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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **Writ Petition (Civil) No. 1592/2012**

Reserved on: 20th March, 2012

% **Date of Decision: 30th March, 2012**

M/s SREI Infrastructure Finance Ltd. ....Petitioner

Through Mr. Vikas Singh, Sr. Advocate with Mr.Sashi Tulsiyan & Ms. Amrita Narayan, Advocates.

Versus

The Income Tax Settlement Commission & Ors. ...Respondent

Through Mr. Himanshu Bajaj, Advocate for Respondent No. 3/UOI.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE R.V. EASWAR

SANJIV KHANNA, J.

The petitioner, SREI Infrastructure Finance Ltd. is a public limited company engaged in project financing through term loans and leasing in specified sectors. For the assessment year 2009-10, the petitioner had disclosed loss of more than Rs.76 crores in their return. The book loss computed under Section 115JB of the Income Tax Act, 1961 (Act, for short) was more than Rs.72 crores. No return was filed for the assessment year 2010-11.

2. On 19th July, 2010, the petitioner filed an application under Section 245C(1) of the Act, before the Settlement Commission, for the assessment years 2009-10 and 2010-11, disclosing additional income, under MAT of

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Rs.111,08,00,000/- for the assessment year 2009-10, which was earlier not disclosed in the return which was pending scrutiny before the Assessing Officer and an income of Rs.126,35,41,333/- under MAT for the assessment year 2010-11.

3. On 23rd July, 2010, the Settlement Commission passed an order under Section 245D(1) admitting the application. During the course of the proceedings, the Commissioner a filed report under Section 245D(2B) of the Act and Rule 9 of the Income Tax Settlement Commission (Procedure) Rules, 1997. Reply and clarifications by both the petitioner and the Commissioner were examined and considered by the Settlement Commission.

4. On 16th December, 2011, the Settlement Commission passed the final order determining and deciding various aspects and questions which were raised. In the present writ petition, we are only concerned with one aspect i.e. taxability of Rs. 375 lacs under Section 50B of the Act as capital gains on 'slump sale' paid under the Scheme of Arrangement to the petitioner by its subsidiary SREI Infrastructure Development Finance Ltd ("SIDFL", for short).

5. The Settlement Commission has held that the consideration of Rs.375 lacs received by the petitioner from SIDFL on transfer of its project finance business and assets based financing business, including its shareholding in SREI Insurance Broking Pvt. Ltd ("SIBPL", for short) was taxable under the Section

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50B of the Act as ‘slump sale’. Settlement Commission has also computed the taxable capital gains under Section 50B of the Act.

6. The contention of the petitioner is that the ‘transfer’ under the Scheme of Arrangement is not a sale under Section 50B of the Act. The Scheme of Arrangement was sanctioned by the High Court of Calcutta under Section 391 to 394 of the Companies Act, 1956 and is statutory in nature and character. It is pleaded that Section 50B of the Act has no applicability as the ‘transaction’ was under the Scheme of Arrangement and the same is not a ‘slump sale’ as contemplated under Section 2(42C) of the Act. The petitioner claims that Section 2(42C) deals with limited category/type of transactions i.e. sales, which are construed as a ‘slump sale’ and the broader and wider definition of the term ‘transfer’ as defined under Section 2(46) is not applicable to “slump sales”.

7. During the course of the hearing, the petitioner had relied upon ***Madhu Intra Limited and Anr., VAT Automation Pvt. Ltd. and Stuti Developers Pvt. Ltd. and Ors. Vs. Registrar of Companies and Ors.***, [2006] 130 Comp. Cases 510 (Cal.), ***Sadanand S. Varde and Ors. vs. State of Maharashtra and Ors.,*** (2001) 247 ITR 609 (Bom) and ***J.K. (Bombay) (P) Ltd. vs. New Kaiser-I-Hind Spinning and Weaving Co. Ltd.,*** (1970) 40 Comp. Cases 689 (SC).

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8. In order to appreciate the contentions, we deem it appropriate to reproduce Sections 2(47), 2(42C) and Section 50 B of the Act which read :-

> “2(42C) "**slump sale**" means the transfer of one or more undertakings as a result of the sale for a lump sum consideration without values being assigned to the individual assets and liabilities in such sales :
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> Explanation 1.- For the purposes of this clause, "undertaking" shall have the meaning assigned to it in Explanation 1 to clause (19AA) :
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> 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 ;
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> 2(47) "**transfer**", in relation to a capital asset, includes,-
> (i) the sale, exchange or relinquishment of the asset ; or
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> (ii) the extinguishment of any rights therein ; or
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> (iii) the compulsory acquisition thereof under any law ; or
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> (iv) in a case where the asset is converted by the owner thereof into, or is treated by him as, stock-in-trade of a business carried on by him, such conversion or treatment ; or

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(iva) the maturity or redemption of a zero coupon bond ; or

(v) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882) ; or

(vi) any transaction (whether by way of becoming a member of, or acquiring shares in, a co-operative society, company or other association of persons or by way of any agreement or any arrangement or in any other manner whatsoever) which has the effect of transferring, or enabling the enjoyment of, any immovable property :

Explanation.- For the purposes of sub-clauses (v) and (vi), "immovable property" shall have the same meaning as in clause (d) of section 269UA.

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Section 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 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.

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(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 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.

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

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is allowable as a deduction under section 35AD, nil ; and

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

9. Section 50B was inserted in the Act vide the Finance Act, 1999 w.e.f 1st April 2000, in view of the decisions that ‘slump sales’ were not taxable under the capital gain provisions because it was not possible to compute cost of acquisition. It was held that when computation cannot be made in the absence of cost of acquisition, then the charging section itself would not be applicable. [see ***PNB Finance Ltd. versus Commissioner of Income Tax***, (2008) 307 ITR 75 (SC)].

10. Slump sale, as then understood, meant transfer of business as a going concern, and therefore, it was not possible to determine the actual cost namely the cost of acquisition even though, in a given case, it might be a generated asset [see ***CIT vs. Artex Manufacturing Co.*** [1997] 227 ITR 260 (SC). In such cases, it was not possible to break-up and compute capital gains on the assets sold, either individually or in entirety.

11. The term ‘slump sale’, which has now been specifically defined in Section 2(42C) of the Act, means 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 in such sales. The use of the word ‘transfer’

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in said section is significant. The term 'transfer' is used in said section is with reference to the transaction in the nature of 'slump sale'. Thus any type of "transfer" which is in nature of slump sale i.e. when lump sum consideration is paid without values being assigned to individual assets and liabilities are covered by the definition clause 2(42C) and then by Section 50B of the Act. This is the reasonable, plausible and natural grammatical meaning which has to be given to the definition clause 'slump sale'. It is not correct to construe and regard the word 'slump sale' to mean that it applies to 'sale' in a narrow sense and as an antithesis to the word 'transfer' as used in Section 2(47) of the Act. The intention of the legislature was to plug in the gap and tax slump sales and not to leave them out of the tax net. The term 'slump sale' has been used in the enactment to describe a particular and specific type of transfers called slump sales. Use of word 'sale' in the term 'slump sale' does not and is not intended to narrow down the concept of 'transfer' as defined and understood in Section 2(47) of the Act. All transfers in nature of 'sales' i.e. 'slum sales' are covered by the definition clause 2 (42C) of the Act. The word 'transfer' as defined and understood in Section 2(47) of the Act is wide. It is an inclusive definition of wide import. It includes sale, exchange or relinquishment, extinguishment of any right in an asset, compulsory acquisition under the law etc. We may note and record here that the learned Senior Advocate

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appearing for the petitioner did not contest and submit that the transaction in question is not covered by the word 'transfer' as defined in Section 2(47) and the contention raised was that Section 50B read with Section 2(42C) is only applicable to "sale" in a narrow sense and not to 'transfer' under Section 2(47) of the Act.

12. The term 'slump sale' has been defined to mean a transfer of a business undertaking or a business for a lumpsum consideration with all its assets and liabilities, without values being assigned to individual assets/liabilities. The said term has no other significance and we should not read into and understand that the word 'sale', used in the term 'slump sale', as a cause/reason to give a restrictive meaning to "slump sale", i.e. it can only apply to "sales" in a narrow sense and not to "transfers" under Section 2(47). This is apparent as when we read the proviso and sub-section (1) to Section 50B together and in a harmonious way, it is clear that it applies to all types of "transfers" that can be categorized as a "slump sale". Sub-section (2) to Section 50B of also refers to transfer of an undertaking or division by way of sale i.e. "slump sale" and prescribes the mode of computing and calculating capital gains on such transactions.

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13. We may refer to the judgment of the Supreme Court in ***CIT, Cochin vs. Grace Collis (Mrs.) and Ors.***, (2001) 3 SCC 430, wherein it has been held as under:-

> "**15.** We have given careful thought to the definition of "transfer" in Section 2(47) and to the decision of this Court in *Vania case*. In our view, the definition clearly contemplates the extinguishment of rights in a capital asset distinct and independent of such extinguishment consequent upon the transfer thereof. We do not approve, respectfully, of the limitation of the expression "extinguishment of any rights therein" to such extinguishment on account of transfer or of the view that the expression "extinguishment of any rights therein" cannot be extended to mean the extinguishment of rights independent of or otherwise than on account of transfer. To so read the expression is to render it ineffective and its use meaningless. As we read it, therefore, the expression does include the extinguishment of rights in a capital asset independent of, and otherwise than on account of transfer.
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> **16.** This being so, the rights of the assessees in the capital asset, being their shares in the amalgamating company, stood extinguished upon the amalgamation of the amalgamating company with the amalgamated company. There was, therefore, a transfer of the shares in the amalgamating company within the meaning of Section 2(47). It was, therefore, a transaction to which Section 47(*vii*) applied and, consequently, the cost to the assessees of the acquisition of the shares of the amalgamated company had to be determined in accordance

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> with the provisions of Section 49(2), that is to say, the cost was deemed to be the cost of the acquisition by the assessees of their shares in the amalgamating company."

14. In the said case, the assessee had received equity shares in the amalgamated company for shares of the amalgamating company. The amalgamating company ceased to function and its business, assets and liabilities were taken over by the amalgamated company. The shares received of the amalgamated company under the Scheme of Arrangement were subsequently sold by the assessee at Rs.107.50 against the face value of Rs.100/-. The Assessing Officer took the cost of acquisition as the cost paid to acquire the shares in the amalgamating company by applying Section 49(2) read with Section 47(vii) of the Act. The contention of the assessee, however, was that no capital gain tax was leviable because what was sold where the shares in the amalgamated company and it was submitted that there was no provision under the Act to determine the value of the said shares. There was no "transfer" when the shares were issued in the amalgamated company under the statutory scheme under Sections 391- 394 of the Companies Act, 1956. The assessee had relied on an earlier decision of the Supreme Court in ***CIT vs. Rasiklal Maneklal (HUF)***, (1989) 2 SCC 454, in which Section 12-B of the Income Tax Act, 1922, was interpreted. The Supreme Court held that the decision in the ***Rasiklal's*** case (supra) would not be applicable in view of the

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expanded definition of the term 'transfer' in Section 2(47) which includes extinguishment of any right in a capital asset. Reference was made to another decision of the Supreme Court in ***Vania Silk Mills (P) Ltd. Vs. CIT***, (1991) 4 SCC 22, wherein the term 'transfer' in Section 2(47) has been interpreted as under:-

> "11. It is true that the definition of "transfer" in Section 2(47) of the Act is inclusive, and therefore, extends to events and transactions which may not otherwise be "transfer" according to its ordinary, popular and natural sense. It is this aspect of the definition which has weighed with the High Court and, therefore, the High Court has argued that if the words "extinguishment of any rights therein" are substituted for the word "transfer" in Section 45, the claim or compensation received from the insurance company would be attracted by the said section. The High Court has, however, missed the fact that the definition also mentions such transactions as sale, exchange etc. to which the word "transfer" would properly apply in its popular and natural import. Since those associated words and expressions imply the existence of the asset and of the transferee, according to the rule of *noscitur a sociis*, the expression "extinguishment of any rights therein" would take colour from the said associated words and expressions, and will have to be restricted to the sense analogous to them. If the legislature intended to extend the definition to any extinguishment of right, it would not have included the obvious instances of transfer, viz., sale, exchange etc. Hence the expression "extinguishment of any rights therein" will have to be confined to the extinguishment of rights on account of transfer and cannot be

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> extended to mean any extinguishment of right independent of or otherwise than on account of transfer."

15. The decision of Bombay High Court in ***Sadanand]S. Varde's*** case (supra) was in a public interest writ petition and a question had arisen whether provisions of Chapter XX C of the of the Act were applicable when a scheme of amalgamation was sanctioned by a Company Court. The High Court observed that the amalgamation order passed by the High Court cannot be challenged in a collateral proceedings. The High Court considered the scheme of Chapter XX-C and the term 'transfer' which was specifically defined for the purpose of said Chapter in clause (f) to Section 269UA. It was held that the said chapter was enacted for compulsory purchase, when a property was sold by making significant undervaluation with the intention of evading tax. It was held that the definition clause i.e. Section 269UA(f) would apply to only contractual agreements and not statutory transfers. Possibly it can be submitted that statutory transfers do not have an element of understatement of sale consideration. We are not required to examine and go into the said question/ issue in the present case and express no opinion. We are not required to interpret and apply Section 269UA(f) in the present case.

16. The judgment of the Calcutta High Court in ***Madhu Intra Ltd.*** (supra) deals with the question of payment of stamp duty under the Indian Stamps Act

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1899, upon sanction of a Scheme of Re-Construction and/or Amalgamation and whether the sanction order amounts to 'conveyance' as defined under Section 2(10) of the Indian Stamps Act, 1899. As noticed above, in the present case, we are only concerned with definition of 'transfer' as defined under Section 2(47) of the Act which is a very wide and broad definition. The issue in question and ratio of the decision in ***Madhu Intra Ltd.*** (supra) are not apposite to the issue in question.

17. It may be appropriate here to notice the decision of the Supreme Court in ***Hindustan Lever vs. State of Maharashtra***, (2004) 9 SCC 438, which arose under the Bombay Stamp Act, 1958. A question arose whether an order sanctioning the amalgamation of two companies under Section 394 read with Section 391 of the Companies Act, 1956, was an instrument within the meaning of Section 2(1) of the Bombay Stamp Act, 1958 in view of the insertion of clause (iv) to Section 2(g) which expanded the definition of term 'conveyance' to include every order made by the High Court under Section 394 of the Companies Act, 1956 in respect of amalgamation or reconstruction of the Companies etc. The contention of the petitioners therein was that amalgamation under Section 394 of the Companies Act, 1956, was not an order simpliciter of transfer of property by an act of parties with imprimatur of the Court. It was an order of the Court after judicial scrutiny. Such an order

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was not an act of the parties and constitutes a decree and, therefore, not a conveyance. The contention was rejected in the following words by the Supreme Court:-

> "**18.** It is difficult to subscribe to the view propounded by the learned counsel for the appellants. As stated earlier, the order of amalgamation is based on a compromise or an arrangement arrived at between the two companies. No individual living being owns the company. Each shareholder is the owner of the company to the extent of his shareholding. By enacting Sections 391 to 394 a method has been devised to give effect to the will of the prescribed majority of shareholders/creditors. Even in the absence of individual agreement by all the shareholders and creditors the decision of the majority prescribed in Section 391(2) binds all the creditors and the shareholders. The scheme after being sanctioned by the court binds all its creditors, members and shareholders including even those who were opposed to the scheme being sanctioned. It binds the company as well. While exercising its power in sanctioning the scheme of amalgamation, the court is to satisfy itself that the provisions of statute have been complied with. That the class was fairly represented by those who attended the meeting and that the statutory majority was acting bona fide and not in an oppressive manner. That the arrangement is such as which a prudent, intelligent or honest man or a member of the class concerned and acting in respect of the interest might reasonably take. While examining as to whether the majority was acting bona fide, the court would satisfy itself to the effect that the affairs of the company were not being conducted in a manner prejudicial to the interest of its

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members or to public interest. The basic principle underlying such a situation is none other than the broad and general principle inherent in any compromise or settlement entered into between the parties, the same being that it should not be unfair, contrary to public policy and unconscionable or against the law.

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30. A document creating or transferring a right is an instrument. Can it be said that an order effectuating the transfer is a document? The answer has been given in the affirmative by this Court in *Haji Sk. Subhan* v. *Madhorao* wherein it was held that the question is whether the word "document" includes a decree of the court. It was held that there was no good reason why a decree of the court, when it affects the proprietary rights and is in relation to them should not be included in this expression. This question more pointedly arose before this Court in *Ruby Sales and Services (P) Ltd.* In that case in a suit for specific performance the property was conveyed to the vendee by a consent decree. The question arose whether the consent decree is an instrument and liable to be stamped. The consent decree contained a recital to the effect that "this decree does operate as the conveyance from the defendants in favour of the plaintiffs in respect of the said property more particularly described in Exhibit A to the plaint". The Court held that: (SCC p. 535, para 11)

"*11*. There is no particular pleasure in merely going by the label but what is decisive is by the terms of the document. It is clear from the terms of the consent decree that it is also an 'instrument' under which title has been passed over to the appellants-plaintiffs. It is a live

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document transferring the property in dispute from the defendants to the plaintiffs."

The aforesaid decree was based on an agreement between the parties. So is the case with an order under Section 394 of the Companies Act which is also based on an agreement between the transferor company and the transferee company.

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32. In view of the aforesaid discussion, we hold that the order passed by the Court under Section 394 of the Companies Act is based upon the compromise between two or more companies. Function of the court while sanctioning the compromise or arrangement is limited to oversee that the compromise or arrangement arrived at is lawful and that the affairs of the company were not conducted in a manner prejudicial to the interest of its members or to public interest, that is to say, it should not be unfair or contrary to public policy or unconscionable. Once these things are satisfied the scheme has to be sanctioned as per the compromise arrived at between the parties. It is an instrument which transfers the properties and would fall within the definition of Section 2(*1*) of the Bombay Stamp Act which includes every document by which any right or liability is transferred. The State Legislature would have the jurisdiction to levy stamp duty under Entry 44 List III of the Seventh Schedule of the Constitution of India and prescribe rates of stamp duty under Entry 63 List II."

18. Decision of the Supreme Court in ***J.K. (Bombay) (P) Ltd. (supra)*** is on the general proposition as to the statutory nature of the scheme which is sanctioned under Sections 391-394 of the Companies Act, 1956. The said

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decision is hardly relevant for interpreting the term 'transfer' as defined in Section 2(47) of the Act, which as noted above, is applicable. There is another reason why this decision should not be applied. The Act i.e. Income Tax Act, 1961 was enacted to tax the income or gains made by an assessee. The Companies Act, 1956, on the other hand serves, and is intended to serve a different purpose and, therefore, when a scheme under Sections 391-394 of the Companies Act, 1956 is sanctioned by the Court, it is treated as a binding statutory scheme because the scheme has to be implemented and enforced. This cannot, or is not, a ground to escape tax on 'transfer' of a capital asset under and as per provisions of the Act.

19. We record that no other contention or issue was raised by the petitioner during the course of the arguments. We also record that the petitioner has not relied upon Section 47 of the Act before us and we have not expressed any opinion on the said Section.

20. For the reasons stated above, the contentions raised by the petitioner are rejected and the writ petition is dismissed. No costs.

(SANJIV KHANNA)
JUDGE

(R.V. EASWAR)
JUDGE

March 30th , 2012/kkb