IN THE INCOME TAX APPELLATE TRIBUNAL "I" BENCH, MUMBAI

BEFORE SHRI. AMARJIT SINGH, AM
AND
MS. KAVITHA RAJAGOPAL, JM

ITA No. 5429/Mum/2024
(Assessment Year: 2019-20)

Frank S. International ITL Limited 602, X'Trium Building, Sir Mathuradas Vasanji Road, Chakala MIDC S.O. Mumbai – 400059.	Vs.	**ACIT(IT), Circle (2)(3)(1)** Kautilya Bhavan, G Block, BKC, Bandra East, Mumbai – 400051.
PAN/GIR No. AABCI3188F		
(**Assessee**)	:	(**Respondent**)

Assessee by	:	Shri. Devendra Jain
Respondent by	:	Shri. Krishna Kumar (SR. DR.)

Date of Hearing	:	09.12.2024
Date of Pronouncement	:	07.03.2025

O R D E R

Per Kavitha Rajagopal, J M:

This appeal has been filed by the assessee, challenging the order of the learned Commissioner of Income Tax (Appeals) 56, Mumbai ('ld. CIT(A)' for short), National Faceless Appeal Centre ('NFAC' for short) passed u/s. 250 of the Income Tax Act, 1961 ('the Act'), pertaining to the Assessment Year ('A.Y.' for short) 2019-20.

2. The assessee has challenged the order of the ld. CIT(A) in treating the sale of office premises as short term capital gain at 40% plus surcharge instead of considering the same as long term capital gain at 20% plus surcharge.

3. Brief facts are that the assessee is an Indian branch of Frank International ITL Limited, a company incorporated under limited liability in British Virgin Island and a group

company of Franks International USA, which is engaged in the business of BPO services. The assessee filed its return of income dated 31.10.2019, declaring total income at Rs.7,64,34,720/- and deemed income under provisions of MAT at Rs. 8,57,10,001/- after claiming refund of Rs.11,78,00,500/-. The return was processed u/s. 143(1) of the Act, dated 16.07.2020 and refund of Rs.12,72,24,541/- has been issued to the assessee. The assessee's case was selected for scrutiny and notices u/s. 143(2) and 142(1) were duly issued and served upon the assessee. It is observed that the assessee has offered business income of Rs.42,10,975/-, after setting off the brought forward depreciation losses from the 'Income from Business or Profession' declared at Rs. NIL and the assessee has offered income of Rs.8,57,10,001/-, u/s. 115JB of the Act. Further, the assessee has also offered long term capital gain at Rs.7,64,34,724/- @ 20% for which the assessee has paid its tax as per the MAT provisions as the same was higher than the tax computed as per the normal provisions of the Act. The ld. AO during the assessment proceedings observed that the assessee has sold its office premises at Andheri which was purchased in the year 2012-13 on 15.09.2012, for a consideration of Rs.22,20,00,000 and the same was sold on 14.11.2018, for a consideration of Rs.28,96,80,930/-, towards which the assessee has declared long term capital gain offered in the return of income amounting to Rs.7,64,34,724/-. The ld. AO further observed that the said asset was acquired in F.Y. 2012-13 which was shown in the balance sheet in the return of income of the A.Y. 2013-14 as 'Work in Progress' valued at Rs.23,31,31,100/-. The assessee then from A.Y. 2014-15 onwards had claimed depreciation on the said asset @10% on WDV of the assets and reducing the same from

the 'Income from Business or Profession' in its return of income till A.Y. 2018-19. The total depreciation claimed by the assessee is Rs.9,54,69,527/-, claiming deduction from 'Income from Business or Profession'. The ld. AO after duly considering the assessee's submission, passed the draft assessment order u/s. 143(3) r.w.s. 144C(1) of the Act, dated 29.09.2021, determining total income at Rs.14,27,19,759/- by making an addition of Rs.15,20,19,347/-, after deducting the unabsorbed brought forward depreciation of Rs.1,35,10,563/- as short-term capital gain on sale of depreciable business assets. The ld. AO then passed the final assessment order dated 12.11.2021, u/s. 143(3) r.w.s. 144C(3) of the Act, confirming the income determined in the draft assessment order.

4. The assessee then preferred an appeal before the first appellate authority, which upheld the addition made by the learned Assessing Officer (ld. A.O. for short), vide order dated 21.08.2024, by invoking Section 50(1) of the Act.

5. The assessee is in appeal before us, challenging the impugned order of the ld. CIT(A).

6. We have heard the rival submissions and perused the materials available on record. It is observed that the only issue that requires adjudication in the present appeal is whether the gain arising out of transfer of depreciable assets forming part of the block of assets should be treated as short term capital gain as per Section 50(1) of the Act or the rate of long term capital gain is to be applicable. For this, it is trite to reproduce the said provision herein under for ease of reference:

> *"Sec. 50* *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 or 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;"

7. From the bare reading of the above provision, it is observed that the capital asset forming part of block of assets, where depreciation is allowable, the full value of consideration received or accruing on transfer of the asset is in excess over and above the aggregate of the expenditure incurred for such transfer or the WDV of the block of assets and the actual cost of the asset, then the said excess is to be treated as capital gain arising from transfer of short-term capital assets. The ld. AO observed that the said property was acquired by the assessee on 15.09.2012 for a sale consideration of Rs.2,22,00,000/- along with registration and stamp duty paid and was sold on 14.11.2018 for a consideration of Rs.28,96,80,930/-, where the cost of acquisition declared by the assessee in its return of income for A.Y. 2013-14 was Rs.23,31,31,100/- and the assessee had claimed depreciation @10% on WDV of the asset aggregating to Rs.9,54,69,527/- which was deducted from the 'Income from Business or Profession' in the assessee's return of income till A.Y. 2018-19 which is tabulated herein under:

A.Y.	*Opening Written Down Value*	*Addition in assets made during the year*	*Reduction in Assets*	*Depreciation Claimed@ 10%*	*Closing Written Down Value*
2013-14		*233131110*	*NIL*	*NIL*	*233131110*
2014-15	*233131110*	*NIL*	*NIL*	*23313110*	*209817990*
2015-16	*209817990*	*NIL*	*NIL*	*20981799*	*188836191*
2016-17	*188836191*	*NIL*	*NIL*	*18883619*	*169952572*
2017-18	*169952572*	*NIL*	*NIL*	*16995257*	*152957315*
2018-19	*15,29,57315*	*NIL*	*NIL*	*15295257*	*137661583*
2019-20	*137661583*	*NIL*	*137661583*	*NIL*	*NIL*

8. The ld. AO relied on the provision of Section 50(1) of the Act, and treated the same as short term capital gain. The ld. AO also distinguished the decision relied upon by the assessee by stating that the decisions are pertaining to long term depreciable assets and the deductions claimed from the transfer are eligible u/s. 54E/EA/EB/EC of the Act, whereas in the present case, the assessee has not made such claim. The ld. AO further treated the same as short term capital gain on sale of depreciable business assets thereby making an addition of Rs.15,20,19,347/-.

9. The learned Authorised Representative (ld. AR for short) for the assessee contended that the issue in hand has been decided in favour of the assessee by the Special Bench decision in case of *SKF India Ltd. vs. Dy. Commissioner of Income Tax Range 4(3), in ITA NO. 7544/Mum/2011, dated 03.10.2024*, where the rate of tax is prescribed u/s. 112 of the Act @ 20% would be applicable on such gain even if it is a short term capital gain as per Section 50 of the Act.

10. The learned Departmental Representative (ld. DR for short) on the other hand controverted the said fact and stated that in the above said decision there has also been a divergent view on the said issue. Further, the ld. DR stated that the intent of the

provisions of Section 50 is to avoid multiple benefits to the assessee on depreciable assets and that the provision expressly treats the same as short term capital gain. The ld. DR relied on the order of the lower authorities.

11. Upon perusal of the same and on considering the submissions of either sides, it is observed that the special bench in the case of SKF India Ltd. (supra) has decided this issue in favour of the assessee by treating the gain arising out of such transaction to be a short term capital gain as per Section 50 but had applied the rate of long term capital gain @20% as per Section 112 of the Act. Though there has been a dissenting view taken by one of the member constituting the special bench, the majority view has upheld that the rate of tax would be 20% and not the rate applicable for a short term capital gain. The relevant extract of the said decision is cited herein under for ease of reference:

> *"31. Now, finally this issue has been set at rest by the Hon'ble Supreme Court in the case of CIT vs. Dempo Company Ltd 387 ITR 354 (SC) wherein Hon'ble Supreme Court had the occasion to examine the eligibility of assessee to claim exemption under section 54E of the Act in respect of capital gains arising on transfer of a capital asset on which depreciation has been allowed. The Hon'ble Apex Court reiterated and affirmed the judgment of Hon'ble Bombay High Court in the case of Ace Builders (P.) Ltd. (supra). In the said appeal before Supreme Court, in the income-tax return filed by the respondent/assessee for the A.Y. 1989-90, the assessee had disclosed that it had sold its loading platform M.V. Priyadarshni for a sum of Rs. 1,37,25,000/- on which it had earned some capital gains. On the said capital gains the assessee had also claimed that it was entitled for exemption under Section 54E of the Act. Admittedly, the asset was purchased in the year 1972 and sold sometime in the year 1989. Thus, the asset was almost 17 years old. Going by the definition of long term capital asset contained in Section 2(29B) of the Act, it was admittedly a long- term capital asset. Further the Assessing Officer rejected the claim for exemption under Section 54E of the Act on the ground that the assessee had claimed depreciation on this asset and, therefore, provisions of Section 50 were applicable. Though this was upheld by the CIT (Appeals), the ITAT allowed the appeal of the assessee herein holding that the assessee shall be entitled for exemption under Section 54E of the Act. The Bombay High Court confirmed the view of the CIT (Appeals) and dismissed the appeal of the Revenue. While doing so, the Hon'ble High Court relied upon its own judgment in the case of CIT, Mumbai City-II, Mumbai vs. ACE Builders Pvt. Ltd. (supra). In the words of Hon'ble Supreme Court, "the High Court observed that Section 50 of the Act which is a special provision for computing the capital gains in the case of depreciable assets is not only restricted for the purposes of Section 48 or Section 49 of the Act as specifically stated therein and the said fiction created in sub-section (1) & (2) of Section 50 of the Act has limited application only in the context of mode of computation of capital gains contained in Sections 48 and 49 of the Act and would have nothing to do with the exemption that is provided in a totally different provision i.e. Section 54E of the Act. Section 48 of the Act deals with the mode of computation and Section 49 of the Act relates*

to cost with reference to certain mode of acquisition." Their Lordships observed that, this aspect has been analysed in the judgment of the Bombay High Court in the case of CIT, Mumbai CityII, Mumbai vs. ACE Builders Pvt. Ltd. (supra), in the following manner:

> *"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-section (1) & (2) of Section 50 is restricted only to the mode of computation of capital gains contained in Section 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 vs. 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 19.07.1969. The respondent therein who had joined the bank on 1.7.1972 claimed extension of service because he was deemed to be appointed in the bank with effect from 26.10.1965 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 nondepreciable 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 I.T. Act cannot be denied to the assessee on account of the fiction created Section in 50."*

32. Their Lordships dismissing the appeal filed by the Revenue held that, "we are in agreement with the aforesaid view taken by the Bombay High Court." Thus, the judgment of Hon'ble Bombay High Court in the case of Ace Builders has been fully approved by the Hon'ble Supreme Court, thereby settling the issue that the fiction created in sub section (1) and sub section (2) of section 50 has limited application only in the context of mode of computation of capital gains contention of sections 48 and 49 of the Act and beyond that nothing should be imported to other sections of the Act.

33. Though most of the decisions have been rendered in the context of Section 54E but the principle laid down therein will apply mutatis mutandis on this issue also for the reason that Section 54E provides for exemption from capital gain where the capital gain arises from transfer of "long term capital asset" ----------. Thus, even if u/s.50, long term capital asset is taxed as short term capital gain because of the deeming fiction, but that does not lead to convert long term capital asset into short term capital asset for the purpose of other section. Similarly, u/s.112 uses the word "where the total income of an assessee includes any income, arising from the transfer of a long-term capital asset, which is chargeable under the head "Capital gains", the tax payable by the assessee on the total income shall be the aggregate of ----------. Thus, wherein the statute had used the word "long term capital asset, it has to be given the same meaning as defined in said provision of the Section. Thus, all these judgments of Jurisdictional High Court as well as Hon'ble Supreme Court in the context of Section 54E which is applicable on capital gain arising of long term capital asset will also apply here. Thus, respectfully following the aforesaid judgments, we hold that, 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 long term capital asset into a short term capital asset. This principle of law has been exactly held by the Hon'ble Jurisdictional High Court and approved by the Hon'ble Supreme Court.

34. Now coming to the judgment relied upon by the ld. CIT DR in the case of Shakti Metal (supra), first of all the Hon'ble Kerala High Court had passed the order in the context of asset on which assessee had discontinued the claim of depreciation immediately prior to its sale and re-classified the asset as an investment. The brief facts in that case were, the assessee-firm purchased a flat for business purposes in the financial year ending on 31-3-1974. Since then it was used as the branch office of the assessee and on the capitalised cost of the building the assessee was allowed depreciation until the assessment year 1995-96. However, the assessee discontinued claiming depreciation for the flat for the assessment years 1996-97 and 1997-98. The flat was sold during the assessment year 1998-99 and profit arising on such sale was claimed by the assessee as long-term capital gain. The Assessing Officer, however, held that profit arising on transfer of depreciable asset was assessable as short-term capital gain under section 50. He rejected the assessee's contention that it stopped using the flat for business purposes after the assessment year 1995-96 and thereafter, the flat was treated as an investment and was so shown in the balance sheet. On appeal, the Commissioner (Appeals) concurred with the Assessing Officer. However, on second appeal, the Tribunal, solely relying on the entry in the balance sheet of the assessee wherein the flat was shown as an investment, held that since the item was purchased in 1974, sale of the flat was assessable as long-term capital gain.

35. The Hon'ble High Court after referring the provisions of Section 50 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 categorize 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 shortterm 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 of 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 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 up to the date of sale of the asset, in other words, 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 up to the assessment year 1995-96, still continued to be part of the business asset and depreciable asset, no matter the non-user disentitles the assessee for depreciation for two years prior to the date of sale. We do not know-how a depreciable asset forming part of block of assets within the meaning section 2(11) of the Act can cease to be part of 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 disentitles 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."

36. The decision of the Hon'ble High Court was confirmed by the Hon'ble Supreme Court in the following manner: -

2. In our view the High Court justly over-turned the opinion recorded by the Commissioner of Income Tax (Appeals) 11. Aayakar Bhavan North Block, Manachira, Calicut, vide Order dated 23-6-2004 in Appeal NO.ITA57/M/00-01, inter alia, on the following basis-

"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 disentitles the assessee for depreciation for two years prior to the date of sale. We do not know how a depreciable asset forming part of block of assets within the meaning Section 2(11) of the Act can cease to be part of 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 to 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 it's character as such, no matter one of two of the assets in one or two years not used for business purposes disentitles 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 deprecation was allowed last."

(emphasis supplied)

3. The reasoning by the High Court in view of the facts on record commends to us.

4. The High Court has, therefore, rightly restored the findings and addition made in the assessment order. Hence, we find no merits in this appeal and it is dismissed.

37. The ratio of the aforesaid decision is that once depreciable asset forming part of block of assets within the meaning Section 2(11) of the Act it does not cease to be part of block of assets and description of the asset by the assessee in the balance sheet as an investment is meaningless to avoid payment of tax on short term capital on sale of building. As long as assessee continues business, the building forming part of the block of asset will retain its character, no matter one of the assets in one of the two years has not been used for business purpose this entitles the assessee for depreciation for those years. This view of the Hon'ble Kerala High Court has been upheld that instead of selling the building, the assessee starts using the building after two years for business purpose, the assessee can continue to claim the depreciation based on WDV available as on the date of ending the previous year in which depreciation was allowed.

38. Nowhere, in the judgment deals with the situation or question, which is before us in the present reference to this Special Bench. The Hon'ble High Court has only dealt with the controversy raised before it to a limited application u/s.50 / 50A of the Act. It was rendered in view of the background that assessee had reclassified the asset as a non-depreciable asset and held it as such at the time of sale. In contrast, in the present case the asset continued to be depreciable asset and assessee has neither challenged the applicability of Section 50 of the Act nor has it challenged the income determined in accordance with the Section 50. The issue before us is, whether the rate of tax which is to be determined u/s.112 of the Act shall be applicable if asset is a long term capital asset held for more than 36 months and due to deeming fiction, it is treated as short term capital gain for the purpose of Section 50 and such deeming fiction is with regard to applicability of Section 48 & 49. The decision of the Hon'ble Supreme Court cannot be a binding precedent on the issue which was not there at all. It is axiomatic that the decision cannot be relied upon which was not the issue or context in which it was decided and it is only the ratio decidendi, i.e., the principle of law that decides a dispute on a question is a precedence to be followed. In support of this proposition it would be relevant to refer to the following judgments:-

(i). Hon'ble Bombay High Court in the case of HDFC Bank Ltd. V. DCIT (2016) 383 ITR 529, wherein it has been held as under:

> *"...One more aspect which needs to be adverted to and that is that a decision would be considered to be a binding precedent only if it deals with or decides an issue which is the subject matter of consideration or decision before a coordinate or subordinate court. It is axiomatic that a decision cannot be relied upon in support of the proposition that it did not decide. (see Mittal Engineering Works P. Ltd. v. Collector of Central Excise [1997] 106 STC 201 (SC) ; (1997) 1 SCC 203. Therefore, it is only the ratio decidendi, i.e., the principle of law that decides the dispute which can be relied upon as precedent and not any obiter dictum or casual observations. (See Girnar Traders v. State of Maharashtra (2007) 7 SCC 555 and Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd. (2005) 127 Comp Cas 97 (SC) ; (2005) 7 SCC 234."*

(ii). Apex Court's decision in the case of CIT v/s. Sun Engineering Works (P.) Ltd. reported in 198 ITR 297 (1992) where in it has been held that:

> *"It is neither desirable nor permissible to pick out a word or a sentence from the judgment of the Court, divorced from the context of the question under consideration and treat it to be the complete 'law' declared by the Court. The judgment must be read as a whole and the observations from the judgment have to*

be considered in the light of the questions which were before the Court. A decision of the Court takes its colour from the questions involved in the case in which it is rendered and while applying the decision to a latter case, the Courts must carefully try to ascertain the true principle laid down by the decision of the Court and not to pick out words or sentences from the judgment, divorced from the context of the questions under consideration by the Court, to support their proceedings."

(iii) Apex Court's decision in the case of Madhav Rao Jivaji Rao Scindia Bahadur v. Union of India [1971] reported in 3 SCR 9; AIR 1971 SC 530, where in it has been held that:

"It is difficult to regard a word, a clause or a sentence occurring in a judgment of this Court, divorced from its context, as containing a full exposition of the law on a question when the question did not even fall to be answered in that judgment."

39. One of the arguments also raised by the ld. CIT DR was that, since Section 50 starts with non-obstante clause therefore, other provisions of that will not apply and once the Section itself is treated sale of long term capital asset as short term capital gain, then Section 112 would not apply. As we have already stated that non-obstante clause in Section 50 is only with regard to definition of a short term capital asset, i.e., an asset which is held by the assessee in not more than 36 months, preceding the date of its transfer. Thus, the exclusion prescribed by the non-obstante clause is limited to the purpose of modification of Section 48 & 49. In this regard, the decision of Hon'ble Gujarat High Court in the case of Amar Jewellers Ltd vs/ ACIT (2022) 444 ITR 97 would be relevant to quote wherein the scope of non-obstante clause has been discussed.

46. A non-obstante clause is generally appended to a section with a view to give the enacting part of the section, in case of conflict, an overriding effect over the provision in the same or other Act mentioned in the non-obstante clause. It is equivalent to saying that inspite of the provisions or Act mentioned in the non- obstante clause, the provision following it will have its full operation or the provisions embraced in the non-obstante clause will not be an impediment for the operation of the enactment or the provision in which the non-obstante clause occurs. (See: Principles of Statutory Interpretation, 9th Edition by Justice G.P. Singh Chapter V, Synopsis IV at pages 318 and 319]

47. Normally the use of the phrase by the Legislature in a statutory provision like notwithstanding anything to the contrary contained in this Act is equivalent to saying that the Act shall be no impediment to the measure [See: Law Lexicon words notwithstanding anything in this Act to the contrary]. Use of such expression is another way of saying that the provision in which the non-obstante clause occurs usually would prevail over the other provisions in the Act. Thus, the non- obstante clauses are not always to be regarded as repealing clauses nor as clauses which expressly or completely supersede any other provision of the law, but merely as clauses which remove all obstructions which might arise out of the provisions of any other law in the way of the operation of the principle enacting provision to which the non-obstante clause is attached. [See: Bipathumma v. Mariam Bibi 1966 1 MYSLJ 162]

48. A non obstante clause has two parts the non obstante clause and the enacting part. The purpose of enacting a non obstante clause is that in case of a conflict between the two parts, the enacting part will have full sway in spite of the contrary provisions contained in the non obstante clause. Therefore, the object and purpose of the enacting part should be first ascertained and then the assistance of the non obstante clause should be taken to nullify the effect of any contrary provision contained in the clause."

40. Thus, non-obstante clause does not mean to completely supersede any other provisions of the Act. To remove the obstruction which might arise out of the provision of any other law in way of operation of the principle enacting provision to which the non-obstante clause is attached. If the non-obstante clause has been confined to Section 50 dealing with the mode of computation of Section 48 & 49 and that even if the asset appearing in the block of asset on which depreciation has been claimed is more than 36 months, then the gain of transfer of such asset is to be taxed as short term capital gain while computing the income. However, as held by the Hon'ble Jurisdictional High Court in several cases as noted above, Section 50 cannot convert the long term capital asset into a short term capital asset and therefore, the principle laid down by the Hon'ble Jurisdictional High Court in all the above quoted cases acts as a binding precedent.

41. It came to our notice that this Tribunal in the case of M/s. Velvet Holdings Pvt. Ltd. vs. ACIT in ITA No.6810/Mum/2008 vide order dated 26/06/2014 had decided the similar issue, whether the rate of tax should be 20% u/s 112 of the Act which is applicable for long term capital asset on the transfer of asset forming part of block of asset which is taxed as short term capital gain u/s 50. This issue was decided in favour of the assessee following the earlier decision of the Tribunal in the case of Smita Conductors Ltd., in ITA No.4004/Mum/2011 dated 17/09/2013. The ground before the Tribunal was as under:-

> *"The learned Commissioner of Income-tax (Appeals) has erred in law and in facts in not appreciating that the tax on capital gain ought to have been charged at 20% and not at the normal tax rate."*

42. The Tribunal followed the decision of Smita Conductors Ltd., which in turn was based on a judgment of the Hon'ble Bombay High Court in the case of Ace Builders Pvt. Ltd., This judgment was challenged by the Revenue before the Hon'ble Bombay High Court in ITA No.165 of 2015, judgment and order dated 10th July 2017 observed as under:-

> *"1. Heard the learned counsel for the appellant and the learned counsel for the respondent. It is fairly conceded that the Tribunal has relied upon the judgment of this court in case of CIT vs. ACE Builders Pvt. Ltd, reported in [2006] 281 ITR 210. The said judgment has been approved by the Apex Court in the case of CIT. Panji vs. VS.Dempo Company Ltd. reported in [2016] 74. Taxmann.com 15 (SC). As the issue raised in the present appeal is already covered by the above referred judgment, no substantial question of law arises."*

43. Ergo, this precise issue decided by the tribunal has been approved by the Hon'ble Bombay High Court following its earlier judgment of CIT vs. Ace Builders Pvt. Ltd. (supra) which in turn has been approved by the Hon'ble Supreme Court in the case of CIT vs. Dempo Company Ltd reported in (2016) 74 Taxmann.com 15 (SC) which we have also analysed in the earlier part of the order. Hence the issue, that the rate of tax of 20% as prescribed u/s 112 of the Act is applicable on the transfer of an asset forming part of block of asset (which was held for more than 36 months) which is deem to be taxed as short term capital gain u/s 50, has been approved by the Hon'ble Jurisdictional High Court.

44. Accordingly, we hold that capital gains arising out of the depreciable asset u/s 50 even though deem to be capital gain arising from transfer of a short term capital asset, that fiction has to be confined only to section 50 and it cannot convert 'short term capital asset' into a 'long term capital asset' and vice versa for the other purpose of the Act, either for set off against a long term capital loss or exemption provision were benefits is given from a long term capital gain on transfer of a long term capital asset or the rate of tax provided u/s 112 of the Act which clearly provides that income arising from transfer of a long term capital asset chargeable under the head capital gains, the amount of income tax calculated on such a long term capital gain shall be the rate of 20%.

Thus, even section 50 treats that excess is to be taxed as capital gain arising from transfer of a short term capital asset but the rate of tax has to be applicable in terms of section 112 of the Act, because the treatment of a short term capital asset is only a purpose of section 50 and not otherwise can convert a 'long term capital asset' into a 'short term capital asset' for the purpose of rate of tax or any other provision of the Act. Accordingly, this question is answered in favour of the assessee holding that rate of tax applicable would be in terms of section112 of the rate of 20% and applicable surcharge.

45. Since, this is the only question referred to the Special Bench by the Hon'ble President, therefore, for the deciding other issues as raised in cross appeals filed by the assessee as well as the revenue, same shall be fixed before the regular bench to decide.

46. In the result, the question of law referred to the Special Bench is answered in favour of the assessee."

12. From the above observation, it is evident that on identical facts, the rate of tax on a short term capital gain on depreciable assets u/s. 50 has been held to be the rate of long term capital gain @ 20%, taking into consideration, the concessional rate of LTCG provided as per Section 112 of the Act. Though the Revenue's contentions that Section 50 of the Act, being a deeming fiction treats the computation of gain arising out of transfer of depreciable assets to be a short term capital asset irrespective of the period of holding such assets which is the intention of the legislature, the same has been considered by the Special Bench decision in the case of SKF India Ltd. (supra) and has held the same in favour of the assessee by applying the rate applicable for long term capital gain. Due to the principle of precedent, we are bound to follow the said decision and hereby allow the ground raised by the assessee.

13. By respectfully following the above decisions, we hereby allow the appeal filed by the assessee.

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

Order pronounced in the open court on 07.03.2025

Sd/-	**Sd/-**
(AMARJIT SINGH)	**(KAVITHA RAJAGOPAL)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai; Dated: 07.03.2025
Karishma J. Pawar (Stenographer)

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent
3. CIT- concerned
4. DR, ITAT, Mumbai
5. Guard File

BY ORDER,

(Dy./Asstt.Registrar)
ITAT, Mumbai