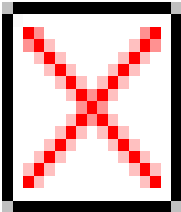


Taxing the untaxed - Slump Exchange

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Introduction



BUDGET

2021 was well received amongst the business fraternity with its focus on growth and fiscal expansion while simultaneously maintain the headline tax rates. While tax rates have not been tinkered with, measures have been taken to rationalize tax leakage / plug the loopholes. One such measure is widening of the definition of slump sale to cover all types of transfer of business undertaking.

Taxation of transfer of business undertaking - A long drawn litigation path

Sale of business undertaking on a going concern basis is one of the widely used modes of business reorganization as it can be quickly implemented and does not have to go through Court/ NCLT approval process.

Taxation of sale of such business undertaking has always been a contagious issue wherein the Supreme Court ('SC') while dealing with slump sale in the case of *CIT v. Mugneeram Bangur & Co.* - [2002-TIOL-766-SC-IT-LB](#) had held that in the absence of a specific provision in the Income-tax Act, 1961 ('IT Act') to tax sale of a business undertaking, the sale is not liable to income-tax.

The above anomaly was filled by Finance Act, 1999 inserting the provisions for explicitly taxing sale of a business undertaking. The definition of slump sale read as

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.

Current taxation issue

During the recent years, transfer of business undertakings started taking place through various alternative mechanisms such as issue of shares or other securities for acquisition of an undertaking instead of cash consideration. Such transfers essentially are considered as 'exchange' and hence, were popularly referred to as slump exchange.

Various Courts dealt with the issue of taxation of slump exchange / transfer of business undertaking involving non-monetary consideration / consideration in kind or no consideration over the years. In *M/s. Areva T&D India Ltd vs. DCIT (ITA No.561/Mds/2011)*, Madras High Court ('HC')

' held that where there is no monetary consideration involved in the transaction, the transaction ought not to be brought within the definition of the term slump sale as defined under the IT Act.

Bombay HC in *CIT v. Bharat Bijlee Ltd.* - [2014-TIOL-730-HC-MUM-IT](#),

after closely examining the applicability of the provisions relating to slump sale, held that the essence of a slump sale transaction is a lump-sum monetary consideration. Where transfer of undertaking takes place not against monetary consideration, but against other assets, it amounts to 'exchange' and not sale. Such exchange transaction does not fall within the ambit of slump sale, which necessitates a sale transaction at the first place.

The aforesaid rulings created another anomaly wherein transfer of business undertaking involving non-monetary consideration held as not liable to income-tax. Accordingly, business reorganization through slump exchange became a preferred method.

Finance Bill proposal

Finance Bill, 2021 has proposed to remove this deficiency by modifying the definition of slump sale to cover all type of transactions. The amendment overturns a series of rulings of the HCs wherein transfer of business undertaking involving non-monetary consideration was held to be outside the purview of slump sale of the IT Act.

Can it still be argued that transfer of business undertaking is not liable to income-tax?

Finance Bill, 2021 does not provide explanation/ guidelines on the mechanism to compute capital gains in case of transfer of business undertaking involving non-monetary consideration. Accordingly, there may be divergence in the views/ positions adopted by taxpayers and the income-tax authorities in determining the amount chargeable to tax under the head 'Capital Gains' which may result into potential litigation.

[The views expressed are strictly personal.]

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