

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

INCOME TAX REFERENCE NO.96 OF 2000

Smt.Meena v. Pamnani, Mumbai

Applicant

versus

The Commissioner of Income Tax,
City-IX, Mumbai

Respondent

Mr.Rohan Deshpande for applicant.

Mr.Suresh Kumar with Ms.Samiksha Kanani for Respondent.

**CORAM : S.C.DHARMADHIKARI AND
PRAKASH D. NAIK, JJ.**

DATE : 29th September 2017

ORAL JUDGMENT (Per - S.C.Dharmadhikari, J.) :-

1. The Income Tax Appellate Tribunal, Mumbai Bench 'A', Mumbai ('Tribunal' for short) at the instance of assessee, has referred the following questions for answer and opinion by this Court:-

1. Whether, the Tribunal was right in law in holding that even when an asset for many years has ceased to be used for the purpose of the business, it still forms part of the 'Block of Assets' only because at some point of time in the past, it was used for the purpose of the business ?

2. Whether, the Tribunal was right in law in holding that an asset cannot move out of the 'Block of Assets', if depreciation was allowed to the asset some time in the past, even though depreciation was claimed for many years thereafter ?

3. Whether, the Tribunal was right in law in holding that even in a case where there is evidence to prove that an industrial gala which was once used for business is not used for business for many years, the gain on sale thereof will attract the provisions of section 50 and will consequently be short term capital gain ?”

2. The Income Tax Appeal No.6316 of 1993 for the assessment year 1991-92 pertains to the assessee, an individual. It is her case that she carried on weaving work on job basis in all her three concerns, viz. (i) Gitanjali Silk Mills; (ii) Kalpana Silk Mills and (iii) M/s.J.R.Enterprises. There were eight looms in M/s.Gitanjali Silk Mills and four each in other concerns. It is her case that the looms of M/s.Gitanjali Silk Mills were operated from gala No.210 and other looms of the sister concerns were operating from gala no.211.

3. These two galas being gala nos.210 and 211 were purchased by the assessee on 30th June 1977 for Rs.1,39,500/-. Of these two galas, the assessee sold gala no.210 on 16th August 1990 for Rs.6,60,000/- and earned profit of Rs.6,23,645/-. The assessee treated this gain as long term capital gain and claimed deduction under Section 48(2) of the Income Tax Act, 1961 ('I.T.Act'). The assessing officer noted that the assessee had not only claimed depreciation on the above gala for the assessment years 1981-82 to 1986-87 but also claimed deduction under Section 80(J) for the assessment years ('A.Y. for short) 1981-82 to 1985-86.

4. According to the assessee, Section 50 is applicable when the assets sold is forming part of 'Block of Assets' which is not applicable to her case. It was further stated that the concept of block of assets was incorporated in the I.T.Act and came into effect from 1st April

1988. That is why Section 50 of I.T.Act was not applicable to her case. It was further pointed out that machinery and looms were shifted from gala no.210 to gala no.211 and gala no.210 was lying vacant since 1st April 1988 and no depreciation was claimed thereon. Since no depreciation was claimed and it was sold as personal asset, she contended as above.

5. The assessing officer negated this claim by holding that once depreciation has been allowed, the asset would remain a business asset and the profit earned on sale of that asset would be taxed under Section 50 of I.T.Act. According to the assessing officer, though the section was effective from 2nd November 1986, it did not state that provisions of this section would apply only to those assets where depreciation has been allowed after 1st April 1988 and in fact it referred to old act. According to the assessing officer stoppage of the claim of depreciation will not alter the nature of assets. Both these galas were situate in one premises and the assessee claimed depreciation on the basis that the written down value was also taken on both together into a consolidated figure. To put it differently, neither the depreciation nor the written down value was shown separately for the galas. The assessing officer found that even the claim of personal asset was not correct because the assessee claimed society charges of Rs.62,935/- in the Profit and Loss Account pertaining to the two galas. The assessing officer also noted that the assessee herself had shown in the Profit and Loss Account “profit on sale of factory gala”. With these findings, the assessing officer concluded that the gain arising on the sale of industrial gala No.210 was not long term capital gain, as claimed by the assessee, but short term capital gain under Section 50 of the I.T.Act. He accordingly

taxed the amount. In appeal, the Commissioner of Income Tax (Appeals) concurred with this view of the assessing officer.

6. The matter came up before the Tribunal in further appeal and the Tribunal also upheld the order of assessing officer and Commissioner of Income Tax (Appeals) and with the observations which have been noted in paragraph no.5 of the statement of case. It is in these circumstances that the questions have been referred for our answer and opinion by an order dated 21st May 1996.

7. Mr.Rohan Deshpande appearing for the assessee would submit that the concurrent views are not in accordance with law. Mr.Deshpande would submit that gala no.210 never became a part of the assessee's block of assets and therefore, Section 50 of the I.T.Act 1961 (as amended by Taxation Laws [Amendment and Miscellaneous] Provisions Act 1986]) is not attracted. Mr.Deshpande would submit that from the A.Y. 1987-88 onwards, when gala no.210 was vacated and all machinery and looms were moved to gala no.211, the assessee never used gala no.210 for the purposes of her business. Consequently, no depreciation was claimed thereupon as it had ceased to be the 'business asset/depreciable asset'. The nature of gala no.210 as a business asset was not revived up to its date of sale which is 16th August 1990 and relevant to A.Y. 1991-92 i.e. the assessment year under consideration. It was during the period namely A.Y. 1987-88 to A.Y. 1991-92, when gala no.210 was not being used by the assessee for the purpose of business, that this concept of depreciation on block of assets was introduced vide Taxation Laws (Amendment and Miscellaneous) Act, 1986 with effect from 1st April 1988 i.e. from A.Y. 1988-89 onwards. It is in

these circumstances that this gala no.210 never became a part of the assessee's block of assets and the amendment of 1986 cannot be made applicable to her case.

8. Then, Mr.Deshpande relied upon Section 32(1) of the I.T.Act and would submit that gala no.210 was incapable of being termed as depreciable asset as on 1st April 1988. It cannot be deemed to be a part of the block of assets. Apart from this factual submission, it is submitted by him that gala no.210 was incapable of being treated as depreciable asset. This asset was not 'used' for the purpose of assessee's business. It is settled law that for availing depreciation under I.T.Act, it is imperative that two criterias are satisfied. First is the ownership and second is the use for the purpose of business or profession. These two requirements are set out in Section 32(1) itself. In such circumstances, the user criteria is not satisfied to attract Section 32(1). Once that is not satisfied, then, the assessing officer as also other authorities under the Act, have erred in terming this asset as 'part of block of assets'. Third fundamental error would enable us, according to Mr.Deshpande, to answer these questions in favour of the assessee and against the revenue. Mr.Deshpande has relied upon Section 50 of the I.T.Act to submit that for the purposes of computation of short term capital gains on sale of gala no.210, its written down value has to be necessarily computed after allowing depreciation thereof. Once no such depreciation was claimed by the assessee, then, that cannot be thrust on her. Precisely that has been done in the instant case. Our attention is, therefore, invited by Mr.Deshpande to the provisions and particularly Explanation-5 to Section 32(1) of I.T.Act.

9. In support of his contention, he relied upon following judgments :-

**(i) (1954)25-ITR-265 (SC) - Liquidators of Pursa Limited
Vs. Commissioner of Income Tax;**

**(ii) (2004)134-Taxman-725 - Commissioner of Income Tax
Vs Sree Senhavalli Textiles (P) Ltd.;**

Mr.Deshpande has invited our attention to some material documents compiled by him.

10. On the other hand, Mr.Suresh Kumar appearing on behalf of revenue would submit that there is no merit in the contentions of Mr.Deshpande. Our attention is invited by Mr.Suresh Kumar to each of these provisions and he submitted that once an asset has been treated as block of asset, then, irrespective of its disposal and in the manner done by the assessee, it would continue to be treated as such. Once it is treated on its initial introduction in the block as 'block of asset', then, that treatment continues and that is how the law has been understood throughout. Therefore, there is no merit in the argument that assessing officer or the first appellate authority or the Tribunal have acted contrary to law. In these circumstances, he would submit that all the questions proposed by the assessee should be answered against her.

11. It is common ground that there is a concurrent finding that the assessee has originally purchased gala nos.210 and 211 together. She claimed depreciation of the cost of galas together and the written down value was also shown together. The Tribunal has observed that even though the depreciation has been allowed in the past on gala no.210 and plant and machinery therein was shifted to gala no.21, no depreciation has been claimed thereon subsequently

still the definition of block of assets, as appearing in Section 2(11) of the I.T.Act was in force. That is because both the galas are identical in nature. These galas constituted one class of assets. Once the depreciation has been granted on gala no.210, but subsequently no business operations were carried on therefrom, that does not mean that it ceased to be a business asset. The Tribunal, therefore, relied upon an order passed by it in the case of **M/s.Sonalika Vs. A.C.I.T in (Income Tax Appeal No.5807/Bom/1992, dated 6th December 1993)**. Therefore, the Tribunal concluded that it was unable to accept the assessee's contention that Section 50 did not apply because depreciation was neither claimed nor allowed in the year of sale. Agreeing with the view in Sonalika Vs. A.C.I.T. , the appeal of the assessee was dismissed.

12. The Income Tax Act, 1961 defines in Section 2, clause-11 the term “Block of Assets” to mean a group of assets falling within a class of assets comprising (a) tangible assets, being buildings, machinery, plant or furniture; and (b) intangible assets, being know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature. The further part of this definition indicates that these block of assets comprising as above in respect of which same percentage of depreciation is prescribed, can be understood as block of assets.

13. Section 32 of I.T.Act enables claiming deductions in respect of depreciation on the tangible and intangible assets owned, wholly or partly, by the assessee and used for the purpose of business or the profession. One of the aspect in respect of any block of assets is that such percentage of the written down value thereof, as may be

prescribed, can be claimed. The relevant rule is Rule 5(1) of Appendix-I of I.T.Rules.

14. Section 50 of the I.T.Act sets out special provision for computation of capital gains in case of depreciable assets. The section opens with a non obstante clause and states that 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 I.T.Act or under the Indian Income Tax Act, 1922 (11 of 1922), the provisions of sections 48 and 49 shall be subject to the modifications set out in Section 50. Sections 48 and 49 provide for mode of computation of the capital gains. Section 48 deals with the mode of computation and deductions. The income chargeable under the head capital gains shall be computed by deducting the full value of the consideration received or accruing as a result of the transfer of the capital asset. Section 49 deals with the cost with reference to certain modes of acquisition. Where the capital asset became the property of the assessee on distribution of assets of a HUF, or under gift or will or by succession/inheritance or devolution and/or on distribution of assets on liquidation of a company or under a transfer to a revocable or an irrevocable trust etc., the cost of such acquisition of the asset shall be deemed to be the cost for which the previous owner of the property acquired it. Both these provisions are subject to modifications set out in Section 50, where capital asset is an asset forming part of a block of assets in respect of which depreciation has been allowed.

15. Mr.Deshpande has placed heavy reliance on the judgment of Hon'ble Supreme Court in the case of Liquidators of Pursa Limited

Vs. Commissioner of Income Tax reported in (1954)-25-ITR-265 (SC) (**supra**). In that case the facts relevant for our purpose have to be noted. There, the business of the assessee was that of growing up of sugar cane, manufacturing of sugar and dealing in the same. In the middle of 1943, the directors of the company commenced negotiations for the sale of the factory and other assets of the company with the ultimate object of winding up the company. That is how an inventory was prepared and a firm offer was received from a third party for the purchase of the factory and stores as on 9th August 1943. A written agreement was drawn on 7th December 1943. Thereafter, the third party paid the sum and took possession of the factory on 10th December 1943. On the date of sale, the company possessed sugar stock valued at Rs.6 lakh which was excluded from the sale. The company continued to sell this stock of sugar up to June-1944. Between 9th August 1943, when the firm offer was obtained and 10th December 1943 when possession of the factory was made over to the third party, the company never used the machinery and plant for the purpose of manufacturing the sugar and for any other purpose, except that of keeping them in proper and running order. The company went into voluntary liquidation on 20th June 1945. By letter dated 17th May 1947, the Income Tax Officer claimed that large profits which had been made by the company on sale of their machinery and plant, were taxable under the second proviso to Section 10(2)(vii) of 1922 Act and called upon the liquidators to retain sufficient funds and assets in their hands to meet the heavy tax liabilities that might eventually arise and also to warn the shareholders accordingly. The Income Tax Officer had also asked for some information, which, however, the liquidators did not furnish. Instead, the liquidators sent their reply and disputed the

view of Income Tax Officer that profits are taxable. Their contention was that the profits to which reference has been made, were not profits arising from the business carried on by the assessee, but were profits arising from the company ceasing the business. The Income Tax Officer did not agree and passed an assessment order making above provisions applicable. The first appellate authority as also the Tribunal dismissed the liquidator's objections. On reference, the High Court held that surplus profit is assessable as taxable profit under Section 10(2)(vii) of 1922 Act. When the matter was carried to the Hon'ble Supreme Court, the Supreme Court referred to Section 10(2)(iv) of Income Tax Act, 1922 and held that fundamental idea underlying each of these words is the continuous exercise of an activity and the same central idea is implicit in the words 'carried on by him' occurring in Section 10(1) of the Act of 1922 and those crucial words are an essential constituent of that which is to produce the taxable income. Therefore, it is clear that the tax is payable only in respect of the profits or gains of the business which is carried on by the assessee.

16. Mr.Deshpande would rely upon these observations and particularly the portion where the Hon'ble Supreme Court has held that the words 'used for the purpose of business' obviously means use for the purpose of enabling the owner to carry on the business and earn profits in the business. In other words, the machinery or plant must be used for the purpose of that business which is actually carried on and the profits of which are assessable under Section 10(1). The Hon'ble Supreme Court did not deem it fit and proper to express any opinion on the employment of word "used" and whether it should be so interpreted so as to include a passive user. The

Hon'ble Supreme Court held that in order to attract operation of clauses (vi), (vi) and (vii) of Section 10(1) of the Income Tax Act, 1922, the machinery and plant must be such as were used, in whatever sense that word is taken, at least for a part of the accounting year. If they are not being used at all during the accounting year, no allowance can be claimed under clause (vii) of Section 19(2) of the Act of 1922. However, we must understand the context in which the observations made and the law that was applicable.

We would make a reference to other judgments relied upon by Mr.Deshpande later.

17. Mr.Deshpande also brought to our notice and fairly the relevant extracts from Income Tax Act, 1961 as amended by Finance Act No.2 of 1991 and the Central Board of Direct Taxes (CBDT) Circular No.469, dated 23rd September 1986. Our attention has also been invited to the order passed on 17th November 2015 in Income Tax Appeal No.2088 of 2013 by this Court. There the revenue had proposed a question which is noted in paragraph 2(a) of the order. The Tribunal had held that the assessee is eligible to claim depreciation in respect of plant and machinery of discontinued business without appreciating the fact of basic condition for claiming depreciation under Section 32 of the Act is the 'use of asset' for business purpose of the assessee. In answering that question, the Division Bench found that the respondent-assessee claimed depreciation in respect of its machinery which was used in its business on refining edible oil. The machinery had not been used in the A.Y. 2005-06 to which the order relates. The respondent-

assessee discontinued its business of refining edible oil. The depreciation was claimed on the block of assets on the written down value including refining edible oil machinery. This claim was disallowed by the assessing officer on the ground that one of the twin requirements of ownership and user under Section 32(1)(ii) of the Act enabling claiming of depreciation viz user was not satisfied. The view of the assessing officer was confirmed in appeal before the first appellate authority. On further appeal, the Tribunal held that refining edible oil machinery was a part of block of assets of plant and machinery. In such a case, depreciation is granted to the entire block of assets, whether or not an individual item therein has been used during the subject assessment year. It is in that sense and relying upon its earlier view to this effect, that Tribunal allowed the assessee's appeal and consequently the claim for depreciation. In confirming this view of the Tribunal that individual asset loses its identity for the purposes of depreciation and the user test is to be satisfied at the time the purchased machinery becomes a part of the block of assets for the first time, has been confirmed by this Court. The revenue tried to distinguish this judgment, but this Court found no merit in the argument.

18. Mr.Deshpande would submit that the view taken by this Court ought to be confined to the peculiar facts and should not be understood as a general proposition.

19. Mr.Deshpande also brought to our notice a judgment of Division Bench of Kerala High Court in case of **Commissioner of Income Tax Vs. Sakthi Metal Depot reported in (2011)-333-ITR-492 (Ker)**, but attempted to distinguish that as well. There, the

assessee had purchased a flat for business purpose in 1974 and depreciation was allowed thereon upto the A.Y. 1995-96. However, the assessee discontinued claiming depreciation for the flat for the A.Y.s 1996-97 and 1997-98. The flat was sold during the year 1997-98. That was in the previous year relevant to assessment year under consideration namely 1998-99. The expenses towards brokerage and legal expenses were deducted and the assessee returned the profit as long term capital gains. The assessing officer disagreed and held that profit arising on transfer of a depreciable asset was assessable as short term capital gains under Section 50 of the I.T.Act. This view came to be confirmed by the Commissioner of Income Tax (Appeals). However, the Tribunal held that such profit was chargeable as tax as long term gains because no depreciation was claimed or allowed for two years prior to the previous year in which the building was sold. The revenue preferred an appeal to Kerala High Court and one question was framed as substantial question of law for opinion and answer by Kerala High Court. The Kerala High Court after noting the rival contentions, held as under :

“4. While the contention of the Revenue is that the asset in respect of which depreciation has been claimed when sold should always be assessed as short-term capital gains, the contention of the assessee is that unless the asset sold forms part of the block asset in the previous year in which sale took place, it cannot be assessed to short-term capital gains under section 50 of the Act. In our view section 50 has to be understood with reference to the general scheme of assessment on sale of capital assets. The scheme of the Act is to categorise assets between short-term capital assets and long-term capital assets. Section 2(42A) defines short-term capital asset as an asset held for not more than 36 months. The non obstante clause with which section 50 opens makes it clear that it is an exception to the definition of short-term

capital asset which means that even though the duration of holding of an asset is more than the period mentioned in section 2(42A), still the asset referred to therein will be treated as short-term capital asset. No one can doubt that assets covered by section 50 are depreciable assets forming part of block assets as defined under Section 2(11) of the Act. Section 50 has two components, one is as to the nature of treatment on an asset, the profit on sale of which has to be assessed to capital gains. The section mandates that a depreciable asset in respect of which depreciation has been allowed when sold should be assessed to tax as short-term capital asset. The other purpose of section 50 is to provide cost of acquisition and other items of expenditure which are otherwise allowable as deduction in the computation of capital gains and covered by sections 48 and 49 of the Act. Here again section 50 provides an exception for deduction of cost of acquisition and other items of expenditure otherwise allowable in the computation of capital gains under sections 48 and 49 of the Act. In other words, section 50 provides for assessment of a depreciable asset in respect of which depreciation has been allowed as short-term capital gains and the deductions available under sections 48 and 49 should be allowed subject to the provisions provided in sub-sections (1) and (2) of section 50. Section 50A also deals with assessment of depreciable asset that too as short term capital gains and it actually supplements section 50. In our view, the purpose of section 50A is to enable the assessee to claim deduction of the written down value of the asset in respect of which depreciation was claimed in any year as defined under section 43(6) of the Act towards cost of acquisition within the meaning of sections 48 and 49 of the Act. The condition for computation of short-term capital gains in the way it is stated in section 50A is that the assessee should have been allowed depreciation in respect of a depreciable asset sold in any previous year which obvious means that for the purpose of assessment of profit on the sale of a depreciable asset, the assessee need not have claimed depreciation continuously for the entire period upto the date of sale of the asset. In other words, in our view, the building which was acquired by the assessee in 1974 and in respect of which depreciation was allowed to

it as a business asset for 21 years, that is upto the assessment year 1995-96, still continued to be part of the business asset and depreciable asset, no matter the non-user dis-entitles the assessee for depreciation for two years prior to the date of sale. We do not know how a depreciable asset forming part of a block of assets within the meaning of section 2(11) of the Act can cease to be part of the block of assets. The description of the asset by the assessee in the balance-sheet as an investment asset in our view is meaningless and is only to avoid payment of tax on short-term capital gains on sale of the building. So long as the assessee continued business, the building forming part of the block of assets will retain its character as such, no matter one or two of the assets in one or two years not used for business purposes dis-entitles the assessee for depreciation for those years. In our view, instead of selling the building, if the assessee started using the building after two years for business purposes the assessee can continue to claim depreciation based on the written down value available as on the date of ending of the previous year in which depreciation was allowed last.”

20. Mr.Deshpande also attempted to distinguish this judgment by submitting that this view of Kerala High Court firstly is not binding on us. Secondly, there the High Court held that so long as the assessee continued business, the building forming part of the block of assets, will retain its character as such, no matter one or two of the assets in one or two years not used for business purposes dis-entitles the assessee to claim depreciation for those years. Mr.Deshpande would submit that in the case before us, long before sale, galla no.210 was locked. The plant and machinery in that were shifted to gala no.211 and no depreciation had been claimed thereon. There was, thus, no question of definition of 'block of assets' being applicable.

21. We are unable to agree with Mr.Deshpande for more than one reason. The consistent view taken is that the initial introduction was the material part. We are of the opinion that the Tribunal correctly understood this concept of 'block of assets'. The argument has been and throughout that the expression 'block of assets' means a group of assets falling within the assets enumerated in Section 2(11) of the I.T.Act. That section does not make any distinction between different units or different types of businesses, which may be carried out by the assessee. Only requirement in respect of an asset which forms part of assets, is that same percentage of depreciation should be prescribed. The relevant rule has been referred to and through out. Once the law enables claiming of depreciation on the block of assets, as stated by the Tribunal, then, it is not possible to agree with the assessee that between A.Y.1986-87 to A.Y.1991-92, when gala no.210 was not being used by her for the purpose of business, and the concept of depreciation of block of assets was introduced vide 1986 amendment with effect from 1st April 1988, that cannot be applied. The argument is that from A.Y.1988-89, this amendment would apply. However, it is not an accurate reading of this definition. The definition of the term 'block of assets' means a group of assets falling within the class of assets and comprising both – tangible and intangible assets, in respect of which same percentage of depreciation is prescribed. Section 32 of the I.T.Act which provides for claiming depreciation, enables an assessee to claim it and in the case of any block of assets, on such percentage of written down value thereof, as may be prescribed.

22. The Tribunal in the case before us has referred to the appellate order. The appellate order took a view that an asset cannot move out

of the block of assets once depreciation is allowed on that particular asset. In the present case, initially depreciation was claimed and allowed on both galas. It was only during last four years that no depreciation was claimed or allowed, as the assets were not used for the purpose of business. Even though the assets were not used for the business of the assessee, they continued to be part of block of assets on which depreciation was allowed. The Tribunal in affirming this view of the first appellate authority, had passed a detailed order. Initially the order was passed in which all the contentions were referred including that once an asset ceased to be in use for the purpose of business, it does not remain a part of 'block of assets' and it was not open for the assessee to claim depreciation thereon. The Tribunal concluded that the facts are eloquent enough. The assets being gala nos.210 and 211 were purchased as industrial galas together. The assessee claimed depreciation on the galas together and written down value was also shown together. Though depreciation has been allowed in the past on gala no.210 and plant and machinery in gala no.210 was shifted to gala no.211 and no depreciation was claimed thereon subsequently, nonetheless, the depreciation on block of assets stipulated in Section 2(11) is applicable. Both the galas are of the same nature. They form one class of assets. Once the depreciation has been granted on gala no.210 and even if business operations were not carried out therefrom, merely at the convenience of the assessee, it does not cease to be a business asset. The understanding of this provision and the concept, to our mind, conforms with the consistent view taken by the Tribunal earlier, and which has been upheld by this Court. We do not see how the provisions can be construed otherwise.

23. To our mind, the Kerala High Court, with respect, has rightly understood this concept and in the backdrop of the facts which are more or less identical. Section 50 has to be understood with reference to the general scheme of assessment on sale of capital assets. The Kerala High Court referred to the fact that the assets covered by Section 50 are depreciable assets forming part of block of assets, as defined in Section 2(11) of the I.T.Act. The components of Section 50 have also been, with respect, rightly understood in that decision. The Kerala High Court on reading of these provisions took the view that once the building was acquired by the assessee and in respect of which depreciation was allowed to it as a business asset, no matter the non-user dis-entitles the assessee for depreciation for two years prior to the date of sale, still, this asset does not cease to be a part of block of assets. The character of such asset is not lost, according to Kerala High Court.

24. In our view, therefore, the questions proposed by the assessee and forwarded for our opinion, have to be answered in favour of the revenue and against the assessee. We answer them accordingly. It is not relevant for our purpose and in the context of the questions of law forwarded for our opinion, whether the user test can be involved and applied, for, we are not called upon to decide whether the assessee is entitled to claim depreciation in assessment year under consideration. Our opinion is sought on the issue that on sale of the gala, whether the profits earned are taxable as short term capital gains or long term capital gains. To answer that question, we do not think we should travel beyond the applicable statutory provisions, namely, Sections 2(11), 2(42A) and 50 of the Income Tax Act, 1961.

25. We would also make in fairness a reference to the judgment of the High Court of Delhi in the case of **Commissioner of Income Tax Vs. Ansal Properties & Infrastructure Limited reported in (2012)-20-Taxmann.com.770 (Delhi)**. The provisions considered therein were identical namely Section 50 of the I.T.Act. There, the case was a reverse one. The assessing officer held that Section 50 was not applicable. Once entire plant and machinery relating to paper division was sold, the block of assets relating to the paper division ceased to exist and entire amount was taxable as capital gains and it did not matter if the assessee had a block of assets in respect of other division. The Commissioner (Appeals) reversed the decision of assessing officer and held that Section 50 was applicable. The Tribunal confirmed that decision and in the backdrop of the definition of the term 'block of assets'. The revenue appealed to the High Court and in the case of Ansal Properties (supra), the Tribunal's view was considered and eventually relevant provisions were referred. In conclusion, the Delhi High Court held that the question will have to be answered in favour of assessee and against the revenue. The provisions of Section 50 are applicable.

26. The other decision in the case of **Commissioner of Income Tax Vs. Oswal Agro Mills Limited reported in (2011)-197-Taxman 25 (Delhi)** also pertains to a unit which was closed. According to the assessee, depreciation was to be allowed as the assets of that unit remained part of the block of assets and remained for passive use which was as good as active use. The assessing officer was not impressed with this argument and disallowed the depreciation. The Commissioner dismissed the appeal of the assessee. On further appeal, the Tribunal allowed the claim on the ground that it was a

case of depreciation on block of assets, and the assets of Bhopal unit could not be segregated for the purpose of allowing depreciation and depreciation had to be allowed on entire block of assets.

27. Thus, the view taken by this Court in the decision which was brought to our notice fairly by Mr.Deshande in Income Tax Appeal No.2088 of 2013, dated 17th November 2015 (supra), conforms with opinions of Kerala High Court and High Court at Delhi.

28. We do not think that this view can be differed or distinguished by us, (once we have agreed with the revenue on the applicability of the definition of the term 'block of assets'). We do not think that we should go into other aspects and highlighted by Mr.Deshpande. He would submit that the user test apart, there is a further aspect of the matter. That further aspect is with regard to the introduction or insertion of explanation-5 in Section 32 of the I.T. Act and by this method the revenue is forcing or thrusting the claim of depreciation on the assessee. In that regard our attention was invited to the case of **Commissioner of Income Tax Vs. Mahendra Mills/Arun Textile 'C/Humphreys/Glassgow Consultants reported in (2000)-109-Taxman-225 (SC)**. The argument was that in the present case, the assessee has not consciously claimed any benefit of depreciation on gala no.210 from A.Y.1987-88 onwards, inter alia, on the ground that the said asset was not in use and was not a business asset. If the revenue's contentions on such gala being part of the block of assets and consequently Section 50 of the I.T.Act is attracted, is accepted, then, that would be foisting and thrusting the claim of depreciation on the assessee.

29. In that context Mahendra Mills (supra) case was relied upon. In Mahendra Mills (supra) case, the assessee was a company and maintained accounts on mercantile basis. For the A.Y.1974-75 it did not claim depreciation. The assessing officer, however, allowed the depreciation. The assessee appealed to the Commissioner (Appeals) who allowed the appeal. The revenue took the matter to the Tribunal which dismissed the appeal of the revenue. The Hon'ble Supreme Court, therefore, was considering an issue on the backdrop of the unamended Section 32 of I.T.Act. It noted that Section 32 of the I.T.Act has been amended by Amendment Act of 1986 with effect from 1st April 1988. The question arose before the Hon'ble Supreme Court on the applicability of Section 32 as it stood prior to 1st April 1988. That is how it reproduced the section and then held that the revenue's submissions have no merit. The entire scheme of the Act with regard to the claim of depreciation was referred including several High Court judgments, dealing with them. The Hon'ble Supreme Court then held that though this claim of depreciation is for the benefit of the assessee but if assessee does not avail of that benefit for some reason, it cannot be forced upon him. That is how if Section 34 is not satisfied and as particulars are not furnished by the assessee, his claim for depreciation under Section 32 cannot be allowed. Section 29 of the Act was thus interpreted with other provisions of the Act. Section 29 of the I.T.Act was held not to be a complete code by itself.

30. We do not think that we have to go into this controversy for the simple reason that the issue arose before us arises in the context of applicability of Section 50 of the I.T.Act. If we have found that Section 50 was applicable because of the definition of the term

`block of assets' and the user test not being attracted, then, nothing as held above further needs to be decided. The present case is distinct and no claim for depreciation was in issue. The question of thrusting it upon the assessee does not, therefore, arise. It is for avoiding the tax liability, arising because of the applicability of Section 50, that the assessee raised the plea of depreciation being thrust on her even though gala no.210 was not used by her. That plea has rightly been rejected.

31. We dispose of this reference by answering the essential questions framed for our opinion namely question nos.1 and 2, in favour of revenue and against the assessee. Therefore, question no.3 also would have to be answered on the touchstone that Section 50 of the I.T.Act was attracted and the Tribunal was right in law in the view it took. Income Tax Reference is disposed of accordingly.

(PRAKASH D. NAIK, J.)

(S.C.DHARMADHIKARI, J.)

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