आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'बी' मुंबई ।

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

सर्वश्री एच.एल .कार्वा अध्यक्ष एवं, नरेन्द्र कुमार बिल्लैय्या, लेखा सदस्य के समक्ष

BEFORE SHRI H.L. KARWA, PRESIDENT AND SHRI N.K. BILLAIYA, AM

आयकर अपील सं./I.T.A. No.5554/Mum/2011

(**निर्धारण वर्ष** / Assessment Year : 2003-04

M/s. Bayer Material Science Pvt. Ltd., (Formerly Bayer Industries Pvt. Ltd.) Bayer House, Central Avenue, Hiranandani Gardens, Powai, Mumbai-400 076		The ACIT, Range 10(3), Aayakar Bhavan, Mumbai-400 020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AACB 2419H		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

अपीलार्थी ओर से/ Appellant by: `	Shri Mayur Kisanadwala
प्रत्यर्थी की ओर से/Respondent by :	Shri Surendra Kumar

सुनवाई की तारीख **/ Date of Hearing : 18.09.2013**

घोषणा की तारीख /**Date of Pronouncement : 18.09.2013**

आदेश / O R D E R

PER N.K. BILLAIYA, AM:

This appeal by the assessee is preferred against the order of the Ld. CIT(A)-22, Mumbai dt.16.8.2010 pertaining to A.Y. 2003-04.

2. The appeal is late by 243 days. The assessee has filed an affidavit justifying the delay in filing the appeal. A perusal of the affidavit filed by the assessee shows that the assessee entrusted the Income tax matters to one of its employees Shri Dilip Kanojia. The said employee of the

assessee resigned from the employment of the company and left the services of the company without proper notice. It is stated that the company did not even issue relieving letter to the said employee. The first Appellate order was in possession of the said employee. It is further stated that while reviewing the tax status of the various year of the company on 20th July, 2011, the Senior Manager, Taxation noticed that appeal against the Appellate order dt. 16th August, 2010 remained to be filed. The assessee immediately took steps to file the appeal before the Tribunal. It is the say of the Ld. Counsel that the assessee was prevented by reasonable and sufficient cause for not filing the appeal on time.

3. We have carefully considered the submissions of the Ld. Counsel and the contents of the affidavit. In our considerate view, the assessee deserves a chance to defend its case, therefore delay is condoned and the appeal is admitted.

4. A perusal of the order of the Ld. CIT(A) shows that in this case order u/s. 143(3) r.w.s. 147 of the Act was passed on 31.10.2008 in which it was held that the transaction was not slump sale but consider it u/s. 2(47) of the Act and the capital gain of Rs. 3,28,81,141/- has been computed and AO taxed the same at the rate of 20% instead of 35%. The AO rectified original assessment order passed u/s. 154 of the Act on 25.10.2010. However, it is seen from the record that the order u/s. 143(3) travelled upto Tribunal in ITA No. 6666 & 6667/M/09 in which the Tribunal has given a finding at para-38 of its order on page-33 as under:

> *"Now the question arises as to whether any profit or loss from the transfer of stock in trade can be considered under the Head `Capital gains'. There is hardly any need to wander here and there in search of reply to this question. The answer is self evident. Section 45, the substantive provision of the income under the head `Capital gains', unequivocally provides through sub-section (1)*

that : "Any profits or gains arising from the transfer of a capital asset effected in the previous year shall, save as otherwise provided in sections ……, be chargeable to income-tax under the head `Capital gains', and shall be deemed to be the income of the previous year in which the transfer took place." Thus it is manifest that profit or gain chargeable under the Chapter IV-E can arise only on the transfer of capital asset. Section 2(14) defines `capital asset' to mean : "property of any kind held by an assessee, whether or not connected with his business or profession, but does not include— (i) any stock-in-trade, consumable stores or raw materials held for the purposes of his business or profession …..". When we consider the provisions of section 45 in juxtaposition to section 2(14), it becomes abundantly clear that stock in trade is not a `capital asset'. Resultantly, no profit or gain from the transfer of stock can be charged to tax under the head `Capital gains'. The view canvassed by the lower authorities on this issue, is therefore, set aside.

We sum up our conclusion that the loss from the transfer of stock amounting to Rs.2.10 crore is deductible under the head `Profits and gains of business or profession' in relation to the A.Y. 2003-04."

5. As the issue is now decided by the Tribunal vide ITA Nos. 6666 & 6667/M/09, appeal filed by the assessee against the order of the Ld. CIT(A) pursuant to the order u/s. 154 becomes otiose and accordingly dismissed.

Order pronounced in the open court on 18/9/2013

आदेश की धोषणा खुले न्यायालय में दिनांकः18.9.2013 को की गई ।

Sd/-	Sd/-
(H.L. KARWA)	(N.K. BILLAIYA)
अध्यक्ष /PRESIDENT	लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 18/09/2013

व.नि.स./ *RJ* , Sr. PS

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

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**