

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH "A" KOLKATA**

Before **Shri Waseem Ahmed, Accountant Member** and
Shri S.S.Viswanethra Ravi, Judicial Member

ITA No.79/Kol/2013 & C.O. No.27/Kol/2013 (a/o ITA No.79/Kol/2013) Assessment Year :2009-10

DCIT, Circle-7, P7, Chowringhee Square, 5 th Floor, Room No.15, Kolkata-700 069	V/s.	Bhagirath Agarwal, Rajkamal Building, 1 st Floor, 13 Camac St.Kolkata-700 017
Shri Bhagirath Agarwal Raj Kamal Building, 1 st Floor, 13, Camac Street Kolkata-700 017 [PAN No.ACZPA 4354 Q]	V/s.	DCIT, Circle-7, Kolkata
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

आवेदक की ओर से/By Assessee	Shri S.K.Tulsiyan, Advocate
राजस्व की ओर से/By Respondent	Shri Sudipta Guha, JCIT,SR-DR
सुनवाई की तारीख/Date of Hearing	29-04-2016
घोषणा की तारीख/Date of Pronouncement	27-05-2016

आदेश /O R D E R

PER Waseem Ahmed, Accountant Member:-

This appeal by the Revenue and Cross Objection (CO) are arising out of order of Commissioner of Income Tax (Appeals)-VIII, Kolkata in appeal No. 259/CIT(A)-VIII/Kol/11-12 dated 12.10.2012. Assessment was framed by DCIT,Circle-7, Kolkata u/s 143(3) of the Income Tax Act, 1961 (hereinafter

referred to as 'the Act') vide his order dated 30.12.2011 for assessment year 2009-10.

Shri Ravi Tulsiyan, Ld. Authorized Representative appearing on behalf of assessee and Shri Rajat Kumar Kureel, Ld. Departmental Representative appearing on behalf of Revenue.

First we take up Revenue's appeal

2. Common ground raised by Revenue is that Ld. CIT(A) erred in deleting the addition made by Assessing Officer u/s.50B of the Act by holding the tea estate as slump sale.

3. Facts in brief are that assessee in the present case is a partnership firm and owns two tea estate namely – Suboang & Hatticherra Tea Estates. During the year assessee has sold both the tea estates to M/s Prithvi Tea Co. Pvt. Ltd. for a total consideration of ₹3,58,66,118/-. The tea estates were comprised of land and plantations, common factory building and plant and machinery. The buyer M/s Prithvi Tea Co. Pvt. Ltd. paid an amount of ₹ 2.83 crores and for remaining balance, the buyer has taken over the certain liabilities. As a result of sale there arose capital gain which was claimed as exempted by assessee. During the course of assessment proceeding, AO observed that the tea estates were sold as a whole and as going concern. Therefore, the provision of Sec. 50B of the Act is attracted to this transaction. Accordingly, AO sought clarification from the assessee for the applicability of the provision of Sec.50B of the Act. In compliance to the notice, assessee submitted that all the assets were sold after assigning the value to the individual assets including specified liability which does not include any market liability or liabilities arising out of any loan or advance that might have obtained by vendor running the tea estate. However, AO disregarded the claim of assessee by holding that tea estates were sold as going concern. Therefore, provision of Sec.50B of the Act is very much applicable to the

instant transaction and accordingly made addition of capital gains to the total income of assessee.

3. Aggrieved assessee preferred an appeal before Ld. CIT(A) who has deleted the addition made by AO by observing as under:-

“This ground of appeal of the appellant is directed against the action of the AO in applying the provisions of section 50B of the Income Tax Act, 1961 to the transaction involving sale of Subong and Hitticherra Tea Estates when the same was not a slump sale as shall be evident from memorandum of sale dated 11.08.2008.

After carefully going through the submission of the appellant along with the case laws relied upon and detailed furnished, perusing the facts of the case including the impugned assessment order and the remand report, the relevant provisions of law and the other materials brought on record, this 1st revised Ground of the appeal regarding applicability of section 54B of the Act to the case of the appellant is decided in favour of the appellant is decided in favour of the appellant for the following reasons:-

(i) As per the memorandum of sale dated 11.08.2008 the appellant has transferred the following assets of his two tea estate to Prithvi Tea Company P ltd for Rs.3,58,66,118/-:-

<i>Land & Plantation</i>	<i>Rs.2,83,00,000/-</i>
<i>Factory Building</i>	<i>Rs. 27,00,000/-</i>
<i>Plant & Machineries</i>	<i><u>Rs. 48,66,118/-</u></i>
<i>Total</i>	<i>Rs.3,58,66,118/-</i>

The item wise detail of assets transfer is given in 1st & 2nd Schedule of the memorandum of sale. The appellant has also transferred the liabilities mentioned in the memorandum of sale and accordingly the net consideration was arrived at Rs.2,83,00,000/-.

The appellant has not transferred all the assets of the Tea Estate (undertaking) but has retained some of the assets mentioned in clause 1 and 2.1 of the memorandum.

(ii) That section 2(42C) of the Act define slump sale as under:-

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

(iii) The Hon'ble Supreme Court in the case of CIT v. Artex Manufacturing Co (1997) 227 ITR 260 has held that in case if individual value has been assigned to assets transferred to the buyer then it is not the case of sump sale and if no individual value has been assigned to the assets than it is a case of slump sale. Similarly view has been taken by the Hon'ble Supreme Court in the case of PNB Finance (2008) 307 ITR 75 and Bombay High Court in the case of Premier Automobiles Ltd. v. ITO (2003) 264 ITR 193 and CIT v. Polychem (2012) 343 ITR 115.

(iv) In the case of the appellant the value has been assigned to the individual assets in the memorandum of sale dated 11.08.2008 hence the sale transaction between the appellant and Prithvi Tea Company P Ltd cannot be termed as slump sale and accordingly this ground of appeal is decided in the favour of the appellant.

(v) During the course of hearing the Ld AR has raised an alternate plea that even if sale to M/s Hindustan Tea Company is considered as slump sale than also in view of section 2(14)(iii) of the Act, the value of agricultural land can't be taxes, is not adjudicated since i am holding that the sale of Tea Estates by the appellant to M/s Hindustan Tea Company is not slump sale."

Being aggrieved by this order of Ld. CIT(A) Revenue is in appeal before us.

4. Before us Ld. DR submitted that the impugned tea estate sold as going concern and as is where as basis. As per agreement, assessee is not assigned the individual value to the assets of the tea estates and it was sold for a lump sum consideration. Ld. DR stated that Ld. CIT(A) has deleted the addition made by Assessing Officer after having reliance on the memorandum of sale which was not produced by assessee while framing of assessment proceedings and vehemently relied on the order of AO.

On the other hand, Ld. AR submitted two sets of paper book which are running at pages from 1 to 81 and 1 to 133 respectively and filed copy of this Tribunal's order. Ld. AR submitted that tea estates were transferred to the buyer for assigning the individual value to all the assets of the tea estates. The Ld. AR drew our attention on pages 5 to 7 of the paper book where the

individual value of the asset was recorded. He further submitted that only specified liabilities were taken over by the buyer so the provision of Sec.50B of the Act is not applicable to the instant case. On rejoinder Ld. DR stated that memorandum of sale was not produced before AO at the time of framing assessment. Contrary to that Ld. AR submitted that same was made available to AO at the time of remand report and he relied on the order of Ld. CIT(A).

5. We have heard rival contentions and perused the materials available on record. We find that assessee has sold two tea estates as going concern but after assigning the value to the individual asset and without transferring all the liabilities. AO treated the aforesaid transaction as lump sum sale and made addition to the total income of assessee. Now the question before us arose is as to whether the instant transaction amounts to slump sale or not. We find that similar issue was also decided by this Tribunal in **ITA No.1233/Kol/2008** dated 06.11.2015 in the case of *DCIT v. M/s Tongani Tea Co. Ltd.* wherein Tribunal has decided the issue in favour of assessee and against the Revenue and relevant extract is reproduced below:-

“17. In view of the above facts and circumstances of the case, we find that Section 50B of the Act provides that any profit or gain arising from the slump sale effected in the previous year shall be chargeable to income-tax as capital gain 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. Further, Section 2(42C) of the Act defines 'slump sale' as a transfer of one or more undertakings as a result of the sale for a lump sale consideration without values being assigned to the individual assets and liabilities in such sales. The Explanation I to section 2(42C) of the Act further provides that 'undertaking' shall have the meaning assigned to it in the Explanation I of clause (19AA) of section 2 of the Act, whereby an undertaking means, in an inclusive sense, 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. The Explanation 2 to section 2(42C) of the Act further provides 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.

18. The admitted facts of the case are that the assessee company carried on business of growing and manufacture of tea, which owned two tea gardens by the names - Tongani Tea Estate and Nagrijuli Tea Estate. According to AO, out of these two tea estates, the assessee by an agreement dated 14.09.1999 sold Nagrijuli Tea Estate, to Russel Tea Ltd. for a total value of Rs.18 cr. Ld. Counsel for the assessee Sh. Agarwalla first of all narrated the facts that according to agreement dated 14.09.1999 between the assessee and Russel Tea Ltd. sale consideration paid by vendee was for specific assets mentioned in the agreement and which were purchased/acquired for specific consideration. We find that this estate had been sold on the basis of detailed agreement executed between the vendor and the vendee. The total consideration stipulated for the transfer of the estate had been split over different assets, both movable and immovable enumerated in different schedules and annexure. The assessee had assigned specific consideration/value for the tea estate as such along with the standing trees. The consideration for the extent of land had been specifically mentioned. Thereafter, the assessee had listed out every item of, movable property transferred to the buyer and value had been assigned to those movable assets. The assessee had not transferred the estate with all the assets and liabilities. All the financial assets available to the assessee up to the date of the transaction were not transferred as per the agreement but had been retained by the assessee. The assessee had assumed all the liabilities including the statutory liabilities till the date of transfer. Therefore, it could not be said that the transfer was a slump sale only for the reason that the rubber estate was transferred to the buyer as a 'going concern'.

19. Even though the expression "**going concern**" is a functional qualification as far as the estate is concerned, the said functional qualification was not sufficient enough to decide the exact legal character of the transaction, for the purpose of income-tax assessment. Even though, the workers on the rolls of the assessee had also been absorbed by the buyers along with the estate but that did not change the character of the transaction. It was not easy to retrench all the experienced workers only for the reason that the property had changed hands. Retrenchment of the workers would create serious labour problems and it would not be possible either for the assessee or for the buyer to close the contract without having a clear understanding on the engagement of labour deployed. Therefore, the agreement with the buyer that the new owners would absorb the existing labour force was not a salient feature to decide whether the sale was a slump sale or not. The meaning of the expression '**going concern**' has to be understood in the light of the peculiar nature of the property transferred in the instant case. What was transferred in the instant case was a tea estate. The activities in a tea plantation/estate are continuous and un-interrupted

ones and tapping operations have to be carried out on a regular basis and all other activities have to be carried out without any interruption. Therefore, by nature of the activities of the Tea estate itself, it is a 'going concern'. Therefore, while adding an expression in the agreement that the Tea estate was transferred as a going concern, the purpose was only to refer to the estate of affairs and to an existing fact and not to create any legal proposition in the context of the sale deed. Therefore, the AO and CIT(A) had been carried away by the commercial expression reflected in the agreement like 'going concern'. Therefore, the said expression is not a test to be relied on to decide the exact nature of the transaction for the purpose of income-tax matters.

20. In the instant case, the items sold did not include liabilities. The sale agreement did not include investments and deposits. Accordingly, all the investments, deposits, receivables, stock and such other current assets in the form of financial and other assets remained with the assessee-company along with the liabilities. Only those assets which were enumerated in the Schedules and Annexure were sold to the vendee. Therefore, the instant case was one of split sale and not a case of slump sale. Accordingly, we are of the view that, in the instant case, the assessee had seen sold Tea Estate excluding cash in hand, stock in hand receivables, finance, assets and liabilities. It was not a case of sale by lock, stock and barrel. The assessee had made conscious exclusions. The assets sold by, the assessee had been listed out in different Schedules and Annexures. The consideration had been specifically assigned to the sale of immovable property by way of Tea estate. Separate consideration had been assigned to the sale of movable properties including vehicles and properties. Therefore, it was not a case of slump sale for a lump sum amount of consideration. Further, as all the assets and liabilities had not been sold as per the agreement, this was not a slump sale as construed in section SOB of the Act. Accordingly, in view of the above facts of the case and position of law discussed in various case laws of different Hon 'ble Courts, we are of the view that sale of Nagrijuli Tea Estate was not a slump sale within the meaning of sec. 2(42C) of the Act read with section SOB of the Act and, therefore, not even assessable to capital gains. Accordingly, we uphold the order of CIT(A) and this issue of revenue's appeal is dismissed."

Ld. AR further submitted that tea estates comprising of land which is agricultural land within the provision of 2(14) of the Act. Therefore the same cannot be taxed under the provision of the Act. In rejoinder, Ld. DR submitted that the land does not fall under the category of agricultural land as the tea

estates were sold as “**going concern**”. From the facts of the present case, we find that on the exactly identical issue this Tribunal decided in favour of assessee and against the Revenue in the case of *M/s Tongani Tea Co. Ltd.* (supra). Accordingly, respectfully following the precedents, as above, we uphold the order of Ld. CIT(A) and ground raised by Revenue is dismissed.

6. In the result, Revenue’s appeal is dismissed.

Coming to assessee’s CO

7. The AR of the assessee stated that if the Revenue’s appeal was rejected the CO would become infructuous because it was filed to support the order of Ld. CIT(A). We have already dismissed the Revenue’s appeal, therefore, CO of assessee becomes infructuous.

8. In the result, appeal of Revenue is dismissed and that of assessee’s CO is dismissed as infructuous.

Order pronounced in the open court 27/05/2016

Sd/-
(S.S.Vishwanethra Ravi)
(Judicial Member)
Kolkata,

Sd/-
(Waseem Ahmed)
(Accountant Member)

*Dkp

दिनांक:- 27/05/2016 कोलकाता ।

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. आवेदक/Assessee-Bhagirath Agarwal, Rajkamal Building, 1st Floor, 13, Camac St. Kol-17
2. राजस्व/Revenue-DCIT, Circle-7, P7, Chowringhee Square, 5th Floor, Room No.15, Kol-69
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

/True Copy/

By order/आदेश से,
उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता ।