IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH "G" DELHI)

BEFORE SHRI G.D. AGRAWAL, HON'BLE VICE PRESIDENT
AND SHRI A.D. JAIN, JUDICIAL MEMBER

ITA No. 4274(Del)2011
Assessment year: 2008-09

Asstt.Commissioner of Income Tax, Circle 33(1), New Delhi.	v.	Smt. Sangeeta Wij, 11/15, East Patel Nagar, New Delhi.
(Appellant)		(Respondent)

Appellant by: Mrs. Shumona, Sr. DR
Respondent by: S/Shri Pradeep Dinodia &R.K.Kapoor, CA

ORDER

PER A.D. JAIN, J.M

This is Department's appeal for the assessment year 2008-09 against the order dated 29.6.2011 of the CIT(A)XXVI, New Delhi, contending that the ld. CIT(A) has erred in deleting the addition of Rs. 1,20,00,000/- received by the assessee as compensation, as business profit u/s 28(va) of the I.T. Act, since the assessee has been found to have received the said amount as compensation for not carrying on any business activity in relation to the business, which, as per the provisions of section 28(va), is chargeable as income under the head 'profits and gains of business'.

2. The assessee, individual, during the year, was engaged in providing consultancy in Civil Engineering under the name and proprietorship of M/s. S.D. Engineering Consultants. This concern was taken over by ICT-SD Engineering Consultants Pvt. Limited w.e.f. 31.10.2007. The assessee also received salary from M/s. ICT-SD Engineering Consultants Pvt. Ltd. in the capacity of Director, income from capital gain and other sources.

3. The AO observed that during the year, the assessee had received a compensation of Rs. 1,20,00,000/- against the discontinuance of her proprietary business. It was observed that as per the copy of Agreement dated 4.12.2007 between IST-SD Engineering Consultants Pvt. Ltd. and Mrs. Sangeeta Wij (the assessee), proprietor of M/s. S.D. Engineering Consultants, the total enterprise value of the proprietary business of M/s. S.D. Engineering Consultants Pvt. Ltd. including good-will, empanelments, receivables, work in progress and all other rights and entitlements, as per the schedule attached, had been decided and determined at Rs. 1,20,00,000/-, as follows:-

Computation of Goodwill

Agreed consideration	(A)	1,20,00,000
Amount of Sundry Debtors taken over		68,62,759.00
Cost of Fixed Assets taken over		8,06,256.00
Amount of opening balance of banks		91,890.00
		77,60,905.00

Less: Loan against car		5,81,242.51
	(B)	71,79,662.49
Cost of good-will (A-B)		48,20,337.51
	Or say	48,00,000.00

The AO observed that however, the balance sheet of M/s. S.D. Engineering Consultants on 31.3.2006, 31.3.2007 and 31.10.2007 showed the following comparison:-

A.Y.	2006-07	2007-08	31.10.2007
Capital	5,49,282.49	13,29,060.35	4,37,725.37
Unsecured loans	7,97,451.00	6,06,755.00	4,85,403.00
Current liabilities	9,58,925	2,67,731.50	2,21,361.60
Fixed Assets	12,40,268.00	11,99,535.00	9,70,122.00
Investments	8,26,250.00	8,45,000.00	
Current Assets	1,000.00	58,029.00	1,06,943.00
Loans & Advances	1,05,215.00	63,965.00	71,859.00
Cash & Bank balances	1,32,925.49	37,017.85	1,231.00
Total Assets	23,05,658.00	22,03,546.85	11,50,154.97
Net profit	18,11,068.00	9,64,928.86	6,81,187.62

The AO observed that the net worth of the proprietary concern as on 31.10.2007 was of Rs. 4,73,725/-, as per Form 3 CEA filed by the assessee and also as per the clarificatory statement of the assessee dated 19.10.2010; that taking this figure into account, the value of the good-will came to Rs. 1,15,26,275/-; and that therefore, the good-will of the

proprietary concern had been grossly over-valued, which had not been substantiated by the financial statement of the proprietorship concern.

4. The AO further observed that as per para 11 of the aforesaid Agreement, it had been stated that Mrs. Sangeeta Wij shall work exclusively as a whole-time Director of the Company for a minimum period of 5 years, starting on a salary of Rs. 2,00,000/- per month plus perks, as agreed to between the parties, that such remuneration shall be received each year, provided that in case she was relieved before the expiry of five years by the controlling group led by Shri K.K. Kapila, she would be adequately compensated, that she shall not carry out any activity or encourage, directly or indirectly in any other business directly or indirectly related to the business of ICT-SD Engineering Consultants Pvt. Ltd., and that however, she would be at liberty to do any business whatsoever after quitting or leaving ICT-SD Engineering Consultants Pvt. Ltd. From these contents of para 11 of the Agreement, the AO observed that it was evident that the compensation of Rs.1,20,00,000/- was not a capital receipt liable for capital gains as claimed by the assessee, but a business receipt and that rather, the compensation was not for carrying out any activity in relation to the business of the Company; that as per section 28(va)(a) of the Act, any sum, whether received or receivable in cash or kind, under an agreement for not carrying out any

activity in relation to any business shall be chargeable to Income Tax under the head 'profits and gains of business or profession'.

5. It was in this manner that the AO held the compensation of Rs. 1,20,00,000/- received by the assessee to be her business income and added it to the total income of the assessee under the head 'business income'.

6. By virtue of the impugned order, the ld. CIT(A) deleted the aforesaid addition.

7. Aggrieved, the Department is in appeal before us.

8. Challenging the impugned order, the ld. DR has contended that while wrongly deleting the addition correctly made, the ld. CIT(A) has failed to take into consideration the settled position that as per section 28(va)(a) of the Act, any sum received under an agreement for not carrying out any activity in relation to any business is chargeable to tax as profits and gains of business or profession; that the AO had correctly taxed the amount of Rs.1,20,00,000/- under the provisions of the said section 28(va) of the Act; that the ld. CIT(A) has illegally ignored the contents of para 11 of the Agreement dated 4.12.2007 between ICT-SD Engineering Consultants Pvt. Ltd. and the assessee, though the said para has explicitly been reproduced in the assessment order; that the contents of the aforesaid para 11 of the Agreement clearly evidence that the compensation of Rs. 1,20,00,000/- was not a capital receipt liable for

capital gains, but was a business receipt in the shape of compensation for not carrying out any activity relating to the business of the Company and, therefore, liable to tax u/s 28(va)(a) of the Act; that the compensation was admittedly received against discontinuance of the proprietary business of the assessee; that the amount had been taken as consideration for slump sale by the assessee and had been shown as a capital receipt and offered as capital gains u/s 50 C of the Act; that the ld. CIT(A) has wrongly held the receipt to be a revenue receipt; that the AO had lifted the veil over the Agreement; that the ld. CIT(A) failed to appreciate the AO's findings; that a copy of the Agreement in question is at pages 30 to 32 of the Assessee's Paper Book ('APB', for short); that in fact, no finding was recorded by the ld. CIT(A) regarding the issue of compensation paid for discontinuance of business; that in these circumstances, where the AO has gone behind the Agreement and has made the addition taking into consideration the surrounding circumstances, the case of 'Mc Dowell', 154 ITR 148(SC) gets squarely attracted; and that therefore, the order of the ld. CIT(A), being entirely unsustainable in law, be ordered to be cancelled, while reviving the addition correctly made by the AO by allowing the appeal filed by the Department.

9. The learned counsel for the assessee, on the other hand, has strongly relied on the impugned order, contending that the assessee is an

M.Tech (Structures) from IIT, Delhi; that her field of specialization is in designing of structures, Public Health Engineering and Fire Protection Services; that she has designed over 500 projects all over the world; that these projects are of all kinds, i.e., Metro Corridor, Railway Coach Factory, Hospitals, Schools, Fire Stations, Police Stations and commercial and residential projects for PWD, CPWD, DLF, Ansals, Jaypee and JMD, etc.; that she has an experience of over 25 years; that she and Shri K.K. Kapila, CMD, ICT Pvt. Ltd. formed a Company by the name of ICT-SD Engineering Consultants Pvt. Ltd., in the Agreement pertaining to which newly formed Company, it was agreed that the newly formed Company had taken over the assets and liabilities of SD Engineering Consultants as a going concern on the close of business as on 31.10.2007 for a total consideration of Rs. 1,20,00,000/-, inclusive of good-will, vide Memorandum of Understanding dated 30.10.2007, which was followed by the said Agreement dated 4.12.2007; that it was, in fact, a slump sale and it was in compliance with the provisions of section 50 B(2)/(3) of the Act, that the assessee furnished a Report of the Chartered Accountant in Form 3 CEA, determining the net worth at Rs. 4,73,725/-; that as such, there was a long term capital gain of Rs. 1,15,26,275/-, exemption whereon was availed u/s 54 F of the Act; that while making the addition, the AO completely disregarded the provision in the aforesaid Agreement dated 4.12.07, to the effect that the

consideration of Rs. 1,20,00,000/- was for take over of the business as a going concern as on the close of the business on 31.10.07, inclusive of good-will, empanelments, receivables, work in progress and all other rights and entitlements; that the AO further failed to take into consideration the undisputed fact that there was absolutely no competition in the business carried on by the assessee and that of Shri K.K. Kapila, Shri K.K. Kapila being engaged in the business of providing consultancy services in the field of Airports, Highways and Bridges and that a large chunk of their business related to providing PMC by way of Project Management Consultancy; that Shri K.K. Kapila did not have any past experience whatsoever in working on building projects; that S.D. Engineering Consultants, i.e., the assessee's concern, on the other hand, had been handling a large variety of building projects including Metro Stations, Rail Stations, Bus Terminals, Hospitals, Schools, Colleges and Industrial Projects, namely, Cement and Power Plants, Rail Coach Factory, Pharmaceutical Plants and Chemical Plants, etc.; that even the AO himself did not find the transaction entailed by the aforesaid Agreement to be a collusive transaction between the assessee and Shri K.K. Kapila; that the addition made by the AO, in fact, was a result of complete misreading of the Agreement in question; and that the ld. CIT(A) has correctly appreciated the factual as well as the legal position and has only thereafter deleted the addition wrongly made,

which deletion of the addition has been ordered by passing a detailed reasoned order that does not require any interference whatsoever.

10. It has been contended that the present case falls squarely under Proviso (i) to Section 28 (va) of the Act, where-under, any sum received on account of transfer of the right to carry on any business is not taxable u/s 28(va), the same being taxable under the head "capital gains". Reliance has been placed on the following case laws:-

1. "ACIT v. B.V. Raju", 138 ITD 1 (Hyd)(SB) = 18 Taxmann.com, 188-(Hyd)- (Trib)(SB) (copy placed on record); and

2. "CIT v.Media World Publications Pvt. Ltd.", 337 ITR 178(Del) = 2011-TIOL-371-HC-DEL-IT (copy placed on record).

11. We have heard both the parties and have perused the material on record. The assessee is a specialist in designing of structures, public health and fire protection services, having designed over 500 projects in India and abroad, including Public Health Engineering services for the Metro Corridor, Railway Coach Factory, Hospitals, Schools, Fire Stations, Police Stations and commercial and residential projects for PWD, CPWD, DLF, Ansals, Jaypee and JMD, etc., was the proprietor of SD-Engg.Consultants. She formed a Company with one Sh.K.K. Kapila, who was engaged in Project Management Consultancy for various projects in India and abroad. The Company is known as ICT-SD Engineering Consultants Pvt. Ltd. Vide a Memorandum of

Understanding dated 30.10.2007, (copy placed at pages 35-36 of the APB), followed by an Agreement dated 4.12.2007 (copy at pages 30 to 34 of the APB), it was agreed that the newly formed Company had taken over the assets and liabilities of the business of S.D. Engg. Consultants as a going concern on the close of business as on 31.10.2007, for a total consideration of Rs. 1,20,00,000/-, inclusive of good-will, empanelments, receivables, work in progress and all other rights and entitlements. Out of the said consideration of Rs. 1,20,00,000/-, a sum of Rs.54,00,000/- was to be paid by Rs. 54,000/- fully paid up the equity shares of ICT-SD Engineering Consultants Pvt. Limited. At this juncture, it would be appropriate to reproduce here-under, the relevant clauses of the said Agreement:-

> *"1. That M/s. ICT-SD Engineering Consultants Pvt. Ltd. have taken over the assets and liabilities of the business of the party of the second part, i.e., Mrs. Sangeeta Wij under the name and style M/s. S.D. Engineering Consultants Pvt. Ltd. as a going concern as on the close of business as on 31.10.2007, such assets being described in detail in the Schedule attached to this Agreement.*
>
> *2. That the total Enterprise value of the proprietary business of M/s. S.D. Engineering Consultants Pvt. Ltd. including good-will, empanelments, receivables, work in progress and all other rights and entitlements as per Schedule attached herewith has been decided and determined at Rs. 1,20,00,000/- (rupees one hundred and twenty lakhs only).*
>
> *3. That the share of the party of the second part hereto in the enterprise value as described in para 2 above shall be paid by the*

party of the first part to the party of the second part in the following manner:-

> *a) Rs. 22,00,000/-(rupees twenty two lakhs) by account payee cheque No. 043706 dated 05.12.2007 drawn on Axis Bank, Green Park, New Delhi.*
>
> *b) Rs. 44,00,000/- (rupees forty four lakhs) by account payee cheque No. 043707 dated 15.12.2007 drawn on Axis Bank, Green Park, New Delhi.*
>
> *c) Rs. 54,00,000/-(rupees fifty four lakhs) by 54,000 fully paid up equity shares in the company for which share certificates will be executed and duly handed over as per procedure to the second party within fifteen days of the execution of this Agreement."*

12. As per the Agreement, the sale was for a lump-sum consideration without value being assigned to individual assets. The assessee maintained that the transfer of the business was as a going concern. This is also evident from the Agreement, particularly para 6 thereof, which runs as follows:-

> "*6. That it is expressly agreed to between the parties hereto that the party of the first part has taken over all the assets and liabilities as a going concern, as described in the Schedule attached herewith and the party of the second part shall be personally responsible for all the liabilities and other obligations in respect of the business of M/s. SD Engineering Consultants of completed contracts/works till 31.10.2007, such liabilities to include without limitation all existing or future liabilities and all statutory dues relating to the business, completed contracts/works till 31.10.2007, but shall in no case include any liabilities whatsoever arising on account of unfinished/incomplete business carried on hitherto by the second party and taken over by the first party and executed/completed subsequent to 31.10.2007.*

It has been made clear that such liability is limited to only completed and finished contracts/works till 31.10.2007. Any liability in respect of unfinished/running/unexecuted works/contracts shall be the responsibility of the party of the first part who has taken over these contracts/works as a going concern with effect from 01.11.2007 (after the close of the business of 31.10.2007) as any receipts recovered subsequent to the date of take over shall be on account of party of the first part, though in the name of party of the second part."(emphasis supplied).

13. As per section 2(42C) of the I.T. Act:

"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.

14. The assessee having carried on business for 11 years, she computed long term capital gains qua the slump sale under section 50B of the I.T. Act and under the said section, she furnished the Report of a Chartered Accountant in Form 3 CEA, determining the net worth at Rs. 4,73,725/-, taking the Written Down Value of depreciable assets and the book value of the other assets, in accordance with Explanation 2 to section 50B of the Act. The long term capital gain was thus calculated at Rs. 1,15,26,275/-. Seeking to avail exemption thereon u/s 54 F of the Act, the assessee invested Rs. 1,76,64,235/- by purchasing an apartment in Westend Heights, DLF City-V, Gurgaon, on 13.6.2008. The complete documentation regarding the sale of her business and purchase of the said house property were furnished before the AO. Along with the return of income filed at Rs. 16,78,570/-, the Tax Audit Report u/s 44AB, Balance

Sheet and the aforesaid Report in Form 3 CEA were filed by the assessee. In the assessment proceedings, on query, all details regarding the slump sale, the capital gains and the investment in the house property were furnished by the assessee before the AO.

15. In the assessment order passed, the AO held that the assessee had received the amount of Rs. 1,20,00,000/- as "compensation for not carrying on any business activity in relation to any business", which, according to the AO, was chargeable as profits and gains of business, u/s 28 (va) of the Act.

16. The ld. CIT(A) deleted the addition.

17. The question before us is as to whether the ld. CIT(A) is correct in having deleted the addition made by the AO.

18. The AO having invoked the provisions of section 28(va) of the I.T. Act, it would be appropriate to reproduce here-under, the said provision (relevant provision):

> *Section 28(va):*
>
> *"Any sum, whether received or receivable, in cash or kind, under an agreement for –*
>
> *(a) Not carrying out any activity in relation to any business; or*
> *(b) Not sharing any know-how, patent, copyright, trade-mark, licence, franchise or any other business or commercial right of similar nature or information or technique likely to assist in manufacture or processing of goods or provision for services:*
>
> ***Provided** that sub-clause(a) shall not apply to –*

(i) any sum, whether received or receivable, in cash or kind, on account of transfer of the right to manufacture, produce or process any article or thing or right to carry on business, which is chargeable under the head "Capital gains."

19. Thus, according to the main provisions of section 28(va), as sought to be applied by the assessee to the present case, any sum received under an agreement for not carrying out any activity in relation to any business, is chargeable to income as "profits and gains of business".

20. It is, however, seen that herein, the sum received was not for carrying out any activity in relation to any business. Rather, it is patent on record, that the business itself was transferred by the assessee, for a lump-sum consideration, with effect from 31.10.2007, when the firm of the assessee ceased to operate consequent upon the slump sale of the business as a going concern. The intention of the assessee is eloquently clear from the Disclosure of the Accounting Policies (APB 27), filed before the AO. As per clause 1B thereof:-

"The firms ceases its operations w.e.f. 31.10.2007 consequent to the slump sale of the business."

21. Further, as per clause 1C of the aforesaid Disclosure of Accounting Policies :-

"The Written Down Value Method has been adopted to provide depreciation on Fixed Assets. Depreciation has been charged upto the date of slump sale of the undertaking."

22. Further, as noted above, the assessee had filed before the AO, the Report of an Accountant in Form 3 CEA. This Report is a report required to be filed u/s 50B(3) of the I.T. Act, relating to computation of capital gains in the case of a slump sale. A copy of the said Report is at APB 28. As per item 2 thereof:-

> *"2. Details of the undertaking or division, transferred assets by way of slump sale:*
>
> *(a) Address/Location-M/s. S.D. Engineering Consultants,11/15, East Patel Nagar, New Delhi-110008.*
>
> *(b) Nature of business- Consultancy in Civil Engineering."*

22.1 As per item 3 of the said Report:

"3. Name, address and permanent account No. of the person who has purchased the undertaking or division referred to in item 2. - ICT-SD Engg. Ltd. A-9, Green Park Main, N.Delhi-11016. PAN: AABC17918R.

22.2. As per item 4 thereof:-

> *"4. Date of slump sale of the undertaking or Division referred to in item 2 - 31st Oct.2007."*

22.3. As per item 5 thereof:-

> *"5. Amount of consideration received for Slump sale referred to in item 2 - Rs.1,20,00,000/-"*

23. Further, as per Explanation 2 to section 50 B, for computing the net worth of the concern in the case of the slump sale, the WDV of depreciable assets is to be taken and the book value of the other assets is to be taken. Now, as per item 6 of the aforesaid Report of the Accountant in Form 3 CEA:-

6. Net worth of the undertaking or division referred to item 2:

(a)In case of depreciable assets, written down value of the Undertaking or division transferred by way of slump sale, determined in accordance with sub item (C) of item(i) of sub-clause (6) of section 43.	*Rs.9,70, 122/-*
(b)In the case of other assets, book value of Such assets.	*Rs.1,80,033/-*
(c) Aggregate value of total assets of the undertaking or division transferred by way of slump sale [(a)+(b)]	*Rs.11,50,155/-*
(d)Value of liabilities relatable to the undertaking or Division as appearing in the books of account.	*Rs. 7,12,430/-*
(e)Net worth of the undertaking or division [(c) -(d)]	*Rs. 4,73,725/-*

24. As per the Schedule of Fixed Assets of S.D. Engineering Consultants for the year ended 31.10.2007 (APB 25), the WDV of the concern has been shown at Rs.9,70,122/-.

25. Then, as per the balance sheet of M/s. S.D. Engineering Consultants, as on 31.10.2007, the aggregate value of total assets has been shown at Rs. 11,50,154.97.

26. The above facts were all placed before the AO by the assessee and the AO never raised any dispute with regard to the veracity thereof.

27. The balance sheet of ICT-SD –Engineering Consultants Pvt. Ltd. as on 31.3.08, including all its annexures (copy at APB 38 to 46) was also placed before the AO beside the copy of sale deed of house property purchased by the assessee (APB 47 to 52), the ledger account of S.D. Engineering Consultants for the period from 1.4.07 to 31.10.07 (copy at APB 55 to 57), showing, inter alia, including loans and TDS payable (professional), copy of bank statement of Union Bank of India for the period from 1.4.07 to 31.10.07 (APB 58), bank statement of Union Bank of India for the period from 31.5.07 to 31.3.08 (APB 59 to 60), and copy of bank statement of Punjab National Bank for the period from 1.8.07 to 12.9.07 (copy at APB 61-62). All these documents were considered by the AO and no fault therewith was found. It is only that the AO took the consideration received by the assessee, amounting to Rs. 1,20,00,000/-, as compensation for not carrying on any activity in relation to the business of the Company and bringing it to tax as profits and gains of business u/s 28(va) of the Act.

28. Now, item 5 in the Report in Form No. 3 CEA (supra) reads as follows:-

"5. Amount of consideration received for Slump sale referred to in item 2 - Rs.1,20,00,000/-"

29. Therefore, the AO was also wrong in observing that from the details filed by the assessee, it stood revealed that during the year, the assessee had received "compensation" of Rs. 1,20,00,000/-. The AO further erred in observing that this "compensation" was received by the assessee against the discontinuance of her proprietary business. In fact, while observing that "this concern was taken over by ICT-SD-Engineering Consultants Pvt. Ltd. w.e.f. 31.10.2007", the AO has himself admitted that the concern of the assessee was taken over w.e.f. 31.10.2007 and that there was no discontinuation of the assessee's proprietary business. The business was, as noted, taken over as a going concern. The fact that it was being continued after the take over is clear from clause 13 of the Agreement (supra). The said clause 13 of the Agreement reads as follows:-

"13. That w.e.f. the close of business on 31.10.2007, S.D. Engg.Consultants shall be a proprietary unit of party of the first part, who has taken over the same as a going concern."(emphasis ours)

30. Further, the first para at APB 31 reads as follows:-

"Whereas the party of the first part hereto has offered to the party of the second part hereto to take over all the assets and liabilities

> *including goodwill etc. of the business of M/s. S.D. Engineering Consultants as a going concern, subject to clause 6 of the Agreement at an enterprise value mutually agreed between the parties."(*emphasis ours*)*

31. The second para at APB 31 states as under:-

> *"And whereas the party of the second part has accepted the offer of the party of the first part and agreed to transfer all the assets and liabilities of the business M/s. SD Engineering Consultants as on the close of business as on 31.10.2007, subject to clause 6 of the Agreement, to the party of the first part (such assets being described in detail in Schedule attached herewith) at an agreed enterprise value of Rs. 1,20,00,000(rupees one crore and twenty lakhs only)."*

32. Therefore, a reading of the Agreement (supra) makes it amply clear that the business of the assessee was taken over by ICT-SD-Engg. Consultants Pvt. Ltd. as a going concern, for a lump-sum *consideration*, and not "compensation", of Rs. 1,20,00,000/-.

33. Then, in the third para on the second page of the assessment order, the AO has observed as follows:-

> *"As per the copy of Agreement executed on the 4th day of December, 2007 between IST-SD Engineering Consultants Pvt. Ltd. and Mrs. Sangeeta Wij, proprietor of M/s. S.D. Engineering Consultants, the total enterprise value of the proprietary business of M/s. S.D. Engineering Consultants Pvt. Ltd. including good-will, empanelments, receivables, work in progress and all other rights and entitlements as per Schedule attached had been decided and determined at Rs. 1,20,00,000/- (rupees one hundred and twenty lakhs only)."*

34. Thus, the AO was in the know of the fact, and accepted it as such, that the consideration of Rs. 1,20,00,000/- was an enterprise value of the business of M/s. SD Engg. Consultants, inclusive of good-will,

empanelments, receivables, work in progress and all other rights and entitlements. So much so, even the break up of the assets, as shown in the books of the acquiring Company, M/s. ICT-SD Engg. Consultants Pvt. Ltd., including the amount of good-will, as appearing in their balance sheet for the assessment year 2008-09, post take over, has been reproduced by the AO in the assessment order, at page 2 thereof. The good-will was taken at Rs. 48,20,337.51, rounded off to Rs. 48,00,000/- and was shown as such in the balance sheet of M/s. ICT-SD Engineering Consultants Pvt. Ltd. (copy at APB 38 to 46). As per the balance sheet of ICT-SD-Engineering Consultants Pvt. Ltd., under Application of Funds (APB 38), investments have been shown at Rs. 48,00,000/-. The relevant Schedule 6 with regard thereto appears at APB 40 and therein, the entry is as under:-

> *"6. Investments:*
>
> *Goodwill (at cost) Rs.48,00,000/-"*

35. This position, undoubtedly, was verified by the AO from the balance sheets of ICT-SD Engineering Consultants, which were requisitioned directly from them u/s 133(6) of the Act, vide Order dated 16/20.12.2010 and asking them to provide a Schedule of calculation of total enterprise value mentioned in the Agreement along with audited balance sheets for the assessment years 2007-08 to 2009-10 and to show

as to whether the assets of the slump sale had been incorporated in the balance sheet.

36. Though the AO, referring to para 11 of the Agreement (supra), observed that the assessee was to work exclusively as a whole time Director of ICT-SD Engineering and took this to be a circumstance going against the claim of the assessee, it was ignored that the employment of the assessee was a whole time employment entailing the normally prevalent condition that she would not engage in any other activity related to the business of the Company. Besides, para 11 of the Agreement (APB 33) also states that:-

> *" …………………….. However, the party of the second part shall be at liberty to do any business whatsoever after quitting or leaving the party of the first part."*

37. In this regard, as per the appointment letter issued to the assessee by ICT-SD-(copy at APB 37), on her appointment as Managing Director of ICT-SD Engineering, the assessee was to receive a Basic Pay of Rs. 1,20,00,000/-, House Rent Allowance of Rs. 60,000/-, Transport Allowance of Rs. 800/- and General Allowance of Rs. 19,200/-, total amounting to emoluments of Rs. 2,00,000/-.

38. It is thus evident that no material whatsoever was brought on record by the AO to the effect that the payment of Rs. 1,20,00,000/- was for the assessee not to engage in any business. Even so, the AO opined

that the "compensation" of Rs.1,20,00,000/- was not a capital receipt liable to capital gains, but was a business receipt falling under "business income" and that rather, the "compensation" was for not carrying out any activity in relation to the business of the Company, which was taxable u/s 28(va) of the Act. This, despite the fact that the recitals in the Agreement (supra) are specific, clear and unambiguous and even the AO himself did not record a finding holding the Agreement either to be sham, or not acted upon the parties thereto. The contention of the ld. DR that the AO has "lifted the veil" over the Agreement, carries no weight inasmuch as, in fact, despite the lucid contents of the Agreement, this Agreement was tried to be re-written by the AO, which is wholly impermissible in law. That the amount of Rs.,1,20,00,000/- was *indeed* the consideration and not the compensation, is amply clearly borne out from the stand taken by the parties to the Agreement, their respective audited balance sheets and the statutory reports filed in support of the claim of slump sale. The consideration has not been proved not to be for the take over of the assets and liabilities of the business of SD-Engineering Consultants as a going concern on the closure of the business on 31.10.2007, inclusive of good-will, empanelments, receivables, work in progress and all other rights and entitlements. As such, the amount of Rs. 1,15,26,275/-, arrived at by the AO as representing the value of good-will, in fact represented long term capital

gains within the meaning of the provisions of section 50B of the Act, such provisions being special provisions for the computation of capital gains on a slump sale and providing for deduction of net worth for the sale consideration to arrive at the figure of capital gains. The computation of good-will, in fact, does not stand contemplated in section 50B and it is the computation of capital gains on slump sale which the said section deals with. The net worth, for the purposes of section 50B, is to be computed according to the formula prescribed in Explanations (1) & (2) to the said section and the aggregate of the total assets is to be the WDV of the Fixed Assets and the book value of the other assets.

39. Further, it was not the case of the AO that the Agreement between the assessee and ICT-SD was between related parties or that the transaction was not at an arm's length consideration, or that the transaction was a collusive one, or that the Agreement was a sham Agreement, or even that the Agreement was not actually acted upon by the parties thereto. Hence, the genuineness of the Agreement is beyond the pale of any doubt whatsoever, even as per the AO.

40. That the Agreement has to be construed in accordance with the words contained therein and the circumstances in which it is executed, has been well settled in "CIT v. Delhi Flour Mills Co. Ltd.", 35 ITR 15 (SC). Also, it has been held in "Narayan Prasad Vijaivargiya v. CIT", 102 ITR 748 (Cal), that a deed has to be read as a whole and that effect should be

given to all parts thereof. In "Belapur Company Ltd. v. Maharashtra State Farming Corporation", 1972 Bom L.R. 246, dealing with the ambit of Proviso (6) to Section 92 of the Evidence Act, it was held that the fundamental Rule of Construction of a document is to ascertain the intention of the parties to it from the words used in the document, which are considered to be the written declaration of their minds. Meaning thereby, that the Agreement at hand could not have been tried to be re-written, as has been done by the AO, nor could a new Agreement be sought to be made out for the parties. The intention of the parties to the Agreement is to be gathered from the form of the document and from its contents, taken in their entirety. In fact, in "CIT v. Motor & General Store Pvt. Ltd.", 66 ITR 692 (SC), it has been, inter alia, held that when the transaction is embodied in a document, the liability to tax depends upon the meaning and the context of the language used in the document, in accordance with the ordinary rules of construction. The Agreement could have either been rejected in totality or accepted in its entirety. There was no mid-way available to the AO. Herein, though, the AO, while not bringing anything on record to refute the veracity of the Agreement, has sought to interpret it in a manner un-envisageable in law under the garb of lifting the veil over the Agreement. This, in fact, amounts to a conduct of approbation and reprobation, which cannot be resorted to by an AO in his dual capacity of Investigator as well as Adjudicator. The Hon'ble

Supreme Court in "Lakshmikanta Jha (Pandit) v. CIT", 75 ITR 790 (SC) and "CIT v. Gillanders Arbuthnot & Co.", 87 ITR 407 (SC), has held that it is not open to the Income Tax Authorities to deduce the nature of the document from the purported intention by going behind the document, or to consider the substance of the matter, or to accept it in part, or reject it in part, or to re-write the document merely to suit the purpose of Revenue.

41. Further still, in "CIT v. B.M. Kharwar", 72 ITR 603 (SC), it was held that the Taxing Authorities are not entitled, in determining whether the receipt is liable to tax, to ignore the legal character of the transaction which is the source of the receipt and to proceed on what they regard as "the substance of the matter"; and that the Taxing Authority is entitled and bound to determine the true legal relation resulting from a transaction.

42. To further bring into focus the intention of the parties to the Agreement, it would not be out of place to reproduce the relevant parts of the Agreement in clauses/paras:-

> *"1. That M/s. ICD-SD Engineering Consultants Ltd. have taken over the assets and liabilities of the business of the party of the second part, i.e., Sangeeta Wij under the name and style of S.D. Engineering Consultants Pvt. Ltd. as a going concern as on the close of business as on 31.10.2007 (such assets being described in detail in the Schedule attached to this agreement).(*emphasis supplied)
>
> *2. That the total enterprise value of the proprietary of M/s. S.D. Engineering Consultants Pvt. Ltd. including goodwill, empanelments, receivables, work-in-progress and all other rights and entitlements, as per Schedule attached herewith, has been*

*decided and <u>determined at Rs. 1,20,00,000</u> (rupees hundred and twenty lakhs only.)(*emphasis supplied)

*13. That with effect from the close of business on 31.10.2007, S.D. Engineering Consultants Pvt. Ltd. <u>shall be a proprietary unit of the first part, who has taken over the same as a going concern.</u>"(*emphasis supplied*)*

43. Then, the factum of the assessee having claimed exemption u/s 54 F of the Act has nowhere been disputed by the AO. The investment by the assessee in a residential property, in order to claim exemption u/s 54F of the Act is patent on record and has nowhere been challenged.

44. Further, CBDT Circular No. 779 dated 14.9.99 explains the sale of business for a lump-sum consideration, without assigning value of individual assets and liabilities, to be a slump sale liable for capital gains u/s 50B. The relevant portion thereof reads as follows:-

"56/4 (xx) A new section 50B has been inserted in the Income Tax Act containing special provision for computation of capital gains in the case of slump sale. It provides that the profits and gains arising from slump sale shall be chargeable to income tax as capital gains arising from transfer of long term capital assets in the previous year in which the transfer takes place. However, the profits and gains arising from such transfer of one or more undertakings held for less than 36 months shall be deemed to be short term capital gains. It is further provided that the net worth of the undertaking or the division shall be deemed to be the cost of acquisition and cost of improvement for the purpose of sections 48 and 49 and the provisions contained in the second proviso to section 48 relating to adjustment for cost inflation index shall be ignored. The "net worth" of the undertaking shall be determined with reference to the net worth of the company. It is also provided that the assessee shall furnish a report of an Accountant in the prescribed form (Form No. 3CEA)along with the return of income

in the case of slump sale indicating the computation of net worth of the undertaking or division and certifying that the same has been correctly arrived at. The expression "net worth" means net worth as defined in clause (ga) of sub-section (1) of section 3 of the Sick Industrial Companies (Special Provisions) Act, 1985, net worth has been defined in this Act as under:-

"Net worth" means the sum total of the paid-up capital and f ree reserves.
Explanation – For the purposes of this clause, "free reserves" means all reserves credited out of the profits and share premium account but does not include reserves credited out of re-evaluation of assets, write back of depreciation provisions and amalgamation."
The scope and effect of the substitution (w.e.f. 1.4.2000) of new Explanations 1 and 2 in place of then Explanation to section 50B by the Finance Act, 2000 have been elaborated in the following portion of the Departmental Circular No. 794, dated 9th August, 2000, as under:-

29.2, The Finance Act, 2000, therefore, substitutes the definition of "net worth" in sub-section (2) of section 50B to now define "net worth" as the aggregate of the cost of depreciable assets as reduced from the block of assets of the transferor company in accordance with section 43(6)(c)/((i)(c) and the value of other assets transferred as appearing in the books of account ignoring any revaluation. From this, the value of liabilities will be reduced to arrive at "net worth"(only relevant para reproduced)."

45. In para 6.7 of the impugned order, it was observed by the ld. CIT(A) that the investment of Rs. 1,76,64,725/- in residential property had been made by the assessee against capital gain of Rs. 1,15,26,275/-, which far exceeded the net consideration and the assessee having fulfilled all the conditions therefor, the assessee was entitled to complete exemption u/s 54F of the Act.

46. The above entire conspectus of facts and law was duly taken into consideration by the ld. CIT(A) while deciding the matter in favour of the assessee and it was rightly held that the AO was not justified in changing the treatment of the income of the assessee from capital gain u/s 50B to income from business u/s 28(va) of the Act. Thus, correctly directing the AO to treat the amount of Rs. 1,15,26,275/- as long term capital gains of the assessee, the ld. CIT(A) rightly deleted the addition of Rs. 1,20,00,000/- wrongly made by the AO.

47. The assessee, in fact, is correct in contending that the case is covered by the Proviso (i) to section 28(va). The said Proviso stands reproduced hereinabove. This Proviso, it is seen, as applicable to the facts of the present case, provides that section 28(va)(a) shall not apply to any sum received on account of transfer of a right to carry on business, which is chargeable as capital gains. Herein, as discussed in the preceding paras, what was transferred was a right to carry on business and that being so, application of the main section 28(va)(a) is foreclosed and forbidden, by the use of the words "shall not" in the Proviso.

48. In "ACIT v. B.V. Raju" (supra), it has been held that:-

> *"If a payment is in the nature of non-compete fee received by the transferor when he sells his business and agrees not to carry on the business which he transfers, then that would fall for consideration under (category (b) referred to earlier) section 55(a) "right to carry on business". If the non-compete fee is paid to persons associated with the transferor, then the same would fall for consideration only under sec. 28(via)(a) of the Act introduced*

> *by the Finance Act, 2002, w.e.f. 1.4.2003. It is significant to note that the words used in Sec. 28(va)(a) of the Act are "not carrying out any activity in relation to any business". The proviso (i) to section 28(va)(a) provides for exception to cases where such receipt[ts are taxable as capital gain viz., where any sum is receied for transfer of a right to carry on any business which is chargeable to tax as capital gains. When the transferor is already carrying on business and agrees not to carry on business transferred, then the same would fall for consideration only under sec. 55(2)(a) of the Act."*

49. Thus, in "B.V. Raju" (supra), the Special Bench has specifically dealt with the clear difference between a situation where there is no carrying out of any activity "in relation to any business" and the "right to carry on any business". Whereas the former has been held to be taxable u/s 28(va) of the Act, the latter has been held exigible to tax u/s 55(2)(a) of the Act. When applied to the case of the assessee, the ratio of "B.V. Raju" (supra) brings the assessee's case squarely within the Proviso to section 28(va) of the Act. This is so, because, as deliberated upon herein- before, the amount of Rs. 1,20,00,000/- was received by the assessee for transferring her right to carry on business.

50. The assessee's business, it may be reiterated, was itself transferred, as a going concern to ICT-SD.

51. Moreover, now, even the jurisdictional High Court in "CIT v. Media World Publications Pvt. Ltd."(supra), has held that the right to carry on any business has been recognized by the Legislature as a capital asset, taxable u/s 55 (2)(a) of the Act and not taxable u/s 28(va) thereof.

52. In view of the above, we do not find any error whatsoever in the order of the ld. CIT(A), which we hereby confirm. Finding no merit in the grievance sought to be raised by the Department, the same is rejected.

53. In the result, the appeal filed by the Department is dismissed.

Order pronounced in the open court on 25.05.2012.

Sd/-	sd/-
(G.D. Agrawal)	(A.D. Jain)
Vice President	Judicial Member

Dated: 25.05.2012.
*RM

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

True copy

By order

Assistant Registrar