

IN THE INCOME TAX APPELLATE TRIBUNAL
NAGPUR BENCH, NAGPUR

BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER AND
SHRI K.M. ROY, ACCOUNTANT, MEMBER

ITA no.408/Nag./2017
(Assessment Year : 2006-07)

Income Tax Officer
Ward-4(1), Nagpur

..... Appellant

v/s

M/s. Afzal Cold Storage & Ice Factory
Behind APMC Market, Kalamna
Nagpur 440 008 PAN – AACCA0574G

..... Respondent

Assessee by : None

Revenue by : Shri Kailash C. Kanojiya

Date of Hearing – 05/08/2024

Date of Order – 08/08/2024

ORDER

PER V. DURGA RAO, J.M.

The present appeal has been filed by the Revenue challenging the impugned order dated 13/10/2017, passed by the learned Commissioner of Income Tax (Appeals)-1, Nagpur, [*learned CIT(A)*], for the assessment year 2006-07.

2. When the case was called for hearing, neither the assessee respondent nor any of its authorised representatives appeared before us to assist the Bench and argue the matter. There is no application for adjournment either. However, the Bench was of the opinion to dispose off the matter in the

absence of the assessee respondent after hearing the learned Departmental Representative and on the basis of material available on record.

3. In its appeal, the Revenue has raised following grounds:-

"(i) Whether on the facts and circumstances of the case, the CIT (A) was right in holding that AO was not justified in assessing the income at Rs. 3,28,18,270/- by treating long term capital gain u/s. 50B of the IT Act at Rs. 3,94,44,635/- on sale of assets without appreciating that the Assessing Officer has computed the capital gains treating the sale as 'slump sale' after verifying the factual matrix and the computation thereunder was based following the decision of Hon'ble ITAT's Special Bench, Mumbai in the case of DCIT vs. Summit Securities Ltd. Reported in (2012) 135 ITD 99.

(ii) Whether on the facts and circumstances of the case, the CIT (A) was right in treating that the sale was not "slump sale" thereby accepting the Long Term Capital Gains computed without applying the provisions of sec. 50C of the I.T. Act, 1961.

(iii) Any other ground that may arises at the time of hearing."

4. The proceeding of the present appeal before us is the second round of appeal.

5. Facts in brief:- The assessee is a Company incorporated under the Companies Act, 1956, which is also registered on 23/04/1992, with Registrar of Companies with authorised capital of ₹ 1 crore. The return of income for the year under consideration was filed on 29/11/2006, declaring loss of ₹ 1,00,85,399, which includes profit of ₹ 67,72,475, earned from transfer / sale of assets or total consideration of ₹ 3,01,00,000. As per the Assessing Officer, market value of land and building mentioned in the sale deed comes to ₹ 7,09,02,000, as per stamp duty purposes. Vide order dated 30/12/2009, passed under section 143(3) r/w section 147 of the Act, the Assessing Officer has applied provisions of section 50B of the Act in respect of sale of land and

section 50 and 50A of the Act in respect of sale of other assets. The Assessing Officer computed long term capital gain of ₹ 3,44,28,577, on sale of land and short term capital gain of ₹ 59,80,078, on sale of other assets comprising building, plant and machinery, furniture and fixture / electric installation. The assessee carried the matter before the learned CIT(A), wherein the learned CIT(A), vide order dated 13/03/2012, dismissed the appeal filed by the assessee stating that the concerned sale is not a slump sale, as contended in appeal by the assessee and that provisions of section 50/50A and 50C of the Act are applicable in its case. On further appeal, the Co-ordinate Bench of the Tribunal, Nagpur Bench, vide order dated 03/04/2013, passed in ITA No.280/Nag./2012, has set aside the order of the first appellate authority and sent back the matter to the file of the Assessing Officer to pass the fresh order after ascertaining the factual matrix of the case in respect to the contention of the assessee regarding slump sale, as submitted in appeal before first appellate authority, taking into consideration provisions of section 50C(2) of the Act and after allowing opportunity to the assessee.

6. Accordingly, the Assessing Officer, while giving effect to the order passed by the Tribunal, issued notices to the assessee, which have been reproduced in the assessment order vide Para-2, Page-2 to 5, asking the assessee to justify its contention of slump sale under section 50 of the Act, as against capital gains and applicability of section 50C of the Act thereto. The assessee filed reply before Assessing Officer, which is reproduced in the assessment order vide Para-3.1 / Page-5 to 8, explaining the circumstances for the impugned sale and stated that the provisions of section 50A and not

50C of the Act are applicable in its case. The Assessing Officer has worked out long term capital gain at ₹ 3,94,44,635, under section 50B of the Act treating the sale as slump sale. Accordingly, the Assessing Officer assessed the income of the assessee at ₹ 3,26,18,270, as against the income assessed originally at ₹ 3,44,36,161. The assessee once again being aggrieved by the order so passed by the learned CIT(A), is in appeal before the learned CIT(A).

7. The learned CIT(A) allowed the claim of the assessee by observing as follows:-

"4. Appellant's submissions along with assessment order and records have been considered carefully. The undisputed fact remains that the appellant's assets have been mortgaged with Nagpur Nagari Sahakari Bank Ltd. (hereafter referred as the Bank) and that a sum of Rs. 3,12,41,365/- comprising of principal and interest calculated upto 30.06.2003 has remained outstanding. In fact, vide application No. 45/2003, dated 28.07.2003, the Bank has filed before Debts Recovery Tribunal, Nagpur to sell and auction all immovable properties of the appellant for realisation of its dues. Before this, vide public notice dated 17.07.2002 given in Nav Bharat Newspaper, the Bank has informed general public of its first charge on the aforesaid assets and has warned the appellant not to sell or make any agreement to sell any of the said assets. The appellant has also been informed by the Bank on 07.09.2002 that the Bank can sell the project for amount not less than Rs. 3.51 crores and can take his final settlement amount i.e. Rs. 2.60 crores from it. The remaining amount is to be given to the Bank only. As per Bank's letter, it is trying to sell the project, Also, if any party approaches the appellant and the deal is to be finalised, the Bank is to be informed accordingly. Further, vide letter dated 10.02.2006, the Bank has given to the appellant the permission for sale of fixed assets of the company subject to condition that the entire sale proceeds shall have to be directly deposited in the Bank towards liquidation of the Bank's dues.

4.2 All the above mentioned background facts show that the valuation of assets sold has been arrived at around Rs. 3.57 crores by the Bank also. Therefore, sale consideration of Rs. 3,01,00,000/- has also been arrived at by the appellant and purchaser after taking into account WDV of these assets, excluding land, which, in any case, comprises only 11.74% of total assets, the Bank's first charge on these assets and the fact that the sale consideration is to be deposited directly in the Bank's account. The Bank has granted the loan to the appellant by executing English Mortgage which implies that the right to sell these assets vests with the Bank.

Regarding AO's action of computing LTCG u/s 50B by treating it is sump sale, it is seen that on these very same facts, the then FAA has not treated this sale as slump sale by mentioning in his appeal order as under.

"A sale was affected by appellant of land, building and machinery, appellant did not sell the whole business as is clear from the sale deed and appellant's own submission before A.O. making more clear as mentioned in AO's order that appellant claimed before A.O. that:

I. It is sale of land building and machinery.

II. Specific value to each item was assigned and given as Annexure I to Audit report.

III. Some assets are retained by the appellant.

IV. All liabilities are borne by the appellant as is clear from conveyance deed.

V. Appellant company is still existing and is filing return of income as separate entity.

Now appellant is arguing just opposite of what was stated before A.O. and above mentioned facts by appellant before A.O. do not support the revised claims of the appellant before appeal proceedings that it is a slump sale.

One more word of caution here is that now in appeal, appellant has furnished the CA's certificate purportedly u/s 508 sub section (3).

a) firstly it is undated (probably just to pass it as if net worth was derived at the time of assessment.

b) secondly it says that it is calculating "net worth of undertaking on 31.03.2006.

This certificate has been furnished on 12.03.2012 before me. It is not clear how a certificate of "net worth" can be drawn without taking into consideration liabilities as per submission of appellate before A.O. which makes it very clear that certain assets have been retained by the appellant and hence it is not a slump sale at all.

Also appellant has assigned specific value to assets sold and as per Annexure-I to Audit Report."

4.4 In the impugned order under appeal, AO has applied provisions of section 50B by relying on this very certificate / Form No. 3CEA and by simply mentioning in the assessment order, as under, while reproducing his notice and appellant's reply thereto for assessing appellant's income u/s 50B:

"5. Keeping in view all the facts of the case and also submissions, etc., placed by the assessee before the appellant Authorities as well as during the course of re-assessment (present proceedings), I proceed to complete the reassessment proceedings as directed by the Hon'ble ITAT, Nagpur Bench, Nagpur.

Computation of capital Gains on slump sale under section 50B of the Act:

During the course of assessment proceedings, the AR filed paper book, In the Paper Book, a copy of the Report of an Accountant in Form No. 3CEA, relating to the computation of capital against in case of slump sale, as furnished before the learned CIT (Appeals), Nagpur, has been furnished.. As per this Report, the working of Net Worth of the undertaking has even made which is as follows:-

Date of slump sale of the undertaking	29/03/2006
Amount of consideration received for slump sale	₹ 3,01,00,000
Net worth of the Undertaking	
(a) In the case of depreciable assets, written down value of the assets of the undertaking transferred by way of slump sale, determined in accordance with sub-item (c) of item (i) of sub-clause (c) of clause (6) of section 43	₹ 2,05,98,150
(b) In case of other assets, book value of such assets	₹ 27,29,375
(c) Aggregate value of total assets of the undertaking transferred by way of slump sale [(a) + (b)]	₹ 2,33,27,525
(d) Value of liabilities relatable to the undertaking as appearing in the books of account	₹ 3,26,72,160
(e) Net worth of the undertaking	(₹ 93,44,635)

6.1 It is seen from the above that the Net worth of the assessee's undertaking transferred by way of slump sale is negative. The Hon'ble ITAT, Mumbai Special Bench in the case of DCIT vs. Summit Securities Ltd., reported in (2012) 135 ITD 99, has held that, "negative figure of net worth of the undertaking should not be ignored for working out capital gain in case of a slump sale under section 50B of the Income-tax Act, 1961."The Hon'ble ITAT, Mumbai Bench has thus ruled that Negative net worth of an undertaking in the case of slump sale is to be added to the consideration for determining capital gains. In view of this decision of the jurisdictional ITAT, Mumbai Special Bench, the computation of capital gains on slump sale is made as under:-

Sale Consideration	₹ 3,01,00,000
Add: Negative net-worth	(₹ 93,44,635)
Long term capital gains on slump sale u/s 50B of the Act	₹ 3,94,44,635

4.5 It is seen from above that on same set of facts both the appellant as well as AO have been taking varying stance in original assessment and appeal proceedings and in the assessment proceedings under appeal. The appellant has taken plea of 'slump sale' before the then FAA which has not been accepted by him. Then Hon'ble ITAT has set aside the matter with direction to AO to ascertain the factual matrix of the case considering the provisions of section 50C(2). Thereafter, in reassessment and appeal proceedings, the appellant has denied of having made any slump sale but AO has treated it as such, though without giving any reasons/ justification for the same.

4.6 After perusal of entire material on records, relevant provisions of IT Act and keeping in view Court's decisions, the impugned sale of assets, in my considered opinion, is not a slump sale. Though these assets have been sold through registered deed and not through any public auction, but their sale consideration has been arrived at after due consideration of their valuation, mortgaged value, WDV, the Bank's first charge thereon and its involvement at all stages, including the impugned sale, and accompanying factors. This is not found to be a slump sale, to sell at any price, whatsoever, fetched in the market from the first buyer itself who shows any intention/ inclination for such purchase at the price determined by him. Specific valuation, as per its book value, has been assigned to each item of these assets sold by the appellant and resultant capital gains of Rs. 67,72,475/- also been declared in its return by the appellant. Further, the appellant has not sold these assets as a going concern nor the items sold include any liabilities. As per provisions of section 2(42C) of the IT Act. slump sale" means the transfer of one or more undertaking as a result of the sale for a lump sum consideration without value being assigned to the individual assets and liabilities in such sales. What is contemplated by slump sale u/s 50B is transfer of business as a whole. Thus, provisions of both section 2(42C) and section 50B of the Act are not found applicable in case of the appellant treating the impugned sale of assets as slump sale." AO is not found justified in assessing the appellant's income at Rs. 3,28,18.270/- by treating LTCG u/s 50B at Rs.3,94,44,635/- on sale of assets as against shown at Rs 67,72,475/- by the appellant in its return as provisions of section 50B of the IT ACT are not found applicable in the appellant's case. In the appellant's case, it is not found to be a case of sale by lock, stock and barrel."

8. None appeared on behalf of the assessee respondent.

9. The learned Departmental Representative supported the order of the learned CIT(A).

10. Having heard the learned D.R., perused the material available on record and gone through the orders of the authorities below, we find that the learned CIT(A) has not considered the facts and circumstances of the issue properly and thus the learned CIT(A) was not correct in holding that the provisions of section 50B of the Act are not applicable in the facts of the present case. For ready reference, provisions of section 2(42C) and section 50B of the Act are reproduced below:—

Section 2(42C)

"(42C) "slump sale" means the transfer of one or more ²¹[undertaking, by any means,] for a lump sum consideration without values being assigned to the individual assets and liabilities in such ²²[transfer].

Explanation 1.—For the purposes of this clause, "undertaking" shall have the meaning assigned to it in Explanation 1 to clause (19AA).

Explanation 2.—For the removal of doubts, it is hereby declared that the determination of the value of an asset or liability for the sole purpose of payment of stamp duty, registration fees or other similar taxes or fees shall not be regarded as assignment of values to individual assets or liabilities.

²³[*Explanation 3.*—For the purposes of this clause, "transfer" shall have the meaning assigned to it in clause (47);]"

Section 50B

Special provision for computation of capital gains in case of depreciable assets.

50. Notwithstanding anything contained in clause (42A) of section 2, where the capital asset is an asset forming part of a block of assets in respect of which depreciation has been allowed under this Act or under the Indian Income-tax Act, 1922 (11 of 1922), the provisions of sections 48 and 49 shall be subject to the following modifications :—

(1) where the full value of the consideration received or accruing as a result of the transfer of the asset together with the full value of such consideration received or accruing as a result of the transfer of any other capital asset falling within the block of assets during the previous year, exceeds the aggregate of the following amounts, namely :—

(i) expenditure incurred wholly and exclusively in connection with such transfer or transfers;

(ii) the written down value of the block of assets at the beginning of the previous year; and

(iii) the actual cost of any asset falling within the block of assets acquired during the previous year,

such excess shall be deemed to be the capital gains arising from the transfer of short-term capital assets;

(2) where any block of assets ceases to exist as such, for the reason that all the assets in that block are transferred during the previous year, the cost of acquisition of the block of assets shall be the written down value of the block of assets at the beginning of the previous year, as increased by the actual cost of any asset falling within that block of assets, acquired by the assessee during the previous year and the income received or accruing as a result of such transfer or transfers shall be deemed to be the capital gains arising from the transfer of short-term capital assets:

⁹⁹ [Provided that in a case where goodwill of a business or profession forms part of a block of asset for the assessment year beginning on the 1st day of April, 2020 and depreciation thereon has been obtained by the assessee under the Act, the written down value of that block of asset and short-term capital gain, if any, shall be determined in such manner as may be prescribed¹.]

² [Explanation.—For the purposes of this section, reduction of the amount of goodwill of a business or profession, from the block of asset in accordance

with sub-item (B) of item (ii) of sub-clause (c) of clause (6) of section 43 shall be deemed to be transfer.]

11. In this appeal, the learned CIT(A) simply allowed the appeal of the assessee without giving proper reasons. We, therefore, reverse the order passed by the learned CIT(A) and allow the grounds raised by the Revenue.

12. In the result, appeal filed by the Revenue is allowed.

Order pronounced in the open Court on 08/08/2024

Sd/-
K.M. ROY
ACCOUNTANT MEMBER

Sd/-
V. DURGA RAO
JUDICIAL MEMBER

NAGPUR, DATED: 08/08/2024

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The PCIT / CIT (Judicial);
- (4) The DR, ITAT, Nagpur; and
- (5) Guard file.

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

Sr. Private Secretary
ITAT, Nagpur