

Transfer as a 'Going Concern' not determinative of 'Slump Sale'

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In brief

Recently, the Kolkata Income Tax Appellate Tribunal ('Tribunal') held that where only specified assets of an undertaking were sold, it could not be termed as Slump Sale in accordance with section 50B of the Income-tax Act, 1961 ('the Act') merely because the agreement of transfer referred to transfer of a 'Going Concern'.

In detail

Facts

During assessment Year 2000-01, the taxpayer¹ sold one of its tea estates ('Vendor') to another company ('Vendee'). The taxpayer executed a sale agreement giving a break-up of consideration between various asset categories. Accordingly, the taxpayer treated this as piecemeal sale of assets.

While dealing with taxability of gains arising on transfer of the assets, the taxpayer transferred gain on sale of land to agricultural development reserve without offering it to tax; and offered the gain on sale of plant and machinery as short term capital gain in its return of income. However, the assessing officer ('AO') proposed an addition to the taxpayer's total income on the ground that sale of the tea estate on a 'Going Concern' basis was a slump sale within the meaning of section 2(42C) read with section 50B of the Act, taxable as capital gains.

Aggrieved, the taxpayer filed an appeal before the CIT (Appeals) who ruled in its

favour and noted the following:

- net worth of the undertaking could not be computed as envisaged under section 50B
- no intangible assets like licenses, quotas, and brand name were transferred;
- there was no continuity in business or management of the tea garden before or after the sale;
- sale consideration was apportioned between different fixed asset categories.

The revenue preferred an appeal before the Tribunal.

Issues before the Tribunal

- Could such transfer of tea estate as a going concern be treated as a slump sale under section 50B of the Act?

Taxpayer's contentions

- Sale consideration paid by vendee was for specific assets mentioned in the agreement.

- To demonstrate that the transaction was not in the nature of slump sale, the taxpayer emphasised various clauses of the agreement. In one clause, it was agreed that the vendor would bear all liabilities prior to date of agreement, including statutory liabilities such as gratuity, cess on green leaves, sales tax, excise duty, etc..
- Entries regarding transfer and purchase of fixed assets were passed in the respective books of vendor and vendee based on a valuation report.
- The taxpayer argued that business undertakings always consist of immovable and movable, tangible and intangible, fixed and current assets which comprise various rights/ obligations/ corporeal and other rights. In a slump sale, not only were the assets of the undertaking transferred, the corresponding liabilities too were transferred.

¹ TS-647-ITAT-2015 (Kol)

- Some current assets and current liabilities which were part of the tea estate were not transferred. These included stock of stores and spares, stock of finished tea, sundry debtors, cash and bank balances, loans, advances, deposits, and recoverable sundry creditors for goods and services.
- The taxpayer relied on various case law² in support of its contention. In the case of *Harrisons Malayalam*³, the taxpayer had sold one of its rubber estates with standing trees and all other paraphernalia, as a going concern. The Tribunal ruled that the surplus arising out of sale of estate was not taxable as capital gain under section 50B of the Act, observing that:
 - The total consideration stipulated for transfer was split over different assets;
 - Entire assets and liabilities of the undertaking were not transferred
 - All liabilities till the date of agreement were to be borne by the transferor
 - Though the existing workforce was transferred, it was not a salient feature to decide whether the sale was a slump sale

Revenue's contentions

- It was not a piecemeal sale of assets, or part of assets, of a tea estate, but the parties

mutually agreed to break up the consideration between various asset categories.

- The tea estate was sold as a going concern, on an as-is-where-is basis, free from all encumbrances, which clearly indicated that the transfer was in the nature of a slump sale in view of section 50B of the Act.

Tribunal's ruling

- The following specific aspects resulted in the tribunal concluding that the transfer was not a slump sale:
 - The taxpayer had not transferred the estate with all assets and liabilities;
 - All financial assets available to the taxpayer up to the date of transaction were not transferred as per the agreement, but retained by the taxpayer.
 - The taxpayer had assumed all liabilities till the date of transfer
 - Though the entire workforce was absorbed by the new owner, it was not decisive of whether the sale was a slump sale.
- Though the expression, 'Going Concern' was a functional qualification as far as the estate was concerned, it was insufficient to decide the legal character of the transaction. The meaning of 'Going Concern' had to be understood in the light of the peculiar nature of the property transferred.

The takeaways

- The Tribunal has reiterated the principle that even if transfer of specific assets constitutes a 'Going Concern', it may not still qualify as a 'slump sale' within the meaning of section 50B of the Act. It is relevant to analyse whether the business is being transferred along with all necessary assets and liabilities which are an integral part of the undertaking.
- Accordingly, to qualify as a piecemeal or itemised sale, the following important factors should be considered:
 - Clearly describing the intent to transfer specific assets only;
 - Assigning specific value to individual assets based on an expert valuer's report;
 - Appropriate disclosure of all assets and liabilities that are not being transferred.

Let's talk

For a deeper discussion of how this issue might affect your business, please contact:

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² CIT v. Mugneeram Bangur & Co. (1965) 57 ITR 299 (SC), Premier Automobiles Limited v. ITO (2003) 264 ITR 193 (Bom)

³ *Harrisons Malayalam Ltd v. ACIT* (2009) 32 SOT 497 (Cochin Tribunal)

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