आयकर अपीलीय अधिकरण, 'ई' खंडपीठ मुंबई
INCOME TAX APPELLATE TRIBUNAL,MUMBAI "E" BENCH
सर्वश्री ए. डी.जैन ,न्यायिक सदस्य, एवं राजेन्द्र, लेखा सदस्य
Before S/Sh. A.D. Jain,Judicial Member & Rajendra,Accountant Member
आयकर अपील सं/.ITA No.495/Mum/2012,निर्धारण वर्ष/Assessment Year-2008-09

M/s. SRM Energy Ltd., 601, Pressman House, 70-A, Nehru Road, Vile Parle (E) Mumbai-400 099. **PAN: AAACH 4692 J**	Vs	Dy. CIT-2(1) Room No.561, Aayakar Bhavan M.K. Road, Mumbai-400 020.
(अपीलार्थी /Appellant)		(प्रत्यर्थी / Respondent)

निर्धारिती ओर से/Assessee by : Shri Bhadresh K. Doshi (AR)
राजस्व की ओर से/ **Revenue by : Shri S.S. Rana-DR**

सुनवाई की तारीख/ Date of Hearing : 27-07-2015
घोषणा की तारीख / Date of Pronouncement : 31.08.2015
आयकर अधिनियम,1961 की धारा 254(1)के अन्तर्गत आदेश
Order u/s.254(1)of the Income-tax Act,1961(Act)

लेखा सदस्य राजेन्द्र के अनुसार PER RAJENDRA, AM-

Challenging the order dated 8/11/2011 of the CIT(A)- 4, Mumbai,the Assessee has raised following Grounds of Appeal:

On the facts and circumstances of the case and in law,the learned CIT (A) erred in confirming addition of negative net wo th of the undertaking transferred under the slump sale amounting to Rs 3,38,69,898/- to the long term capital gain u/s 50B.

On the facts and circumstances of he case and in law , the learned CIT (A) erred in not allowing the deduction of Rs.2,03,46,191/- from the book profit arising out of the sale of undertaking by way of slump sale ,while working out the income under the head profit and gains of the from business.

On the facts and circumstances of the case and in law, the learned CIT erred in upholding the disallowances u/s.43B of provisions for sale tax liability covered under sales tax deferral scheme amount ng to Rs.51,12,586/-

Assessee-company engaged in business of manufacturing and supply of non woven fabrics , automotive carpets,domestic carpets and blankets,filed its return on 26.09.2008, declaring income of Rs.(-)5.02 Crores.The Assessing Officer(AO)finalised the assessment on 24.12. 2010,u/s.143(3)of the Act,determining the income of the assessee at Rs.(-)56.88lakhs

2.Ground No. 1 is against the addition of negative net worth of the undertaking transferred under the slump sale amounting to Rs 3,38,69,898/-.During the assessment proceedings,the AO found that in pursuance of the scheme of amalgamation approved by the Hon'ble high courts of Mumbai and Delhi the assessee sold its fabric lining and carpet manufacturing business to Hitkari hi-tech Filters private Limited on slump sale basis at a net consideration of Rs.10 lakhs,that the net worth of the undertaking was certified at negative figure of Rs. (-) 3,38,69, 898/- as per para 6(e) of the form no 3CEA.However while filing the return of income assessee computed capital gain u/s. 50B of the Act of Rs 10,00,000/- only without adjusting the negative net worth.The AO raised the query in that regard and held that the computation of capital gain u/s 50B was incorrect and the benefit arising to the assessee of Rs 3.38 Crores was further required to be adjusted upward. The assessee submitted that in view

of the decision of Mumbai ITAT in case of Zuari Industries Limited(95 SOT 563) when net worth calculated u/s 50B was negative the cost of acquisition of the industrial undertaking would be taken as NIL.However,the AO was not convinced and held that as the negative a Net worth amounted to reduction in the liability payable by the assessee and it had got benefit of reduction of liability as remission as not payable, that it was clearly a gain in the hands of the assessee,that the decision of Zuari industries limited had not been accepted by the revenue and matter was pending before Hon'ble Mumbai High court. Placing reliance on the decision of Hon'ble supreme court in case of IPCA laboratories Limited (266 ITR 521)held that negative net worth u/s 50B should also be added to the sales consideration for working out cost acquisition of industrial undertaking.He increased the capital gain computation by Rs 3.38 Crores and charged capital gain of Rs 3,48,69,848/- u/s 50B of the Act.

2.1. Aggrieved by the order of the AO the assessee carried the matter in appeal before First Appellate Authority(FAA)unsuccessfully where FAA confirmed the addition holding that the case of the Zuari Industries Limited was different,that the assessee had never proved that the industrial undertaking sold by the assessee was saddled with these liabilities.

2.2. During the course of hearing before us,the Authorised Representative fairly admitted before that the case was covered against the assessee by the decis on of Special bench of ITAT delivered in the case of V Summit securities Limited(19 Taxmann. Com 102-Mum). We have carefully perused the facts of the case of the assessee.We find that in the case of V Summit securities Limited(supra)the matter has been decided as under:

> ***17.3*** *Having held in the para 16 that the full value of consideration had to be considered of All assets minus All liabilities' of the undertaking as one unit, now let us examine the question of determination of the cost of acquisition and cost of improvement or 'net worth' of the undertaking u/s 50B. The methodology for computing net worth had been given in Explanation 1 read with Explanation 2 to section 50B as per which the aggregate value of total asset (written down value in case of depreciable assets and book value in the case of other assets) is reduced by the value of liabilities of such undertaking. The rationale for determining net worth in this way is beyond any doubt as it is nothing but a consolidated figure of cost etc. of 'All assets minus All liabilities' of the under aking, which is a capital asset of typical kind. Consequently capital gain is computed on 'All assets minus All liabilities' of the undertaking by considering the full value of consideration and also net worth with the same composition of assets and liabilities of the undertaking. Thus in order to find a correct amount of capital gain it is sine qua non that all the three variables in this computation must match with their inherent contents being 'All assets minus All liabilities' of the undertaking.*
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> ***17.4*** *It had been noticed above that when we compute capital gain on the transfer of undertaking, what we actually compute is the capital gain on the transfer of all the assets of the undertaking as one unit. The full value of consideration is settled as a lump sum figure of the undertaking as a whole comprising of all the assets minus all the liabilities. To attain the ultimate end of computing capital gain on the transfer of assets which are embedded in the undertaking, the process of calculating net worth of the undertaking is taken up so as to match it with the full value of consideration which is settled at a lump sum figure for all the assets minus all liabilities of the undertaking. When we reduce the full value of the consideration from the net worth of the undertaking, what we in fact get is the capital gain on the transfer of bundle of assets of the undertaking by impliedly negating the effect of the value of liabilities from both the*

full value of consideration and the cost of acquisition at the same figure because the book value and current value of liabilities remains the same as discussed in para 14.4 above.

17.5 *Section 50B stipulates that the net worth of an undertaking is equal to the aggregate value of total assets of the undertaking as reduced by the value of liabilities. The aggregate value of the assets and the value of liabilities as per Expl. 2 is the w.d.v of the depreciable assets, book value of other assets and the book value of all the liabilities. To be more elaborate the 'aggregate value of total assets' shall require not only the inclusion of recorded but also unrecorded assets such as Goodwill and brand value, to which no specific cost can be attributed. So the net worth is nothing but the depreciated/book value of all the assets recorded in books of account and Nil in case of intangible/other unrecorded assets. Similarly the value of liabilities shall be that recorded as per books of account plus the value of contingent liability, if any. Our attention had not been drawn towards any contingent liability also having been transferred by the assessee. The order of the ld. CIT (A) also does not refer to any such contingent liability. So in the instant case 'the value of liabilities' as per section 50B will be the book value of the liabilities of the undertaking.*

17.6 *Continuing with the example given in Table A above it can be seen that the net worth is at a positive figure of Rs. 5 (Rs. 10 towards assets minus Rs. 5 towards liabilities). The calculation of capital gain on the undertaking does not create any difficulty which is Rs. 95 (Rs. 100 minus Rs. 5) determined by reducing the net worth of the undertaking from the full value of consideration of the undertaking. In this exercise, the value of liabilities had been reduced both from the agreed value of the bundle of assets and also from the book value of assets so that the ingredients of both the components match with each other. As discussed above that even in slump sale what we in fact calculate is the capital gain on the transfer of all the bundle of assets of the undertaking but as a one unit and not separately. From Table A it can be seen that the composite agreed value of all the assets of the undertaking is Rs. 105 and the w.d.v/book value of all the assets is Rs. 10 leaving the figure of capital gain at Rs. 95. Such figure of capital gain of transfer of all assets as one unit matches with the figure of capital gain on the transfer of undertaking. Thus it is clear that while computing the capital gain from the transfer of the undertaking, we cannot include the book value of the part of the bundle of assets but all the liabilities in the amount of net worth. It had to be of all the assets and all the liabilities. If we consider agreed value for all the assets but reduce book value of only some of the assets or we consider full value of all the bundle of assets but cost of acquisition at more than book value of such assets, the computation will give absurd results. Similarly we cannot ignore part of the liabilities from the net worth because the full value of consideration is determined by considering the effect of all the liabilities. If only a part of the liabilities are included in the net worth, the computation of capital gain will be incorrect as the full value of consideration had been determined by reducing the value of all the liabilities. Thus it is evident that for the purposes of working out the amount of capital gain u/s 45, the computation u/s 48 can be correctly done only by keeping intact all the assets and all the liabilities of the undertaking in full value of consideration and also net worth.*

17.10 *Now we will take up various arguments put forth by the learned A.R. in support of his case that the figure of negative net worth be ignored and taken at nil value for the*

purpose of computing capital gain. The following broad submissions have been made in this regard which we will take up one by one for consideration.

(i) Cost of acquisition cannot be in negative.

17.11.1 *The ld. AR argued that since the net worth of the undertaking represents cost of acquisition and cost of improvement of the undertaking, such cost can never be in negative. In other words it cannot be contemplated that a person purchades an asset without paying anything but rather taking something more from the seller. He contended that the Act had not ascribed any meaning to the words 'cost', 'worth', 'net worth' in the context of section 50B and hence their dictionary meaning should be adopted for this purpose. He referred to the Oxford English Dictionary, Webster's Third New International Dictionary, The Random House Dictionary and Black's Law Dictionary to emphadize that the word 'cost' had been defined in such dictionaries to mean "the amount paid or charged for something; price or expenditure"; the word "worth" to mean "having a value of, or equal in value to, as in money"; and the words "net worth" to mean "net assets" or to mean "the excess of value of resources over liabilities to creditors". Taking clue from these meanings the learned AR came back to Explanation 1 to section 50B which defines "net worth" and contended that it cannot be considered at a negative figure.*

17.11.2 *We are not inclined to accept this submission. It is patent that the words "net worth" and "cost" have not been given any meaning for the purposes of section 50B. At the same time it equally relevant to note that these words have been used in the context of "undertaking" which itself refers to the 'All assets minus All liabilities' of the undertaking. Section 50B contemplates the computation of "cost of acquisition and cost of improvement" of the "undertaking" as one unit which does not restrict itself to the bundle of assets but also includes within its ambit "the liabilities of such undertaking or unit or division". The contention on behalf of the assessee that cost of an asset cannot be in negative is though true in a general sense but fails in the context of the capital asset referred to in section 50B as 'Undertaking'.*

17.11.3 *The context of a provision cannot be ignored while finding out the meaning of particular word not defined in the provision or elsewhere in the Act. It had been observed by the Hon ble Supreme Court in several cases that a particular word occurring in one section of the Act, having a particular object cannot carry same meaning when used in different section of the same Act, which is enacted for different object. In Jt. CIT v. Saheli Leasing & Industries Ltd. [2010] 324 ITR 170/ 191 Taxman 165 (SC). Their Lordships have held in para 34(vi) that : "one word occurring in different sections of the Act can have different meaning, if the object of the two sections are different and when both operate in different fields". The Hon'ble Supreme Court in the case of CGT v. N.S. Getti Chettiar [1971] 82 ITR 599 (SC) noted that the dictionary gives various meanings to the words but those meanings do not help. It had been specifically observed: "We have to understand the meaning of those words in the context in which they are used. Words in the section of a statue are not to be interpreted by having those words in one hand and the dictionary in the order. In spelling out the meaning of the words in a section, one must take into consideration the setting in which those terms are used and the purpose that they are intended to serve." In the case of CIT v. Anand Theatres [2000] 244 ITR 192/ 110 Taxman 338 (SC) it had been held by Their Lordships that dictionary meaning of a word should not be adopted*

where the context conveys a different meaning. It had been laid down: "In our opinion dictionary meanings, however helpful in understanding the general sense of the words, cannot control where the scheme of the statute or the instrument considered as a whole clearly conveys a somewhat different shade of meaning. It is not always a safe way to construe a statute or a contract by dividing it by a process of etymological dissection and after separating words from their context to give each word some particular definition given by lexicographers and then to reconstruct the instrument upon the basis of those definitions. What particular meaning should be attached to words and phrases in a given instrument is usually to be gathered from the context, the nature of the subject-matter, the purpose or the intention of the author and the effect of giving to them one or the other permissible meaning on the object to be achieved. Words are after all used merely as a vehicle to convey the idea of the speaker or the writer and the words have naturally, therefore, to be so construed as to fit in with the idea which emerges on a consideration of the entire context."

17.11.4 *When we consider the nature of capital asset being undertaking as comprising not only positive assets but also the liabilities thereof, in our considered opinion, the usual dictionary meanings of the words "cost" and "net worth" can have no application in this context. It is pertinent to note that "net worth" had been defined in section 50B itself as difference between the aggregate value of all assets and value of liabilities. It can be both ways, that is, in some case the aggregate value of all assets may be more than the value of all liabilities and in others it may be value of liabilities exceeding the aggregate value of all assets. In the former case it will be positive net worth and in the latter it will be negative net worth. Negative net worth is not something unknown in the business world. SA570 (AAS16) dealing with "Going concern" is a standard of auditing brought out with a purpose to establish standard on the Auditor's responsibilities in the audit of financial statements regarding the appropriateness of the going concern assumption as a basis for the preparation of the financial statement. Various financial indications have been given in it and the first one is "Negative net worth or negative working capital". Therefore to contend that the cost or net worth can never be in negative, in our considered opinion, is too wide a proposition to be accepted in case of the capital asset in the nature of 'Undertaking'. We, therefore, reject this contention.*

(ii) Why only negative net worth and not entire liabilities added ?

17.12.1 *Taking a dig at the Departmental stand on adding the negative net worth, the ld AR argued in that view of the matter this logic should have then been extended to the entire liabilities of the undertaking worth Rs. 1517 crore undertaken by the transferee and not only the negative net worth of Rs. 157 crore which is a fraction of total liabilities.*

17.12.2 *This contention of the learned AR defies the very rationale behind the computation of capital gain in case of slump sale. It had been noticed above that the value of assets fluctuates over the period vis-Ã-vis their book value/w.d.v. but the amount of liabilities appearing in the balance sheet as on a particular date normally coincides with the current value of such liabilities on a given date. In that view of the matter the figure of net worth is the result of consideration of current value of liabilities which also happens to be their book value vis-Ã-vis the only written down value / book value of the assets. If the amount of all liabilities is added to the full value of consideration of the undertaking, it will mean that current/book value of liabilities to*

the extent it equalizes book value/w.d.v. of the assets had been considered twice in the computation of capital gain on the sale of undertaking, which will be irrational. It can be seen from Table B above that the actual profit from the transfer of bundle of assets of the undertaking is Rs. 95 (Agreed value of all the assets at Rs. 105 - Book value/w.d.v of all the assets at Rs. 10). If we add the figure of negative net worth of Rs. 5 to the full value of consideration of the undertaking of Rs. 90, the capital gain from transfer of undertaking comes to Rs. 95 which is eventually the same figure as the capital gain from the transfer of bundle of assets as one unit. If however we go by the contention of the ld. AR that the entire amount of liabilities should have been added, and add the figure of total liabilities of Rs. 15 to the full value of undertaking of Rs. 90, the figure of Rs.105 will emerge. It can be seen that Rs.105 is the agreed value of the bundle of assets of the undertaking and not the amount of capital gain. Since the amount of capital gain from transfer of assets is Rs. 95, that would finally turn out to be the figure of capital gain from the transfer of undertaking as well, it can be possible only by adding the amount of negative net worth to the full value of consideration and not the value of all liabilities. That is why the legislature had mandated to consider the figure of net worth supplied by section 50B and not the total liabilities for the purposes of computing capital gain u/s 48.

(iii) Section 48 uses the words 'deducting from' and not 'adding to'

17.13.1 *The next leg of the ld. AR's submission was that section 48 clearly provides that the capital gain shall be computed 'by d ducting from' the full value of the consideration received or accruing as a result of transfer of a capital asset inter alia the cost of acquisition of the asset and the cost of any improvement thereto, which in the present case is the amount of net worth as per section 50B. He contended that in such a case if the negative net worth is added to the full value of consideration, it will be against the language of the section. It was argued that if the intention of the legislature had been to add the amount of negative net worth then it should have been expressly provided by us ng he words 'deducting from or adding to' in place of only 'deducting from'. He stated that in the absence of any words "adding to" in section 48, the presumption is that the negative figure of the net worth had to be reduced to zero.*

17.13.2 *This contention is again devoid of merits. The reason is obvious for using the words "deducting from" in section 48 and not "deducting from or adding to" to the full value of consideration received or accruing as a result of transfer of the capital asset. When we talk of "deducting" net worth from the full value of consideration for computing capital gain u/s 48, it automatically implies that whatever way the net worth be, that is positive or negative, it will be taken care of accordingly. If the net worth is positive, "deducting from" the full value of consideration shall mean that the positive figure as supplied by section 50B in absolute terms shall be deducted. However, if it is negative then deducting a negative figure will ultimately mean adding to the full value of consideration for determining the income chargeable under the head "Capital gains". If the legislature had used the expression "deducting from or adding to", as contended by the ld. AR, in between the 'full value of consideration' and 'net worth', then the ridiculous results would have followed. Talking of the net worth in negative and considering it in juxtaposition to "adding to" the full value of consideration, would have had the effect of again reducing it because of the simultaneous use of words "negative" and "adding to" in the provision. The legislature had very rightly used the words "deducting from" only to make its intention clear that for determining the income*

chargeable under the head "Capital gains" if the amount of net worth is positive, that should be reduced from and if it is negative then it should be added to the full value of consideration.

(iv) Capital gain cannot be more than full value of consideration

17.14.1 *The ld. AR vehemently argued that the amount of capital gain can never be more than the full value of consideration received or accruing as a result of transfer of assets. It was stated that the amount of capital gain is always a part of the full value of consideration which is determined by reducing the cost of acquisition and cost of improvement there from. He illustrated his submission by explaining that if a particular asset is sold for Rs. 100, the capital gain cannot be more than Rs. 100 in any case. It had to be Rs. 100 itself in case there is no cost of acquisition or less than that to the extent of the positive cost of acquisition. On the basis of this submission he argued that when the sale consideration of the undertaking is Rs. 143 crore, then the computation of capital gain at any figure more than Rs. 143 crore is not possible.*

17.14.2 *We are again unconvinced with this submission which is though correct in the case of transfer of an asset of a general nature but fails in the context of a capital asset in the nature of an undertaking. As the capital gain on transfer of undertaking (All assets minus All liabilities) is determined by reducing from the full value of consideration received or accruing of the undertaking (All assets minus All liabilities), the net worth i.e. cost of acquisition and cost of improvement had also to be of the undertaking (All assets minus All liabilities). In a case where the book value of liabilities is less than the book value/written down value of the assets of the undertaking, the amount of capital gain will be less than the full value of consideration of the undertaking. But if the book value of liabilities is more than the book value/written down value of assets, as is the case under consideration, then the inherent element of full value of assets in the total full value of consideration of the undertaking, though not separately indicated, wi l be depressed accordingly. In case the book value of all the liabilities is more than the book value/w.d.v. of all the assets, it is quite natural that the capital gain on the transfer of undertaking will be more than the full value of consideration because of the reason that the value of liabilities undertaken by the transferee stands embedded in and had the effect of reducing the full value of consideration accordingly. As such we are not inclined to accept this contention raised on behalf of the assessee.*

(v) The words 'as reduced by' pre-suppose that preceding figure is higher than the succeeding

17.15.1 *The ld. AR contended that Explanation 1 to section 50B provides that the 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 as appearing in the books of account'. He emphadized on dictionary meaning of the word "reduced" as referring to "diminish in size, amount, extent or number : make smaller". As the word 'reduce' refers "to bring down", the learned AR contended that "the value of liabilities" can only bring down the "aggregate value of the total asset" as per Explanation 1 to section 50B. In his opinion unless the "value of liabilities" is less than "the aggregate value of total asset", the computation of the net worth will not be possible. The sum and substance of his submissions was that in case the "value of liabilities" is more than "the aggregate value of the total asset" then such value of liabilities should be restricted to*

the aggregate value of total assets thereby giving the amount of net worth at Rs. Nil. He also took us through Clause no. 315 of the Direct Tax Code Bill, 2010 which provides that any direction for aggregation of two or more items shall be construed also to include a direction for aggregation of negative and positive amounts in all their combinations. It was suggested that since the Income-tax Act, 1961 does not contain any provision similar to that of clause 315 of Direct Tax Code Bill, 2010, the words 'reduced by' should be understood as having Nil value where the value of liabilities is in excess of the aggregate value of the assets of the undertaking.

17.15.2 *We are unable to accept this contention put forth by the learned AR that the words "as reduced by" employed in Explanation 1 should always be understood to mean that the aggregate value of total assets will be more than the value of liabilities. The dictionary meaning of the word "reduced" is of no relevance in the computation of capital gain from the transfer of slump sale for the reasons discussed above. The context of a provision is relevant for understanding the meaning of a word which had not been defined in the statute. To contend that the words "as reduced by" used in Explanation 1 can never have the effect of the value of liabilities more than the aggregate value of the total assets of the undertaking is completely unfounded. It is a fact that the aggregate value of the total assets of the undertaking is Rs. 1360 crore with the value of liabilities at Rs. 1517 crore. The figure of the 'value of liabilities' is in fact more than the figure of 'aggregate value of total assets' of the undertaking. When the net worth in the present case is negative at Rs. 157 crore it automatically implies that the liabilities are more than the total assets. The contention that the liabilities cannot be more than the aggregate value of assets, therefore, fails at the very outset. The further argument that if the value of liabilities is more than the aggregate value of total assets then the "net worth" should be restricted to zero, runs contrary to the main argument that the words 'as reduced by can never mean that the value of liabilities will be more than the aggregate value of the assets.*

17.15.3 *Insofar as the rel ance of the learned AR on clause 315 of the Direct Tax Code Bill, 2010 is concerned we find that the same does not advance his case any further. The said clause reads as under:-*

"315. In this Code, unless otherwise stated, -

(a) a reference to any income, or to the result of any computation, shall be construed as a reference to both the negative and positive variation of the income or the result, as the case may be;

(b) any direction for aggregation of two or more items, which are expressed as amounts, shall be construed also to include a direction for aggregation of negative and positive amounts in all their combinations;

(c) the value of any variable in a formula shall be deemed to be nil, if the value of such variable is indeterminable or unascertainable."

17.15.4 *The first component of this clause is that the income can be both negative and positive. The second sub-clause is about aggregation of two or more items which may give the negative and also positive amounts. It is beyond our comprehension as to how this clause can be read as making any departure from the existing position under the Act. It had been laid down by the Hon'ble Supreme Court on several occasions that the income also includes loss. In the case of CIT v. Harprasad & Co. (P.) Ltd. [1975] 99 ITR 118 (SC), Their Lordships have categorically held that the income includes loss*

also. Similar proposition had been reiterated in CIT v. P. Doraiswamy Chetty [1990] 183 ITR 559 / 52 Taxman 346 (SC). Section 28 dealing with the computation of income under Chapter IV-D states that the income shall be chargeable to income-tax under the head "Profits and gains of business or profession". Even though the reference had been made only to the "Profits and gains of business or profession", but it is quite clear that there can be income as well as loss under the head. Can anyone imagine that if there is a loss under the head "Profits and gains of business or profession" then that should be ignored because the reference is only to "profits and gains" and "income". It is obvious that the words 'income' and 'profits' can be both positive as well as negative. Similarly section 45 provides that "profits or gains" arising from the transfer of capital asset shall be chargeable to income-tax under the head "Capital gains". There can be both income as well as loss under this head. Had anyone ever contended that since the words used are 'profits' or 'gains' which imply a positive income, there can be no loss under this head. The answer to all these questions is simple and plain that a reference to an 'income' under the provisions of Income-tax Act, 1961 automatically refers to the 'loss' as well. What is true for the "income" in both positive and negative terms is equally true for other items as well. Most importantly it is re evant to note the positioning of Clause 315 in the Direct Tax Code Bills, 2010 It had been incorporated under Chapter XVI with the heading "Interpretations and Constructions". It is not as if it had been made a part of provisions under Chapter III II - D dealing with 'Capital gains' covered under Clauses 46 to 55 of the DTC Bill, 2010. It, therefore, transpires that nothing new had been brought in to the Code by way of insertion of Clause 315 providing that the income or aggregation of two or more items shall include both positive and negative amounts. What was earlier implied had now been sought to be expressed. We, therefore, find this contention as bereft of any force.

17.15.5 *It is relevant to note that the cost of acquisition and cost of improvement of an undertaking or its net worth had been incorporated in section 50B(2) by way of a deeming provision. It had be n made clear in sub-section (2) that : "the 'net worth' of the undertaking or the divi ion, as the case may be, shall be deemed to be the cost of acquisition and the cost or improvement for the purposes of sections 48 and 49". It is trite that a deeming provision or a legal fiction presumes a hypothetical state of affairs and mandates to substitute it with the real. Such an artificial meaning is enacted with a specific purpose which is confined to that provision alone. In this way, the deeming provision tends to ignore the characteristics normally attaching to a particular connotation. In such a situation the commonly understood meaning of a word or phrase or expression is given a go-by and in its place the artificial meaning so given is substituted. As the very object of inserting a deeming provision is to observe a departure from the meaning and scope of the word, phrase or expression to which it is attached, it is but natural that such artificial meaning must have full application in that regard. To put it simply a deeming provision had to be brought to a logical conclusion. Coming back to section 50B(2) it is observed that by this deeming provision the "net worth" of the undertaking had been explained to mean "the aggregate value of total assets of the undertaking or the division as reduced by the value of liabilities of such undertaking or division as appearing in its books of account". Because of this deeming provision the cost of acquisition and cost of improvement of the undertaking is required to be strictly calculated in the manner prescribed and the result may be positive or negative. In other words, if the aggregate value of total asset is more than the value of*

liabilities the net worth shall be positive and in the otherwise case it shall be negative. When the legislature in its wisdom had prescribed the scope of "net worth" in unambiguous terms by way of a deeming provision, we cannot suo motu change it in case it is negative and accept it when it is positive. It had to be invariably accepted in both the situations whether it is positive or negative. If we accept this contention of the learned AR that the amount of negative net worth determined u/s 50B should be taken as zero, then it would mean creating one more legal fiction by ourselves within the existing legal fiction which the legislature had not prescribed. Such a course of action can never have sanction of law. In view of the foregoing reasons we are not inclined to accept this part of the arguments advanced on behalf of the assessee.

17.15.6 *To fortify his view that the negative figure of net worth should be ignored, the learned AR had heavily relied on the judgment of the Hon'ble Supreme Court in the case of IPCA Laboratory Ltd. v. Dy. CIT [2004] 266 ITR 521 / 135 Taxman 594 (SC) in which case it had been held that the deduction u/s 80HHC(3)(c) can be allowed only if there is a positive profit on the exports of both self manufactured goods as well as trading goods and if there is a loss in either of the two then the loss had to be taken into account for the purpose of computing profits. The facts of that case are that there was a loss of Rs. 6.86 crore from the export of trading goods and profit of Rs. 3.78 crore from export of self-manufactured goods. The assessee claimed deduction u/s 80HHC on a sum of Rs. 3.78 crore by ignoring the loss of Rs. 6.86 crore from the export of trading goods. The Assessing Officer did not allow any deduction u/s 80HHC for the reason that there was a net loss from export of goods and hence deduction was not permissible. The Hon'ble Supreme Court eventually upheld the Assessing Officer's stand by holding that the negative figure of loss of Rs. 6.86 crore cannot be ignored for computing the income eligible for deduction u/s 80HHC. It is on this strength of this judgment that the learned AR contended that the figure of negative net worth computed u/s 50B be also ignored and taken as nil as had been done by the Hon'ble Supreme Court in this case.*

17.15.7 *There is no merit what so ever in this contention. The ratio decidendi in the case of IPCA Laboratory Ltd. (supra) operates in an altogether different field, being the eligibility or otherwise of deduction u/s 80HHC in case there is loss from one set of exports and profit from the other. This judgment had been rendered by considering the specific provision of sub-section (3) along with sub-section (1) of section 80HHC. It is more than obvious that the question of granting deduction u/s 80HHC on exports can arise only when there is a positive profit from such exports. The Hon'ble Supreme Court observed that in arriving at a figure of positive profit both the profit and loss will have to be considered, and if the net figure is positive then the assessee will be entitled to deduction, but if the net figure is a loss then the assessee will not be entitled to deduction. At this juncture it will be relevant to note that section 80AB clearly provides that the deductions are to be made with reference to the income included in the gross total income. This section states that where any deduction is required to be made or allowed under any section included in this Chapter under the heading "C. - Deductions in respect of certain incomes" in respect of any income of the nature specified in that section which is included in the gross total income of the assessee, then, notwithstanding anything contained in that section, for the purpose of computing the deduction under that section, the amount of income of that nature as computed in accordance with the provisions of this Act shall alone be deemed to be the amount of*

income of that nature which is derived or received by the assessee and which is included in his gross total income. Further sub-section (2) of section 80A provides that the aggregate amount of the deductions under this Chapter shall not in any case exceed the gross total income of the assessee and the "gross total income" had been defined u/s 80B(5) to mean the total income computed in accordance with the provisions of this Act before making any deduction under this Chapter. Basically there are deductions either based on certain payments or in respect of certain incomes. The overall amount of all the deductions can in no case exceed the gross total income. However deductions in respect of incomes have to result from the qualifying income. In case there is positive qualifying income, the amount of deduction shall be computed and allowed. But if there no qualifying income, there will be nil deduction. Further the law does not say that in case there is a loss instead of the eligible income then any addition should be made to the total income. Thus in respect of 'income based deductions', there had to be some positive qualifying income so as to avail the benefit of deduction. And no deduction is available when there is either no eligible income at all or a loss. In both such cases the amount of deduction will be Nil. Section 80HHC falls in Chapter VI-A - C. "Deductions in respect of certain incomes". Unless there is an income from exports included in the gross total income, there cannot be any deduction in respect of section 80HHC. The existence of a positive income is a requisite condition to claim deduction under the relevant section falling within this sub-Chapter. Reverting to the case of IPCA Laboratory Ltd. (supra) it can be seen that there was a loss from export of trading goods at Rs. 6.86 crore and income from export of self-manufactured goods at Rs. 3.78 crore thereby giving the net loss of Rs. 3.08 crore from the export of goods. As section 80HHC provides for deduction in respect of 'income' from export of goods, naturally there could not have been any question of granting deduction. On the contrary we are dealing with section 45 read with sections 48 and 50B providing for the computation of capital gain on the transfer of capital asset. Section 45 recognizes not only the positive income chargeable to tax as capital gain but also loss from the transfer of capital assets which is available for set off and carry forward in the same or subsequent years as per the provisions of Chapter 'Set off, or carry forward and set off' consisting of sections 70 to 80. Unlike section 80HHC which provides for deduction only in respect of some positive eligible income and for no deduction in case of qualifying income is either nil or negative, section 45 contemplates both income as well as loss. Whereas the income so determined is charged to tax under the head "capital gains" but the loss is either set off against the other incomes of the same year and in case of insufficiency of such other income can be carried forward to subsequent years for set off, subject to the specific provisions. Thus it is abundantly clear that the reliance of the learned AR on the case of IPCA Laboratory Ltd. (supra) for contending that the negative figure of net worth be ignored, is clearly misconceived. We, therefore, reject the contention that the words 'as reduced by' in section 50B pre-suppose that the aggregate value of all the assets must be invariably more than the total liabilities and in case it is not so, then the resultant negative figure should be taken as zero.

17.15.8 *In support of the contention that the negative net worth cannot be added to the full value of consideration for the purposes of computing capital gain, the learned AR relied on the judgment of the Hon'ble Bombay High Court in the case of Li Taka Pharmaceuticals Ltd. v. State of Maharashtra [1998] 91 Comp. Cas. 871/[1996] 8 SCL 102 (Bom.). In that case the petitioner initially contended that no stamp duty was at all*

payable in case of an amalgamation u/s 394 of the Companies Act. There was transfer of a company as a going concern on the basis of compromise on which the Hon'ble Bombay High Court held that stamp duty would be payable by the party. It was further observed that under the amalgamation scheme, what is transferred is a going concern and not assets and liabilities separately. As a going concern what is the value of the properties is to be taken into consideration. The learned Advocate General in that case contended that the stamp duty should be recovered on the market value of shares of the transferee company allotted to the shareholders of the transferor company plus the liabilities of the transferor company transferred to the transferee company. The Hon'ble Bombay High Court found this contention to be "contrary" to the meaning of the word "conveyance" as provided u/s 2(g)(iv) of the Bombay Stamp Act, 1958. It is on the basis of this finding of the Hon'ble jurisdictional High Court rendered in the context of Bombay Stamp Act, 1958 that the learned A.R. canvassed the view that for the purpose of computing capital gain only the full value of consideration should be taken and the net worth representing excess of liabilities over the book value of assets should be ignored.

17.15.9 *Stamp duty is always charged on the sale consideration. In that case the Hon'ble High Court held that the stamp duty was payable on the sale consideration of the undertaking as one unit without increasing it with the amount of liabilities transferred. In fact it supports the contention of the ld. AR which had been accepted by us above, that for the purposes of calculating full value of consideration for the transfer of undertaking there cannot be any addition towards the value of liabilities transferred to the agreed consideration of the undertaking. Continuing with the above example given in Table A where the agreed value of assets transferred is Rs. 105 and the liabilities worth Rs. 5 have been taken ove by the transferee, the amount of the sale price of the undertaking had been held to be Rs. 100 which amount as per the facts of the case is Rs. 143 crore and not Rs. 105 akin to Rs. 300 crore as per facts prevailing before us. Besides that, this judgment does not support the point that negative net worth should also be ignored for alculating the capital gain. Here it is pertinent to note that presently we are not concerned with only the determination of sale consideration of the undertaking but also the capital gain on its transfer, which obviously on a macro level refers to the sale p ice minus cost. While sustaining the figure of sale consideration at Rs. 143 crore, we have held that the cost price be taken at a minus figure of net worth at Rs. 157 crore, so that the amount of capital gain becomes Rs. 300 crore. As this judgment is related to the determination of the sale price relevant for imposing stamp duty, it can have no application on the other aspects of the computation of capital gain. The situation could have some resemblance if the stamp duty had been payable on the profit from the transfer of undertaking and not the sale consideration. Moreover this is basically a case under the Bombay Stamp Act and that too in the context of amalgamation under section 394 of the Companies Act, 1956, whereas we are not confronted with the question of determination of any stamp value much less in the amalgamation. We, therefore, hold that the reliance of the ld. AR on this judgment in any context other than the question of determination of full value of consideration of the undertaking is of no use. In view of the foregoing reasons we are of the considered opinion that in computing net worth of the undertaking 'the value of liabilities' can be more than 'the aggregate value of assets of the undertaking' within the meaning of section 50B.*

18. *The learned AR pressed into service the judgment of the Hon'ble Bombay High Court in the case of Premier Automobiles Ltd. v. ITO [2003] 264 ITR 193 / 129 Taxman 289 (Bom.). That assessee-company was engaged in the business of manufacture and sale of cars. It entered into a joint venture agreement with a foreign company to establish a joint venture company. The assessee sold one of its business undertakings as a whole to the joint venture company for a lump sum consideration. The Assessing Officer took it as a case of sale of itemized assets and allocated sale value to building, plant and machinery and paint shop. After deducting written down value there from, he calculated short term capital gain. The Hon'ble Bombay High Court held that it was an entire business undertaking which was sold as a going concern and not any distinct asset such as land, building and plant and machinery etc. Along with such assets, the assessee also transferred intangible assets and business advantages like licences, quotas etc. It was eventually held that in a case of sale of business as whole, there is no allocation of price to any particular assets and, therefore, the computation of capital gains in such a case should have been done on the business as a whole which business itself is a capital asset. The matter was eventually remanded to the Assessing Officer for computation of capital gain on sale of business in its entirety u/s 45 read with sections 2(42C) and 50B. We fail to appreciate as to how this case supports the assessee's contention in any manner. In the present case also the assessee sold the entire undertaking as one unit and the Assessing Officer had not computed capital gain on different assets by allocating the total sale consideration to such assets. The A.O. applied the provisions of section 50B and hence there can be no grievance on such applicability. From table A it can be observed that though there are different assets such as depreciable assets, non-depreciable tangible assets and non-depreciable intangible assets but the overall consideration had been taken at Rs. 105 for all such assets taken together. Similarly the value of all liabilities had also been taken as one composite figure thereby giving the net amount of capital gain of Rs. 95 from the transfer of the undertaking as one capital asset and not any separate capital gain arising from the transfer of individual assets. Both the assets and liabilities have been considered as one composite unit and the eventually full value of consideration is for the undertaking as a whole and not towards any separate assets or liabilities. It can be noticed that in that case the computation of capital gain was remitted to the file of Assessing Officer to be determined as per the prescription of sections 45 and 50B. However, in the instant case the Assessing Officer had computed the capital gain by taking resort to these provisions only. This judgment, therefore, does not assist the learned AR in any manner.*

19. *We have noticed above in para 14.6 that the capital gain on transfer of 'Undertaking' (All assets minus All liabilities) of the undertaking is equal to Full value of consideration received or accruing (All assets minus All liabilities) as a result of the transfer of undertaking (-) Net worth or the cost of acquisition and cost of improvement (All assets minus All liabilities) of the undertaking. Contents of all the three components viz. Capital gain, Full value of consideration and Net worth are common, that is, 'All assets minus All liabilities' of the undertaking. It had to be so because we are computing capital gain on the transfer of the undertaking which is again nothing but 'All assets minus All liabilities'. If we accept the contention of the assessee and adopt the figure of Full value of consideration at Rs. 143 crore which is for 'All assets minus All liabilities' of the undertaking and take the figure of Net worth at 'Nil', it*

would mean that for computing capital gain on the transfer of undertaking 'All assets minus All liabilities', the cost of acquisition and cost of improvement had been taken for 'All assets minus Part of all liabilities' i.e. (Rs. 1360 crore towards All assets minus only Rs. 1360 crore towards Part of all liabilities{total liabilities are Rs. 1517 crore}). Obviously it cannot be so because the computation of capital gain is from the transfer of 'All assets minus All liabilities' and hence both the Full value of consideration and Net worth must be of 'All assets minus All liabilities'.

20. *In view of the detailed discussion made above, we are with utmost respect unable to concur with the view expressed by the Mumbai Bench of the Tribunal in the case of Zuari Industries Ltd. (supra) and Delhi Bench of the Tribunal in the case of PaperBase Co. Ltd. (supra). Thus the question referred to the Special Bench is answered in negative by holding that the Assessing Officer was not right in adding the amount of liabilities being reflected in the negative net worth ascertained by the auditors of the assessee to the sale consideration for determining the capital gains on account of slump sale. However, we allow ground no.2 raised by the Revenue in its appeal by holding that the CIT(A) was not correct in coming to the conclusion that the negative figure of the net worth of Rs. 157 crore should be ignored for working out the capital gains in case of a slump sale. The summary of our conclusion is that the amount of 'Net worth' will be a negative figure of Rs. 157 crore and not Zero. Resultantly the amount of capital gain chargeable to tax will be Rs. 300 crore and not Rs. 143 crore as declared by the assessee."*

Respectfully,following the above order of the Special Bench we decide ground no.1 against the assessee.

3.Ground no 2 is against not allowing deduction of Rs 2,03,46,191/- from the profits arising out of the sale of undertaking by way of slump sale while working out the income under the head profits and gains from business.During the assessment proceedings,the AO found that on slump sale of the undertaking assessee earned profit of Rs 2,03,46,191/- which was credited to the books of accounts of the assessee-company,that the sum was not added to the loss of the company while making the computation of total income,that the amount of profit on sale of asset was clubbed under the head of extra ordinary items in the profit and loss account,that the amount was also not excluded by the AO while passing the order,that mistake came to knowledge of the assessee and it raised the issue before the FAA,that the he did not consider the claim by it and observed that no application u/s 154 of the act filed before AO.

3.1. Before us,the AR submitted that claim was made before CIT (A)for adjustment of the amount by Rs. 2,03,46,191/-,that he should have allowed the claim.The DR supported the order of the FAA.

3.2. We have carefully perused the material submitted and argument advanced. The computation of Total income filed by Assessee at page no 52 to 55 of the paper book shows that assessee had starred the computation of business income from (-) Rs. 4,62,67,764/- as per profit and loss account and without increasing it further by the amount of any profit arising on the sale of the business undertaking which is chargeable to tax under the head capital gains and not under the head of profit and gains of the business and profession.It had credited extra-ordinary item in the profit and loss account of Rs. 2,55,74,116/-.As per note no B (6) of schedule 12 of the balance sheet at serial no item no 10 shows profit on sale of non-woven fabrics business under slump sale an amount of Rs 2,03,46,191/- is shown.In

our opinion, said amount has be adjusted in the computation of income and the claim made by the assessee is justified.In the matter of Prithvi Brokers the Hon'ble Bombay High Court has held that the appellate authorities can admit new claim made before them,though the AO cannot admit such claim without filing of fresh return.We are of the opinion,that in the interest of justice, the matter should be restored back to the file of the FAA for fresh adjudication,who will decide the issue after affording a reasonable opportunity of hearing to the assessee.Ground no.2 is allowed in favour of the assessee,in part.

4.Third ground of appeal is against disallowance of Rs 51,12,586/- pertaining to sales tax deferral scheme.During the assessment proceedings,the AO found that the assessee had debited an amount of Rs 1,05,10,218/- on account of sales tax.He held that the amount of sales tax liability was pertaining to the unit sold by the assessee,that same was taken over by the buyer.Invoking the provisions of section 43B of the Act,he disallowed an amount of Rs. 51,12,586/-.In the appellate proceedings,the FAA upheld the order of the AO.

4.1. Before us,the AR submitted that disputed amount was covered under the deferred sale tax scheme and same was eligible for deduction u/s.43B of the act as per circular no 496 dated 25.09.1987 of the CBDT,that liability was crystallised after reconciliation made with the sales tax department,that upon the reconciliation the amount was provided against such deferred sale tax liability.The DR contended that the assessee had not raised any such claim before AO,that no details of deferred sales tax amount was quan ified.

We have carefully considered the rival submissions The assessee had contended that an amount of Rs.51,12,586/- is pertaining to sales tax deferred scheme and same is not disallowable u/s 43B of the Act in view of the circular no 496 dated 25.09.1987.It is found that the assessee had also not submitted before AO the details of such claim.Further before FAA details of claims,reconciliation and how it is covered by the circular no 496 dated 25.09.1987were not submitted.Therefore such claim requires verification and also ascertainment whether the conditions and requirements mentioned under circular no 496 is met by the assessee or not.Therefore,in the interest of justice,this ground of appeal is set aside to the file of AO with direction to verify the claim of the assessee in accordance with circular no 496 dated 25.09.1987 and decide the issue in accordance with law after providing proper opportunity to the assessee. Ground no.3 of appeal is allowed in favour of the assessee,in part.

As a result,appeal filed by the assessee stands partly allowed.

फलतः निर्धारिती द्वारा दाखिल की गई अपील अंशतः मंजूर की जाती है.

Order pronounced in the open court on 31st August,2015.

आदेश की घोषणा खुले न्यायालय में दिनांक 31st अगस्त,2015 को की गई।

Sd/-	**Sd/-**
(ए. डी.जैन **/A.D. Jain)**	**(**राजेन्द्र **/ RAJENDRA)**
न्यायिक सदस्य **/ JUDICIAL MEMBER**	**लेखा सदस्य / ACCOUNTANT MEMBER**

मुंबई/Mumbai,दिनांक/Date: 31P .8. 2015

व.नि.स.*Jv.Sr.PS.*

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1.Appellant /अपीलार्थी **2.** Respondent /प्रत्यर्थी

3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, **4.**The concerned CIT /संबद्ध आयकर आयुक्त

5.DR A Bench, ITAT, Mumbai /विभागीय प्रतिनिधि**, ए** खंडपीठ,आ.अ.न्याया.मुंबई

6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ **BY ORDER,**
उप/सहायक पंजीकार **Dy./Asst. Registrar**
आयकर अपीलीय अधिकरण, मुंबई **/ITAT, Mumbai.**