

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

**BEFORE SHRI G.S. PANNU, VP AND SHRI AMARJIT SINGH, JM**

आयकर अपील सं/ I.T.A. No.239/Mum/2017

(निर्धारण वर्ष / Assessment Year: 2004-05)

DCIT Central Circle-2(3) Room NO. 804, 8 <sup>th</sup> Floor, Old CGO Building, Annex M.K. Road, Mumbai-20.	<b>बनाम/</b> Vs.	M/s. N.S. Guzder & Co. Ltd. Neville House, Currimbhoy, Road, Ballard Estate, Mumbai-400038.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACN1223F		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

Revenue by:	Shri Chaitanya Anjaria (Sr AR)
Assessee by:	Shri Nitesh Joshi & Sunil S. Jhunjhunwala

सुनवाई की तारीख / Date of Hearing: 13.08.2018

घोषणा की तारीख /Date of Pronouncement: 31.10.2018

**आदेश / ORDER**

**PER AMARJIT SINGH, JM:**

The revenue has filed the present appeal against the order dated 18.10.2016 passed by the Commissioner of Income Tax (Appeals) -52, Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the A.Y.2004-05.

2. The revenue has raised the following grounds: -

"1 On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in holding that the gain arising from sale of property namely El-cid flat was Long term Capital Loss of Rs.1,42,40,336/- without appreciating the fact that the assessee claimed depreciation on this

*property as appearing in the depreciation schedule filed for A.Y. 2003-04 and therefore erred in deleting the addition made by the AO whereby the gain arising the sale of aforesaid property was treated as short term capital gain of Rs.74,50,787/-."*

3. The brief facts of the case are that the assessee filed its return of income on 01.11.2004 declaring loss to the tune of Rs.2,52,15,506/-. The return was processed u/s 143(1) of the I.T. Act, 1961. Thereafter, the case was selected for scrutiny and the assessment u/s 143(3) of the Act dated 21.12.2006 was completed assessing the total income to the tune of Rs.94,82,269/-. The Assessee Officer has raised the following addition: -

1	Repairs and Maintenance	38,06,840
2	Written off spare parts	11,93,180
3	Short term capital gain	74,50,787

Feeling aggrieved, the assessee filed an appeal before the CIT(A) who confirmed the addition made in respect of repair and maintenance by virtue of the order dated 21.03.2007, however, in respect of written off spare parts disallowance made to the extent of Rs.11,93,180/-, the Ld. CIT(A) directed the AO to verify the records and find out whether the deferred revenue expenditure written off pertains to repair and maintenance disallowed. Thereafter, the assessee filed an appeal before the Hon'ble ITAT and the Hon'ble ITAT vide order dated 10.06.2011 remanded the controversy of depreciation amount upon Elicid Flat in accordance with record of all the years. The claim of the assessee was examined and it was found that the assessee was claiming the depreciation @ 5% on this assets under the head of building. Therefore, the same was part of block assets and the claim of the assessee was declined. The income of the assessee was

assessed to the tune of Rs.94,82,269/- and after adjusted the brought forwarded loss total income was assessed as Nil. The assessee again filed an appeal before the CIT(A) and the CIT(A) allowed the claim of the assessee, therefore, the revenue has filed the present appeal before us.

**ISSUE NO. 1:-**

4. Under this issue the revenue has challenged the allowance of the claim of the assessee in which sale consideration of the flat of Elicid flat premises has been treated as long term capital gain. The assessee sold the flat at Elicid Premises for a sum of Rs.75,50,000/-. During the year, the assessee computed the long term capital loss of Rs.1,42,40,336/- on this transaction. The AO noticed that the said flat was the part of the schedule of fixed assets of the assessee who claimed the depreciation @ 5% on this flat, therefore, the capital gain on the sale of flat was treated the short term capital gain hence rejected the claim of the assessee of long term capital gain. The contention of the assessee is that the assessee did not claim the depreciation in respect of this flat. Therefore on the sale of the flat, the consideration is liable to be treated as long term capital gain. Before going further, we deemed it is necessary to advert the finding of the CIT(A) on record.:-

*“4. I have considered the facts of the case, submissions and contentions of the assessee, directions of the Hon'ble ITAT and the order of the AO. From the perusal of the facts of the case, it is clear that the assessee had prepared two charts for working of depreciation. One, as per Schedule VI of the Companies Act, in which this asset (El-cid) flat was appearing and another chart, for working of depreciation u/s. 32 of the I.T. Act, in which this asset is not appearing. It is gathered that for computation of income, the*

*assessee has added back the depreciation computed as per the Companies Act and has claimed depreciation only as per Section 32 of the LT, Act. Therefore, the assessee has actually not claimed depreciation in respect of this flat, though there are other properties on which the depreciation has been claimed. It appears that the Ld, AO did not look into the facts of the case properly and considered only the depreciation chart as per the Companies Act, which in any case could not be a basis of his decision making against the assessee as the assessee has already added back this amount in the computation of income. For clarify, both the depreciation charts as per the Companies Act and as per Section 32 of the Companies Act, are enclosed as Annexures to this order. In view of the above facts, the provisions of Sec 50 of the I.T, Act are not applicable on the sale of this flat. Consequently, the decision of the AO in treating the capital Gains on sale of such flat, as short term gains becomes unsustainable in law. He is therefore directed to treat the same as 'Long Term Capital Gains' and allow consequential benefits to the assessee. Therefore, the Grounds no1 to 4 taken by the assessee are allowed.”*

5. On appraisal of the finding of the CIT(A), we noticed that the assessee prepared the return in accordance with companies Act as well as in accordance with normal provision of the Act. The return as per the schedule VI of the Companies Act, the flat Elicid was appearing in the return of income and in the another chart which is under the normal provision of the Act and the working of depreciation u/s 32 of the I.T. Act, 1961, the assets was not appearing. In the computation of the income, the assessee added back the depreciation computing as per the provision of the Companies Act and the claimed depreciation on this flat though the depreciation on the other properties have been claimed. The CIT(A) while deciding the matter of controversy relied upon both the chart in his order as annexures. According to the said facts, the sale of the flat was not found within the

ambit of provision u/s 50 of the Act hence the CIT(A) has treated the long term capital gain on account of sale of the said flat. The facts are not distinguishable at this stage also. No distinguishable material has been placed on record for deviating the finding of the CIT(A) in question. Taking into account, all the facts and circumstances, we are of the view that the CIT(A) has decided the matter of controversy judiciously and correctly which is not liable to be interfere with at this appellate stage. Accordingly, this issue is being decided in favour of the assessee against the revenue.

7. In the result, the appeal filed by the **revenue is hereby ordered to be dismissed.**

Order pronounced in the open court on 31.10.2018.

Sd/-  
(G. S. PANNU)  
VICE PRESIDENT

Sd/-  
(AMARJIT SINGH)  
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 31.10.2018

*vijay*

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

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

**आदेशानुसार/ BY ORDER,**

सत्यापित प्रति //True Copy//

**उप/सहायक पंजीकार / (Dy./Asstt. Registrar)**  
**आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**