* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ ITA 448/2016, CM APPL.26426/2016

TRIUNE PROJECTS PRIVATE LIMITED Appellant
Through: Mr. Tarun Gulati with Mr. Rony 0 John, Mr. Shashi Mathews and Ms. Rachana Yadav, Advocates.

Versus

DEPUTY COMMISSIONER OF INCOME TAX .....Respondent
Through: Mr. Zoheb Hossain, Sr. Standing Counsel.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE NAJMI WAZIRI

ORDER

% 22.11.2016

1. Admit.

2. The question of law is "whether in the circumstances of the case the Income Tax Appellate Tribunal (ITAT) fell into error in holding that the assessee's transactions of sale to Triune Energy Services Pvt. Ltd. (hereafter referred to as 'buyer') is not a genuine slump sale to qualify treatment under Section 50B of the Income Tax Act, 1961".

3. The assessee is engaged in the business of design, engineering and consultancy in the oil and gas (both onshore and offshore), petroleum refinery and allied sector. It provides a range of services starting from concept or project which includes feasibility study, process design and detail engineering procurement services, construction supervision etc. On 22.09.2006 it entered into a Slump Sale Agreement (hereafter referred to as `the agreement') with the buyer. The agreement had the effect of

transferring the business undertaking entered by the appellant/assessee as a going concern. All tangible assets and liabilities together with goodwill were conveyed for a lump sum consideration of 245.85 crores. The net book value of the assets so transferred was 25.27 crores. In the return filed by the assessee on 10.11.2007 it declared a corresponding income and since its undertaking had been in existence for more than three years it computed long term capital gains under Section 50B and offered 20% of it as tax.

4. The assessee's claim was selected for scrutiny during which it relied upon the agreement dated 22.09.2016 and its various terms. The Assessing Officer (AO) rejected the assessee's claim holding *inter alia* that the slump sale tax claim was a "sham transaction" designed to avoid tax liability by artificially inflating assets value and that the assets so transferred were short term in nature. The AO decided that the considerations, i.e., lump sum amount received was income from other sources and directed a higher rate of tax.

5. The assessee unsuccessfully appealed to the Commissioner of Income Tax (Appeals) [CIT(A)], who upheld the finding that the transaction was not genuine and so had colourable device. The assessee accordingly appealed to the ITAT. In the meanwhile, parallelly the buyer, which was formerly known as `Saipem Triune Engineering Private Limited', preferred an appeal to the ITAT against a similar finding that the transaction was colourable and there was no expression of slump sale which resulted in purchase of such assets. The ITAT, on that occasion, in its order made in the buyer's appeal, accepted the genuineness of this slump sale agreement of 22.09.2006 and set aside the findings of the AO and the CIT(A). The ITAT, however, remanded the matter with respect to valuation of goodwill to the AO. The

buyer, therefore, appealed to this Court. By judgment and order reported as ***Triune Energy Services Pvt. Ltd. Vs. Deputy Commissioner of Income Tax, 2015-TIOL-2701-HC-Del-IT,*** it was held that the finding of the ITAT with respect to the genuineness of slump sale was on account of a cross appeal by the Revenue on this point.

6. On the other issue of the remit (for which the assessee had appealed), this Court held that goodwill was an intangible asset and the question of its valuation, in any manner, other than the one disclosed by the assessee could not have arisen. In so holding, this Court relied upon the decision of the Supreme Court in ***Commissioner*** *of* ***Income Tax Vs. Smifs Securities Ltd.*** *348 ITR 302 (SC)*. Besides, the Court also noted the relevant Financial Reporting Standard i.e., No. 10 and the Accounting Standard issued by the Chartered Accountants of India. Therefore, the Court concluded that the excess consideration paid over and above the value of the net tangible asset, was none other than the value of the goodwill.

7. The ITAT, in the present case, negated the ruling of the CIT(A), which had concluded that the slump sale reported by the assessee here was not genuine. It was apprised of its previous ruling, in the buyer's case which had, in effect, rejected the Revenue's contention that the agreement was a device or a "sham transaction". The ITAT was made aware of the judgment of this Court in ***Triune's case (supra),*** however, it held as follows:-

> *"29. We, however, find that in the meanwhile the Coordinate Bench of the ITAT, Delhi in the case of purchaser i.e. Saipem Triune Engg. Pvt. Ltd. vs. DCIT (supra) has given its finding on the genuineness of the same agreement dated 22.9.2006 between STEP and the present assessee following the decision of Hon'ble jurisdictional High Court of Delhi in the case of Triune*

> *Energy Services Pvt. Ltd. vs. DCIT & Ors. (supra). We thus in the interest of justice set aside the matter to the file of the Assessing Officer to decide the issue afresh in view of the above submission of the assessee and the decisions cited above, after affording oppoliunity of being heard to the asesse, as the submissions of assessee before us meeting out the above objections raised by the Ld. CIT(A) reproduced in para no. 28 above, need factual' verification in view of the above cited decisions to arrive at a just and proper conclusion on the issue. The ground No.2 of the appeal of the assessee is thus allowed for statistical purposes."*

8. It is contended by the assessee that the question of remitting the matter, as was sought to be done by the impugned order, does not arise and that the previous ruling in Triune's case *(supra)* concludes the same entirely in its favour.

9. Learned counsel relied upon the operative portion of the judgment in that case and stated that a transaction held to be not a device or a sham, in the hands of one of the parties cannot transform itself to a suspect and a sham transaction in the hands of the other party. Accordingly, the Revenue highlighted that the remittance order should be upheld. He highlighted that there are certain other aspects which cannot be papered over; the principle one being that the entire undertaking was not transferred to the buyer. It was submitted that two assets i.e. one in the form of bad debt and another shown to be written off were retained by the seller. In the circumstances the entire "undertaking was not sold". To satisfy the pre-requisites of a slump sale, as defined in Section 2(42C) of the Act, the undertaking had to be transferred as a whole.

10. At the outset, this Court is of the opinion that the ITAT entirely misdirected itself in its interpretation of the previous judgment in ***Triune's case*** *(supra)*. This Court had affirmed the decision of the ITAT to the effect that the transaction was not a sham or was not a colourable device. In these circumstances, unless there are exceptional facts to the contrary, the same finding has to be maintained in the case of the seller – which the assessee too was. So far as the Revenue's contentions with respect to the retention of two assets that were not sold as a part of the going concern by the assessee is concerned, we find the argument is insubstantial. The sale transaction was reported for a total consideration of Rs.45.83 crores. The sale was for a going concern, which included ongoing service contracts, employment contracts and other tangible assets, and intangible assets such as technical know-how etc. To expect a purchaser to buy and pay value for defunct or superfluous assets flies in the face of commercial sense. Unfortunately, the Revenue's understanding is that in a going concern the buyer is bound to pay good money, transact and purchase bad and irrecoverable debts. Not only does it fly in the face of common and commercial understanding, but it is not even a pre-condition , as is evident from the definition of "undertaking", cited in Explanation (1) to Section 2 (19) (A) of the Act.

11. This definition of "undertaking" is what has been engrafted into by reference, under Section 2(42C) of the Act. Therefore, if certain assets or properties are left out because they would cause inconvenience or lead to some kind of a trouble for the purchasing party, it is well within its right to exclude it from the list of assets.

12. For these reasons, the revenue's contentions are rejected.

13. For the foregoing reasons, the appeal has to succeed; question of law framed has to be answered in favour of the assessee and against the renue. It is so answered. Accordingly, it is held that the slump sale qualifies for treatment under Section 50(B) of the Act.

14. The appeal is consequently allowed and CM No.26426/2016 stands disposed off.

S. RAVINDRA BRAT, J.

NAJMI WAZIRI, J.
NOVEMBER 22, 2016