

आयकर अपीलिय अधिकरण, मुंबई न्यायपीठ , मुंबई ।

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

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER AND

SHRI PAWAN SINGH, JUDICIAL MEMBER

आयकर अपील सं/ I.T.A. No.3148/Mum/2013

(निर्धारण वर्ष / Assessment Year:2007-08

UTV Software Communications Ltd., 1 st Floor, Bldg No. 14, Solitaire Corporate Park, Gutru Hargovindji Marg, Chakala, Andheri (E), Mumbai-400 093	बनाम/ Vs.	The ACIT 11(1), Aayakar Bhavan, Mumbai-400 020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACU 4122G		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
अपीलार्थी ओर से/ Appellant by:		Shri Farokh V. Irani
प्रत्यर्थी की ओर से/ Respondent by:		Shri Pawan Kumar Beerla

सुनवाई की तारीख / Date of Hearing :01.12.2015

घोषणा की तारीख /Date of Pronouncement : 09.12.2015

आदेश / ORDER

PER N.K. BILLAIYA, AM:

This appeal by the assessee is directed against the order of the Ld. CIT(A)-3, Mumbai dated 21.2.2013 pertaining to Assessment year 2007-08.

2. The assessee has raised two substantive grounds of appeal. At the very outset, the Ld. Counsel for the assessee stated that under the instructions from his client (assessee), he is not pressing ground No. 2, the same is dismissed as not pressed.

3. The only surviving ground reads as under:

“Based on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in treating the sale of shares by the Appellant of its joint venture company, United Home Entertainment Ltd.(UHEL), as transfer of an undertaking (i.e. slump sale u/s. 2(42C) of the Act) and hence, determining the capital gain tax liability u/s. 50B, instead of section 48 of the Act as computed by the Appellant.”

4. Briefly stated the facts of the case are that the assessee is in the business of production of Television programs, Air time sales, movie production and distribution of films. The return for the year was filed at a loss of Rs. 21,01,75,216/- under normal provisions of the Act and the Book profit was returned at Rs. 19,44,37,860/- u/s. 115JB of the Act.

4.1. The return was selected for scrutiny assessment and accordingly statutory notices were issued and served upon the assessee.

4.2. While scrutinizing the return of income, the Assessing Officer noticed that during the year the assessee has sold entire share holding in its 100% subsidiary United Home Entertaining Ltd (UHEL) to a third party. On this sale of entire share holding, the assessee worked out capital gains u/s. 48 of the Act which read as under:

Actual cost of shares		
Equity shares 490000 (2004-05)	Rs. 49,00,000	
Preference shares (acq. 1.4.2005)	Rs. 19,51,00,000	
Indexed cost Equity shares	Rs. 52,98,125	

Preference shares	Rs. 20,37,36,217	Rs. 20,90,34,342 cost
Sale consideration (net of expense in connection with sale)	Rs. 45,84,44,579	Rs. 45,84,44,579 Sales
Capital Gain – long term		Rs. 24,94,10,237/-

4.3. Taking a leaf out of the assessment proceedings for A.Y. 2006-07, the AO was of the firm belief that the transaction amounts to slump sale of an undertaking and the capital gains have to be computed as per provisions of Sec. 50B of the Act.

4.4. The assessee was asked to explain the same. The assessee filed a detailed reply vide letter dated 6.4.2010 explaining that why the transaction should not be considered as slump sale of an undertaking. The explanation filed by the assessee did not find favour with the AO who proceeded by computing the capital gain as per the provisions of Sec. 50B of the Act treating the sale of shares of 100% subsidiary as slump sale. The capital gains was computed as under:

Net worth of undertaking as per Sec. 50B		
Fixed assets (wdv-block remains in UHE dep. Actually allowed nil)	2,85,80,000	
Inventory	21,32,98,000	
Net current assets (current assets less current liabilities)	1,30,22,000	
Net worth of undertaking		25,49,00,000/-
Net sales consideration		45,84,44,579/-
Capital gain-short term		20,35,44,579/-

5. Aggrieved by this, the assessee carried the matter before the Ld. CIT(A) and reiterated its claim but without any success.

6. Before us, the Ld. Counsel for the assessee vehemently submitted that provisions of Sec. 50B of the Act which relate to the computation of capital gains in case of a slump sales is not at all applicable on the facts of the case. It is the say of the Ld. Counsel that what the assessee has sold is the shares in UHEL which cannot be considered as a transfer of any undertaking within the definition of slump sale given u/s. 2(42C) of the Act. The Ld. Counsel continued stating that when the shares of a company are bought, it cannot be said that the share holder acquired any interest in the assets of the company, therefore by the same analogy when the shares are transferred, it cannot be said that the assessee has transferred the assets of the company. For this proposition, the Ld. Counsel relied upon the decision of the Hon'ble Supreme Court in the case of Mrs. Bacha F. Guzdar Vs CIT 27 ITR 01. Further reliance was placed on the decision of the Hon'ble High Court of Bombay in the case of Brooke Bond India Ltd 79 COMPCAS 346. In support of his submission, the Ld. Counsel also relied on the decision of the Hon'ble Supreme Court in the case of Vodafone International Holdings Vs Union of India And Another 341 ITR 01 and Hon'ble Karnataka High Court in the case of Bhoruka Engineering Indus. Ltd. 356 ITR 25.

6.1. The Ld. Counsel drew our attention to the sale and subscription agreement between the Walt Disney Company (South East Asia) Pte Ltd (Purchaser) and Zarina Mehta, Ronnie Screwvala, Unilazer Exports & Management Consultants Ltd, UTV Software Communications Ltd (assessee) – collectively known as the 'Sellers' and United Home Entertainment Ltd. The Ld. Counsel continued to state that Unilazer Export holding 50% shares, the assessee is holding 49% shares and others are holding 1% share in the Company

United Home Entertainment Ltd (UHEL). The Ld. Counsel further clarified the fact that the share in UHEL were transferred by the assessee to Walt Disney Company. Thus, what have been transferred are the shares in UHEL when UHEL is still in existence. Therefore, it cannot be said that the assessee has transferred any undertaking which would come within the purview of definition of slump sale as given u/s. 2(42C) of the Act. The Ld. Counsel concluded by stating that since the transaction is outside the purview of the definition of slump sale, provisions of Sec. 50B of the Act are not applicable.

7. Per contra, the Ld. Departmental Representative strongly supported the findings of the lower authorities. It is the say of the Ld. DR that the Ld. CIT(A) has correctly held that sale of 100% share of any company would lead to a change of ownership and management of the said company and same is the situation in the case of a slump sale, therefore the conclusion arrived at by the AO that the assessee has sold shares and same has been purchased by the purchaser and the transactions have given rise to the transfer of the undertaking within the definition of slump sale given u/s. 2(42C) of the Act. The Ld. DR concluded by saying that there is no error in the findings of the Ld. CIT(A).

8. We have given a thoughtful consideration to the rival contentions and have carefully perused the orders of the authorities below. With the assistance of the Ld. Counsel, we have also gone through the relevant documentary evidences brought on record before us.

8.1. There is no dispute that the assessee has transferred its shares in UHEL in the name of the Walt Disney Company. The point for consideration before us is whether this transfer of shareholding would amount to transfer of an undertaking to bring the transaction within the ambit of Sec. 50B qua Sec. 2(42C) of the Act. Sec. 50B read as under:

"Any profits or gains arising from the slump sale effected in the previous year shall be chargeable to income-tax as capital gains arising from the transfer of long-term capital assets and shall be deemed to be the income of the previous year in which the transfer took place :

Provided that any profits or gains arising from the transfer under the slump sale of any capital asset being one or more undertakings owned and held by an assessee for not more than thirty-six months immediately preceding the date of its transfer shall be deemed to be the capital gains arising from the transfer of short-term capital assets.

(2) In relation to capital assets being an undertaking or division transferred by way of such sale, the "net worth" of the undertaking or the division, as the case may be, shall be deemed to be the cost of acquisition and the cost of improvement for the purposes of sections 48 and 49 and no regard shall be given to the provisions contained in the second proviso to section 48.

(3) Every assessee, in the case of slump sale, shall furnish in the prescribed form along with the return of income, a report of an accountant as defined in the Explanation below sub-section (2) of section 288 indicating the computation of the net worth of the undertaking or division, as the case may be, and certifying that the net worth of the undertaking or division, as the case may be, has been correctly arrived at in accordance with the provisions of this section."

8.2. Now let us see the definition of slump sale given in Sec. 2(42C) of the Act which reads as under:

"slump sale" means the transfer of one or more undertakings as a result of the sale for a lump sum

consideration without values being assigned to the individual assets and liabilities in such sales

Explanation — 1. For the purposes of this clause, "undertaking" shall have the meaning assigned to it in Explanation 1 to clause (19AA) :

Explanation — 2. For the removal of doubts, it is hereby declared that the determination of the value of an asset or liability for the sole purpose of payment of stamp duty, registration fees or other similar taxes or fees shall not be regarded as assignment of values to individual assets or liabilities"

8.3. A perusal of the aforementioned section shows that the word "undertaking" has further been defined as per Explanation-1 to Sec 2(19AA) and which reads as under:

"For the purposes of this clause, "undertaking" shall include any part of an undertaking, or a unit or division of an undertaking or a business activity taken as a whole, but does not include individual assets or liabilities or any combination thereof not constituting a business activity"

8.4. If the aforementioned sections are read in conjoint, we have no hesitation to hold that by any stretch of imagination, transfer of shares will not result into transfer of undertaking making it a slump sale for Sec. 50B of the Act.

8.5. Assuming, yet not accepting this transaction to be a slump sale, the consideration should have been received by UHEL and not the assessee because it is UHEL which has been transferred and being a distinct legal entity is entitled for the sale consideration of its transfer. However, this is not the case since the shares were transferred by the assessee, assessee received the sale consideration.

8.6. Shareholders right has been explained in detail by the Hon'ble Supreme Court in the case of Mrs. Bacha F. Guzdar (supra) and the observations of the Hon'ble Supreme Court read as under:

*"That a shareholder acquires a right to participate in the profits of the company may be readily conceded but it is not possible to accept the contention that the shareholder acquires any interest in the assets of the company. The use of the word "assets" in the passage quoted above cannot be exploited to warrant the inference that a shareholder, on investing money in the purchase of shares, becomes entitled to the assets of the company and has any share in the property of the company. A shareholder has got no interest in the property of the company though he has undoubtedly a right to participate in the profits if and when the company decides to divide them. The interest of a shareholder vis-a-vis the company was explained in the Sholapur Mills case**. That judgment negatives the position taken up on behalf of the appellant that a shareholder has got a right in the property of the company. It is true that the shareholders of the company have the sole determining voice in administering the affairs of the company and are entitled, as provided by the articles of association, to declare that dividends should be distributed out of the profits of the company to the shareholders but the interest of the shareholder either individually or collectively does not amount to more than a right to participate in the profits of the company. The company is a juristic person and is distinct from the shareholders. It is the company which owns the property and not the shareholders."*

8.7. This view is further fortified by the decision of the Hon'ble High Court of Bombay in the case of Brooke Bond India Ltd (supra) wherein, inter alia, one of the contentions before the Hon'ble High Court was that the agreement is illegal and unenforceable as it is contrary to Sec. 293(1)(a) of the Companies Act. The observations of the Hon'ble High Court reads as under:

" The first contention is that, u/s. 293(1)(a), the Board of Directors of the first defendants, a public company, is prohibited from selling, leasing or otherwise disposing of the whole, or substantially the whole of the undertaking of the company and, hence, the agreement was ultra vires power of the board of directors of the first defendants. It is contended that the plaint makes it clear that what is agreed to be sold is the "food division" of the first defendants and hence, what it agreed to be sold to the

plaintiffs is a substantial part of the first defendants' undertaking. There is no consent obtained to this sale from the first defendant company in general meeting. Hence, the agreement is clearly prohibited u/s. 293(1)(a), as what has been agreed to was completely beyond the pale of the powers of the board of directors of the first defendants."

8.8. It would not be out of place to refer to the following observations of the Hon'ble Supreme Court in the case of Vodafone International Holdings (supra).

"A controlling interest is an incident of ownership of shares in a company, something which flows out of the holding of shares. A controlling interest is, therefore, not an identifiable or distinct capital asset independent of the holding of shares. The control of a company resides in the voting power of its share holders and shares represent an interest of a shareholder which is made up of various rights contained in the contract embedded in the articles of association. The right of a shareholder may assume the character of a controlling interest where the extent of the shareholding enables the shareholder to control the management. Shares, and the rights which emanate from them, flow together and cannot be dissected.

The tax consequences of a share sale would be different from the tax consequences of an asset sale. A slump sale would involve tax consequences which could be different from the tax consequences of a sale of assets on itemized basis"

8.9. In the very same order, the Hon'ble Supreme Court further held that "the subject matter of the transaction was the transfer of the share in CGP (a company incorporated in Cayman Islands). Consequently, the Indian tax authority had no territorial tax jurisdiction to tax the offshore transaction".

8.10. In the very same order again the Hon'ble Supreme Court held as under:

"That the transaction in question was one of "outright sale" between two non-residents of a capital asset (share) outside India. The transaction was entered into on principal to principal basis. Therefore, no liability to deduct tax at source arose. Further, there was no assignment of price for each right, considered by the Revenue to be a "capital asset" in the transaction. In the absence of a permanent establishment profits were not attributable to Indian operations. The Department had failed to establish any connection with section 9(1)(i) . Under the circumstances, section 195 was not applicable".

8.11 A similar view has also been taken by the Hon'ble High Court of Karnataka in the case of Bhoruka Engineering Indus. Ltd (supra).

"The language employed in section 10(38) of the Act is simple and unambiguous and it makes no distinction between the transfer of share of company with an immovable asset and movable asset, instead of executing a sale deed in respect of the immovable property by the company, which is owning the land. If the shareholder chooses to transfer the lands and part with the land to the purchaser of the shares, it would be a valid legal transaction in law and merely because they were able to avoid payment of tax, it cannot be said to be a colourable device or a sham transaction or an unreal transaction.

As set out above, the transaction is real, valuable consideration is paid, all legal formalities are complied with and what is transferred is the shares and not the immovable property. The finding of the assessing authority that it is a transfer of immovable property is contrary to law and contrary to the material on record. They committed a serious error in proceeding on the assumption that the effect of transfer of share is transfer of immovable property and, therefore, if the veil of the company is lifted what appears to them is transfer of immovable property. Such a finding is impermissible in law. Unfortunately, the three authorities committed the very same mistake which is ex facie, illegal, contrary to the settled legal position and, therefore, requires to be set aside. In that view of the matter, we pass the following order :

(a) The appeal is allowed.

(b) The impugned order passed by all the three authorities is hereby set aside.

(c) The substantial question of law is answered in favour of the assessee and against the Revenue”.

8.12. In the light of the aforementioned observations of the Hon’ble Supreme Court/High Courts and also considering the provisions of Sec. 50B and Sec. 2(42C) of the Act, in our considered opinion what the assessee has transferred is the shares in UHEL and this transfer of shares cannot be considered to be a slump sale of an undertaking within the provisions of Sec. 2(42C) of the Act, thereby making the applicability of the provisions of Sec. 50B of the Act inapplicable.

8.13. Considering the facts in totality, we set aside the order of the Ld. CIT(A) and direct the AO to accept the transaction as shown returned by the assessee.

9. In the result, the appeal filed by the assessee is partly allowed.

Order pronounced in the open court on 9th December, 2015

Sd/-

(PAWAN SINGH)

न्यायिक सदस्य/JUDICIAL MEMBER लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 9th December, 2015

व.नि.स./ Rj , Sr. PS

Sd/-

(N.K. BILLAIYA)

FIT FOR PUBLICATION

JM

AM

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.

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