ITAT, Cochin

Harrisons Malayalam Ltd. vs ACIT

I.T.A. No. 54/Coch/2009

And

DCIT vs Harrisons Malayalam Ltd.

I.T.A. No. 60/Coch/2009 (assessment year 2005-06)

O.K. Narayanan, Accountant Member and N. Vijayakumaran, Judicial Member

12 May 2009

Dilip S. Damle for the Assessee
C. Karthikeyan Nair for the Department

ORDER

O.K. Narayanan, Accountant Member:-

1. These two appeals are cross appeals filed by the assessee and the Revenue, for the assessment year 2005-06. These appeals are directed against the order of the Commissioner of Income-tax (Appeals)-II at Kochi dated November 28, 2008. They arise out of the assessment completed under section 143(3) of the Income-tax Act, 1961.

The assessee-company is engaged in various business activities like growing and manufacturing tea, rubber plantations, agricultural operations, executing engineering contracts, etc. The return for the impugned assessment year 2005-06 was filed by the assessee-company disclosing a total loss of Rs.4,66,82,249. Initially, the return was processed under section 143(1). Thereafter, the return was selected for scrutiny and assessment was completed under section 143(3) of the Act.

In the course of assessment proceedings, the Assessing Officer has made certain disallowances/additions whereby the assessable income has been determined at Rs.39,24,14,587, as book profit under section 115JB.

The first disallowance/addition made by the assessing authority was in respect of depreciation claimed by the assessee in its tea division which amounted to Rs.95,52,231;

The second addition/disallowance was again in respect of depreciation, but in the rubber division of the assessee, which amounted to Rs.59,54,017;

The third addition/disallowance made by the Assessing Officer was also in respect of depreciation vis-a-vis rubber division, amounting to Rs.74,85,588;

The fourth addition/disallowance made by the Assessing Officer was in respect of loss claimed by the assessee in the computation of capital gains relating to the sale proceeds of trees, amounting to Rs.17,58,746;

The fifth addition/disallowance made by the assessing authority was in respect of replanting expenses amounting to Rs.6,93,096; and

The sixth addition/disallowance was in respect of expenses debited in the plantation division amounting to Rs.37,91,439.

In computing the book profit under section 115JB, the Assessing Officer has added an amount of Rs.32,65,94,751 being the profit on sale of agricultural land, which was in fact the profit computed by the assessing authority on the sale of the rubber estate known as "Boyce Estate".

It is in the light of the above various disallowances and additions that the Assessing Officer has finally arrived at a taxable book profit of Rs.39,24,14,587.

This assessment was taken in the first appeal and the Commissioner of Income-tax (Appeals)— Confirmed the disallowance of Rs.74,85,588 being employees contribution, towards various funds like provident fund, employees7 state insurance, etc.;

Addition of Rs.17,58,746 being capital loss dismissed as not pressed; Addition of Rs.32,65,94,751 towards book profit confirmed; and The Commissioner of Income-tax (Appeals) deleted various other disallowances made by the Assessing Officer relating to licence fee paid to RPG Enterprises, capital expenditure, capital gains, etc.

The Commissioner of Income-tax (Appeals) has also enhanced the assessment on two counts; First one is in respect of income by way of long-term capital gains assessable under section 50B to the extent of Rs.32,65,94,751. According to the Commissioner of Income-tax (Appeals), the sale of "Boyce Estate" was a slump sale and the resultant profit is assessable under section 50B of the Act whereas the Assessing Officer has accepted the contention of the assessee that it was not a slump sale. The second instance of enhancement is treating the loss on sale of shares as speculation loss amounting to Rs.2,04,15,600 and not allowing the same to be adjusted against long-term capital gain of Rs.99,50,934 earned on the sale of land.

The assessee-company is aggrieved by the additions/disallowances upheld by the Commissioner of Income-tax (Appeals) and the Revenue is aggrieved on the relief granted by the Commissioner of Income-tax (Appeals). Therefore, these cross-appeals before the Tribunal.

The first we will consider the appeal filed by the assessee.

The first ground raised by the assessee is that the Commissioner of Income-tax (Appeals) has erred in upholding the action of the Assessing Officer in disallowing the employees' contribution to provident fund and labour welfare fund under sections 36(1)(va) and 2(24)(x) of the Income-tax Act, 1961.

The case of the appellant is that the payments were made before the due date for filing the return and therefore deductions should be allowed as prayed for. The Assessing Officer found that the contributions being employees' contribution, it cannot be allowed as a deduction and the Commissioner of Income-tax (Appeals) upheld the disallowance in the light of the order of the Tribunal passed in the assessee's own case for the assessment years 2001-02 to 2003-04. In that order, the Tribunal has held that section 43B(b) was applicable only in respect of employer's contribution and not to employees' contribution. The learned chartered accountant appearing for the assessee invited our attention to the judgment of the hon'ble Supreme Court in the case of CIT v. Vinay Cement Ltd. [2007] 213 CTR 268; [2009] 313 ITR (St.) 1 where it has upheld the judgment of the Gauhati High Court in the case of CIT v. George Williamson (Assam) Ltd. [2006] 284 ITR 619 in which the Gauhati High Court has held that the payments to provident fund, etc. made after the close of the accounting year but before the due date for filing of the return is entitled for deduction in computing the income of an assessee. The learned chartered accountant submitted that the effect of the order of the Tribunal in the assessee's own case for the earlier years mentioned above has been disapproved in the above judgment and in the light of the judgment in the case of Vinay Cement Ltd., [2007] 213 CTR 268 (SC); [2009] 313 ITR (St.) 1 the payments made by the assessee beyond the accounting year but before the due date for filing of the return must be allowed as legitimate deductions.

We considered the matter. It is true that the Tribunal has taken a view, in favour of the Revenue, in the assessee's own case for the earlier assessment years, viz., 2001-02 to 2003-04. The hon'ble High Court of Kerala in the case of CIT v. South India Corporation Ltd. [2000] 242 ITR 114 has held that wherever the payments were not made within the due dates specified under the respective Acts, the deduction could not be allowed. It is in the light of that judgment that the Tribunal has taken such a view. But the Gauhati High

Court in the case of CIT v. George Williamson (Assam) Ltd. [2006] 284 ITR 619 has held that payments made to the provident fund etc., after the close of the accounting period but before the due date for filing of the return is entitled for deduction. In fact, the Gauhati High Court was following its own earlier decisions in the case of CIT v. Assam Tribune [2002] 253 ITR 93 and CIT v. Bharat Bamboo and Timber Suppliers [1996] 219 ITR 212. In the course of hearing of the case in George Williamson (Assam) Ltd. [2006] 284 ITR 619, counsel appearing for the assessee had urged before the court to review its earlier decisions in the cases of Assam Tribune [2002] 253 ITR 93 and Bharat Bamboo and Timber Suppliers [1996] 219 ITR 212 in the light of the judgment of the Kerala High Court in the case of CIT v. South India Corporation Ltd. [2000] 242 ITR 114. The Gauhati High Court after considering the judgment of the Kerala High Court in the case of CIT v. South India Corporation Ltd. [2000] 242 ITR 114 has come to the conclusion that its decision rendered in earlier cases, i.e., Assam Tribune [2002] 253 ITR 93 and Bharat Bamboo and Timber Suppliers [1996] 219 ITR 212 are to be followed and accordingly decided the case of George Williamson (Assam) Ltd. [2006] 284 ITR 619 (Gauhati), in assessee's favour. The above decision of the Gauhati High Court has now been upheld by the Supreme Court in the case of Vinay Cement Ltd. [2007] 213 CTR 268; [2009] 313 ITR (AT) 1. It means, the court has also taken note of the judgment of the Kerala High Court in the case of CIT v. South India Corporation Ltd. [2000] 242 ITR 114 and thereafter upheld the judgment of the Gauhati High Court in the case of George Williamson (Assam) Ltd. [2006] 284 ITR 619. It means that the issue has now been decided by the Supreme Court, in the case of Vinay Cement Ltd. [2007] 213 CTR 268; [2009] 313 ITR (AT) 1 that the payments made to provident fund and employees' state insurance scheme etc. are to be allowed as deductions, if the payments were made before the due date for filing of the return. This judgment is applicable to both the employees' and employer's contribution, as no distinction has been made by the Gauhati High Court in the case of George Williamson (Assam) Ltd. [2006] 284 ITR 619. Therefore, in the facts and circumstances of the case, we allow this ground of the assessee and direct the Assessing Officer to give deductions for delayed payments made by the assessee in respect of the employees' contribution to provident fund and labour welfare fund, etc. Thus, this ground raised by the assessee is allowed.

The ground Nos. 2 and 3 raised by the assessee relate to the computation of book profit for the purposes of section 115JB. While computing the book profit for the purposes of section 115JB, the Assessing Officer has added profit on sale of one of its rubber estate as forming part of the book profit. The contention of the assessee was that the profit arising on the sale of its Rubber Estate was agricultural income and therefore it was outside the scope and purview of the book profit as provided in section 115JB. But this contention was not accepted by the Commissioner of Income-tax (Appeals).

The assessee has earned a profit of Rs.32,65,94,751 on sale of one of its rubber estates known as "Boyce Estate". The "Boyce Estate" is situated at Kokkayar, Peermedu Taluk, Iddukki District, which is beyond 8 k.m. from any municipality. In the course of assessment proceedings, the Assessing Officer himself has accepted the contention of the assessee that the land comprised in "Boyce Estate" was agricultural land within the definition of section 2(14)(iii) of the Act. The Assessing Officer also agreed with the assessee that the said estate land did not fall in either sub-clause (a) or sub-clause (b) of clause (iii) of section 2(14) and accordingly he had accepted the contention of the assessee that the profit on sale of the said estate was not exigible to capital gains tax. It is the case of the assessee that once the income is held to be agricultural income, the same would not form part of the book profits for the purposes of section 115JB.

The Bombay High Court in the case of Manubhai A. Sheth v. Nirgudkar, 2nd ITO [1981] 128 ITR 87 has held that the capital gains arising from the sale of land situated in India, which land is used for agricultural purposes, would be revenue derived from such land and, therefore, agricultural income within the meaning of section 2(1) of the Income-tax Act, 1961.

The Andhra Pradesh High Court in the case of S. Mutyam Reddy v. ITO [1988] 169 ITR 174 has held that the capital gains arising from sale of land used for agricultural purposes constituted revenue derived from agricultural land and therefore agricultural income under section 2(1A) of the Act and therefore not chargeable to Central income-tax.

The hon'ble High Court of Kerala has also held the same view as reflected in the judgment of their Lordships in the case of CIT v. Alanickal Co. Ltd. [1986] 158 ITR 630. The hon'ble jurisdictional High Court held that where the rubber estate sold by an assessee was in a rural area, transaction of sale of a rubber estate with rubber trees standing on it did not involve transfer of any capital asset and as such the sale of rubber estate along with rubber trees amounts to sale of agricultural land alone and the transaction cannot be split up as sale of agricultural land and sale of trees and any gains arising from that sale of trees are not liable to tax on capital gains.

Obviously, the profit on sale of agricultural land is agricultural income and the court further held that standing trees also form part of the immovable property and therefore contributed to agricultural income alone.

The hon'ble Supreme Court in the case of CIT v. All India Tea and Trading Co. Ltd. [1996] 219 ITR 544 has held that the compensation received on requisition of agricultural land amounted to agricultural income. The Supreme Court again in the case of Singhai Rakesh Kumar v. Union of India [2001] 247 ITR 150 has held that the income arising out of the transfer of such agricultural lands are not exigible to capital gains as they are in the nature of agricultural income.

In the present case, the assessee has sold a rubber estate with standing trees and all other paraphernalia known as "Boyce Estate". There is no dispute that the said estate was in a rural area and outside the purview of any municipal limit. Therefore, in the light of the judgment of the Supreme Court and the hon'ble jurisdictional High Court, it is to be held that the profits arising from the sale of the rubber estate to the assessee on transfer of the said rubber estate amounted to agricultural income as provided under section 2(1A) of the Act.

Section 115JB, in the Explanation given thereunder as item (ii) provides that the amount of income to which any of the provisions of section 10 [other than the provisions contained in clause (38) thereof] or section 11 or section 12 apply, if any such amount is credited to the profit and loss account, shall be reduced from the book profit for the purposes of section 115JB, Section 10(1) provides that in computing the total income of a previous year of any person, agricultural income shall not be included therein.

In the light of various judicial pronouncements, it is a settled law that the profits arising on transfer of agricultural land partakes the character of agricultural income and the agricultural income is not to be included in the total income as provided in section 10(1) of the Act. Section 115JB provides that any income listed under section 10 other than listed in clause (38) shall be reduced from the book profit and whereby meaning that agricultural income shall not form part of book profit for the purposes of section 115JB of the Act.

This being the facts of the case and governed by the legal position already explained, it is a clear case that the profit accounted by the asses-see on sale of "Boyce Estate" should not be considered for the purposes of computing book profit under section 115JB. Accordingly, the Assessing Officer is directed to exclude the profit on sale of "Boyce Estate" from computing book profit for the purposes of section 115JB. This issue is decided in favour of the assessee and ground Nos. 2 and 3 are accordingly allowed.

The ground Nos. 4 to 6 raised by the assessee involve the issue relating to the assessment of profits made on sale of "Boyce Estate", as capital gains under section 50B of the Act.

As already stated in this order, the assessee has accounted for the profit on sale of its "Boyce Estate" at Rs.32,65,94,751 but claimed exemption from levy of tax on the ground that the property was not a capital asset within the meaning of section 2(14) and the profit arising on sale of that rubber estate would not form part of long-term capital gains tax. The basis of this argument is that the rubber estate is an agricultural land and therefore profits arising on sale of agricultural land partakes of the character of agricultural income itself and would not come within the purview of computation of total income under the provisions of the Income-tax Act.

The above position was accepted by the Assessing Officer, as there was no dispute on the factual aspects of the issue. The asset sold by the assessee was a rubber estate. It was sold in a running condition and as a going concern basis. The asset was a rubber estate with all supporting facilities and paraphernalia. The land situated outside 8 k.m. of any municipality. The property was agricultural land used for plantation purposes. Therefore, in these circumstances, the Assessing Officer accepted the contention of the assessee that the asset was not a capital asset and therefore no capital gain arose on the profit derived from the sale of the rubber estate.

But, as already stated, the Commissioner of Income-tax (Appeals) in his appellate order enhanced the assessment by holding that the surplus arising to the assessee on sale of its "Boyce Estate" is taxable as capital gains under section 50B, as according to the Commissioner of Income-tax (Appeals) the profit arose out of slump sale of an undertaking.

Section 50B provides that any profit or gains arising from the slump sale effected in the previous year shall be chargeable to income-tax as capital gains arising from the transfer of long-term capital assets and shall be deemed to be the income of the previous year in which the transfer took place.

Section 2(42C) defines "slump sale" as a 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. Explanation 1 to section 2(42C) further provides that "undertaking" shall have the meaning assigned to it in Explanation 1 to clause (19AA) whereby an undertaking means, in an inclusive sense, any part of an undertaking, or a unit or division of an undertaking or a business activity taken as a whole, but does not include individual assets or liabilities or any combination thereof not constitution of a business activity. Explanation 2 to section 2(42C) further provides that the determination of the value of an asset or liability for the sole purpose of payment of stamp duty, registration fees or other similar taxes or fees shall not be regarded as assignment of values to individual assets or liabilities.

The Commissioner of Income-tax (Appeals) held that "Boyce Estate" owned by the assessee was sold as a "going concern", which showed that the sale was a slump sale of an undertaking in its entirety. The Commissioner of Income-tax (Appeals) observed that the personnel employed by the assessee-company was transferred to the employment of the new owners of "Boyce Estate" without any break of service and the sale was a sale of lock-stock-barrel basis. The Commissioner of Income-tax (Appeals) observed that "Boyce Estate" sold by the assessee contained not only the standing rubber trees but also plant/factory, accommodation, other facilities and other movable properties and all those properties both movable and immovable have been sold by the assessee and as such the entire rubber estate as a working unit was transferred as such, which in fact, satisfies all the attributes of a slump sale.

The Commissioner of Income-tax (Appeals) held that the assessee is having a number of rubber estates and it is one of the rubber estates, viz., "Boyce Estate" which is in the nature of an undertaking as provided in Explanation 2 to section 2(19AA). He held that "Boyce Estate" itself is a functional unit in the nature of an independent undertaking and therefore in the light of the terms and conditions stipulated in the transfer deed, the sale was that of a slump sale. The Commissioner of Income-tax (Appeals) further held that as the property was sold as a going concern with all the assets both movable and immovable along with the personnel, it is a clear case of transfer of an undertaking in its entirety and therefore there is every reason to hold that the sale is a slump sale. He was of the view that once the sale is found to be a slump sale, it is subjected to the provisions of section 50B whereby the assessee is liable for long-term capital gains as provided in that section.

The contentions of the assessee-company was that the agreement of sale executed by the assessee to transfer "Boyce Estate" excluded the following items from the sale:

(i) All the rubber manufactured, stored or in stock or in the process of manufacture up to the date of sales;

(ii) All the rubber tapped from the said estate prior to the date of sale;

(iii) Benefit of all contracts in so far as they were referable to sale or production of the rubber for the period prior to the date of sale;

(iv) Cash in hand and bank balance;

(v) All unadjusted profits;

(vi) All investments;

(vii) All book debts;

(viii) All securities;

(ix) Deposits and other liquid assets of Boyce Estate prior to the date of sale;

(x) All refunds and subsidies; and

(xi) Excess payments made by the "Boyce Estate" to any persons, Government, Revenue or public authorities or other concerns for the period up to the date of sale.

The assessee contended that clause (1) of the agreement for sale indicated that the subject-matter of sale was only the assets specified in the schedule and annexure to the agreement and did not include all the assets comprised in the "Boyce Estate" as listed above. Clause (2) of the agreement stated that the agreed consideration of Rs.33.30 crores was only in respect of "Boyce Estate" described in the schedule together with rubber and other plantations and improvements thereto and all plants, machines, vehicles and other assets described in the annexure attached to the agreement. Assets other than specified in the schedules and annexure to the agreement were to remain and on conclusion of sale, actually remained the property of the assessee. The assessee further explained that the sale deed has bifurcated the sale consideration between two specified categories of assets. Therefore, it was not a case of slump sale vis-a-vis lump-sum consideration as held by the Commissioner of Income-tax (Appeals).

We considered the matter in detail. The assessee-company is engaged in different types of business like running of plantations, executing turnkey projects, clearing and forwarding agency and shipping business, etc. In its agricultural division, the assessee-company is having a number of estates growing tea, rubber, cocoa, cardamom, etc. In the case of rubber itself, the assessee is having about 12 different estates. During the previous year relevant to the assessment year under appeal, the assessee-company has sold one of its rubber estates known as "Boyce Estate". The estate has been sold on the basis of a detailed agreement executed between the vendor and vendee. The total consideration stipulated for the transfer of the estate has been spilt over different assets both movable and immovable enumerated in different schedules and annexure.

The assessee-company has assigned specific consideration/value for the rubber plantation as such along with the standing trees. The consideration for the extent of land has been specifically mentioned. Thereafter, the assessee has listed out every item of movable property transferred to the buyer and value has been assigned to those movable assets. Vehicles and other assets were shown and sold separately. The assessee-company has not transferred the estate with all the assets and liabilities. All the financial assets available to the assessee up to the date of the transaction were not transferred as per the agreement but have been retained by the assessee-company. The assessee-company has assumed all the liabilities including the statutory liabilities till the date of transfer. Therefore, it is not possible to hold that the transfer was a slump sale only for the reason that the rubber estate was transferred to the buyer as a "going concern".

Even though the expression "going concern" is a functional qualification as far as the estate is concerned, the said functional qualification is not sufficient enough to decide the exact legal character of the transaction, for the purpose of income-tax assessment. The Commissioner of Income-tax (Appeals) has pointed out that the workers on the rolls of the assessee have also been absorbed by the buyers along with the estate. That does not change the character of the transaction. Rubber plantation is a highly labour oriented activity. It is not easy to retrench all the experienced workers only for the reason that the property has been changed hands. Retrenchment of the workers will create serious labour problems and it will not be possible either for the assessee or for the buyer to dose the contract without having a clear cut understanding on the engagement of labour deployed in the rubber estate. Therefore, the agreement with the buyer that the new owners would absorb the existing labour force is not a salient feature to decide whether the sale was a slump sale or not.

The meaning of the expression "going concern" has to be understood in the light of the peculiar nature of the property transferred in the present case. What is transferred in the present case is a rubber estate. The activities in a rubber plantation/estate is a continuous and uninterrupted one and that tapping operations have to be carried out on a regular basis and all other activities have to be carried out without any interruption. Therefore, by the nature of the activities of the rubber plantation itself, it is a "going concern". Even if there is no such an expression in the agreement that the rubber estate is sold as a going concern, the nature of the asset has become "a continuous asset". Even, in the absence of such a specific clause, by its nature, a rubber plantation is in the nature of a "going concern". Unless and until the yielding rubber trees are usually slaughtered and once tapping is started, it always partakes of the character of a "going concern".

Therefore, it is to be seen that while adding an expression in the agreement that the rubber estate was transferred as a going concern, the purpose was only to refer to the state of affairs and refer to an existing fact and not to create any legal proposition in the context of the sale deed.

Therefore, in the facts and circumstances of the case, we are of the considered view that the Commissioner of Income-tax (Appeals) has been highly carried away by the commercial expression reflected in the 'agreement like "going concern". At the cost of repetition, we have to state that a rubber plantation is always a "going concern". Even if the parties to the contract do not say so, still the estate in the nature of a rubber plantation is a going concern. Therefore, the said expression is not a test to be relied on to decide the exact nature of the transaction for the purpose of income-tax law.

The Income-tax Appellate Tribunal, Cochin Bench in the case of Accelerated Freeze Drying Co. Ltd. v. Deputy CIT in I.T.A. No.611/Coch/08 has considered the issue of "slump sale" in its order dated December 15, 2008. In that case, the Tribunal found that there was a bifurcation of sale proceedings, splitting up of the value between the movable and immovable assets, and those are depreciable assets. In that case, the Tribunal held that section 50 is applicable. The Tribunal further held that it was not the value of the transaction to be taken as a noteworthy for the purpose of "slump sale". The Tribunal held that section 50B did not attract in that case.

The Income-tax Appellate Tribunal, Bangalore Bench, in the case of Kampli Co-operative Sugar Factory Ltd. v. Joint CIT [2002] 83 ITD 460 has considered the case of split sale vis-a-vis slump sale. In that case, the Tribunal observed that the liabilities did not enter into a transaction in question and what was sold were the assets, movables and immovables and not the liabilities. The agreement made it clear that the liabilities would be the responsibility of the vendor. The Tribunal held that it was not a slump sale for the reason that only the assets excluding the investment and deposits were sold and the liabilities remained with the assessee.

In the present case before us, the answers are exactly to the facts and circumstances of the case decided by the Bangalore Tribunal as mentioned above. As in the case of Kampli Co-operative Sugar Factory Ltd, v. Joint CIT [2002] 83 ITD 460 in the present case also, the items sold did not include liabilities. The sale agreement did not include investments and deposits. All the investments, deposits, receivables, stock and such other current assets in the form of financial and other assets remained with the assessee-company along with the liabilities. Only those assets enumerated in the schedules and annexure were sold to the vendee. Therefore, in the light of the above judgment of the Bangalore Tribunal, it is to be seen that the present case is one of split sale and not a case that of slump sale.

Similarly, the Income-tax Appellate Tribunal, Mumbai Bench "J", in the case of Mahindra Sintered Products Ltd. v. Deputy CIT [2004] 279 ITR (AT) 1; [2005] 95 ITD 380 has held that where the price had been fixed before hand in respect of identifiable assets of undertaking and no liability was transferred to the buyer, the transfer of undertaking would not constitute a slump sale.

The Income-tax Appellate Tribunal, Kolkota Bench "D", in the case of Deputy CIT v. ICI (India) Ltd. [2008] 23 SOT 58 has held the same view that there cannot be a case of slump sale, if all the assets and liabilities of an undertaking have not been transferred to the vendee.

As rightly relied on by the learned chartered accountant appearing for the assessee, the same view was taken by the Income-tax Appellate Tribunal, Ahmedabad Bench, in the case of Camphor and Allied Products Ltd. v. Deputy CIT [2001] 79 ITD 489.

In the present case, the rubber estate has been sold by the assessee excluding cash in hand, stock in hand, receivables, finance, assets and liabilities. It was not a case of sale by lock, stock and barrel. The assessee-company has made conscious exclusions. The assets sold by the assessee have been listed out in different schedules and annexure. The consideration has been specifically assigned to the sale of immovable property by way of rubber estate. Separate consideration has been assigned to the sale of movable properties including vehicles and other properties. Therefore, it is not a case of slump sale for a lump sum amount of consideration where the consideration is not attributable to any particular item of asset. There is no such a statement of blanket consideration in the present case. Here, the sale of every asset is attributable to a specified sum of consideration. Therefore, we cannot say that there is a "slump sale". What is reflected is only "total consideration". As all the assets and liabilities have not been sold as per the

agreement, this is not a slump sale as construed in section 50B of the Act. It is a sale of several assets through a common agreement with different amounts of consideration ultimately culminating into a total consideration. The facts being so, in the light of the judgment of different Benches of the Tribunal as stated in the above paragraphs, we hold that this is not a "slump sale" answerable to section 50B of the Act. Moreover, in the light of the decisions:

(a) Manubhai A. Sheth v. Nirgudkar, 2nd ITO [1981] 128 ITR 87 (Bom);

(b) S. Mutyam Reddy v. JTO [1988] 169 ITR 174 (AP);

(c) CIT v. Alanickal Co. Ltd. [1986] 158 ITR 630 (Ker);

(d) CJT v. All India Tea and Trading Co. Ltd. [1996] 219 ITR 544 (SC) and;

(e) Singhai Rakesh Kumar v. Union of India [2001] 247 ITR 150 (SC).

The profits arising on sale of agricultural land is agricultural income in nature and therefore, the surplus does not come within the meaning of capital assets and by the nature of the income, it will not come under the provisions of section 50B, Therefore, in the facts and circumstances of the case, we hold that the Commissioner of Income-tax (Appeals) has erred in directing the Assessing Officer to levy long-term capital gains under section 50B on the surplus arising to the assessee on sale of its "Boyce Estate". The said direction is set aside. This issue is decided in favour of the assessee.

The next issue raised by the assessee in its appeal is against the finding of the Commissioner of Income-tax (Appeals) that long-term capital loss of Rs.3,39,44,694 suffered on sale of shares was assessable as "speculation loss" within the meaning of the Explanation to section 73.

The assessee-company, in the previous year relevant to the assessment year under appeal, had incurred a loss of Rs.2,04,15,600 on sale of 2,21,744 equity shares of M/s. Harrison Universal Flowers Ltd, (HUFL). These shares were acquired by the assessee-company by way of direct subscription during the accounting periods from 1995-96 to 1998-99. M/s. Harrison Universal Flowers Ltd. (HUFL) was a subsidiary of the assessee-company.

In the previous year, the entire holding of the assessee in the subsidiary company was transferred to M/s. Surendra Jain and Family in terms of an agreement dated November 3, 2004, for a consideration of Rs.17,54,400. The loss suffered on sale pf these shares was returned by the assessee under the head "Long-term capital gains". After considering the indexed cpst, the long-term capital loss was worked out at Rs.3,39,44,694 and the same was assessed by the Assessing Officer as "capital gains". In the first appeal, the Commissioner of Income-tax (Appeals) directed the Assessing Officer to treat the loss as speculation loss and therefore held that the said loss would not be available for setting off against positive long-term capital gains.

It is to be seen that since 1995-96 onwards, the shares of M/s. Harrison Universal Flowers Ltd. (HUFL) were disclosed by the assessee-company in its balance-sheet as "Long-term investment". These shares were also reflected in the balance-sheet at cost. The assessee-company has no activities of business inpurchase and sale of shares.

In the case of Deputy CIT v. Jindal Exports Ltd. [2006] 287 ITR (AT.) 172; [2006] 101 ITD 129 (Delhi) (TM), by majority decision, the Tribunal has held that where the assessee has held the shares as investment and not as a stock-in-trade, the loss arising out of the sale of the shares would be in the nature of capital loss and not in the nature of speculation loss. In the present case, there is no evidence on record to show that the assessee was indulged in the business of buying and selling of shares. The shares held by the assessee-company are investments. There is no dispute on these facts. When the assessee-company held the shares as investments, there cannot be a case of applying the Explanation to section 73 of the Act. In the facts and circumstances of the case, the loss is very much in the nature of capital loss and therefore, there is no justification in treating the same as speculation loss. This enhancement order of the Commissioner of Income-tax (Appeals) is set aside. This issue is decided in favour of the assessee.

The last ground raised by the assessee is that the Commissioner of Income-tax (Appeals) has erred in not allowing the set off of long-term capital gains on sale of land with the long-term capital loss on sale of shares on the facts and in the circumstances of the case.

This ground is allowed in the light of our finding that the loss on sale of shares is not a speculation loss.

The assessee is successful in its appeal filed before us.

As far as the appeal filed by the Revenue is concerned, following are the grounds:

> "2. The learned Commissioner of Income-tax (Appeals)-II, Kochi, erred in deleting the addition of Rs.6,93,096 made by the Assessing Officer invoking the provisions of sections 37 and 14A of the Income-tax Act, being expenditure attributable to sale proceeds of old rubber trees.
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> 3. The learned Commissioner of Income-tax (Appeals) went wrong in knocking down the disallowance of Rs.1,00,01,290, being licence fee paid to RPG Ltd., a group company, which was not expended wholly and exclusively for business purpose.
>
> 4. The learned Commissioner of Income-tax (Appeals) erred in holding that the Assessing Officer was not justified in treating Rs.17,58,746 as capital gain and reducing the long-term capital loss brought forward from earlier years."

We heard both sides in detail. Regarding the disallowance of Rs.6,93,096, the Assessing Officer disallowed 10 per cent, of replanting expenditure. The disallowance was made under section 37 of the Act. It is the view of the Assessing Officer that the expenditure was disallowable under section 14A of the Act. The Appellate Tribunal deleted similar disallowances made by the Assessing Officer for the assessment years 2002-03 and 2003-04. Following the order of the Tribunal, the Commissioner of Income-tax (Appeals) deleted the said disallowance. The application of sections 37 and 14A made by the Assessing Officer in disallowing 10 per cent, of the replanting expenditure is an exaggerated interpretation of the statutory provisions. The replanting expenditure by itself is a separate block of expenses incurred for the business of the assessee, which is partly agricultural in nature. There is no provision to straight away disallow any part of the business expenditure only for the reason that it is attributable to agricultural operations and the assessee is equally deriving agricultural income. Therefore, the order of the Commissioner of Income-tax (Appeals) is justified especially in the light of the orders of the Tribunal available on the subject. This ground of the Revenue is accordingly rejected.

The next ground is in respect of the disallowance of Rs.1,00,01,290, being licence fee paid to RPG Ltd. According to the Assessing Officer these expenses were capital in nature. The Tribunal has considered the very same issue in the assessee's own case for the earlier assessment years 2001-02 to 2003-04. It is on the basis of these Tribunal decisions, the Commissioner of Income-tax (Appeals) has deleted the disallowances. The said findings of the Tribunal not being disputed so far. Therefore, the Commissioner of Income-tax (Appeals) is bound to follow the order of the Appellate Tribunal and he is justified in doing so. This ground is also rejected.

The last issue is regarding the brought forward capital loss of Rs.17,58,746, relating to the sale of grevillea trees. The Commissioner of Income-tax (Appeals) has rightly relied on the judgment of the jurisdic-tional High Court in the case of CIT v. Rajagiri Rubber and Produce Co. Ltd. [1991] 189 ITR 182 (Ker) which has later been confirmed by the Supreme Court in Kalpetta Estates Ltd. v. CIT [1996] 221 ITR 601. The courts have categorically held that on sale of rubber trees, there cannot be a case of capital gains. This ground also fails.

The Revenue fails in its appeal.

In result, the appeal filed by the assessee is allowed and the appeal filed by the Revenue is dismissed.