

Premier Automobiles Ltd. Vs. Ito

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SooperKanoon Citation : sooperkanoon.com/369798

Court : Mumbai

Decided On : Apr-09-2003

Reported in : [2003]129TAXMAN289(Bom)

Appeal No. : IT Appeal No. 97 of 2003 9 April 2003

Appellant : Premier Automobiles Ltd.

Respondent : ito

Advocate for Pet/Ap. : S.E. Dastur, J.D. Mistry and B.D. Damodar, *for the Assessee R.V. Desai and P.S. Jetly, for the Revenue*

Judgement :

S.H. Kapadia, J.

Being aggrieved by the Judgment and order passed by the Tribunal dated 18-11-2002, in Income Tax Appeal No. 3580/MUM/99, Premier Auto Ltd. has filed this Appeal under section 260A of the Income Tax Act, 1961. The Appeal pertains to assessment year 1995-96.

Facts

2. Premier Auto Ltd. is a company registered under the Companies Act, 1956 and is engaged in the business of manufacture and sale of cars. Upto and during the year under consideration, Premier Auto Ltd. (hereinafter referred to for the sake of

brevity as 'PAL') was engaged in the manufacture of two cars viz. Padmini and Premier 118 NE at Kurla and Kalyan respectively. PAL had plant & machinery for 118 NE at Kalyan, Kurla (Gear box) and Pune (Machining) (hereinafter referred to as Kalyan Undertaking'). PAL had manufacturing facility for Padmini at Kurla. Pal entered into memorandum of understanding (hereinafter referred to as 'the MOU') on 11-3-1993 with Automobile Peugeot (hereinafter referred to as 'the AP') to establish a Joint Venture Company known as Kalyan Motors Co. Ltd. (hereinafter referred to as 'the KMCL') for manufacture and distribution of 60,000 Peugeot Cars throughout India. Under the MOU, it was agreed that PAL will contribute to the equity of Joint Venture Company - KMCL to the extent it was engaged in the manufacture and sale of 118 NE Cars. PAL also entered into Supplemental MOU with AP on 17-5-1994. PAL also executed a Deed of Declaration of Trusteeship on 29-9-1994 whereby PAL agreed to sell, assign and transfer to Kalyan Motor Company Ltd. its Kalyan Undertaking as a Going Concern on 'as is where is' basis. On 19-10-1994, PAL entered into Joint Venture Agreement with AP. On 6-1-1995, PAL executed a Slump Sale Agreement whereby PAL transferred and sold to Kalyan Motor Company Ltd., the said Kalyan Undertaking as a going concern on 'as is where is' basis.

PAL manufactured the body, seats, and various gadgets of 118 NE Cars at Kalyan Factory. PAL assembled the said cars at Kalyan Plant. PAL painted the cars at Kalyan Plant. However, the Gear box Shop for the said cars was located at Kurla and the Machine Shop was located at Pune. Therefore, Kalyan Business of manufacture of 118 NE Cars was located at three sites. On 30-11-1995, PAL submitted its return of income enclosing a profit and loss account in which it disclosed a book profit of Rs. 81.31 crores from the slump sale dated 6-1-1995. The assessing officer, however, took the view that it was a sale of itemized assets. He, therefore, assigned the Sale Value to building, plant and machinery, Paint shop etc. separately. He determined the sale price of the building 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 took 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. Similarly, he took the sale price of paint shop at Rs. 68 crores and arrived at short-term capital

gain of Rs. 7.57 crores. The assessing officer determined the sale price by relying on the cost of acquisition mentioned in the books of account of the transferee company (hereinafter referred to as 'the PPL'). This finding of assessing officer was accepted by Commissioner (Appeals) and by the majority judgment of the Tribunal. According to PAL, the assessing officer erred in relying on allocation done by PPL for its books of account. According to PAL, Agreement dated 6-1-1995 was a slump sale for Rs. 247 crores which price has been allocated for accounting purposes by PPL and which allocation was not binding on PAL. Therefore, the basic issue is : whether Agreement dated 6-1-1995 was a slump sale or a sale of itemized assets?

Being aggrieved, the assessee-PAL has come by way of appeal under section 260A of the Income Tax Act to this court for the assessment year 1995-96.

Although PAL-assessee has framed large number of questions, the following three questions arise for deciding this appeal :

'1. Whether on the facts and in the circumstances of the case, the Tribunal was justified in holding that the transaction of Sale of Kalyan Business was not a slump sale ?

2. Whether on the facts and in the circumstances of the case the Tribunal was justified in holding that the lump sum consideration of Rs. 210 crores is apportionable to different assets and that the value of individual assets is ascertainable ?

3. Whether on the facts and in the circumstances of the case the Tribunal was justified in holding that the apportionment of Rs. 210 crores done by the transferee company for its accounting purposes should be taken by the assessing officer for working out the depreciation allowable to the assessee-company

Arguments

(A) Challenge to the Impugned Assessment Order

3. Mr. S.E. Dastur, learned senior counsel appearing on behalf of the assessee-PAL invited our attention to the MOU dated 11-3-1993 between PAL on one hand

and AP on the other hand. He submitted that the object of MOU was to create a joint venture manufacture of 60,000 vehicles for which AP offered to contribute Rs. 350 crores and PAL agreed to contribute Rs. 210 crores in the joint venture. He submitted that AP offered a good price as AP got a ready facility including infrastructure to manufacture 60,000 cars. He contended that the object of MOU was to create a Joint Venture Company. That, the total cost of the joint venture was estimated at Rs. 560 crores which included Kalyan Undertaking costing Rs. 210 crores. He contended that prior to MOU dated 11-3-1993, PAL manufactured 118 NE Cars at Kalyan with gear box workshop at Kurla and Machinery at Pune. That the said amount of Rs. 210 crores had remained fixed an constant right from 11-3-1993. That, the rest of the item like investments, toolings, know-how and technical assistance were to be brought in by AP. That, under clause III of the MOU, the existing dealers of PAL were to be transferred to Kalyan Motors Company Ltd. (hereinafter referred to as 'the JVC'). He contended that under the MOU, ready-made dealers of PAL also got transferred. He contended that under the MOU, 51 per cent of the shareholding in Kalyan Motor Co. Ltd. belonged to AP and PAL and the balance went to others. At this stage, it may be mentioned that later on the name of KMCL was changed to PPL. That, under clause IV of the MOU, PAL was to contribute to the equity of Kalyan Motor Company Ltd. in the form of assets of the Kalyan Undertaking, Mr. Dastur contended that, under the MOU, what was contemplated was centralisation of all the activities at one place. It was argued that if one reads the MOU in its entirety, it is clear that there was a transfer of the entire Kalyan Undertaking by PAL to KMCL and, therefore, the MOU constituted a step-in-aid to the execution of Slump Sale Agreement.

That on 17-5-1994, a supplemental MOU came to be executed between AP and PAL. Mr. Dastur submitted that under clause 2 of Supplemental MOU, parties undertook to verify the assets to be transferred by PAL to Kalyan Motor Company Ltd. (hereinafter referred to as 'KMCL'). According to PAL, the Supplemental MOU does not refer to valuation of assets. That, the Supplemental MOU refers to verification of assets to be transferred by PAL to the Joint Venture Company. That, under clause 2 of the Supplemental MOU, it was provided that AP will check whether the Kalyan Undertaking had the capacity to manufacture 60,000 Peugeot cars under what was called as Industrial Due Diligence. Under Supplemental

MOU, the verification clause also contemplated various government authorities to check the capacity of the Kalyan Undertaking to manufacture 60,000 Peugeot cars. That, under clause 2 of Supplemental MOU, the only exercise which was required to be undertaken was, whether there existed the principal assets in the Kalyan undertaking for which the estimated cost was fixed at Rs. 210 crores. That the clause 2 did not deal with valuation. That, under clause 3(b)(II), AP was to conduct Due Diligence Exercise. That, under the Supplemental MOU, it was inter alia provided that the parties shall execute Slump Sale Agreement by 30-9-1994 failing which the MOU and Supplemental MOU would stand terminated. That, the MOU and supplemental MOU were subject to approval by government authorities.

4. Mr. Dastur further pointed out that on 29-9-1994, PAL declared that Kalyan Undertaking will be held in Trust and to the account of the New JVC to be called Kalyan Motor Company Ltd. and from that date the Kalyan Undertaking will not be held on account of PAL.

Mr. Dastur further invited our attention to the Joint Venture Agreement between PAL and AP dated 19-10-1994 which refers to incorporation of a New JVC called as Kalyan Motor Company Ltd. Under the Joint Venture Agreement, the sale of Kalyan Undertaking to Kalyan Motor Company Ltd. was to be followed by execution of a Conveyance. (see Article-II). Under the Joint Venture Agreement, the scope of Due Diligence Exercise has been carved out. Under the Joint Venture Agreement, the Assets of PAL, were declared to be free from all encumbrances. The Joint Venture Agreement also contemplates execution of additional documents by PAL, AP and Kalyan Motor Company Ltd. for transfer of Kalyan Undertaking to Kalyan Motor Company Ltd. The scope of Due Diligence Exercise is referred to in Schedule III of the Joint Venture Agreement dated 19-10-1994.

5. Mr. Dastur next invited our attention to the Slump Sale Agreement dated 6-1-1995 between PAL and Kalyan Motor Company Ltd. He contended that the MOU, the Supplemental MOU and the Joint Venture Agreement resulted in the Slump Sale Agreement dated 6-1-1995, but the price of Rs. 210 crores for Kalyan Undertaking remained unchanged. He contended that between execution of the MOU on 11-3-1993 and the Slump Sale Agreement dated 6-1-1995, there were

five developments i.e., on 6-7-1993, the parties obtained approval from Foreign Investment Promotion Board; execution of Supplemental MOU on 17-5-1994; incorporation of Kalyan Motor Company Ltd. on 25-7-1994; execution of Declaration of Trust dated 29-9-1994 and Joint Venture Agreement dated 19-10-1994. Mr. Dastur pointed out that under clause 2.A of the Slump Sale Agreement dated 6-1-1995, there was an assignment of the entire Kalyan Undertaking. That, under clause 2.A.4 there was a transfer of licenses and quotas.

Mr. Dastur next contended that, in this case, the basic controversy is, whether there was a sale of itemized assets or whether there was a sale of entire Kalyan Undertaking by PAL. He contended that it was impossible to assign a Sale Value to the assets like licenses, quotas, technical information, work-force, use of brand name etc. He contended that under the Slump Sale Agreement, a sum of Rs. 210 crores plus the sale value of the net current assets constituted consideration. That, under clause 2.B.2, the price of Rs. 210 crores was to be paid in the following manner :

(i) KMCL to issue and allot to PAL fully paid up equity shares amounting to Rs. 84 crores.

(ii) KMCL to pay to PAL a sum of Rs. 113 crores.

(iii) The balance amount of Rs. 13 crores was payable to PAL on completion of the Paint Shop by PAL.

Mr. Dastur further pointed out that under clause 2.B.3, price of Acquired Current Assets and Acquired Current Liabilities was to be paid subject to Rs. 5 crores being retained by KMCL as guarantee against payment related to Deposits obtained by PAL from its suppliers. That, under clause 2.C, all costs for dismantling and transportation of Acquired Net Assets upto the site at Kalyan was to be borne by PAL and all costs relating to installation of Acquired Net Assets was to be borne by KMCL. Mr. Dastur next invited our attention to clause 3.6 under which PAL represented to KMCL that the net assets transferred to KMCL had a production capacity of 30,000 vehicles per annum. That, under clause 3.7.1 PAL agreed to transfer its employees of Kalyan Undertaking. Under clause 3.7.2,

KMCL agreed to take over such employees with continuity. That, the initial total payroll cost attributable to such employees was not to exceed Rs. 24 crores. Under clause 3.8 of the Agreement, PAL was entitled to carry on its Residual Business of manufacture of Padmini Cars. Mr. Dastur invited our attention to clause 3.13(c) which states that stamp duty on Conveyance of land and building shall be borne by KMCL. Mr. Dastur invited our attention to clause 3.15 under which PAL had transferred to KMCL all permits, licenses, franchises etc. Under clause 3.22, book debts, accounts receivable, claims and bills pertaining to Kalyan Undertaking prior to 29-9-1994 (i.e., Sale Date) were to continue to belong to PAL.

Mr. Dastur submitted that in the entire Slump Sale Agreement dated 6-1-1995, there is no sale of itemized assets. That, in the Slump Sale Agreement, there is no payment having nexus with any particular item of asset. That, under the said Agreement, all assets and liabilities of Kalyan Undertaking stood transferred. That, apart from fixed assets, PAL also transferred licenses, permits, quota intellectual property, technical know-how, contract with costumers and suppliers, net work of dealers and repairers as also labour for a sum of Rs. 210 crores. He, therefore, contended that any attribution of cost to a specific asset was wholly unsupportable. That, therefore, the assessing officer was not justified in attributing price only to buffiding, plant, machinery, etc. He contended that on 27-5-1996 PAL had to execute a conveyance in favour of PPL formerly known as KMCL in respect of land and building for a total price of Rs. 43,44,59,477.50. He contended that, under the Slump Sale Agreement, the stamp duty was payable by KMCL (known as PPL). He contended that an immovable property could not have been transferred without a conveyance. He contended that the assessing officer was wrong in allocating Rs. 20,49,56,346 as price of the land. That, the assessing officer erred in valuing the building at Rs. 23,24,12,935 from which he deducted Rs. 3,92,45,907 as cost and on that basis he arrived at short-term capital gain of Rs. 19,31,67,078 which he adds to the income of the assessee. Mr. Dastur further points out that, similarly, the assessing officer erred in taking the sale price of plant and machinery at Rs. 87,73,60,908 from which he deducted Rs. 33,44,50,204 (Written Down Value) and arrived at the profits realised on account of the transaction at Rs. 64,39,50,057 which is assessed as short-term capital gain under section 50 of the Income Tax Act and which he adds to the total income. Mr.

Dastur further points out that, similarly, the assessing officer fixes the sale price of the Paint Shop at Rs. 68,00,03,809 and deducts therefrom the cost price of Rs. 60,42,69,150 in order to arrive at the short-term capital gain of Rs. 7,57,34,659 which is added to the total income of PAL. Mr. Dastur submits that the sale price adopted by the assessing officer was based on the report of the valuer of September 1996. He contended that the MOU was entered into on 11-3-1993 under which the entire Kalyan Undertaking was transferred for Rs. 210 crores. That, on 11-3-1993 the report of September 1996 did not exist. That, therefore, the assessing officer was wrong in coming to the conclusion that there was a sale of itemized assets. He contended that this finding of assessing officer was perverse. He contended that if the argument of assessing officer was to be accepted, namely, that because of the Conveyance of land and building there was no slump sale then such an argument would lead to an absurd conclusion because in every slump sale there has to be a Conveyance. Mr. Dastur further pointed out the perversity of the order passed by the assessing officer. As per the report of valuer of September 1996, the value of the Paint Shop was Rs. 70 crores. That, the assessing officer has accepted the values of land and building, plant and machinery as indicated in the said report, but when it comes to the Paint Shop, he reduces the value from Rs. 70 crores to Rs. 68 crores because if he was to accept the sale value of the Paint Shop at Rs. 70 crores then the total price would exceed Rs. 210 crores by Rs. 2 crores. Mr. Dastur, therefore, submits that entire exercise undertaken by assessing officer is arbitrary and without any basis.

Mr. Dastur next contended that the assessing officer erred 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 it was held by PAL for more than three years and, therefore, what was transferred was a long-term capital asset. Mr. Dastur contended that by treating the impugned transfer as sale of itemized assets, long-term capital gains is converted into short-term capital gains. He contended that if this court accepts the contention of the assessee that the Kalyan Undertaking was an undertaking; that the said undertaking was a Capital Asset held by PAL for more than three years and that what was transferred was a long-term capital asset, then the matter needs to be remanded back. That, the only question which needs to be answered was, whether any portion of the lump sum

price was attributable to any specific asset and for that purpose one has to examine the MOU dated 11-3-1993 along with the contemporaneous documents and not with the valuation reports of 15-11-1995 and September, 1996. He contended that the assessing officer has relied upon the valuation report of September, 1996 and he has held that the parties were aware as far back as 11-3-1993 of the valuation of each of the items of sale. He contended that this finding of assessing officer was perverse and incorrect. He contended that on 11-3-1993, the MOU only provided for transfer of Kalyan Undertaking to KMCL for Rs. 210 crores which was a lump sum price fixed for the Kalyan Undertaking.

Mr. Dastur next contended that, in this case, the assessing officer erred in deriving the sale values from the books of PPL (formerly known as KMCL). He contended that for tax purposes every assessee has to value its assets. He contended that 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. Mr. Dastur pointed out that even according to the accounting standards laid down by the Institute of Chartered Accountants, a buyer who purchases the Undertaking at a lump sum price is required to apportion the price item-wise.

6. Mr. Dastur next contended that there is a difference between values assigned to the land as the assessee-PAL while applying for certificate under section 230A, has relied upon valuation of November, 1995 whereas the assessing officer relies upon valuation of September, 1996. Therefore, it was argued that the order of assessing officer was full of contradictions.

7. Mr. Dastur next invited our attention to the audit report of the PPL for year ending 31-3-1995. He pointed out that in this report, there is no sale value of plant and machinery. He contended that the value was not there because the entire Kalyan Undertaking was sold for a lump sum price of Rs. 210 crores as indicated by MOU dated 11-3-1993. He contended that on 11-3-1993, PPL was not in existence. He contended that on 11-3-1993, even Kalyan Motor Company Ltd. was not in existence. Mr. Dastur further submitted that even in the Balance sheet of PPL, the fixed assets are valued at Rs. 145.80 crores and not at Rs. 210 crores.

That, as per the said balance sheet, plant and machinery is valued at Rs. 82.14 crores on 31-3-1995. However, the assessing officer values the said plant and machinery at Rs. 97.73 crores which is the value taken from the report of the valuer of September, 1996. Mr. Dastur therefore contended that on one hand the assessing officer holds that the assets have to be valued as per the books of PPL and yet, on the other hand, he has not valued the assets as per the books of PPL but he has valued assets item-wise as per the report of valuer of September, 1996. He therefore submits that there is inherent contradiction in the order of assessing officer. Mr. Dastur contends that the purpose of obtaining the valuers report in September, 1996 by PAL was to spread over the price of Rs. 210 crores over various fixed assets purchased by PPL. He contended that on 31-3-1995 (year ending for PPL), there was no apportionment of the price item-wise. That, the assessment order is based on the report of September, 1996 which is outside the MOU dated 11-3-1993. Hence, even if this court holds that there was a sale of itemized assets, the matter will have to be remanded because the values assigned are arbitrary. That, there is no evidence to support sale of itemized assets and hence the impugned assessment order needs to be set aside.

8. Mr. Dastur has cited before us several authorities in support of his contention that in order to ascertain the true character of payment, one has to go by the substance of the transaction and not by the manner in which the assessee apportions the price. That, in order to find out the intention of the parties on the date of MOU, one has to go by surrounding circumstances and contemporaneous documents in existence on that date i.e., 11-3-1993 and not by valuation of 1995-1996. In this connection, he has relied upon the judgment of the Supreme Court in the case of CIT v. Mugneeram Bangur & Co. (Land department) : [1965]57ITR299(SC) , CIT v. EX. Periera & Sons (Travancore) (P) Ltd. : [1990]184ITR461(Ker) ; Killick Nixon & Co. v. CIT : [1963]49ITR244(Bom) . Mr. Dastur also relied upon various authorities in support of his contention that, in this case, the entire Kalyan Undertaking constituted an undertaking and that there was a transfer of the Kalyan Undertaking as a capital asset. In this connection, he placed reliance on the judgment of the Kerala High Court in the case of CIT v. Kar Valves Ltd. : [1992]197ITR95(Ker) . Mr. Dastur has placed reliance on two judgments of the Supreme Court in the case of CIT v. Artex Mfg. Co. :

[1997]227ITR260(SC) as also in the case of CIT v. Electronic Control Gear Mfg. Co. : [1997]227ITR278(SC) which will be dealt with at the proper place hereinafter.

(B) Challenge to the Findings of Third Member of ITAT

For the sake of convenience, the impugned order is of the 3rd Member of the Tribunal which is basically under challenge.

9. Mr. Dastur, thereafter, challenged the findings of the Third Member of the Tribunal. In para 31, the 3rd Member of the Tribunal has held that the entire land of the Kalyan Undertaking was not sold. That, only a portion of the land was sold and, therefore, there was no sale of Kalyan Undertaking. Mr. Dastur challenged this finding on the ground that the Kalyan Undertaking was located on a portion of the land surrounded by vacant land. He contended that, even in the past, the Kalyan Factory was on a portion of the land which was enclosed by a barbed wire fencing. That, the rest of the land was open. Therefore, Mr. Dastur contended that the land on which the factory was located was transferred under the MOU and, therefore, it cannot be said that there was no sale of Kalyan Undertaking. Mr. Dastur next invited our attention to para 40 of the order of the Third Member of the Tribunal which has held that PAL had sold the business located on a portion of the land along with two machines used by Kurla Unit and Pune Unit. This finding is challenged by PAL on the ground that under the MOU dated 11-3-1993, the Gear box Unit and Machining Unit at Kurla and Pune respectively were to be brought to Kalyan and therefore one cannot infer non-existence of a slump sale. It was next pointed out that the factory at Kalyan was located on an area of land admeasuring 7,43,000 sq. meters. That, the remaining land was vacant. From that, one cannot infer non-existence of the slump sale because the sale was of the Kalyan Undertaking which stood on a land admeasuring 7,43,000 sq. meters. In fact, if the assessee would have transferred vacant land along with 7,43,000 sq. meters of Factory land, the department would have objected on the ground that PAL had transferred other assets. He, therefore, submits that the order of the Tribunal was erroneous.

Mr. Dastur next invited our attention to the findings of the Third Member of the Tribunal that in view of clause 3.16 of the Slump Sale Agreement, there was no

sale of Kalyan Undertaking. Clause 3.16 of the Slump Sale Agreement deals with residual business of PAL. It states that manufacture of Padmini Cars constituted the residual business of PAL. That, PAL was entitled to continue to manufacture Padmini Cars even after the MOU. In other words, there was no sale of the residual business by PAL. Therefore, the Tribunal has held that, in this case, the entire Kalyan Undertaking was not transferred and, therefore, there was no slump sale. This finding has been challenged by the assessee. It is argued on behalf of PAL that there is no rule which states that in order to constitute a slump sale, there should be, in every matter, transfer of the entire business. In this connection, our attention is invited to the judgment of the Bombay High Court in the case of CIT v. Narkeshari Prakashan Ltd. : [1992]196ITR438(Bom) in which 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. It was argued on behalf of the assessee that it is not necessary that the entire business should be transferred. That, in the case of Narkeshari Prakashan Ltd. (supra), the entire business was not transferred. That, only two Branches were transferred. That, in this case, the entire business of PAL has not been transferred. That, only the Kalyan Undertaking pertaining to manufacture of 118 NE Cars has been transferred. It was, therefore, submitted that the basic test in order to be a slump sale was that there should be a transfer of a business and not all the businesses of the assessee. It was argued that PAL maintained separate books for Kurla, Pune and Kalyan. It was, therefore, contended that the Tribunal erred in holding that there was no sale of the entire Kalyan Undertaking and, therefore, there was no slump sale.

Mr. Dastur next invited our attention to the finding of the Third Member of the Tribunal which has placed reliance on clause II.2 of MOU dated 11-3-1993 under which the Gear box Unit and the Machining Unit are required to be shifted to Kalyan. Placing reliance on clause II.2, Tribunal has held that clause II.2 indicated that machines belonging to other Unit were also being transferred to Kalyan. That, machines which did not belong to Kalyan Undertaking earlier, were being transferred to the Kalyan Undertaking and, therefore, the assessee-PAL had transferred assets to itself in addition to what it possessed and, therefore, there

was no slump sale. This finding has been challenged by the assessee on the ground that, in this case, the Kalyan Undertaking, Pune Unit and Kurla Unit were all working for the assessee to manufacture 118 NE Cars. That, under the MOU there was centralization. That, under the MOU, PAL was not transferring the assets of a business with the assets of the another business. That, alternatively, even if an assessee were to transfer Pune and Kurla Units, the transfer did not cease to be a slump sale.

10. Mr. Dastur next invited our attention to the finding of the Third Member of the Tribunal which has placed reliance on para 2(a)(ii) of the supplemental MOU dated 17-5-1994 for coming to the conclusion that there was no slump sale. Now para 2(a)(ii) refers to verification. There is no reasoning given in the order of Tribunal as to how verification process rules out the slump sale. This is the point argued on behalf of the assessee. Similarly, the Tribunal has found that there was no slump sale because in the certificate under section 230A obtained by PAL (transferor), there is item-wise valuation for land and building. It is argued that for transfer of land and building, PAL, as an assessee, was required to obtain certificate under section 230A. Therefore, one cannot rule out the slump sale because the law requires the transferor to obtain such a certificate for fixed assets. Secondly, as already pointed out earlier, the valuation in the certificate of land and building is of November 1995 and not of 11-3-1993. In the circumstances, Tribunal erred in coming to the conclusion that there was apportionment of price item-wise in view of the certificate obtained by PAL under section 230A of the Income Tax Act. Mr. Dastur invited our attention to the finding of Tribunal in which it is held that the PAL was aware of the value of the land, building and plant and machinery as indicated in its application for obtaining certificates under section 230A but PAL deliberately suppressed the valuation in its MOU dated 11-3-1993 and, therefore, it was not a slump sale. The assessee has challenged this finding as perverse. According to the assessee, PAL had applied for the said certificate under section 230A on the basis of the valuation report dated November, 1995 but the Tribunal proceeds to give a value to the land and building as per the report of the valuer of September, 1996. In the circumstances, it was argued that the finding of the Tribunal needs to be set aside. That, the basic issue was whether, in this case, there is any evidence to show that PAL was aware of the value of the land and building on 11-3-1993. It

was argued that Tribunal erred in coming to conclusion that PAL was aware of such value by placing reliance on valuation of September, 1996 which was not a contemporaneous document.

Mr. Dastur next invited our attention to the finding of the Third Member of the Tribunal under which it has been held that the Due Diligence Report indicates that apart from description of item-wise assets, a value was required to be given of each item and that PAL had deliberately kept the column dealing with value as blank, although PAL was aware of the value of the land and building even on 11-3-1993. This finding has been challenged by the assessee as erroneous on the ground that the Due Diligence Exercise was undertaken much prior to submission of the reports in November, 1995 and September, 1996. That, the Due Diligence Exercise was undertaken to identify the assets and to make decision to purchase the Kalyan Undertaking. That, for such Due Diligence Exercise, valuation of the assets item-wise was not required to be made and, therefore, one cannot infer absence of slump sale merely because value of consideration for each of the assets under Due Diligence Report is left blank.

11. Mr. Dastur then invited our attention to the order of the Third Member of the Tribunal which has held that there was an itemized sale of assets because PAL had sold land and building under the conveyance dated 27-5-1996. This finding has been challenged by assessee on the ground that the conveyance was necessary as stamp duty was required to be paid by PPL. That, in the conveyance, it has been specifically recited that PPL would value the land and the building for stamp duty purpose. In the circumstances, it was argued that the order of the Tribunal needs to be set aside.

12. Mr. Dastur next urged that, in this case, the basic point for determination is whether there was a slump sale. That, if the court holds that the transaction was a slump sale then the matter need to be remanded back to assessing officer to compute the capital gains as the assessing officer will have to decide whether the cost of the business could be ascertained and indexed and, if not, whether capital gains, in this case, was at all computable. In this connection, he submitted that Kalyan Undertaking, as a capital asset, was acquired before 1-4-1981 and,

therefore, the assessee had an option to take valuation as on 1-4-1981 in order to index the cost subject to the value being on the higher side. That, the consideration in this case for the entire Kalyan Undertaking being transferred was Rs. 247 crores. That, in this case, we are only concerned with the issue as to whether the transaction was a slump sale. That, no separate consideration has been received by PAL for quota, licenses, transfer of employees and intellectual property rights etc. In the alternative, Mr. Dastur contended that even if the transaction is treated as a sale of itemized assets still the matter will have to be remanded to the assessing officer because the assessing officer has not assigned any value in his order to assets such as quota, licenses, DGTD Registration etc. That, in this case, the assessing officer has only valued land, building, plant and machinery and the Paint Shop. That, the overall total price of the slump sale was Rs. 210 crores plus the realized value of net current assets. However, assessing officer has not given any sale value to the above intangible assets. Mr. Dastur pointed out that the assessing officer erred in valuing building, plant and machinery and Paint Shop as depreciable assets and consequently he has erroneously made the assessee liable for short-term gains without allocating the sale value to licenses, quota, DGTD registration, transfer of employees and intellectual property rights (hereinafter referred to for the sake of brevity as 'Other Assets'). It was further submitted that there were assets like right to use the name 'Premier' by PPL which right belonged to PAL and which is transferred to PPL under the Slump Sale Agreement. Similar is the case in respect of the right to marketing net-work. He contended that such assets do not carry costs. He contended that such assets have not been given any sale value. That, in cases where assets do not have costs, one fails to understand how the assessing officer could calculate capital gains as defined under section 2(14). Mr. Dastur contended that by allocating the sale value only to building, plant and machinery, the assessee is adversely affected in two ways. According to the assessing officer, the entire amount of Rs. 210 crores was subject to capital gains whereas if the assessing officer had allocated the sale value to other assets enumerated above, then the assessee may not be liable for the full capital gains as the said items like licences, quotas etc. do not have costs. The second disadvantage for PAL-assessee was that by not taking into account above such other assets, the

assessing officer has converted long-term capital gains into short-term capital gains. Mr. Dastur further points out that in the books of PAL, the cost of intellectual property and technical information is mentioned but the assessing officer has not taken that cost into account. That assessing officer has not given to the assessee the deduction for such costs. In the circumstances, he submits that even if the assessing officer was right, he has not taken into account the costs of assets like intellectual property, technical information and thereby he has denied to PAL the deduction. Therefore, in any event, the matter will have to be remanded back to the assessing officer.

13. Mr. Dastur invited our attention to the finding of the Third Member of the Tribunal on page 462, stating that PAL had deliberately kept the column relating to 'Value as blank and that the assessing officer was right in assuming the value of assets which were not mentioned in the Slump Sale Agreement deliberately in order to give a transaction a colour of slump sale. Mr. Dastur submits that this finding is erroneous. Mr. Dastur points out that under clause 2(a)(ii) of the supplemental MOU, verification of principal items of assets is contemplated as a part of Due Diligence Exercise under which PPL was required to verify existence and location of assets worth Rs. 210 crores and to gauge whether those assets had the potentiality to manufacture 60,000 Peugeot Cars. For that purpose, all other items in the proforma have been particularized. He contended that the proforma had several columns. He contended that Due Diligence Exercise is undertaken for several reasons. That, in this case, it was undertaken to verify existence to assets. In the circumstances, valuation was not on the agenda and, therefore, the column is left blank. He contended that the assessing officer erred in drawing an adverse inference against PAL. He contended that the Tribunal erred in holding that PAL had deliberately kept such column blank. Mr. Dastur therefore submits that the above finding of the Tribunal is erroneous.

14. Mr. Dastur next points out that, in this case, if the court holds that there was a slump sale of the entire Kalyan Undertaking even then the matter will have to be remanded back to the assessing officer because the assessing officer will have to decide the question of depreciation. He pointed out that question of depreciation at this stage does not arise. Mr. Dastur submits that on page 535 of the paper-book,

the Tribunal has held that there was no slump sale as PAL carried on business till PPL took over. He submitted that PAL had to run the business till the final take over by PPL. He contended that this circumstance cannot be taken into account for coming to the conclusion that there was a sale of itemized assets.

15. Mr. Dastur next invited our attention to finding of the Third Member of the Tribunal at page 536 which states that since the Paint Shop was under construction, it could not be transferred and, therefore, there was no slump sale. Mr. Dastur has challenged this finding as perverse. He states that, in this case, the assessment order shows that the assessing officer has held that profits arose to PAL on transfer of the Paint Shop amounting to Rs. 7,57,34,659 and that PAL has been assessed on that basis. Therefore, he submitted that the Tribunal erred in holding that there was no transfer of the Paint Shop.

16. Mr. Dastur next invited our attention to the finding of the Third Member of the Tribunal at page 536 to the effect that separate accounts were not maintained for Kalyan Undertaking. Mr. Dastur pointed out that this finding is also perverse. The assessee has produced before us, General Ledgers for accounting year ending 31-3-1995, which refers to sale of 118 NE Cars manufactured at Kalyan. Our attention was invited to the Asset Account No. 110 and the Sale Account No. 010 for 118 NE Cars. He also invited our attention to separate Asset and Sale Account for Padmini under Kurla Business. This was because the Kalyan Undertaking was for manufacture of 118 NE Cars whereas Kurla business was for manufacture of Padmini Cars. He also invited our attention to auditors report of PPL which gives particulars of separate accounts maintained by PAL prior to the Slump Sale Agreement. He, therefore, submitted that the finding of the Tribunal was totally wrong on this point.

17. Mr. Dastur next invited our attention to one more finding of the Third Member of the Tribunal at page 537, stating that PAL had failed to produce Register of Fixed Assets. Mr. Dastur submits that this finding of the Tribunal is erroneous because in the assessment order, the assessing officer has specifically discussed the items appearing in the Property Register maintained by PAL which Register was a Fixed Asset Register.

18. Mr. Dastur invited our attention to another finding of the Third Member of the Tribunal at page 537 which states that there was no slump sale as PAL has not transferred deposits of its customers. Mr. Dastur submits that this finding is also erroneous. He pointed out that these deposits have been received by PAL for advance booking of cars. That, the parties to the contract found that it would be difficult to assigns the deposits to PPL because there were large number of Depositors and it would be very difficult to obtain their consent and, therefore, a different method of transfer has been evolved under the Slump Sale Agreement under which PAL was to retain such deposits and under which PAL was responsible for implementing such booking contracts up to completion. That, in the event of the booking contract not being performed, PAL had to pay back such deposit with interest to the Depositors. Mr. Dastur therefore contended that clause 4.6.1 of Slump Sale Agreement cannot be relied upon to hold that it was a sale of Itemized Assets.

19. Mr. Dastur next invited our attention to the finding of the Third Member of the Tribunal at page 537 which states that PAL did not assign loans received by it to PPL under the Agreement. In this connection, it was argued on behalf of the assessee that prior to the Slump Sale Agreement, PAL had borrowed loans from ICICI and other Banks and Financial Institutions. That, these loans were not specifically restricted to Padmini Cars or 118 NE Cars. That, these were general loans. That, there was a charge of ICICI on all the properties of PPL. That, under clause 2.D of Slump Sale Agreement, the loans had to be transferred to PPL for which PAL had to obtain NOC from the lenders and for obtaining that NOC, PAL had to pay additional interest cost to ICICI, etc., and, therefore, under clause 2.1) of the Slump Sale Agreement, PPL agreed to contribute to that cost to the extent of Rs. 2 crores and, therefore, it cannot be said that there was no transfer of loans to PPL. It was argued that, in fact, clause 2.D) shows that Kalyan Undertaking stood separated from the charge on the entire business by virtue of MOU. That, clause 2(iii) of the Supplemental MOU refers to restructuring of loans with the approval of ICICI in order to enable PAL to sell the Kalyan Undertaking to PPL.

20. Mr. Dastur invited our attention to finding of the Third Member of the Tribunal at page 538 in which it has been held that PAL did not transfer to PPL its creditors

to the tune of Rs. 13 crores. In this connection, Mr. Dastur submitted on behalf of the assessee that PAL had a Paint Shop which was under construction. That, PPL wanted the Paint Shop to be completed by PAL. For this, PAL had to pay Rs. 13 crores to its contractors. That, PAL could have transferred this liability of Rs. 13 crores to PPL on payment of Rs. 210 crores less Rs. 13 crores or PAL could have discharged its liabilities to the tune of Rs, 13 crores directly. That, in this case, PAL opted for the latter option as it wanted to complete the Paint Shop. Mr. Dastur invited our attention to the Slump Sale Agreement at page 159 of Paper-book which further stipulates that PPL retained Rs. 13 crores out of Rs, 210 crores till completion of the Paint Shop. In the circumstances, it was contended that the Tribunal erred in holding that PAL had not transferred the liability to the tune of Rs. 13 crores to PPL.

21. Mr. Dastur invited our attention to finding of the Third Member of the Tribunal at page 538 in which it has been held that PAL did not transfer the Depreciation Fund to PPL. Mr. Dastur submits that this finding is perverse. He points out that, in this case, there was no such fund in existence. That, in this case, there was merely a Depreciation Account in the books of PAL. He submitted that depreciation was only a notional reduction in the value of assets and when the PAL transferred the Kalyan Undertaking as a capital asset to PPL, there was no transfer of depreciation as an item of transfer. He contended that depreciation was similar to salary which is a charge on the profit and loss account of the assessee. That, such a charge exists only in the books of account of PAL. That, when PAL transferred its work-force to PPL, it cannot be asked as to why salary was not transferred. He contended that salary and depreciation represented charges on profit and loss account of PAL. In the circumstances, he submitted that this finding of the Tribunal is perverse.

22. Mr. Dastur invited our attention to the finding of the Third Member of the Tribunal at page 538 that PAL did not transfer the liabilities of Residual Business. Mr. Dastur submitted that this finding was erroneous because, the Residual Business consisted of manufacture of Padmini Cars which has never been transferred to PPL and, therefore, there was no question of transferring liabilities of Residual Business to PPL.

23. Mr. Dastur contended that in deciding the question as to whether the sale was a slump sale or a sale of an 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 of assets 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. He contended that this submission of his is borne out by the subsequent amendment to the Income Tax Act vide section 2(42C) read with section 2(19AA) along with Explanation 1 thereto. He contended that the basic test in this case is whether PAL has transferred its business activities. He contended that, in this case the slump sale agreement shows sale of asset, viz. Kalyan Undertaking for Rs. 210 crores paid to PAL. That, this consideration is not paid to the share holders of PAL. That, Slump Sale Agreement was a contract. That, the Slump Sale Agreement was for a lump sum price. That, in the case of a slump sale, there is a transfer of the business activity for a lump sum price. That, in the case of a slump sale, there is no sale value attached or attributable to specific items of assets. He, therefore, contended that none of these tests have been applied by the Tribunal in this case and the Tribunal erred, therefore, in coming to conclusion that there was no slump sale.

24. Mr. Dastur contended on behalf of the assessee that, in this case, the Tribunal has held that there was no transfer of assets by PAL to PPL. He points out that this finding of the Tribunal was wrong. He contended that, in this case, Name Plates of PPL were put on the individual items of plant and machinery which Name Plates show that there was a constructive delivery of plant and machinery by PAL to PPL. Moreover, the order of assessment for the year ending 31-3-1995 along with the Balance sheet and Profit and Loss Account of PPL show that PPL had manufactured Peugeot Cars during the accounting year 1-4-1994 to 31-3-1995 and that they had sold these Cars for which the turnover was Rs. 177.26 crores. That, this turnover is reflected in the order of assessment passed in the case of PPL for the said accounting year ending 31-3-1995. Therefore, without transfer, PPL could not have manufactured the Cars worth Rs. 177.26 crores. He, therefore, submitted that the finding of the Tribunal that there was no transfer of assets was totally perverse.

25. Mr. Dastur invited our attention to the finding of the Third Member of the Tribunal at page 538 which states that PAL did not transfer its wage liability to PPL and, therefore, there was no slump sale because the entire Kalyan Undertaking was not sold lock, stock and barrel. Mr. Dastur contended that this finding was erroneous. He submitted that there were wage settlements under Industrial Disputes Act between PAL and its employees. That, the work-force of PAL vis-a-vis Kalyan Undertaking was transferred to PPL. That, settlements under the Industrial Disputes Act had to be implemented by PAL. Therefore, it cannot be contended that there was no slump sale. That, one has to take a businessmen's point of view and consider the totality of the facts including the terms and conditions of sale. He therefore submitted that this finding of the Tribunal was wrong.

26. Mr. Dastur next invited our attention to the finding of the Third Member of the Tribunal at page 538 of paper-book which states that, in this case, there were three sales viz. sale of Net Current Asset, sale of land and sale of remaining Assets. Mr. Dastur submitted that this finding is erroneous. That, under clause 2.B.1 of the Slump Sale Agreement, the total consideration for sale was not Rs. 210 crores but it was Rs. 210 crores plus the value of the Current Assets as on the Sale Date, i.e., 29-9-1994. That, on 11-3-1993 when the MOU was entered into between PAL and AP, PAL did not possess a value of the Acquired Current Assets and therefore on 11-3-1993, the consideration for sale was determined at Rs. 210 crores plus price of Net Current Assets as on 29-9-1994. That, on 11-3-1993, PAL had not known the value of Net Current Assets as on 29-9-1994. That, it was impossible for PAL to know the value of the Net Current Assets as on a future date. In the circumstances, it was urged that the Tribunal erred in coming to the conclusion that there were three sales as stated above. Mr. Dastur further submitted that, in this case, land was conveyed on 27-5-1996 for a price of Rs. 43,44,59,477.50. He contended that valuation of the land was given by PPL as PPL had agreed to pay the stamp duty. He contended that if the finding of the Tribunal was to be accepted it would mean that there would never be a slump sale because in a slump sale there has to be a transfer of property for which a conveyance is required to be executed for the purposes of payment of stamp duty. He therefore urged that the Tribunal erred in holding the transaction to be sale of

itemized assets merely because PAL had executed Conveyance of immovable property on 27-5-1996 in favour of PPL.

27. Mr. Dastur next invited our attention to the finding of the Third Member of the Tribunal at pages 540 and 541 of the Paper-book where the Tribunal has held that there was sale of itemized assets in view of section 230A certificate and the conveyance. Mr. Dastur submits that this finding is erroneous. He submitted that in order to transfer the immovable property under a conveyance PAL had to obtain a certificate under section 230A and, for that purpose, the immovable property had to be valued. Therefore, the report of Dalvi and Associates dated 15-11-1995 had to be obtained for land and building. That, when the assessee applied for certificate under section 230A of the Income Tax Act, they had to get the land and building valued. Accordingly, Dalvi and associates valued the property at Rs. 43,44,59,477.50 vide report dated 15-11-1995. That, this was the value of the land and building as on 29-9-1994 which was the sale date under Slump Sale Agreement dated 6-1-1995. Therefore, the Tribunal erred in holding that since there was a conveyance and certificate under section 230A, assessee was aware of the price of the land and building on 11-3-1993. He contended that in the entire MOU, there is no sale value assigned to the land and building. That, Rs. 210 crores is the sale value for the entire Kalyan Undertaking. That, even PPL assigned the value of land and building in its books only after the report dated 15-11-1995 and after the report of Nagarseth dated September, 1996. That, this value has been incorporated in the books of PPL for the accounting year ending 31-3-1997. Mr. Dastur further submitted that, in this case, the assessing officer has held that there was a sale of itemized assets. According to the assessing officer, land and building were sold for a total consideration of Rs. 43.85 crores. Mr. Dastur submitted that this value has been taken by the assessing officer from the report of Nagarseth, Valuer dated September 1996 and, therefore, till September 1996 value of the land and building was not even ascertained and, therefore, it is impossible to say that PAL was aware of the value of the land and building when MOU was entered into on 11-3-1993 and PAL had deliberately suppressed the value. He contended that even the department is not sure about the value for the land because in the assessment order, the value of the land and building is taken at Rs. 43.85 crores from the report of Nagarseth of September 1996 whereas the

value of the land and building was Rs. 43,44,59,477.50 as per report of Dalvi and Associates dated 15-11-1995. This aspect is important because the Conveyance is for Rs. 43,44,59,477.50 and not for Rs. 43.85 crores. That the Conveyance is for Rs. 43,44,59,477.50 because it is based on the report of Dalvi and Associates dated 15-11-1995 and further the conveyance is dated 27-5-1996. Therefore, the conveyance had to be based on the report of Dalvi and Associates dated 15-11-1995 because the report of Nagarseth is dated September 1996 i.e., after the conveyance and yet, the assessing officer has taken the valuation of immovable property from the report which came into existence much after the conveyance. Therefore, even the computation of capital gains by assessing officer was erroneous even if one was to proceed on the basis of sale of itemized assets. In the circumstances, it was argued that the Tribunal was wrong in holding that the MOU gave individual value of specified assets. That, MOU was for a total lump sum price of Rs. 210 crores.

28. Mr. Dastur next invited our attention to the finding of the Third Member of the Tribunal at page 543 of the Paper-book where Tribunal has held that the value of individual assets has been deliberately suppressed from the MOU in order to give colour of slump sale. Mr. Dastur submitted that the Due Diligence Exercise was undertaken to verify existence of and to judge the capacity of assets to be used for manufacture of cars. That, there were hundreds of assets which were required to be identified and located. That, it was impossible to value hundreds of assets on 11-3-1993 and, therefore, when the MOU was signed on 11-3-1993, there was no verification of each and every item of asset. He pointed out that if the parties had undertaken this exercise then it was impossible to sign the MOU because it would have taken three to five years to verify each and every item. In the alternative, he contended that even if on 11-3-1993 assets would have been valued at Rs. 500 crores (by way of an illustration), it would not have made any difference because, under the MOU, the contractual price for Kalyan Undertaking was fixed at Rs. 210 crores and, therefore, there was no charm in valuing each and every item of assets. That, the purpose of Due Diligence Exercise was only to find out the existence and the condition in which the assets stood and whether those assets were capable of producing 60,000 Peugeot Cars. That, Due Diligence Exercise was undertaken during the period October, 1995 to January, 1996. That, in the

MOU dated 11-3-1993 there is no reference to Due Diligence Exercise. That, the Due Diligence Exercise came on the scene for the first time under supplemental MOU of 17-5-1994. Mr. Dastur, therefore, contended that the Tribunal erred in coming to the conclusion that the value of the asset was wilfully suppressed in order to avoid the transaction being termed as sale of itemized assets. In this connection, Mr. Dastur relied upon the judgment of the Supreme Court in the case of Mugneeram Bangur & Co. (Land Department) (supra). He contended that, in this case, the Tribunal erred in holding that the assessee deliberately did not produce details of itemization of individual assets. However, it was argued that even if a schedule would have formed part of MOU dated 11-3-1993, it would not have made any difference. It was argued that in the above Judgment of the Supreme Court there was a Schedule to the agreement of sale and yet, the Supreme Court took the view that the sale was a slump sale as no part of the sale value/price was attributable to the cost of the land and consequently no part of the price was taxable. That, in the above judgment of the Supreme Court, it was found that there was a sale of the whole concern and the mere fact that there was a schedule to the agreement did not lead one to the conclusion that part of the slump price was attributable to the land sold because the particulars mentioned in the schedule was the cost price of the land as stated in the books of the vendor and that there was nothing to show that such cost price of the land represented market value of the land. Mr. Dastur, therefore, contended that the existence of the Schedule is not the test to decide the nature of the transaction and the absence of the schedule cannot lead one to the conclusion of suppression of valuation by the assessee.

29. Mr. Dastur invited our attention to the Judgment of the Bombay High Court in the case of Narkeshari Prakashan Ltd.s case (supra). He contended that this Judgment is squarely applicable to the facts of our case as it has been held that where the Branch Business of the assessee stood transferred lock, stock and barrel the character of the transaction showed that it was a slump sale. Mr. Dastur submitted that in view of the said Judgment of the Bombay High Court the sale of Kalyan Undertaking by PAL was also lock, stock and barrel and, therefore, it was a slump sale. Mr. Dastur contended that the Tribunal erred in not applying the judgment of the Bombay High Court on the ground that it did not relate to capital

gains tax but it related to profits arising on sale of a Branch of the assessee under section 41(2) of the Income Tax Act as it stood at the relevant time. Mr. Dastur argued that the Judgment of the Tribunal was wrong because the principle applicable for working out balancing charge under section 41(2) of the Act and the principle applicable for working out capital gains under section 50 was the same. That, in both the cases the assessee was required to work out the sale price of individual assets. He, therefore, contended that the Tribunal had erred in not applying the Judgment of the Bombay High Court in the case of Narkeshari Prakashan Ltd. (supra). Mr. Dastur contended that, similarly, the Tribunal erred in applying the Judgment of the Supreme Court in the case of CIT v. B.M. Kharwar : [1969]72ITR603(SC) He contended that in the case of B.M. Kharwar (supra), it was a case of firm which was succeeded by a company and the Supreme Court took the view that in case of such succession, capital gains did not arise. Mr. Dastur submitted that the said judgment of the Supreme Court was not concerning the issue which arises in the present case namely whether there was a slump sale.

30. Lastly, it was argued that in this case computation of capital gains is not in issue. That, if this court takes the view that there was a slump sale of the Kalyan Undertaking then the transaction will have to be processed under section 45 in which event, the assessing officer will have to decide whether any cost to be attributed to the Kalyan Undertaking; that the effect of absence of cost of the Kalyan Undertaking will also have to be decided; that, in such a case PAL had an option to substitute 1-4-1981 value; that the assessing officer will have to decide the index cost of acquisition and the index cost of improvement. Therefore, the matter will have to be remanded back for computation of capital gains after taking into account various parameters. Mr. Dastur submitted that he did not accept the position that there resulted a capital gain on transfer of the Kalyan Undertaking but he submitted that that issue will have to be decided by the assessing officer in the event of this court coming to the conclusion that the transaction was a slump sale. Mr. Dastur submitted that, ultimately, there may not be any gain but if there is a resultant gain then such gain will have to be computed under section 45 of the Income Tax Act. That, in such a case, the assessing officer will have to decide whether the gain is a long-term gain or a short-term gain. Mr. Dastur submitted

that in the event of it being held that land, building, plant and machinery was a part of the undertaking which is transferred, it would be a long-term capital gain but if it is held that land, building, plant and machinery constituted sale of itemized assets then the assessing officer will have to decide the sale value of each and every item of asset transferred to PPL which would include other assets like transfer of marketing net-work, transfer of work-force, intellectual property rights etc. because there is no dispute that such other assets have also been transferred. Therefore, it was argued that the price of Rs. 210 crores will have to be apportioned and allocated/spread over land, building, plant and machinery, licenses, quotas DGTD Registration, work-force, intellectual property rights, right to use the name of Premier etc. That, in such an event, the assessing officer will also have to decide whether each of the above assets are held for long-term or short-term periods and accordingly the assessing officer will have to decide the cost of each item. That, if any item is found to be a long-term capital asset then further the assessing officer will have to consider indexation of the cost of acquisition and cost of improvement. In short, it was submitted that the assessing officer will have to apportion Rs. 210 crores over not only depreciable assets like building, plant and machinery but the assessing officer will also have to apportion the said amount of Rs. 210 crores over all other assets described above. He further contended that the assessing officer will also have to decide the quantum of depreciation which the assessee would be entitled to, depending on the question whether there was a sale of Kalyan Undertaking or whether there was a sale of itemized assets. Mr. Dastur contended that the judgment of the Accountant Member at page 467 of the paper-book is correct. Mr. Dastur contended that the test to be applied in this case in order to decide whether the sale was a slump sale or an itemized sale was the test applied by the Accountant Member viz. whether on 11-3-1993 PAL knew the value of the land, building, plant and machinery and aforesaid other assets and if PAL did not know such value then the court should hold that it was a slump sale under which there was a transfer of the entire business activity of the Kalyan Undertaking and in such a case this court should direct the assessing officer to compute capital gains by applying the above parameters contemplated by the Income Tax Act. Accordingly, it was argued that question Nos. (a) and (c) mentioned in para 27 of the Appeal Memo, as quoted above, should be answered in the negative i.e., in

favour of the assessee and against the department.

31. Mr. R.V. Desai, learned senior counsel appearing on behalf of the revenue contended that, in this case, the attributes of a slump sale do not exist. He contended that a slump sale contemplates sale of a Going Concern lock, stock and barrel plus transfer of all assets and liabilities plus absence of an Itemized sale. That in the case of a slump sale it is not possible to assign the sale value to individual items of asset whereas, in the present case, such value is assigned to land, building, plant and machinery and, therefore, there is not slump sale. That, this court should look at the substance of the agreement dated 6-1-1995 and according to the department, the agreement is a device to evade capital gains tax liability because if the court holds that there was a slump sale then the department was not in a position to compute the capital gains. He submitted that, in this case, the sale value of each item was known to the assessee on 11-3-1993 when the MOU was signed, but these values were suppressed. In this connection, Mr. Desai has placed reliance on the assessment order dated 24-3-1998 (page 309 of the paper-book). He submitted that the agreement dated 6-1-1995 was a device to prevent the assessing officer from computing the correct liability of PAL-assessee. He contended that the assessee cannot rely upon amended provisions of the Income Tax Act which applies to subsequent assessment years in support of its contention that there was a slump sale. Mr. Desai contended that, in this case, the test laid down by the Bombay High Court in the case of Narkeshari Prakashan Ltd. (supra) was applicable. He contended that, in this case, there was no transfer of the Kalyan Undertaking, lock, stock and barrel. That, in this case, there was no transfer of assets and liabilities of the Kalyan Undertaking. That, in this case, the entire Kalyan Undertaking was not transferred and, therefore, unless all assets and liabilities were sold it cannot constitute a slump sale. It was contended that in order to constitute a slump sale, there must be a transfer of the entire business on 'as is where is' basis. It was further argued that, in this case, PAL has sold machines which stood in the Kurla Unit and Pune Unit and, therefore, there was no slump sale. That, PAL was not entitled to sell assets of other business situated at Kurla and Pune which they have done in this case. He further contended that, in this case, the total area of the Kalyan unit was 18,000 sq. meters (approximately) whereas under the arrangement only 7,000 sq. meters have been transferred by

PAL to PPL and, therefore, all the assets of the Kalyan Undertaking have not been transferred and, therefore, there is no slump sale. He contended that if certain assets were retained by PAL then there could not be a slump sale because what is required is a transfer of a going concern as a whole. He contended that, in this case, under the above arrangement, the first step which PAL undertook as a device was to create a new concern by bringing to Kalyan machinery located at Kurla Plant and Pune plant and, therefore, there was no transfer of a going concern. That, the entire device was to first set up a new concern at Kalyan to avoid computation of the liability of the assessee. Mr. Desai submitted that in the case of a slump sale, the business activity should have been in existence and the entire business activity should be then transferred as a going concern whereas, in the present case, the first step which PAL took was to constitute a new concern by bringing in the machinery from Kurla and Pune Units to Kalyan. In this connection, reliance has been placed on the judgment of the Supreme Court in the case of Artex Mfg. Co. (supra) in which it has been held that in order to constitute a slump sale, there must be a sale of a going concern as a whole on as is where is basis whereas, in the present case, PAL has created Kalyan Undertaking by transferring the assets from Pune and Kurla Units. He therefore submitted that this was a device to prevent the department from computing the correct liability of the assessee. He contended that under clause II.2 of the MOU dated 11-3-1993 what is contemplated is setting up of a New Unit and, therefore, the Kalyan Undertaking cannot be called as a going concern because it is set up for the first time under the MOU dated 11-3-1993. That, under the joint venture agreement between PAL and AP dated 19-10-1994 there is a recital (F) under which it is stated that PAL would sell to Kalyan Motor Company Ltd. some of its assets. According to the learned counsel, therefore, there was no sale of all the assets of the Kalyan Undertaking and, therefore, there was no sale of a going concern. That, even under Slump Sale Agreement dated 6-1-1995, PAL has agreed to sell and transfer to Kalyan Motor Company Ltd. some of its assets including plant and machinery at Kalyan and machinery located at Kurla and Pune concerning manufacture of 118 NE Cars and, therefore, there was no slump sale. He contended that the assessee was not entitled to rely upon the definition of the word 'Undertaking' in Income Tax Act as defined under section 2(19AA) read with Explanation 1 thereto as the amendment

was not there during the assessment year in question. He further contended that, in this case, the assessee was not entitled to rely upon the definition of the word 'slump sale' under section 2(42C) as the said section did not exist during the assessment year in question. He contended that we have to go by the test laid down by Bombay High Court in case of Narkeshari Prakashan Ltd. (supra) viz. that in order to constitute a slump sale, there must be a transfer of a going concern. Mr. Desai next pointed out that, in this case, all the liabilities of PAL have not been transferred. In this connection, he placed reliance on clause 4.6 of the Slump Sale Agreement to show that deposits received from customers who had booked the cars for purchase have not been transferred by PAL to PPL. That, these deposits have been retained by PAL. That, under clause 4.6 of slump sale agreement, it is clearly stipulated that such deposits will not form part of current liabilities transferred to PPL and that PAL shall retain such deposits. Therefore, it was argued that, in this case, there was no transfer of liabilities and consequently there was no slump sale. Mr. Desai invited our attention to clause 2.D) of the slump sale agreement which states that PAL will obtain consent of the Lenders of the Kalyan Undertaking to modify loans given to PAL. That, any cost incurred for such modification is to be borne by PAL and that PPL agreed to reimburse Rs. 2 crores to PAL on that account only on confirmation from Lenders that such additional cost has been paid by PAL for restructuring of the loans and, therefore, there was no transfer of liabilities by PAL to PPL. Mr. Desai next pointed out clause 2.B of the slump sale agreement which states that as consideration for sale PPL agrees to pay to PAL the price as defined in para 2.B. 1. Mr. Desai invited our attention to clause 2.B. 1 which states that the price to be paid by PPL to PAL as consideration for the sale shall be aggregate of Rs. 210 crores corresponding to the value of the immovable and movable assets. That, under clause 2.B. 1, it is further agreed that PAL and PPL would decide the value of the current assets and current liabilities as on 29-9-1994 which was to constitute the price. Mr. Desai, therefore, contended that under clause 2.B there were two sales, namely, sale of assets (movable and immovable) and sale of current assets and current liabilities. He therefore contended that even the slump sale agreement contemplates a sale of itemized Assets. He contended that clause 2.B shows that the entire Kalyan Undertaking has been transferred by itemizing broadly two assets, namely, those

categorised in Schedule 2.A and those categorised in the Schedule 2.C and, therefore, it is an itemized sale. He contended that the Slump Sale Agreement has deliberately not assigned values to the items of assets mentioned in Schedules 2.A and 2.C in order to give a colour of slump sale. He submitted that it is wrong to say that the Kalyan Undertaking was transferred for one consideration. He submitted that, in fact, two separate considerations are provided for in two separate items of assets and, therefore, there was no slump sale. According to the learned counsel, clause 2.B shows itemized sale subject to assignment of values in future. He submitted that under clause 2.B.1, the price of the Kalyan Undertaking was fixed at Rs. 247 crores and not Rs. 210 crores. He contended that after entering into the slump sale agreement, the value assigned by the parties to the current assets as on 29-9-1994 was Rs. 37.84 crores and odd and, therefore, the total consideration for transfer was Rs. 247 crores divided into two parts of Rs. 210 crores plus Rs. 37.84 crores. Mr. Desai contended that it is well settled principle of law that if even one of the two items has a value which was ascertainable then the transaction would cease to be a slump sale. He contended that, in this case, value has been assigned to net current assets acquired by PPL of Rs. 37.84 crores and, therefore, the department was right in coming to the conclusion that there was no slump sale. Mr. Desai contended next that, in this case, PAL did not supply the values to assessing officer. That, the values were known to parties when they entered into the MOU on 11-3-1993. That, since PAL did not supply those values, the assessing officer has relied on the Balance-sheet submitted by PPL in order to arrive at an approximate value in order to compute the liability of PAL. In this connection, he relied upon the findings given by the assessing officer at page 315 of the Paper-book which states that the net price of the current assets acquired by PPL was Rs. 37.84 crores and, therefore, the value was attributable to the net current assets transferred to PPL and even if one item has a value then the agreement ceases to be a slump sale. Mr. Desai contended that in cases where the assessing officer finds on examination of the entire agreement that there was a value assigned to one of the items but that the parties had deliberately suppressed those values then the assessing officer was entitled to hold that there was a sale of itemized assets even if there was no Schedule annexed to the agreement. That, in this case, the slump sale agreement clearly

indicates sale of assets under two distinct Schedules under Schedules 2.A and 2.C and, therefore, it was a case of sale of itemized assets. He further submitted that apart from the sale value of the current assets, the parties have also assigned the sale value to the land transferred by PAL to PPL fixed at Rs. 20,61,84,000. In this connection, he relied upon the report of Nagarseth and Associates of September, 1996. He contended that, in this case, we are not concerned with the exact value of the land. He submitted that the point which he would like to make is that the land which was an asset transferred to PPL, was assigned a value, and, therefore, in this case, there are at least two items, viz., current assets and land which were given a specific value and, therefore, the transaction was not a slump sale. That, mere absence of a Schedule annexed to the MOU or to the slump sale agreement will not convert an Itemized sale into a slump sale. That, since PAL failed to produce relevant records indicating the values assigned to items of assets the assessing officer had to rely upon the records of PPL in order to fix approximate price. That, because PAL did not give particulars of sale value to assessing officer, he has relied upon the deed of conveyance and the certificate under section 230A of the Income Tax Act in order to compute the liability of PAL to pay capital gains tax. That, these documents are relied upon in order to ascertain approximate value of the land and current assets. Therefore, there was no slump sale in this case. Mr. Desai further contended that, in this case, due diligence exercise was undertaken by PPL. That, for that exercise a proforma was prepared in which there is a column representing value of each asset. He contended that the assessing officer has correctly found that this column relating to value has been deliberately kept blank in order to prevent the department from computing the correct liability of PAL to pay capital gains tax and, for that purpose, the column has been kept blank although all other columns have been filled in. Mr. Desai contended that, in this case, the basic issue is whether the transaction in question was a slump sale or an itemized sale. That this point was required to be decided by the assessing officer by examining the terms and conditions mentioned in MOU, Supplemental MOU, joint venture agreement, slump sale agreement etc. He contended that all the authorities below have examined the terms and conditions mentioned in the above documents and they have given a concurrent findings to the effect that the transaction in question was an itemized sale and not

a slump sale. In the circumstances, it was submitted that this court should not interfere with the concurrent findings of fact.

32. Mr. Desai next contended that, in this case, the assessing officer has assigned a sale value to land, building, plant and machinery. He submitted that, in this case, there was no need to give a separate sale value to other assets like intellectual property rights, work-force, use of brand name because values of all such other assets stood blended in the sale value of the land, building, plant and machinery. He contended that since the sale value has been given separately by the assessee to land, building, plant and machinery, it was not necessary for the assessing officer to give individual sale value to such other abovementioned assets. He contended that in the judgment of the Bombay High Court in the case of Narkeshari Prakashan Ltd. (supra), the test to decide whether the transaction is a slump sale or a sale of itemized assets has been laid down. He contended that the basic test to determine whether the transaction is a slump sale is whether the entire going concern has been transferred lock, stock and barrel. That, in this case, large number of assets have not been transferred by PAL and, therefore, it is not a slump sale. He further contended that the Accountant Member of the Tribunal has failed to examine all the documents and, therefore, he erred in considering the transaction as a slump sale. He contended that, in this matter, PAL has created a device of setting up a New Unit at Kalyan at the very threshold and it is that unit which is sought to be transferred to PPL. That, this was a device to evade liability of capital gains tax and, therefore, the assessing officer was right in going behind the transaction after taking into account all the requisite documents and surrounding circumstances. He further contended that, in this case, despite repeated reminders, PAL had failed to furnish details of sale values known to PAL in respect of each and every asset. He contended that these particulars were not wilfully furnished and, therefore, the assessment order has proceeded on the valuation of assets in the books of PPL. He, therefore, contended that no interference is called for in this matter and that the appeal needs to be dismissed with costs.

33. In rejoinder, Mr. Dastur submitted on behalf of the assessee that there is no one conclusive and decisive test for coming to the conclusion whether the

transaction is a slump sale or it is a sale of itemized assets. Mr. Dastur submitted that there are three broad tests to be applied to decide the basic question involved in this appeal viz. whether the subject transaction is a slump sale Firstly, do the assets constitute a running business If assets, which are transferred, constitute running business then the transaction is a slump sale. However, if, in a given case, an assessee has assigned sale values to the itemized assets then the question may arise whether the transaction was a slump sale He contended that, in this case, on and after 29-9-1994 manufacture of 118 NE Cars was transferred to PPL. That, for the relevant accounting period ending 31-3-1995, the turnover in the books of PPL was Rs. 177,26,81,546. That, prior to 29-9-1994, these cars were manufactured by PAL. Therefore, the entire running business of manufacture of 118 NE cars stood transferred to PPL on 29-9-1994 and, therefore, the subject transaction constituted the slump sale. In this connection, reliance was also placed on the judgment of the Bombay High Court in the case of Narkeshari Prakashan Ltd. (supra). It was submitted that in the said judgment the Bombay High Court has laid down certain tests to decide whether the transaction is a slump sale. In that matter, broadly, on facts, the court held that the Branch of the assessee had a goodwill and, therefore, when the Branch is transferred as a whole for a given price, it constituted a slump sale. Therefore, one of the tests applied by the Bombay High Court was transfer of a running business. According to the learned counsel, the second test applied by the Bombay High Court was to look at the subject agreement in its entirety and if it is found that several items mentioned in the agreement were such that they could not be independently purchased then the transaction was a slump sale. In this connection, it was submitted that even in the present case there were several such items which were not purchasable independently. For example, outstanding contracts, licenses, quota, intellectual property rights etc. That, no buyer would have bought each of these items alone. That, every buyer would have insisted on total purchase. That, these intangibles were not purchasable item-wise separately and independently. In the circumstances, the second broad test applied by the Bombay High Court was that if several items were not capable of independent purchase then it would amount to slump sale. He contended that this test has not been considered by the Tribunal in this case. Lastly, the Bombay High Court following the judgment of the Supreme

Court in the case of Mugneeram Bangur & Co. (Land Department) (supra) has applied the test which states that merely because an inventory was made and the value was assigned against each item, the character of the transaction does not change and if the transaction as a whole was a slump sale, it does not cease to be a slump sale merely because an assessee has made an inventory of assets for purpose of identification. Mr. Dastur therefore submitted that three tests applied by the Bombay High Court in the case of Narkeshari Prakashan Ltd. (supra) was applicable to this case also.

34. Mr. Dastur contended that the basic test to be applied in this case was Whether (he transferee PPL was in a position to carry on business of PAL, viz., manufacture of 118 NE cars after 29-9-1994. He contended that, in this case, as indicated by the audit report, the turn-over of PPL was Rs. 177,26,81,546 for the year ending 31-3-1995 and, therefore, this basic test propounded above stood satisfied. He submitted that, in this case, the assessing officer was required to step into the shoes of two contracting business parties and find out whether they agreed upon sale of individual assets or whether they contemplated sale of the entire running business. He submitted that, in this case, there is no evidence to show that on 11-3-1993 PAL was aware of the value of each individual asset. That there is no evidence to show that on 29-9-1994 the parties had evaluated sale of itemized assets. That there is no evidence to show that on 11-3-1993 separate amounts were fixed for plant and machinery, land, building and other assets. He, therefore, submitted that in this case the sale was of the entire business and, therefore, it was a slump sale.

35. Mr. Dastur next contended that on 11-3-1993, the current assets could not be valued and, therefore, in the MOU it has been so stated that the sale value to the current assets would be assigned on the date of sale. He contended that on 11-3-1993, the parties were not even aware as to the date on which the sale would take place. That, on 11-3-1993 PAL did not know the exact date on which transfer would take place. That, on 11-3-1993 PAL did not know the quantum of debtors. That, on 11-3-1993 PAL was not in a position to know the exact price which was to be arrived at on the date of the sale which, in this case, happens to be 29-9-1994. He therefore contended that in the MOU what is contemplated is that the PAL

would contribute Rs. 210 crores plus the value of the net current Assets as on the date of sale and, therefore, merely because in the MOU Net Current Assets has been mentioned as a separate paragraph one cannot infer existence of itemized sale. He contended that a sum of Rs. 37.84 crores (approx) was ultimately assigned to net current assets only on 6-1-1995. Mr. Dastur alternatively submitted that there is no principle of law which states that even if one item is assigned a sale value the entire transaction ceases to be a slump sale. He contended that this argument has been rejected in the judgment of the Bombay High Court in the above case, of Narkeshari Prakashan Ltd. (supra) in which it has been held at page 441 that merely because an inventory, has been made for the purpose of identification, the character of the transaction was not changed.

Findings

(A) Preface

36. In the fiscal year ending 31-3-1991, Foreign Direct Investment to India was around \$ 103 million. The country was in need of increased Foreign Direct Investment. Therefore, the economy was liberalized. The Licence Raj was dismantled. With globalization, the country has more cases of mergers and acquisitions. Consequently, at the end of the financial year ending 31-3-2001, Foreign Direct Investment (FDI) to India has increased to \$ 5102 million. In this case, the basic issue which arises for determination is : whether the agreement dated 6-1-1995 between PAL and KMCL constituted a slump sale or a sale of itemized assets

Before 11-3-1993, PAL, in India, used to manufacture 118 NE Cars. PAL had an infrastructure for manufacture of these cars spread over three units, viz., at Kalyan, Kurla and Pune. At Kalyan, PAL had the facility to manufacture the body, seats, gadgets, painting and assembling whereas the gear box unit was at Kurla and Machine works was at Pune. (These activities are hereinafter referred to as 'Kalyan Business'). In the circumstances, Auto Peugeot, a French company, was interested in investing Rs. 350 crores in India to set up a Joint Venture Company (hereinafter referred to as 'PPL') to manufacture 60,000 cars per annum. This French Company was interested in making this huge investment as it found that

the Indian company PAL had a ready infrastructure worth Rs. 210 crores plus the value of Net Current Assets.

This Preface is important because in order to judge the nature of the impugned transaction, one must take into account the terms and conditions of the slump sale agreement as also the relevant surrounding circumstances as prevalent on 11-3-1993.

(B) Analysis of MOU, Supplemental MOU, Joint Venture Agreement and Slump Sale Agreement

37. Before analyzing the aforestated agreements, it may be noted that, in this case, we are concerned with the assessment year 1995-96. During that year, the definition of the 'slump sale' under section 2(42C) was not there as that definition came on the statute book only under Finance Act, 1999 with effect from 1-4-2000. The concept of slump sale initially was evolved under judge-made Law which has been subsequently recognized by the Legislature by inserting section 2(42C). Under the said Law, the basic test which one must apply to ascertain whether there existed a slump sale is continuity of business. The question to be asked is : whether there is a transfer of a business as a whole It cannot be disputed that even in the case of a transfer of a Business as a whole, there is conveyance of land and building. In this case, the department has relied on the conveyance of land and building for coming to the conclusion that there was a sale of itemized assets. The question, therefore, to be asked is : whether, there was a transfer of land, building, plant and machinery as a whole or whether there was a transfer of land, building or plant & machinery Separately and Individually (Emphasis here italicised in print supplied). For that purpose, one has to read the terms and conditions of the Arrangement. We have used the word 'Arrangement' in a broad sense in this case so as to cover the MOU, Supplemental MOU, Joint Venture Agreement and Slump Sale Agreement.

(i) Analysis of MOU dated 11-3-1993 between PAL and AP

The purpose of MOU is mentioned in clause I of the MOU viz. to set up a Joint Venture of manufacturing 60,000 cars per annum throughout India and in certain

countries. This Joint Venture was approved by the Foreign Investment Promotion Board-Government of India. The cost of the entire Project was fixed at Rs. 560 crores out of which Rs. 210 crores by way of Assets was to be contributed by PAL and the balance of Rs. 350 crores by AP. Under clause II.2 of MOU, the Kalyan Business was to be owned by the Joint Venture Company (JVC). Under that clause, the facilities available in the Kalyan Plant have been mentioned. Under the MOU, a Joint Venture Company (JVC) was to operate at Kalyan or at any other site mutually agreed upon by and between the parties. Kalyan Business was located at three places viz., at Kalyan, Pune and Kurla. Under the MOU, the three locations were to be centralized. Under clause III, all existing dealers of PAL were to get transferred to the JVC. Under the MOU, a minimum of 51 per cent of the total equity was to be held by AP and PAL in the JVC. Under clause IV, PAL agreed to contribute to the equity of JVC by way of all the assets of the Kalyan Business including the license to manufacture diesel engines, the Machine Unit at Pune and the Gear box Shop at Kurla in all priced at Rs. 210 crores as on 11-3-1993.

Hence, under the MOU a lump sum price was fixed for the entire Kalyan Business to be transferred to JVCs.

(ii) Analysis of Supplemental MOU dated 17-5-1994

On 17-5-1994, a Supplemental MOU was executed between AP and PAL. One of the objects of Supplemental MOU was to take steps to complete the process of signing Joint Venture Documents by 31-7-1994 and to undertake Verification of principal assets to be transferred by PAL to its Subsidiary viz., Kalyan Motor Company Limited (hereinafter referred to as 'the KMCL') which was later called as PPL. The Verification Process covered plant and machinery at Kalyan and also facilities at Pune and Kurla. Under Supplemental MOU, PAL undertook to promote a New Company in the name of Kalyan Motor Company Limited. The Verification Process contemplated by the Supplemental MOU referred to identification of principal assets to be transferred by PAL to KMCL. In this case, it has been held that the Verification Process also covered valuation. That, the due diligence report of the transferee showed that there was a separate Column titled 'Value' in the

Due Diligence Report which has been left blank. Therefore, it has been held that the values have not been deliberately mentioned though the Verification Process did contemplate assignment of Sale Values to each and every item of assets transferred by PAL to KMCL. In our view, this finding is wrong. It is important to bear in mind that valuation of each and every item of assets would have taken three to five years. There are thousands of assets. The department has held that, in this case, there was a sale of itemized assets. If the Verification Process contemplated by Supplemental MOU covered valuation, it would have taken considerable time and, in that event, it would not have been possible for the parties to complete execution of Joint Venture Documents by 31-7-1994 including the Slump Sale Agreement. It may be mentioned that under the Supplemental MOU, the Verification Process is contemplated under what is called as Industrial Due Diligence. This is an American concept. Due Diligence Exercise is undertaken for several reasons, one reason being to enable the contracting parties to take a decision to enter into a Slump Sale Agreement. Even after coming into force of the Joint Venture, periodically Due Diligence Exercise is undertaken for various purposes including operations. In this case Verification Process covered by Due Diligence Exercise was to verify condition of important assets to be transferred by PAL to KMCL. There is no evidence to show that Due Diligence Exercise mentioned under Supplemental MOU covered valuation. The Due Diligence Reports are in a proforma. They are prepared by the JVC. One cannot infer sale of itemized assets merely because the JVC has not filled-in the Column pertaining to value, though all other columns are duly filled-in. As stated above, Due Diligence Exercise is undertaken periodically for various reasons and if, in this case, the exercise is undertaken only to verify condition of the assets to be transferred to KMCL, the column pertaining to value need not be filled-in. In this case, the MOU has fixed the price of the Kalyan Facilities/Undertaking at Rs. 210 crores and, therefore, the column pertaining to Value in the Due Diligence Report is left blank. In the circumstances, the finding given in this case that the column pertaining to value is deliberately left blank is erroneous. Lastly, one has to construe the entire Arrangement in order to ascertain the true intention of the parties and merely because there is a schedule of assets on record, it cannot be said that there is a sale of itemized assets. It is also important to note that even the Foreign

Investment Promotion Board of Government of India has granted its approval on the footing that there is a slump sale for Rs. 210 crores (see letter dated 6-7-1993 addressed by Ministry of Industry, Government of India to PAL granting permission to set up a Joint Venture for manufacture of 60,000 motor cars per annum with AP of France). Moreover before the foreign party could enter into the Slump Sale Agreement, it was entitled to know whether the assembly line was capable of manufacturing 60,000 cars per annum. Therefore, clause 2 of Supplemental MOU contemplated Verification Process. AP could not have made the investment of Rs. 350 crores without checking the status of the principal assets and their capacity to manufacture 60,000 cars per annum. Under clause 3(b)(II) of the Supplemental MOU, it has been provided that AP will conduct Due 1 Diligence Exercise of the Kalyan Assets and only if AP was satisfied with the due diligence then alone KMCL shall execute a Slump Sale Agreement for Kalyan Business with PAL. This clause is important. It indicates that initially KMCL will get the assets of Kalyan Business from PAL and thereupon the Slump Sale Agreement shall be executed and the name of KMCL shall stand altered. Under the Supplemental MOU, the parties appreciated the advantages of completing the slump sale by 30-9-1994. Under Supplemental MOU, it has been provided that in consideration of the transfer of Kalyan Business to KMCL the latter shall allot equity shares at such price as shall be decided by PAL, AP and KMCL based on Slump Sale Agreement in part consideration of the transfer and the balance amount shall be treated as debt payable by KMCL to PAL.

On 29-9-1994, PAL declared that Kalyan Business shall be held in trust by PAL for KMCL and that KMCL agrees to take over, as a Going Concern, the Kalyan Business on and from 29-9-1994 (see Deed of Trust). Under this Deed of Trust, PAL agreed to carry on Kalyan Business as a Trustee for and on behalf of KMCL up to 29-9-1994.

(iii) Analysis of Joint Venture Agreement dated 19-10-1994 between PAL and AP

Under Recital (F) of the Joint Venture Agreement, it has been provided that PAL and AP agreed that subject to the terms and conditions of the Slump Sale Agreement, PAL would sell to KMCL some of its assets including plant and

machinery at Kalyan. It has been held that all the assets of PAL have not been transferred. That, only some of the assets have been transferred and, therefore, there is no slump sale. For that purpose, reliance has been placed on Recital (F). However, there is a complete misreading. Recital (A) states that PAL was engaged in the Business of manufacture and sale of 118NE and Padmini cars. That, PAL had necessary infrastructure for manufacture and marketing of cars. That PAL enjoyed number of facilities at Kalyan, Kurla and Pune. That, Government of India had approved the Joint Venture. That, the Joint Venture was only for manufacture of 118 NE Cars. That, on 25-7-1994, PAL had registered KMCL under the Companies Act as its Subsidiary. That, KMCL shall obtain a loan for financing acquisition of Kalyan Business. That, after sale and transfer of Kalyan Business by PAL to KMCL and in accordance with a Slump Sale Agreement, KMCL shall issue and allot equity shares to PAL and shall pay balance amount to PAL on terms and conditions mentioned in the Slump Sale Agreement. These are the various Recitals which have not been read. As stated above, we have to read the entire Joint Venture Agreement in order to ascertain the intention of the contracting parties. Under article II of the Joint Venture Agreement, it has been provided that sale of Kalyan Business by PAL to KMCL shall be made pursuant to and in accordance with the Slump Sale Agreement. That PAL and KMCL shall initiate filing of applications, obtaining of approvals etc. in relation to sale of Kalyan Business to KMCL. Under article V, after satisfactory completion of the above, KMCL was to change its name to PPL (PAL Peugeot Limited).

In the entire Joint Venture Agreement, therefore, there is no evidence of sale of Itemized Assets. The Joint Venture Agreement is dated 19-10-1994 and the price of Rs. 210 crores fixed under the MOU dated 11-3-1993 has remained constant. There is no clause for valuation of assets in the entire Joint Venture Agreement dated 19-10-1994. That, the Joint Venture Agreement refers to execution of Joint Venture Documents by PAL, AP and KMCL in order to effect transfer of the entire Kalyan Business to KMCL including proposed Slump Sale Agreement. Therefore, the scope of Joint Venture Agreement also does not show valuation of itemized assets being intended by the parties. The nature of the documents to be executed by the contracting parties also indicate transfer of the entire Kalyan Business for Rs. 210 crores.

(iv) Analysis of Slump Sale Agreement dated 6-1-1995 between PAL and KMCL

The abovementioned MOU dated 11-3-1993 and Supplemental MOU dated 17-5-1994 ultimately culminated into Slump Sale Agreement between PAL and KMCL on 6-1-1995. Under the Slump Sale Agreement, KMCL got dealers of PAL, licenses obtained by PAL as also the work-force of PAL. Under the Slump Sale Agreement, the sale date was 29-9-1994. Under clause 2.A.1, the object of Slump Sale Agreement is mentioned. Clause 2.A.1 refers to assignment of Kalyan Business on and from 29-9-1994. It states that PAL agrees to sell to KMCL on and from 29-9-1994, the Kalyan Business as a Going Concern comprising of immovable and movable assets, intellectual property rights and Net Current Assets. Under clause 2.A.4, it is mentioned that incidental to sale of Kalyan Business as a Going Concern, PAL agrees to transfer all licenses, quotas permits, outstanding contracts etc. to KMCL for Rs. 210 crores plus value of the net current assets as on 29-9-1994. In this case, a finding is recorded against PAL and it has been argued on behalf of the department that under the Slump Sale Agreement, the price to be paid by KMCL to PAL vide clause 2.B. 1 was an aggregate of Rs. 210 crores corresponding to the value of immovable and movable assets plus an amount to be decided after the execution date corresponding to the value of net current assets and, therefore, there was a sale of itemized assets. It was submitted on behalf of the department that even sale of one asset in a block of assets for a price would constitute sale of itemized assets. We do not find any merit in this finding. Firstly, it may be noted that the Slump Sale Agreement is executed on 6-1-1995 and the figure of Rs. 210 crores under the MOU dated 11-3-1993 has remained unchanged even on 6-1-1995. Secondly, when the MOU was executed on 11-3-1993, it was not possible for the parties to know the value of Net Current Assets on 29-9-1994. Thirdly, the price of Rs. 210 crores fixed under the MOU was not only for fixed assets but it also took into account business advantages like licenses, quotas etc. That, merely because the Slump Sale Agreement refers to sale of net current asset for Rs. 37.84 crores (approx) cannot lead one to the conclusion that there was a sale of itemized assets. Further, the value of the Net Current Asset has no Profit element. Lastly, Rs. 210 crores plus value of net current assets like stock, raw material etc. as on 29-9-1994 represented total consideration payable by KMCL to PAL as a lump sum amount.

At this stage, it may be mentioned that under the Slump Sale Agreement sum of Rs. 13 crores was kept in abeyance by KMCL as there was Paint Shop under construction on the date of the Slump Sale Agreement which was to be completed by PAL. However as per the findings, there was no slump sale as PAL had not transferred the Paint Shop to KMCL under the Slump Sale Agreement. This finding is erroneous. The assessing officer has computed the Gains from transfer of the Paint Shop at Rs. 7.57 crores in his assessment order. Further, under clause 2.C of the Slump Sale Agreement, the parties agreed that all costs relating to dismantling and transportation of Net Assets to Kalyan from Pune and Kurla were to be borne by PAL and all costs relating to installation and putting into operation Acquired Net Assets will be borne by KMCL. According to the impugned findings, in view of the said clause 2.C of the Slump Sale Agreement, a New Entity was set up for the first time at Kalyan and, therefore, there was no transfer of a Running Business in this case. This finding is equally wrong. As stated above, Kalyan Business related to manufacture of 118 NE Cars spread over three Units viz., at Kalyan Plant, Kurla and Pune. Under this Arrangement, the Facilities were centralized. Therefore, it cannot be said that the New Unit was set up before transfer from PAL to KMCL. Under the Slump Sale Agreement, what is contemplated is transfer of the Kalyan Business in its entirety including the work-force and other intangible items of assets. At this stage, it may be mentioned that under clause 3.8, it is provided that PAL was free to carry on manufacture of Padmini cars (referred to in Slump Sale Agreement as Residual Business). According to the impugned findings, PAL has not transferred all its liabilities and, therefore, there was no slump sale. In this connection, reliance has been placed on clause 3.8. This finding is also wrong as clause 3.8 refers to liability of PAL concerning Residual Business of manufacture of Padmini Cars which has not been transferred under the Slump Sale Agreement. Further, under clause 3.12, 3.15, 3.16, intellectual property rights and technical know-how have been transferred. In this case, the department has come to the conclusion that there was a sale of itemized assets for Rs. 210 crores. However, no Sale Values are assigned to these assets and, as a result, the liability of PAL stood increased because the assessing officer has allocated the price of Rs. 210 crores only to land, building, plant and machinery. If the assessing officer had assigned the Sale

Value not only to these three items of assets but also to all other transferred items then their cost of acquisition was also required to be taken into account for computing the liability of PAL. Therefore, assessing officer was required to allocate Rs. 210 crores not only to land, building, plant and machinery but he was also required to spread over Rs. 210 crores to all the assets in which event the liability of PAL would stand reduced. This aspect has not at all been considered. There is one more aspect which needs to be mentioned. In this case, there is a transfer of work-force. Such assets do not carry value. In the circumstances, we are of the view that reading the Agreement dated 6-1-1995 as a whole, it is a slump sale and not a sale of itemized assets. Now, in the present case, under the Slump Sale Agreement, the stamp duty is required to be paid by the transferee on the conveyance of land and building. According to the impugned findings, in this case, there is a sale of itemized assets because a conveyance of land and building was executed on 27-5-1996. This finding is erroneous. As stated above, we are required to examine the entire Arrangement consisting of MOU, Supplemental MOU, Joint Venture Agreement and Slump Sale Agreement. On reading the said Arrangement, one finds transfer of land, building, plant and machinery as a part of the entire Kalyan Business which by itself constitutes capital asset as defined under section 2(14). As stated above, transfer of land, building, plant, and machinery is there both in the case of slump sale as well as in the case of sale of itemized assets. However, in the case of slump sale, the transfer of land, building, plant and machinery is as apart of entire Business whereas in the case of itemized sale, the transfer of land, building plant and machinery is individual. This test been lost sight of in the case. Therefore, merely because a conveyance is executed preceded by a certificate under section 230A of the Income Tax Act for land and building cannot lead one to the conclusion that there was a sale of itemized assets. This conclusion of ours is supported by the Judgment of the Bombay High Court in the case of Narkeshari Prakashan Ltd. (supra) as also by the Judgment of the Supreme Court in the case of Mugneeram Bangur & Co. (supra). Under the Slump Sale Agreement, it has been provided vide clause 3.22 that accounts receivable will be on PALs account and that KMCL shall assist PAL to recover the book-debts, claims and bills pertaining to Kalyan Business prior to 29-9-1994. As per the impugned findings, in view of clause 3.22 all the assets of PAL were not

transferred even qua Kalyan Business and for that purpose reliance is placed on clause 3.22. This finding is also erroneous. Book-debts, claims and bills pertaining to the Kalyan Business prior to 29-9-1994 had to be on account of PAL. Book-debts of PAL prior to the sale date had to remain on account of PAL. It is only book-debts arising after 29-9-1994 which would go to the transferee. Hence, the impugned finding is wrong. As per the impugned finding, under clause 4.6 of the Slump Sale Agreement the deposits received by PAL from its customers against advance booking of cars were not transferred. This finding is wrong. Under clause 4.6, it is provided that on transfer of Kalyan Business if a customer seeks return of his deposit, PAL would be liable to return that deposit. On the other hand, if the car was sold then PAL was to pay Rs. 25,000 to PPL. In the circumstances, it cannot be said that the liabilities of PAL were not transferred. Clause 4.6 was incorporated as the contracts were between PAL and its customers and it would be very difficult to assign deposits to the transferee without the consent of the customers. This aspect has been lost sight of in the impugned findings. Further vide clause 2.D) of the slump Sale Agreement, PPL agree to reimburse Rs. 2 crores to PAL on confirmation from the lenders that such payment has been made by PAL to them towards prepayment costs. According to the impugned findings, there was no slump sale as the liability of PAL was not transferred. This finding is equally erroneous. PAL had obtained loans from Financial Institutions like ICICI. When PAL signed MOU on 11-3-1993, they had to obtain NOC from the said lenders. Whenever a borrower (including Government of India) seeks substitution of loans, the lenders levy additional interest costs. Without the permission of the lenders, the loans can never be substituted or assigned. In the circumstances, under clause 2.D) what is contemplated is that PAL will obtained NOC from the lenders and the cost up to Rs. 2 crores on account of additional interest shall be reimbursed to PAL by PPL and that too on confirmation being obtained from the lenders that PAL had paid the prepayment cost or additional interest costs to the lenders. In the circumstances, it cannot be said that there was no transfer of liabilities. One has to adopt commercial principles for interpreting such arrangements. According to the next impugned finding, in this case, there was no slump sale as PAL was the owner of the land admeasuring 18. 10 lacs sq. meters at Kalyan whereas they have conveyed to PPL a portion admeasuring 7.23 lakhs

sq. meters under conveyance dated 27-5-1996. According to the impugned findings, since the entire land was not transferred there was no slump sale. This finding is erroneous. Kalyan factory at all material times prior to 11-3-1993 was located on an area admeasuring 7.23 lakhs sq. meters. In fact, that area was bounded by a wall. In fact, that area always stood segregated from the open land. In fact, the open land and the build-up area were separated by a road. In the circumstances, area admeasuring 7.23 lakhs sq. meters was the fixed asset of the Kalyan Business. That, the entire area of 18.10 lacs sq. meters was never the asset of the Kalyan Business. Hence, the impugned finding is erroneous. According to the next impugned finding, in this case, machines were not physically transferred from PAL to PPL. That, only name plates of PAL are put on the machines and, therefore, there was no transfer under the slump sale of plant and machinery. This finding is also erroneous. Firstly, delivery is not a condition precedent for transfer of title. Secondly, by putting a name plate, there is a constructive delivery. Thirdly, the order of assessment of PAL for assessment year 1995-96 shows that PPL was incorporated on 25-7-1994 under the name of Kalyan Motor Company Limited which was subsequently changed to PPL on 28-7-1995. This order of assessment read with the Balance Sheet of PPL for the year ending 31-3-1995 shows the turn-over of Rs. 177.26 crores (approx). Without transfer of plant and machinery, it was impossible for PPL to have a turn-over of Rs. 177.26 crores (approx). Therefore, the impugned finding is erroneous. According to the next impugned finding, there was no transfer of depreciation fund and, therefore, there was no slump sale. In this case, there was no depreciation fund in existence. In 1984, there was revaluation of fixed asset, namely, land and the assessee had to calculate depreciation on revalued asset. Therefore, the Tribunal erred in holding that there was a depreciation fund which was not transferred to PPL. Depreciation is a notional deduction in the value of assets. It is not an item of transfer. In this case, depreciation was not invested in Government Security. In this case, there was no separate fund created. There was only a depreciation account in the books of PAL to reduce, notionally, the value of the assets. It was similar to salary which is a charge on profit and loss account. Hence, the impugned finding is erroneous. According to the next impugned finding, PAL had failed to transfer its liabilities to the extent of Rs. 13 crores and,

therefore, there was no slump sale. This finding is also erroneous. On 11-3-1993, a New Paint Shop was under construction. The transferee insisted that PAL should discharge its liability to their contractors and that PAL should complete the construction and hand over the newly constructed Paint Shop to PPL. There were two ways of discharging this liability PAL could have transferred their liability to PPL by reducing the consideration amount from Rs. 210 crores to Rs. 197 crores or PAL could have discharged its liability of Rs. 13 crores by effecting payment directly to its contractors and receive from PPL-full consideration of Rs. 210 crores. PAL opted for the latter option. In the circumstances, PAL agreed to complete the New Paint Shop and hand over the same to PPL and under the Slump Sale Agreement, till completion, Rs. 13 crores were kept in abeyance. Therefore, it cannot be said that there was no transfer of liability. According to the next impugned finding, PAL had failed to produce a Register of fixed assets and consequently the department was entitled to draw an adverse inference against PAL. This finding is also erroneous. As per the order of assessment, the Income Tax Officer has examined a Property Register which is nothing but a Register of fixed assets. This Property Register was also shown to us. Hence, this finding is also erroneous. According to the next impugned finding, no separate accounts were maintained by PAL for Kalyan Business. This finding is also erroneous. Before us, General ledgers for accounting year 1994-95 have been produced. They refer to sale of vehicles manufactured at Kalyan. They reflect Asset Account bearing No. 110 and Sale Account bearing No. 110 in respect of manufacture and sale of 118 NE Cars. Similarly, a separate asset and sale account was maintained for Padmini Cars under Kurla Business. In the circumstances, the finding given is erroneous.

(C) Whether there was a slump sale or a sale of Itemized Assets : Summary of above analysis

38. On the analysis of the above, we are of the view that, in this case, the entire Kalyan Business has been sold by PAL to PPL as a going concern. On reading the above documents, the intention of the parties in the commercial sense was to transfer the Kalyan Business, as a whole, for a lump sum consideration of Rs. 247

crores. That, the parties did not intend to make a sale of itemized assets. That, mere execution of a conveyance of immovable property by itself would not constitute sale of itemized assets. That, PPL never intended to purchase individual items. That, apart from land, building, plant and machinery, PAL had transferred Business Advantages like licenses, quotas, permission to use the name 'Premier', work-force and other intangibles. Therefore, on facts, we hold that there was a slump sale. That, in this case, there was a sale of all assets and liabilities of Kalyan Business as a whole for a lump sum amount. That, even after the Sale Date 29-9-1994, there was continuity of business by PPL of manufacturing 118 NE Cars and Peugeot Cars. That, the balance sheet, profit and loss account and the assessment order of PPL show that within 6 months period ending 31-3-1995, PPL has sold cars to the value of Rs. 177.26 crores (approx). That, the entire Arrangement was to the effect that the French Company AP agreed to make an investment of Rs. 350 crores in the Joint Venture because the other contracting party viz. PAL had infrastructure to manufacture 118 NE Cars at Kalyan, Kurla and Pune. That, PPL did not intend to purchase assets individually/separately and that they intended to buy the entire Kalyan Business for a lump sum price. Therefore, reading the Arrangement in its entirety along with relevant circumstances prevalent on 11-3-1993, we are of the view that, in this case, there was a transfer of the Kalyan Business as a Going Concern to PPL and that the Tribunal erred in holding that there was a sale of itemized assets. That, mentioning of value/consideration in respect of land or building will not per se take the transaction out of slump sale Narkeshari Prakashan Ltd.s case (supra); Mugneeram Bangur & Co. (Land Department)s case (supra). That the assets transferred, constituted running business and, therefore, there was a slump sale. That, merely because a conveyance of land and building came to be executed on 27-5-1996 it cannot be said that there was no slump sale. If that test is applied then there could never be a slump sale. That, the total cost of the Project was Rs. 560 crores of which PAL contributed Rs. 210 crores plus value of Net Current Assets amounting to Rs. 37.84 crores (approx). That, on 11-3-1993, there was no valuation. There is no evidence of valuation on that date. That, every facility at Kalyan was transferred. That, on 11-3-1993 value of net current assets had not been ascertained. That, on 11-3-1993 the sale date was not even fixed and,

therefore, it was impossible to fix the value of net current assets on 11-3-1993 as the Sale Date was 29-9-1994. That, in any event, there is no question of any profit arising to the assessee PAL on transfer of Current Assets. The amount of Rs. 37.84 crores (approx) was an excess of current assets over Current Liabilities transferred at Book Value. Current Assets such as deposits, receivables, debtors etc. cannot fetch more than their Book Value. The assessing officer in his original order calculated short-term capital gains of Rs. 1.84 crores on transfer of current assets. However, in the light of above principles, the first appellate authority cancelled the addition of Rs. 1.84 crores. In the circumstances, we are of the view that the transaction in question was a slump sale.

There is one more aspect which needs to be mentioned. Our above conclusion, namely, that the transaction is a slump sale is not only based on our interpretation of terms and conditions of the entire Arrangement but it is also based on the manner in which the gain is accounted for by PAL in its Books of Account. As can be seen from the Extracts of Accounts of PAL at page 341 of the Paper-book, it is clear that PAL has not accounted for profits on itemized assets. That, Rs. 81.31 crores was the book profit on the slump sale. That, the crucial figure in the accounts at page 341 of the paper-book was Rs. 210 crores and not Rs. 37.84 crores (approx) as the value of net current asset did not give rise to any profits and, therefore, that value had to be ignored. These accounts of PAL support the Slump Sale Agreement because the accounts are not based on the sale of itemized assets. This aspect has been lost sight of by the assessing officer. There was a separate Ledger for Kalyan Business which contains various Heads of Accounts viz. Building Account, Land Account, Plant and Machinery Account in which debit/credit entries were made as per the figures given on page 341 of the Paper-book. Rs. 81.31 crores was the book surplus and not a tax surplus. In order to decide the tax surplus, one has to take into account cost of acquisition of building, plant and machinery, Paint Shop etc. Therefore, Rs. 81.31 crores did not represent taxable profits. That, figure represented only book profits. These accounts of PAL support the Slump Sale Agreement. Therefore they are relevant.

Under section 2(14), capital asset is defined to mean property of any kind held by an assessee whether connected or not connected with his business or profession.

In the case of West Coast Electric Supply Corpn. Ltd. v. CIT : [1977]107ITR483(Mad) , it has been held that the word 'property' in the definition of 'capital asset' in section 2(14) would include an Undertaking acquired as a whole. Therefore, the Kalyan Business acquired as a whole by PPL, constituted property in the definition of 'capital asset'. In the case of de-merger, all assets and liabilities stand transferred at Book Value. There is no such condition prescribed for a slump sale. In the case of a slump sale, there is a sale for consideration. That consideration is paid to the transferor company and not to shareholders. A Slump Sale Agreement is contractual in nature. The only condition in the case of slump sale is that the sale should be for a lump sum price. Therefore, in the case of a slump sale, there is a transfer of the entire business activity for a fixed price and, therefore, sale value is not attributed to individual items of assets. In the present case, all the tests laid down by the Bombay High Court in the case of Narkeshari Prakashan Ltd. (supra) stand satisfied. In our view, principles for computing capital gains is the same, both under section 41(2) as it stood at the relevant time and under section 50 of the Income Tax Act. In the present case, having held that transaction was a slump sale, the assessing officer will now have to decide, on remand, computation of capital gains. That question of computation does not arise before us in this appeal. In the present case, we have held that there is a sale of an entire Kalyan Undertaking under the Slump Sale Agreement and, therefore, assessing officer will now have to compute the quantum capital gains under sections 45 to 50 of the Income Tax Act.

Assuming for the sake of argument that, in this case, our finding that there was a slump sale is erroneous and that the transaction was a sale of itemized assets even then there is a basic fallacy in the stand taken by the department. In this case, the assessing officer has held that there was a sale of itemized assets. According to the Income Tax Officer, there was a short-term gain on sale of building of Rs. 19.31 crores; Rs. 64.39 crores on plant and machinery, Rs. 7.57 crores on Paint Shop. These short-term gains have been calculated by assessing officer by assigning specific sale values to building, Paint Shop, plant and machinery. For example, sale price attributed to plant and machinery has been taken at Rs. 97.73 crores. Similarly, the sale price for building is fixed at Rs. 23.24 crores. Similarly, the sale price or Paint Shop is taken at Rs. 68 crores. Basically,

the assessing officer has apportioned Rs. 210 crores over land, building, plant and machinery. However, he has not given any Sale Value to intellectual property, right to use the name 'Premier', technical proprietary information and intangibles like licenses, quotas, permits, etc., all of which have been transferred to PPL and consequently the liability of PAL stood increased arbitrarily. Moreover, there is arbitrariness of the assignment of Sale Value by the assessing officer. For instance, the assessing officer has assigned Sale Values to buildings, plant and machinery on the basis of the report of the valuer of September, 1996. However, when it came to assignment of the Sale Value to the Paint Shop, the assessing officer, arbitrarily, without reasons, has reduced the value of the Paint Shop from Rs. 70 crores to Rs. 68 crores although the Paint Shop is valued at Rs. 70 crores in the said Report. The reason is obvious. If the Paint Shop is valued at Rs. 70 crores then the total of the assigned Sale Values exceeds Rs. 210 crores and, therefore, without reasons, the assessing officer reduces the Sale Value of the Paint Shop from Rs. 70 crores to Rs. 68 crores. Further, in this case, the controversy in computation of capital gains by the assessing officer is, whether the assessing officer was justified in taking into account valuation of assets done by PPL in September, 1996. At this stage, it may be mentioned that PAL sold the entire Kalyan Business for a net consideration of Rs. 247 crores (see page 267 of the Paper-book). As per the returns filed by PAL, the book profit/surplus was Rs. 81.31 crores. The assessing officer has increased the book profits by 17.92 crores on the basis of revaluation of assets. However, in our view, the assessing officer was wrong because revaluation is considered for arriving at a profit on sale for the purposes of books of account of PAL. For the purposes of computing assessable profits, one has to go by the provisions of the Income Tax Act. If the income/profit is the long-term capital gain, one has to take original cost with indexation. For short-term capital gain, one has to take the amount shown under the Block of Assets on the first day of the previous year. Lastly, the valuation of assets done by the transferee-PPL in this case is not for determining value of individual assets but for allocating the price of various assets in their books of account. Therefore, the Sale Value assigned by the transferee for the purposes of their books of account cannot constitute the basis for computing income/profits of PAL under the Income Tax Act. In the case of sale of business as a whole, there is no allocation of price

to any particular assets and, therefore, the computation of capital gains in such a case is done on the business as a whole which business itself is a capital asset. However, in case of sale of itemized assets, the assessing officer has to allocate the total amount of Rs. 210 crores not only to land, building, plant and machinery but to also all other assets and only then the computation of capital gains could be said to be correct. Otherwise, if Rs. 210 crores is restricted to specific three items then liability of the assessee would stand increased artificially. In the case of sale of itemized assets, the department will have to work out the cost of each item. We are dealing with the case concerning the assessment year 1995-96. At that time, there was no definition of slump sale. The concept of slump sale is based on judge-made law. Under the circumstances, even if we were to accept the contention of the department, namely, that there was a sale of itemized assets, the computation of capital gains tax liability in this case is erroneous as Rs. 210 crores is not apportioned over all the transferred assets.

(D) Consequences of our holding that there was a slump sale

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 assessing officer to compute the quantum of capital gains. For that purpose, the assessing officer will have to decide the cost of the undertaking for the purposes of computing capital gains that may arise on transfer. That, the assessing officer will also be required to decide its value under section 55 of the Income Tax Act. Further, the assessing officer will be required to decide on what basis indexation should be allowed in computing capital gains and the quantum thereof. Lastly, the assessing officer 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.

Accordingly, we set aside the order of the Tribunal. We make it clear that section 45 of the Income Tax Act applies in this case. This is on the footing that Kalyan Unit constituted the capital asset which has been transferred to PPL, and on that

basis the assessing officer will have to apply the parameters under sections 45, 48 etc. and decide on remand whether any capital gains tax liability arises and, if so, what is the amount thereof.

(E) Answers to the Questions raised in this appeal

40. In this appeal filed by the assessee, large number of questions from (1) to (3) have been raised. In our view, substantial questions of law which are required to be answered are only question Nos. (1), (2) and (3) which are quoted above as we are not concerned with computation of capital gains.

Accordingly, we answer the said questions as follows :

Our answer to question No. (1) is in the negative, i.e., in favour of the assessee and against the department.

Our answer to question No. (2) is in the negative, i.e. in favour of the assessee and against the department.

Our answer to question No. (3) is that the subject sale was a slump sale and, therefore, the assessing officer will have to decide the value of the Block of Assets on which PAL would get Depreciation.

Conclusion

41. Subject to above, this appeal stands allowed with no order as to costs.