

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH 'A', KOLKATA**

[Before Hon'ble Shri P.M. Jagtap, AM & Hon'ble Shri N.V. Vasudevan, JM]

**I.T.A. No. 1325/Kol/2013
Assessment Year: 2009-10**

***D.C.I.T., Cir-4, KolkataAppellant
P-7, Chowringhee Square,
Kolkata - 700069***

***M/s. Maud Tea & Seed Co. Ltd.....Respondent
2, N.C. Dutta Sarani,
Sagar Estate, 5th Floor,
Kolkata - 700001.
[PAN: AACCM0710C]***

Appearances by:

*Shri Sallong Yaden, Addl. CIT appearing on behalf of the Revenue.
Shri Rajeeva Kumar, Advocate appearing on behalf of the Assessee.*

Date of concluding the hearing : September 04, 2017
Date of pronouncing the order : September 13, 2017

ORDER

Per P.M. Jagtap, AM

This appeal is preferred by the revenue against the order of Ld. CIT (Appeals) - 4, Kolkata dated 28.02.2013.

2. The common issue involved in ground no 1 to 3 of this appeal relates to the determination of the Long Term Capital Gain from the land sold by the assessee company.

3. The assessee in the present case is a company which is engaged in the business of growing, manufacturing and selling of tea. During the year under consideration it sold 132 bighas of Sewpur Tea Estate land for a consideration of Rs. 9,07,20,000/- to Tinsukia Development Authority (AS) vide an agreement dated 18.08.2008. The fair market

value of the said land as on 01.04.1981 was determined by the assessee company at Rs. 78.43 lakhs on the basis of back calculation after considering the value of present day land and after adopting the same as cost of acquisition and applying index, the deduction was claimed on account of indexed cost of acquisition while computing the Long Term Capital Gain. A further deduction of Rs. 4,25,37,053/- was also claimed by the assessee on account of development expenditure incurred on the said land and accordingly a Long Term Capital Loss was claimed by the assessee in the return of income as arising from the sale of Sewpur Tea Estate land. During the course of assessment proceedings, this claim of the assessee was examined by the AO. On such examination, he found that the land in question was originally belonged to M/s. Sewpur Tea Limited Co. Which was amalgamated with the assessee company w.e.f. 01.04.1981 as per the order of Hon'ble Kolkata High Court. He also noted that the value of lease hold land and development comprising 284.23 hectares situation at Sewpur Tea Estate, Tinsukia, Assam was declared at Rs. 19,46,373/- as per Schedule B Part II of the order of the Hon'ble Kolkata High Court. According to him, it was apparent from the relevant terms and conditions as laid down in the order of Hon'ble Kolkata High Court that the amalgamation was actually in the nature of purchase for which 'the purchase method' had to be applied in terms of AS-14. He observed that the assessee during the course of assessment proceedings did not furnish any evidence to show that the property was acquired by Sewpur Tea Co. Prior to 1981. He held that section 55(3) thus was applicable and the proportionate cost of entire land declared at Rs. 19,46,373/- as per balance sheet of M/s. Sewpur Tea

Limited Co as on 31.03.1997 was required to be taken as the cost of acquisition of the said land in the hands of the assessee company for the purpose of computation of capital gains. Accordingly, such proportionate cost of 132 bighas of Sewpur Tea Estate land was worked out by the AO at Rs. 1,21,987/- as on 31.03.1997 and after allowing the benefit of indexation, a deduction of Rs. 2,14,490/- was allowed by the AO on account of indexed cost of acquisition for the purpose of computing the Long Term Capital Gain. As regards, the deduction of Rs. 4,25,37,053/- claimed by the assessee on account of development expenditure incurred on land, the Assessing Officer noted that the assessee company could not furnish the relevant supporting bills, vouchers, payments details to substantiate the same. He however noted from the relevant sale agreement that some development work such as land filling, erections of boundary wall, drainage, culvert, realignment of electric line etc. had taken place. He, therefore, estimated the expenditure incurred by the assessee company on development of land at Rs. 1.32 crores being 1 lakh per bigha and after allowing deduction for the same, long term capital gain arising to the assessee company from the sale of Sewpur Tea Estate land was computed by the AO at Rs. 7,73,05,510/- in the assessment completed u/s 143(3) vide order dated 21.09.2011.

4. Against the order passed u/s 143(3), an appeal was preferred by the assessee before the Ld. CIT (A) and a detailed submission was made by the assessee during the appellate proceedings before the Ld. CIT (A) in support of its claim for long term capital loss arising from the sale of Sewpur Tea Estate land as against the long term capital

gain of Rs. 7.73 crores computed by the AO. The said submission was forwarded by the Ld. CIT (A) to the AO for verification and comments and when the remand report submitted by the AO to him giving his comments was confronted by the Ld. CIT (A) to the assessee, a rejoinder was filed by the assessee company offering its explanation to the points raised by the AO in the remand report. After considering the entire material available on record including the submission made by the assessee, the remand report filed by the AO as well as the rejoinder filed by the assessee, the Ld. CIT (A) decided the issue relating to the determination of long term capital gain arising to the assessee company from the sale of Sewpur Tea Estate land vide paragraph no 3.9 to 3.13 of his impugned order as under:

3.9 I have gone through the rival submissions as well as the remand report received from the AO. The first objection of the AO is that the amalgamation was not in the nature of merger but in the nature of purchase. He has held that the share holder of a transferor company should obtain substantial share in the transferee company to the extent that it is not possible to identify the dominant company. The AR has already clarified that majority share in both the companies i.e. the amalgamated and amalgamating companies was held by the same Lohia family. In the appellant company the Lohia family held 85.34% of share capital and in the amalgamating company the same family held 91.19% of share capital. The merger was done only to revive the business prospects of the Sewpur Tea Company which was generally running in losses. It also follows that if the share transfer from one company to the other is made within the same family then there is a continued participation of the transferor company in the management of the transferee company even after amalgamation. I am of the view that the appellant company had made the amalgamation in the nature of merger following clause 3(e) of AS14 and the transfer of asset and liabilities was made as per 'pooling of interest method' as per clause 10 of AS14. These facts were communicated to the AO during the course of assessment proceedings through letter dated 15.11.2011. The AO has further held that the land has been duly valued by the High Court of Kolkata. In fact, no such valuation was ever ordered or done by or on behalf of the High

Court of Kolkata. However, assets and liabilities of the transferor company was valued at their existing book value as required under AS14 (Accounting of Amalgamation) which is a requirement for making any proposal for amalgamation.

3.10 From the order of the AO, I find that he has held that the provisions of Section 55(2)(b)(ii) is not applicable in the case of the appellant and instead he has placed reliance on Section 55(3) of the I.T. Act. Section 55(2)(b)(ii) is elaborated below:

“For the purpose of Section 48 and 49, ‘cost of acquisition’ in relation to any other capital assets where the capital assets became the property of the appellant by any of the mods specified in sub-section (1) of Section 49 and the capital assets became the property of the previous owner before the first day of April, 1981, means the cost of capital assets to the previous owner or the fair market value of the assets on the first day of April, 1981, at the option of the assessee”

3.11 This means that the I.T. Act, has given freedom of choice to the appellant to choose between the above two given options. However, the AO has not allowed the freedom of choice given under the I.T. Act, 1961 on the ground that the appellant did not furnished any evidence to show that the property was acquired by M/s. Sewpur Tea Co. Prior to 01.04.1981 and also that the valuation report of the said property at the time of registration at Tinsukia, Assam was not furnished. The AO therefore, held that the appellant had deducted arbitrarily on the fair market value as on 01.04.1981 and booked Capital Loss on Long Term Transfer. The AO, has therefore, invoked Section 55(3) of the I.T. Act. 1961 which reads:

“Where the cost for which the previous owner acquired the property cannot be ascertained, the cost of acquisition of the previous owner means the fair market value on the date on which the capitl assets became the property of the previous owner’.

3.12 I find the observation of the AO that there is no evidence to show that the property was acquired by M/s. Sewpur Tea Co. prior to 01.04.1981 is factually incorrect. Even the AO in his remand report dated 14.02.2013 at page no 2 has stated ‘it appears from the balance sheet of Sewpur Tea Co. Ltd., that the land sold by the amalgamated company was duly possessed by the amalgamating company (i.e. Sewpur Tea Co. Ltd.), even before 01.04.1981’. As this fact was available in the records of the AO., invoking

section 55(3) of the I.T. Act., 1961 by the AO was not justified. I find that the any issue pertaining to capital gains has to be valued and assessed under the I.T. Act, 1961 as it is the applicable Act. The appellant has been given the option to calculate its cost of acquisition u/s 55(2)(b)(ii) which it has rightly exercised. I am of the view that the cost of acquisition taken at Rs. 78,61,672/- is justified.

3.13 The AO has also estimated the cost of improvement of land @ Rs. 1 lakh per bigha and estimated an expenditure of Rs. 1,32,00,000/-. The appellant had claimed total development expenditure on land for Rs. 4,25,37,053/- over four years. The AO was of the view that only estimation can be done as no supporting bills, vouchers and payment details could be furnished by the appellant. This conclusion of the AO is flawed. On page two of remand report dated 14.02.2013 the AO has given a chart in which development expenses from A.Y. 2005-06 to 2009-10 have been given. These have been duly reflected in the respective balance sheets. When all the details are available with the records of the AO where is the question of any kind of estimation or guesswork? Accordingly, the AO is directed to go by the actual development expenses debited in the P&L a/c. The AO should also allow the appellant's request for ascertaining cost of Acquisition u/s 55(2)(b)(ii) of the I.T. Act, 1961 and also allow the benefit of indexation accordingly.

5. We have heard the arguments of both the sides on this issue and also perused the relevant material available on record. As found by the Ld. CIT (A) from the relevant documentary evidence and accepted even by the AO in the remand report, the land in question sold by the assessee was acquired by the amalgamating company M/s. Sewpur Tea Co. Ltd. prior to 01.04.1981. At the time of hearing before us, the learned DR has not been able to rebut or controvert this position. Once it is established that the land in question was acquired by the previous owner prior to 01.04.1981, it follows that the provisions of section 55(2)(b)(ii) become applicable and for the purpose of section 48 and 49, cost of acquisition in relation to the said land has to be taken as the cost of the said land to the previous owner

or the fair market value of the said land on 01.04.1981 at the option of the assessee. We therefore, find no infirmity in the impugned order of the Ld. CIT (A) directing the AO work out the claim of the assessee for deduction on account of cost of acquisition of land u/s 55(2)(b)(ii) of the Act and also to allow the benefit of indexation. However we do not agree with the view of the Ld. CIT(A) that the cost of acquisition in terms of section 55(2)(b)(ii) has to be taken at Rs. 78,61,672/- as claimed by the assessee since the same was worked out by the assessee by reverse calculation after considering the value of present day land and this method or basis followed by the assessee is not correct. In our opinion, the fair market value of the land on 01.04.1981 is required to be determined by taking into consideration the then prevailing market conditions in April, 1981 including the sale instances, if any, available in the same locality.

6. As regards the deduction claimed by the assessee on account of development expenditure amounting to Rs. 4,25,37,053/-, it is observed that the claim of the assessee for deduction on account of the said expenditure incurred over 4 years was disallowed by the AO as the assessee could not furnish the relevant bills, vouchers, payment details to support and substantiate the same. The Ld. CIT (A) however directed the AO to allow the claim of the assessee for deduction on account of development expenditure on the basis of the remand report submitted by the AO wherein a chart was given showing the development expenses incurred by the assessee during the relevant previous years as reflected in the balance sheets. In this regard, the contention raised by the learned DR before us is that the Ld. CIT (A) is

not justified in directing the AO to allow the deduction claimed the assessee on account of development expenses in the absence of the supporting bills, vouchers and other records. The learned counsel for the assessee, on the other hand, has pointed out from the relevant portion of the impugned order of the Ld. CIT (A) that copies of such bills, vouchers etc. were filed by the assessee during the course of appellate proceedings before the Ld. CIT (A) in the separate Paper Book containing 632 pages. However, as rightly pointed out by the learned DR, the same were filed by the assessee company along with the rejoinder to the remand report and the AO thus had not got any opportunity to verify the same. We accordingly modify the impugned order of the Ld. CIT (A) on this issue and direct the AO to recompute the long term capital gain arising to the assessee company from the sale of Sewpur Tea Estate land after determining afresh the fair market value of the said land as on 01.04.1981 and after verifying the assessee's claim for development expenses from the relevant bills, vouchers etc. Needless to observe that the AO shall afford proper and sufficient opportunity of being heard to the assessee while doing this exercise. The relevant grounds of the revenue's appeal on this issue are accordingly treated as allowed for statistical purposes.

7. As regards the issue involved in ground no 4 of the revenue's appeal relating to the deletion by the Ld. CIT (A) of the addition of Rs. 4,71,934/- made by the AO on account of cess on green leaf, it is observed that this issue is squarely covered in favour of the assessee by the decision of Hon'ble Kolkata High Court rendered on 02.02.2016 in the case of CIT vs Moran Tea Co. Ltd. (ITA No. 269 of

2009) wherein it was held that the deduction on account of cess paid on green leaf has to be allowed on hundred per cent of the composite income under the Income Tax Act, 1961 before applying Rule 8 of the Income Tax Rule, 1962. As noted by the Hon'ble Kolkata High Court in the said decision, the SLP filed by the revenue on the similar issue in the case of CIT vs Apezay Tea Co. Ltd. was already dismissed by the Hon'ble Supreme Court. Respectfully following the said decision of Hon'ble Jurisdictional High Court, we uphold the impugned order of the Ld. CIT (A) giving relief to the assessee on this issue and dismiss ground no 4.

8. As regards the issue involved in ground no 5 of the revenue's appeal relating to the deletion by the Ld. CIT (A) of the disallowance of Rs. 58,949/- made by the AO on account of payment of employees contribution towards provident fund after due date as prescribed in the Provident Fund Act but before due date of filing of return, it is observed that this issue is also squarely covered in the assessee by the decision of Hon'ble Kolkata High Court rendered on 06.09.2011 in the case of CIT vs M/s. Vijay Shree Ltd. (ITA No. 245 of 2011) wherein a similar issue was decided by the Hon'ble Kolkata High Court in favour of the assessee by following the decision of Hon'ble Supreme Court in the case of CIT vs Alom Extrusions Ltd. 319 ITR 306. Respectfully following the said binding precedent, we uphold the impugned order of the Ld. CIT (A) giving relief to the assessee in this issue and dismiss ground no 5.

9. In the result, the appeal of the revenue is treated as partly allowed for statistical purposes.

Order Pronounced in the Open Court on 13th September, 2017.

Sd/-

(N.V. Vasudevan)
JUDICIAL MEMBER

Sd/-

(P.M. Jagtap)
ACCOUNTANT MEMBER

Dated: 13/09/2017

Biswajit, Sr. PS

Copy of order forwarded to:

1. M/s. Maud Tea & Seed Co. Ltd. Kolkata.
2. DCIT, Cir – 4, Kolkata
3. The CIT(A)
4. The CIT
5. DR

True Copy,

By order,

Sr. P.S. / H.O.O.
ITAT, Kolkata