# Ece Industries Ltd. vs Deputy Commissioner Of Income Tax on 29 September, 2006

## Equivalent citations: (2007)111TTJ(DELHI)11

ORDER

P.N. Parashar, J.M.

1. These are two appeals by the same assessee against two different orders of the learned CIT(A) for asst. yrs. 1999-2000 and 2000-01. As common facts are involved in these two appeals and further as the...(sic) interconnected in the two assessment years, for the sake of convenience, these appeals are being decided by a common order.

2. Shri Ajay Vohra and Shri Prakash Narayan, advocates and Smt. Rashmi Kapoor, chartered accountant appeared for the assessee whereas Shri Sunil Aggarwal, senior Departmental Representative represented the Revenue.

3. Before proceeding to adjudicate the grounds taken in this appeal by the assessee and additional grounds admitted during the course of hearing of the appeal, we consider it proper to briefly narrate the facts of this matter, which are as under:

> 3.1 The assessee company was manufacturing various electrical equipments like transformers, switches, switchgears, bulbs, lamps and tubes, etc. It was having various factories at various places in the country. The company had set up its lamp division for manufacturing of lamps and bulbs, etc. at Sonepat (Haryana). It wanted to transfer this factory and for this purpose, it entered into an agreement with M/s Osram India (P) Ltd. for sale of this factory/unit. For effecting sale, an agreement dt. 20th May, 1998 was executed. The sale consideration for the transfer of the entire unit was fixed at Rs. 42.50 crores. The board passed a resolution in the meeting dt. 28th Aug., 1998 to execute the conveyance deed and such other documents, as may be required in connection with the transfer of the unit. The sale was effected through delivery of possession and receipt of full consideration paid by M/s Osram India (P) Ltd. In this regard, two conveyance deeds dt. 9th Oct., 1998 were also executed.
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> 3.2 The assessee filed return for asst. yr. 1999-2000 and in the computation for the purposes of capital gain, it showed cost of lamp division at Rs. 59.33 crores against the sale consideration of Rs. 42.50 crores. The balance of Rs. 16.83 crores was shown by the assessee as capital loss to be adjusted against the profit for the current year.
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> 3.3 The AO invoked Section 50 of IT Act and issued a notice to the assessee vide letter dt. 29th Jan., 2002 to explain as to why the capital gain earned on sale of lamp division should not be treated as short-term capital gain as per the provisions of

Section 50(2) of the IT Act, 1961. In response to the notice, it was submitted on behalf of the assessee that the Sonepat unit was sold as a going concern to M/s Osram India (P) Ltd. as per agreement dt. 20th May, 1998 against a lump sum consideration of Rs. 42.50 crores as consideration for all the intangible and tangible assets as well as the contracts and rights transferred and sold to the transferee. It was contended that no part of the price of Rs. 42.50 crores was attributable to any particular asset including any depreciable asset and, therefore, Section 50(2) cannot be attracted in the transaction of sale. On behalf of the assessee, reliance was placed on the decision of Hon'ble Supreme Court in the case of CIT v. Artex Mfg. Co. and the decision in the case of Sarabhai M. Chemicals (P) Ltd. v. P.N. Mittal, IAC .

3.4 The AO rejected the contention of the assessee after distinguishing the case law on which reliance was placed on behalf of the assessee and held that capital gain on depreciable assets is to be treated as short-term capital gain.

3.5 The AO also required the assessee to quantify the consideration received by it for the sale of tangible and intangible assets but the assessee did not furnish the same. Hence, the total consideration received by the assessee of Rs. 42.50 crores for sale of lamp division was computed on the bulk of assets as a whole. The AO worked out the short-term capital gain at Rs. 36,89,23,393.

3.6 Before the AO, the assessee also pleaded that although for calculation of book profit under Section 115JA, it had shown profit of Rs. 25,13,32,834 in the P&L a/c but this capital gain is not a book profit and the same was shown only as an extraordinary item. This contention of the assessee was also rejected.

3.7 The assessee challenged the order and finding of the AO in working out the short-term capital gain at Rs. 36,89,23,393 before the learned CIT(A). It was submitted before her that under the agreement dt. 20th May, 1998, the assessee company had received a lump sum amount of Rs. 42.50 crores as consideration of all tangible and intangible assets including customer relations, royalty fee, use of trade-mark 'ECE' for five years, labour contracts and rental agreements etc. and as the entire lamp division was transferred as a going concern for a lump sum consideration and further as no part of this consideration was apportioned or was attributable to any particular asset, the transaction of sale was purely as a slump sale.

3.8 The assessee placed reliance on the following decisions for supporting its contention.

(i) CIT v. Mugneeram Bangui & Co. (Land Department) ;

(ii) CIT v. Artex Mfg. Co. (supra);

(iii) Sarabhai Chemicals (P) Ltd. (supra);

(iv) CIT v. F.X. Pereira & Sons (Trvancore) (P) Ltd. ; and

(v) CIT v. West Coast Chemicals & Industry Ltd. .

The assessee also made reference to the facts that the newly inserted Section 50B related to the computation of capital gains in the case of slump sale and submitted that prior to the insertion of Section 50B indexing was allowable in the case of slump sale.

3.9 Learned CIT(A) distinguished the authorities on which reliance was placed by the assessee and upheld the view taken by the AO. The finding of the learned CIT(A) after considering various cases has been recorded in para 21 of her order, which is as under:

> 21. Keeping in mind the analyses of the case laws cited by the appellant, the question of fact whether the sale of the Sonepat plant was a 'slump sale' or not, can be now taken up for discussion. I find that the case of the case law cited by the appellant related to the sale of a going concern, a whole concern, or a realization sale. The key factor was not that there was a lump sum consideration but the fact that the business as a whole concern was sold. In the instant case before me, I find that the appellant has sold one of its units (lamp division) located at Sonepat. It was not a case of a sale of an entire business or a whole business. It was not a realization sale, or a sale of a whole concern as a going concern. In the world of modern business, it is not uncommon to find companies deciding to sell or hive off, one or more of its units for various commercial reasons, which could range from cutting down losses, to making profits, or mobilizing cash resources, for business needs. Such transaction would not be in the nature of a 'slump sale' on a sale of a going concern. I also find that the appellant itself was not even treating the Sonepat unit as a separate, independent business concern/entity. This is reflected in the balance sheet of the appellant in which the fixed assets are shown in a consolidated manner for the company as a whole and not shown separately for the Sonepat unit. In the light of the foregoing discussion, I do not consider the sale of Sonepat unit as a 'slump sale'.
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> 3.10 The learned first appellate authority also considered the issue relating to cost of acquisition, cost of improvements and method of computation of capital gain as given in Sections 48 and 50 of IT Act and held that provisions of Section 50 which provide a special method for determining the cost of acquisition shall apply in the case of the assessee.
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> 3.11 Regarding the applicability of Section 50B relating to slump sale, she observed that this provision came into force w.e.f. asst. yr. 2000-01 and has no application to the assessee's case. However, she rejected the contention of the assessee that slump sale could not be taxed prior to 1st April, 2000, i.e. prior to the insertion of Section 50B.

3.12 After considering various issues raised before her in connection with the chargeability of taxable capital gain, etc., the learned -CIT(A) has drawn following conclusions:

(a) The appellant 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 appellant company ECE Industries Ltd. still continues as a business concern.

(b) The balance sheet of the appellant indicates that the appellant was not treating this unit a separate and independent business, but as part of the integrated whole business of the appellant.

(c) Therefore, this unit sale of the lamp division was not in the nature of a 'slump sale' as a going concern.

(d) The Supreme Court in Commonwealth Trust Ltd. has settled the legal question that Section 50 would apply to sale of depreciable assets, in favour of Revenue.

(e) It is reasonable to conclude that there would be a financial break up of the sale consideration between tangible and intangible assets and therefore the appellant's contention that no break up is possible is not sustainable.

(f) Even if, the sale was a slump sale, the gain would be taxable, as laid out in the case of B.M. Kharwar by the Supreme Court.

(g) The rationale for taxing capital gain on depreciable assets is found in the Supreme Court judgment in Bipinchandra Maganlal & Co.

3.13 She has also rejected the contention of the assessee that capital gain should not be included in the assessee's income for computation of income under Section 115JA and held that capital gains are to be included while working out book profit under S.115JA.

4. Before us, the assessee has challenged the findings of the learned CIT(A) in upholding the order of AO for computing the short-term capital gain at Rs. 36,89,23,393. For this purpose, the assessee has taken as many as eight grounds, which are as under:

1. The learned CIT(A) has erred in holding that the appellant had earned short-term capital gain of Rs. 36,89,23,393 in the sale of its Sonepat unit (lamp division) instead of suffering a loss of Rs. 16.83 crores as computed under the provisions of IT Act, 1961.

2. The learned CIT(A) has wrongly summarized in para 11 (b) of her appellate order, in the case of the appellant that "the sale consideration of a 'slump sale' is not taxable". On the contrary, the case of the appellant throughout was that the 'slump

sale' of its Sonepat Unit as a going concern gave rise to capital gain/capital loss under Section 45 of the above Act.

In this connection, she failed to consider the following assertions of the appellant:

(a) The company has been legally advised that sale of lamp division on slump sale basis will attract capital gain on the basis of computation of fair market value on the date of sale and indexed in accordance with the provisions of IT Act, 1961 (See page 4 of written submissions);

(b) In view of the above facts, it is Section 45 of the Act which will apply to the case of the appellant. In other words, capital gain/loss will have to be worked out as if the entire unit was itself a capital asset and had been sold as such (See para 14, page 7 of written submissions).

(c) The appellant has itself claimed long-term capital loss of Rs. 16.83 crores in the sale.

Thus by making a totally wrong assumption, she has come to an entirely incorrect conclusion that the appellant has earned capital gain of Rs. 36,89,23,393 in the sale.

3. The learned CIT(A) has further erred in holding that the sale of the appellant's Sonepat unit (lamp division) was not the case of a 'slump sale'. She illegally and wrongly presumed that for a 'slump sale' there should be the sale of the entire business or a whole business, meaning thereby the sale of all the units, even though they may be independent and self-contained units.

4. The learned CIT(A) has misinterpreted and misapplied various decisions relied on by the appellant before her or quoted by herself to arrive at a predetermined notion that the appellant's was not the case of a 'slump sale' or 'sale of a going concern' and subjected the appellant with an extremely high burden of tax which was neither justified on facts, nor in law, nor on equity and justice.

5. The learned CIT(A) while coming to the above conclusion wrongly and illegally, without appreciating the basic issue, relied on the entries in the balance sheet of the appellant ignoring the principle laid down by the Supreme Court in Kedarnath Jute Mfg. Co. Ltd. v. CIT and Sutlej Cotton Mills Ltd. v. CIT that the entries in the books of account are not decisive or conclusive in the matter.

6. The learned CIT(A) has also erred in holding that the provisions of Section 50 of the above Act applied to the case of the appellant by wrongly placing reliance on the decision of the Hon'ble Supreme Court in Commonwealth Trust Ltd. v. CIT , a case that was applicable to depreciable assets. She failed to consider the fact that in the ease of the . appellant, there was no sale of a particular depreciable asset. On the other hand, it was a case of a 'slump sale' of a going concern for a composite price of Rs. 42.50 crores and no part of this price could be attributed or related to any particular asset including a depreciable asset.

7. The learned CIT(A) has further erred in holding (or impliedly holding) that Section 50B applied even to sales made prior to 1st April, 2000 ignoring the fact that the section came on the statute only w.e.f. 1st April, 2000. It was not retrospective and could not, therefore, apply to sales made prior to that date.

8. The learned CIT(A) has also erred in adjudicating upon irrelevant issues while ignoring to deal with relevant issues. She has also erred in making the following uncalled for observations:

> To my mind, it would be an inequitable applicable (application) of the taxation statute, if an assessee would be allowed to take refuge under the concept of slump sale and in the process exempt itself from paying tax by simply non-bifurcation of the sale price.
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> She failed to appreciate/consider that the sale by the appellant to Osram was a composite sale for a fixed sum of Rs. 42.50 crores and the appellant could not be expected to furnish a financial break up of the sale consideration between tangible and intangible assets that was not even in existence."
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> The assessee moved application for admitting additional following grounds:
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> 1. That on the facts and in law the gain arising from the slump sale of the lamp division of the appellant was not liable to tax under the IT Act ('the Act').
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> 2. That on the facts and in law, transfer of an undertaking was outside the purview of Section 45 of the Act in the absence of cost of acquisition, cost of improvement and date of acquisition of an undertaking.

After hearing the learned Counsel for the assessee and the learned senior Departmental Representative, these two additional grounds were admitted by the Bench by order dt. 30th May, 2006.

5. As the core issue in the original grounds of appeal, as reproduced above, and in the additional grounds admitted by the Bench revolves around the decision regarding the nature of the transaction of Sonepat division of the assessee, we consider it proper to decide all these grounds together.

6. Learned Counsel for the assessee, Shri Ajay Vohra, after narrating the background of the case and supporting the grounds of appeal, submitted that vide agreement dt. 20th May, 1998, the assessee had sold its business undertaking. After making reference to the dictionary meaning of 'slump' and after referring to Sections 293 and 394 of Companies Act relating to reconstruction and amalgamation of companies, he argued that a company may have plurality of undertakings and in view of provisions contained under Section 394 of Companies Act, it is possible to transfer even a part of the undertaking. He also made reference to the provisions of Section 80HH and 80-I to contend that the losses of one undertaking cannot be set off against the profits of another undertaking which also shows that each undertaking has to be treated as a separate and

independent unit. Learned Counsel also made reference to the provisions contained under Section 2(42C) of IT Act and submitted that undertaking means 'a unit' or 'business activity' but not union of several activities. According to him, 'an undertaking' comprises much more and includes assets, liabilities, tangible and intangible property and therefore, if the undertaking is sold or transferred as a going concern, it is transferred as a whole and what is sold is not only individual items but entire undertaking as such and the same has to be treated as a distinct capital asset.

6.1 In support of his contention that the sale of Sonepat division by the assessee to M/s Osram was a slump sale, he made detailed reference to the terms of agreement and supplementary deed dt. 9th Oct., 1998 including the certificate of delivery of possession. It was specifically argued by him that in the agreement and in supplementing documents, no specific valuation has been shown to any particular item by the assessee. The learned Counsel, after placing reliance on the cases of CIT v. Mugneeram Bangui & Co. (supra) and West Coast Chemicals & Industry Ltd. (supra) and after making reference to several other decisions reported in CIT v. Electric Control Gear Mfg. Co. ; (supra); (supra); CIT v. Poyilakada Fisheries (P) Ltd. ; CIT v. Kar Valves Ltd. ; 264 ITR 108 (sic); CIT v. Narkeshari Prakashan Ltd. ; 277 ITR 281 (sic); 81 LTD 483 (sic); Coromandel Fertilisers Ltd. v. Dy. CIT (2004) 84 TTJ (Hyd) 370 : (2004) 90 LTD 344 (Hyd), 264 ST 141 and the decision of the Delhi Bench 'G' of Tribunal in the case of Jt. CIT v. Sten Sheets Ltd. dt. 12th May, 2006 rendered in ITA Nos. 546 and 547/Del/2000 and CO No. 223/Del/2006 [reported at (2007) 106 TTJ (Del) 460-Ed.] submitted that even if some assets or liabilities are retained by the assessee but the undertaking is transferred as a going concern then also it has to be treated as a slump sale. The learned Counsel further pointed out that the AO was not justified in reducing the written down value of the assets from the sale consideration.

7. The learned Departmental Representative, on the other hand, supported the order of the AO and that of the learned CIT(A) and submitted that in the case of 'slump sale' the entire block of assets ceases to exist. According to him, entire business has to be transferred including all assets and liabilities. The next submission of the learned Departmental Representative was that even if the transaction is treated to be slump sale, it is not impossible to work out capital gain. Learned Departmental Representative made reference to the printed accounts of the assessee and submitted that the assessee had made valuation of closing stock. After making reference to Item No. 15, he pointed out that all the assets were not sold. He made reference to Item No. 15 and pointed out that the assessee had retained certain items and also liabilities and that the entire unit was not transferred, locked, stocked and barrel. In support of his arguments, the learned Departmental representative placed reliance on the following decisions:

(i) (supra);

(ii) Syndicate Bank v. Addl. CIT ;

(iii) PNB Finance Ltd. v. CIT (2001) 168 CTR (Del) 509 : (2001) 252 ITR 491 (Del).

8. In rejoinder, the learned Counsel submitted that the term 'undertaking' is different from the company or business of the company and, therefore, even if one undertaking is sold out of the entire

business of the particular company having several undertakings, it cannot be said that the undertaking was not transferred as a going concern. Regarding the objection of the learned Departmental Representative that liabilities were not transferred in the case of the present assessee, he pointed out that the retention of some of the liabilities does not militate against the concept of slump sale. In support of his contention, he placed reliance on Premier Automobiles Ltd. v. ITO . He submitted that if all the liabilities are not transferred, it cannot be said that it is not the case of slump sale. On the facts of the present case, the submission of the learned Counsel was that only those liabilities were not transferred which had no concern with the running business of the undertaking. For example, liability in relation to employees has been transferred because without the employees the factory cannot run. Likewise, all the intellectual rights, licenses, etc. were also transferred as indicated in the agreement.

9. The learned Counsel further submitted that so far as valuation of individual assets are concerned, no attempt was made by the Departmental authorities to ascertain the value of individual items and as per the terms of agreement, such valuation of individual items was not kept into consideration while determining the sale price.

10. We have carefully considered the entire material on record to which our attention was invitd and the rival submissions. The main issue to be decided is as to whether the covenants executed and transactions carried out in relation to transfer of Sonepat unit of the assessee are covered within the meaning and concept of slump sale or piecemeal sale. The intention and conduct of parties as well as the consequences of the acts performed in execution of conveyance deeds etc. are, in fact, the essential factors on the basis of which nature of the transactions can be ascertained. Hence, we consider it proper to examine the relevant documents relating to transfer of the unit.

11. The assessee company in its extraordinary general meeting of the members held on 16th May, 1998 adopted the following resolution:

> Resolved that pursuant to the provisions of Section 293(l)(a) and other applicable provisions, if any of the Companies Act, 1956 and the memorandum and articles of association of the company and subject to other permissions and approvals as may be required, consent is being accorded to the board of directors of the company, to transfer, sell and/or dispose of the undertaking of the company manufacturing GLS Bulbs, Fluorescent Tubes, Filaments, Glass Shells and other miscellaneous items situated at Sonepat (Haryana) and including its sales division as a going concern or otherwise at such price and on such terms and conditions as may be decided by the board of directors with power to the board of directors or a committee of directors appointed for the purpose to finalise and execute necessary documents including agreements, deeds of assignment/conveyance and other documents and to do all such other acts, deeds, matters and things as may be deemed necessary and expedient on their discretion for completion of transfer/sale of the said undertaking.

12. In pursuance to the above resolution, an agreement was entered into on 20th May, 1998 between the assessee company and the transferee company i.e. Osram India (P) Ltd. The preamble of the

agreement discloses the intention of the parties in following terms:

> 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 Osram 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.
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> The relevant terms of this agreement are as under:
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> 1.1 At the closing date ECE shall transfer to Osram free and clear of all liens, claims, taxes, mortgages, pledges and/or equities of any kind (hereinafter altogether referred to as "encumbrances") including registration of title in the name of Osram of all land and building (including all technical infrastructure) thereon of the Sonepat lamp factory, shown in the drawing enclosed in Annex.
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> 1. Such title shall have no time limitation.

All of the buildings as shown in Annex. 1 (including all technical infrastructure) are in normal operating conditions and repair and are to the best of ECE's knowledge, free from termites, dry rot, other fungi and other forms of deterioration and any and all damage resulting therefrom, and the operation thereof as conducted and as proposed to be conducted is not in any material respect in violation of any applicable building code or other law or without limitation and safety laws, as furnished to Osram. ECE holds valid and effective certificates of occupancy covering all buildings and improvements and electrical works.

Chapter 2-Transfer of machinery and equipment 2.1 ECE shall sell and transfer at the closing date to Osram, free and clear of encumbrances full title and ownership of all machinery and equipments existing and/or used by ECE in its entire lamp business operation on the site listed in Annex. 1. Enclosed Annex. 2 lists the major equipment to be transferred (such as but not limited to machinery, technical equipment, cars and computers). It is understood that in addition all other items (such as but not limited to office supplies, office furniture and fittings etc.) that are located in the site according to Annex. 1 are also to be transferred. The items described above shall further on be jointly referred to as "the Sonepat Lamp Equipment".

2.2 ECE shall sell and transfer at the closing date to Osram, free and clear of encumbrances full title and ownership of all machinery and equipment existing and/or used by ECE in its entire lamp business operation and located at third parties or outside the site listed in Annex. 1, hereinafter jointly referred to as "lamp equipment outside Sonepat". Enclosed Annex. 3 lists the equipment outside Sonepat, indicating the address and (where applicable) name of the third party being in possession at the closing date.

2.3 ECE warrants and represents that the Sonepat lamp equipment and the lamp equipment outside Sonepat to be transferred according to Chapters 2.1 and 2.2, hereinafter jointly referred to as "lamp equipment" fully represent the assets used by ECE in the entire business for the manufacture of lamps to be manufactured and sold by Osram and thus puts Osram in the position to continue this business on an ongoing basis without any disruption. The lamp equipment is in normal working condition as on the closing date.

Chapter 3-Transfer of intangible assets/goodwill ECE as on the closing date shall transfer to Osram all goodwill of ECE's lamp business by transferring the ownership and the benefit of:

3.1 all past, present and prospective customer relationship (address, contracts, purchase orders, price lists, etc.) 3.2 the benefit of the activities of ECE lamp division; and 3.3 all contracts (for instance water, gas, energy, rental agreements, customer contracts, labour contractors) which are necessary to continue the previous business operation of ECE without any disruption. Such contracts to be transferred are listed in Annex. 4 and any other intangible assets which are beneficial to Osram in order to ensure that Osram is able to continue ECE's previous business activities as on ongoing concern without any disruption.

3.4 the non-exclusive, royalty-free right of Osram to use the trademark "ECE" for a period of 60 months from the closing date according to the trademark licence agreement in Annex, 5.

13. As per Chapter 5.1 of the agreement, the closing was to take place at the office of ECE at Sonepat. On the date of closing, both the parties were to consummate the transaction by executing all actions described in the agreement and by transferring the ownership of the assets and the goodwill to Osram according to the agreement against payment of agreed purchase price which was to be received from Osram by the assessee.

14. As per Chapters 5.2 and 5.3 both the parties were to make efforts for taking necessary licenses, permissions and approvals from the State Government and other Departments for effectively running the business by the transferee. The assessee also undertook to perform all necessary obligations in this regard.

15. Under Chapter 7, some liabilities have been excluded. On perusal of the relevant clause, it is found that such liability related to conduct of business operations by ECE upto the closing date. This clause is as under:

> Chapter 7-Exclusion of liabilities 7.1 The parties agree that (i) Osram shall not assume any liabilities arising out of the conduct of any business operations by ECE upto the closing date, which exclusion shall include without limitation any taxes or any employee matters (except as expressly assumed according to Chapter 8) or any environmental liabilities, any financial debits or any costs which were caused by ECE or any other liabilities to third parties (hereinafter collectively referred to as "excluded liabilities") and that (ii) ECE shall from and upto a period of five years from the closing date indemnify and hold harmless Osram and its respective

shareholders, directors, officers, employees and agents. Disputes, if any, of such nature shall be referred by Osram to ECE for its dealing with the matter and Osram agrees to fully co-operate with ECE in resolving such matters.

7.2 Osram will be accountable for collecting receivables as they fall due for invoices effected by ECE before closing date and would hand over the proceeds as agreed.

15.1 From the above, it is clear that the liabilities excluded were past liabilities and did not have any. direct relationship with the running of the smooth functioning of the business of the concern. It may be pointed out that there is no exclusion of any statutory liability or liability on account of running of the business, which stood transferred with the unit. It is also clear that the transferee undertook all liabilities in relation to the employees also.

16. It is to be observed that for ensuring that the concern remained fully functional in the hands of the transferee, the employees were also transferred as has been provided in Chapter 8, which is as under:

Chapter 8-Transfer of employees 8.1 Annex. 6 lists all employees of ECE who shall be transferred to Osram.

8.2 Osram represents that it will enter into with the employees in a new employment contract on existing terms that recognizes for the purpose of gratuities only the past service age under the previous employment by ECE.

8.3 Osram will takeover preclosing gratuities liabilities and liabilities for leave salary not taken by the employees accrued and earned up by the transferred employees at the date of closing, ("the assumed preclosing liabilities") against transfer of ECE's funds to Osram.

8.4 The parties agree that the exact amount of compensation for the liabilities reserves shall be jointly determined by the actuaries of ECE and Osram as per the date of closing. The calculation shall be based on the same calculation principles as presently applied by ECE. The so determined amount shall be paid by ECE to Osram within one week from the closing date.

8.5 ECE will co-operate with Osram to procure, that the provident fund amounts for the ECE employees taken over by Osram will be transferred with effect from the closing date to Osram without any compensation.

17. The assessee also undertook not to engage directly or indirectly in the conduct of lamp business. The non-competition clause as indicated in Chapter 9 is as under:

Chapter 9-Non-competition by ECE ECE covenants and warrants with Osram that it will not be directly or indirectly engaged or concerned in the conduct of lamp business competing with Osram carry on for his own account either alone or in partnership lamp business competing with Osram assist any person, firm or company with technical advice in relation to lamp business competing with Osram be otherwise interested, directly or indirectly in lamp business competing with Osram except for minority shareholding/s in publicly listed companies solicit business from the past, present or prospective customers of its lamp business operations or solicit or encourage any employee of the business to leave the employment of Osram or hire any employee who has left the employment of Osram if such hiring is proposed to occur within one year after the termination of such employee's employment with Osram, at any time on or after the closing date for a period of 60 months thereafter. However, ECE shall remain fully entitled to carry on the business of luminaries and Government rate contract of lamps subject to its procurement of lamps from Osram at a mutually agreeable price to allow it to remain competitive in the said business.

17.1 From the above, it is further clear that the transferor took all steps for enabling the transferee to carry on the entire business in full form without there being any obstruction on account of any conduct of the assessee. Details of plant and machinery are given in Annex. 2 annexed with the agreement which is part of the agreement and which is available at pp. 13 to 16 of the paper book. In the list of items included in these annexures, no price or valuation of any item has been mentioned. This also shows that all the assets were included in the total price attributed to the entire unit and no price was allotted to any particular asset or property.

18. In view of the resolution of the meeting of the general body of the company and the agreement dt. 20th May, 1998, a resolution was adopted in the meeting of board of directors on 28th Jan., 1998, which is as under:

that the company be and is hereby authorised 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 Rs. 42.5 crores subject to verification of assets by the buyer. The transfer of assets inter alia will include land and building, plant and machinery both immovable and movable, furniture/fixtures, fittings, office equipment, computers, vehicles and all other movable and balance intangible assets.

19. For executing the agreement and the resolutions, a supplemental sale and purchase agreement was executed in 1998. The mode of payment of the sale consideration was described in this agreement. The relevant portion of this agreement available at pp. 26 to 28 of the paper book are as under:

I. Whereas the parties hereto had entered into a sale and purchase agreement dt. 20th May, 1998 (hereinafter referred to as the "principal agreement") : and II. Whereas the parties hereto have applied to and are ... (not legible) in the agreement

and amendment in Chapter 4 in relation to the purchase consideration.

Now, therefore, the parties hereby agree as follows:

1. 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 Chapters 1, 2 and 3 above as well as any goodwill, know-how or benefit connected therewith shall amount to INR 425 million And shall be paid by Osram in the following manner:

(a) by cheques in favour of "ECE Industries Ltd." for INR 365 million at the closing date.

(b) by cheque in favour of "ECE Industries Ltd." for INR 60 million after closing on the handing over of discharge certificate/.... (not legible) from Bank of India, New Delhi Corporate Banking Branch, New Delhi/original title deeds and related filings with the Registrar of Companies in respect of their lien on the assets of the lamp division, Sonepat.

Stamp duty on land and buildings will be borne by Osram. All other taxes or fees shall be borne by the party that is legally liable to pay.

20. Further, to effectuate the transaction of sale, a possession certificate was also prepared which was signed by both the parties. This certificate is as under:

Possession certificate It is hereby confirmed that M/s ECE Industries Ltd. having its registered office at ECE House, 28 A, Kasturba Gandhi Marg, New Delhi 110 001 (ECE) has handed over to Osram India Ltd., having its registered office at "Indomag House", 81/1, Adchini, Sri Aurobindo Marg, New Delhi 110 017 (Osram), on this the 9th day of October, 1998 the possession, occupation and title of its immovable and movable plant and machinery furniture, fittings, office equipments, computers, vehicles etc. as itemized in Schs. 1 and 2 attached against full consideration paid by Osram and received by ECE in terms of the sale and purchase agreement dt. 20th May, 1998 and the supplemental agreement to the sale and purchase agreement dt. 9th Oct., 1998 and the two conveyance deeds dt. 9th Oct., 1998.

ECE confirms that it has hereafter no claim, right, title or interest whatsoever in the above said assets.

20.1 From the above certificate, it is clear that the possession, occupation and title of movables and immovables, plant and machinery along with all assets were transferred to the transferee, which again establishes the fact that the entire undertaking was transferred as a going concern.

22. On the basis of the transactions carried out through the documents and covenants, referred to above, the assessee showed, the capital loss of Rs. 16.83 crores in the return of income filed by it. The working given by the assessee in this regard is as under:

5. The details of the long-term capital loss are given at p. 28A of the paper book which are reproduced below:

| Computation of capital gain | Cost inflation index | FY | Original cost | Indexed cost | Indexed cost |
|---|---|---|---|---|---|
| Cost of acquisition | 161 | 88-89 | 638.39 | -- | 1391.77 |
| Cost of improvement | 172 | 89-90 | 775.99 | 1583.56 | |
| 182 | 90-91 | 265.02 | 511.11 | 199 | 91-92 | 910.19 | 1605.41 |
| 223 | 92-93 | 272.08 | 428.25 |
| 244 | 93-94 | 10.25 | 14.74 |
| 259 | 94-95 | 25.9 | 35.10 |
| 281 | 95-96 | 198.73 | 248.24 |
| 305 | 96-97 | 11.42 | 13.14 |
| 331 | 97-98 | 83.3 | 88.33 |
| 351 | 98-99 | 13.42 | 13.42 |
| 4541.31 | Total cost of acquisition | | | | 5933.08 |
| Less : Sale consideration | | | | | 4250.00 |
| Long-term capital loss | | | | | (1683.08) 16.83 crores |

23. The assessee vide letter dt. 21st Jan., 2002 justified the version by submitting as under:

The company has been legally advised that sale of lamp division on slump sale basis will attract capital gain on the basis of computation of fair market value on the date of sale and indexed in accordance with the provisions of IT Act, 1961.

Indexed cost of lamp division which was sold during financial year 1998-99 worked out to Rs. 59.33 crores against the sale consideration of Rs. 42.50 crores only leaving a balance of Rs. 16.83 crores towards long-term capital loss to be adjusted against the profits for the current year.

24. The AO did not accept the stand of the assessee and required the assessee to show cause as to why computation of short-term capital should not be made in the following manner:

Computation of short-term capital gain on sale of lamp division at Sonepat as per Section 50(2) Sale consideration received on transfer of lamp division at Sonepat 42,50,00,000 Less : WDV of the lamp division as on 1-4-1998 5,05,91,167 Addition made during the year 13,90,440

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| | |
|---|---|
| | 5,19,81,607 |
| Short-term capital gain | 37,30,18,393 |

25. Against the show-cause notice of the AO, the assessee vide letter dt. 12th Feb., 2002 reaffirmed its stand that the business activities of the undertaking was transferred as a going concern without any disruption. The relevant submission of the assessee in this regard is as under:

3. In this connection, we have to submit that Section 50 of the Act does not apply to our case. The facts in this connection are that we are engaged in the manufacture of various kinds of electrical items, such as bulbs, tubelights, lifts and transformers etc. We have different self-contained units at different places spread over the country for the manufacture of separate items. One of the units located at Sonepat in Haryana is manufacturing different types of lamps and also produces certain semi-finished products and components necessary for lamp manufacture.

4. We sold the above Sonepat unit as a going concern to M/s Osram India (P) Ltd. as per agreement dt. 20th May, 1998. Under the agreement, we have received a lump sum of Rs. 42.50 crores as consideration of all the tangible and intangible assets, as well as the contracts and rights sold and transferred, and also the goodwill, know-how and the following benefits connected therewith:

(i) All past, present and prospective customer relationship (address, contracts, purchase orders, price lists etc.)

(ii) The benefit of the activities of ECE Lamp Division; and

(iii) All contracts (for instance : water, gas, energy, rental, agreements, customer contracts, labour contracts) which are necessary to continue the previous business operation of ECE without any disruption. Such contracts to be transferred and any other intangible assets which are beneficial to Osram in order to ensure that Osram is able to continue ECE's previous business activities as a going concern without any disruption.

(iv) The non-exclusive, royalty-free right of Osram to use the trademark 'ECE' for a period of 60 months from the closing date according to the trademark licence agreement.

5. Since our Sonepat unit has been sold/transferred as a going concern or as a slump sale, no part of the price of Rs. 42.50 crores was attributable to any particular asset including any depreciable asset. It was a pure case of a slump sale. This view is supported by a decision of Supreme Court in the case of CIT v. Mugneeram Bangur & Co. (Land Department) . This case has again been considered and approved by the Supreme Court in a recent decision in CIT v. Artex Mfg. Co. .

6. If no part of sale consideration can be attributed to any asset including depreciable asset, then Section 50 as pointed out in your show-cause notice, will have no application to our case. To clarify, we may state that if no part of sale consideration can be separately attributed to the block of assets, there is no question of any separate determination of any income on their sale/transfer. On that basis there will also be no question of treating any such non-determinative income as short-term capital gam.

26. The assessee also pointed out that even in the form for obtaining certificate under Section 230A(2) of IT Act, the assessee, in the column relating to particulars of company, nature has described the sale transaction as that of slump sale. A copy of the application form has been filed on pp. 124 to 126 of the paper book. Relevant information given in column 16 is as under:

16. The lamp unit of the company at Sonepat is being sold as slump sale on a going concern basis and entire assets of the company including land, building, plant and machinery, electrical installations, motor vehicles, furniture, other equipments, goodwill etc. will get transferred together with the entire technical infrastructure and employees as per the agreement.

27. Vide reply dt. 22nd March, 2002, the assessee again clarified its stand before the AO.

28. It is significant to point out here that while dealing with the issue the AO has only considered the provisions of Section 50 and some case laws for rejecting the stand of the assessee. He had also

observed that the assessee did not furnish the details of consideration received on loan and, therefore, capital gain is computed on the block of assets as a whole. It may be pointed out that he has neither considered the conveyance deeds, referred to above, nor the detailed written submissions of the assessee reproduced by us in above paras.

29. It is seen that on the facts of the present matter, the terms and conditions of the covenants and the mode of transfer required a thorough examination for deciding the nature of the transaction. The AO has ignored the basic documents and has thus not properly appreciated the relevant aspect of the matter.

30. In appeal, while challenging the order of AO before the learned CIT(A), the assessee vide letter dt. 7th March, 2001 available on pp. 109 to 122 of the paper book made a detailed submission. In particular, it was emphasised that the consideration of Rs. 42.50 crores included the assets, rights, liabilities, etc. The relevant plea of the assessee in this regard is as under:

> The total purchase consideration of all the tangible and intangible assets as well as contracts and rights to be sold and transferred according to Chapters 1, 2 and 3 of the aforesaid agreement as well as any goodwill, know-how or benefits connected therewith was Rs. 42.50 crores. The stamp duty on land and building was to be borne by Osram. All other taxes or fees were to be borne by the party that was legally liable to pay.
>
> 3. Simultaneously with the sale of the above unit by appellant to Osram, it was decided assessment (as) per Chapter 9 of the above agreement that the appellant will not directly or indirectly engage or concern in the conduct of lamp business competing with Osram or solicit business from any customer etc. A supplementary agreement was also entered into between the appellant and Osram on 9th Oct., 1998. It will be preferable to quote this agreement in full as it shows that the total purchase consideration of Rs. 42.50 crores related to all the tangible and intangible assets as well as contracts and rights to be sold and transferred according to Chapters 1, 2 and 3 of the aforesaid agreement as well as any goodwill, know-how or benefit connected therewith."

It was specifically pointed out by the assessee before the learned CIT(A) that as no part of the consideration was attributed to any particular asset including depreciable asset, provisions of Section 50 cannot be applied. In support of this plea, the assessee placed reliance on various authorities.

31. The learned CIT(A) has of course considered various authorities cited on behalf of the assessee but he has not properly examined the conveyance deeds and replies of the assessee submitted before the AO and before him.

32. On the application of Section 50, the specific submission of the assessee was that since depreciable assets alone were not transferred, short-term capital gain did not arise from the

transfer. The learned CIT(A) has rejected this plea and has observed as under:

> 24. From a reading of the above sections, it is clear that Section 50 is a special provision relating to taxation of depreciable assets, and in case of depreciable assets, the provision of Section 50 would apply over and above the provisions of Section 48. Section 50 itself provides that in calculating capital gains on assets in respect of which depreciation has been allowed under this Act, the provisions of Section 48 shall be subject to the modification that the WDV of the block of assets at the beginning of the previous year shall be taken to be the cost of acquisition and the capital gain shall be treated as a short-term capital gain. Therefore, it is clear that 'indexing' as providing for in Section 48 would not be available in case of depreciable assets. From this analysis, it flows that Section 50 which enacts a specific provision relating to depreciable assets, would gain primacy over Section 48, which is a general provision.

33. Regarding the applicability of Section 50B which came into force w.e.f. asst. yr. 2000-01, he rejected the argument of the assessee that since Section 50B came into effect only from 1st April, 2000, slump sale could not be taxed prior to that.

34. Learned Counsel of the assessee, Shri Ajay Vohra, while assailing the findings of learned CIT(A), has emphatically contended that neither Section 50 nor Section 50B is attracted to the transaction of the assessee. Learned Departmental Representative, on the other hand, supported the findings of the learned CIT (A).

35. In view of discussion made above and on examining the documentary evidence, referred to above, and after considering the entire material to which our attention was invited by the learned representatives of the parties as well as after considering the various authorities brought to our notice, we are unable to concur with the findings of the learned CIT(A). Our reasons for holding so and for concluding that in the case of the assessee, neither Section 50(2) nor the amended provisions of Section 50B of IT Act are attracted 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 intangible assets including goodwill, licenses and liabilities.

(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 from the transfer of a long-term capital asset, other than capital gain arising to a non-resident from the transfer of 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.

36. On the basis of above reasons, we find sufficient force in the contentions raised on behalf of the assessee that the learned CIT(A) was not justified in applying the provisions of Sections 50 and 50B of the IT Act and that the transaction of sale of Sonepat unit was a transaction of slump sale.

37. Now, we proceed to consider various authorities to which reference was made by the learned representatives before us.

38. CIT v. Mugneeram Bangui' & Co. (Land Department) (supra)-In this case, a firm which was carrying on the businesses of buying land, developing it and then selling it, pursuant to an agreement sold the business as a going concern with its goodwill and stock-in-trade to a company promoted by the partners of the firm. The transferee company undertook to discharge all debts and liabilities, development expenses and liability in respect of deposits made by intending purchasers. The schedule to the agreement indicated the cost of land, goodwill and furniture and fixture, etc. On examination of the agreement and the schedule, Tribunal was of the opinion that although value of goodwill was shown at Rs. 2,50,000 but it was really the excess value of land which was its stock-in-trade and though the sale was that of a business as a going concern but the value of its stock-in-trade would be traced out and the transaction was the mere adjustment of business operation of the partners. Department placed reliance on the decision of Privy Council of Doughty v. Commr. of Taxes (1927) AC 327 (PC) to hold that the transfer was a transfer of all assets to a company and thus, the transfer was a capital sale. The Hon'ble Supreme Court, after examining the issue, held that the sale was the sale of the whole concern and no part of the slump price was attributable to the cost of land. After placing reliance on the decision in the case of Doughty v. Commr. of Taxes (supra) and the decision in the case of CIT v. West Coast Chemicals & Industries Ltd. (supra), the Hon'ble Court held that no part of the slump price was taxable.

39. In the instant case also, the transfer is to be treated as a sale of the undertaking as a going concern because there was no separate sale of the stock and no valuation of the slock or any other asset was done. In the case of Doughty v. Commr. of Taxes (supra), it was observed that where a slump price is paid and no portion of it is attributable to stock-in-trade it may not be possible to hold that there is a profit other than what results from the appreciation of capital.

40. CIT v. F.X. Periera & Sons ('Travancorc) (P) Ltd. (supra)-In this case, the assessee company, an agent of the Government, agreed to transfer the business to the Government. However, the Government failed to fulfil certain applications (obligations) due to which the assessee took resort to civil litigation. Ultimately, the matter was settled through a compromise decree and sale deed was executed. The company had sold the property for a consideration of Rs. 17 lakhs. In the agreement, it was specifically provided that purchaser shall purchase all the properties mentioned in the schedule for a consideration of Rs. 17 lakhs out of which a sum of Rs. 5 lakhs has already been deposited in the High Court. The Hon'ble High Court has gathered the intention of the parties from the terms of the agreement and observed as under:

(ii) That the intention of the parties to the sale deed was to have the business sold as a going concern. A capital asset had thus been transferred by the sale deed dt. 14th April, 1971. There was, therefore, no sale of the building, plant, machinery and furniture separately. Only if the assets which were enjoying depreciation were sold separately, that the provisions of Section 41(2) would be attracted. Therefore, the Tribunal was right in holding that the industrial undertaking as a whole had been taken over by the Government and the profit derived by the assessee could not be assessed under Section 41(2) of the Act.

41. East India Electric Supply & Traction Co. Ltd. v. CIF (2003) 184 CTR (Cal) 6 : (2003) 133 Taxman 759 (Cal)-In this case, the undertaking was acquired by the State Electricity Board and a slump sale was awarded for the same by the arbitrator. The said sum was subject to assessment. In appeal, the Tribunal assessed the same amount both to capital gain and to income from business, having regard to Section 41(2) of IT Act. The assessee filed application under Section 254(2) contending that since the undertaking was sold at a slump price and since no amount was attributable to depreciable and non-depreciable assets, there is a mistake in the order of the Tribunal which required to be rectified. However, this application was rejected. The assessee filed appeal before the Hon'ble High Court under Section 260A and submitted that money payable on transfer of undertaking at a slump price cannot be subject to tax under the head "Income from business". It was pointed out that the balance sheet does not indicate the amount payable on transfer or acquisition. It might be the book value or other value but it is not indicative of the amount payable on any one of the heads. On the other hand on behalf of the Revenue, it was contended that the price of land can be ascertained from the balance sheet and having admitted the valuation, the assessee firm cannot contend that the valuation is different from what has been shown in the balance sheet and, therefore, if that amount is deducted from the price received, the balance would be the amount received on account of depreciable assets and then the calculation is to be followed by computing the difference of book value and written down value and, therefore, the excess receipt comprising the book value would be chargeable to capital gains. In support of his argument, the learned Counsel for the assessee placed reliance on the decision of Hon'ble Supreme Court in the case of CIT v. Artex Mfg. Co. (supra). After considering the award, the Hon'ble Court observed that it is not possible to hold that any amount was attributable for the land as per the contents of the award. According to the Hon'ble Court until and unless there are materials to determine the value of the land component, from the award itself, the value of the going concern when awarded by a slump price cannot be subject to tax as income from business.

41.1 The Hon'ble Calcutta High Court distinguished the case of CIT v. B.M. Kharwar by saying that in that case, the apex Court had found that in the books of account, different items were sold under different heads of plant, machinery and dead stock etc. and in the assessee's books of account, the cost of acquisition and the written down value was reflected thereof. It was pointed out that these were revalued by Hargovandas Girdharlal at the time of transferring the assets to the private limited company and in the said revaluation, the value of each item was shown separately. It was further pointed out that this revaluation was made by the assessee itself. Thus, on these facts, according to the Hon'ble Court, it was clearly ascertainable as to what amount reflected the difference between the written down value and the valuation at which it was transferred, enabling the authority to

determine the profit/income out of it. The Hon'ble Court placed reliance on the decision in the case of CIT v. West Coast Chemicals & Industries Ltd. (supra) in which it was held that if the slump price does not show any portion attributable to stock-in-trade, then it would not be possible to hold that there was a profit other than what results from the capital appreciation. The Hon'ble Court further placed reliance on the decision in the case of CIT v. Mugneeram Bangui & Co. (supra) and held that if on the basis of the material, a particular price can be attributable to a particular item, then the excess amount would be chargeable to tax under the head it comes so that the same cannot be charged to tax as the income from business. With these observations, Hon'ble Court distinguished the decision in the case of CIT v. Mugneeram Bangui & Co. (supra). However, Hon'ble Court confirmed that part of the order which deals with the principle relating to capital gains and held that the income on account of slump sale in this case is subject to chargeability under the head "Capital gains". Therefore, the aforesaid decision is applicable to the present case. In the present case also, no portion of the slump price is attributable to any particular asset or property.

42. The issue relating to slump sale versus itemized sale was considered in detail by Hon'ble Bombay High Court in a recent decision in the case of Premier Automobiles Ltd. v. ITO (supra). The facts of the case are as under:

> 42.1 Premier Automobiles Ltd. (in short PAL), a company registered under Companies Act, 1956 was engaged in the business of manufacture and sale of two cars, viz., Padmini and Premier 118NE. For manufacturing of 118NE, PAL had a plant and machinery at Kurla (gear box) and Pune (machining). It had manufacturing facility of Padmini at Kurla. The manufacturing units of 118NE were styled as "Kalyan Undertaking".
>
> 42.2 PAL entered into a MoU dt. 11th March, 1993 with Automobile Peugeot (AP for short) to establish a joint venture company known as Kalyan Motor Company Ltd. (KMCL) for manufacture and distribution of Peugeot cars throughout India. Later on, PAL agreed to sell and assign to the joint venture company, namely, Kalyan Motor Company Ltd. its Kalyan Undertaking "as a going concern" on "as is where is" basis. The price fixed for the Kalyan Undertaking was at Rs. 217 crores. As pointed out above, the Kalyan Undertaking consisted of plant and machinery for 118NE at Kalyan, Kurla (gear box) and machining at Pune.
>
> 42.3 On 30th Nov., 1995, PAL submitted its return of income enclosing P&L a/c in which it disclosed a profit of Rs. 81.31 crores from the slump sale of Kalyan Undertaking in view of the supplementary agreement dt. 6th Jan., 1995. The AO took the view that it was a sale of itemized assets. He assigned sale value of building, plant and machinery and paint shop etc. separately. Sale price of building was determined at Rs. 23.24 crores from which he deducted written down value of Rs. 3.92 crores and arrived at short-term capital gain of Rs. 19.31 crores. Similarly, he determined the sale price of plant and: machinery at Rs. 97.73 crores from which he deducted written down value of Rs. 33.44 crores to arrive at the profit of Rs. 64.39 crores. He also determined the price of paint shop at Rs. 68 crores and arrived at short-term capital

gain of Rs. 7.57 crores. The value of various items was determined by the AO on the basis of cost of acquisition mentioned in the books of account of transferee company.

42.4 In appeal CIT(A) and in further appeal Tribunal confirmed the view taken by the AO. As there was difference between the two Members of Tribunal, the decision of the Third Member was the majority decision as per which the approach of the AO was found justified.

42.5 Challenging this approach before the Hon'ble High Court, it was submitted on behalf of the assessee that as per the MoU dt. 6th Jan., 1995, it was slump sale for a total consideration of Rs. 247 crores which price was allocated for accounting purposes by the PPL. Before the Hon'ble High Court the issue was as to whether on facts and circumstances of the case, the Tribunal was justified in holding that the transaction of sale of Kalyan business was not a slump sale. The second issue was whether on the facts and circumstances of the case, the Tribunal was justified in holding that lump sum consideration of Rs. 210 crores is apportionable to different assets and that the value of individual assets is ascertainable.

42.6 On behalf of the Department, several reasons were advanced to justify the order of Third Member of Tribunal.

42.7 The assessee, on the other hand, contended that in the entire slump sale agreement dt. 6th Jan., 1995, there was no sale of itemized assets. Following arguments were also raised in support of this plea:

(i) That there was no payment having nexus with any particular item of assets;

(ii) That under the said agreement, all assets and liabilities of Kalyan Undertaking stood transferred;

(iii) That apart from the fixed assets, PAL also transferred licences, permits, quota, intellectual property, technical know-how, contract with customers and suppliers, network of dealers and repairers as also labour for a sum of Rs. 210 crores;

(iv) In view of the scheme of agreement, the AO was not justified, in attributing price only to building, plant, machinery etc.

(v) Under the slump sale agreement, the stamp duty was payable by KMCL i.e. transferee which was subsequently known as PPL because immovable property could not be transferred without a conveyance;

(vi) That the AO was not justified in holding that short-term capital gains had accrued to PAL on sale of building, plant and machinery as Kalyan Undertaking was a capital asset and since it was held by PAL for more than three years and, therefore,

what was transferred was a long-term capital asset;

(vii) That the AO was not justified in deriving the sale values from the books of PPL (formerly known as KMCL). It was contended that for tax purposes, every assessee has to value its assets and every buyer values the assets which he buys at a higher rate so that .he could claim higher depreciation and, therefore, apportionment; of price by PPL cannot be the yardstick. for coming to the conclusion that there was a sale of itemized assets;

(viii) That the objection of Third Member that entire land of Kalyan was not sold and, therefore, there was no sale of Kalyan Undertaking, was not justified because apportionment of vacant land which was not sold was separate;

(ix) That since the residual business of manufacturing of Padmini cars was not transferred, the transferor i.e. PAL was entitled to continue the manufacturing of Padmini cars even after the MoU and, therefore, the entire business of the assessee was not transferred was not correct. In support of this argument, reliance was placed on the decision of Bombay High Court in the case of CIT v. Narkeshari Prakashan Ltd. (supra), in which case, the assessee, a publishing house, having branches, at two places, had sold the said two branches to two different co-operative societies and yet it was held by the Bombay High Court that since the entire branch business as a whole was transferred, it constituted a slump sale. On this basis, it was argued that it is not necessary that the entire business should be transferred; and

(x) That the assessee also challenged the finding of the learned Third Member wherein it was said that the assessee had not transferred deposits of its customers, did not assign loans received by it to the transferee under the agreement, did not transfer its creditors to PPL to tune of Rs. 13 crores, did not transfer the depreciation fund to PPL, did not transfer wage liabilities to PPL and did not transfer the liabilities of residual business.

42.8 Before the Hon'ble High Court, the contention of the learned Counsel was that the question as to whether the sale was slump sale or sale of itemized assets, one has to look at the overall transaction and ascertain whether the basic structure of the unit is transferred or not transferred and that one cannot go by individual items being transferred unless that particular asset goes to the root of the matter i.e. cars could not have been manufactured without such an asset like gear box unit.

43. The Hon'ble High Court accepted the contentions raised on behalf of the assessee and held that the assets transferred constituted running business and, therefore, there was a slump sale. It was held that merely because a conveyance of land and building came to be executed subsequently it cannot be said that there was no slump sale. The Hon'ble High Court also took into consideration the definition of capita] asset as given under Section 2(14) of IT Act and held that word "properties" in the definition of capital assets under Section 2(14) would include an undertaking acquired as a

whole. According to the Hon'ble High Court, the Kalyan business acquired as a whole by PPL constituted property in the definition of assets. The Hon'ble High Court, after holding that it was a case of slump sale, directed the AO to compute the quantum of capital gains under Sections 45 to 55 of IT Act by observing as under:

> 39. In this case, we have held that sale of Kalyan business was for a slump price. In this appeal, we were only required to consider whether the transaction was a slump sale and having come to the conclusion that there was a sale of business as a whole, we have to remand the matter back to AO to compute the quantum of capital gains. For that purpose, the AO will have to decide the cost of the undertaking for the purposes of computing capital gains that may arise on transfer. That, the AO will also be required to decide its value under Section 55 of the IT Act. Further, the AO will be required to decide on what basis indexation should be allowed in computing capital gains and the quantum thereof. Lastly, the AO will be required to decide the quantum of depreciation on the block of assets. It may be mentioned that these parameters which we have mentioned are not exhaustive. They are some of the parameters under the Act.

44. If we consider the facts and circumstances, terms of agreement and the objections of learned Third Member of Tribunal against holding the transaction of sale as that of slump sale which have been dealt with in detail in the judgment of Hon'ble Bombay High Court and if we compare the facts of the present case then the grounds and objections of the Departmental authorities in rejecting the plea of the assessee cannot be sustained. Thus, the decision of Premier Automobiles Ltd. (supra) fully supports the case of the assessee.

45. The issue has also been dealt with by Hon'ble Madras High Court in a recent order in the case of Asstt. CAT v. Raka Food Products . In this case, the assessee sold its bakery including land, building, plant and machinery and closing stock for a total cost of Rs. 25,50,555. In the original return, the assessee claimed the gains arising out of sale of land as long-term capital gains whereas gains arising out of sale of building, plant and machinery were claimed as short-term capital gains.

45.1 In the revised return, the assessee claimed deduction under Section 48(2) of the IT Act for gains from the sale of building and showed a long-term capital loss from the plant and machinery. The AO applied provisions of Section 50 and worked out entire gain from sale of the bakery etc. as short-term capital gain by holding that the sale was of depreciable assets.

45.2 The CIT(A), on appeal, held that it was not a transfer of series of assets individually but a transfer of entire business undertaking as a whole and hence it could be regarded as a long-term capital asset. He, therefore, directed the AO to allow the assessee deductions under Section 48(2) after considering various provisions contained under Sections 53 to 54G.

45.3 The Revenue filed appeal before the Tribunal but the Tribunal upheld the order of the learned CIT(A).

45.4 On appeal by Revenue, the High Court distinguished the decisions on which reliance was placed by the Revenue and upheld the order of the Tribunal, by observing as under:

> Held, dismissing the appeal, there was no doubt that the sale was done through two separate documents in respect of movable and immovable assets, but this was done only because immovable property could only be sold through a registered sale deed. Land is not a depreciable asset. Once the land forms part of the assets of the undertaking and the transfer was of the entire undertaking as a whole, it was not possible to bifurcate the sale consideration of a particular asset. Section 50 of the Act only applies when depreciable assets alone are transferred. It could not be said that the Tribunal had reversed the finding of the CIT(A) who had held that it was a transfer of the entire business undertaking as a whole. The finding of the CIT(A) was not set aside by the Tribunal. All that the Tribunal had held was that the business of the bakery was closed when it was sold. Therefore, the CIT(A) rightly directed that the profit on sale of the bakery had to be assessed as long-term capital gains thereby granting exemption under Section 54E.

46. The above decision of Hon'ble Madras High Court also applies fully to the facts of the present case because in this case also, it is not a case of transfer of series of assets individually but a transfer of entire business as a whole.

47. In view of the above, the test laid down in various decisions, referred to above, is fully satisfied in the present assessee and even if we consider the exclusionary clause relating to some liabilities then also, we come to the conclusion that the entire business of Sonepat undertaking was transferred as a running business i.e. "as a going concern" and further that no part of the sale consideration was attributable to the separate items or assets and, therefore, the sale in the case of the present assessee of Sonepat unit has to be taken as slump sale and not as itemized sale.

48. In the case of PNB Finance Ltd. v. CIT (supra), Hon'ble Delhi High Court has considered the issue relating to chargeability of capital gains. In that case, the assessee was originally known as Punjab National Bank was carrying on banking business, which was acquired by the Government of India under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1969. The said acquisition was quashed by Hon'ble Supreme Court and thereafter the Parliament enacted the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970. The Second Schedule to this Act provided for a lump sum compensation in respect of each of such undertakings taken over. The assessee was paid a compensation of Rs. 10.20 crores for acquisition of its undertaking. The claim of the assessee was that no amount was chargeable to income-tax as capital gains because the undertaking was acquired as a going concern which was not a capital asset within the meaning of Section 2(14) of IT Act. In the alternative, it was pleaded that assuming the provisions of Section 45 were applicable, the assessee could exercise its option for substitution for fair market value of such undertaking as on 1st Jan., 1954. The AO computed capital gains in the hands of the assessee by taking fair market value of the undertaking as on 1st Jan., 1954 adding thereto cost of improvement and deducting the same from the total compensation received. The AAC held that since it was not possible to evaluate the cost of acquisition and the increase in value of various intangible rights,

powers and privileges and the allocation of the compensation with respect thereto, no capital gain could be determined. The Tribunal on further appeal held that even on the assessee's own showing, by letter dt. 17th July, 1972, the fair market value of the undertaking as on 1st Jan., 1954, was determinable. According to the Tribunal, the valuation had to be of the entire business enterprise of the undertaking as a unit. The Tribunal finally set aside the order of the AAC and remanded the matter to the AO to recompute the capital gains. Regarding cost of acquisition, the Hon'ble Court observed that no opinion can be expressed on this issue because none of the authorities below has undertaken this exercise. Therefore, the issue was remanded to the Tribunal for re-examination.

49. In view of the judgment of PNB Finance Ltd. (supra), the sale of undertaking is to be taken as capital and capital gain under Section 45 of IT Act has to be charged to tax.

50. Delhi Bench of Tribunal has considered a similar issue in the case of Salora International Ltd. v. Jt. CIT (2004) 88 TTJ (Del) 53 : (2003) 129 Taxman 68 (Del)Mag). In that case, the assessee company which was engaged in the business of manufacturing television and components decided to start Panasonic Division in 1993 in technical collaboration with foreign company M for the manufacture of colour television sets in India. During the previous year relevant to asst. yr. 1997-98, the assessee decided to restructure and recoganize the company by spin off of the Panasonic Division to company M. After permission of the High Court to the scheme, the assessee agreed to sell the unit at a fixed price of Rs. 50.12 crores as per the scheme of arrangement. The shareholders of the assessee were also entitled allotment of two equity shares of Rs. 10 each credited as fully paid. While completing the assessment for asst. yr. 1997-98, the AO was of the view that shares of Rs. 17.64 crores given to the shareholders were nothing but application of income. According to him, the whole amount of Rs. 50.12 crores which accrued to the assessee was liable to capital gams. The Tribunal considered the issue and also applicability of Section 50B and observed as under ;

As regards the computation of capital gains, reading of Section 50 makes it clear that this section applies where a capital asset forms part of the block of assets and the same was transferred. But in the case of the assessee by spinning off of the Panasonic Division, the assessee had transferred all the assets and liabilities of that division. It was not a case of transferring of assets from block of assets. Such spinning off was a clear case of slump sale. When the assessee transferred a going concern, there were many tangible assets like goodwill, non-computation, etc. They were not depreciable assets. The land was also transferred which was noted depreciable asset. Thus, it was not a case of transfer of any depreciable asset only.

It may be mentioned that slump sale has also been brought within the purview of Section 50B which has been brought on the statute w.e.f. 1st April, 2000. Section 50B could not be made applicable to the assessee's case during the asst. yr. 1997-98. Such provision being not retrospective in nature, could not, therefore, be relied upon. Similarly, Section 5OA which provides for special provision for cost of acquisition in case of depreciable asset has been brought on the statute w.e.f. 1st April, 1998. As this section has also not been made operative with retrospective effect, this provision was also not applicable in the year under consideration.

51. Tribunal, Bangalore Bench has also considered the matter in the case of Dy. CIT v. Mahalasa Gases & Chemicals (P) Ltd. (2004) 84 TTJ (Bang) 992. In that case, the assessee sold its business undertaking for a slump price. Vide agreement dt. 9th Feb., 1998 with Praxair Carbon Dioxide (P) Ltd., the company's manufacturing and distribution business was transferred for a sum of Rs. 3,40,29,332. The AO was of the view that assets sold were depreciable assets and the written down value should be the cost of acquisition. Therefore, he computed the value of capital gain under Section 50 of IT Act. Learned CIT(A), on the other hand, held that the entire business of the assessee was sold as a going concern and not just depreciable assets. In appeal before the Tribunal, it was vehemently contended by the Revenue that the claim of the assessee about the slump sale was totally incorrect. It was pointed out by the learned Departmental Representative that as held by the AO, as three of the assets, namely, sundry debtors at Rs. 12,97,150, land at Rs. 97,000 and vehicle at Rs. 4,35,029 was not sold as part of the going concern and, therefore, it could not be said that the agreement entered into by the buyer was a sale of an undertaking as a going concern and, therefore, it is not a slump sale. Learned Departmental Representative placed reliance on the decision of Hon'ble Karnataka High Court in the case of Syndicate Bank Ltd. v. Addl. CIT (supra) and on the decision of Bombay High Court in the case of Killick Nixon & Co. v. CIT . Reliance was also placed by the learned Departmental Representative in the case of CIT v. Artex Mfg. Co. (supra).

52. On the other hand, the assessee placed reliance on the decision of Bombay High Court in the case of Premier Automobiles Ltd. v. ITO (supra) and also the decision of Bombay High Court in the case of CIT v. Narkcshari Prakashan Ltd. (supra).

53. The Tribunal, after considering the relevant material including the decisions on which reliance was placed by the parties held that the agreement dt. 9th Feb., 1998 clearly indicated that the transfer by the assessee to the purchaser was of slump sale as a going concern for a slump price and, therefore, it was nothing but a case of slump sale. Regarding computation of capital gain, the matter was restored to the AO by. making Mowing observations:

> 38. In view of the above finding that the transfer was a case of slump sale, we do not think it necessary to go into the aspects of computation of the capital gain on the basis that the sale was one of the individual items. Therefore, the method adopted by the AO in computation of the capital gain is not to be gone into by us as it would not serve any purpose and would be only of academic importance. However, in view of the unanimous view taken by the Hon'ble High Courts of Karnataka, Bombay, Madras, Gujarat and Delhi and especially that of the Hon'ble High Court of Karnataka in the case of Syndicate Bank (supra) and that of the Delhi High Court in the case of PNB Finance Ltd. (supra), we are of the view that as the undertaking sold is a capital asset the provisions relating to capital gains would apply but while doing so the treatment that should be given to the transaction is that the undertaking is sold as a whole and the question of liability will have to be considered only as a transfer of an undertaking as a slump sale for a lump sum and that it is not possible to split the sale consideration amongst the individual assets for this purpose. We, therefore, uphold the order of the learned CIT(A), insofar as it relates to slump sale. However, we direct the AO to consider the liability to capital gain on the basis that

> this is a case of slump sale and the AO has to follow the directions contained in the various judgments cited above and especially the one by the jurisdictional High Court at Bangalore.

With this direction, the conclusion drawn by the learned CIT(A), is modified to the extent indicated above.

54. Delhi Bench of Tribunal has considered the issue in a recent decision in the case of Jt. CIT v. Steri Sheets Ltd. vide order dt. 12th May, 2006 rendered in ITA Nos. 546 and 547/Del/2000. In this case, as per agreement entered into with Kelvinator of India Ltd. on 30th Aug., 1994, the assessee company agreed to sell its entire undertaking as a going concern. As per the agreement, the undertaking was to be transferred for a total consideration of Rs. 6.30 crores. In its return, the assessee declared a long-term capital gain of Rs. 4,29,38,582 arising from the said transfer. The AO applied the provisions of Section 50 and worked out short-term capital gain at Rs. 5,81,11,261 by reducing the written down value of block of assets amounting to Rs. 48,88,739 from the sale consideration of Rs. 6,30,00,000.

55. The assessee submitted before the CIT(A) that since it had transferred its entire business in a slump sale, which was in existence for a period more than 36 months, the profit on such transfer was a long-term capital gain exigible to tax under Section 45. The learned CIT(A) accepted the plea of the assessee and directed the AO to tax the long-term capital gain in the hands of the assessee at Rs. 4,34,06,198.

56. The Revenue filed appeal before the Tribunal for challenging the direction of the learned CIT(A). The assessee also filed cross-objection alleging that the gains arising from the slump sale were not allowable (exigible) to tax under the Act. It was also pleaded that the transfer of an undertaking was outside the purview of Section 45 of the Act in absence of cost of acquisition, cost of improvement and rate of acquisition of undertaking.

57. The Tribunal, after referring to the decision of Premier Automobiles (supra), observed as under:

> 11. On the other hand, the decision of Hyderabad Bench of Tribunal in the case of Commanded Fertilizers Ltd. (supra) cited by the learned Counsel for the assessee is directly on the point in issue wherein it was held that the slump sale of an individual unit as a going concern does not attract capital gains tax as the computation provisions fail to compute the capital gain arising from such sale. It was also held that there was a lacuna in the statute to provide for such computation provisions which has been removed by insertion of Section 50B by the Finance Act, 1999 w.e.f. 1st April, 2000 and this provision being a substantive one is not retrospective in operation. To the similar effect is the decision of Ahmedabad Bench of Tribunal in the case of Industrial Machinery Associates (supra) wherein it was held that prior to insertion of Section 50B effective from asst. yr. 2000-01, it was not possible to conceptualize the cost of acquisition of a going concern as well as date of acquisition thereof and since the cost of acquisition and/or the date of acquisition of the asset

could not be determined, it could not be brought within the purview of Section 45 for levy and computation of capital gains. Since the assessment year involved in the present case is 1995-96, the issue raised in the cross-objection filed by the assessee is squarely covered by the aforesaid decisions of the Tribunal in favour of the assessee and respectfully following the same, we hold that the gain arising from the slump sale of its manufacturing division by the assessee company was not liable to tax. Accordingly, we allow the cross-objection filed by the assessee.

12. In view of our aforesaid decision on the cross-objection of the assessee holding that the gains arising from the slump sale of the manufacturing division were not liable to tax, the issue raised by the Revenue in its appeal for asst. yr. 1995-96 in ground Nos. 1 and 2 has become infructuous. The same is accordingly dismissed.

58. Now we proceed to consider the authorities on which specific reliance was placed by the learned senior Departmental Representative.

59. The first decision on which reliance has been placed by the learned Departmental Representative is in the case of CIT v. Artex Mfg. Co. (supra). In that case, it was found by the AO that for the purposes of determination of purchase consideration, the assets were sold at Rs. 41,73,973 out of which the plant, machinery and dead stock, as revalued by the H was Rs. 15,87,296. The liabilities were shown at Rs. 30,23,573 and the balance amount of Rs. 11,50,400 was shown as purchase consideration. In view of these bifurcated and specified prices of various assets and after taking into consideration, the WDV of depreciable assets as per income-tax records of the assessee and after deducting the same from the amount of Rs. 15,87,296 for which the plant and machinery and dead stock were transferred to the company, the AO held that the tax was payable under Section 41(2) of the IT Act. The learned CIT(A), on the other hand, stated that the capital gains could not be assessed under the head business income. The Tribunal upheld the view taken by the AO. In appeal, the Hon'ble High Court upheld the view taken by the Tribunal but the Supreme Court held that on the basis of information furnished by the assessee before the Tribunal, it became evident that the amount of Rs. 11,50,400 was arrived at by taking into consideration the value of plant and machinery and dead stock as estimated by valuer and, therefore, Section 41(2) was applicable. This authority is, therefore, distinguishable from the facts of the present case because in the instant case, it is not the stand of the Department that the capital gain is to be assessed as business profit under Section 41 of IT Act and secondly in that case, the price of various assets were determinable which task is not possible in the present case because neither in the sale agreement, separate prices were shown for different assets nor any exercise was undertaken by the AO to determine the valuation thereof. No help, therefore, can be taken by the Revenue from this decision.

60. The next case on which reliance has been placed by the learned Departmental Representative is of Delhi High Court in the case of Rajesh Brothers v. CIT . In that case a cinema building was transferred for a total consideration of Rs. 9 lakhs. Out of which, assessee claimed goodwill of Rs. 2,09,268. ITO did not accept the contention of the assessee and held that no goodwill was attached to the cinema business run by the assessee. The Hon'ble High Court has upheld the approach of AO which was affirmed by Tribunal. In fact, in that case, the main issue was under what circumstances

goodwill can be generated and how its value can be determined.

61. The learned Departmental Representative has also placed reliance on the decision of Hon'ble Supreme Court in the case of A.R. Krishnamurthy and Anr. v. CIT (1989) 76 CTR (SC) 18. In that case, the assessee purchased land in 1966 by an instrument of lease-cum-licence for a period of 10 years from time to time of Rs. 5 lakhs in addition to payment of royalty of Rs. 12 per 100 cubic feet of clay extracted subject to a maximum of Rs. 60,000 per year. The ITO construed the lease deed as transferring a leasehold interest in the land in favour of the company and came to the conclusion that the transfer was assessable to capital gains tax. AAC held that the cost of the acquisition of the assets could not be determined. It was thus held that the cost for the purposes of ascertaining the capital gains would be the total price of land paid by the assessee. The Tribunal confirmed the order of AAC. On appeal, the Hon'ble High Court held that there was a transfer of capital asset and in further appeal, the Hon'ble Supreme Court held that so far as the apportionment of cost of acquisition is concerned, it is a question of fact to be determined by the ITO in each case on the basis of evidence. It was observed that the determination of cost of the right to excavate land in terms of money may be difficult but nonetheless money value of the same can be determined. This ratio of this case is again not applicable to the present case because in the present case, it is not the stand of the assessee that the cost of acquisition of the undertaking transferred by it cannot be determined. On the other hand, the assessee has himself indicated the cost of acquisition in the computation given which is available at p. 28A of the paper book, which has been reproduced in para 22 of this order.

62. The other authorities on which reliance has been placed by the learned Departmental Representative are also distinguishable on facts. We do not consider to refer to the same to unnecessarily add load to the bulk of this decision.

63. In view of the above, we accept the contentions raised on behalf of the assessee in support of ground Nos. 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 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 IT 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 AO nor the learned CIT(A) have undertaken the exercise of computation of long-term capital gain as per provision of Sections 45 and 48 of IT 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 5013 shall be attracted in the present matter. Rather the provisions of Sections 45 and 48 shall be applied. We, therefore, set aside the finding of the learned CIT(A) and after holding that the impugned sale transaction is to be treated as transaction of slump sale, we direct the AO to recompute the capital gain as per the relevant provisions of law and in the light of our observations

made above. While doing so, the AO 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.

65. In view of the above, grounds Nos. 1 to 8 stand allowed and are decided accordingly for statistical purposes. In view of our findings on ground Nos. 1 to 8, the additional grounds do not require any specific adjudication and are disposed off accordingly.

66. Ground No. 9 runs as under:

> The learned CIT(A) has further erred in holding that the income form capital gains, computed by the learned AO at Rs. 36,89,23,393 should form part of profit for the purposes of computing book profit under Section 115JA of IT Act, 1961.

67. The learned Counsel for the assessee has filed a detailed synopsis in relation to this ground and submitted that in view of the provisions contained in paras II and III of Sch. VI of Companies Act, 1966, the capital gain is not to be included in the book profit under Section ll5JA. In support of his contentions, he placed reliance on the decision of Special Bench of Tribunal in the case of Sutlej Cotton Mills Ltd. v. Asstt. CIT and also on the decision of Tribunal in the case of Oswal Agro Mills Ltd. v. Dy. CIT (1994) 51 ITD 447 (Del) and the decision of Tribunal Delhi Bench in the case of Dy. CIT v. Sutlej Industries Ltd. in ITA No. 743/Del/2002. He also placed reliance on the decision of Bombay Bench of Tribunal in the case of ITO v. Fringsales (India) Ltd. (2005) 4 SOT 376 (Bom). Reliance has also been placed on the decision of Delhi Bench of the Tribunal in the case of Eicher Ltd. in ITA No. 2363/Del/2001. Learned Departmental Representative, on the other hand, submitted that the provisions of Section 115JA are very clear and capital gains are to be included in the book profit to be computed as per provisions contained under Section 115JA. He placed reliance on the decision of Hon'ble Bombay High Court in the case of CIT v. Veekaylal Investment Co. (P) Ltd. .

68. We have carefully considered the entire material on record to which our attention was invited and the rival submissions. In the case of Sutlej Cotton Mills Ltd. v. Asstt. CIT (supra), the Special Bench of Calcutta took the view that capital gains exempt under Section 54E of IT Act cannot be considered to be part of book profits of the company for purposes of Section ll5J. In the case of Sutlej Industries Ltd. (supra), the Tribunal Delhi Bench has placed reliance on this decision to hold that capital gains are not to be included in the book profit worked out for purposes of Section 115J.

69. The issue has been considered by Hon'ble Bombay High Court in the case of CIT v. Veekaylal Investment Co. (P) Ltd. (supra). In that case, the Tribunal, following the decision in the case of Sutlej Cotton Mills (supra) held that what is deemed to be income under Section 45 is not income for book profits. The issue was thus decided in favour of the assessee. The Revenue filed appeal against the order of the Tribunal and submitted that-by virtue of Section 115J, it is provided that in the case of a company whose total income as computed under the Act is less than 30 per cent of the book profit computed under that section then the total income chargeable to tax will be 30 per cent of the book profits as computed. It was further argued that for the purposes of Section 115J, book

profits will be the net profits as shown in the P&L a/c prepared in accordance with Sch. VI of Companies Act, 1956 after certain adjustments. It was also submitted that expression "total income" covers capital gains which are deemed to be income in lieu of Section 45 of IT Act. The Hon'ble Court after considering various authorities held and decided the issue in favour of the Revenue and against the assessee by observing as under:

> Held, allowing the appeal, that according to Section 115J of the Act, in the case of an assessee being a company, if the total income is less than 30 per cent of its book profits then the total income of such company shall be deemed to be an amount equal to 30 per cent of such book profit and such income shall be chargeable to tax. The important thing to be noted is that while calculating the total income under the IT Act, the assessee is required to take into account income by way of capital gains under Section 45 of the IT Act. In the circumstances, while computing the book profits under the Companies Act, the assessee has to include capital gains for computing the book profits under Section 115J. Even under Clause 3(xii)(b) of Part II of Sch. VI to the Companies Act, 1956, profits or losses in respect of transactions or transactions of an exceptional or nonrecurring nature are to be disclosed. This shows clearly that capital gains should be included for the purposes of computing book profits.

70. In the instant case, the assessee has prepared P&L a/c which has been filed in the printed annual report for asst. yr. 1998-99. In this P&L a/c which has been duly approved by the auditors as per the provisions of Companies Act, the profit on sale of lamp division has been shown. Thus, the P&L a/c prepared by the assessee includes profit on sale of lamp division. Thus, capital gain has been shown by the assessee in the audited P&L a/c and since the assessee had included the capital gain in the audited P&L a/c, for the purposes of Section 115JA in view of the decision of Hon'ble Bombay High Court, the capital gain has to be included in the book profit. The learned CIT(A) has considered the decision of Hon'ble Bombay High Court and has correctly held that the capital gains would form part of profits for the purposes of Section 115JA. We, therefore, do not find force in the submissions of the learned Counsel for the assessee and uphold the view taken by the learned CIT(A). This ground is, therefore, rejected.

71. Ground Nos. 10 and 11 are directed against sustenance of addition of Rs. 29.55 lakhs as interest accrued to the assessee from inter-corporate deposits. The learned CIT(A) has considered this issue in para 40 of his order. He has sustained the additions by observing as under:

> 41. I find that this issue of the same ICDs and interest due thereon has been the subject-matter of addition in the assessment orders in earlier assessment years also. The appellant has gone in for a reference to the Delhi High Court on exactly the same facts and legal issues.

In the light of the above, in accordance with Section 158BA, the decision of the Hon'ble High Court of Delhi in the assessment years under consideration before the High Court would be applicable to this assessment year also. Meanwhile, the addition made by the AO is upheld in view of the fact that

the appellant is following the mercantile system of accounting under which income is to be calculated on accrual basis and not on cash/receipt basis."

72. Before us, the learned Counsel for the assessee submitted that the issue stands covered by the decision of Tribunal in the case of the assessee for asst. yr. 1998-99. In this regard, our attention was invited to order of Tribunal dt. 23rd Sept., 2005 in the assessee's own case rendered in ITA Nos. 950/Del/2002 and 1694/Del/2002, copy of which has been filed by the assessee is available at pp. 516 to 520. The issue relating to inter-corporate deposits was also involved in asst. yr. 1998-99. In that year, the addition of Rs. 35,04,794 was made to the income of the assessee by rejecting its claim. The issue has been considered in paras 3 to 6.6 of the order. The Tribunal, after considering the aforesaid order of Tribunal for asst. yr. 1998-99 and after making reference to the decision reported in CIT v. Ferozepur Finance (P) Ltd. and other decisions, has deleted the addition. Respectfully following the above referred decision, we delete the addition and consequently allow ground Nos. 10 and 11.

73. Ground No. 12 runs as under:

> The learned CIT(A) has also erred in disallowing the expenditure of Rs. 21,70,165 being l/5th of total payment made in previous years and already allowed in previous assessment years under Voluntary Retirement Scheme (VRS) treating it as capital expenditure. She failed to consider that claim was in accordance with the decision of her predecessor CIT(A) in the asst. yr. 1998-99 which was binding on her. In any case, it was a revenue expenditure and not of capital nature having been incurred wholly and exclusively for the purposes of the appellant's business and in accordance with law, was an allowable deduction.

74. CIT(A) has considered this issue in para 42 of the order and has upheld the order of the AO disallowing the expenditure on VRS claimed by the assessee. His observations are as under:

> The other point raised by the appellant is the claim of l/5th expenditure on VRS based on the orders of asst. yr. 1998-99 of CIT(A)-IU, before whom the appellant had relied on Section 35DDA which provides for l/5th expenditure on VRS being debited each year for 5 years. I find that Section 35DDA was introduced w.e.f. asst. yr. 2001-02. This section does not have retrospective effect. Furthermore, the section is a specific deeming section which deems that l/5th of the expenditure on VRS will be debited in one year i.e. will be treated as (or deemed to be) expenditure of the previous year. This provision does not lay down any general principle of taxation and hence the rationale behind it, cannot be applied retrospectively. Accordingly, I uphold the orders of the AO in disallowing the expenditure on VRS claimed by the appellant.

75. The learned Counsel for the assessee pointed out that this ground stands covered by the order of the Tribunal dt. 24th May, 2006 rendered in ITA No. 4852/Del/1996 for asst. yr. 1993-94, ITA No. 1181/Del/1998 for asst. yr. 1994-95 and ITA No. 4244/Del/1999 for asst. yr. 1996-97. The Tribunal

has considered the issue in para 16 of the order and has upheld the finding of the learned CIT(A) deleting the addition in asst. yr. 1996-97 by observing as under:

> 16.2 After considering the orders of the AO and CIT(A), we found no infirmity in the finding of the CIT(A). The findings of the CIT(A) are given in middle para at p. 7 of his order, which are as under:
>
> I have considered the arguments raised on behalf of the appellant. I find that the AO has not examined the matter in detail. From the details furnished by the appellant shown above, it is found that the payment in VRS was allowable as deduction. The appellant chose to claim the payment over five years and not in one year. The Department did not object to this method followed by the appellant and allowed the claim from asst. yr. 1994-95. The liability for asst. yr. 1995-96 had been allowed at l/5th in asst. yr. 1995-96 also and do not find why the claim should be disallowed in this year. It is not the case of the AO that the expenditure was not allowable. There is no question of amortization of these expenses because these are allowable expenses. The only issue is whether it should have been allowed in one year or in five years. Since the appellant spread it over five years, I do not find any reason to interfere with the method followed by the appellant. The disallowance made of Rs. 9,55,643 is hereby deleted.
>
> 16.3 These findings could not be controverted by the learned Departmental Representative. Therefore, on the reasoning given by CIT(A), we confirm his order on this issue.

76. As the identical issue is involved in this year, respectfully following the order of the Tribunal, we delete the addition. Ground No. 12 is, therefore, allowed in favour of the assessee.

77. Ground Nos. 13 and 14 are general in nature and therefore do not require for adjudication.

78. In the result, appeal of the assessee (ITA No. 2564/Del/2003) is allowed partly for statistical purposes and as above.

79. The assessee has taken following grounds in this appeal:

> 1. The learned CIT(A)-III, New Delhi has erred in not allowing/setting off the carried forward business loss of the asst. yr. 1999-2000, amounting to Rs. 4,70,40,396 from the income of the assessment year under appeal.
>
> 2. Similarly, the learned CIT(A) has further erred in not allowing the carried forward capital loss of Rs. 16,83,00,000 relating to the same asst. yr. 1999-2000 from the income/capital gain of the assessment year under appeal.

> 3. The order passed by the learned CIT(A) is thus illegal and against the facts of the case.
>
> 4. The learned CIT(A) may also be directed to set off any other loss/losses that might arise as a result of appellate, revisional or rectification orders against the income of the assessment year under appeal or subsequent years.
>
> 5. The appellant seeks permission to modify and/or add any other ground or grounds of appeal as the circumstances of the case might require or justify.

80. The assessee had claimed carry forward business loss of Rs. 4,70,40,396 and long-term capital gain of Rs. 16,83,00,000 relating to asst. yr. 1999-2000 on account of slump sale of his lamp division. The learned AO has disallowed the claim of the assessee.

81. In appeal, the learned CIT(A) has dismissed the claim of the assessee by observing as under:

> It relates to disallowing the carry forward of business loss of Rs. 4,70,40,396 and long-term capital gain of Rs. 16,83,000 relating to asst. yr. 1999-2000 on account of 'slump sale' of its lamp unit. The issue relating to this loss arose in the asst. yr. 1999-2000. The appellant company had sold its lamp unit to Osram India (P) Ltd. in the asst. yr. 1999-2000. It had claimed the loss arising therefrom, but the same were disallowed in the relevant assessment year i.e. asst. yr. 1999-2000 by the learned CIT(A) vide order dt. 21st March, 2003. In view of the same the loss so claimed by the appellant are not allowable in the present year for being carried forward and, therefore, the same is dismissed on this account.

82. The learned Authorised Representative submitted that these grounds are consequential and the decision of the same rests on the decisions to be taken in the main grounds of appeal in ITA No. 2564/Del/2003. Since we have held that the sale transaction in the case of the assessee was a slump sale and have also directed the AO to recompute the capital gains as per law and in view of Section 45 of IT Act, we set aside the finding of the learned CIT(A) and restore the matter to the AO for recomputing the capital gain or capital loss and thereafter to decide the issue relating to set off of the business loss, if any, as per law.

83. In the result, the appeal, (ITA No. 5508/Del/2003) is allowed for statistical purposes.