Virtual Software and Training (P) Vs. Ito

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Court : Income Tax Appellate Tribunal ITAT Delhi

Decided On : Jul-20-2007

Reported in : (2008)116TTJ(Delhi)920

Judge : P Parashar, R Singh

Appellant : Virtual Software and Training (P)

Respondent : ito

Judgement :

1. This is an appeal filed by the assessee against the order of the learned Commissioner (Appeals) dated 18-1-2005 relating to assessment year 2001-02.

2. Shri K. Sampath and Shri L.K. Paonam, Advocates along with Shri VijayGupta, Finance Manager appeared on behalf of the assessee whereas Smt. Purnima Singh CIT DR along with Shri L.M. Pandey Sr. DR represented the revenue.

3. The assessee has taken as many as 13 grounds in this appeal, out of which ground Nos. 1 to 10 are directed against the findings of assessing officer and that of the learned Commissioner (Appeals) in working out the taxable short-term capital gain under Section 50B of the Income Tax Act, 1961 at Rs. 3,14,58,832. Ground Nos. 11 & 12 challenge the levy of interest under Sections 234B and 234C. These grounds have to be dealt with separately. Ground No. 13 is general in nature and does not require any specific adjudication.

4. Ground Nos. 1 to 10: These grounds relate to the addition made on account of short-term capital gain. The facts relating to the issue, as culled out from the material on record, as well as on perusal of the orders of the authorities below, are as under: 4.1 The assessee-company was incorporated in the year 1998 with themain object of development of software and multimedia contents. Itdecided to transfer its undertaking to M/s. Suri Capital & Leasing Limited ("SCL" in short). For this purpose, acquisition agreement between SCL and the assessee-company, namely, Virtual Software & Training Pvt. Ltd. ("VSTL" in short), was executed on 16-6-2000. We consider it proper to reproduce the relevant clauses of this agreement, which are as under: 3. VSTL is desirous of transferring its entire undertaking with respect to software development and training, consisting of its assets, liabilities, intellectual property rights and other contractual rights and obligations as more particularly described in Schedule-B to this Agreement on a 'going concern' basis (hereinafter referred to as the "Business").

4. SCL is desirous of acquiring the Business on a 'going concern' basis.

5. VSTL has agreed to transfer to SCL and SCL has agreed to acquire from VSTL, the Business on a 'going concern' basis for the consideration and on the terms and conditions set forth hereinafter.

2.1 Agreement to Sell and Purchase - Subject to the provisions of this Agreement, on the Closing Date. VSTL shall sell, transfer, convey, assign and deliver, to SCL and SCL shall purchase, acquire and accept, from VSTL, free from all type of encumbrances, all rights, title and interest of VSTL in and to the Business except domain names owned by VSTL.

3.1 Purchase Price -The slump purchase price for the Business (inclusive of the assets) shall be the allotment to VSTL of 45 lakhs (forty five lakhs) fully paid equity shares with the face value of Rs. 10 each in the capital of SCL so that the said 45 lakhs shares shall immediately after the losing constitute about 60 per cent of total issued. Subscribed and paid up capital of SCL.

4.2 It was decided that this agreement shall take effect from the date of its execution but the obligation of parties to proceed to closing, shall arise only after

all of the requisite conditions set forth in article 5.2 are fulfilled. Hence after fulfilment of these conditions, another agreement, under the title, "Memorandum of Entry" was prepared and signed on 31-7-2000. On this date, the business along with its assets and liabilities of VSTL were transferred to the transferee company. Both the parties signed this agreement.

4.3 As the transfer took place in the period covered under the assessment year under consideration, the assessing officer required the assessee to show cause as to why the transaction should not be considered as the slump sale within the meaning of Section SOB of the Income Tax Act. The company was, therefore, asked to explain as to why the transaction of transfer of assets in business of the company should not be taxed as a slump sale in view of the provisions contained under Section 50B of the Income Tax Act. The assessee submitted the following reply: The assessee-company is engaged in the business of development of computer software and imparting training for computer professionals.

The assessee entered into an agreement with M/s. Suri Capital and Leasing Ltd. (Presently known as Virtual Software System Ltd. and hereinafter referred to as 'VSL').

Pursuant to such agreements dated 16-7-2000 and 31-7-2000, the assessee company transferred its entire undertaking with respect of software business consisting assets, liabilities, intellectual property rights, contractual rights and obligations to VSL.

The assessee-company exchanged all its assets and liabilities, lock stock and barrel as "going concern" and VSL took over all such assets and liabilities in exchange of allotting the assessee 45 lakh equity shares in VSL.

The equity shares of VSL are listed and traded in various stock exchanges across the country.

As per the terms of the agreement for acquiring the business of the assessee-company, VSL discharged the consideration by allotment of its 45 lakh equity shares of the face value of Rs. 10 each.

(i) Assets, liabilities, employees, intellectual property rights, contractual obligations etc. of the assessee-company stood transferred to VSL.

(ii) For such transfer, as stated above in (i) the assessee-company was allotted 45 lakh equity shares of the face value of Rs. 10 each of VSL.

Thus the assets of the assessee-company which up to 31-7-2000 were in the form of fixed assets, current assets and its liabilities were converted into and took the form of specified number of equity shares of VSL.

The aforesaid transaction between the assessee-company and VSL is one of exchange and there was no sale of individual assets of the assessee for money consideration.

The presence of money consideration is an essential element in a transaction of sale.

If the consideration is not money but some other valuable consideration, then there is no sale.

In the present case, the assets and liabilities as they stood on 31-7-2000 in the books of assessee-company were transferred to VSL and in lieu thereof, the assessee-company was allotted 45 lakh equity shares of the face value of Rs. 10 each of VSL.

Thus, what the assessee received for parting with its assets, liabilities, contractual obligations etc. is only the market value (as per Stock Exchange quotation) of the equity shares of VSL.

In respect of the above transaction of transfer of assets etc., and allotment of equity shares, there is no element of income, whether on revenue account or on capital account.

4.4 The assessing officer was not satisfied with the reply of the assessee and rejected the same. He was of the view that under Section 45(1) of the Income Tax Act, any profit arising from the transaction is chargeable to tax as capital gains. The relevant observations of the assessing officer to justify his findings, which

have been reproduced in the appellant order also, are as under: The definition of word "Transfer" under Section 2(47) is merely inclusive and does not exhaust other kinds of transfer. In other words, expression "Transfer" in Section 2(47) must be read widely and not narrowly. The definition denote extension and cannot be treated as restricted.

The assessee-company entered into an agreement described as "Acquisition Agreement". This agreement dated 16-6-2000 is between M/s. Suri Capital and Leasing Ltd. (now known as Virtual Soft Systems Ltd.) and the assessee-company. Article 3 of the agreement, under the caption "consideration and payment" describe the consideration as purchase price, the same reads as under: The slump purchase price for the business (inclusive of the assets) shall be the allotment of VSTL of 45 lakhs (Forty Five Lakhs) fully paid equity shares with the face value of Rs. 10 each in the capital of SCL so that the said 45 lakhs shares shall immediately after the closing constitute about 60 per cent of the total issued subscribed and paid up capital of SCL.

Earlier in article 2.1 of the same agreement has also been described as "Agreement to sell and purchase". Under such article, it has been mentioned that the assessee-company shall sell, transfer etc., to VSL the entire organization in the business of computer software.

In view of the above, provisions of the Agreement dated 16-6-2000 between the assessee-company and M/s. Suri Capital and Leasing Ltd. the transaction is slump sale of the business of the assessee-company in consideration of 45 lakhs shares of face value of 10 each of M/s. Suri Capital and Leasing Ltd. Section 50B has been inserted in the Income Tax Act with effect from 2000-01. Section 50B is applicable for computation of capital gains in case of slump sale of business.

In order to tax, transaction as a slump sale, it is necessary to understand the word "slump sale" and provisions of Section 50B. As defined in Section 2(42C) "Slump sale" means the transfer of one or more undertakings as a result of sale for a lump sum consideration without values being assigned to the individual assets and liabilities.

Section 50B has been inserted with effect from the assessment year 2000- A 01. Provisions of Section 50B, applicable for computation of capital gains in the case of slump sale, are given below: Any profits or gains arising from the slump sale effected in the previous year shall be chargeable as long-term capital gains and shall be deemed to be the income of the previous year in which the transfer took place.

Where, however, any capital asset being one or more undertakings owned and held by the assessee for not more than 36 months is transferred under the slump sale, then capital gain shall be deemed to be short-term capital gains.

In the case of slump sale of the capital asset being one or more undertaking, the "net worth" of the undertaking shall be taken as cost of acquisition and cost of improvement. Net worth for this purpose is the aggregate value of total assets of the undertaking or division as reduced by the value of liabilities of such undertaking or division as appearing in the books of account. Any change in the value of assets on account of revaluation of assets shall be ignored for the purpose of computing the net worth. The aggregate value of total assets of such undertaking or division shall be written down value of block of assets determined in accordance with the provisions contained in sub-item (c) of Section 43(6)(c)(i) in the case of depreciable assets and the book value for the other assets.

4.5 The assessing officer in view of the above observations calculated the short-term capital gain at Rs. 3,14,58,832 and made addition of this amount accordingly. For so doing, he worked out the net worth of the undertaking of the assessee under Section 50B and took the sale consideration at Rs. 4,50,00,000 on the basis of the face value of shares allotted to the assessee in lieu of the transfer. The computation part of capital gain worked by the assessing officer is as under: 4.6 The assessee challenged the findings and working of the Assessing Officer before the learned Commissioner (Appeals). It was submitted that the main object in the acquisition agreement was to get control of a company by the assessee. In support of this submission it was stated that even though the entire undertaking software was transferred, but the domain names owned by the assessee was never transferred. It was pointed out that all such domain names related to the

software business whereas M/s. Suri Capital was carrying on the business of leasing.

Thus, in view of the agreement, both M/s. Suri Capital and the assessee could continue their business in the ordinary course of business.

4.7 The assessee further submitted that the transaction was given the name of transfer only for commercial reasons. It was submitted that in reality the assessee had subscribed for the shares of M/s. Suri Capital and instead of contributing the actual cash, it had contributed variable assetsi.e., business undertaking. It was pointed out that in pursuance of article3 of the Acquisition Agreement, 45 lakh equity shares were allotted which resulted into holding of 60 per cent of the total capital of M/s. Suri Capital. Thus, in consideration of the cost of 45 lakh equity shares, the assessee had contributed its entire commercial undertaking and thus in return it had acquired the shares and also the controlling interest. It was also submitted that various assets and liabilities of the undertaking subscribed for the shares were at book value only.

4.8 It was contended on behalf of the assessee that for the purpose of capital gain, Section 48 provides that the full value of the consideration accruing or received was to be adjusted against the deduction on account of the cost of acquisition of the asset transferred and the cost of improvement thereto. The assessee further submitted that undertaking which was subscribed to form share capital had been evaluated by M/s. PriceWaterhouse Coopers, CAs at the value ranging between Rs. 8 crores toRs. 11 crores and thus the difference between the face value of the shares allotted and such book value of the net assets represented its intangible assets i.e., goodwill.

4.9 In support of this submission, the assessee placed reliance on the ratio of decisions in the cases of CIT v. Mugneeram Bangur & Co.

; Venkatesh (Minor) v. CIT ; and CIT 4.10 The learned Commissioner (Appeals) sought comments of the assessing officer on the submissions of the assessee. The assessing officer submitted comments vide remand report dated 29-11-2004, which have been reproduced in the appellate order and which are as under: The

assessee-company entered into an acquisition agreement dated 16-2-2000 with M/s. Suri Capital and Leasing Ltd. (now known as M/s.

Virtual Soft-ware System). According to acquisition agreement, the assessee company will transfer all assets/liabilities to M/s. Suri Capital and Leasing Ltd. and in lieu of this the assessee-company will get 45 lakh shares of face value of Rs. 10 each. The assessing officer has referred article 3 of the agreement which explains "the slump purchase price for the business (inclusive of the assets) shall be the allotment to VSTL (i.e., assessee) of 45 lakh fully paid equity shares with the face value of Rs. 10 each in the capital of SCL, so that the said 45 lakh shares shall immediately after the closing constitute: about 60 per cent of the total issued subscribed and paid up capital of SCL" it is a slump sale and the assessing officer has rightly treated it a slump sale under the provisions of Section 50B of the Income Tax Act which is introduced with effect from assessment year 2000-01.

The assessee pleaded before the Commissioner (Appeals) that equity share of M/s. Suri Capital Leasing Ltd., are listed at Delhi and Mumbai Stock Exchange. The market value of the share is Rs. 4 per share as per exchange quotation. The assessing officer has rightly taken the value of each share Rs. 10 in view of acquisition agreement made between these two parties that the transfer share will be made on face value of Rs. 10 each.

The assessee has also referred to the balance sheet of M/s. Suri Capital valued by Price Water House Cooper, CA company. It is valued the assets to Rs. 8 crores to 11 crores in different way of valuation and states that the difference between the face value of the share allotted at Rs. 4.5 crores and such book value of the net assets is an intangible assets i.e., goodwill.

The assessee's contention is not correct, as the acquisition agreement clearly states that the transfer of the share on face value is Rs. 10 each and has no reference to the tangible assets or the goodwill.

The assessee-company also pleads that it gets 60 per cent control over the total capital of M/s. Suri Capital Ltd., thus the assessee gets 45 lakhs share as well as control over the M/s. Suri Capital Ltd., whose share are quoted in the stock

exchange.

This plea of the assessee is not acceptable as there is nothing in theacquisition agreement that it will effect the value of the face value of theshares The assessee's this contention is also not correct. The Section 50B(3) explains that "the benefit of indexation will not be available.

These judgments are clearly distinguishable from the facts of the present case. Moreover the judgment are dated 7-9-1971, 21-12-1981 and 31-3-1965, whereas the provisions of Section 50B have been inserted in the Income Tax Act with effect from assessment year 2000-01 and, hence these judgments have no relevance for the present case which relate to assessment year 2001-02. In view of the facts of the case, the appeal filed by assessee may kindly be rejected.

4.11 Against the remand report, the assessee also submitted followingcomments in rejoinder: For such transaction, the assessee was allotted 45 lakhs equity shares of Rs. 10 each of M/s. Suri Capital and Leasing Ltd. M/s.

Suri Capital & Leasing Ltd. is listed at Bombay Stock Exchange and Delhi Stock Exchange.

As on the date of transfer of such software business, the Equity Shares of M/s. Suri Capital & Leasing Ltd. were quoted at Rs. 4 per share on the Bombay Stock Exchange. This is evident from the Bombay Stock Exchange quotation placed at pages 62 to 65 of the Paper Book.

The assessing officer in his Remand Report has contended that the judgment of the Hon'ble Supreme Court of India in CIT v. Central India Industries Ltd 82 ITR 555 (SC) is not applicable.

In the same judgment, the Supreme Court of India has held that the market value as on the date on which the transaction is executed should be taken.

4.12 The learned Commissioner (Appeals) did not find force in the submissions of theassessee and held that provisions of Section 50B and Section 2(42C) which define slump sale, were clearly applicable to the case of the assessee. He thus

upheld the action of the assessing officer in taxing short-term capital gain. In support of his findings, the learned Commissioner (Appeals) relied upon the following authorities also: Kuttukaran Machine Tools v. CIT (2003) 131 Taxman 690/264 ITR 305 (Ker.).

4.13 He has also placed reliance on the ratio of decision of the Hon'ble Supreme court in the case of Rameshwar Prasad Bagla v. CIT to hold that profit on sale of shares acquired with the intention ofacquiring managing agency, was a capital gain, which was taxable as capital gains.

5. Aggrieved, the assessee has preferred second appeal before the ITAT.On the directions of the Bench dated 3-1-2007, 18-1-2007 and 26-2-2007, both the parties have also filed written submissions, besides making oral submissions in support of their respective claims. The assessee filed written arguments dated 13-3-2007. Subsequently, the assessee has also filed further written submissions. The learned CIT DR has similarly filed written submissions dated 31-1-2007 along with the submissio of the assessing officer dated 25-1-2007. The learned DR has also filed further submissions dated 12-3-2007. The learned DR has placed reliance on various authorities including the decision of ITAT Mumbai Bench "E" in the case of Zuari Industries Ltd v. Asstt. CIT (2006) 9 SOT 563.

6. The main argument of the learned Counsel for the assessee was that the assessing officer was not justified in treating the transaction as a slump sale. According to him, there was no sale in the transaction and it was only exchange in terms of agreement itself. It was pointed out by him that the assessee-company had lodged its software undertaking minus its domain rights to M/s. Suri Capital & Leasing Ltd. in consideration of its receiving 45 lakh equity shares of the said company, so as to make the assessee company a dominant and controlling shareholder in M/s. Suri Capital & Leasing Ltd. The effect of the transaction, according to him, was that what was owned exclusively as a 100 per cent interest in an undertaking got diluted by 40 per cent and consequently, leaving a majority control at 60 per cent with the assessee-company. He emphatically submitted that the effect of this transaction was only to dilute the ownership right by 40 per cent though, before and after the transaction, the right of the assessee-company

remained unimpaired due to its retaining majority control. The learned Counsel contended that the assessing officer had, therefore, wrongly construed the transaction as a transfer at 100 per cent whereas the transaction was merely affecting 40 per cent of the assessee-company's rights in the software undertaking.

6.1 In the written submissions, this argument has been elaborated by him by taking following pleas: The facts in the instant case are that there is absolutely no sale either in terms of the Sale of Goods Act or the Transfer of Property Act. The assessee-company was having a unit dealing in software.

While it owned the unit, it had absolute and total control over its assets and liabilities and the entirety of its business interests.

The assessee-company had agreed to hold the ownership interests. The assessee-company had agreed to hold the ownership of this through the shareholdings of SCL. In effect therefore, the transaction resulted in the assessee suffering loss of 40 per cent control over its software undertaking and gaining 60 per cent control over the share capital of SCL. This transaction can thus, by no stretch of either imagination or reasoning, be equated to a straight case of sale as contemplated under Section 2(42C) of the Act or a case of transfer under Section 2(47) of the Act. Where there is no sale, Section 2(42C) of the Act has no role to play. And when there is no transfer, the provisions of capital gains tax would not apply.

The Learned Authorities failed to appreciate and realize that the exclusion of the domain names from the vesting contract and further the explicit provision pinning responsibility forrepayment of assets and liabilities of leasing business on SCL virtually crafted a situation where the appellant would have complete control over the software undertaking as heretofore with no responsibility of the leasing business thereby totally and completely obviating the incidence of a transfer. It was a simple case of the appellant contributing its undertaking in consideration of its acquiring SCL shares numbering 45 lakhs. Appellants rights over the software unit did not relinquished or extinguished completely just as the responsibility of SCL for its leasing business continued uninterrupted as before. Part

relinquishment or partial extinguishment are beyond the contemplation of the provisions.

Inchoate adjustment of rights do not create a taxable event for it is impossible to read a clear transfer therein.

The provisions aim at a total transfer of the undertaking. That is a prerequisite of a slump sale. In the given facts there is no total transfer of the undertaking involved for indubitably the sway of the appellant over the undertaking and its business interest goes unaffected. In such circumstances slump sale conditions are not manifest and so the cited provisions are otiose in the context of the conditionalities as enumerated herebefore.

Further transaction is required to be examined for its tax impact on the basis of the incidence of the conditions as contended in the documents. All the same, it is now well-established through a series of decisions that in undertaking the import and impact of a transaction, the name given by the party to the transaction is not decisive. Parties to the transaction are free to give any name to the transaction just the Assessing Authority is free to take leave to such nomenclature and read the real effect of the transaction so as to arrive at an independent finding of its true characteristics and consequences and in particular of its exigibility to tax. In the circumstances, it is therefore, wrong to say that since the parties to transaction have themselves labelled the deal as a slump sale, there is indeed a slump sale. Slump sale will be involved only if the parameter of a slump sale as envisaged under Section 50B read with Section 2(42C) of the Act are fulfilled. As enumerated above such parameters are conspicuous by their absence in the subject case.

6.2 Another argument of the learned Counsel was that the assessing officer has wrongly calculated the short-term capital gain by taking the valuation of the shares at Rs. 4.5 crores because the agreement nowhere mentions such valuation. In this regard it was submitted by him that the shares of the transferee company were dealt on the Stock Exchange and therefore at the most, the value of the share could have been determined on the basis of market value of the shares on the date of transfer i.e., 16-6-2000. It was pointed out by him that the nearest quotation on record was 30-6-2000 on which date 100 shares were traded @ Rs.

4.05 per share. It was also pointed out that the price or value per share cannot be more than Rs. 4 during that period and therefore at the most the sale consideration should be determined by taking into account such market value. The learned Counsel also submitted arguments on the working of net worth and placed reliance on the valuation report of Price Water House. Thus, according to him, no short-term capital gain can be worked out if the net worth is taken at Rs. 8 to 11 crores and the value of shares is taken at Rs. 45,00,000 X 4 = 1,80,00,000.

6.3 In order to challenge the finding of the learned assessing officer and that of the learned Commissioner (Appeals) that the transaction was a slump sale, he submitted that neither under the Sales of Goods Act nor under the Transfer of Property Act, this transaction could be called sale simplicitor. He further pointed out that the requirement of slump sale as contained under Section 2(42C) were also not satisfied because the transaction was merely an exchange resulting into diminution of controlling rights by 40 per cent. The other argument taken by the learned Counsel in the written submission was that the face value of Rs. 10 per share of 45 lakh shares, which was the subject-matter of exchange, was of little significant. It is pointed out by him that the quotation on the Stock Exchange of shares of M/s.

Suri Capital & Leasing Ltd. at the relevant time was the applicable and binding value. The learned Counsel thus contended that the agreement nowhere states that the transaction was for Rs. 4.5 crores and the assessing officer had only gone on presumption in taking this value as consideration for the transfer of the software undertaking. This argument has been taken by him in the written submission filed on 13-3-2007 and we consider It proper to reproduce the same which is as under: The assessing officer wrongly attributed the face value of Rs. 10 to the 45 lakh shares being the subject-matter of exchange. As between the parties, it is only the number of shares that mattered, so as to give the assessee-company a controlling interest in the composite entity. The face value of Rs. 10 was of no relevance to either party. In fact, such face value was of no significance to anyone else also, on established principles of law. The principle of law is that where shares are quoted on the stock exchange, it is the value so quoted which is relevant. The assessing officer, in his enthusiasm to foist a fantastic addition, gave a convenient go-by to

this fundamental principle of law as postulated by the Supreme Court in 265 ITR 435, where it was held that 'it is clear from this decision that where the shares in a public limited company are quoted on the stock exchange and here are dealings in them, the price prevailing on the valuation date would represent the value of the shares'. This, their Lordships did by reproducing in part, the observations from page 45 of 122 ITR of the Supreme Court, wherein the earlier principle as stated in 86 ITR 621 (SC) was also considered and approved.

6.4 Another argument of the learned Counsel was that the quotation on the stock exchange of the shares of Suri Capital & Leasing Limited at the relevant time, was the relevant factor for working out the market value of the shares. The projection of the assessing officer of the value of the shares at Rs. 10, according to him, was therefore clearly preposterous. If at all the value as quoted on the stock exchange had to be bypassed or ignored or even substituted by another value, then it was incumbent on the assessing officer to have brought on record the extra-commercial consideration so agreed to and changing hands on account of this deal.

6.5 It was pointed out by the learned Counsel for the assessee that the agreement between the assessee-company and Suri Capital & Leasing Limited only stipulated an exchange of 45 lakh shares. The agreement did not state at any place, that the transaction is for a sum of Rs. 4.5 crores. Such is only a presumption of the assessing officer. The genuineness of the transaction has not been questioned. In such a situation, the averments in the agreement are not only binding but are final. Nothing could be construed beyond what is stated in the agreement. As for instance, the multiplication of the number of shares by their face value is not in the contemplation of the agreement.

Commercial transactions are always to be valued in terms of business concepts and practices. The High Court of Madhya Pradesh in Smt.

Maharani Ushadevi v. CIT has prohibited any estimation or valuation and had directed the department to go-by the transaction value as stipulated in the agreement. The Hon'ble High Court has done so in consonance with commercial principles. No businessman would pay Rs. 10 for a share just because of its face

value, ignoring the crucial fact that at the relevant time, the market value of such share as per the stock exchange quotation, was in the range band of Rs. 2 to Rs. 3. If such were done, then there would be an extra commercial element flowing out of the transaction so as to belie the assessing officer's own computation of the net worth at Rs. 1.35 crores.

6.6 In the written submissions, effort has also been made to distinguish the case laws on which the assessing officer as well as the learned Commissioner (Appeals) have placed reliance.

7. The learned CIT DR, on the other hand, has filed detailed arguments to controvert the arguments of the learned Counsel for the assessee.

According to the learned CIT DR, Section 50B contained special provision for computation of capital gain in the case of slump sale. It was pointed out by her that the net worth of the undertaking or the division, shall be deemed to be the cost of acquisition and the cost of improvement for the purposes of Sections 48 and 49 of the Income Tax Act and the provisions contained in second proviso to Section 48 relating to adjustment for cost, inflation, index is to be ignored. The learned DR pointed out that the scope and effect of the amended provision has been elaborated in the departmental Circular No. 794, dated 9-8-2000 and now in view of the departmental Circular, the position of Section 50B is very clear. After referring to the agreement, a copy of which has been filed in the written submissions, the learned DR submitted that the consideration and payment has been defined in article 3 and capital gain has to be worked out after taking into consideration this article.

7.1 The learned DR also submitted that the argument of the learned Counsel for the assessee that word 'relinquishment' should qualify the word 'exchange', would not be accepted. According to her, the words 'sale', 'exchange' and 'relinquishment' are separate and independent terms and are to be construed accordingly. Regarding the purchase price, it was submitted by the learned Counsel that the term 'purchase price' mentioning the number of equity shares allotted along with the value of each share clearly spells the amount of consideration received and therefore there is no question of any presumption on

the part of the assessing officer. According to learned DR as per the terms and conditions of the agreement the purchase price stated was allotment of 45 lakhs of equity shares on face value of Rs. 10 per share.

8. We have carefully considered the facts and circumstances relating to this matter and the rival submissions. On going through the agreement, referred to above, it is clear that the assessee agreed to transfer VSTL as a going concern. The term 'going concern' has been deliberately used in para 3 of the agreement, which has been reproduced above.

Similarly, in article 3, under the caption, "Consideration and Payment", slump purchase price has been indicated. Thus, on consideration of various stipulations and provisions made in the agreement, it is clear that the intention of the parties was to sell and purchase a going concern for a slump purchase price. It is true that in article 2.1 though domain name owned by VSTL have been retain but by merely reserving the domain names by the assessee it cannot be said that there was no transfer of VSTL to the transferee company i.e., SCL. The terms of the agreement are very specific and clear and there is no need for importing any other conditions. The provision of Section 50B has been incorporated with effect from 1-4-2000. This provision is as under: 50B Special provision for computation of capital gains in case of slump sale. (1) Any profits or gains arising from the slump sale effected in the previous year shall be chargeable to income-tax as capital gains arising from the transfer of long-term capital assets and shall be deemed to be the income of the previous year in which the transfer took place: Provided that any profits or gains arising from the transfer under the slump sale of any capital assets being one or more undertakings owned and held by an assessee for not more than thirty-six months immediately preceding the date of its transfer shall be deemed to be the capital gains arising from the transfer of short-term capital assets.

(2) In relation to capital assets being an undertaking or division transferred by way of such sale, the "net worth" of the undertaking or the division, as the case may be, shall be deemed to be the cost of acquisition and the cost of improvement for the purposes of Sections 48 and 49 and no regard shall be given to the provisions contained in the second proviso to Section 48.

8.1 The assessment year involved in this appeal is assessment year 2001-02 and therefore the amended provision will apply. As per this provision any profits or gains arising from the slump sale effected in the previous year shall be chargeable to income-tax as capital gains arising from the transfer of long-term capital asset. As per this provision, if the transfer is of an undertaking which is owned for more than 36 months immediately preceding the date of his transfer, then capital gains arising from such transfer shall be taxed as short-term capital gains. In the case of present assessee, the proviso will apply and therefore, the assessing officer was fully justified in charging short-term capital gain on the transfer of capital asset which was held by the assessee for less than 6 months immediately preceding the date of its transfer.

8.2 As per the amended provision contained in Section 50B(2), the networth of the undertaking shall be deemed to be the cost of acquisition and the cost of improvement for the purpose of Sections 48 and 49. Thus, in our opinion, the assessing officer as well as the learned Commissioner (Appeals) were fully justified in taking the transaction relating to the transfer of the undertaking as that of slump sale. The argument of the learned Counsel for the assessee that the transaction is not covered within the definition of "transfer" under the Sales of Goods Act and Transfer of Property Act is not tenable because definition of 'transfer' has been given in Section 2(47) which includes sale, exchange or relinquishment of the asset. The argument that the word 'relinquishment' will qualify sale and exchange is not acceptable because the words used are 'sale', 'exchange' or 'relinquishment' of the asset. Thus, it is not necessary that there should be extinguishment of all the rights in the case of sale or exchange. In any case, there can be no dispute that the transaction was transfer within the meaning of Section 2(47). The slump sale has also been defined in Section 2(42C) which is as under: (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 in such sales.

8.3 The definition is quite clear and ingredients of this definition are fully satisfied in the case of the present assessee. We are, therefore, unable to accept the contention of the learned Counsel for the assessee that the transaction involved

here is neither sale nor exchange and consequently it is not absolute transfer. We, therefore, reject these contentions and uphold the view taken by the assessing officer and sustained by the learned Commissioner (Appeals) in holding that the transaction is covered within the definition of slump sale and is a transfer of the undertaking by the assessee to the transferee for a consideration. Similarly, we concur with the findings of assessing officer in calculating the net worth of the undertaking transferred.

8.4 The next point to be considered relates to the working of the short-term capital gain. In the agreement the sale consideration is shown interms of 45 lakh shares of SCL of the face value of Rs. 10 each. The actual consideration in terms of money has not been indicated in the agreement. Nowhere in the agreement the price of these shares is shown to be at Rs. 4.5 crores. It is settled legal preposition that the shares are to be valued as per market rate or price of shares prevailing in the market on the date of transfer. Hence, in our considered opinion for working out the short-term capital gain, the consideration of Rs. 4.5 crores cannot be taken and instead, the market price of the shares obtaining on or around the date of transfer should be taken into account for working out the value of shares acquired.

8.5 The matter regarding determination of value of shares has been considered by the Hon'ble Supreme Court in the case of CIT v. Central India Industries Ltd . In that case the assessee declared dividend and the amount receivable by the assessee was paid to it partly in cash and partly in shares in Company and Company C held by Company A. In determining the income of the assessee the Income Tax Officer valued those shares on the basis of their market value on the date on which they became the assets of the assessee but the Tribunal held that only their face value could be taken into account. The Hon'ble Supreme Court of India held that what the assessee really received was the market value of the shares as on the date it became entitled to receive them, and not their face value. Applying this ratio in the instant case also the market value of the shares is to be determined by making reference to the quoted price of the shares in the Stock Exchange. It may be pointed out here that learned DR has not submitted any other rates of the shares on the relevant dates nor has cited any other authority to show that it is only the face value of the shares which is to be taken into account for

working out the sale consideration.

8.6 The stand of the assessee regarding determination of the value of shares right from the very beginning was that the consideration determined by the assessing officer at Rs. 4.50 crores is wrong. In this regard before the ITAT also ground Nos. 8 & 9 have been taken specifically. The learned Counsel pointed out that before the assessing officer as well as before the learned Commissioner (Appeals) this submission was made but has notbeen considered by the authorities.

8.7 On going through the assessment order it is found that before the assessing officer in the written submissions the assessee took the following plea: As on 31-7-2000 when the above transaction took place, the market value (as per Stock Exchange quotation) of the equity shares of VSL was hovering between Rs. 2, Rs. 3 per share.

Thus, what the assessee received for parting with its assets, liabilities, contractual obligations etc. is only the market value (as per Stock Exchange quotation) of the equity shares of VSL.

In respect of the above transaction of transfer of assets etc. and allotment of equity shares, there is no element of income, whether on revenue account or on capital account.

8.8 However, the assessing officer while determining sale consideration, took the value at Rs. 4.50 crores. He has not commented as to why the value as shown by the assessee in the written submission, referred to above, should not be taken into account. On going through the order of the learned Commissioner (Appeals) also, it is found that the assessee objected to the determination of sale consideration on the basis of face value of shares. It appears that on this issue also a remand report was sought from the assessing officer. Vide his report dated 29-11-2004, reproduced on page 7 of the learned Commissioner (Appeals), the assessing officer has again justified the approach adopted in the assessment order. It is clear from the following extract of remand report: The assessee pleaded before the Commissioner (Appeals) that the equity share of M/s. Suri Capital Leasing Ltd. are listed at Delhi and Mumbai Stock Exchanges. The market value of the share is Rs.

4 per share as per exchange quotation. The assessing officer has rightly taken the value of each share at Rs. 10 in view of acquisition agreement made between these two parties that the transfer share will be made on face value of Rs. 10 each.

8.9 It may also be pointed out that before these authorities the assessee had filed paper book in which the balance sheet and P & L A/c dated 31-7-2004 was also included. The value of shares as quoted in the stock market has been shown as under: 8.10 The above details were submitted before the assessing officer and the learned Commissioner (Appeals) but they have not commented about the same. On the basis of the quoted price, as per above, the average price per share in any case will be around Rs. 4.70 per share on and near the date of transaction of sale and hence this may be the cost which should normally be taken into account for determining the sale consideration, but in the circumstances of the present case, where the shares of transferee company were acquired in bulk and controlling interest over that company was also acquired by the assessee, the market price of the shares so acquired should be determined after taking into consideration all these relevant aspects including the rates of shares quoted in stock exchange, wherein too should be considered after obtaining authentic information from concerned exchange, regarding prevailing rates in the market before and after the date of transfer. The assessing officer is, therefore, required to undertake the exercise of determining the market value of 45,00,000 shares of the transferee company on the date of transfer. For this purpose the assistance of expert valuers may be taken. Hence this issue requires to be redetermined on the basis of above points.

8.11 So far as the working of the net worth is concerned, as per the observations of assessing officer at page 5 of the assessment order, the assessee had determined the net worth of the business as on 31-7-2000 atRs. 1,54,81,525. On the same page in the computation of net worth, the assessing officer has taken net worth at Rs. 1,35,41,168.

The assessee has filed a report of Price Water House Coopers which is available at pages 69to 96 of the paper book. In this report market based analysis of VST as

on1-4-2000 has been done. The net worth of the company has been determined by the Price Water House Coopers at Rs. 6.50 crores to Rs. 8.50crores as per page 95 of the paper book which is as under: The Business value of VST as on 1-4-2000 works out between Rs. 65-85 million by the Market Approach Based on the above analysis and finding we estimate the value of VST to be in the range of Rs. 65 - 85 million.

8.11-1 However, it is not clear as to whether this report is obtained as per provisions of amended Section 50B or not.

8.12 In view of the provisions contained in Section 50B(3), the assessee isrequired to submit a report of an accountant, indicating the computationof net worth. This provision is as under: 50B(3)Every assessee, in the case of slump sale, shall furnish in the prescribed form along with the return of income, a report of an accountant as defined in the Explanation below Sub-section (2) of Section 288, indicating the computation of the net worth of the undertaking or division, as the case may be, and certifying that the net worth of the undertaking or division, as the case may be, has been correctly arrived at in accordance with the provisions of this Section.

8.13 From the assessment order and from the order of the learned CIT(Appeals) it is not clear as to whether the assessee filed any such report as required under Section 50B(3), referred to above, along with the return or not and as to whether the net worth of the business has been worked out by the assessing officer on the basis of such report or not. The provision of Section 50B(3) is mandatory in nature and therefore the assessing officer is required to follow the procedure laid down therein. Hence, we consider it proper to direct the assessing officer to ensure compliance of this provision for working out the net worth of the business of the assessee. In case such report has been filed, then the facts and figures shall be verified and in case it has not been so filed, then such report shall be obtained and shall be taken into consideration as per law.

8.14 In view of the above discussion, we set aside the findings of Assessing Officer and that of the learned Commissioner (Appeals) on the point of computation of short-term capital gain and direct the assessing officer to work out

the short-term capital gain in the case of the present assessee after taking into account the sale consideration, which is to be worked out in the light of our observations made above and to adopt the net worth of the business of the assessee as per the provisions of Section 50B(3) as referred to above. This has to be done after providing due opportunity of hearing to the assessee and as per law. On the basis of the above, the short-term capital gain shall be determined by the assessing officer.

8.15 In the result, ground Nos. 1 to 10 are allowed partly for statistical purposes and as above.

9. Ground Nos. 11 & 12 relate to the chargeability of interest under Sections 234B and 234C. Charging of interest under the aforesaid Sections is consequential. The assessing officer shall recalculate the charging of interest, if any, while giving effect to appellate order.

10. In the result assessee's appeal stands partly allowed as indicated above.