

Income Tax – Slump Sale | Even non-mandatory consideration will be henceforth taxable

As per the erstwhile Section 2(42C), "Slump sale" means the transfer of one or more undertakings as a result of the sale for a lump sum consideration without values being assigned to the individual assets and liabilities.

Madras High Court, in its recent verdict 'Areva T&D India Ltd vs. CIT' (2020)¹, held that transfer of an undertaking pursuant to an approved scheme of arrangement, in exchange of shares (i.e., without any monetary consideration) does not fall under the ambit of 'slump sale,' and hence not taxable under section 50B. According to the honorable high court 'exchange' is different from 'sale.' Similar decisions were taken in the past by Mumbai High Court (2014) and by the Supreme Court (1967).

To tax such arrangements, where a transfer of business undertakings is settled by the issuance of non-monetary considerations, Finance Act 2021 has amended the definition of slump sale U/S 2(42C) as under:

"Slump sale" means the transfer of one or more undertakings, by any means for a lump sum consideration without values being assigned to the individual assets and liabilities in such sales.

Pursuant to the insertion of the above definition, many schemes of arrangement will be taxed from now onwards. The fair market value (FMV) of the capital assets shall be taken as the 'sale consideration' while computing capital gains. Accordingly, on 24th May 2021, CBDT has notified new Rule 11UAE prescribing the method of calculating FMV of capital assets for the purposes of section 50B.

FMV will be higher of FMV 1 and FMV 2.

FMV 1: Value of net assets 'given up' by the assessee in the scheme of arrangement.
(Net assets = assets *minus* liabilities)

FMV 2: Value which the assessee has 'received' in the scheme of arrangement.
(Monetary as well as non-monetary considerations)

The capital gains would be: FMV (Higher of FMV 1 and FMV 2) *minus* the net worth (calculated under section 50B)

Weblink

<https://www.incometaxindia.gov.in/pages/rules/income-tax-rules-1962.aspx>

Therefore

The new amendment brings under its purview, the 'otherwise exempt' arrangements' by changing the statute itself. The genuine schemes of arrangement under the Companies Act, approved by the courts will now attract tax. This will be a hardship on the assesses who were genuinely exercising 'tax planning' and not 'tax evasion' while relying on the courts' landmark decisions. This is true mostly in cases, where businesses holding high value immovable property, shares or other specified assets in their books at low historical cost, since businesses will need to pay tax considering fair market value of specified assets, irrespective of actual transaction price.

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