
(1995) 11 KAR CK 0052

In the Karnataka High Court

Case No : ITRC No's. 3 of 1995 and 117 of 1993 & Income Tax R.C. No's. 117 of 1993 and 3 of 1995

Emerald Valley Estates Ltd.

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 03-11-1995

Acts Referred:

Income Tax Act, 1961 — Section 45, 48, 50

Citation : (1996) 88 TAXMAN 335

Hon'ble Judges : Tirath S. Thakur, J; S.A. Hakeem, J

Bench : Division Bench

Advocate : S. Parthasarthy, in I.T.R.C. No. 3 of 1995 and K.S. Ramabhadran, in I.T.R.C. No. 117 of 1993, for the Appellant; M.V. Seshachala and H.L. Dattu, for the Respondent

Judgement

Tirath S. Thakur, J.—These two references have been made by the Income Tax Appellate Tribunal, Bangalore Bench, at the instance of the assessee. In I.T.R.C. No. 3 of 1995, the Tribunal has referred the following three questions relevant to the assessment year 1982-83 for the opinion of this court :

" (1) Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the sale of shade trees would give rise to capital gains, liable to tax u/s 45 of the Income Tax Act, 1961 ?

(2) Whether, on the facts, the Tribunal was justified in determining the cost of purchase of the shade trees sold at Rs. 1,50,000 ?

(3) Whether, the Tribunal was right in holding that the applicant is not entitled to the benefit of Section 54E of the Act on investment made in rural development bonds out of the income of the preceding year ?"

2. In I. T. R. C. No. 117 of 1993 the Tribunal has referred the following two questions relevant to the assessment year 1984-85 ;

"(1) Whether, on the facts and in the circumstances of this case, the Tribunal was right in holding that the sale of shade trees gave rise to capital gains ?

(2) Whether, on the facts and in the circumstances of this case, the Tribunal was correct in holding that the assessee had incurred cost for acquiring the shade trees ?"

3. Since common questions of law and fact arise in both these references, the same are being disposed of by this common judgment.

4. The assessee-company purchased in March, 1970, a coffee estate together with shade trees standing thereon for a total consideration of Rs. 31,51,456. It is common ground that the sale deed in favour of the assessee did not indicate the price paid by it for different assets comprising the estate like land, shade trees, buildings, etc., The assessee has, however, in the books of account maintained by it shown a sum of Rs. 29,39,456 as having been paid towards the price of the coffee garden and balance of Rs. 2,12,000 as price for the building. It is also admitted that the coffee estate was a yielding estate with sustenance drawing standing trees on the same, some of which were cut and removed by the assessee resulting in the receipt of a sum of Rs. 8,17,196 during the assessment year 1982-83 and a sum of Rs. 58,693 during the year 1984-85.

5. In the assessment proceedings for the assessment year 1982-83, the Inspecting Assistant Commissioner (Assessment) considered the question of capital gains arising out of the sale of the shade trees and after fixing the cost of acquisition thereof at Rs. 25,000 and allowing the permissible deductions, brought the sale proceeds to tax under the head "Capital gains". Aggrieved, the assessee went up in appeal before the Commissioner of Income Tax (Appeals) who, while agreeing with the conclusions drawn by the Officer below, directed him to fix the cost of acquisition of the trees in question at Rs. 75,000 instead of Rs. 25,000. The assessee took the matter in a further appeal before the Tribunal and urged that the assessee had not incurred any cost on the acquisition of the shade trees with the result that the principle settled by the Supreme Court in Commissioner of Income Tax, Bangalore Vs. B.C. Srinivasa Setty, was applicable making the receipts wholly immune to the levy u/s 45 of the Act. The Tribunal did not find favour with the submission made on behalf of the assessee but held that the figure empirically taken by the Commissioner of Income Tax (Appeals) representing the cost of acquisition of the trees in question was not proper. Taking judicial notice of the fact, that the price of coffee land in the year 1980-81, was around Rs. 20,000 to 25,000 per acre, the Tribunal came to the conclusion that the price of the shade trees standing on the coffee estate could be taken to be approximately 1/10th of the total price paid by the assessee. Proceeding on the said basis, the Tribunal worked out a sum of Rs. 3,15,145 as the price paid by the assessee for the shade trees standing on the estate at the time of its purchase, and held that the cost of acquisition of the shade trees sold during the relevant assessment year could not be less than Rs. 1,50,000 for purposes of computation of the capital gains.

6. The Tribunal also turned down the assessee's plea for exemption u/s 54E of the Act, in respect of an investment of Rs. 89,449 made during the assessment year 1981-82. The Tribunal held that the investment in question had been made out of the sale proceeds of shade trees sold during the assessment year 1981-82 and the same had nothing to do with the sale of shade trees which had given rise to capital gains during the assessment year 1982-83.

7. In so far as the second reference, i.e., I. T. R. C. No. 117 of 1993 is concerned, there is no material difference in the factual background in which the controversy has arisen except that the assessee had sold the shade trees during the period relevant to the assessment year 1984-85 for a sum of Rs. 58,693. The Tribunal while following its earlier judgment dismissed the appeal filed by the assessee holding that there was no error either in bringing the sale proceeds to tax or in the computation of the capital gains arising out of the same.

8. We have heard Mr. Sarangan, learned senior counsel appearing for the assessee, and Mr. Sheshachala, learned standing counsel for the Revenue.

9. The expression "capital gains" implied any profits or gains arising from the transfer of a capital asset. Any such profits or gains are by reason of Section 45 of the Income Tax Act, 1961, deemed to be income of the previous year in which the transfer takes place and is chargeable to Income Tax under the head "Capital gains" save to the extent otherwise provided by Sections 54, 54B and 54D to 54H of the said Act, Section 48 of the Act prescribes the method of computation of capital gains and in substance provides that income chargeable under the head "Capital gains" shall be computed by deducting from the full value of the consideration received or accruing as a result of the transfer of the capital asset, amounts incurred by the assessee wholly or exclusively as expenditure in connection with such transfer and the cost of acquisition of the asset as also the cost of any improvement thereto.

10. The term "capital asset" is defined by Section 2(14) of the Act and means "property of any kind" held by an assessee whether or not connected with his business or profession excluding those set out in the said provision. The expression "property of any kind" held by an assessee gives the widest possible import to the term "capital asset" and would mean and include all conceivable kinds of property or rights in such property that an assessee may hold or be capable of holding or enjoying except of course those as are specifically excluded from the definition of the term "capital asset" by Section 2(14) of the Act.

10. Having regard to the wide definition of the expression "capital asset" there is no reason why shade trees growing in a coffee estate should not be deemed to be covered by the said expression. Shade trees, it is common ground are absolutely essential for the protection of the coffee bushes. These trees prevent the soil from becoming hot and dry and help in maintaining an even temperature considered conducive for proper growth of the coffee bushes. They also help increase the fertility of the soil and protect the coffee plants from the direct beat

of the rain and the sun. Such trees are grown not with a view to produce timber or collect any fruit from the same but, with a view to help production of coffee or other plantation crops. There is, therefore, no reason why shade trees existing in a coffee estate cannot be said to be the fixed assets of a planter so as to give rise to capital gains in the hands of the owner should he decide to sell either whole or any part of the said capital asset.

11. There is ample authority in support of the above proposition. Reference may be made only to some of the cases on the point.

12. In *STATE OF KERALA Vs. KARIMTHARUVI TEA ESTATE LTD.*, , the High Court of Kerala held that gravies trees grown and maintained for the sole purpose of providing shade to the tea bushes in the tea estates of the assessee were essential for the proper cultivation of tea and that the same had to be considered to be as much a part of the capital asset of the company as the tea bushes themselves or the equipment in its factory. Some of the gravies trees when the same became old and useless by efflux of the time were cut down and sold. The sale proceeds of such trees were held by the court to be capital and not revenue receipts in the hands of the assessee. In *State of Kerala Vs. Karimtharuvi Tea Estate Ltd.*, , the view taken by the High Court of Kerala in the above case was upheld by the Supreme Court. The following passage from the judgment of their Lordships states the legal position thus (at page 276) :

" There is no controversy about the fact that the owners of tea estates plant grevelia trees not for the purpose of deriving any income therefrom but solely for the purpose of providing shade for the tea plants and that such shade is essential for the proper cultivation of tea. The trees were cut down and sold after they had become useless by efflux of time.

The gravies trees in the tea estate of the respondent constituted, therefore, capital assets and the proceeds derived therefrom by sale as firewood would not constitute agricultural income under the Act."

13. In *Consolidated Coffee Estates (1943) Ltd Vs. Commissioner of Agricultural Income Tax, Mysore*, , a Division Bench of this court was considering the question as to whether sale proceeds received by the assessee from the sale of rose wood trees cut from the land of the assessee were liable to assessment for agricultural Income Tax. The Commissioner of Agricultural Income Tax had rejected the assessee's contention that the income was not liable to agricultural Income Tax. Upholding the contention raised on behalf of the assessee, this court held that the shade trees were absolutely essential for the protection of coffee bushes and such trees existing in a coffee estate were as important as the coffee bushes yielding the coffee crop. Such trees in a coffee estate were a part of fixed assets of the planter and any payment made on the acquisition or creation of a fixed asset or a sum received on its realisation was a capital sum and the proceeds of the sale of timber of the shade trees was a capital receipt and not taxable agricultural income. The following passage from the judgment of this

court can be gainfully reproduced (at page 37) :

" The cost of planting coffee bushes and shade trees is not treated as revenue expenditure but as capital expenditure. Therefore, it is clear that the shade trees in a coffee estate are part of the fixed assets of the planter. The payment made on the acquisition or creation of a fixed asset or a sum received on its realisation is usually a capital sum. (vide Simon's Income Tax, volume I, second edition, page 33), . . .

" The gravies trees were not useless. The gravies trees were old and money was realised. The business of the assessee is not to produce timber but to produce coffee and other plantation crops. It is clear that the assessee did not retain and foster the rose wood trees for the purpose of selling timber. The question whether the rose wood trees were planted by the assessee's predecessors or they were of spontaneous growth is irrelevant for the purpose of decision on the question whether the receipts are capital assets or not. In view of the common ground that the trees were maintained as shade trees for the coffee bushes, the shade trees, in our opinion, are capital assets as much as the coffee bushes and the proceeds of sale of timber of the shade trees is a capital receipt in the hands of the assessee and not taxable as income." "

14. In Commissioner of Income Tax, Mysore Vs. H.B. Van Ingen, . The assessee had purchased a coffee estate, in which as on the date of the purchase, a portion of the estate was covered by coffee plants while the rest was a jungle. Year after year the assessee cleared the portions of the jungle for the purpose of planting coffee. The question that arose before this court was whether the price realised by the assessee by the sale of the trees was income. This court held that the assessee had sold the very same trees which he had purchased as part of the estate hence the price realised by the sale of such trees was a capital and not a revenue receipt.

15. In Travancore Tea Estates Co. Ltd. Vs. Commissioner of Income Tax, , the assessee had during the relevant assessment year sold old shade trees growing in his agricultural land. The profits and gains arising from the asset sold were assessed by applying Section 45 of the Income Tax Act, 1961, by the Income Tax Officer concerned. The assessee appealed to the Appellate Assistant Commissioner who accepted the same on the ground that profits, if any, arising from the sale constituted agricultural income and, therefore, could not have been brought to tax under the Income Tax Act. The Revenue appealed to the Tribunal and contended that the trees in question would be property of any kind mentioned in Section 2(14) of the Act. It was also urged before the Tribunal that the sale proceeds of the trees did not constitute agricultural income. Both these contentions were accepted by the Tribunal. Upon a reference, the High Court of Kerala held that trees were property of any kind within the meaning of Section 2(14). The court further observed that the rule that what is attached to the land belonged to the land was not applicable in India. Reliance was placed upon the judgment of the Supreme Court in K.A. Dhairyawan and Others Vs. J.R. Thakur

and Others, for holding that trees attached to the land could not be said to be agricultural land in India with the result that if any such trees are cut and removed and a gain arises from the same, it would be taxable u/s 45 of the Act. Reliance was also placed upon the judgment of the Supreme Court in Commissioner of Agricultural Income Tax, Kerala Vs. Kailas Rubber and Co. Ltd., .

16. To the same effect is the judgment of the High Court of Madras in Beverley Estates Ltd. Vs. Commissioner of Income Tax, . That was a case in which the assessee had sold certain trees planted and nurtured by it for providing shade to the coffee plants. The assessee claimed that sale proceeds shown in the accounts as miscellaneous sales and receipts, were not taxable. The Tribunal held to the contrary. On a reference, the High Court following the judgment of the Supreme Court in State of Kerala Vs. Karimtharuvi Tea Estate Ltd., and Travancore Tea Estates Co. Ltd. Vs. Commissioner of Income Tax, , held that the gains arising to the assessee by sale of standing shade trees grown by him were assessable u/s 45 of the Income Tax Act.

17. Mr. Sarangan however made a two fold submission. He argued that since the assessee had not specifically paid any price for the standing trees purchased as a part of the coffee estate, it should be presumed that the assessee had incurred no cost of acquisition on the trees in question. Determination of the cost of acquisition of a capital asset, argued Mr. Sarangan, was a sine qua non for bringing to tax any capital gain arising out of the transfer of any such asset. Since, however, the assessee had not specifically paid any price as cost of acquisition of shade trees sold to him, it must be presumed that the shade trees had not cost the assessee anything or that the determination of the cost of acquisition was not possible thereby making Section 48 unworkable and, therefore, inapplicable to the assessee's case.

18. Alternatively, he submitted that from the date the trees were purchased till the date they were sold the same had improved in the sense that they had grown no matter by a natural process of growth. The cost of this improvement contended Mr. Sarangan could not be determined thereby making the computation of the capital gain in terms of Section 48 impossible. This argued learned counsel rendered the entire machinery provided by Sections 45 and 48 inapplicable to a case of this nature. Reliance, in this connection, was placed by Mr. Sarangan upon the judgments of the Supreme Court in Commissioner of Income Tax, Bangalore Vs. B.C. Srinivasa Setty, , Evans Fraser and Co. Ltd. (In Liquidation) Vs. Commissioner of Income Tax, Bombay City-II, and Bawa Shiv Charan Singh Vs. Commissioner of Income Tax, Delhi, .

19. In Commissioner of Income Tax, Bangalore Vs. B.C. Srinivasa Setty, , the Supreme Court was considering the question as to whether the transfer of the goodwill of a newly commenced business could give rise to a capital gain taxable u/s 45 of the Income Tax Act. Answering the question in the negative, the court observed that a variety of elements goes into the making of goodwill and its composition varied from business to business. It was held that because of its

intangible nature it remained insubstantial in form and nebulous in character and that there could be no account in value of the factors producing it and that it was impossible to predicate the moment of its birth. The court observed that in order that Section 45 could be made applicable, the asset must bear the quality which brings Section 45 into play and ruled that none of the provisions pertaining to the head "Capital gains" suggested that they would apply to an asset in the acquisition whereof no cost at all could be conceived. The date of acquisition it was observed was a material factor in applying the computation provisions and since "goodwill" could not be said to have been acquired on any particular date, the provisions of Sections 45 and 48 had no application to such an asset. The following passage from the judgment states the conclusion drawn by their Lordships (at page 300) :

" What is contemplated is an asset in the acquisition of which it is possible to envisage a cost. The intent goes to the nature and character of the asset, that it is an asset which possesses the inherent quality of being available on the expenditure of money to a person seeking to acquire it. It is immaterial that although the asset belongs to such a class, it may, on the facts of a certain case, be acquired without the payment of money. That kind of case is covered by Section 49 and its cost, for the purpose of Section 48, is determined in accordance with those provisions. There are other provisions which indicate that Section 48 is concerned with an asset capable of acquisition at a cost. Section 50 is one such provision. So also is Sub-section (2) of Section 55. None of the provisions pertaining to the head "Capital gains" suggests that they include an asset in the acquisition of which no cost at all can be conceived. Yet there are assets which are acquired by way of production in which no cost element can be identified or envisaged. From what has gone before, it is apparent that the goodwill generated in a new business has been so regarded . . .

In the case of goodwill generated in a new business there is the further circumstance that it is not possible to determine the date when it comes into existence. The date of acquisition of the asset is a material factor in applying the computation provisions pertaining to capital gains. It is possible to say that the "cost of acquisition" mentioned in Section 48 implies a date of acquisition, and that inference is strengthened by the provisions of Sections 49 and 50 as well as Sub-section (2) of Section 55.

It may also be noted that if the goodwill generated in a new business is regarded as acquired at a cost and subsequently passes to an assessee in any of the modes specified in Sub-section (1) of Section 49, it will become necessary to determine the cost of acquisition to the previous owner. Having regard to the nature of the asset, it will be impossible to determine such cost of acquisition. Nor can Sub-section (3) of Section 55 be invoked, because the date of acquisition by the previous owner will remain unknown.

We are of opinion that the goodwill generated in a newly commenced business cannot be described as an "asset" within the terms of Section 45 and, therefore,

its transfer is not subject to Income Tax under the head "Capital gains".

20. In *Evans Fraser and Co. Ltd. v. CIT* [1982] 137 ITR 495, the High Court of Bombay simply followed the principle laid down in *Commissioner of Income Tax, Bangalore Vs. B.C. Srinivasa Setty*, and held that even if the moment of the acquisition of goodwill and its cost of acquisition could be pinpointed the cost of improvement if any made to the same could not be precisely ascertained in terms of money. The court held that since income chargeable to capital gains tax is to be computed by deducting from the full value of the consideration, the cost of acquisition of the capital asset and the cost of any improvement thereto, any gain arising out of the sale of goodwill would not be liable to capital gains tax since the cost of improvement of any such goodwill cannot be ascertained.

21. In *Bawa Shiv Charan Singh Vs. Commissioner of Income Tax, Delhi*, the question that arose for consideration was whether the assessee was liable to capital gains tax on the amount received by him in consideration of surrender to tenancy rights, held in respect of a certain premises. The court held that the assessee's tenancy rights were a capital asset and the surrender of the same would result in the right being extinguished and would therefore amount to a transfer of a capital asset within the meaning of the Act. The court, however found that the increase in the value of the tenancy rights depended upon a variety of facts, such as the locality, where the premises are situate, the nature of the business, being carried on in the same, the success of the business, the trend of the customers, the likelihood of competition and so on and so forth. It was also not possible to predicate as to the exact moment of the birth and the rate or period of the growth of the value of such rights. The court proceeded to hold that since it was not possible to ascertain as to when the assessee acquired the rights and as to what was the cost of acquisition or the cost of improvement for the purpose of computation of capital gains u/s 48, the value of the capital asset transferred if brought to tax would amount to taxing the capital value of the asset and not any profit or gain as contemplated by Section 45 of the Act.

22. All the three cases referred to above and relied upon by Mr. Sarangan, pertain to intangible capital assets like goodwill and tenancy rights, in regard where to the cost of acquisition, the date of acquisition and the cost of improvement, if any, was considered to be incapable of computation, and since Sections 45 and 48 of the Act were held to be providing an integrated code the failure of the process of computation u/s 48 was held to be sufficient to take the gains arising from the transfer of the said assets out of the purview of Section 45. In the instant case, the capital asset sold is neither goodwill nor tenancy rights, so as to attract the principles settled in the above cases straightaway. Here, the controversy arises qua a tangible asset acquired and sold by the assessee on dates that are known.

23. The question then is whether the assessee had incurred any cost on the acquisition of the said asset the sale whereof has resulted in the capital gain in question. It is true that the assessee and his seller have not indicated the price

paid or received by them in respect of each item of property comprising the estate that changed hands between them. It is also true that the shade trees have not been separately evaluated while fixing the price of the estate, although the assessee has in his own books of account split up the price according to his convenience one part whereof is related to the coffee garden and the other to the buildings standing in the estate. That does not however appear to be decisive of the matter in controversy. The question is not whether the parties had actually fixed a definite price for the transfer and acquisition of the asset. The question is whether the asset could be said to be one in respect of which no cost of acquisition could at all be envisaged or conceived as was the position in the case of goodwill in Commissioner of Income Tax, Bangalore Vs. B.C. Srinivasa Setty, , where their Lordships ruled that it was impossible to conceive of a cost of acquisition looking to the intangible and nebulous nature of the asset which is created over a period of time by operation of a variety of factors. Unlike goodwill it is not possible to say that no cost of acquisition can at all be conceived or envisaged in respect of a capital asset like the shade trees purchased as a part and parcel of a yielding coffee estate. It is not denied that these trees after passage of time cease to serve their purpose and have to be removed. The removal of such trees is a potential source for capital receipts for the estate owner and are, therefore, bound to constitute an important consideration while fixing the price of the estate as a whole. So also is the position with the purchaser who too is bound to be influenced by the number of the shade trees standing in a particular estate which he proposes to buy and which may over a period of time bring back a sizeable part of his investment in the form of sale proceeds. It is not, therefore, as though shade trees existing in an estate are wholly irrelevant or so insignificant in their value that they can as well be said to have been acquired by the purchaser without any cost whatsoever. The number of shade trees and the possibility of their removal resulting in return of capital invested by the purchaser are all matters which are bound to go into determination of the price, of an estate. It is not, in the circumstances, one of those cases where it may not be possible to envisage or even conceive of the cost of acquisition. The position in law as applicable to an asset like goodwill, therefore, will have no application to shade trees about which not only can a cost be conceived but can be legitimately envisaged in a sale transaction.

24. It was next contended on behalf of the assessee that the cost of acquisition could not be calculated by the authorities below by a process of bifurcation of the total consideration paid and received for the estate in question. Reliance, in this connection, was placed upon the judgment of this court in Syndicate Bank Ltd. Vs. Additional Commissioner of Income Tax, and in Commissioner of Income Tax Vs. Alanickal Co. Ltd.,

25. In Syndicate Bank Ltd. Vs. Additional Commissioner of Income Tax, the facts were entirely different. That was a case in which the banking business of the company was compulsorily acquired by the Government under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970, as a whole. A

lump sum compensation of Rs. 3.6 crores was granted for the acquisition. The business taken over had several assets in respect of some of which the date of acquisition or the cost of acquisition could not have been determined. It was in these circumstances that this court held that if the transfer is of the whole concern and no part of the agreed price is indicated against different and definite items, having regard to their valuation on the date of the sale, the agreed price could not be apportioned on capital assets in specie. The court observed that what was sold in such a case, was not an individual item of property forming part of the aggregate but the capital asset consisting of a business of the whole concern or the undertaking. The facts in the instant case, are entirely different and, therefore, the judgment cited has no application to the present case.

26. In the second case, namely, Commissioner of Income Tax Vs. Alanickal Co. Ltd., , the sale in question pertained to a rubber estate, along with rubber trees on the same. The High Court of Kerala held that when the land with the standing trees is transferred, the sale is an integral one and did not involve a separate sale of the trees as a distinct asset. A bifurcation of the asset, it was held could happen only when the trees were sold separately for being cut and removed while the right over the soil is retained by the owner. On the contrary, where agricultural land is sold with the trees thereon, the sale is only in respect of agricultural land of which the trees form an integral part.

27. In the present case, the sale resulting in the capital gain to the assessee is not a composite sale of the land and the trees standing on the same. It is a sale of only the shade trees standing on the land which have been cut and removed by the assessee. In such a situation the principle laid down by the Supreme Court in Commissioner of Agricultural Income Tax, Kerala Vs. Kailas Rubber and Co. Ltd., and the view taken by the Kerala High Court in Travancore Tea Estates Co. Ltd. Vs. Commissioner of Income Tax, , would apply more appropriately than those stated in Commissioner of Income Tax Vs. Alanickal Co. Ltd., .

28. That brings us to the alternative submission made by Mr. Sarangan according to whom the improvement of the trees between the date of the purchase and the sale thereof was in much the same manner as the improvement in the goodwill of a running business concern. It was urged that since, like goodwill, the trees were also self-generating, therefore, the principles applicable to the case of improvement to a goodwill of a concern must be held to be fully applicable to the case of improvement of shade trees, as well.

29. The argument no doubt appears enticing on its face value, but does not survive a closer scrutiny. The analogy drawn by Mr. Sarangan, between the growth and improvement of goodwill of a running business concern on the one hand and the growth and improvement of a tree drawing sustenance from the soil on the other does not appear to be befitting. There are certain striking features which distinguish one from the other. To enumerate a few, while goodwill is an intangible asset, shade trees growing in an estate are tangible in nature. In the case of goodwill since the growth of the asset is imperceptible and

depends upon a variety of factors it is difficult to conceive of a price or the cost incurred by the assessee in acquiring the same. This is not true about the shade trees in respect of which a cost of acquisition can fairly and reasonably be worked out. In the case of goodwill, it is impossible to predicate the moment of its birth. It comes silently into the world and its impact may not be visibly felt for an undefined period. It is more in the nature of a concept growing or fluctuating with the numerous imponderables pouring into and affecting the business. A tangible asset like trees do not suffer from any such limitations and is not nebulous like the goodwill. In the case of goodwill it fluctuates and is never constant. It changes from time to time both in its content as also its value. This cannot be said to be true about a tangible asset like the trees. Last but not the least, in the case of goodwill some amount of human effort whether it be in the nature of punctuality of the managers handling the business, honesty of the owners, the dedication of its workmen, location of its premises, the value system to which they adhere, and such other matters may be relevant and would require to be constantly monitored in order to maintain or add to the goodwill already generated. All such concepts appear to be wholly foreign to an asset like a shade tree drawing sustenance on its own from the soil and growing not because of any human effort but because of the bounty of nature.

30. Suffice it to say that goodwill as an asset is sui generis an asset of its own kind which it is difficult to compare with any other tangible asset no matter certain features like the growth of a tree may be as imperceptible as the growth of goodwill. The essential character of the two assets being different what may be true about goodwill may not necessarily be true also about shade trees. The principles applicable to capital gains arising out of the sale of goodwill, therefore, cannot be borrowed for purposes of applying the same to the sale of tangible assets like shade trees growing in an estate.

31. There is yet another reason why the argument advanced by Mr. Sarangan cannot be accepted. In terms of Section 48 what is liable to be deducted from the full value of the consideration received as a result of the transfer of the asset is the expenditure incurred wholly or exclusively in connection with such transfer, the cost of acquisition of the capital asset and the cost of any improvement thereto. The expression "cost of improvement" is defined by Section 55 of the Act to mean a capital expenditure incurred in making any additions or alterations to the capital asset in question. The expression expenditure of a capital nature incurred in making any additions or alterations to the capital asset are significant. What is important is that the assessee must have incurred an expenditure of a capital nature with a view to making additions or alterations to the asset. This is so because, the legislative intent behind the imposition of a tax on capital gains is to tax what can be said to be a gain in the hands of the assessee after accounting for the expenditure incurred by the assessee either on the acquisition of the asset or on the improvement thereof as also the expenditure incurred wholly and exclusively in connection with any such transfer. The provisions of Sections 48 and 50 of the Act make it clear that the capital gain

in the hands of the assessee can be correctly worked out only if what the assessee has himself spent on the acquisition, or the improvement of the asset is deducted from the full value of the consideration received by him. Seen in that light, therefore, it is necessary that before the provisions of Section 48 can be called in aid for purposes of deduction of any costs incurred by the assessee on the improvement of the asset, the assessee must not only claim that he has made any such capital expenditure but also demonstrate that any such expenditure could possibly have been incurred by him for purposes of making an improvement in the asset in question. In other words, if the assessee does not make any claim of having made any capital expenditure by way of improvement of the capital asset sold or if the asset did not otherwise admit of any capital investment being made for its improvement, the question of Section 48 of the Act, becoming unworkable simply because the assessee does not claim to have made any capital investment does not arise. The provisions of Section 48 are enabling provisions, which permit certain deductions from the total sale consideration received by the assessee. In order that the assessee may be entitled to any deduction in terms of the said provisions on account of any improvement the least that is required is a claim for such deductions failing which the assessing authority shall be entitled to proceed, on the assumption that no such improvement was actually made. Support for this view is available from a Division Bench judgment of the High Court of Kerala in Parthas Trust Vs. Commissioner of Income Tax, where Kochu Thommen J., as his Lordship then was, speaking for the court observed thus (at page 620) :

" But if the cost and date of acquisition are known, as in the present case, the fact that the assessee has not claimed any expenditure incurred by him wholly and exclusively in connection with the transfer of his business, as postulated under Clause (i), or the cost of any improvement to the asset in question, mentioned in Clause (ii), does not mean that the gains arising from the transfer cannot be computed. These components representing the deductible expenditure in connection with the transfer of the cost of improvement, unlike the cost and date of acquisition, are not essential for the computation of the gains, but are only enabling provisions for the assessee to claim deduction from the sale price so as to reduce the chargeable gains which have arisen. By refusing to claim any such deduction, no assessee can defeat the operation of Section 45. In the present case, there is no claim for expenditure in connection with the transfer or for the cost of any improvement to the assets in question, . . ."

32. But what is significant is that the computation of capital gains u/s 48 presents no difficulty even when the assessee has not claimed any deduction by way of expenditure under Clause (i) or cost of improvement under Clause (ii), so long as the cost and time of acquisition are known components. With great respect, we do not agree with the observation of the Bombay High Court to the contrary in Evans Fraser and Co. Ltd. (In Liquidation) Vs. Commissioner of Income Tax, Bombay City-II,

33. Mr. Sarangan then argued that the assessee had been incurring expenditure on spraying, manuring, deseeding the coffee bushes and that since the shade trees were also a part of the estate the benefit of all such expenditure was going even to the shade trees no matter only in part. There is no merit in this submission either which must be rejected for more than one reason. Firstly, the assessee has not set up any such case before the authorities below. The argument is thus unsupported by any finding from the Tribunal which is the last court on facts. Secondly, any expenditure allegedly incurred by the assessee on the coffee bushes and their upkeep cannot be said to be an expenditure of capital nature incurred for the improvement of the shade trees. Any such expenditure is actually in connection with the cultivation of the coffee crop and incidental thereto and cannot, therefore, be termed as cost incurred on the improvement of the shade trees.

34. That leaves us with the only other point referred which relates to the assessee's entitlement to the benefit of Section 54E of the Act for investments made out of the sale proceeds of the trees relatable to the assessment year 1981-82. Mr. Sarangan fairly conceded that the benefit claimed by the assessee, was not available to it, as the investment in question had been made prior to the sale of the trees in question. The Tribunal was, therefore, justified in holding that any such investment, could not be counted against the receipts for a subsequent year.

35. In the result, our answers to the questions referred to us in these two references are in the affirmative and against the assessee. The references are disposed of accordingly but without any orders as to costs.