* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **ITA No.1069 of 2007**

% DECISION DELIVERED ON: DECEMBER 24, 2010

Commissioner of Income Tax . . . Appellant

through : Ms. Prem Lata Bansal, Advocate.

VERSUS

ECE Industries Limited . . .Respondent

through: Mr. Ajay Vohra, Advocate with Ms. Kavita Jha, Advocate and Mr. Somnath Shukla, Advocate.

CORAM :-
HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE SURESH KAIT

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J. (ORAL**)**

1. For orders, see ITA No.417 of 2007.

(A.K. SIKRI)
JUDGE

(SURESH KAIT)
JUDGE

DECEMBER 24, 2010
pmc

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **ITA No.417 of 2007**

with

ITA No.1069 of 2007

% DECISION DELIVERED ON: DECEMBER 24, 2010

1) ITA No.417 of 2007

Commissioner of Income Tax . . . Appellant

through : Ms. Prem Lata Bansal, Advocate.

VERSUS

ECE Industries Limited . . .Respondent

through: Mr. Ajay Vohra, Advocate with Ms. Kavita Jha, Advocate and Mr. Somnath Shukla, Advocate.

2) ITA No.1069 of 2007

Commissioner of Income Tax . . . Appellant

through : Ms. Prem Lata Bansal, Advocate.

VERSUS

ECE Industries Limited . . .Respondent

through: Mr. Ajay Vohra, Advocate with Ms. Kavita Jha, Advocate and Mr. Somnath Shukla, Advocate.

CORAM :-
HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE SURESH KAIT

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J. (ORAL)

1. Between common parties, identical issues arise for determination in these two appeals; *albeit* for two assessment years, viz., Assessment Years 1999-2000 and 2000-01. ITA 1069 OF 2007 relates to Assessment Year 1999-2000 and since it is prior in point

of time, we have taken note of the facts of this appeal understand the issues involved and to answer the same.

2. For this year, the respondent assessee filed the return declaring a loss of ₹4,70,40,396. During the assessment proceedings, the Assessing Officer (AO) noticed that the assessee had sold its Lamp Division at Sonepat to M/s. Osram India (P) Ltd. for ₹42.50 crores on 09.11.1998. In the computation of capital gain, the assessee showed cost of Lamp Division at ₹59.33 crores and declared the long term capital loss at ₹16.83 Crores to be adjusted against the profit for the current year. The AO invoked the provisions of Section 50 of the Income Tax Act (hereinafter referred to as 'the Act') and issued a show cause notice to the assessee to explain as to why the capital gain earned on sale of Lamp Division be not treated as short term capital gain under Section 50(2) of the Act. The assessee submitted that the Sonepat Unit was sold as a going concern vide agreement dated 20.05.1998 against lump sum consideration of ₹42.50 Crores as consideration for all the tangible and intangible assets as well as contracts and rights sold and transferred to M/s. Osram India (P) Ltd. It was contended that no part of the price of ₹42.50 Crores was attributable to any particular asset including any depreciable asset and therefore provisions of Section 50(2) were not attracted. It also contended that it was an old concern for more than 36 months, its transfer would give long term capital gain. The assessee also relied on ***Commissioner of Income-Tax, Gujarat v. M/s. Artex Manufacturing Co.*** **[227 ITR 260 (SC)]** ***Sarabhai M. Chemicals Private Ltd. and Telerad Private Ltd. v. P.N. Mittal, Competent Authority, Inspecting Assistant***

Commissioner of Income-tax, Acquisition Range-II and Ar

[126 ITR 01 (Guj)]. However, the AO was not convinced with the contentions made by the assessee and observed that the case law relied upon by the assessee was distinguishable. He held that the capital gain on depreciable asset was to be treated as short term capital gain and required the assessee to quantify the consideration received by it for sale of tangible and intangible assets but the assessee did not furnish the same. Accordingly, he took the written down value (WDV) of the assets of Lamp Division at ₹5,15,75,131 as on 01.04.1998 declared by the assessee out of which he segregated the value of land and indexation was applied. Consequently, he computed the short term capital gain at ₹36,89,23,393.

3. Aggrieved by this order, the assessee filed an appeal before the CIT(A) who confirmed the order passed by the AO holding that the assessee had merely made a "Unit Sale" i.e. sale of its Lamp Division which was a part of its overall business concern and that the assessee still continued as a business concern. The assessee was not treating the Sonepat Unit as a separate and independent business but was treating it as a part of the integrated whole business and therefore, the sale of Lamp Division was not in the nature of a "slump sale" as a going concern. The CIT(A) further observed that the judgment of the Supreme Court in the case of ***Commonwealth Trust Ltd., Calicut, Kerala v. Commissioner of Income-tax Kerala II, Ernakulam*** **[228 ITR 01]**, squarely applied to the present case in which it was held that the provisions of Section 50 of the Act would apply to sale of depreciable assets. The CIT(A) also rejected the contention of the

assessee that no break-up of sale consideration between tangil and intangible asset was possible and even if the sale was to be treated as slump sale, the gain would be taxable as laid out by the Supreme Court in the case of ***Commissioner of Income-tax, Gujarat II v. B.M. Kharwar*** [**72 ITR 603]** and in the case of ***Commissioner of Income-Tax, Bombay City v. Bipinchandra Maganlal & Co. Ltd.*** [**41 ITR 290].**

4. Aggrieved by the order of the CIT (A), the assessee filed an appeal before the Income Tax Appellate Tribunal (hereinafter referred to as 'the Tribunal'), who held that the transaction of sale of Sonepat Unit by the assessee was a transaction in the nature of slump sale of a going concern as a whole. Since the Sonepat unit was a capital asset within the meaning of Section 2(14) of the Act, the profit arose on transfer of such capital asset is to be treated as long term capital gain. Neither the provisions of Section 50 nor the provisions of Section 50B shall be attracted in the present matter. Rather provisions of Section 45 and 48 shall be applied. Accordingly, the Tribunal directed the AO to recomputed the capital gain in the light of observations made by the Tribunal after providing full opportunity to the assessee in accordance with law.

5. In support of its view, the Tribunal in Para 35 of its order has given as many as 17 reasons, which will be taken note of at an appropriate stage. While remanding the case back to the AO, directions to undertake the exercise afresh on the lines suggested by the Tribunal are stated as under:

> "63. In view of the above, we accept the contentions raised on behalf of the assessee in support of ground numbers 1 to 8 of this appeal, referred to above, and held that the transaction of sale of Sonepat unit is a transaction

in the nature of slump sale of a going concern as a whole. The transfer of Sonepat undertaking is, therefore, to be treated as a slump sale and since the transfer of this undertaking is to be treated as a transfer of capital asset in view of various authorities, referred to above, and also in view of the definition contained under section 2(14) of the Income Tax Act, the long term capital gains has to be computed in relation to transfer of this unit. The assessee has given a computation of capital gain which has been reproduced by us in para 22 of this order. Since neither the Assessing Officer nor ld. CIT (A) have undertaken the exercise of computation of long term capital gain as per provision of section 45 and 48 of Income Tax Act in our view, this exercise has to be undertaken afresh.

64. On the basis of our observations and findings recorded above, we reverse the view taken by the departmental authorities and hold that neither the provisions of section 50 nor the provisions of section 50B shall be attracted in the present matter. Rather the provisions of section 45 and 48 shall be applied. We, therefore, set aside the finding of the ld. CIT (A) and after holding that the impugned sale transaction is to be treated as transaction of slump sale, we direct the Assessing Officer to recomputed the capital gain as per the relevant provisions of law and in the light of our observations made above. While doing so, the Assessing Officer shall also take into consideration the computation of capital gain furnished by the assessee which has been reproduced above after due verification and shall decide the issue after providing full opportunity of being heard to the assessee and as per law."

6. Challenging this view taken by the Tribunal and the nature of directions issued consequent thereto by the Tribunal, present appeals are admitted on the following substantial questions of law:

"(1) Whether ITAT was correct in law in holding that the profit arose on transfer of Sonepat Unit by the assessee was to be treated as long term capital gain and not the short term capital gain as treated by the Assessing Officer?

(2) Whether ITAT was correct in law in holding that the transaction of sale of Sonepat Unit was a transaction in the nature of slump sale of a going concern or its was a transaction of sale of depreciable asset?

(3) Whether provisions of Section 50 were applicable to the transfer of sale of Sonepat Unit by the assessee?"

7. As the counsel for the parties were ready to argue the matter at that point of time, simultaneously with the admission of the

appeals, we heard the counsel for both the parties at length the aforesaid questions.

8. It is clear from the questions of law as formulated, the dispute, as to whether profits which have accrued to the assessee on the transfer of Sonepat Unit are to be treated as long term capital gain or short term capital gain, whereas the Revenue holds that these profits are in the realm of short term capital gain. Answering to this depends on the question as to whether transaction of sale is to be treated in the nature of slump sale and applicability of Section 50(2) of the Act, in the process. This would show that though three questions of law are framed, they are all interconnected and overlapping and the discussion of one aspect will have bearing on the other. According to the learned counsel for the Revenue, the Lamp Division at Sonepat unit was sold for ₹42.50 Crores on 09.11.1988, i.e., during the financial year 1998-99. Lamp Division was having a total WDV of assets amounting to ₹5.15 Crores as on 01.04.1998. The index cost was worked out as ₹59.33 Crores and since unit was sold at ₹42.50 Crores, in the return of income filed for assessment year 1999-2000 the assessee had claimed long term capital loss 16.83 Crores, which the assessee wanted to be adjusted against the profits for the current year. The AO was of the opinion that as per Section 50 of the Act, which is the special provision for computation of capital gain in the case of depreciable assets, the sale of Lamp Division was treated as capital gain arising out of transfer from depreciable asset and the capital gain was to be calculated under the said provisions. The AO, on the other hand, had submitted that the provisions of Section 50 are not applicable as the Sonepat

unit was sold as going concern or as a slump sale and therefo no part of consideration of ₹42.50 Crores was attributable to any particular asset including depreciable assets. The AO had not accepted this contention and held that Section 50 was applicable and he, therefore, computed short term capital gain at ₹36.89 Crores on the sale of the said division, which is as under:

"COMPUTATION OF SHORT TERM CAPITAL GAIN OF SALE OF LAMP DIVSIION AS PER SECTION 50[2]

Sale consideration received on transfer of lamp division at Sonepat	₹ 42,50,00,000/-	
WDV of lamp division	₹ 5,15,75,131/-	
Less: Value of land	₹ 17,93,417/-	
	₹ 4,97,81,714/-	
Add: Indexation of land:		
1793417x351 / 100	₹62,94,893/-	₹5,60,76,607/-
Capital Gain:		₹36,89,23,393/-"

9. Learned counsel for the Revenue submitted that whether it was a slump sale or not was of no consequence and therefore, various case laws cited by the assessee in support of this proposition were not applicable. The learned counsel referred to the judgment in the case of ***Commonwealth Trust Ltd., Calicut, Kerala Vs. Commissioner of Income-tax Kerala II, Ernakulum*** **[228 ITR 1]** for this purpose. She also submitted that the assessee had itself taken the position that it was a case of long term capital gain which was clear from the ground of appeal before the Tribunal and in case of slump sale, no question of any capital gain would arise as held in ***Brindavan Beverages Limited, rep. by its Managing Director, S.N. Ladhani Vs. The Deputy Commissioner of Income Tax*** **[321 ITR 197]**.

10. Mr. Ajay Vohra, learned counsel appearing for the assessee, the other hand, highlighted the fact that the entire Sonepat division was sold as a going concern – lock, stock and barrel for slump consideration – and therefore, it was a slump sale as per the provisions of Section 50B of the Act. He also argued that the undertaking was to be treated as different from other assets and where entire undertaking is sold, no value was attributable to any particular assets including any depreciable assets. The learned counsel referred to the agreement of sale with M/s. Osram India Pvt. Ltd. to which the aforesaid unit was sold and this clearly reveals that the entire unit was to be sold in a blocked manner. He drew the attention to the preamble of the agreement discussing the intention of the party, which was in the following term:

> "WHEREAS ECE intends to sell all its lamp activities, as a going concern, namely, the lamp manufacturing activities in Sonepat and the sales activities for lamps according to the terms and conditions of this agreement to OSRAM; and
>
> WHEREAS OSRAN intends to buy from ECE all the lamp activities, namely, the lamp manufacturing activities in Sonepat and the sales activities for lamps according to the terms and conditions of this Agreement."

11. He also pointed out to the following portion of the supplemental sale and purchase agreement to buttress his submission:

> "I. Chapter – 4 of the Principal Agreement shall be amended to read as under:-
>
> The total purchase consideration of all the tangible and intangible assets as well as the contracts and rights to be sold and transferred according to Chapter 1, 2 and 3 above as well as any goodwill, know-how or benefit connected therewith shall amount to
>
> INR 425 MILLION."

12. The learned counsel also referred to the resolution passed in the General Body Meeting of the assessee company wherein

resolution of the Board of Directors passed on 28.01.1998 w adopted. This resolution was the following effect:

> "that the company be and is hereby authorized to sell/dispose off and/or transfer the Lamp Division of the company at Sonepat as a going concern to M/s. OSRAM India Ltd. for a consideration of ₹42.5 crores subject to verification of assets by the buyer. The transfer of assets inter alia will include Land & Building, Plant and Machinery – both immovable and movable, Furniture/Fixtures, Fittings, office Equipments, Computers, Vehicles and all other movable and balance intangible assets."

13. His submission was that in the light of the aforesaid facts appearing on record, the learned Tribunal had rightly appreciated that the provisions of Section 50 were not attracted and instead Section 50B was applicable. Leaned counsel pressed his strong reliance upon the reasoning given by the Tribunal and also pressed into service various judgments which are taken note of the Tribunal in this behalf. Particular reference was made to the following judgments:

(1) ***R.C. Cooper*** Vs. ***Union of India*** [AIR 1970 SC 564];

(2) ***Premier Automobiles Ltd.*** Vs. ***Commissioner of Income Tax*** **[264 ITR 193 (Bom)];**

(3) ***Commissioner of Income Tax*** Vs. ***Max India Ltd.*** **[319 ITR 68 (P & H)]**

(4) ***Commissioner of Income Tax*** Vs. ***Narkeshwari Prakashan Ltd.*** **[196 ITR 438 (Bom.)]**

14. We have given our due consideration to the aforesaid submissions made by counsel for the parties on either side. Before we embark on the discussion on the issue that qua for consideration and deal with our comments, we deed it proper to take note of the relevant statutory provisions. Chapter IV which deals with 'Computation of

Total Income' starts with Section 14 which delineates 'Heads Income'. These 'heads of income' are thereafter categorized from various parts, i.e., from (A) to (F). Income arising out of capital gains is one such head discussed in (E) starts from Section 45 and goes up to Section 55A of the Act. Section 45 defines capital gains and sub-section (1) thereof reads as under:

> "**Section 45 (1)**
>
> (1) Any profits or gains arising from the transfer 737 of a capital asset effected in the previous year shall, save as otherwise provided in sections 54, 54B, 54D, 54E, 54EA, 54EB, 54F, 54G and 54H be chargeable to income-tax under the head "Capital gains", and shall be deemed to be the income of the previous year in which the transfer took place.
>
> (1A) Notwithstanding anything contained in sub-section (1), where any person receives at any time during any previous year any money or other assets under an insurance from an insurer on account of damage to, or destruction of, any capital asset, as a result of - (i) Flood, typhoon, hurricane, cyclone, earthquake or other convulsion of nature; or
>
> (ii) Riot or civil disturbance; or
>
> (iii) Accidental fire or explosion; or
>
> (iv) Action by an enemy or action taken in combating an enemy (whether with or without a declaration of war), then, any profits or gains arising from receipt of such money or other assets shall be chargeable to income-tax under the head "Capital gains" and shall be deemed to be the income of such person of the previous year in which such money or other asset was received and for the purposes of section 48, value of any money or the fair market value of other assets on the date of such receipt shall be deemed to be the full value of the consideration received or accruing as a result of the transfer of such capital asset.
>
> Explanation. - For the purposes of this sub-section, the expression "insurer" shall have the meaning assigned to it in clause (9) of section 2 of the Insurance Act, 1938 (4 of 1938)."

15. Thus broadly speaking when profits or gains arise from the transfer of capital asset effected in the previous year, these profits are chargeable in income tax under the head 'Capital

whether or not effected in his business or profession. Certain assets are, however, specifically excluded from the definition of capital asset and these are:

(a) Any stock in trade simply stocks or raw material held for the business or profession;

(b) Presently, agricultural land in India (excluding land situates at certain places specified in the provision).

16. Special provisions are made for computation of capital gain in certain circumstances. We are concerned herein with two such events and to decide as to whether which of the two is applicable. First stage is provided in Section 50 which deals with computation of capital gains in case of depreciable assets. Other special provision is contained in Section 50B which provides for computation of capital gains in case of slump sale. We may point out at this stage that insofar as the AO is concerned, he had only considered the Section 50 of the Act and held that to be applicable. While doing so, he had also observed that the assessee had not furnished the details of consideration received on loan and therefore, capital gain was computed on the block of assets as a whole. However, he neither considered the conveyance deeds, relied upon by the assessee, nor on the detailed written submissions of the assessee, arguing that Section 50 of the Act was not applicable. The CIT(A), no doubt, examined these documents and the submissions of the assessee. He, however, held that Section 50 was applicable in case of depreciable assets and rejected the submission of the assessee about the applicability of Section 50B of the Act on the ground that this provision came into effect only from 01.04.2000, i.e.,

Assessment Year 2000-01. The Tribunal, on the other hand, h that Section 50 would not be applicable in the instant case, as it was not a case of transferring depreciable asset, but for transferring the entire unit as a whole and the sale consideration settled between the parties was not only the depreciable assets but for all intangible or tangible assets including goodwill, licenses and liabilities. Even the stamp duty for transferring the land and building was part of sale consideration, as the same was to borne out by the transferring. The sale of Sonepat Unit was thus, a composite sale and therefore, it was a case of slump sale. Detailed reasoning as provided by the Tribunal in this behalf are as under:

> "(i) From the terms and stipulations contained in the agreement and the supplementary agreement as well as on the basis of certificate of possession, referred to above, the intention of the parties to sale is clearly decipherable. This intention was to have the business sold as a going concern. On transfer, the assessee transferred the entire undertaking in its working condition as a going concern and the transferee acquired absolute ownership and full control over the running business of the undertaking.
>
> (ii) There was no separate sale of building or plant or machinery nor any price was attributable to land, building or immovable properties.
>
> (iii) At the time of transfer, the employees along with statutory liabilities relating to them, were transferred.
>
> (iv) There is no evidence or material on record to show that any part of the sale consideration was attributed to depreciable assets or any other asset.
>
> (v) The learned AO as well as learned CIT(A) have attributed the entire sale consideration only to depreciable assets and land for working out capital gain. There is no basis for such approach in absence of any material on record;
>
> (vi) Section 50 of IT Act cannot be attributed to the facts of the present case because the title of this section is "a special provision for computation of capital gains in the case of depreciable asset". As pointed out above, the agreement to sell was not for transferring depreciable assets only but for transferring the entire unit as a whole and the sale consideration settled between the parties was not only for depreciable assets but for all the tangible and

(vii) As per the terms of transfer, since no part of consideration was attributable even to land and building, plant or machinery hence it was a case of slump sale and not a case of sale of separate asset or piecemeal sale.

(viii) The approach adopted by the learned CIT(A) for rejecting the version of the assessee regarding the slump sale on the reasoning that for a slump sale there should be sale of entire or whole business of the assessee including all the undertakings even though they may be self-sufficient and independent units, is not correct because the word "slump sale" as interpreted by various authorities and as defined in Section 2(42C) means "transfer of one or more undertakings" as a result of the sale for a lump sum consideration without values being assigned to any assets and liabilities. Although this definition has been brought in Section 2(42C) by the amendment introduced w.e.f. 1st April, 2000 but the concept behind slump sale has been the same even before the amendment as has been held by various Courts.

(ix) It is to be pointed out that total purchase consideration of the entire unit even included the contracts and rights to be sold as per Chapters 1, 2 and 3 of the agreement, it included transfer of goodwill and know-how and benefits connected therewith. Even the stamp duty for transferring the land and building was part of sale consideration as the same was to be borne out by the transferee. The mode of transferring possession of all assets and liabilities as well as the mode of payment given in the supplementary agreement further proves the intention and conduct of the parties that they had decided to sell and purchase an independently self-sufficient and fully functional unit without any further formal legal requirements to run the business.

(x) The learned CIT(A) has failed to appreciate that on the facts and circumstances of this matter and in view of the various covenants, referred to above, the sale of the Sonepat unit was a composite sale. Hence, the assessee could not be expected to furnish the financial break up of the tangible and intangible assets.

(xi) The undertaking transferred by the assessee was a capital asset as defined under Section 2(14) of IT Act. Hence, the capital gain or loss will have to be worked out as if the entire unit was itself a capital asset and have been sold as such. Thus, the provisions of Section 45 shall be attracted in the case of the assessee.

(xii) The unit of the assessee was formed and established for a very long time and in any case, for more than 36 months immediately preceding the date of transfer and hence, profits arising therefrom is long-term capital gain or loss and not short-term capital gain.

(xiii) Section 48 of IT Act provides mode and method of computation of capital gain. Second proviso to Section 48 is as under:

Provided further that where long-term capital gain arises

shares in, or debentures of, an Indian company referred to in the first proviso, the provisions of Clause (ii) shall have effect as if for the words "cost of acquisition" and "cost of any improvement", the words "indexed cost of acquisition" and "indexed cost of any improvement" had respectively been substituted.

The above proviso is fully applicable to the facts of the present case and computation of capital gain/loss shall be worked out as per this proviso.

(xiv) Section 50B of IT Act which deals with the case of slump sale has been introduced w.e.f. 1st April, 2000 and does not apply retrospectively. Prior to this provision, there was no provision in the Act dealing with the cases of slump sale. Learned CIT(A) was not justified in applying logic on the basis of this provision to the case of the assessee.

(xv) Exclusion of some of the liabilities in the agreement does not in any way effect the smooth transfer of the going concern as held in the case of Premier Automobiles Ltd. (supra).

(xvi) It is to be pointed out that for effectuating and executing the intention of parties to the sale transaction and for enabling the transferee to carry on the running business of the undertaking, the assessee even incorporated a non-competition clause which further strengthens the argument of the assessee that the business undertaking as a whole was transferred. For non-competition agreement, no consideration was taken.

(xvii) For handing over full functional unit/undertaking, all licenses, terms, contracts, right to sell, etc. were also transferred, thus, nothing was left to be done after the transfer for running the business of the undertaking."

17. We are inclined to agree with the aforesaid approach of the Tribunal having regard to the position of law contained in various judgments cited by the learned counsel for the assessee and we now proceed to discuss the same. In ***R.C. Cooper (supra)***, the Supreme Court had defined the term 'undertaking' in the following manner:

"163. In Gardner v. London Chatham and Dover Railway Co. (1867-8) Vol. II, Chancery Appeals 201 the undertaking of a railway company which was pledged was held to be a railway which was to be made and maintained, by which tolls and profits were to be earned, which was to be worked and managed by a company, according to certain rules of management, and under a certain responsibility. In an undertaking there will be money for the working of the

> Panama, New Zealand and Australian Royal Mail Company the undertaking of a steamship company was explained to have reference not only to all the property of the company which existed at the date of the debenture but which might become the property of the company and further that the word 'undertaking' referred to the application of funds which came into the hands of the company in the usual course of business. Undertaking will therefore relate to the entire business although there may be separate ingredients or items of work or assets in the undertaking. The undertaking is a going concern and it cannot be broken up into pieces to create a security over the undertaking. (See Re: Portsmouth {Kingston, Fratton and Southsea) Tramway Co. (1892) 2 Ch. 362 and A.H. Vivian and Company Ltd.
>
> 164. The word 'undertaking' is used in various statutes of our country, viz, the Indian Electricity Act, 1910, (sections 6, 7.. 7A), Indian Companies Act (Sections 125(4)(f), 293 and 394), Banking Regulation Act, 1949 (Section 14A), Cotton Textiles Companies Management of Undertaking, Liquidation and Reconstruction) Act, 1967 (sections 4(1), 5(1)(2). By the word 'undertaking is meant the entire organisation. These provisions indicate that the company whether it has a plant or whether it has an organisation is considered as one whole unit and the entire business of the going concern is embraced within the word 'undertaking'. In the case of sale of an undertaking as happened in Doughty v. Lomagunda Reefs, Ltd. (1902) 2 Ch. d. 837 the purchaser was required to pay all debts due by and to perform outstanding contracts comprised in the entire undertaking. The word 'undertaking' is used in the Indian Electricity Act, the Air Corporation Act, 1953, the Imperial Bank of India Act, 1920 (sections 3, 4, 6 and 7), the State Bank of India Act, 1955 [Section 6(1)(g)], the State Bank Subsidiaries Banks Act, 1959 [Section 10(1)], the Backing Regulation Act. 1949 [Section 36AE(1)] and there have been legislative provisions for acquisition of some of these undertakings."

18. Taking note of the various pronouncements in Para 164, the Supreme Court further held that the undertaking is an amalgam of all ingredients of property and is not capable of being dismembered. That would destroy the essence and innate character of the undertaking. In reality the undertaking is a complete and complex weft and the various types of business and assets are threads which cannot be taken apart from the weft. We are, therefore, of opinion that undertaking of a banking company is property which can be validly acquired under Article 31(2) of the Constitution.

19. It is clear from the above that when an undertaking is sold, it is be understood in contra-distinction, a whole of undertaking. From this itself, it would clearly follow that Section 50 dealing with the depreciable asset would not be applicable when the entire Sonepat Unit as a going undertaking was sold by the assessee.

20. This judgment of the Supreme Court was relied upon by a Division Bench of this Court in the case of ***PNB Finance Limited*** Vs. ***C.I.T (Delhi)*** [252 ITR 491] in the following manner:

> "7..... The all inclusive definition of the term "capital asset" brings within its ambit property of any kind held by the assessed, except what has been expressly excluded by clauses (i) to (iv) there under. Thus, the expression "capital asset" has a wide connotation. But for the exemptions statutorily provided, the exempted properties would also otherwise fall within the defined meaning. The term "property", though has no statutory meaning but is of widest import and subject to any limitations which the context may require, it signifies every possible interest which a person can acquire, hold or enjoy Ahmed G.H. Ariff v. CWT [1970]76ITR471(SC) . According to Strouds Judicial Dictionary of Words and Phrases (6th Edn.), "Property" is a comprehensive term indicative of every possible interest which a party can have. In R.C. Coopers case (supra) it was also observed that the expression "property" has a wide connotation and "it includes not only assets, but the organisations, liabilities and obligations of a going concern as a unit". In view of the wide meaning of the expression "capital asset" in section 2(14) of the Act and "property" as understood in its ordinary wide connotation, we have no hesitation in holding that the business undertaking of the assessed was a "capital asset". In fact, learned counsel for the assessed did not dispute before us that the "undertaking" of the assessed was a "capital asset" within the meaning of section 2(14) of the Act. The question is, accordingly, answered in the affirmative."

21. In ***Premier Automobiles Ltd. (supra)***, a Division Bench of Bombay High Court (Per Hon'ble Mr. Justice H.S. Kapadia, as his Lordship then was) categorically held that when there was a sale of entire undertaking of a going concern and there was continuation of business, it could not be treated as sale of itemized assets and such transaction clearly amounted to a slump

sale. In such a case, capital gains were to be computed on t basis of slump sale. That was a case where the assessee was engaged in manufacturing of two cars, viz., Padmini and Premier 118 NE, at Kurla and Kalyan, respectively. PAL had plant and machinery for 118 NE at Kalyan, Kurla (gear-box) and Pune (machining) ("Kalyan undertaking"). PAL had manufacturing facility for Padmini at Kurla. PAL entered into a MOU on March 11, 1993 with Automobile Peugeot (AP) to establish a joint venture company known as Kalyan Motors Co. Ltd. (KMCL) for manufacture and distribution of 60,000 Peugeot cars throughout India. Under the MOU, it was agreed that PAL would contribute to the equity of the joint venture company –KMCL to the extent it was engaged in the manufacture and sale of 118 NE cars. PAL also entered into a supplemental MOU with AP on May 17, 1994 whereby PAL agreed to sell, assign and transfer to KMCL its kalian undertaking as a going concern on an "as is where is" basis. On 19.10.1994, whereby PAL entered into a joint venture agreement with AP. On 06.01.1995, PAL executed a slump sale agreement whereby PAL transferred and sold to KMCL the said Kalyan undertaking as a going concern on an "as is where is" basis. For the assessment year 1995-96, PAL submitted its return of income enclosing a profit and loss account in which it disclosed a book profit of ₹81.31 crores from the slump sale dated 06.01.1995. The AO, however, took the view that it was a sale of itemized assets. He therefore, assigned to sale value to building plant and machinery, paint shop, etc, separately. This was upheld by the Commissioner (Appeals) and the Tribunal. The orders of the authority below were set aside by the High Court. While doing so, it was held that a perusal of the documents connected with the transaction

showed that the intention of the parties in the commercial ser was to transfer the Kalyan business, as a whole, for a lump sum consideration of ₹247 crores that the parties did not intend to make a sale of itemized assets. Mere execution of conveyance of immovable property by itself would not constitute sale of itemized assets. PPL (originally MKCL) never intended to purchase individual items and apart from land, building, plant and machinery, PAL had transferred business advantages like licences, quotas, permission to use the name "Premier", work force and other intangibles. Even after the sale dated 29.09.1994, there was continuity of business by PPL of manufacturing 118 NE cars and Peugeot Cars. The balance sheet, profit and loss account and the assessment order of PPL showed that within the six months period ending 31.03.1995, PPL had sold cars to the value of ₹177.26 crores. The entire arrangement was to the effect that the French company AP agreed to make an investment of ₹350 crores in the joint venture because the other contracting party, viz., PAL had infrastructure to manufacture 118 NE cars at Kalya, Kurla and Pune. PPL did not intend to purchase assets individually/separately but intended to buy the entire Kalyan business for a lump sum price. The transaction was a slump sale. The conclusion that the transaction was a slump sale was not only based on interpretation of terms and conditions of the entire arrangement but also on the manner in which the gain was accounted for by PPL in its books of account. It was clear that PAL had not accounted for profits on itemized assets. The sum of ₹81.31 crores was the book profit on the slump sale. The AO would have to compute the quantum of capital gains under Sections 45 to 50.

22. Likewise in ***Narkeshwari Prakashan Ltd. (supra)***, where the assessee, a publishing house had two branches and one of the branches along with its assets and liabilities were sold as a whole as a going concern, it was treated as slump sale. To the same effect was the judgment of the Punjab and Haryana High Court in the case of ***Max India Ltd. (supra)***. In that case a division of the assessee was sold on slump sale and the assessee claimed a loss under the head "Long-term capital loss" by deducting from the sale proceeds, the cost of acquisition of the division and its improvement. The Assessing Officer rejected the claim of the assessee and held that in accordance with Sections 50 and 50A of the Act were not applicable. On further appeal, the Revenue contended that the sale was a sale of block of assets, the gain from which was liable to be treated as short-term capital gains and that the assessee was not entitled to indexing under Section 48 of the Act. Dismissing the appeal, the High Court held that the sale proceeds received by the assessee were from sale of a going concern, which was a slump sale and not a sale of block of assets. Therefore, Section 50 was not applicable.

23. It would be of some relevant to point out that the Special Leave Petition against the judgment was also dismissed by the Supreme Court on 13.08.2009. The Supreme Court reiterated this legal principle in ***PNB Finance Ltd. Vs. Commissioner of Income Tax*** **[2008] 307 ITR 75 (SC)** with much more clarity in the following manner:

> "14. Section 41(2) stands attracted only in the case of a sale of building, machinery, plant or furniture in the previous year. In other words, Section 41(2) applies to a

from such a sale must exceed the written down value of such building, machinery, plant or furniture. Section 41(2) states that certain gains from disposition of building, machinery, plant or furniture shall be deemed to be profits of the previous year. Section 41(2) refers to the concept of a "balancing charge" which arises only when depreciable asset is sold. Section 41(2) brings to tax the balancing charge (difference between written down value and historical cost of depreciable asset) on sale. The object underlying Section 41(2) is to recoup the depreciation allowed by way of deduction under the 1961 Act to the seller of depreciable asset. To attract Section 41(2) the subject matter should be depreciable asset and the consideration received should be capable of allocation between various assets.

15. Section 41(2) and Section 45 operate in different fields. In the case of **CIT v. Mugneeram Bangur & Co.** [1965]57ITR299(SC) this Court held that where the entire business of the undertaking together with its assets including the depreciable assets and liabilities was sold for a composite price without any item-wise earmarking, Section 41(2) was not attracted. But, where the transfer of the entire business as a going concern is involved and the contract indicates item-wise consideration, Section 41(2) would stand attracted with regard to the amount of surplus to the extent of the difference between the written down value of the depreciable asset(s) so transferred and the actual cost thereof.

16. In the case of **Artex Manufacturing Co.** (supra) this Court found, that a valuer was appointed, that valuer submitted his valuation report in which itemized valuation was carried out and on that basis the consideration was fixed at Rs. 11,50,400.00. Therefore, the sale consideration had been 0 arrived at after taking into account the value of plant, machinery and dead stock as computed by the valuer and, consequently, it was held that the surplus arising on the sale was taxable under Section 41(2) of the Act and not as capital gains. In the circumstances, the judgment of this Court in the case of **Artex Manufacturing Co.** (supra) was not applicable to the present case. Further, this Court in the case of **CIT v. Electric Control Gear Manufacturing Co.** [1997]227ITR278(SC) has held that whether the business of the assessee stood transferred as a going concern for slump sale price, in the absence of evidence on record as to how the slump price stood arrived at, Section 41(2) had no application. It is interesting to note that the judgment in the case of **Electric Control Gear Manufacturing Co.** (supra) is given by the same Bench which decided the case of **Artex Manufacturing Co.** In fact, both the judgments are reported one after other in [1997]227ITR260(SC) respectively. In the present case, as can be seen from the impugned judgment of the Delhi High Court, the judgment of this Court in **Electric Control Gear Manufacturing Co.** (supra) is missed out. That judgment has not been considered by the High Court. As stated above, this Court has clarified its judgment in **Artex Manufacturing Co.** (supra) in its judgment in the case of **Electric Control Gear Manufacturing Co.**. Therefore, Section 41(2) has no application to the facts of the present case.

> 17. As regards applicability of Section 45 is concerned, three tests are required to be applied. In this case, Section 45 applies. There is no dispute on that point. The first test is that the charging section and the computation provisions are inextricably linked. The charging section and the computation provisions together constituted an integrated Code. Therefore, where the computation provisions cannot apply, it is evident that such a case was not intended to fall within the charging section, which, in the present case, is Section 45. That section contemplates that any surplus accruing on transfer of capital assets is chargeable to tax in the previous year in which transfer took place. In this case, transfer took place on 18.7.1969. The second test which needs to be applied is the test of allocation/attribution. This test is spelt out in the judgment of this Court in **Mugneeram Bangur & Co.** (supra). This test applies to a slump transaction. The object behind this test is to find out whether the slump price was capable of being attributable to individual assets, which is also known as item-wise earmarking. The third test is that there is a conceptual difference between an undertaking and its components. Plant, machinery and dead stock are individual items of an Undertaking. Business Undertaking can consists of not only tangible items but also intangible items like, goodwill, man power, tenancy rights and value of banking licence. However, the cost of such items (intangibles) is not determinable. In the case of **CIT v. B.C. Srinivasa Setty** [1981]128ITR294(SC) , this Court held that Section 45 charges the profits or gains arising from the transfer of a capital asset to income-tax. In other words, it charges surplus which arises on the transfer of a capital asset in terms of appreciation of capital value of that asset. In the said judgment, this Court held that the "asset" must be one which falls within the contemplation of Section 45. It is further held that, the charging section and the computation provisions together constitute an integrated Code and when in a case the computation provisions cannot apply, such a case would not fall within Section 45. In the present case, the Banking Undertaking, inter alia, included intangible assets like, goodwill, tenancy rights, man power and value of banking licence. On facts, we find that item-wise earmarking was not possible. On facts, we find that the compensation (sale consideration) of Rs. 10.20 cr. was not allocable item- wise as was the case in **Artex Manufacturing Co.** (supra).
>
> 18. For the aforestated reasons, we hold that on the facts and circumstances of this case, which concerns assessment year 1970-71, it was not possible to compute capital gains and, therefore, the said amount of Rs. 10.20 cr. was not taxable under Section 45 of the 1961 Act. Accordingly, the impugned judgment is set aside."

24. When the matter is considered in the aforesaid perspective, one can clearly discern that the judgments cited by the learned counsel for the Revenue would have no application in the instant

the assessee was possessed of considerable property at Calic and Mangalore, it had claimed depreciation for its factory building which had been allowed in the previous years. During the period relevant to the assessment year in question, the assessee had sold some those properties on which it had already claimed depreciation. It was in this context, the question of applicability of Section 50 arose. The depreciable properties were sold and that was not a case where the entire undertaking as a going concern with locked stock barrel was sold by the assessee.

25. We, thus, answer the questions formulated above in favour of the assessee and against the Revenue and therefore, dismiss these appeals.

(A.K. SIKRI)
JUDGE

(SURESH KAIT)
JUDGE

DECEMBER 24, 2010
pmc