

IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN
BEFORE S/SHRI CHANDRA POOJARI, AM & GEORGE GEORGE K., JM

I.T.A. No. 110/Coch/2018
Assessment Year : 2003-04

M/s. Amalgam Foods Ltd., Amalgam House, Briston Road, Willingdon Island, Kochi-682 003. [PAN: AABCA 8383D]	Vs.	The Deputy Commissioner of Income-tax, Circle-1, Alleppey.
(Assessee-Appellant)		(Revenue-Respondent)

Assessee by	Shri R. Srinivasan, CA
Revenue by	Smt. A.S. Bindhu, Sr. DR

Date of hearing	04/04/2019
Date of pronouncement	10 /04/2019

ORDER

Per CHANDRA POOJARI, AM:

This appeal filed by the assessee is directed against the order of the CIT(A), Kottayam dated 26/02/2018 and pertain to the assessment year 2003-04.

2. The assessee has raised the following grounds of appeal:

1) The Officers below were not justified in re-opening the assessment.

2) The Officers below did not appreciate the fact that the assessee had sold depreciable asset, so much so under the block system, this sale value would go to reduce the WDV of the particular block of assets.

3) At any rate the provisions of section 50(2) of the Act (Slump Sale) would not be applicable.

4) The Officers below were also not justified in partially allowing deduction for interest payment, disallowed in earlier year's u/s. 43B.

3. At the time of hearing, the assessee did not press Ground No. 4 and accordingly, Ground No. 4 is dismissed as not pressed.

4. The facts of the case are that during the year, the assessee company had earned other income of Rs.8,71,03,872/-. It included Rs.8,18,69,674/- being profit on sale of one of its business units pursuant to an agreement dated 28/03/2003 as a going concern. As per provisions of section 50B of the Act, inserted by the Finance Act, 1999 introduced w.e.f. 01/04/2000, profits and gains from transfer under slump sale of assets shall be deemed to be capital gain arising from the transfer of long term capital assets. Hence, the gains on transfer of the interest chargeable to tax under "Capital Gains" but the same was treated as business receipts. The Assessing Officer rejected the contention of the assessee that though the sale had arisen on the transfer of the business undertaking, this can be treated only as short term capital gains. According to the Assessing Officer, as per 2(42C) and explanation to clause 19AA of the said section, the transfer will be regarded as a slump sale and gain can be treated as long term capital gain.

5. On appeal, the CIT(A) observed that judgment of the Supreme Court in the case of Equinox Solutions Pvt. Ltd. (150 DTR 137) relied on by the assessee was rendered in a case related to AY 1991-92 and before the introduction of provisions

of section 50B by the Finance Act, 1999 w.e.f. AY 2000-01. The Court held that the sale of business as a going concern will be liable to capital gain. According to the CIT(A), as per section 2(42C) of the Act, 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. As per section 50B of the Act, 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. The CIT(A) observed that from the clauses in the sale deed entered by the assessee, it was clear that the sea food business undertaking was transferred as a going concern on slump sale basis and therefore, the profits on account of such transfer have to be computed as per the provisions of section 50B of the Act. Accordingly, the CIT(A) confirmed the assessment of profits on sale of the sea food business as long term capital gain u/s. 50B of the Act.

6. Against this, the assessee is in appeal before us. The Ld. AR submitted that what has been sold represented depreciable assets which has to be treated as business receipts only. The Ld. AR submitted that in respect of 4 blocks of assets, column no 6 shows the value of the asset sold in each head which in total comes to Rs. 3,45,06,766.68 and even after this sale there is balance value of assets in each block. It was submitted that depreciation was computed under the block system after deducting sale value of assets disposed from the value of the assets as at the

opening balance and the addition thereafter on the balance value as per column 7. According to the Ld. AR, under the Act for computing depreciation, it will not lead to capital gain. The Ld. AR submitted that the assessee had correctly deducted sale value and claimed depreciation of the balance on the written down value. The Ld. AR submitted that the Profit & Loss account for the year ending 31/3/2003 and the balance sheet for the year ending 31/3/2003 would show that the sale value cannot be assessed as capital gain but only as business income.

6.1 In support of his contention, the learned A.R. relied on the decision of the Supreme Court in the case of Equinox Solution Pvt. Ltd. 150 DTR 137 wherein it was held as under:

"11. In our considered opinion, the case of the respondent (assessee) does not fall within the four corners of section 50(2) of the Act. Section 50(2) applies to a case where any block of assets are transferred by the assessee but where the entire running business with assets and liabilities is sold by the assessee in one go, such sale, in our view, cannot be considered as "short-term capital assets". In other words, the provisions of section 50(2) of the Act would apply to a case where the assessee transfers one or more block of assets. Which he was using in running of his business. Such is not the case here because in this case, the assessee sold the entire business as a running concern."

7. On the other hand, the Ld. DR relied on the order of the CIT(A).

8. We have heard the rival submissions and perused the record. First of all it is to be seen what a "slump sale" is all about. Sec. 2(42C) of the IT Act, which is applicable from 1st April, 2000, defines "slump sale" to mean the transfer of one or more undertakings as a result of sale for a lump sum consideration, without values being assigned to the assets and liabilities of such a sale. In other words, if an

undertaking is transferred as a going concern with all its assets and liabilities, without valuations having been assigned to individual assets such a transaction is to be regarded as a "slump sale." As per Explan. 1 to s. 2(42C) of the Act, "undertaking" shall have the meaning assigned to it in Explan. 1 to s. 2(19AA) of the Act. Explanation 1 to s. 2(19AA) says that "undertaking" shall include any part of the 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 as business activity. From this, it is clear where the assets and liabilities of an undertaking are sold as a group or lumped together, such a would qualify as a slump sale. In the light of the above, we have carefully gone through the material on record and we have carefully gone through the agreement entered into by the parties on 28th March 2003, which reads as under:

**DEED OF CONFIRMATION FOR SALE AND ASSIGNMENT OF
SEAFOOD BUSINESS UNDERTAKING:**

THIS DEED made at Cochin the 28th day of March 2003, entered into by and between:

AMALGAM FOODS LIMITED, a company registered under the Companies Act, 1956, and having its registered office at Kuthiathode, Thuravoor P.O., Alleppey District, Kerala hereinafter called "**TRANSFEROR**" (which expression shall, **unless** repugnant **to the** meaning or context thereof, be deemed to include **its successors** and assigns) of the **First Part**)

AND

HINDUSTAN LEVER LIMITED, a company incorporated under the Indian Companies Act, **1913**, and having its registered office at 165/166, Backbay Reclamation, Mumbai-400 020, hereinafter called "**TRANSFeree**" (which

expression shall, unless repugnant to the meaning or context thereof, be deemed to include its successors and assigns) of the **Second Part, THE TRANSFEROR** and **THE TRANSFEREE** are hereafter collectively referred to as "parties" and individually as "party" **THE TRANSFEREE** is desirous of acquiring the entire seafood processing and export business of the **TRANSFEROR**, Which the **TRANSFEROR** had agreed to transfer. This is subject however to the **TRANSFEROR**, inter alia, negotiating and restructuring its loans and debts with the creditors to the satisfaction of the TRANSFEREE,

The TRANSFEROR represents that it has been negotiating with financial institutions/banks for settlement of its overdue loans borrowed earlier for its manufacturing and export operations, which have caused severe erosion to its net worth over the years. For this reason, the TRANSFEROR is also unable to plan any further investment into the business which otherwise is imperative for growing and developing its export markets.

The TRANSFEROR is therefore desirous to sell and the TRANSFEREE with a view to strategically expand the export of value-added marine products is interested in acquiring the TRANSFEROR'S seafood Business Undertaking at Kuthiathode, Thuravoor P.O., Alappuzha District 688 532, Kerala, on a 'going concern' basis subject to the TRANSFEROR securing agreement from the financial institution/banks for takeover and immediate settlement thereafter by the TRANSFEREE of the TRANSFEROR'S loans/debts including outstanding interest as described herein.

The TRANSFEROR and the TRANSFEREE have executed a Memorandum of Understanding dated 4 February 2003 pursuant to which the TRANSFEROR has agreed to transfer and the TRANSFEREE has agreed to purchase and TRANSFEROR'S Seafood Business undertaking subject to and in accordance with the terms contained therein.

SALE, TRANSFER AND PURCHASE

The TRANSFEROR DOETH hereby grant, sell, transfer, convey, assign, deliver and assure UNTO the TRANSFEREE on and from the date hereof forever the undertaking as a going concern on slump sale basis together with its permanent Employees, Assets, Assumed Liabilities, etc. and all that estate right, title, interest, claim and demand whatsoever at law and in equity of the TRANSFEROR into over or upon the same unto and to the use of the TRANSFEREE forever free and clear of all Encumbrance together with all deeds, documents, writings vouchers and other evidences of the TRANSFEROR'S title exclusively relating to the Undertaking and every part thereof.

8.1 By this agreement, the assessee sold sea food business undertaking for a lumpsum consideration as a going concern. On consideration of various stipulations and provisions stated in the agreement, it is clear that the intention of the parties was to sell the entire sea food business undertaking for a lumpsum consideration which is nothing but slump purchase price

8.2 As per clause 2.2, the sale and purchase of the undertaking shall specifically exclude the following assets and liabilities:

- (a) the Excluded Assets;
- (b) all obligations, liabilities and duties of the TRANSFEROR in respect of the Undertaking relating to the period prior to and up to the Closing Date not expressly assumed by the TRANSFEREE under this Deed including without limitation:
 - (i) the Taxation Liabilities;
 - (ii) the Severance Liabilities, being any liabilities in respect of any employee of the TRANSFEROR who is not an Employee and any liabilities arising from claims made prior to and up to the Closing Date by Employees;all such exclusions and exceptions being together referred to as "the Retained Assets and Liabilities" in the hands of and/or to the account of the TRANSFEROR.

8.3 Further, clauses 2.3 to 2.7 reads as under:

2.3 The TRANSFEROR and the TRANSFEREE hereby confirm and declare that all the Movable Assets forming part of the Undertaking being entirely of movable nature and capable of passing by physical delivery of possession have been sold and transferred by the TRANSFEROR to the TRANSFEREE by way of delivery of physical possession on the Closing Date and which the TRANSFEREE hereby acknowledges to the TRANSFEROR and there is no further additional act or deed required to be done for this purpose by or between the TRANSFEROR and the TRANSFEREE.

2.4 The TRANSFEROR and TRANSFEREE hereby further confirm and declare that all Immovable Assets that are owned by the TRANSFEROR stand sold and transferred by the TRANSFEROR to the TRANSFEREE and the TRANSFEROR

agrees and undertakes to execute and register within 30 days from the Closing Date, such conveyance deeds, instruments, agreements and other documents that the TRANSFEREE may reasonably require to perfect its title to the Immovable Assets, subject to procuring necessary approval or consent of the concerned governmental or competent authorities.

2.5 The TRANSFEROR and the TRANSFEREE further confirm and declare that the Intellectual Property Rights also stand transferred and assigned by the TRANSFEROR to the TRANSFEREE along with the Goodwill and the TRANSFEROR shall execute in favour of the TRANSFEREE separate Deed of Assignment of Trade Mark and other requisite documents within 30 days hereof.

2.6 Further Assurances: At any time and from time to time after the Closing Date, the TRANSFEROR agrees to execute and deliver to the TRANSFEREE such other instruments of sale, transfer, conveyance, assignment and confirmation and to take such reasonable action as the TRANSFEREE may request in order to more effectively transfer, convey and assign to the TRANSFEREE, and to confirm the TRANSFEREE'S title to the said Undertaking, to put the TRANSFEREE in possession and control of them and to assist the TRANSFEREE in exercising all rights in respect of the same.

2.7 Co-operation: Prior to and up to the Closing Date and thereafter, the TRANSFEROR shall provide reasonable co-operation to the TRANSFEREE for obtaining at the TRANSFEREE'S cost, all Permits and Environmental Permits, power / water connections, consents, permissions or other authorizations from any Governmental, municipal or local authority that the TRANSFEREE may require (including provision of no-objection/consent letters from the TRANSFEROR and / or execution of any application forms etc.) to conduct and carry on the manufacturing and processing operations at the Undertaking without any let or hindrance.

8.4 It is clear from the reading of the above clauses of the sale deed that the assets of the assessee including goodwill, intellectual property rights, trademark were sold for a lumpsum consideration. The terms of agreement are very specific and clear and there is no need for importing any other meaning. Since the assets and liabilities of the sea food business undertaking were sold by the agreement cited supra, the sale will consequently fall in line with the idea of slump sale as per the provisions of section 2(42C) of the Act. Since the assessee sold the entire

undertaking with all its assets and liabilities together with all licences, permits, approvals, registration, contracts, employees and other contingent liabilities also for a slump price, this kind of sale falls under the purview of section 50B of the Act. In our opinion, the provisions of section 50B of the Act are applicable so as to ascertain computation of capital gain in this case.

8.5 In view of the above, we do not find any infirmity in the order of the CIT(A) and the same is confirmed. This ground of appeal of the assessee is dismissed.

9. In the result, the appeal filed by the assessee is dismissed.

Order pronounced in the open Court on this 10th April, 2019

sd/-
(GEORGE GEORGE K.)
JUDICIAL MEMBER

sd/-
(CHANDRA POOJARI)
ACCOUNTANT MEMBER

Place: Kochi

Dated: 10th April, 2019

GJ

Copy to:

1. M/s. Amalgam Foods Ltd., Amalgam House, Briston Road, Willingdon Island, Kochi-682 003.
2. The Deputy Commissioner of Income-tax, Circle-1, Alleppey.
3. The Commissioner of Income-tax(Appeals), Kottayam.
4. The Pr. Commissioner of Income-tax, Kottayam.
5. D.R., I.T.A.T., Cochin Bench, Cochin.
6. Guard File.

By Order

(ASSISTANT REGISTRAR)
I.T.A.T., Cochin

