

**IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "A" : HYDERABAD**

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SHRI SAKTIJIT DEY, JUDICIAL MEMBER

ITA.No.275/Hyd/2013
Assessment Year 2007-2008

The ITO, Ward 3(2) Hyderabad (Appellant)	vs. M/s. Zinger Investments (P) Ltd. Secunderabad PAN AABCG9751C (Respondent)
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For appellant	: Shri M.H. Naik (DR)
For respondent	: Shri Inturi Rama Rao (AR)

Date of Hearing	: 12.06.2013
Date of pronouncement	: 21.08.2013

ORDER

PER SAKTIJIT DEY, J.M.

This appeal is filed by the Revenue against the Order of the CIT(A)-IV, Hyderabad dated 10.12.2012 for the assessment year 2007-2008.

2. Briefly the facts are that the assessee-company earlier known as M/s. GVK Novapan Industries Pvt. Ltd. is a Private Limited Company. For the impugned assessment year, the assessee filed its return of income declaring NIL income. Initially, the return was processed under section 143(1) on 05.02.2009. Subsequently, action was initiated under section 147 of the Act by issuing a notice under section 148 calling upon the assessee to submit a return of income. In response to such notice, the assessee filed a letter dated 30.12.2010 requesting the Assessing Officer to treat the return filed originally as a return in response to the notice under section 148 of the Act. In the course of assessment proceedings, the Assessing

Officer noticed that during the year under dispute, the assessee had transferred its manufacturing division to M/s. Novapan Industries Limited under a scheme of amalgamation approved by the Hon'ble High Court of A.P. w.e.f. 01.04.2006. It was further noticed that as on 31.03.2006 the assessee-company had total assets of Rs.3219.89 lakhs and total liabilities of Rs.2538.67 lakhs. Hence, the net worth of the assessee-company was Rs.681.22 lakhs. The Assessing Officer further noted that as per the scheme of amalgamation both the assets and the liabilities were transferred by the assessee company to M/s. Novapan Industries Limited. As a consideration for the transfer of the division the amalgamated company M/s. Novapan Industries Limited allotted 38 shares for every 100 shares of the amalgamated company. Besides allotment of shares, the amalgamated company M/s. Novapan Industries Limited also transferred certain investments held by it amounting to Rs.25,24,05,000/- to the assessee company. The balance-sheet of the assessee company as on 31.03.2007 shows share capital of Rs.6,28,07,500/- and reserve amount of demerger at Rs.18,42,87,883/-.

3. The Assessing Officer on examining the above facts felt that the transfer of the manufacturing division to M/s. Novapan Industries Limited tantamount to a "slump sale" within the meaning of section 50B of the Act attracting liability of capital gains therein. The Assessing Officer referring to the definition of "Slump Sale" under section 2(42C) and the definition of "Undertaking" as in Explanation to 1 to Section 2 (19AA) defining demerger, was of the view that the transfer of manufacturing division by the assessee company amounted to "slump sale" and the capital gain arising therefrom has to be brought to tax under the provisions of section 50B of the Act. Though the assessee objected to the aforesaid view taken by the Assessing Officer by submitting that the manufacturing

unit of the assessee was not transferred for a slump sale consideration and the same is amalgamated with M/s. Novapan Industries Limited as a part of scheme of arrangement and there was no consideration received in terms of money value, the Assessing Officer, however, did not accept such contention of the assessee by holding that the transfer of the manufacturing division by the assessee to M/s. Novapan Industries Limited is a 'slump sale' attracting liability under section 50B(1) of the Act and therefore, to be charged to capital gains tax. The Assessing Officer, accordingly, proceeded to determine the capital gain by adopting the sale consideration for the purpose of computing capital gain, the share capital allotted and the value of investment transferred to the assessee by the amalgamated company M/s. Novapan Industries Limited amounting to Rs.6,28,07,500/- and Rs.25,24,05,000/- respectively totalling to Rs.31,52,12,500 /- and after reducing the cost of acquisition of Rs.6,81,22,000/- determined long term capital gain at Rs.24,70,90,500/-. The assessee being aggrieved of the assessment order, preferred appeal before the CIT(A).

4. In the course of hearing of the appeal, it was submitted by the assessee that the assessee company as well as the transferee company were engaged in manufacturing and sale of particle boards upto 31.03.2006 and therefore, the management of the two companies felt it would be economical and effective to combine their operations. Accordingly, as per a scheme of arrangement under section 391/394 of the Companies Act, duly approved by the Hon'ble High Court of A.P. by an Order dated 27.12.2006, all the assets and liabilities of the assessee were vested with M/s. Novapan Industries Limited against which, the assessee was given investments valued at Rs.25,24,05,000/- held by M/s. Novapan Industries Limited besides allotment of 68,12,200 equity shares of Rs.10/- each of the face value to Rs.6,81,22,000/- to the share holders of the assessee. It was

submitted by the assessee that the provisions of section 50B were applicable only in the case of sale of an undertaking and not in the case of an arrangement between two companies under section 391/394 of the Companies Act, 1956. In this context, learned A.R. relied upon certain judicial precedents including the decision of Hon'ble Supreme Court in the case of CIT vs. Motors and General Stores Pvt. Ltd. 66 ITR 692 (S.C.) wherein the Hon'ble Supreme Court held that the term 'sale' connotes a transfer of property in goods or of the ownership in immovable property for a money consideration and the presence of money consideration is an essential element in a transaction of sale. It was further held that if the consideration was not money but some other valuable consideration, it may be an 'exchange or barter' but not a 'sale'. The assessee further relied upon the decision of ITAT, Mumbai Bench in the case of Avaya Global Connection Ltd. vs. ACIT 7(3), Mumbai 26 SOT 397 wherein it was held that the expression 'transfer' as defined in section 2(47) of the Act include several forms of transfer and sale is only one such form of transfer. It was further held that the definition of "slump sale" under section 2(42)(C) would mean that it is only a transfer as a result of sale that can be construed as a slump sale. Therefore, any transfer of an undertaking otherwise than as a result of sale will not qualify as a slump sale. The CIT(A) on following the aforesaid decisions relied upon by the assessee allowed the appeal by holding as under :

"5.6. The judicial view is thus clear that money consideration is an essential element of sale and there being no money consideration being passed between the transferor and transferee in an arrangement u/s. 391 r.w.s. 394 of the Companies Act, a scheme of arrangement or amalgamation does not amount to a 'sale'. It is therefore held that the transaction in the case of the appellant, being a result of a scheme of arrangement u/s. 391 r.w.s. 394 of the

Companies Act was not a sale. Consequently, it did not fall within the definition of a 'slump sale' u/s. 2(42C), and therefore, the provisions of sec.50B did not apply to the transaction in question."

5. Being aggrieved, the department is in appeal before us. The learned D.R. supporting the conclusion arrived at by the Assessing Officer submitted that demerger is nothing but slump sale coming within the ambit of section 2(42C) of the Act. He, therefore, contended that the Assessing Officer was correct in treating the transfer as a slump sale and bringing it to tax under the head "Capital Gain" under section 50B of the Act. .

6. The learned A.R. on the other hand, at the outset, submitted that the grounds raised by the department are not on the issue in dispute as they relate to demerger only whereas, the Assessing Officer has completed the assessment by treating it as a slump sale under section 50B of the Act. Hence, the grounds cannot be entertained. He further submitted that the assessment was completed under section 143(3) read with section 147 of the Act. In the reasons recorded, the Assessing Officer has made no reference to demerger. It is also admitted by the Assessing Officer that there is no money consideration involved for transfer of the assets. It was submitted that the assessee has never claimed it as demerger. Under these circumstances, the grounds raised cannot be entertained. It was further contended by the learned A.R. that if these grounds are allowed to be adjudicated, it would amount to confirming the addition on an item in respect of which no reasons were recorded under section 148 of the Act as no addition has been made on that account.

7. So far as the merit of the case is concerned, the learned A.R. submitted that the transaction cannot be treated as slump sale under section 2(42C) of the Act as the amalgamation of the assessee

with M/s. Novapan Industries Limited is by operation of Law as a result of a scheme of arrangement approved by the Hon'ble High Court of A.P. in a proceeding under section 391 and 394 of the Companies Act, 1956. It was submitted that the amalgamation was not contractual. It was submitted that the scheme of amalgamation would make it clear that there was no flow of money consideration for transferring the manufacturing division to M/s. Novapan Industries Limited as the manufacturing division was merged with the M/s. Novapan Industries Limited as a going concern with the term that 'M/s. Novapan Industries Limited shall transfer the investments appearing in its books of accounts as on 31.03.2006 to the assessee company and allot 38 equity shares at Rs.10/- each for every 100 equity shares held in the assessee company to the shareholders'. Therefore, it is very much evident that no monetary consideration is involved in the scheme of amalgamation. In this context, the learned A.R. referred to the decision of the Hon'ble Supreme Court in the case of CIT vs. Motors & General Stores Pvt. Ltd. 66 ITR 692 (SC). He further referred to a decision of the Hon'ble Supreme Court in the case of CIT vs. R.R. Ramakrishna Pillai 66 ITR 725 wherein it was held that where a person carrying on business transfers assets to a company in consideration of allotment of shares, it would be a case of exchange, but not sale. In the light of aforesaid decision, it was submitted that since the transaction between the assessee and the M/s. Novapan Industries Ltd. does not involve any monetary consideration it cannot be considered as sale.

8. We have considered the rival submissions of the parties and perused the materials on record. We have also carefully examined the decisions relied upon by both the parties. On perusal of the assessment order, it is very much clear that the entire assessment is based on the fact that the Assessing Officer has treated the transfer of assets to M/s. Novapan Industries Ltd. as a slump sale attracting

the provisions of section 50B of the Act. In this scenario, we have to confine ourselves to the issue as to whether the transfer of the manufacturing division M/s. Novapan Industries Ltd. is a 'slump sale' within the meaning ascribed under section 2(42C) of the Act so as to attract the provisions of section 50B of the Act. It is undisputed that under the scheme of amalgamation approved by the Hon'ble High Court of A.P. under section 391 and 394 of the Companies Act, the manufacturing division of the assessee company was transferred to M/s. Novapan Industries Ltd. with all its assets and liabilities as per the terms of the scheme of amalgamation approved by the Hon'ble High Court. The assessee in return for the transfer of the assets received the investments of Rs.25,24,05,000/- besides allotment of 38 equity shares of Rs.10/- each to the shareholders of the assessee-company for every 100 equity shares held in the assessee company. From the aforesaid facts, it is very much clear that as per the scheme of amalgamation, there is no monetary consideration received by the assessee-company for transfer of the manufacturing division. Section 50B of the Act provides for computation of capital gains in the case of 'slump sale'. The definition of 'Slump Sale' under section 2(42C) reads as under :

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

9. A plain reading of the aforesaid provision makes it clear that to qualify as slump sale, two conditions have to be satisfied viz., (1) there must be transfer of one or more undertaking as a result of sale and (2) the sale should be for a lumpsum consideration without values being assigned to the individual assets and liabilities. In the case of the assessee it is not disputed that there is no monetary consideration received for transfer of the assets and liabilities of the manufacturing division to M/s. Novapan Industries Ltd. though

there may be a transfer of an undertaking. In that view of the matter, it has to be examined in the light of ratio laid down by the various judicial precedents whether the transaction would assume the character of sale ? The Hon'ble Supreme Court in the case of CIT vs. Motors and General Stores Pvt. Ltd. (supra) held as under :

“Sale is a transfer of property in goods or of the ownership in immovable property for a money consideration. But, in exchange there is a reciprocal transfer of interest in immovable property, a corresponding transfer of interest in movable property being denoted by the word ‘barter’. The difference between a sale and an exchange is this that in the former the price is paid in money, whilst in the latter it is paid in goods by way of barter.

The presence of money consideration is an essential element to a transaction of sale. If the consideration is not money but some other valuable consideration it may be an exchange or barter but not a sale.”

10. The same view was again expressed by the Hon'ble Supreme Court in the case of CIT vs. R.R. Ramakrishna Pillai 66 ITR 725 wherein it was held that where a person carrying on business, transfers assets to a company in consideration of allotment of shares, it would be a case of exchange but not of sale. The ITAT, Mumbai Bench in the case of Avaya Global Connect Ltd. vs. ACIT 26 SOT 397 (Mum.) after following the decision of the Hon'ble Supreme Court in the case of CIT vs. Motor General Stores Pvt. Ltd. (supra) and the decision of the Hon'ble Bombay High Court in the case of Sadanand S. Varde vs. State of Maharashtra 247 ITR 609 held as under :

“30. In the light of the principle laid down in the aforesaid judicial pronouncements, we are of the view that the transfer of TTD by assessee to ITEL consequent to scheme of amalgamation approved by Hon'ble Bombay High Court cannot said to be a sale of undertaking by the assessee. Consequently, the transfer could not be said to be as a result of sale and

therefore the provisions of section 2(42C) of the Act did not apply. The provisions of section 50B were also not therefore applicable to the facts and circumstances of the present case.”

11. Therefore, considering the facts of the present case in the light of ratio laid down as above by the Hon’ble Supreme Court and the Tribunal since there is no monetary consideration involved in transferring the manufacturing division with all its assets and liabilities to M/s. Novapan Industries Ltd. under scheme of amalgamation approved by the Hon’ble High Court of A.P. it cannot be considered to be a slump sale within the meaning ascribed under section 2(42C) of the Act so as to attract the liability of the capital gain under section 50B of the Act. In the aforesaid view of the matter, we do not find any reason to interfere with the finding of the CIT(A) which is accordingly upheld.

12. In the result, grounds raised by the Revenue are dismissed and the appeal is also dismissed.

Order pronounced in the Open Court on 21.08.2013

Sd/-
(CHANDRA POOJARI)
ACCOUNTANT MEMBER

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

Hyderabad Date 21st August, 2013.

VBP/-

Copy to

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2. M/s. Zinger Investments (P) Ltd. 156-159, Paigah House, S.P. Road, Secunderabad. PAN AABCG9751C
3. Commissioner of Income Tax(Appeals)-IV, Hyderabad.
4. Commissioner of Income Tax-III, Hyderabad
5. DR “A” Bench