Slump Sale and Its Subtleties: Structuring Transfer of Undertakings in a Multi-Statute Landscape

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I. Context

The slump sale or a business transfer (in common parlance) has emerged as the dominant structuring tool for business transfers in India. Whether it is a listed entity vesting its renewable energy undertaking into a dedicated subsidiary on a slump sale basis, or a diversified conglomerate's transfer of its consumer goods business, the underlying commercial logic is consistent: transfer a going concern as a single economic unit, preserving contractual relationships, regulatory permissions, and operational continuity. What follows is a technical mapping of the terrain that one must navigate across direct tax, indirect tax, stamp duty, and transfer pricing, identifying the specific inflection points where structuring choices create or dilute value.

II. Direct Tax: Interplay of Section 2(42C), Section 50B, and the Rule 11UAE Framework

A. The Definitional Expansion

Section 2(42C) of the Income-tax Act, 1961 (“ITA”) now defines slump sale as the transfer of one or more undertakings 'by any means' for a lump sum consideration without values being assigned to individual assets and liabilities. The replacement of 'as a result of the sale' with 'by any means' was not cosmetic. It brought slump exchanges, where the transferor receives shares or other non-cash consideration, squarely within the taxing provision. Group reorganisations effected through share swaps, which were earlier outside the charging section, now attract capital gains under Section 50B of the ITA.

It bears recalling that prior to the insertion of Section 50B by the Finance Act, 1999, slump

sales occupied a peculiar position in the capital gains architecture: the Supreme Court's ratio in CIT v. B.C. Srinivasa Setty[1] held that where the cost of acquisition of an asset is indeterminate, the computation mechanism under Section 48 fails and no capital gains can be levied. Since a slump sale transfers an undertaking as a whole without assigning values to individual assets, the cost of acquisition was arguably indeterminate, and the B.C. Srinivasa Setty principle served as the doctrinal basis for the position that slump sales fell outside the capital gains net altogether. Section 50B was the legislative response to this gap, prescribing 'net worth' as the deemed cost of acquisition and thereby bringing slump sales within a workable computation framework.

Section 50B taxes gains as long-term capital gains at 12.5% (plus surcharge/ cess) where the undertaking has been owned and held for more than 36 months (unlike other capital assets where the period of holding is either 12 months i.e., for listed shares, or 24 months i.e., for other capital assets). The cost of acquisition is the “net worth” of the undertaking: book value of non-depreciable assets plus tax written-down value of depreciable assets, minus book value of liabilities. The revaluation reserve is expressly excluded. This exclusion matters considerably for asset-light tech companies, where self-generated intangibles may have been capitalised, or land-heavy companies, where land is carried at historical cost; any attempt to inflate the cost base through revaluation will not reduce the taxable gain. The consideration for Section 50B purposes is the actual consideration or the tax consideration (after adjusting for the stamp duty reckoner value of immovable properties, net book value of unlisted shares, and fair market value of listed shares), whichever is higher. There are no deemed income implications in the hands of the transferee under Section 56(2)(x) of the ITA, since an “Undertaking” is not “Property” as defined therein, which includes individual capital assets such as land or building, and shares or securities, amongst other things, but not an “Undertaking” as a whole[2].

B. Rule 11UAE: The Deemed FMV

Rule 11UAE introduces two parallel valuations for determining the full value of consideration under Section 50B, and the higher of the two is deemed to be the consideration for capital gains purposes.

FMV1 is the fair market value of the capital assets transferred, computed on an adjusted net asset value basis: immovable property at stamp duty value, listed shares at market price, unlisted shares under Rule 11UA, and other assets at book value, reduced by liabilities (excluding reserves, share capital, and tax provisions). FMV1 operates as a floor: regardless of what the parties agree as consideration, the transferor's capital gains liability cannot be computed on a base lower than the aggregate fair market value of the assets leaving the undertaking. It bites where the undertaking contains immovable property whose stamp duty value materially exceeds book value, or where unlisted shares held by the undertaking carry a Rule 11UA valuation above their carrying cost.

FMV2 is the fair market value of the consideration received, whether monetary or non-monetary. In a pure cash transaction, FMV2 equals the cash received. The structural significance of FMV2 emerges in slump exchanges, where consideration is discharged through the issuance of instruments rather than payment of cash. A slump exchange is, in substance, the determination of a lump sum consideration and its discharge by way of issuance of an instrument; the valuation risk attaches to both the quantum and the instrument through which it is settled. Where the consideration is equity shares of an unlisted company, FMV2 is computed under Rule 11UA using the adjusted net book value

(for unlisted companies), methodology and fair value for listed shares. Where it is a straightforward debt instrument, the FMV would ordinarily be the agreed redemption amount. However, where the consideration takes the form of hybrid or convertible instruments, the FMV2 computation becomes materially more complex since the fair market value would be the value which the instrument would fetch in the open market. The choice between instruments can produce meaningfully different FMV2 outcomes on identical economic terms.

C. Part Undertakings, Negative Net Worth, and Intangibles

Several related questions recur in practice. Whether a part of an undertaking qualifies for slump sale treatment was answered affirmatively in Rohan Software Ltd v. ITO[3], provided what is transferred constitutes a business activity as a whole, confirming that a sectoral carve-out or a divisional separation can qualify as a slump sale if the transferred portion is capable of independent operation as a business. Conversely, where separate consideration is assigned to each asset, the transaction is an itemised sale and taxable as asset transfer (without any corresponding reduction against liabilities transferred), not a slump sale, as held in ACIT v. RPG Life Sciences Ltd[4], with the further consequence that individual asset transfers attract GST at applicable rates rather than the going concern exemption. The critical drafting discipline in BTA or scheme documentation is to avoid inadvertent allocation of values to individual assets except for the limited purpose of stamp duty determination, which Section 2(42C) itself expressly permits.

The treatment of negative net worth remains unresolved. The Special Bench of Mumbai ITAT in Summit Securities[5] held that negative net worth must be added to the sale consideration, increasing the taxable gain. The Mumbai ITAT in Zuari Industries[6] declined to follow that approach, but on narrower facts: the net worth was negative only under the WDV-based computation prescribed by Section 50B, while the commercial net worth of the undertaking was positive. The ITAT held that the seller did not derive any real economic benefit from such negative net worth, and accordingly it was not added back while computing capital gains. The two decisions are therefore not squarely opposed on identical facts, and the question of whether negative net worth must be added back where the undertaking is genuinely economically impaired, as in leveraged infrastructure SPVs or early-stage project companies, remains open. Buyers negotiating the acquisition of such undertakings would need to factor this uncertainty into the pricing discussion.

On intangibles, whether book-recorded intangibles form part of net worth depends on their tax written-down value and whether the booking involved revaluation. Post-Finance Act 2021, self-generated goodwill not acquired by purchase from a previous owner is taken at nil, further compressing the cost base and inflating the taxable surplus.

III. Slump Sale Through a Scheme: Three Structural Advantages Over a Business Transfer Agreement

A. Appointed Date: Clean Economic Cut-Off

A scheme of arrangement under Sections 230 to 232 of the Companies Act, 2013 permits the parties to fix an appointed date that precedes the NCLT sanction order, with economic consequences deemed to flow from that date. The financial results, regulatory obligations, and contractual performance of the transferred undertaking accrue to the transferee from the appointed date, irrespective of when the NCLT order is eventually passed. The

appointed date need not be retrospective; it may be a prospective date tied to regulatory or commercial milestones, giving the parties flexibility to select the cleanest economic cut-off for the transfer. In sectors governed by long-term contracts, whether power purchase agreements, EPC contracts, concession agreements, or similar frameworks, this eliminates the need for interim period adjustments, working capital true-ups, and indemnity provisions that a BTA requires. A BTA creates a hard economic cut-off on the execution date; a scheme permits a seamless transition through the concept of Appointed Date. The additional time consumed by the scheme process is frequently offset by the reduction in closing mechanics and post-closing uncertainties.

B. Transfer of Pre-Qualification Credentials and Track Record

For EPC companies, power generators, and infrastructure developers, pre-qualification credentials and demonstrated execution track record are frequently more valuable than the physical assets being transferred. An NCLT-sanctioned scheme effects the transfer by operation of law, recognising the transferee as the legal successor of the transferred undertaking. Government agencies, PSUs, and multilateral institutions evaluating bidders on prior execution experience would ordinarily accept NCLT-sanctioned succession with significantly less friction than contractual novation under a BTA, where each counterparty must independently consent.

C. Stamp Duty: A Quantitative Comparison

Under the Maharashtra Stamp Act and comparable state legislations, a slump sale through a scheme attracts stamp duty computed at approximately 0.7% of the net book value of the undertaking or 5% of the market value of immovable property, whichever is higher, subject to a cap of 10% of the value of shares allotted or consideration paid. Under a BTA, stamp duty is charged as an ad valorem conveyance: approximately 3% on net consideration (excluding immovable property) plus 5% on immovable property market value, without capping. For transactions of any meaningful size, the higher stamp duty rate and the absence of a cap under the BTA route can produce a stamp duty differential that materially alters the post-tax economics of the transfer, making the choice between scheme and BTA a structuring variable in its own right.

IV. GST: The Going Concern Exception Exemption and Its Limits

The transfer of a going concern as a whole is not subject to GST. The exception is contingent on substance: assets, liabilities, employees, and contracts necessary for independent operation must transfer together. A selective asset cherry-pick, or failure to transfer employees and liabilities, risks recharacterisation as an itemised asset sale with each component attracting GST at applicable rates. This mirrors the RPG Life Sciences risk on the direct tax side: form must align with substance. On input tax credit, the transferor may transfer unutilised credit to the transferee through the prescribed mechanism; failure to do so triggers reversal provisions for exempt supplies, creating an avoidable ITC cost.

V. Transfer Pricing: The Section 92B(2) Overlay

Section 92B(2) provides that a transaction between an enterprise and a non-associated person shall be deemed an international transaction if a prior agreement exists between that person and the enterprise's associated enterprise, or if the terms are determined in

substance by the associated enterprise. The practical question in cross-border group restructurings is whether a global framework, under which a foreign parent directs its Indian subsidiary to transfer a business to another Indian entity, triggers 92B(2) and subjects the consideration to arm's length scrutiny. Judicial precedents have generally held that where the Indian entities independently determined the terms and consideration, the deemed international transaction provision is not attracted, and that a slump sale between Indian subsidiaries of a foreign holding company does not automatically fall within Section 92B, even if the transaction is at net book value (subject to deemed consideration norms under Rule 11UAE). A domestic transfer between two Indian entities does not become an international transaction merely because both are ultimately held under a foreign parent; the enquiry under section 92B(2) turns on whether the terms, conditions or pricing are in substance determined by the associated enterprise arrangement. Precautions such as ensuring no reference to a global deal value in the Indian transaction documents, maintaining separate board-level records, and documenting an independent Indian valuation exercise are important safeguards against a 92B(2) challenge.

VI. The Big Picture

The slump sale endures as the preferred mechanism for business transfers in India not because of its tax architecture, but despite it. The commercial logic is prior to and independent of the multi-statute framework mapped in this article.

The fundamental advantage is continuity. A business is not a collection of assets; it is a living system of contracts, permissions, relationships, and institutional knowledge. A slump sale preserves that system intact. The transferee inherits a functioning operation, not a set of components that must be reassembled. In industries where regulatory approvals take years to obtain, where customer relationships are built over decades, or where operational licences are non-transferable on an asset-by-asset basis, this continuity is not a convenience but a precondition for value preservation. A slump sale also compels both parties to negotiate a single number for the entire undertaking, forcing a commercial conversation about enterprise value rather than a piecemeal negotiation over individual assets.

But the slump sale also creates structural consequences that must be weighed against these advantages. Where the consideration is cash, it accrues to the transferor company, not its shareholders. Unless the transferor has a deployment plan for that cash, whether reinvestment, debt reduction, or a pre-identified acquisition, the proceeds sit trapped at the entity level, and extraction to shareholders triggers a second layer of tax, whether through dividend distribution or buyback. A demerger, by contrast, delivers value directly to shareholders in the form of shares in the resulting company, bypassing the entity-level cash trap entirely. The choice between slump sale and demerger is therefore not merely a tax optimisation question; it is a question about where the value should land and in what form.

Where the consideration is non-cash, the risks shift but do not disappear. If the transferor receives equity shares in the transferee, it assumes market value risk: the shares received today may trade at a discount tomorrow, and the capital gains tax was computed on the FMV2 at the date of transfer, not at the date of eventual monetisation. If the transferor receives redeemable preference shares, the instrument offers the comfort of a fixed redemption value and a defined exit timeline, but the Companies Act prescribes redemption out of profits or out of the proceeds of a fresh issue of shares made for the

purpose of redemption. If the transferee company does not generate sufficient profits, or is unable to raise fresh capital, the redemption obligation becomes a contractual right without a practical remedy, and what appeared to be quasi-cash consideration at the time of structuring becomes an illiquid exposure. Compulsorily convertible instruments avoid the redemption risk but reintroduce the equity value risk at conversion, and optionally convertible instruments leave the transferor holding an option whose exercise depends on future conditions that may not materialise as projected.

The tax, stamp duty, GST, and transfer pricing considerations mapped in the preceding sections are the cost of executing commercial logic within a multi-statute framework. They must be navigated with precision, and the structuring choices between scheme and BTA, between cash and instrument-based consideration, and between the various valuation methodologies will determine how much of the commercial value survives the transaction. But the decision to pursue a slump sale, and the choice of consideration form, is at its core a business decision about where value should reside, in what form, and subject to what risks. The technical architecture exists to serve that decision, not to drive it.

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[1] CIT v. B.C. Srinivasa Setty [TS-2-SC-1981]

[2] Syndicate Bank Ltd. v. Additional CIT [TS-5102-HC-1985(Karnataka)-O]

[3] Rohan Software Ltd v. ITO [TS-5461-ITAT-2007(Mumbai)-O]

[4] ACIT v. RPG Life Sciences Ltd [2009-TIOL-645-ITAT-Mum] (Mumbai ITAT)

[5] DCIT v. Summit Securities Ltd. [TS-140-ITAT-2012(Mum)]

[6] Zuari Industries Ltd. v. ACIT [TS-50-ITAT-2006(Mum)]