded on the basis that the division itself constitutes separate and an independent block of assets. Appendix to the Rules as noticed above, is not a unit/division specific but is rate of depreciation specific, as all assets prescribed the same rate of depreciation are clubbed and are a part of the same block of assets. The view we have taken finds resonance and acceptance in two decisions of the Delhi High Court in ***Commissioner of Income Tax versus Eastman Industries Limited***, 174 Taxman 344 and ***Commissioner of Income Tax versus Oswal Agro Mills Limited***, (2012) 341 ITR 467 (Del.).

20. In the case of ***Eastman Industries Limited*** (supra), Section 50 of the Act was interpreted and examined. In the said case, the assessee had sold an asset forming part of block of assets and on the date of the sale there was a positive figure or surplus. However, during the assessment year in question, the assessee had purchased new assets prescribed/having the same rate of depreciation and falling with the same block of assets. The contention of the Revenue was that as a positive figure or surplus existed on the date of the transfer, the gain was taxable as short term capital gains and the purchase of assets carrying same rate of depreciation and belonging to the same block of assets, subsequently, did not matter and

effect the chargeability or taxation under the head short ter capital gains. The contention was rejected, inter alia, holding as under:-

> "14.6 A clearer indicator of the untenability of, the Revenue's submission, is demonstrable from the latter part of the provision of section 50(2) which provides the manner in which capital gains are to be arrived at. In order to do so, firstly, the cost of the acquisition of „block of assets is ascertained by taking 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 falling within the „block of assets acquired during the previous year. Then, the income received or accruing as a result of such transfer or transfers is deemed to be short term capital gains. A bare reading of the provision of sub-section (2) of Section 50 of the Act would show that, the very fact that, there is a reference to, in arriving at the cost of acquisition, to the written down value of the „block of assets at the beginning of the previous year as increased by actual cost of assets falling within the „block of assets acquired during the previous year would show that what is required to be seen is that whether at the end of the previous year, the „block of assets have ceased to exist or, in other words what is to be seen is that whether „throughout the course of or „after the commencement and before the expiration of the previous year (i.e., the financial year immediately preceding the relevant assessment year) there was an asset which fell within the „block of assets. In the event the block of assets i.e., a class of asset(s) bearing same rate of depreciation exist(s) was with the

> assessee at the end of the previous year, then the provision of Section 50 (2) would not apply."

21. The aforesaid paragraph shows and records that in Section 50 there is reference to written down value of the block of assets at the beginning of the previous year as increased or decreased by the actual cost of assets acquired/transferred falling within the block of assets during the previous year. The term "block of assets" for the purpose of the Section 50 would mean assets having the same rate of depreciation.

22. In the case of ***Oswal Agro Mills Limited*** (supra) the assessee had different units and the Bhopal unit was closed. The High Court observed and held that the assets of Bhopal unit were not being used even passively by the assessee as the unit was completely non functional. A second question thereafter arose whether the assets of the Bhopal unit were entitled to depreciation, if they form part of the block of assets as the assessee had other businesses/divisions other than the Bhopal unit. The stand of the assessee in this regard was accepted after making reference to Section 2(11) and Section 50 of the Act. Reference was also made to Section 43(6), which reads as under:

"43(6) – "Written down value" means –
(a) ** ** **

(b) ** ** **
(c) In the case of any block of assets, -

(i) In respect of any previous year relevant to the assessment year commencing on the 1st day of April, 1988, the aggregate of the written down values of all the assets falling within that block of assets at the beginning of the previous year and adjusted, -

(A) by the increase by the actual cost of any asset falling within that block, acquired during the previous year; and

(B) by the reduction of the moneys payable in respect of any asset falling within that block, which is sold or discarded or demolished or destroyed during that previous year together with the amount of the scrap value, if any, so, however, that the amount of such reduction does not exceed the written down value as so increased; and

(ii) in respect of any previous year relevant to the assessment year commencing on or after the 1st day of April, 1989, the written down value of that block of asses in the immediately preceding previous year as reduced by the depreciation actually allowed in respect of that block of assets in relation to the said preceding previous year and as further adjusted by the increase or the reduction referred to in item (i)."

23. The High Court also made reference to Direct Taxes Circular No. 469 dated 23rd September, 1986, which reads as under:

> "6.3 As mentioned by the Economic Administration Reforms Commission (Report No. 12, para 20), the existing system in this regard requires the calculation of depreciation in respect of each capital asset separately and not in respect of block of assets. This requires elaborate book-keeping and the process of checking by the Assessing Officer is time consuming. The greater differentiation in rates, according to the date of purchase, the type of asset, the intensity of use, etc., the more disaggregated has to be the record-keeping. Moreover, the practice of granting the terminal allowance as per section 32(1)(iii) or taxing the balancing charge as per section 41(2) of the Income-tax Act necessitate the keeping of records of depreciation already availed of by each asset eligible for depreciation. In order to simplify the existing cumbersome provisions, the Amending Act has introduced a system of allowing depreciation on block of assets. This will mean the calculation lump sum amount of depreciation for the entire block of depreciable assets in each of the four classes of assets, namely, buildings, machinery, plant and furniture."

24. Thereafter it has been observed and held:

> "29. Thus, for the assessment year 1998-99, the W.D.V. of any block of assets shall be the aggregate of the W.D.V. of all the assets falling within that block of assets at the beginning of the previous year. From this, the adjustment has to be made for the increase or reduction in the block of assets during the year under consideration. The deduction from the block of assets has to be made in respect of any asset, sold discarded

or demolished or destroyed during the previous year.

……..

32. It becomes manifest from the reading of the aforesaid Circular that the Legislature felt that keeping the details with regard to each and every depreciable assets was time consuming both for the assessee and the Assessing Officer. Therefore, they amended the law to provide for allowing of the depreciation on the entire block of assets instead of each individual asset. The block of assets has also been defined to include the group of asset falling within the same class of assets.

33. Another significant and contemporaneous development, which needs to be noticed is that the Legislature has also deleted the provision for allowing terminal depreciation in respect of each asset, which was previously allowable under section 32(1)(iii) and also taxing of balancing charge under section 41(2) in the year of sale. Instead of these two provisions, now whatever is the sale-proceed of sale of any depreciable asset, it has to be reduced from the block of assets. This amendment was made because now the assessees are not required to maintain particulars of each asset separately and in the absence of such particular, it cannot be ascertained whether on sale of any asset, there was any profit liable to be taxed under section 41(2) or terminal loss allowable under section 32(1)(iii). This amendment also strengthen the claim that now only detail for "block of assets" has to be maintained and not separately for each asset.

> 34. Having regard to this legislative intent contained in the aforesaid amendment, it is difficult to accept the submission of the learned counsel for the Revenue that for allowing the depreciation, user of each and every asset is essential even when a particular asset forms part of „block of assets. Acceptance of this contention would mean that the assessee is to be directed to maintain the details of each asset separately and that would frustrate the very purpose for which the amendment was brought about. It is also essential to point out that the Revenue is not put to any loss by adopting such method and allowing depreciation on a particular asset, forming part of the „block of assets‟ even when that particular asset is not used in the relevant assessment year. Whenever such an asset is sold, it would result in short term capital gain, which would be exigible to tax and for this reason, we say that there is no loss to Revenue either."

25. Madras High Court in ***S. Muthurajan versus Deputy Commission of Income Tax***, (2011) 339 ITR 301 (Mad) had examined Section 50(2) and interpreted the same. In the said case, the assessee had separate units/divisions and one of the units was sold. Question arose whether the gain from the sale of the said unit was separately taxable as a short term capital gains though the block of assets, i.e., assets carrying/having same rate of depreciation still continued to exist and whether short term capital gains tax was payable in such cases. The

High Court rejected the contention and the stand of the Revenue and agreed with the plea of the assessee that Section 50(2) was not applicable as the block of assets, i.e., assets in the same rate of depreciation continue to exist and, inter alia, observed:

> "16. As already pointed out, section 50 is a special provision for computation of capital gains in the case of depreciable assets. The said provision states that where the capital assets is an asset forming part of a block of assets, then the computation of the capital gains has to be done in accordance with section 50 of the Act. Under sub-section (2) of Section 50, where any block of assets are transferred, the cost of depreciation at the hands of the transferee shall be written down value of the block of assets at the beginning of the previous year, as increased by the actual cost of any asset falling within that block of assets, acquired by the assessee during the previous year. The income thus received or accruing as a result of such transfer or transfer is deemed to be the capital gains arising from the transfer of short term capital assets. Given the fact that block of assets is identified by the percentage of depreciation granted, on going through the various heads under the Schedule, we find that the depreciation percentage fixed is more of machinery specific rather than industry specific. Thus, on going through the various clauses in the Schedule, we find, if the asset transferred and the asset purchased fall for consideration under the self-same percentage of depreciation, then the asset qualified for being termed as falling under a block of assets. Thus, if the assets transferred from the 100 per cent export-

> oriented unit and the assets purchased come for the same percentage of depreciation as prescribed in the table, the assessee would be justified in seeking adjustment in the matter of working out the capital gains."

26. Learned counsel for the Revenue has relied upon Section 32 of the Act and has submitted that the effect of the said Section should be examined while computing short term capital gains and interpreting Section 50. It is not possible to accept the said contention. Capital gains is chargeable to tax under Chapter IV-E. The provisions of the said Chapter are independent and separate. The provisions of the said chapter relating to capital gains have to be examined and interpreted. Only if there is a contradiction or conflict, we have to harmoniously interpret the two provisions. Section 50 incorporates a deeming fiction and has to be given and interpreted accordingly. Section 32 forms part of Chapter IV-D and relates to computation of income from profession and business. It is not the case of the Revenue that the gain on transfer of the block of assets is taxable as business income. The two sections operate in their own filed and there is no conflict. In these circumstances, we do not think we should refer and rely upon Section 32 and accordingly compute and decide

whether short term capital gains is payable under Chapter IV-

Learned counsel for the assessee in this regard has rightly relied upon decision of the Supreme Court in ***Express Newspaper Limited*** (supra) in which it was held as under:

> "Now turning to section 12B, it provides for capital gains. Under that section the tax shall be payable by the assessee under the head "capital gains" in respect of any profits or gains arising from the sale of a capital asset effected during the prescribed period. It says further that such profits or gains shall be deemed to be income of the previous year in which the sale, etc., took place. This deeming clause does not lift the capital gains from the sixth head in section 6 and place it under the fourth head. It only introduces a limited fiction, namely, that capital gains accrued will be deemed to be income of the previous year in which the sale was effected. The fiction does not make them the profits or gains of the business. It is well settled that a legal fiction is limited to the purpose for which it is created and should not be extended beyond its legitimate field. Sub-sections (2A) and (2B) of section 24 provide for the setting off of the loss falling under the head "capital gains" against any capital gains falling under the same head. Such loss cannot be set off against an income falling under any different head. These three sections indicate beyond any doubt that the capital gains are separately computed in accordance with the said provisions and they are not treated as the profits from the business. The profits and gains of business and capital gains are two distinct concepts in the Income Tax Act: the former arises from the activity which is called business and the

> latter accrues because capital assets are disposed of at a value higher than what they cost the assessee. They are placed under different heads; they are derived from different sources; and the income is computed under different methods. The fact that the capital gains are connected with the capital assets of the business cannot make them the profit of the business. They are only deemed to be income of the previous year and not the profits or gains arising from the business during that year."

27. In view of the aforesaid position, we answer the question of law in affirmative, i.e., in favour of the assessee and against the Revenue. The appeals are disposed of. No costs.

SANJIV KHANNA, J.

R.V. EASWAR, J.

APRIL 19, 2012
VKR/NA