



Bombay Chartered Accountants' Society
Harnessing Talent and Providing Quality Service

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7th June, 2021

Shri Jagannath Mohapatra,
The Chairman,
Central Board of Direct Taxes,
New Delhi

Respected Sir,

Subject: Taxation of slump sale transaction – Section 50B and Rule 11UAE

The Bombay Chartered Accountants' Society is the oldest and largest voluntary body of CAs in India. Established on 6th July, 1949, we have almost 9,000 members from across India and overseas and have been regularly providing our inputs to the government for betterment of various laws of the country.

Through this letter, we wish to place for your consideration certain burning issues that several tax payers are facing because of the recent amendments affecting slump sale.

- 1) Section 2(42C) of the Income-tax Act, 1961 (IT Act) defines 'slump sale' as transfer of one or more undertakings for a lumpsum consideration without the value being assigned to individual assets and liabilities in such cases. Section 2(42C) reads 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.*

Explanation 1. For the purposes of this clause, "undertaking" shall have the meaning assigned to it in Explanation 1 to clause (19AA).

Explanation 2. For the removal of doubts, it is hereby declared that the determination of the value of an asset or liability for the sole purpose of payment of stamp duty, registration fees or other similar taxes or fees shall not be regarded as assignment of values to individual assets or liabilities;"

- 2) Explanation 1 to section 2 (19AA) of the Act defines term 'undertaking' is as under:

*"Explanation 1. For the purposes of this clause, "undertaking" shall include any part of an undertaking, or a unit or division of an undertaking or a **business activity taken as a whole, but does not include individual assets or liabilities** or any combination thereof not constituting a business activity."*

- 3) Section 50B of the Act provides for computation mechanism. As per section 50B of the Act, the gains arising from slump sale shall be taxed as Capital Gains.

Section 50B of the Act, prior to its amendment by the Finance Act, 2021, read as under:

“Special provision for computation of capital gains in case of slump sale.

50B. (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 asset 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.

(3) Every assessee, in the case of slump sale, shall furnish in the prescribed form a report of an accountant as defined in the Explanation below sub-section (2) of section 288 before the specified date referred to in section 44AB 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.

Explanation 1. For the purposes of this section, "net worth" shall be 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 its books of account:

Provided that any change in the value of assets on account of revaluation of assets shall be ignored for the purposes of computing the net worth.

Explanation 2. For computing the net worth, the aggregate value of total assets shall be,

(a) in the case of depreciable assets, the written down value of the block of assets determined in accordance with the provisions contained in sub-item (C) of item (i) of sub-clause (c) of clause (6) of section 43;

(b) in the case of capital assets in respect of which the whole of the expenditure has been allowed or is allowable as a deduction under section 35AD, nil; and

(c) in the case of other assets, the book value of such assets.

- 4) The Finance Act, 2021 made following amendments:

In section 2(42C) – w.e.f. 01.04.2021 (AY 2021-22 or FY 2020-21)

“3. In section 2 of the Income-tax Act:

(v) in clause (42C),

(I) for the words "undertaking as a result of the sale", the words "undertaking, by any means," shall be substituted;

(II) after Explanation 2, the following Explanation shall be inserted, namely:

Explanation 3.—For the purposes of this clause, "transfer" shall have the meaning assigned to it in clause (47)"

In section 50B – w.e.f. 01.04.2021 (AY 2021-22 or FY 2020-21)

21. In section 50B of the Income-tax Act,

(a) for sub-section (2), the following sub-section shall be substituted, namely:

(2) In relation to capital assets being an undertaking or division transferred by way of such slump sale,

(i) 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;

(ii) fair market value of the capital assets as on the date of transfer, calculated in the prescribed manner, shall be deemed to be the full value of the consideration received or accruing as a result of the transfer of such capital asset.

(b) in Explanation 2, after clause (a), the following clause shall be inserted, namely:

(aa) in the case of capital asset being goodwill of a business or profession, which has not been acquired by the assessee by purchase from a previous owner, nil."

Amendment to section 50B was not originally proposed in the Finance Bill and was included in the Finance Bill at last moment without any discussion.

- 5) Rules for computation of FMV of the capital assets transferred for the purpose of Section 50B(2), are notified by CBDT on 24.05.2021. In pursuant to Clause (ii) of sub-section 50B of the Act, Rule 11UAE is inserted to the Income Tax Rules, 1962 ("ITR") vide Notification No.68/2021/F. No. 370142/16/2021-TPL dated 24.05.2021.

Rule 11UAE reads as under:

"Rule 11UAE

*(1) For the purpose of clause (ii) of sub-section (2) of section 50B, the fair market value of **the capital assets** shall be the FMV1 determined under sub-rule (2) or FMV2 determined under sub-rule (3), whichever is higher.*

*(2) The FMV1 shall be the fair market value of **the capital assets** transferred by way of slump sale determined in accordance with the formula –*

A+B+C+D - L, where,

A= book value of all the assets (other than jewellery, artistic work, shares, securities and immovable property) as appearing in the books of accounts of the undertaking or the division transferred by way of slump sale as reduced by the following amount which relate to such undertaking or the division, -

(i) any amount of income-tax paid, if any, less the amount of income-tax refund claimed, if any; and

(ii) any amount shown as asset including the unamortised amount of deferred expenditure which does not represent the value of any asset;

B = the price which the jewellery and artistic work would fetch if sold in the open market on the basis of the valuation report obtained from a registered valuer;

C = fair market value of shares and securities as determined in the manner provided in sub-rule (1) of rule 11UA;

D = the value adopted or assessed or assessable by any authority of the Government for the purpose of payment of stamp duty in respect of the immovable property;

L = book value of liabilities as appearing in the books of accounts of the undertaking or the division transferred by way of slump sale, but not including the following amounts which relates to such undertaking or division, namely: -

(i) the paid-up capital in respect of equity shares;

(ii) the amount set apart for payment of dividends on preference shares and equity shares where such dividends have not been declared before the date of transfer at a general body meeting of the company;

(iii) reserves and surplus, by whatever name called, even if the resulting figure is negative, other than those set apart towards depreciation;

(iv) any amount representing provision for taxation, other than amount of income-tax paid, if any, less the amount of income-tax claimed as refund, if any, to the extent of the excess over the tax payable with reference to the book profits in accordance with the law applicable thereto;

(v) any amount representing provisions made for meeting liabilities, other than ascertained liabilities;

(vi) any amount representing contingent liabilities other than arrears of dividends payable in respect of cumulative preference shares.

(3) FMV2 shall be the fair market value of the consideration received or accruing as a result of transfer by way of slump sale determined in accordance with the formula-

$E+F+G+H$, where,

E = value of the monetary consideration received or accruing as a result of the transfer;

F = fair market value of non-monetary consideration received or accruing as a result of the transfer represented by property referred to in sub-rule (1) of rule 11UA determined in the manner provided in sub-rule (1) of rule 11UA for the property covered in that sub-rule;

G = the price which the non-monetary consideration received or accruing as a result of the transfer represented by property, other than immovable property, which is not referred to in sub-rule (1) of rule 11UA would fetch if sold in the open market on the basis of the valuation report obtained from a registered valuer, in respect of property;

H = the value adopted or assessed or assessable by any authority of the Government for the purpose of payment of stamp duty in respect of the immovable property in case the non-monetary consideration received or accruing as a result of the transfer is represented by the immovable property.

(4) The fair market value of the capital assets under sub-rule (2) and sub-rule (3) shall be determined on the date of slump sale and for this purpose valuation date referred to in rule 11UA shall also mean the date of slump sale.

Explanation. -For the purposes of this rule, the expression "registered valuer" and "securities" shall have the same meanings as respectively assigned to them in rule 11U.]”

Draft of Rule 11UAE was not placed in public domain for comments prior to notifying the same. There was no discussion or consultation with stakeholders.

Comments and suggestions:

A) Rule 11UAE contradicts the IT Act and is devoid of logic:

The Income Tax Act defines a slump sale as a transfer - sale of an undertaking for a lump sum consideration without values being assigned to its individual assets and liabilities. A slump sale is generally done when an entire undertaking is to be sold as a business on going concern basis wherein the acquirer continues to operate the business in current or different form. Businesses enter into such transactions due to valid business reasons such as multiplicity and interconnection of different business segments, erosion in value of assets, no further investment planned in the business etc. The law provides a special method to calculate the gains arising from a slump sale transaction.

FMV1 under the Rule 11UAE(2) is proposed to be computed by assigning value to each asset and liability. Thus, the Rule 11UAE is in contradiction to main section 2(42C). The whole idea is to value the undertaking as a going concern rather than valuing each component of the undertaking. When an undertaking consisting of business activity is transferred, it is settled practice to arrive at value of undertaking based on standard market practices by valuers, which includes primarily future earning potential of the undertaking. Book value of assets and liabilities adjusted for notional stamp duty value of immovable property method is adhoc and not reflective of value of undertaking. Moreover, it is prone to arriving at erroneous valuation based on value of land rather than the business. This approach questions the going concern concept and even if it is applied, if land is not freely transferable and/or end-use is restricted, then it leads to flawed logic that the land value is realizable.

Additionally, income tax can be levied on real income and not on notional income. Valuation should be based on the concept of willing buyer and willing seller. Application of tax based on notional value which is higher than arrived at based on consideration received by the seller is not logical. Deeming provisions should be based on sound logic rather than with the objective of maximizing revenue.

This amendment is a deeming fiction and introduces concept of fair value ignoring the actual consideration agreed and transferred between genuine buyer and seller. Thus, the rule 11UAE is exceeding the basic principle and concept enshrined in the Act. It is a well settled law that Rules cannot override the basic principles of the Act and Rules cannot extend the scope of the Act.

Stamp duty value cannot be taken as fair value for immovable property is the same are for different purpose and in case of slump sale transactions, the immovable property is not sold, but the business undertaking is sold on going concern basis.

It will therefore a big impediment for the genuine business transactions and will lead to situations where the businesses cannot be divested for such a provision which totally

ignores the facts of actual consideration for the purpose of levy of tax and will be forced to do such businesses inefficiently. This may lead to inefficiencies, bankruptcies, closure of the businesses, loss of employment, loss of revenue to Govt. etc.

Our suggestion:

In case of slump sale transaction, fair market value under Rule 11UAE should be determined based on business valuation carried out by an independent merchant banker/valuer.

B) Retrospective effective

Stable and certain tax legislation is one of the prerequisites for development of business in the country. The Finance Minister has, in the past, given commitment on the floor of the Parliament that amendments in the income tax law will not be done with retrospective effect. Section 50B was inserted in the Finance Bill at the last moment without discussion and with retrospective effect. Numerous slump sale transactions are carried out during FY 2020-21 and are pending completion owing to approval or otherwise. All these transactions were entered into with understanding of tax legislation prevailing pre amendment. Changes in section 50B and Rule 11UAE has adversely impact these genuine transactions.

Our suggestion:

Government must clarify that slump sale schemes and transactions declared / finalized before 24.05.2021, even if not completed and pending for approval(s), will not be governed by the provisions of Rule 11UAE. Capital gain in such cases will be computed taking consideration actually received.

C) Effective date of Rule 11UAE

The Notification does not mention the date from which Rule 11UAE is effective.

Our suggestion:

The Government must clarify that Rule 11UAE will be effective from 24.05.2021 and also that the slump sale schemes and transactions declared / finalized before 24.05.2021, even if not completed and pending approvals, will not be covered by Rule 11UAE.

We look forward to your positive response in the matter.

Thanking you,

Yours sincerely,

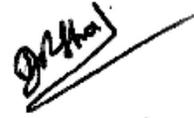
For Bombay Chartered Accountants' Society



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President



CA Ameet Patel
Chairman, Taxation Committee



CA Deepak Shah
Co-chairman, Taxation Committee

- cc. 1. The Prime Minister's Office
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3. Shri Anurag Thakur, Minister of State, Finance
4. Shri Tarun Bajaj, The Finance Secretary, Ministry of Finance
5. Shri Ajay Bhushan Pandey, The Revenue Secretary, Ministry of Finance