IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "B", MUMBAI

BEFORE SHRI D.T. GARASIA, JUDICIAL MEMBER AND
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER

ITA No.3298/M/2012
Assessment Year: 2008-09

M/s. Bennett Coleman & Co. Ltd., The Time of India Bldg., Dr. D.N. Road, Mumbai – 400 001 **PAN: AAACB4373Q**	Vs.	Addl. Commissioner of Income Tax, Range – 1(1), Room No.538, Aayakar Bhavan, M.K. Marg, Mumbai – 400 020
(Appellant)		(Respondent)

ITA No.3537/M/2012
Assessment Year: 2008-09

ACIT– 1(1), Room No.579, Aayakar Bhavan, Mumbai –20	Vs.	M/s. Bennett Coleman & Co. Ltd., The Times of India Bldg., Dr. D.N. Road, Mumbai – 400 001 **PAN: AAACB4373Q**
(Appellant)		(Respondent)

Present for:
Assessee by : Shri S. Venkataraman, A.R.
Revenue by : Shri Purushottam Kumar, D.R.

Date of Hearing : 10.11.2017
Date of Pronouncement : 08.01.2018

O R D E R

Per D.T. GARASIA, Judicial Member:

The above titled appeals one by the assessee and the other by the Revenue have been preferred against the order dated 16.03.2012

of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2008-09.

2. The first ground relates to disallowance under section 14A of the Act. The assessee a company of the 'Times Group' is is present in all media spectrums spanning across the print, internet, television, radio, outdoor etc. either directly or through subsidiaries. During the A.Y. 2008-09 assessee earned an exempt dividend income of Rs.15.68 crores from investments in shares and securities. The company has also made long term capital gain of Rs.51.22 crores on sale of equity shares and equity oriented mutual funds which was exempt from tax. The said dividend income and long term capital gains have been claimed as exempt from income tax under section 10(34) and 10(38) of the Act respectively. The Assessing Officer (hereinafter referred to as the AO) held that in the preceding year 1% of the dividend income has been disallowed under section 14A after assessee has explained his position. The assessee has also filed the computation of allocation of indirect expenses attributable to earning the exempt income which worked out to Rs.1.18 Cr. However, after insertion of rule 8D there is no occasion for estimation of disallowance under section 14A of the Act by any other method which too is only an estimated allocation of expenses. According to the AO that assessee has incurred interest expenditure and has not given exact details of the sources of the investments in shares and mutual funds. The AO concluded that it could not be ruled out that part of the interest incurred had a proximate connection with the

investments in tax free securities. Therefore, AO , after giving show cause notice, calculated the disallowance by observing as under:

CALCULATION BASED ON VALUE OF INVESTMENTS, THE INCOME FROM WHICH DOES NOT OR SHALL NOT FORM PART OF THE TOTAL INCOME (RULE 8D)			
Interest paid not directly related to exempt income (A)	31.3.2008	31.3.2007	Amounts in Lacs 2,213
Investments:			
Mutual Fund Units- Unquoted	2,352	292	
Equity Shares Unquoted	1	1	
Equity Shares Subsidiaries Quoted	6,194	5280	
Equity Shares others -Quoted	105,809	62,064	
Mutual Funds Units	9605	9481	
Equity Shares -Unquoted	60839	16532	
Subsidiaries – Unquoted Equity shares	40546	37548	
Preference shares- Subsidiaries	12,458	90	
Preference shares- others	13183	4267	
			Average
Total (B)	**250,986**	135,554	193,270
Total Assets (C)	**600,389**	441,979	521,184
Calculation of disallowance u/s 14A:			
(i) Expenditure directly related to exempt income			-
(ii)Expenditure by way of interest not directly related to exempt income (A x B)/C			821
(iii) 0.5% of Average Investments			966
Total Disallowance u/s 14A			1,787

After allowing the credit of suo motto disallowance of Rs. 1,18,11,210/- , the AO disallowed and added a sum of Rs.16,68,88,790/- to the income of the assessee.

3. Matter carried to Ld. CIT(A) and the Ld. CIT(A) has confirmed the same.

4. The Ld. A.R. submitted that assessee company is in media business. During the year assessee has earned the dividend income of Rs.15.68 crores and long term capital gain of Rs.51.22 crores which it claimed as exempt under section 10(34) and 10(38) of the Act. The company was not having any borrowing till 31.03.06 as per audited balance sheet. The counsel for the assessee submitted that the assessee had surplus own fund which can be verified by balance sheet wherein the assessee has share capital of 32 Cr , reserves and surplus of Rs. 3973 Cr and depreciation reserve of Rs. 843 Cr and and has investments in tax free income yielding and securities/investments to the tune of Rs. 3,123 Cr as on 31.3.2008 meaning thereby that the assessee has surplus funds to the extent of Rs. 1,725 Cr. The ld AR took us through the comparative chart of assessee own funds vis a vis investments right from 31.3.2006 to 31.3.2008 which showed that assessee has sufficient interest free own funds to make investments in tax free income yielding securities. The Ld. A.R. submitted that assessee has not incurred any expenses in relation either making of investments or earing of exempt income. The test which has been enunciated in Walfort for attracting the provisions of 14A of the Act. There has to be a proximate cause for disallowance with its exempt income. Once the test of proximate cause, based on the relationship of the expenditure with exempt income is established, a disallowance would have to be effected under section 14A of the Act. The company over the last few years has been on a rapid growth path. The potential of steep

growth in print business encourage the management to embark on a detailed expansion plan. The company has made additions of Rs.510 crores to its fixed assets and its turnover has also increased and the capital borrowing has come down to very nominal level. During the A.Y. 2008-09 the company has incurred an interest expense of Rs.23.04 crores, out of which Rs.20.77 crores pertained to aforesaid borrowings and the balance pertained to statutory interest payments and interest on deposits.

So far as other expenses are concerned, the assessee has carried out investments activities and said expenditure has to be allocated to the exempt income on the basis of total income in respect of which assessee himself disallowed Rs.1,18,11,210/- under section 14A read with rule 8D(2)(iii). The Ld. A.R. submitted that before invoking rule 8D the AO has not recorded any objective satisfaction that how the interest on borrowing was includable for disallowance as well as how the claim of disallowance of Rs.1,18,11,210/- made by the assessee at the time of filing the return was incorrect. The Ld. A.R. has relied upon the decision of Hon'ble Bombay High Court in the case of "CIT vs. Reliance Utilities and Power Ltd." (2009) 313 ITR 340 (Bom). Moreover, the Ld. A.R. has also relied upon the decision of Hon'ble Bombay High Court in the case of CIT vs. HDFC Bank 366 ITR 505. Finally the ld AR prayed before the bench that the appeal may be allowed.

5. The Ld. D.R relied heavily on the orders of authorities below. It was submitted that since the AO has rightly observed that part of

interest incurred had proximate connection with investment s in tax fee security in view of the fact that if the investments have not been made the need for borrowing would not have arisen. The Ld. D.R. submitted that there was no actual evidence on record that for each investment by the assessee , it had sufficient funds available and no working capital or other loans were utilized for investments in securities. He submitted that the case laws relied by the assessee are distinguishable in facts. The Ld. D.R. submitted that the assessee could not prove that fact of having invested in the shares and securities out of own funds. The Ld. D.R. submitted that assessee did not establish that no interest bearing funds or OD has been utilised. He also submitted that the assessee has not produced day to day cash flow statement to corroborate its averments. Thus, the comparison of share capital plus reserves vis-à-vis investments cannot lead to conclusion that the investments were made out of interest free funds. Therefore, Ld. D.R. submitted that the matter may be restored to AO to verify whether the cash balance was available when the investments was made by the assessee and that fact has to be established by the assessee. In the case of "CIT vs. Reliance Utilities and Power Ltd." (supra) there was a clear finding that assessee has own funds wherein this fact is not established in this case.

6. We have heard the rival contentions of both the parties. We find that assessee has produced the chart showing the summary of source and application of funds which was also available before the

AO and is extracted as under for the sake of better understanding of the facts:

Sources	31.03.2006	31.3.2007	31.3.2008	31.3.2009
Share Capital	32	32	32	32
Reserves and Surplus	2625	3119	3973	4347
Depreciation Reserve	523	669	843	1002
A	3180	3819	4848	5381
Application				
Investments on which tax-free income received	882	982	1996	2187
Investments in unlisted shares of subsidiary	313	374	514	807
Other Investments	173	324	613	812
B	1368	1680	3123	3806
SURPLUS (A-B)	1812	2139	1725	1575

It is clear from the records that the assessee has replied to show cause notice issued by the AO and furnished details before the lower authorities by means of above chart that the own funds over the years were sufficient to cover the investments in the shares and securities yielding exempt income. We also note that the borrowings of the assessee company have been utilised for other business requirements and not for making the investments as such. The entire interest expenditure on borrowing fund was incurred in connection with the operating revenue which has been offered to tax. Therefore, no disallowance is required to be made under section 14A of the Act.We also find merit in the contention of the AR that no objective

satisfaction has been recorded by the AO before invoking the provisions of section 14A of the Act and the assessee is supported by the decision of the Hon'ble Jurisdictional Bombay High Court in the case of "Godrej & Boyce Manufacturing Co. Ltd. Vs. DCIT [(2010) 328 ITR 81 (Bom)]" in which it has been held as under:

> "Sub-section (2) of section 14A does not enable the assessing officer to apply the method prescribed by Rule 8D without determining in the first instance the correctness of the claim of the assessee, having regard to the accounts of the assessee. ……. The satisfaction envisaged by sub-section (2) of Section 14A is an objective satisfaction that has to be arrived at by the assessing officer having regard to the accounts of the assessee. ……. An objective satisfaction contemplates a notice to the assessee an opportunity to the assessee to place on record all the relevant facts including his accounts and recording of reasons by the assessing officer in the event that he comes to the conclusion that he is not satisfied with the claim of the assessee."

From the above judgment it is clear that it is necessary for AO to give opportunity to assessee as to why rule 8D should not be invoked. Assessee has placed on all the relevant facts including his accounts qua the claim and it has also given the detailed working qua the suo motto disallowance Rs.1,18,11,210/- voluntarily made by the assessee for earning the exempt income in the return of income. The assessee has claimed that it had all the sufficient funds to cover investments in tax free securities which is corroborated by the financial audited report for various assessment years i.e. 2006-07 and 2007-08 . Even the first appellate authority has recorded the findings that assessee's own funds were for more than the investments in shares and securities yielding tax free income. We notice that the assessee had sufficient own funds and is squarel covered by the ratio laid down by the decision of the Hon'ble

Bombay High Court in the case of "CIT vs. Reliance Utilities and Power Ltd." (2009) 313 ITR 340 (Bom) which reads as under:

> "16. If there be interest-free funds available to an assessee sufficient to meet its investments and at the same time the assessee had raised a loan it can be presumed that the investments were from the interest-free funds available. In our opinion, the Supreme Court in East India Pharmaceutical Works Ltd. v. CIT [1997] 224 ITR 627 had the occasion to consider the decision of the Calcutta High Court in Woolcombers of India Ltd. [1982] 134 ITR 219 where a similar issue had arisen. Before the Supreme Court it was argued that it should have been presumed that in essence and true character the taxes were paid out of the profits of the relevant year and not out of the overdraft account for the running of the business and in these circumstances the appellant was entitled to claim the deductions. The Supreme Court noted that the argument had considerable force, but considering the fact that the contention had not been advanced earlier it did not require to be answered. It then noted that in Woolcombers of India Ltd.' s case [1982] 134 ITR 219 the Calcutta High Court had come to the conclusion that the profits were sufficient to meet the advance tax liability and the profits were deposited in the over draft account of the assessee and in such a case it should be presumed that the taxes were paid out of the profits of the year and not out of the overdraft account for the running of the business. It noted that to raise the presumption, there was sufficient material and the assessee had urged the contention before the High Court. The principle, therefore, would be that if there are funds available both interest-free and over draft and/or loans taken, then a presumption would arise that investments would be out of the interest-free fund generated or available with the company, if the interest-free funds were sufficient to meet the investments. In this case this presumption is established considering the finding of fact both by the Commissioner of Income-tax (Appeals) and the Income-tax Appellate Tribunal."

7. We, therefore, respectfully following the ratio laid down by the Hon'ble Bombay High Court inclined to set aside the order of CIT(A) on this issue and direct the AO to delete the disallowance as made u.s 14A of the Act.

8. The second issue raised by the assessee is against the upholding of order of AO by Ld. CIT(A) on the issue of transfer of Planet M. division in consideration of equity shares and 6% redeemable unsecured debentures being slump sale and therefore liable for tax under section 50B of the Act.

9. The facts in brief are that assessee included an amount of capital gain of Rs.84,26,04,286/- in its total income by a giving a note in its computation of income which is extracted as under:

"The company has w.e.f 1st November 2007 hived off its business of Planet M division consisting of leisure and retail products, on a going concern basis and transferred it to Planet M Retail Ltd. ('PMRL'), then wholly owned subsidiary of the company on a slump exchange basis. The company has been allotted the following scripts amounting to Rs.12595 lacs for transfer of this business:

	Nos.	Face Value	*Amount (Rs.)*
Equity Shares	9,50,000	Rs.10 each	95,00,000
6% Redeemable Unsecured Debentures	1,25,00,000	Rs.100 each	125,00,00,000
			125,95,50,000

The difference between the value of the shares allotted in exchange and the value of the net assets of the business transferred amounting to Rs.82,87,31,848 has been included in Computation of Income as income u1s.50B of the Income Tax Act out of abundant caution and ***without prejudice to the contention of the assessee that the difference is not chargeable to tax under the provisions of the Income Tax Act, 1961.***

In the opinion of the assessee, the transaction of hiving off the business of Planet M division is not a ***"Sale"*** *but is an* ***"Exchange".*** *The same not being a sale therefore does not fall within the definition of "Slump Sale" u/s 2(42C) of the Income Tax Act, 1961. In the circumstances, the transfer of the division on a going concern basis being a "slump Exchange", no value can be ascribed to any asset that was transferred as part of the business. So also the cost of acquisition of the undertaking that was transferred on "Exchange" cannot be arrived at since what has been exchanged is the entire undertaking comprising of the entire division of the Planet M retail. Consequently, since the computation provisions relating to capital gain are incapable of being applied, following the ratio of the decision of the Hon'ble Supreme Court in B.C. Srinivasa Shetty (128 ITR 294), the charging provisions of capital gains are not attracted. The said ratio has also been followed by the Hon'ble Mumbai Tribunal in Avaya Global Connect Ltd. ITA No.832/Mum/07."*

10. During the assessment proceeding, the AO called for the detail working of income of Rs.84,26,04,286/- which was replied by the assessee by letter dated 27.10.10 submitting that the transaction of hiving off the business of Planet M Division was an exchange of the

said division and not sale as contemplated under the provision of section 50B of the Act and as such the provisions of the said section are not applicable. The assessee also relied on the decision of Hon'ble Supreme Court in the case of B.C. Srinivasan Shetty 128 ITR 294 in defense of his argument and submitted that since the cost of acquisition of the said undertaking could not be arrived at and therefore the amount of capital gain of Rs.84,26,04,286/- was not liable to tax since the computation of provision relating to capital gains was incapable of being applied and thus the charging of provision of capital gains fails.

11. The AO rejected the contention and submission of the assessee by observing as under:

> "14.2 I have considered the above submissions made by the assessee with regard to slump sale of Planet M. The same are not acceptable as merely because the consideration is received by way of shares, the transaction's true character of that of slump sale cannot be said to have changed. The Hon'ble Supreme Court's decision relied upon by the assessee was delivered on different facts and when section 50B was not on the statute book. The provisions of section 50B reproduced above make it clear that transfer of an undertaking for a lumpsum consideration amounts to slump sale and nowhere is it specified that the consideration has to be by way of cash only. Further, what is important here is that an undertaking has been transferred to a company, consideration for which has been paid in the form of shares and debentures issued by the company (which are not assets held by the transferee company) and not goods or assets held or owned by the company. It is not the case of exchange of goods or assets owned or held by two parties. The payment of consideration by way of shares is very common in cases of mergers, demergers , takeovers etc and merely for this incidental fact the whole substance of the transaction cannot be equated with that of an exchange. In the elaborate business transfer agreement entered into by the assessee with Planet M Retail Limited ("the transferee"), the assessee has agreed to transfer the entire business of retailing music and other products as a going concern to the transferee on a slump exchange basis .While the assessee has taken care **to use** the word 'exchange' in the agreement ,nowhere else in the agreement there is any reference to any 'exchange'. The substance of the agreement is that of transfer of all assets and liabilities of the running business including intangible assets described in the agreement under **'Article 2-Sale and Transfer of the business'** for a **"consideration"** detailed in Article 3 of the agreement The consideration includes

the shares and debentures listed above The shares are transferable and the debentures are redeemable after a period of 10 years. The debentures are nothing but a liability of the transferee to actually pay for the transfer of the business at a later date with interest. As regards shares in the transferee company they represent investment of the assessee in the transferee company which has a value. Further ,there are other incidental conditions in the agreement like transfer of employees to the transferee company on employment conditions which cannot be less favorable to them than those enjoyed earlier. The transfer of a running business with concomitant conditions for a clear consideration cannot be termed as a mere exchange of goods or things.

14.3 Hence, the assessee's submissions are rejected and the profit on the sale of the undertaking is brought to tax u/s 50B of the Act. The assessee vide submission dated November *25,* 2010 has submitted the certificate u/s 50B signed by an 'accountant[4] as defined in sub-section(2) of section 288 of the Income-tax Act, which shows the computation of capital gain under section 50B of the Income —tax Act, as under:

7 **Particulars**	**Rs.**
Total consideration received for Business Transfer	1,259,500,000
Less:	
Value of Net Worth	416,895,714
Long Term Capital Gain	**842,604,286**

"44.4 In view of the above discussion, an amount of Rs.84,26,04,286/- is treated as **long term** capital gains and taxed at the rates as applicable to Long Term Capital Gains.

12. Aggrieved by the order of AO the assessee preferred appeal before the Ld. CIT(A) who also dismissed the appeal of the assessee by observing as under:

"5.6 I have considered the facts of the case, submission of the appellant and assessment order. There are numerous cases in which a running business is sold by the owner thereof as a going concern and the successor/buyer takes over the assets and liabilities of the business for which the consideration for the transfer is determined as a lumpsum amount by mutual agreement between the parties to the transaction. The issue has been decided by the Supreme Court In the two Judgments in CIT vs. Artex Mfg. Co. (1997) 227 ITR 260 (SC) and CIT vs. Electric Control Gear Mfg. Co. 227 ITR 278 (SC)) and a perusal of both the decisions of the Supreme Court would show that the surplus realized on sale of depreciable asset to the extent of the difference between the written down value and the actual cost being the depreciation actually allowed would be chargeable to tax as deemed business profits under section 41 (2) and the excess over the actual cost of the capital asset realized would be taxable as capital gain. If, however, there is no evidence to indicate the price of the plant, machinery, building, etc., and the depreciation already allowed to the firm is not determinable, the depreciation so allowed cannot be taxed as balancing charge. This is because of the fact that the price identifiable and

attributable to each machinery, plant or building will have to be ascertained and then only the question of computation of balancing charge under section 41(2) would arise for consideration.

5.7 In the case of Artex Mfg. Co, the transfer of business was for a net consideration of Rs.11,50,400/- which was paid by allotment of Rs.11,504 equity shares of Rs.100 each fully paid up allotted to the partners in their respective profit sharing ratio. The assets of the firm were taken at Rs.41,73,973 and liabilities at Rs.30,23,573/- the difference being the net consideration of Rs. 11,50,400. The debt stock was revalued at Rs. 15,87,296/- as against Rs. 4,36,896/- - in the books. The assessee pleaded that no liability to tax on balancing charge under section 41(2) was attracted as the depredation assets were not sold item wise for an identified price for each The Tribunal upheld the levy of income-tax on the surplus as business profit under section 44 thereupon the assessee sought a reference to the High Court which hel4havour of the assessee that no balancing charge was taxable. Against the decision of the High Court of Gujarat in Artex Mfg. Co. vs. CIT 131 ITR 559 (Guj): TC 20R.165, the Revenue came in appeal before the Supreme Court which decided the appeal in favour of the Revenue by reversing the judgment of the Gujarat High Court and by holding that-

> "In the present case, however, it was the admitted case of the assessee before the Income-tax Officer that the plant, machinery and dead stock had been revalued by Hargovandas Girdharlal at the time of the agreement for sale and the amount of Rs.11,50,400 was fixed after taking into account the value of the plant, machinery and dead stock at Rs. 15,87,296 as per valuation by Hargovandas Girdharlal. This shows that at the time of execution of the agreement on 31st March, 1966, the value of the plant, machinery and dead stock that were transferred was Rs. 15,87, 296. Shri Ganesh, learned counsel appearing for the assessee, has submitted that in the present case, the value of the plant, machinery and dead stock is not mentioned In the agreement and the agreement does not indicate the value attributable to the said items. It is no doubt true that in the agreement there is no reference to the value of the plant, machinery, and dead stock. But on the basis of information that was furnished by the assessee before Income-tax Officer, It became evident that the amount of Rs.11,50,400 had been arrived at by taking into consideration the value of the plant, machinery and dead stock as assessed by the valuer at Rs.15,87,296. This is not a case in which it cannot be said that the price attributed to the items transferred is not indicated and, hence, section 41(2) of the 1961 Act cannot be applied. We are, therefore, unable to agree with the view of the High Court that section 41(2) of the 1961 Act is not applicable".
>
> It was further held that-"Since we are of the view that the income was chargeable to income-tax under section 41(2) the decision of the High Court that it was chargeable to tax as capital gain cannot be upheld. But the liability under section 41(2) is limited to the amount of surplus to the extent of difference between the written down value and the actual cost. If the amount of surplus exceeds the difference between the written down value and the actual cost, then the surplus amount to the extent of such excess will have to be treated as capital gain for the purpose of taxation.

5.8 In the case of Electric Control Gear Mfg. Co the net consideration of Rs 8,00,000/- payable by the company by allotment of shares of equivalent value to the partners of the firm in proportion to their share of profits and in the assessment of the firm an aggregate sum of Rs.3,32,863/- was the depreciation allowed in the past years which the Assessing Officer, wanted to be taxed as balancing charge under section 41(2) and such a levy imposed by the Revenue authorities was cancelled by the Tribunal holding that there was no possibility of identification of the consideration for transfer of each capital asset and hence, no amount could be identified or attributed as the price for each depreciable asset and accordingly no question of balancing charge would arise for consideration. But the surplus on sale of capital asset was held to taxable as capital gain.

5.9 It is not denied that subsequent to the aforesaid decisions of Hon'ble Supreme Court, provision of section 50B came into the statute. Thus, even If the contention of learned AR is accepted that the transfer of net assets against allotment of equity or debt instruments of the other company would be a case of an "exchange" and not a "sale" the case would still be covered under the provisions of capital gains simpliscitor as ordained by Hon'ble Supreme Court In the above referred two cases. The facts in the Artex Mafg. Co. and of electric Control Gear Mfg. Co (supra) are identical to those in the case before me In the case of Artex Mfg. Co, the transfer of business was for a net consideration of Rs.11,50,400 which was paid by allotment of Rs.11,504 equity shares of Rs.100 each fully paid up allotted to the partners in their respective profit sharing ratio and in the case of Electric Control Gear Mfg. Co the net consideration of Rs.8,00,000 was payable by the company by allotment of shares of equivalent value to the partners of the firm in proportion to their share of profits. In the instant case also the transfer of net assets of Planet M division was against allotment of equity or debt instruments of the other company.

5.10 I am in agreement with the view of the AO that transfer of business or in acquisition & mergers, payment consideration are often settled by issuance of share/debenture and that what is material is the substance of the transaction and not its form. In CIT v Gillanders Arbuthnot & Co. [1973] 87 1TR 407 contention raised both on behalf of the revenue as well as of the assessee was to the effect that in finding out the true nature of the transaction, the Court must take into consideration the substance of the transaction and not the legal effect of the agreement entered Into and the Supreme Court accepted the proposition. In Sir Kikabhai Premchand v CIT [1953] 24 ITR 506, the Supreme Court had observed "It is well recognised that in revenue cases regard must be had to the substance of the transaction rather than to its mere form.

5 .11 These observations were made the basis for the decision of the Bombay High Court in CIT v Sir Homi Mehta's Executors [1955] 28 ITR 928 Further the Supreme Court in B M Kharwar's case held that the observations in Sir Kikabhai's case to the effect that in revenue cases regard must be held to the substance of the transaction rather than to its mere form and it cannot be read as throwing any doubt on the principle that the true legal relation arising from a transaction alone determines the taxability of a receipt arising from a transaction.

5 12 The recent decision of Mumbai ITAT in the case of Bharat Bijilee Ltd v Additional Commissioner of Income Tax, ITA No.6410/Mum/2008 heavily relied upon by learned AR does not discuss the decisions of Hon'ble Supreme Court in

Artex Mfg. Co. and Electric Control Gear Mfg. Co. It is also noticed that the plea that the case could also be covered under the provisions of capital gain was not discussed and debated before Hon'ble ITAT. In view thereof relying on the decisions of Apex Court and agreeing with view of AO, the additional ground raised is dismissed."

13. The Ld. A.R. vehemently submitted before us that the order of the Ld. CIT(A) is blatantly wrong and against the provisions of the Act as it affirmed the order of AO of not treating the slump exchange of assets in consideration of equity shares and 6% redeemable unsecured debentures and treated the same as slump sale thereby bringing Rs.84,26,04,286/- as long term capital gain. The Ld. A.R. referred to para B of the business transfer agreement which is placed at page No.59 to 83A of the paper book wherein the assessee specifically pointed out that it was mentioned in the said agreement that the transferor has agreed to transfer on a going concern on slump exchange basis. The Ld. Counsel also brought to our notice the para 2.1 of the said agreement which was worded identically and described the transfer as "on a going concern slump exchange basis". The Ld. Counsel also took us through the provisions of section 50B of the Act wherein the language used was slump sale which is defined in section 2(42C) of the Act. The Ld. A.R. submitted that the assessee transferred under business transfer agreement an undertaking Planet M Division ,the cost of acquisition of which could not be arrived at and thus the charging provisions as provided under section 45 of the Act fail resulting into no income tax liability on the said long term capital gain of Rs.84,26,04,286/-. The Ld. A.R. submitted that Rs. 84,26,04,286/-, being the amount of capital

gain resulting from exchange of net assets relating to one division called Planet M Division of business of the assessee , has been included in the computation of income section 50B of the Act out of abundant caution and without prejudice to the contentions of the assessee that the difference resulting from the exchange of Planet M Division is not chargeable to tax under the provision of Income Tax Act, 1961 and the necessary note was appended in the return of income filed by the assessee and also in the annual audit accounts of the assessee. The Ld. A.R. relied on number of decisions in defense of his arguments namely-

1. CIT vs. Motor & General Stores (P) Ltd. 66 ITR 692 (SC)
2. CIT vs. Bharat Bijlee Ltd. 365 ITR 258 Bombay High Court
3. CIT vs. B.C. Srinivasa Setty (1981) 128 ITR 294
4. PNB Finance Ltd. vs. CIT (307 ITR 75)

14. Finally the Ld. A.R. submitted that since undertaking has been transferred under business transfer agreement the cost thereof is not possible to be arrived at or ascertained and therefore the charging of provisions of section 45 fail and consequently the capital gain of Rs.84,26,04,286/- could not be brought to tax. Therefore, the Ld. A.R. prayed for reversal of order of Ld. CIT(A) and issuing necessary direction to the AO to exclude the said amount from the computation of income.

15. The Ld. D.R., on the other hand, vehemently submitted that the amount of Rs.84,26,04,286/- has already been taxed as there has been transfer by hiving off Planet M. division consisting of leisure

and retail products, on a going concern basis. The Ld. D.R. relied upon the orders of the authorities below. The Ld. D.R. relied on the decision of CIT vs. Artex Manufacturing Co. (1997) 227 ITR 260 (SC) and CIT vs. Electric Control Gear Mfg. Co. [1997] 227 ITR 278 (SC) in which the Hon'ble Apex Court has held that surplus realized on sale of depreciable asset to the extent of the difference between the written down value and the actual cost being the depreciation actually allowed would be chargeable to tax as deemed business profits under section 41 (2) and the excess over the actual cost of the capital asset realized would be taxable as capital gain. The Ld. D.R. further argued that even if the contention of Ld. A.R. is accepted for a moment that transfer of net assets in consideration of allotment of equity/debt instruments of the other company would be a case of an "exchange" and not a "sale" the case would still be covered under the provisions of capital gains simpliciter as held by the Hon'ble Court in the two cases (supra).

16. The Ld. A.R. submitted that in the case of sale ,the consideration is often discharged or settled by issuance of shares/debentures and in that case it could not be taken to mean that the said is a case of exchange of assets and not sale and therefore, not liable to tax.

17. Finally the Ld. D.R. relying heavily on the order of Ld. CIT(A) prayed that the order being legally reasoned and devoid of any defect legal or otherwise and therefore should accordingly be affirmed.

18. We have heard the rival contentions and perused the relevant materials placed before us and also gone through the impugned order and the various decisions cited by the rival parties. The undisputed facts are that during the year the assessee hived off a division from its business on 01.11.2007 called Planet M. division consisting of leisure and retail products, on a going concern basis and transferred it to Planet M Retail Ltd., then wholly owned subsidiary of the company on a slump exchange basis for a consideration of Rs.125,95,50,000 which was discharged by way of allotment of 9,50,000 equity shares @ Rs.10/- each and 6% redeemable unsecured debentures of 1,25,00,000 @ Rs.100 each. The difference between the value of shares/debentures allotted in exchange of the said division and the net value of that division amounting to Rs.82,87,31,848/- was shown in the computation of income as income under section 50B of the Act which was stated to be out of abundant caution and without prejudice to the contentions of the assessee that the said surplus was not chargeable to tax under the provision of the Income Tax Act. According to the assessee the transaction of hiving off a business of Planet M. division was not a sale but an exchange and consequently does not fall within the meaning of definition of slump sale under section 2(42C) of the Act. According to the assessee the said transfer of division on a going concern basis being a slump exchange, therefore no value could be arrived and ascribed to any assets that were transferred as going concern in a consolidated manner. Further, the contentions of the

assessee are that the computation provisions qua capital gain are incapable of being applied and therefore the charging of provisions of capital gain cannot be applied. For the purpose of better understanding of provision 2(42C) is extracted below:

> "(42C) "slump sale"72 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 ;]"

19. The above definition has to be analysed in the light of the ratio laid down in the various decisions infra.In the case of CIT v/s Motor & General Stores (P) Ltd (66 ITR 692) the assessee company entered into an "exchange deed" pursuant to which it transferred a cinema house owned by it to a company for a consideration of Rs.l,20,000. The consideration was discharged by the transferee company by way of allotment of 5% cumulative preference shares in the transferee company. The question before the Apex court was whether the transaction was a "sale" or an "exchange" and consequently whether it was liable to tax under the Income Tax Act. After observing that the expressions "sale", "price", and "exchange" were not defined in the Income Tax Act, the Apex court relied on the definitions in the Transfer of Property Act which were as follows: -

> "Sale is a transfer of ownership in exchange for a price paid or promised or part paid and part promised."
>
> "Price is the money consideration for a sale of goods ".
>
> "When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the

transaction is called an "exchange".

After noting the above definitions their Lordships at page 696 held that:-

"The presence of money consideration is, therefore, an essential element in a transaction of sale. If the consideration is not money but some other valuable consideration, it may be an exchange or barter, but not a sale."

20. In the present case the consideration was not money but equity shares and debentures and hence the transaction was not a "Sale" but an "Exchange" and consequently, the provisions of Section 50B of the I.T. Act, are not attracted. In the case of CIT vs. Bharat Bijlee Ltd. (365 ITR 258) where an undertaking was transferred under a Scheme of Arrangement to a company which allotted preference shares and bonds as consideration to the Transferor company. Following the decision of the Hon'ble Supreme Court in Motor & General Stores (P) Ltd. (66 ITR 692), the jurisdictional High Court held that the provisions of section 50B were inapplicable to the transaction. In the case of CIT v. B.C. Srinivasa Setty reported in [1981] 128 ITR 294, the Hon'ble Supreme Court held that section 45 charges the profits or gains arising from the transfer of a capital asset to income-tax. In other words, it charges surplus which arises on the transfer of a capital asset in terms of appreciation of capital value of that asset. In the said judgment, the Hon'ble Supreme Court held that the "asset" must be one which falls within the contemplation of section 45. It is further held that the charging section and the computation provisions together constitute an integrated code and when in a case the computation provisions

cannot apply, such a case would not fall within section 45. In the present case, the banking undertaking, inter alia, included intangible assets like, goodwill, tenancy rights, man power and value of banking licence. On the facts, we find that item-wise earmarking was not possible. On the facts, we find that the compensation (sale consideration) of Rs.10.20 crores was not allocable item-wise as was the case in Artex Manufacturing Co. [1997] 227 ITR 260. For the aforesaid reasons, we hold that on the facts and circumstances of this case, which concerns the assessment year 1970-71, it was not possible to compute capital gains and, therefore, the said amount of Rs.10.20 crores was not taxable under section 45 of the 1961 Act. Accordingly, the impugned judgment is set aside. The Hon'ble Supreme Court in the case of CIT vs. B.C. Srinivasa Shetty (128 ITR 294) laid down the following ratio at page 299:

> "Section 45 is a charging section. For the purpose of imposing the charge, Parliament has enacted detailed provisions in order to compute the profits or gains under that head . ..... All transactions encompassed by section 45 must fall under the governance of its computation provisions. A transaction to which those provisions cannot be applied must be regarded as never intended by section 45 to be the subject of the charge..... The character of the computation provisions in each case bears a relationship to the nature of the charge. Thus, the charging section and computation provisions together constitute an integrated code. When there is a case to which the computation provisions cannot apply at all, it is evident that such a case was not intended to fall within the charging section."

21. After considering the facts of the assessee's case in the light of aforesaid decisions we are of the view that the case of the assessee is squarely covered by the ratio laid down by the Hon'ble Apex Court and the various High Courts. Whereas the decision as relied upon by the Ld. D.R. in defense of his argument is actually

distinguishable on facts. Accordingly, we hold that the Planet M Division transferred by the assessee as on a going concern basis where no cost of acquisition is possible to be attributed individual assets in that undertaking and therefore the charging of provisions of section 45 are not attracted . We further hold that the provisions of section 50B are not applicable to this case as it is a case of slump exchange and not a slump sale. Accordingly we set aside the order of CIT(A) and direct the AO not to tax the amount of capital gain of Rs.84,26,04,286/-.

22. In the result, appeal of the assessee is allowed.

ITA No.3537/M/2012 (Revenue's appeal)

23. The only issue raised by the Revenue in this appeal is against the deletion of the disallowance of Rs.50,64,781/- by the Ld. CIT(A) as made by the AO by disallowing software expenses relating to website portal as capital in nature.

24. The facts in brief are that the assessee is in the business of printing and publishing of newspapers and periodicals on various online additions of Times of India, Economic Times, Mahabharat Times, Navbharat Times as well as various portals viz. Property Times, Education Times etc. The assessee incurred various expenses during the year in order to maintain its online portals. During the course of assessment proceedings, the AO called for the details of these expenses which was accordingly submitted. During

the year the assessee incurred a total expenditure of Rs.74,73,026/- being software application expenses incurred in relation to website/portals out of which Rs.50,64,781/- was treated as capital expenditure by the AO and consequently disallowed on the ground that Rs.50,64,781/- related to development of website yielding benefit of enduring nature. The details of the said expenditure is given in the assessment order in para 10.2. In the appellate proceedings the Ld. CIT(A) allowed the appeal of the assessee by following the order of his predecessor for A.Y. 2007-08 which was decided in favour of the assessee.

25. We have heard the rival contentions and perused the material on record including the impugned order. We find that the Ld. CIT(A) allowed the appeal of the assessee by following the earlier order for A.Y. 2007-08 which has attained finality. We have observed that order of Ld. CIT(A) is correct and does not suffer from any infirmity as it has been passed after considering the facts of the case in the light of the similar issue decided in A.Y. 2007-08 which attained finality. Also on merit the issue has been correctly decided as the expense are of revenue nature and therefore we are inclined to uphold the same.

26. Appeal of the Revenue is dismissed as above.

Order pronounced in the open court on 08.01.2018.

Sd/-	**Sd/-**
(Rajesh Kumar)	**(D.T. Garasia)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Dated: 08.01.2018.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.