

आयकर अपीलीय अधिकरण, विशाखापटणम पीठ, विशाखापटणम

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

श्रीवी. दुर्गा राव, न्यायिक सदस्य एवं श्री डि.एस. सुन्दर सिंह, लेखा सदस्य के समक्ष

**BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER &
SHRI D.S. SUNDER SINGH, ACCOUNTANT MEMBER**

**आयकर अपील सं./I.T.A.No.497/Viz/2019
(निर्धारण वर्ष/Assessment Year:2013-14)**

Asst.Commissioner of Income Tax
Circle-3(1)
Visakhapatnam

Vs M/s Devi Sea Foods Limited
D.No.50-1-51/1
ASR Nagar, Seethammadhara
Visakhapatnam
[PAN : AABCD0248B]

(अपीलार्थी/ Appellant)

(प्रत्यर्थी/ Respondent)

**Cross Objection No.130/Viz/2019
Arising out of I.T.A.No.497/Viz/2019
(निर्धारण वर्ष/Assessment Year:2013-14)**

M/s Devi Sea Foods Limited
D.No.50-1-51/1
ASR Nagar
Seethammadhara
Visakhapatnam
[PAN : AABCD0248B]

Vs Asst.Commissioner of
Income Tax
Circle-3(1)
Visakhapatnam

(अपीलार्थी/ Appellant)

(प्रत्यर्थी/ Respondent)

राजस्व की ओर से / Revenue by

: Shri S.Ravi Shankar Narayan,
CIT, DR

निर्धारित की ओर से / Assessee by

: Shri G.V.N.Hari, AR

सुनवाई की तारीख / Date of Hearing

: 08.06.2020

घोषणा की तारीख/Date of Pronouncement

: 19.06.2020

आदेश /ORDER

Per Shri D.S.Sunder Singh, Accountant Member :

This appeal is filed by the revenue against the order of the Commissioner of Income Tax (Appeals) [CIT(A)]-1, Visakhapatnam in I.T.A No.10491/2016-17/ACIT,C-3(1),Vsp/2017-18 dated 03.05.2019 for the Assessment Year (A.Y.) 2013-14 and cross objections filed by the assessee in support of the order of the Ld.CIT(A).

2. All the grounds of appeal are related to the deletion of addition made by the Assessing Officer (AO) on slump sale of windmills. Brief facts of the case are that the assessee is engaged in the business of aqua culture, export of frozen shrimp, sale of hatchery seed and wind power generation. During the previous year relevant to the assessment year, the AO found that the assessee has sold three windmills located at S.F.No.127, Mukkudujallipatty village, S.F.No.265/3 & 262/1A, Raghalbavi village, Coimbatore, Tamilnadu and S.F.No.540, Levingipuram village, Tirunelveli, Tamilnadu. The assessee declared this transaction as slump sale of 3 windmills viz., Suzlon (HT No.1186), Vestas-I (HT No.782), Vestas-2 (HT No.1283) and offered the sum of Rs.20,93,56,370/- as long term capital gains on the slump sale as per the provisions of sec.50B of the Income Tax

Act, 1961 (in short 'Act'). In doing so, the assessee has treated these 3 windmills as a single unit and as a separate "undertaking". On verification of the sale agreements, AO observed that 2 windmills viz. Vestas-1 (HT No.782) & Vestas-2 (HT No.1283) were sold to M/s Lotus Clean Power Venture Private Limited, 484, Kamaraj Road, Coimbatore - 641015, for a sale consideration of Rs.18,50,87,332/-. Subsequently, another sale agreement was signed on 16.04.2012 in respect of the third wind mill viz. Suzlon (HT No.1186) which was sold to M/s Clover Energy Private Limited, 484, Kamaraj Road, Coimbatore - 641015, for a sale consideration of Rs.5,58,85,576/-. The AO considered the meaning of undertaking and slump sale as per statute and found that as per section 2(42C) of the Act, the slump sale is the transfer of one or more undertakings as a result of sale for a lump sum consideration without values being assigned to the individual assets and liabilities in such sales. Undertaking is defined in Explanation 1 to Clause (19AA) of the Act which provides provisions relating to computation of capital gains from slump sale and Explanation 1 for net worth and Explanation 2 for computation of net worth. The AO also considered section 180 of Companies Act, 2013 for the purpose of meaning of undertaking and viewed that the assessee company could not explain as to why the assets i.e. windmills should not be treated as assets of the

company, instead of separate undertaking as required under the provisions of slump sale. The AO further found that it has not furnished any balance sheet, profit and loss account for the wind mill business activity. Therefore, AO denied the claim of the assessee treating the gains of the windmill as long term capital gains u/s 50B of the Act and treated the same as gains on depreciable assets u/s 50 of the Act. Accordingly taxed the sale consideration under short term capital gains.

3. Against which the assessee went on appeal before the CIT(A) and the Ld.CIT(A) examined the slump sale agreement entered by the assessee with M/s Clover Energy Private Limited and Lotus Clean Power Venture Private Limited and observed that the assessee has sold the windmills as a going concern inclusive of all its assets such as land, buildings etc. The windmills were transferred for an amount of Rs.24,00,93,258/-. There was no separate valuation of each asset i.e. land, windmill or shed. The Ld.CIT(A) further observed that the assessee has been enjoying deduction u/s 80IA from 2009-10 onwards and the AO has not made any adverse remarks on claiming profits u/s 80IA as separate business of the assessee. Though the assessee has shown the windmill as part of block of all assets, depreciation claims are not independent factors to deny benefit under slump sale.

Therefore, the Ld.CIT(A) held that each wind mill is a unit of undertaking covered under the definition of slump sale, hence directed the AO to treat the sale of windmill as slump sale and the consideration received should be subject to deduction against net worth of undertaking.

3.1. With regard to section 50B(2) the Ld.CIT(A) observed that section 50B is a special provision for computation of capital gains in case of slump sale. There is no requirement to consider the other provisions of section 48 and 49 as required in the case of normal capital gains. Hence, observed that there is no need to consider indexed cost of acquisition or improvement in the slump sale. Thus, held that the long term capital gains is the difference between lump sum consideration and net worth of undertaking. Accordingly, directed the AO to compute the long term capital gains under slump sale.

4. Against which the revenue filed appeal before the Tribunal. During the appeal hearing, taking our attention to para No.5 of the assessment order, the Ld.DR argued that the assessee has sold the 3 windmills located in three different places during the year under consideration. For an enquiry from the AO, why the windmills should not be treated as part of assets of the assessee company instead of separate undertakings, the

assessee has explained before the AO that the capital gains under windmills required to be treated as slump sale since the same constitute a separate undertaking. However, the AO observed that the assessee has not maintained separate books of accounts for each windmill showing independent assets and the windmills sold during the year were not shown separately on the fixed assets schedule of the company for several years for the purpose of claiming depreciation. However, the assessee has submitted that though separate books of accounts were not maintained, the assets, liabilities in relation to windmills had been ascertained and transferred to the buyer along with wind turbines. He further explained that the power generated by the windmills is being sold to the Tamilnadu State Electricity Board and the receipts were shown separately from the undertaking. The Ld.DR argued that the assessee is not maintaining the separate books of accounts and shown the windmills as part of the block of assets of the company, hence, the same required to be treated as the assets of the company, but not separate undertaking. Further, the Ld.DR relied on para No.5.7 of the assessment order and argued that as per the definition of the Companies Act, for treating the separate undertaking the investment should exceed 20% of its net worth as per the audited balance sheet of the preceding financial year or an undertaking which generates 20% of the

total income of the company during the previous financial year. In the instant case, the company has not satisfied the condition of net worth being 20% or the profits of the 20% of the total income as defined in the Companies Act, therefore, the Ld.DR argued that the windmills cannot be treated as separate undertaking for the purpose of slump sale, hence contended that the Ld.CIT(A) erred in directing the AO to treat the windmills as separate unit, thus, requested to set aside the order of the Ld.CIT(A) and allow the appeal of the revenue.

5. Per contra, the Ld.Counsel of the assessee submitted that the definition of undertaking is given in the Income Tax Act as per which 'undertaking' shall include any part of an undertaking or unit, but does not include individual assets or liabilities or any combination thereon not constituting business activity. In the instant case, windmills are separate undertaking though the windmills are included in block of assets, they cannot be treated as assets of the assessee company. The Ld.AR further argued that the assessee has been claiming deduction u/s 80IA on the income of the windmill as a separate business which is also allowed by the AO from the A.Y.2009-10 onwards as observed by the Ld.CIT(A). When the Income Tax Act defines a separate undertaking, there is no need to go to

the definition of Companies Act, therefore, argued that the Ld.CIT(A) has rightly allowed the windmill as a separate undertaking and no interference is called for. Further, the Ld.AR relied on the decision of Commissioner of Income Tax Vs. Abhirami Cotton Mills (P) Ltd. (1996) 87 taxmann 152 (Andhra Pradesh) and argued that non maintenance of separate books of accounts is not a ground for rejection of deduction u/s 80J of the Act. Placing reliance on the decision of Hon'ble Gujarat High Court in the case of Ajanta (P) Ltd. Vs. Deputy Commissioner of Income Tax (2017) 77 taxmann.com 227 (Gujarat), the Ld.Counsel argued that deduction u/s 80-IA could not be denied solely on the ground that there was no separate Profit & Loss account and the balance sheet. The Ld.Counsel further argued placing reliance on the decision of ITAT Pune Bench in ITA No.1479/Pun/2015 dated 20.12.2017 that each windmill is separate undertaking. The Ld.AR submitted that there is no error committed by the Ld.CIT(A), hence, requested to uphold the order of the Ld.CIT(A) and dismiss the appeal of the revenue.

6. We have heard both the parties, perused material placed on record and gone through the orders of the lower authorities. In the instant case, the issue is whether the windmill constitutes separate undertaking or not.

If the same is separate undertaking, the assessee is entitled for computing the sale consideration as slump sale u/s 2(42C) of the Act. The Ld.CIT(A) has discussed the issue in detail in para No.6.1 to 6.4 and gone through agreements and held that the sale of windmills is a separate undertaking and directed the AO to compute the long term capital gains under slump sale. For the sake of clarity we extract para No.6.1 to 6.4, 6.5 and 6.6 which reads as under :

“6.1 Ground No. 2 and 3: slump sale u/s.50B:

I have carefully considered the facts of the case, written submissions and decision of the Assessing Officer in the assessment order. It is relevant to delve upon undisputed facts. The appellant is engaged in different businesses namely production and export of frozen shrimp, LDPE Films and generation and sale of power through windmill operation. It means that the business of the appellant is constituted of 3 different activities. The windmill operation is one of the business units of the appellant. The income earned from each unit is shown in the P & L account separately. The appellant acquired the subjective windmills in the FY 2005 and has been claiming deduction of profits u/s801A from the FY 2008-09 relevant to AY 2009-10. The appellant has also claimed deduction under chapter VI-A for the impugned AY 2013-14. There are separate ledger accounts for the business of windmills forming part of final accounts of the appellant. The appellant had entered in to 2 separate slump sale agreements effected as a whole while selling 3 windmills located at different places in the FY 2012-13. It is a fact that the appellant had been claiming depreciation on the subjective windmills. Having examined the undisputed facts it is worthwhile to examine the definition of slump sale in order to know whether the transfer is falling within the purview of slump sale u/s 2(42C).

6.2. Slump Sale u/s 2(42C). “Slump sale” means the transfer of one or more undertakings as a result of the sale for slump sum consideration without values being assigned to the individual assets and liabilities in such sales.

A cursory reading of the definition reveals the following aspects :

- 1. There must be a transfer of asset*
- 2. That transfer is of one or more undertakings.*
- 3. Such transfer is for a 'lump sum' consideration.*

4. That consideration is not assigned to any individual assets and liabilities of the undertaking.

It is clear from the definition that the slump sale is an exhaustive one which does not give scope for inclusion of any other element other than the meaning assigned. It is also clear from the definition that any individual asset or liability of the undertaking is excluded from the purview of the slump sale. It is further clear that the definition of slump sale refers to transfer of one or more undertakings. Therefore it is equally relevant to examine the definition of undertaking u/s. 2(19AA) explanation 1 of the Act.

6.3 Undertaking u/s.2(19AA) explanation of the Act: 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.

A cursory reading of the definition of undertaking reveals the following aspects/elements.

It is an inclusive definition intended to include:

- a. Any Part of undertaking*
- b. Any unit of undertaking*
- c. A division of undertaking*
- d. A business activity taken as a whole, however,*
- e. It does not include individual assets or liabilities not constituting business activity.*

6.4 A close reading of both the definitions reveal a common factor that any individual asset or liability does not constitute business activity is outside the purview of both the definitions. It means the disqualification of sale of asset to be treated under slump sale or undertaking is built within the provision itself.

Having examined the definitions of 'slump sale' and 'undertaking' together I find it relevant to see whether the subjective sale of windmills in this case will fit into the elements of slump sale and undertaking. In this process it is worthwhile to examine the slump sale deeds executed by the appellant company.

- A cursory reading of both the sale deeds reveal that the windmills are identified as a going concern and an undertaking.*
- The principle assets in the undertaking are land and wind turbine.*
- The appellant disposed the asset as going concern inclusive of all lands, buildings and sheds etc.*
- The subject windmills was transferred for lump-sum amount of Rs.18,50,87,332/- (in first sale deed) and for Rs.18,58,85,576/- (in second sale deed). The total consideration is Rs.24,00,93,258/-.*
- The operative date is the respective date of sale in both deeds.*
- There is no separate valuation of assets such as land, wind turbines, sheds etc.*

6.5 After examining the definition of 'slump sale' and 'undertaking' along with the sale deed, I am of the considered opinion that the sale affected by the appellant is squarely falling within the definition of slump sale. The windmill has been a unit of business of appellant. The appellant has been enjoying the deduction u/s.801A from AY 2009-10. The Assessing Officer has not made any adverse remarks on claiming of profits u/s.801A being a separate unit of business of appellant. There is no doubt that the subjective windmill had been shown as part of fixed assets in the block of assets of appellant and claiming depreciation. In my opinion the asset being part of block of assets and depreciation claims are not independent factors to deny benefit under slump sale. The depreciation any way is allowable to such assets: be it they are part of block of assets of the appellant company or part of assets of undertaking. Regarding separate books of accounts for the unit, the appellant had demonstrated with separate ledger account belonging to the windmill operation. There is no requirement of separate books for claiming relief u/s.801A as held by AP High court in the case of Abhirami Cotton Mills (1996)134CTP1123(AP). The real test for considering any sale of asset as non slump sale would be any independent asset or liability not forming part of business operations. In the instant case the Assessing Officer has not demonstrated that the wind mill is an independent asset. Whereas the appellant has been considering the asset as one of its business unit. Further the consideration received for all the 3 windmills was not assigned to any individual assets be it land, windmill or shed. In the absence of such finding, it is not fair to treat the transaction u/s.50. Further, there is no requirement under the act that the assets intended to be sold in slump sale should be together. The Assessing Officer's observation that the assets are located in different places has no bearing on the nature of transaction being slump sale. As much each windmill is a unit of undertaking covered under the definition of slump sale. In view of the above observation, the Assessing Officer is directed to treat the sale of windmill as a 'slump-sale' and the consideration received should be subjected to deduction against net-worth of undertaking.

6.6 Net-worth :u/s.50B(2) 'Net worth shall be the aggregate value of total assets of the undertaking or division as reduced by the value of liabilities of such undertaking or division as appearing in its books of account'

Section 50B is a special provision for computation of capital gains in case of slump sale. The net-worth of the undertaking is considered as cost of acquisition and improvement for the purpose of section 48 and 49. There is no requirement to consider other provisions of section 48 and 49 as it is required in the case of normal capital gains. It means that there is no need to consider indexed cost of acquisition or improvement in the case of slump sale. In the instant case the net-worth is arrived at Rs.3,07,36,888/- which is not in dispute. The lump-sum consideration for sale of three wind mills is Rs.24,00,93,258/- which is also not in dispute. Thus, the Long Term Capital Gains is the difference between lump-sum consideration and net-worth of

undertaking. Accordingly, the Assessing Officer is directed to compute the Long Term Capital Gains under slump-sale."

6.1. In the instant case, there is no dispute that the assessee has sold the wind mills and claimed it as a separate undertaking. Separate undertaking is one which can be separated from the business unit and both the business units of the assessee should be run separately, independent of each and they should not be dependent on each other. The definition of undertaking is given in 2(42C) and section 2(19) of the Act, wherein undertaking is defined as any part of an undertaking or 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 the business activity. From the definition of Income Tax Act, the windmills satisfy all the conditions for treating it as a separate undertaking as discussed by the Ld.CIT(A) in para No.6.3 of the order. Similarly, since the assessee has sold the windmills along with assets and all the liabilities, it also falls in the definition of slump sale u/s 2(42C) of the Act. Though the assessee has not separately maintained the books of accounts, separate ledger accounts are maintained and claiming deduction u/s 80IA separately for the income generated from the individual units each year. As per the Profit & Loss account, we observe that the assessee is computing

profits separately, from wind mills and in a position to ascertain the income and expenditure separately for the windmills as well as for the assessee's business. As argued by the Ld.Counsel of the assessee, the Hon'ble Andhra Pradesh High Court in the case of CIT Vs. Abhirami Cotton Mills (P) Ltd. (supra) held that non maintenance of separate books of accounts does not make the assessee disentitled for deduction u/s 80J(4) of the Act. Similarly, the Hon'ble High Court of Gujarat in the case of Ajanta (P) Ltd. Vs. Deputy Commissioner of Income Tax (supra) held that the deduction u/s 80IA cannot be denied solely on the ground that separate Profit & Loss account and balance sheet are not produced. The Coordinate Bench of ITAT, Pune in its order in the case of M/s Sargam Retails (P) Ltd. (supra) held that windmill is a separate undertaking. For the sake of clarity, we extract para No.14 of the order of the coordinate bench which reads as under :

"14. Now, coming to the facts of the present case, the assessee had shown profits from its windmill at Satara and had worked out the deduction under section 80IA(4) of the Act in respect of said windmill at Rs.2.42 crores. The assessee was entitled to claim the said deduction undertaking wise. The losses suffered from the other windmill established by the assessee in Karnataka and Gujarat were not to be set off against the profit of Satara windmill, on the proposition that each windmill was a separate undertaking. Such view was upheld by the Pune Bench of the Tribunal in the case of M/s. J-Sons Foundry Pvt. Ltd. (supra) and in the case of M/s. D.J. Malpani Vs. ACIT (supra)."

6.2. Therefore, we hold that wind mills constitute separate undertaking and the Ld.CIT(A) has rightly directed the AO to compute the capital gains

as a slump sale u/s 50B (2) and no interference is called for. Accordingly, we uphold the order of the Ld.CIT(A) and dismiss the appeal of the revenue.

7. The assessee filed cross objections in support of the order of the Ld.CIT(A), Since the appeal of the revenue is dismissed, the cross objections filed by the assessee becomes infructuous and hence dismissed.

8. In the result, appeal of the revenue as well as the cross objections of the assessee are dismissed.

Order pronounced in the open court on 19th June, 2020.

Sd/- (वी.दुर्गा राव) (V. DURGA RAO)	Sd/- (डि.एस. सुन्दर सिंह) (D.S. SUNDER SINGH)
न्यायिक सदस्य/JUDICIAL MEMBER	लेखा सदस्य/ACCOUNTANT MEMBER
विशाखापटणम /Visakhapatnam	
दिनांक /Dated : 19.06.2020	
L.Rama, SPS	

आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:-

1. निर्धारिती/ The Assessee- M/s Devi Sea Foods Limited, D.No.50-1-51/1
ASR Nagar, Seethammadhara, Visakhapatnam
2. राजस्व/The Revenue – The Asst.Commissioner of Income Tax, Circle-3(1)
Visakhapatnam
3. The Pr.Commissioner of Income Tax-1, Visakhapatnam
4. The Commissioner of Income Tax (Appeals)-1, Visakhapatnam
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, विशाखापटणम/DR, ITAT, Visakhapatnam
- 6.गार्ड फ़ाईल / Guard file

आदेशानुसार / BY ORDER

// True Copy //

Sr. Private Secretary
ITAT, Visakhapatnam