

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH“G”, MUMBAI**

**BEFORE SHRI OM PRAKASH KANT, ACCOUNTANT MEMBER &
MS.KAVITHA RAJAGOPAL, JUDICIAL MEMBER**

**ITA No.2945/Mum/2022
(Assessment Year: 2012-13)**

DCIT, Circle-13(2)(2), Mumbai.	बनाम/ Vs.	Sodexo Facilities Management Services India Pvt.Ltd., 1 st Floor, Gemstar Commercial Complex, Ramchandra Lane, extension Kanchpada, Malad West, Mumbai-400064.
स्थायीलेखासं. /जी आइ आरसं. /PAN/GIR No. :AABCS4166M		
(अपीलार्थी/ Appellant)		(प्रत्यर्थी / Respondent)

अपीलार्थी ओर से/ Appellant by :	Shri A.N.Bhalekar, Sr.AR
प्रत्यर्थी की ओर से/Respondent by:	Shri Mrunal Parekh

सुनवाई की तारीख/ Date of Hearing	16/05/2023
घोषणा की तारीख /Date of Pronouncement	25/05/2023

आदेश / ORDER

PER OM PRAKASH KANT- AM:

This appeal filed by the Revenue is directed against the order dated 20.09.2022 passed by Id Commissioner of Income-tax (Appeals)-National Faceless Appeal Centre, Delhi [“in short the Id. CIT(A)”]for Assessment Year (“AY”) 2012-13, raised following grounds: -

1. *“Whether on the facts and circumstances of the case, the Id. CIT(A) erred in treating reopening invalid without appreciating that as per section*

151(1) (prior to 01.04.2021), notice u/s. 148 can be issued after expiry of 4 years from the end of the relevant A.Y., if Principal Commissioner of Income Tax (PCIT) is satisfied on the basis of reasons recorded by AO that it is a fit case for issue of notice and in the instant case of the assessee, approval of PCIT was taken before issue of Notice u/s 148 of the I.T. Act."

- 2. "Whether on the facts and circumstances of the case, the ld. CIT(A) erred in holding the treating reopening invalid without appreciating that for the relevant assessment year AO had examined with reference to the ROI filed and it was found that the assessee had not filed necessary report as required u/s 50B(3) of the Act and it was seen that the assessee had incorrectly adopted the amount of networth of asset while computing Long Term Capital Gain of slump sale made during the year under consideration and this had resulted incorrect computation of LTCG and hence under assessment of Rs. 2,70,32,509/-".*
- 3. "Whether on the facts and circumstances of the case, the ld. CIT(A) erred in deleting the addition made on account of Capital Gains arising on slump sale of the food services business Rs. 3,26,25,6227- without appreciating that the PEVC (Profit Earning Capacity Value) was required to be considered for valuation thereof. The valuation of the said business of Food*

Service Division on the basis of PECV works out to Rs. 7,20,32,509/- whereas the assessee has adopted the sale consideration of Rs. 4,50,00,000/-(Difference of Rs. 2,70,32,509/-)."

4. *"Whether on the facts and circumstances of the case, the ld. CIT(A) erred in view of Apex Court in M/s. Checkmate Services Pvt. Ltd. vs. CIT 143 taxmann. Com 178(SC) (2022) in CA No. 2833 of 2016."*

2. Briefly stated facts are that the assessee filed its regular return of income on 30.11.2012 declaring total income of Rs.2,12,84,880/-. The return of income filed by the assessee was selected for scrutiny and the assessment u/s 143(3) of the Income Tax Act, 1961 ("the Act") was completed on 05.03.2015, accepting the returned income.

3. Subsequently, the assessment was reopened by invoking the provision of section 147 of the Act and the Assessing Officer ("AO") after recording reasons to believe that the income escaped assessment, issued notice u/s 148 of the Act on 26.03.2019. In response thereto, the assessee filed return of income on 08.04.2019 declaring total income of Rs.2,12,84,880/- which was declared originally in the return of income filed u/s 139(1) of the

Act. In the reasons recorded, the AO has noted that during the year under consideration, the assessee transferred one of its division and offered Long Term Capital Gain (“LTCG”) of Rs. 2,99,95,422/-. The AO further noted that the assessee did not file the Audit Report u/s 50B(3) of the Act which was mandatorily to be filed by the assessee and therefore, there is a failure on the part of the assessee in true and full disclosure of the material facts. The LTCG of Rs.2,99,95,422/- worked out by the assessee is reproduced as under: -

Particulars	Amount
<i>Net worth of the business being transferred: Written Down value of Depreciable Assets of the said business determined under section 43(6)(c)(i)(c)</i>	75,51,873
<i>Book value of other Assets</i>	14,28,79,591
	15,04,31,464
<i>Less: Liabilities of the said business at Book Value</i>	13,54,26,886
<i>Net worth of the business</i>	1,50,04,578
<i>Sale consideration</i>	4,50,00,000
<i>Long Term Capital Gains</i>	2,99,95,422

The AO in the assessment proceedings, substituted the sale consideration received by the Fair Market Value (“FMV”) of the transaction of the slump sale of the transfer of food division at Rs.7,20,32,509/- [i.e. which was estimated by the valuer under the Profit Earning Capacity Value(PACV) method]. Thereafter, the AO reduced the net worth of the food division amounting to Rs. 94,11,315/-, worked out by the valuer as against the net worth of Rs.1,50,04,578/- computed by the assessee.

4. The fair market value (FMV) of the sale consideration computed by the AO is reproduced as under: -

<i>Sl.No.</i>	<i>Particulars</i>	<i>Profit Before Tax</i>	<i>Tax</i>
<i>1.</i>	<i>PERFORMANCE</i>	<i>Rs.</i>	<i>Rs.</i>
	<i>2006-07</i>		<i>1,89,36,647</i>
	<i>2007-08</i>		<i>2,15,21,971</i>
	<i>2008-09</i>		<i>1,79,20,548</i>
	<i>2009-10</i>		<i>4,71,60,172</i>
	<i>2010-11</i>		<i>2,68,60,953</i>
	<i>Total</i>		<i>13,24,00,291</i>
<i>2.</i>	<i>FUTURE MAINTENANABLE PROFITS</i>		

	<i>Average profit before tax</i>		2,64,80,058
	<i>Less: TA/TM(&2% of Estimated Turnover)</i>	65,75,78,245	1,31,51,565
	<i>Less Income Tax Payable @ 30%</i>	30,98,548	
	<i>Surcharge Payable @2%</i>	1,99,927	
		41,98,475	
	<i>Education Cess Payable 2%</i>	83,970	
	<i>Higher Education Cess 25</i>	41,985	43,24,230
3.	<i>Net Maintainable Profit after tax</i>		90,04,064
	<i>Capitalization Rate</i>		12.50%
	<i>Capitalization Value (90,04,064/ 12.50 %)</i>		7,20,32,5097
	<i>Value of Business</i>		7,20,32,509

The computation of net worth of the food division computed by the AO on the basis of unaudited Balance Sheet as on 30th June 2011 is reproduced as under:

<i>Particulars</i>	<i>Rs.</i>	<i>Rs.</i>
<i>FIXED ASSETS</i>		19,58,710

<i>Net Block</i>		
<i>Current Assets, Loans & Advances</i>		
<i>Inventories</i>	89,63,056	
<i>Sundry Debtors</i>	11,56,72,740	
<i>Cash & Bank balance</i>	10,94,778	
<i>Loans and Advances</i>	1,71,49,017	14,48,79,591
<i>Total Assets</i>		14,48,38,301
<i>Less: Current Liabilities and Provisions</i>		
<i>Current Liabilities</i>	13,01,81,631	
<i>Provisions</i>	52,45,255	13,54,26,886
<i>Provisions</i>		94,11,415
<i>Less: Loans Funds-Secured Loans</i>		
<i>NET ASSET VALUE</i>		94,11,415

5. The AO worked out LTCG at Rs.6,26,21,094/- (Rs. FMV of sale transaction rs.7,20,32,509/- reduced by net worth of division of Rs. 94,11,415/-) and after subtracting the LTCG already assessed u/s 143(3) of the Act, made addition amounting to Rs.3,26,25,672/-.

6. On further appeal, Ld.CIT(A) held the reopening as invalid in law and also deleted the addition on merit.
7. Aggrieved Revenue is in appeal before the Tribunal raising the grounds as reproduced above.
8. Before us, Ld. Counsel for the assessee has filed a Paper Book containing pages 1 to 398.
9. The **Ground Nos. 1 & 2** raised by the assessee are related to validity of the re-assessment.
10. The findings of Ld.CIT(A) on the issue of validity of reassessment is reproduced as under: -

5.6.6 "In this case the facts are that: -

- 1. The A.Y. under consideration is 2012-13*
- 2. Return of Income for A.Y. 2012-13 was filed on 30.11.2012 declaring Total Income of Rs 2,12,84,880.*
- 3. The Assessment u/s 143(3) of the Act was completed on 05.03.2015. In this, Audit report and valuation report relation to food business sold on a slump basis were duly submitted.*
- 4. Thereafter the case was re-opened by issuing notice u/s 148 of the Act on 26.03.2019 thus, clearly after elapse of four years from the end of the relevant*

Assessment Year. In this case the A.Y. being A.Y. 2012-13, the period ended on 31.03.2013.

1. Thus, there was clear involvement of "change of opinion" and the proceedings of reopening could be valid and legal only if there was no full and true disclosure of material facts, on the part of the assessee. This is clear by the proviso to Section 147 of the Act and, for ready reference, it is reproduced as under: -

"Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year."

11. Before us, Ld.Sr.DR submitted that there was failure on the part of the assessee in submitting the Audit Report required u/s 50B(3) of the Act, which was mandatorily to be filed by the assessee and therefore,

there was a failure on the part of the assessee in disclosing full and true facts which are material for completing the assessment. Thus, under the second proviso (2) of section 147 of the Act, the AO has validly reopened the assessment. He accordingly submitted that Ld.CIT(A) without appreciating the facts of the case, invalidated section 147 of the Act on the ground of “change of opinion” on the same sets of the facts.

12. On the contrary, the Ld. Counsel for the assessee referred to the questionnaire issued by the AO during the course of assessment proceedings and submitted that AO has duly called for the information related to agreement for transfer of the food division of the assessee. Ld. Counsel for the assessee also referred to the Paper Book page 124 to 126 and submitted that all information in respect of the profit and transfer of food service of business on slump basis was duly reported in the financial statement submitted before the AO during the original assessment proceedings u/s 143(3) of the Act. The Ld. Counsel for the assessee also referred to page 153 of the Paper Book and submitted that relevant Audit Report in Form 3CEA r.w. section 50B(3) of the Act was

duly filed on 16.03.2016 before the AO and thus, there was no failure on the part of the assessee in disclosing all the material facts truly and fully.

13. However, in rejoinder, Ld.Sr.DR submitted that said copy of the Audit Report in Form 3CEA, available at page 153 of paperbook was filed in the assessment proceedings of another assessee namely, **M/s Sodexo Food solutions India Pvt. Ltd.** and not in the case of the assessee.

14. We have heard the rival submissions on the issue in dispute and perused the relevant material on record. We find that Ld. CIT(A) has invalidated the reassessment proceedings mainly on the ground that there was a “full and true disclosure” on the part of the assessee and the AO has reopened the assessment merely on the basis of change of opinion. But the facts of the present case, we find that in case of the slump sale u/s 50B(3) of the Act, it is prescribed for mandatory filing of Audit Report in Form 3CEA. The relevant provision of section 50B(3) of the Act is reproduced as under:-

50B(3). *“Every assessee, in the case of slump sale, shall furnish in the prescribed form 49 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.*

[Explanation 1.—For the purposes of this section, "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 :

Provided that any change in the value of assets on account of revaluation of assets shall be ignored for the purposes of computing the net worth.

Explanation 2.—For computing the net worth, the aggregate value of total assets shall be,—

*(a) in the case of depreciable assets, the written down value of the block of assets determined in accordance with the provisions contained in sub-item (C) of item (i) of sub-clause (c) of clause (6) of section 43 ; 51 [***]*

52[(b) in the case of capital assets in respect of which the whole of the expenditure has been allowed

*or is allowable as a deduction under section 35AD ,
nil; and*

*(c) in the case of other assets, the book value of such
assets.]]]]”*

15. During the course of hearing before us, Ld. Counsel for the assessee was given opportunity to produce copy of any such Audit Report required u/s 50B(3) of the Act, which was filed before the AO in original assessment proceedings and the case was adjourned from 04.05.2023 to 16.05.2023 as ‘part heard’. Despite providing sufficient opportunity, the assessee could not support with documentary evidence that such Audit Report was filed by the assessee before the AO in original assessment proceedings. In these circumstances, we are of the opinion that disclosure of this material fact/requirement of law was not fulfilled by the assessee in the original assessment proceedings.

15.1. The proviso to section 147 of the Act during the relevant time prescribed that where assessment is completed u/s 143(3) of the Act then, no action shall be taken u/s 147 of the Act after expiry of four years from the end of the relevant assessment year unless income

chargeable to tax has escaped assessment by reason of the failure on the part of the assessee to disclose fully and truly material facts necessary for the assessment. Since in the case, it is evident that the facts of Audit Report required u/s 50B(3) of the Act being material to the assessment and which was not filed before the AO , therefore, the assessee is responsible for not disclosing the material facts fully and truly. In the facts and circumstances of the case, various decisions relied by the Ld.CIT(A) and the decision relied upon by the assessee before us are not applicable to the facts of the assessee. Hence, we set aside the findings of Ld.CIT(A) on the issue in dispute and hold that re-assessment has been validly reopened by the AO. The Ground Nos. 1 & 2 raised by the Revenue are accordingly allowed.

16. In **Ground No.3** raised, the Revenue has challenged the deletion of addition made by the AO to LTCG computation of the assessee arising from slump sale of the food service division. As far as the Computation of LTCG is concerned, there are two components- the first component being sale consideration, and second component is net worth of the division sold or

transferred. According to the assessee, the food division was transferred for a net consideration of Rs.4,50,00,000/- (Paper Book Page 35) and therefore, the AO is not justified in adopting the FMV of the sale consideration and that too relying on own method of valuation and ignoring the valuation report submitted by the assessee. The second component is net worth of the division, which according to the assessee was Rs.1,50,04,578/- but the AO has worked out at sum of Rs.94,11,450/-. The relevant findings of Ld.CIT(A) on the issue in dispute is reproduced as under: -

5.1.3 "All the facts and circumstances related to the impugned addition of Rs. 3,26,25,672 are duly considered. The Net Worth of the business was worked out for the purposes of Section 50B(3) of the Act at Rs.1.50,04,578by replacing book value of the Fixed Assets by the written down value of the block of assets under the Income-tax Act in terms of the above referred provisions of Section 50-B (3) of the Act. assessee was in the service sector, the valuation should have been adopted at the value of the business arrived at on PECV method instead of the average of NAV& PECV. this Method has been prescribed and followed by the erstwhile Controller of Capital Issues (CCI). Further, the said valuer has

considered various methods and after careful consideration has adopted this method. Hence, it is submitted that the no fault can be found with such method. In fact the Assessment Order also does not contain any specific reasons for not accepting this method of valuation nor does it contain any specific reasons for adopting PECV method. Such consideration had been agreed upon, as reflected in the Business Transfer Agreement, by and between the two parties, after deliberations and negotiations and there was no room what so ever for estimating the same or replacing the same by imaginary figure fetched by a different valuation method.

5.1.4 The fact remained that the actual transaction had taken place for a consideration of a sum of Rs.4,50,00,000 as per the said Business Transfer agreement. The Assessing Officer cannot lay down or determine the price for which the transaction should have taken place instead of such actual price. Further, it is not at all the case that anything more than such consideration of Rs. 4,50,00,000 has been received or has accrued to the appellant, i.e. the Transferor, Accordingly, the question of replacing the actual sale consideration agreed "upon and received under the said Business Transfer Agreement by any other amount does not arise. Such consideration has been agreed upon, as reflected in the Business Transfer Agreement, by and between the two parties, after deliberations and negotiations and there is no

room what so ever for estimating the same or replacing the same by imaginary figure fetched by a different valuation method. The fact remained that the actual transaction had taken place for a consideration of a sum of Rs.4,50,00,000 as per the said Business Transfer agreement.

5.1.5 The Assessing Officer cannot lay down or determine the price for which the transaction should have taken place instead of such actual price. Further, it is not at all the case of the Ld. A.O. that anything more than such consideration of Rs. 4,50,00,000 has been received or has accrued to the appellant, i.e. the Transferor, Accordingly, the question of replacing the actual sale consideration agreed "upon and received under the said Business Transfer Agreement by any other amount does not arise.

5.1.6 It was lastly submitted that that the transaction of purchase of the said business in the hands of Sodexo Food solutions India Pvt. Ltd. had been accepted. A copy of the Assessment Order in the case of Sodexo food solutions India Pvt. Ltd. was enclosed with the written submission uploaded on ITBA.

5.1.7 In the light of such facts, I am afraid; there is no such occasion to confirm action of Ld. A.O. in making the impugned addition of Rs, 3,26,25,672 and relief has to be given to the appellant Company as it is entitled for the same. The amount of addition being

only an estimate and that too without any basis is not confirmed and is directed to be deleted. Therefore, Ground no. 2 with its 5 sub Grounds viz. 2.1 to 2.5 are allowed.”

17. Before us, Ld.Sr. DR referred to section 50B(2) of the Act and submitted that for the purpose of LTCG on transfer of a capital asset by way of slump sale, FMV of the capital asset as on the date of transfer is deemed to the full value of the consideration received or accruing as a result of the transfer of such capital asset , therefore the AO has correctly substituted the sale consideration exchange between the parties with FMV worked out by the valuer on PECV method. He further submitted that net worth of the food division has already been adopted on the basis of the books of the accounts of the assessee.

18. On the other hand, Ld. Counsel for the assessee submitted that the AO has not accepted the method of valuation which was furnished by the assessee. The valuer computed the FMV by averaging the valuation as per PECV method as well as net asset value method. He submitted that when the legislation has conferred an option on the assessee to choose a particular method of

the valuation, the AO cannot find fault in the said recognized method and adopting the method of his own choice. In support of this, he relied on the decision of the Hon'ble Jurisdictional High Court in the case of ***Vodafone M-Pesa Ltd. v PCIT (2018) 164 DTR 257/ 256 Taxman 240 (Bom)(HC)***. As far as the worth of food division is concerned, the Ld. Counsel for the assessee submitted that assessee has followed the method prescribed under section 50B(3) of the Act alongwith Explanation (2). He submitted that in the net worth computed by the assessee and in the AO, there is only one difference. It was submitted that the assessee following the Explanation-2 below section 50B(3) of the Act has adopted written down value of the block asset in case of the depreciable asset as per the proviso to section 43 of the Act, which the AO has omitted.

19. We have heard rival submissions on the issue in dispute and perused the material on record. We find that computation of LTCG on the transfer of undertaking as the slump sale consists of two components. First component is sale consideration and the second component is the net worth or cost of acquisition. When

the net worth of division is subtracted from the sale consideration, which results into LTCG on the slump sale. In the case of the assessee, the AO has taken FMV at Rs. 7,20,32,509/- which was worked out by the valuer following the PECV method, whereas the assessee has followed average value of PECV method as well as NAV method to justify the sale consideration actually received. We are of the opinion that Id Assessing Officer has not carried out valuation by an independent valuer and merely chosen a part of the valuation report submitted by the assessee. Therefore, we restore back the issue to the AO for referring the matter to a valuation expert by way of the issue of commission and thereafter, determining the FMV of the undertaking of the food division of the assessee.

20. As far as the net worth of food division worked out by the Assessing officer and the assessee is concerned, we have already reproduced same above.

21. In our opinion, the net worth of the undertaking worked out by the assessee is as per the provision of the Act whereas the AO has not taken into consideration the

written down value in terms of Explanation-2 to section 50B(3) of the Act. Accordingly, we direct the AO while computing the LTCG on the transfer of the slump sale of the undertaking to adopt net worth as per section 50B(3) read with Explanation -2 below that section, which has been worked out by the assessee at Rs.1,50,04,578/-. The Ground No.3 raised by the Revenue is accordingly allowed for statistical purposes.

22. **Ground No.4** raised by the Revenue relates to the disallowance of employee's contribution to PF/ESI paid after due date prescribed under the relevant Act. The finding of Ld.CIT(A) on the issue in dispute is reproduced as under: -

5.5.1. "For ready reference, this Explanation 5 is reproduced, as below:-

Explanation 5: For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply and shall be deemed never to have been applied to a sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 applies.

5.5.2 It is, thus, clear that the Legislature has expressed its intent clearly that provision of Section 43B of the Act neither applied (words used are "shall not apply and shall be deemed never to have been applied") nor shall apply to any sum received by an assessee from any of his employees to which the provisions of Section 2(24)(x) applies i.e. the controversial contribution of the employees' to PF/ESIC like welfare funds and to which the provision in Income Tax Law is under its Section 36(1)(va).

5.5.3 However, till any judicial decision comes as regards to the date of the applicability of the above explanation (inserted w.e.f.01.04.2021); in light of the above judicial pronouncements especially the dismissal of SLP by the Hon'ble Apex court in the case of M/s Rajasthan State Beverages Corporation Ltd. (Supra), the disallowance so made by the AO is hereby allowed and accordingly, Ground No. 3 with its 3 Sub Grounds 3.1 to 3.3 are allowed."

23. We have heard the rival submission on the issue in dispute and perused the material on record. In view of the decision of Hon'ble Supreme Court in the case of **M/s. Checkmate Services Pvt. Ltd. vs. CIT 143 taxmann. Com 178(SC) (2022) in CA No. 2833 of 2016**, the employee's contribution to PF/ESI deposited after due date prescribed under the relevant Act, is not eligible for

deduction u/s 36(1)(v) of the Act. Accordingly, we set aside the finding of Ld.CIT(A) on the issue in dispute and reject the claim of the assessee of deduction u/s 36(1)(va) of the Act, relevant to the employees contribution to PF/ESI deposited after due date under the relevant Act. Ground No.4 raised the Revenue is accordingly, allowed.

24. In the result, the appeal filed by Revenue is partly allowed for statistical purposes.

Order pronounced in the open court on 25.05.2023.

Sd/-

**(KAVITHA RAJAGOPAL)
JUDICIAL MEMBER**

Sd/-

**(OM PRAKASH KANT)
ACCOUNTANT MEMBER**

Mumbai, Dated 25/05/2023

Amit Kumar, Sr. PS

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / The CIT(A)
4. आयकर आयुक्त (अपील) / Concerned CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/BY ORDER,

सत्यापित प्रति //True Copy//

1.

उप/सहायक पंजीकार (Asst. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai