

**IN THE INCOME TAX APPELLATE TRIBUNAL  
COCHIN BENCH, COCHIN**

**Before Shri Chandra Poojari, AM & Shri George George K, JM**

ITA No.642/Coch/2019 : Asst.Year 2011-2012

The Asst.Commissioner of Income-tax, Circle 1 Tirur.	Vs.	M/s.Feroke Boards Ltd. Post Karad, Via Farook College, Malappuram Pin – 673 632. <b>PAN : AAACF3525E.</b>
(Appellant)		(Respondent)

Appellant by : Sri.Mritunjaya Sharma, Sr.DR

Respondent by : --- None --- (Written submission)

Date of Hearing : 03.03.2020	Date of Pronouncement : 04.03.2020
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**ORDER**

**Per George George K, JM**

This appeal at the instance of the Revenue is directed against CIT(Appeals)'s order dated 20.08.2019. The relevant assessment year is 2011-2012.

2. The grounds raised read as follow:-

*"1. The order of the Learned Commissioner of Income Tax (Appeals), Kozhikode is against the law and facts and circumstances of the case.*

*2. On the facts and circumstances of the case and in law, the Ld. Commissioner of Income Tax (Appeals) erred in holding that the gain on the sale of assets is Long Term capital gain and not the Short Term Capital Gains as held by the Assessing Officer.*

*3. The Ld. Commissioner of Income Tax (Appeals) had erred in law as well as in facts by giving relief to the assessee in holding that the period of holding of the assets transferred by the assessee, M/s Feroke Boards Limited on 18-05-2010 includes the holding period of the previous owner within the meaning of section 2(42A) of the Income Tax Act without appreciating that Explanation to section 49(1) of the Income-Tax Act, 1961 is applicable in the case of the assessee.*

4. *The Ld. Commissioner of Income- Tax (Appeals) failed to appreciate that modes of acquisition of the concerned asset by the Previous Owner was specifically excluded as per Explanation to sec. 49(1) for considering any benefit of previous owner and cost was taken at nil accordingly, both by the Assessee and the AO. Accordingly, the benefit of period of holding of asset by the previous owner could not be allowed to the assessee for computation of Capital Gains.*

5. *The Ld. Commissioner of Income- Tax( appeals) has failed to appreciate that the assessee acquired the asset on 01-04-2008 and transferred the same on 18-05-2010 i.e. within period of less than 36 months. The claim of the assessee that the holding period of the asset should be taken including the holding period to the previous owner of the asset is misplaced in view of Explanation to section 49(1) as applicable w.e.f. 01-04-1965.*

6. *The Ld. Commissioner of Income-Tax (Appeals) has failed to appreciate the conclusion drawn by the assessing officer regarding the holding period of the assets transferred being less than 36 months as determined in explanation (e) to section 2(42A) r.w. explanation to section 49(1) and treated the transfer as short term.*

5. *For these and other grounds that may be urged at the time of hearing, It is requested that the order of the CIT(A) may be set aside and that of the Assessing Officer restored."*

3. Brief facts of the case are as follows:

The assessee is a private limited company. For the assessment year 2011-2012, the return of income was filed on 29.09.2011 admitting a total income of Rs.10,81,85,559. The Hon'ble High Court of Kerala had sanctioned a scheme of amalgamation with appointment date being 01.04.2008, whereby all the assets and liabilities of two transferor companies were transferred and vested with the assessee (the transferee company). The assessee vide a manufacturing and assets transfer agreement sold to another company, its "brand name", "package design", "knowhow" etc. and also "product intangibles" and "marketing intangibles". Since there

was no cost of acquisition, the assessee offered the entire sale consideration as Long Term Capital Gain (LTCG) in the return of income filed.

4. The Assessing Officer during the course of scrutiny assessment, had sought to treat the assets sold as "financial asset" as laid out in *Explanation 1(i) (e)* to section 2(42A) of the I.T.Act. The assessee raised objections vide its letters dated 06.12.2013 and 10.12.2013. However, the objections raised by the assessee were rejected and the Assessing Officer held that the period of holding of the assets transferred is less than 36 months and same being financial assets, the sale proceeds are to be treated as Short Term Capital Gain (STCG). The relevant finding of the Assessing Officer in this regard reads as follow:-

*"5. The assessee's contention is not acceptable for the following reasons:*

*i) The transactions are undoubtedly that of a financial asset being intangibles.*

*ii) As per the amalgamation scheme duly approved by the Honorable High Court of Kerala, the three companies merged and newly formed amalgamated company is known as M/s.Feroke Boards Limited. The Intangibles including the brand name never belonged to the assessee company prior to the amalgamation. They belonged to the amalgamating companies who renounced their rights and ceased to exist consequent to the amalgamation with effect from 1/4/2008.*

*The scheme of amalgamation is reproduced as under:*

*"Effective Date" means the last of the dates on which certified copies of the order(s) of the High Court sanctioning the Scheme are filed with the Registrar.*

*1.9 "Transferor Companies" or the Amalgamating Companies means both*

1.9A FEROKE BOARDS LIMITED (Transferor company No.1), a company incorporated on 20/12/1991 under the Companies Act, 1956 having its Registered Office at W/239, Post Karad Via, Farook College, Calicut, Kerala-673632.

1.9B FEROKE PLYWOOD PRWATE LIMITED (Transferor company No.2), a company incorporated on 28/04/1988 under the Companies Act, 1956 having its Registered Office at Post Karad Via, Farook College, Malappuram, Kerala-673 632.

1.10 Transferee Company" or the "Amalgamated Company" means FEROKE BOARDS LIMITED, a Company incorporated on 26/07/ 1993 under the Companies Act, 1956 having its Registered Office at 4/239, Karad.P.O, Via Farook College, Calicut, Kerala-673 632.

C. Without prejudice to the generally of the sub-clause(a) above. The undertaking of the Transferor Companies shall include all the movable and immovable properties, assets, both tangible and intangible including land, buildings, furniture and fixtures, electrical fittings, computers, vehicles, generators, inventories, reserves, leasehold rights, tenancy rights, licenses, consents powers, entitlements, permits, authorizations, quotas, trademarks, goodwill, patents, intellectual property rights, letters of intent, investments in shares and other investments authorized capital being right to issue shares for which valuable registration fee has been already paid to the Registrar. Raw material, stock in trade, work-in-progress, finished goods, plant, machinery and equipment, tools and implements, goods in transit advances of all kinds, deposits, book debts, outstanding monies, recoverable claims, agreements, arrangements and other intellectual property rights, easements, advantages, benefits and approvals, rights and benefits of all agreement schemes, consents and other interests including without any limitation, privileges, liberties, rights and power of all kinds, nature and description whatsoever in any manner owned by in relation to or connected with the Transferor Companies.»

The effective date of the scheme was 1/04/2008.

iii) What emerges from the above is that it is only with effect from 1/04/2008 that the financial assets being intangibles formed part of the assets of the newly formed amalgamated company Ferok Boards limited, the assessee. These rights were once again renounced by way of transfer to M/s Masonite Doors(P) Ltd., of Mumbai vide agreement dated 18/05/2010. At the time of renunciation of the rights of the intangibles to M/s: Masonite Doors the period of holding by the assessee company was therefore for only 26 months. Explanation 1 to sec 2(42A) lays down the period of holding of

*different types of capital assets even though the assets are acquired in the scheme of amalgamation.*

*Explanation (e) to sec 2(42A) prescribes the period of holding for a financial asset as under:*

*"In the case of a capital asset being the right to subscribe to a financial asset which is renounced in favour of any other person, the period shall be reckoned from the date of offer of such right by the company or institution, as the case may be ,making such offer."*

*Explanation (b) is applicable only to transfer of other capital assets / tangibles by an amalgamated company where the period of holding by a previous owner is determined. The contention of the assessee's AR that the transfer falls within the provision of explanation (b), is therefore not acceptable.*

*iv) A financial asset is not tangible. Instead, its existence is "represented by evidence of its existence." The paper in money has no intrinsic value. Its value is derived by virtue of what it represents. Similarly its period of holding is undetermined. That is why the provision of explanation (e) to sec 2(42A) comes to the rescue.*

*For the above reasons the period of holding of the intangibles by the assessee company at the time of transfer to M/s Masonite Holdings Pvt Ltd being less than 36 months as determined in explanation I(e) to Sec 2(42A),the transfer is treated as short term. Accordingly the assessment is completed treating the receipts as Short term Capital Gains.*

#### Computation of Income

<i>Profits and gains of business or profession .</i>	<i>(-)3,05,34,441</i>
<i>Add : Long Term Capital Gain Treated as Short Term Capital Gain as discussed above.</i>	<i>13,87,20,000</i>
	<i>-----</i>
<i>Total Income</i>	<i>10,81,85,559</i>
<i>Less : B/F depreciation loss as returned.</i>	<i>7,50,150</i>
	<i>-----</i>
<i>Assessed total income (STCG)</i>	<i>10,74,35,409</i>
<i>Total Income rounded to</i>	<i>10,74,35,410</i>
	<i>=====</i>

5. Aggrieved by the order of the Assessing Officer, the assessee preferred an appeal to the first appellate authority. Before the first appellate authority it was contended that the A.O. was not correct in relying on *Explanation 1(i) (e)* to section 2(42A) of the I.T.Act and treating the assets sold as "financial assets". It was further contended that the A.O. ought to have seen *Explanation 1(i) (d)* to section 2(42A) of the I.T.Act, which clearly states what is meant by "financial asset" referred to in clause (e). *Explanation 1(i) (d)* to section 2(42A) of the I.T.Act states it is "a capital asset, being a share or any other security. It was also contended that the A.O. ought to have gone through *Explanation 2* to section 2(42A) which states "for the purposes of this clause, the expression "security" shall have the meaning assigned to it in clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956). According to this section "security" covers "shares, scripts, stocks, bonds, debentures, derivatives, Government Securities, etc.". It does not even remotely cover the assets sold.

6. The CIT(A) held that the assets transferred are not "financial assets" as described in *Explanation 1(i)(e)* to section 2(42A) of the I.T.Act and the period of holding cannot be taken as per said *Explanation 1(i)(e)* to section 2(42A) of the I.T.Act. The CIT(A) held that on the facts and circumstances of the case *Explanation 1(i)(b)* to section 2(42A) of the I.T.Act is applicable and the period of holding of the said asset will

include also the period held by the transferor company. Accordingly, the CIT(A) treated the sale of asset as LTCCG.

7. Aggrieved by the order of the CIT(A), the Revenue has filed this appeal before the Tribunal. The learned Departmental Representative strongly supported the order of the Assessing Officer and relied on the grounds raised.

8. None was present on behalf of the assessee, however, a brief written submission has been filed, which essentially reiterates the submissions made before the Income Tax Authorities.

9. We have heard the rival submissions and perused the material on record. The assessee during the relevant assessment year, vide manufacturing and asset transfer agreement had sold to M/s.Masonite Holdings Private Limited, its "brand name", "trademark", "packaging design" and "knowhow" etc. and also "product intangibles" and "marketing intangibles". The assessee-company totally received a sum of Rs.13,87,20,000 as per the terms of agreement dated 18.05.2010 and supplementary agreement dated 31.03.2011. The A.O. had treated the assets transferred by the assessee to M/s.Masonite Holdings Private Limited as a "financial asset" governed by *Explanation 1(i)(e)* to section 2(42A) of the I.T.Act and since the period of holding of the intangibles by the assessee at the time of transfer being less than 36 months, the transfer was treated by the A.O. as STCCG. Since the relevant clause of the manufacture and asset transfer agreement and its supplementary agreement are extracted in

the orders of the A.O. and CIT(A), the same is not reproduced here.

9.1 The first issue to be decided is whether the assets transferred by the assessee to M/s.Masonite Holdings Private Limited is a "financial asset" coming within the *Explanation 1(i)(e)* to section 2(42A) of the I.T.Act. The term "financial asset" has been described in *Explanation 1(i)(d)* to section 2(42A) of the I.T.Act to be a capital asset, being share or any other security. As per *Explanation (2)* to section 2(42A) of the I.T.Act, the expression "security" shall have the meaning assigned to it in clause (4) of section 2 of the Securities Contract (Regulation) Act, 1956. As per section 2 of the Securities Contract (Regulation) Act, 1956, the term "security" includes "scrips, stocks, bonds, debentures, debenture stock or other marketable securities of a like nature in or of any incorporated company or other body corporate". Therefore, the "financial asset" has been described in the Act as share or security and the assets transferred by the assessee does not fall in the category of "financial asset". This view is further affirmed by section 2(11) of the I.T.Act, which defines the term "block of asset" for the purpose of depreciation. The definition u/s 2(11) of the I.T.Act includes intangible assets. Since the intangible assets are covered in the definition of "block of asset" eligible for depreciation, the same cannot be again covered under the definition of "financial asset" as per *Explanation (1) (i) (d)* to section 2(42A) of the I.T.Act. Therefore, the assets transferred by the assessee, the period of holding

cannot be determined as per *Explanation 1(i)(e)* to section 2(42A) of the I.T.Act, as contended by the Assessing Officer.

9.2 In the facts and circumstances of the case, we are of the view that the holding period should be determined as per *Explanation 1(i) (b)* to section 2(42A) of the I.T.Act to determine whether or not an asset is a short term capital asset. The said *Explanation* states in determining the period for which the capital asset was held by the assessee, "*in the case of a capital asset which becomes the property of the assessee in the circumstances mentioned in sub section (1) of section 49, there shall be included the period for which the asset was held by the previous owner referred to in the said section.*" Section 49(1)(iii)(e) states "*where the capital asset became the property of the assessee under any such transfer as is referred to in clause (iv) or clause (v) or clause (vi) or clause (via) or clause (viaa) or clause (vica) or clause (viab) of section 47*". Section 47(vi) of the I.T.Act reads "*any transfer, in a scheme of amalgamation of a capital asset by the amalgamating company to the amalgamated company if the amalgamated company is an Indian company*". The assessee's case was a scheme of amalgamation and assessee is an Indian company. Therefore, it is not correct for the Assessing Officer to consider 01.04.2008 as the date on which the assets were acquired, because the brand name was already there with Feroke Boards Limited (one of the companies that got merged with Feroke Boards & Doors (P) and later renamed Feroke Boards Limited). The brand name was registered with Trade Marks Registry (Trade Mark No.1432867 dated 14.03.2006).

Section 47(vi) states “any transfer, in a scheme of amalgamation of a capital asset by the amalgamating company to the amalgamated company if the amalgamated company is an Indian Company” is not to be treated as transfer. The term “amalgamation” is defined in section 2(IB) and the assessee’s case fall under the said definition. Therefore, there is no transfer taking place on 01.04.2008. The period of holding is much more than 36 months when the relinquishment / sale took place (on 18.05.2010). Therefore, the A.O. ought not to have taxed such receipts as STCG but should have taxed it as LTCG.

9.3 The *Explanation* to section 49(1) of the I.T.Act is a benevolent provision to extend applicability of the term “previous owner” to cover cases like assessee. Here the previous owner is the amalgamating company and this company did not acquire it in a mode referred to in clause (i) or clause (ii) or clause (iii) or clause (iv) of section 49(1) of the I.T.Act. However, as no purchase price was paid by the amalgamating company, the cost of acquisition was taken as ‘NIL’ as required u/s 55(2)(a)(ii) of the I.T.Act.

9.4 The Hon’ble Delhi High Court in the case of CIT v. Mediward Publication (P) Ltd. in ITA No.549 of 2011 (judgment dated 05.04.2011) had held that transfer of intangible assets with right to carry on business was taxable as LTCG. In view of aforesaid reasoning and judicial pronouncement cited supra, we hold that the CIT(A) is

justified in treating the sale of assets as LTCG. It is ordered accordingly.

10. In the result, the appeal filed by the Revenue is dismissed.

Order pronounced on this 04<sup>th</sup> day of March, 2020.

Sd/-  
**(Chandra Poojari)**  
**ACCOUNTANT MEMBER**

Sd/-  
**(George George K)**  
**JUDICIAL MEMBER**

Cochin ; Dated : 04<sup>th</sup> March, 2020.  
Devadas G\*

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent.
3. The CIT(A)-Kozhikode.
4. The Pr.CIT, Kozhikode.
5. DR, ITAT, Cochin
6. Guard file.

BY ORDER,

(Asstt. Registrar)  
**ITAT, Cochin**