

IN THE INCOME-TAX APPELLATE TRIBUNAL “F” BENCH MUMBAI

BEFORE SHRI PAWAN SINGH JUDICIAL MEMBER AND

SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER

ITA No. 4418/Mum/2016 (Assessment Year 2012-13)

Universal Medicare Pvt. Ltd., Capsulation Premises, Sion Trombay Road, Deonar, Mumbai-400088. PAN: AAACU0717B	Vs.	DCIT, Central Cricle-3(2), Mumbai (Erstwhile Asst. Commissioner of Income Tax, CC-20, Mumbai), Room No. 1923, 19 th Floor, Air India Building, Nariman Point, Mumbai-400021.
Appellant		Respondent

C.O. No. 268/Mum/2017 (Assessment Year 2012-13)

DCIT, Central Cricle-3(2), Mumbai (Erstwhile Asst. Commissioner of Income Tax, CC-20, Mumbai), Room No. 1923, 19 th Floor, Air India Building, Nariman Point, Mumbai-400021.	Vs.	Universal Medicare Pvt. Ltd., Capsulation Premises, Sion Trombay Road, Deonar, Mumbai-400088. PAN: AAACU0717B
Appellant		Respondent

Appellant by : Shri J.D. Mistry Senior Advocate with
Shri Manish Shah Advocate

Respondent by : Mrs. S. Padmaja (CIT-DR)

Date of Hearing : 11.12.2019

Date of Pronouncement : 06.03.2020

ORDER UNDER SECTION 254(1) OF INCOME TAX ACT

PER PAWAN SINGH, JUDICIAL MEMBER;

1. This appeal by assessee and cross objection by revenue are directed against the order of learned Commissioner of Income –tax (Appeals) [Id. CIT(A)-51, Mumbai dated 14.03.2016 which arises from the assessment

order dated 29.03.2014 passed under section 143(3) for Assessment Year 2012-13.

2. Brief facts of the case are that the assessee is a company engaged in manufacturing and trading of Pharmaceutical Products. The assessee filed its return of income for relevant Assessment Year on 28.11.2012 declaring total income of Rs. 495,49,42,070/-. During the assessment, the Assessing Officer noted that Universal Medicare Pvt. Ltd. (UMPL) 'assessee' has sold its marketing division to M/s Aventis Pharma Ltd. (APL), (now known as Sanofi) the assessee has shown total sale consideration against the sale of marketing division of Rs. 567.07 crore. However, in the computation of income, the assessee has shown Capital Gain of Rs. 477.30 crore only, on sale of marketing division, after deducting Rs. 89.73 crore. The assessee claimed that total sale consideration payable to the assessee amounts is Rs. 567.07 crore, out of which Rs. 89.49 crore is placed by the purchaser in a Escrow Account opened with Hongkong and Shanghai Banking Corporation Ltd. (HSBC), which will accrued to the assessee company in five annual equal instalment annually, subject to fulfilment of certain obligation being on the achievements of the performance targets every year. Further, out of Rs. 89.45 crore, the assessee has offered Rs. 17.89 crore being first instalment and remaining Rs. 71.56 crore was kept/shown/deposit in Escrow Account with HSBC Bank. The Assessing Officer issued show-

cause notice as to why the entire amount in the Escrow Account should not be taxed as the income being part of Capital Gain accrued to the assessee on sale of marketing division. The assessee filed its reply stating that the amount will be realized in five equal annual instalments on fulfilling certain specific conditions and can be taxed only year of realization. The extract of reply of assessee is recorded by Assessing Officer in para-3.1.2 of the assessment order.

3. The reply/ explanation furnished by assessee was not accepted by Assessing Officer by taking view that section 50B clearly states that any profit or gain arising from slum sale effected in the previous year shall be chargeable to tax as Capital Gain arising out from the transfer of Long Term Capital Asset and shall be deemed to be income of the previous year in which transfer took place. The business in which Capital Gain on slum sale earned was transferred on 03.11.2011 accordingly; the Capital Gain from transfer cannot accrue in instalments.
4. Secondly, the assessee is following the accrual system of accounting and the income earned is accrued to the assessee on sale of transfer. The contention of assessee is that the amount is kept in Escrow Account is not released to the assessee is not accepted.
5. Thirdly, as per section 2(42C), in case of slum sale, the undertaking which is transferred as a whole, single unit without values being attached to the new asset and liabilities. The consideration of Rs. 567 crore earned

on selling the marketing division is directly related to slum sale and income is earned because of transfer of marketing division and does not have any bearing on any other things (conditions).

6. Fourthly, once the agreement is executed, the transfer took place and any payment or obligation can spread over some time, this does not mean that transfer is also happening over a period of time. The transfer is one time event whereas payment can happen over a period which is agreed between the parties. As the transfer took place on 03.11.2011, major part of consideration was received on the day itself i.e. Rs. 477.62 crore, out of Rs. 567.07 crore i.e. 84% of total consideration.
7. Fifthly, the amount kept in Escrow Account has no relation, whatsoever with the transfer of marketing division. It has only bearing of supply agreement between the parties.
8. And sixthly on going through the Escrow agreement and supply agreement, the Assessing Officer took the view that interest on the amount kept in Escrow Account belong to the seller and that assessee has offered interest of Rs. 3.03 crore accrued on full Escrow Account from 03.11.2011 to 31.03.2012. The assessing officer took his view that these facts clearly establish that the amount is clearly earned by assessee. The Assessing Officer brought the remaining amount of Rs. 71.57 crore, kept in Escrow Account to tax as income of assessee for the assessment year under consideration.

9. On appeal before the Id. CIT(A), the action of Assessing Officer was affirmed. The Id. CIT (A) while affirming the action of Assessing Officer held that as per the agreement, the business of distributing and selling Pharmaceutical Products a going concern was sold on slump sale basis. The assessee also entered with business purpose agreement to supply certain Pharmaceutical Products to the purchaser. As per the supply agreement, the assessee shall supply certain product to purchaser/APL as per terms and conditions against which it would received separate amount for a period five years to ensure these supplies without any disruption to Escrow agreement was executed. As per the Escrow agreement, an amount of Rs. 89.45 crore was kept in Escrow account in HSBC Bank. The claim of assessee that amount of Rs. 17.89 crore being released in five annual equal instalments would accrue to the assessee whenever said instalment is realized; which is subject to fulfilling of certain conditions and should be taxed in relevant Assessment Year, but as per business purpose agreement closing means, the completion of sale and purchase of business pursuant to clause-(7) of Sale Agreement. Clause-(7), the date and place of closing, closing event, payment of closing and breach of closing obligation, the closing events also define in schedule -(6) of the Agreement and on further scrutiny of agreement, the Id. CIT(A) took the view that purchaser has paid the entire amount of closing date and it is the assessee who had instructed the purchaser to

keep the amount in the Escrow Account. The Id. CIT(A) further took his view that on conjoint reading of various clauses of the agreement that sale transfer is not linked to Escrow Account and the assessee, as the guarantee of supply agreement placed certain amount in the Escrow Account and the same is not linked to the sale of business. The Id CIT(A) concluded that it is like a bank guarantee against the performance. The assessee instead of paying this amount separately allowed APL/purchaser to keep the part of consideration in the Escrow Account, the sale of business/marketing division is irrevocable and completed on the closing date mentioned on the agreement and finally concluded that he concur with the finding of Assessing Officer that amount kept in Escrow Account has no relation whatsoever to the transfer of marketing division and accordingly, the Assessing Officer rightly brought the capital gain to tax the entire gain for the year under consideration.

10. Further aggrieved by the order of Id. CIT(A), the assessee has filed the present appeal before this Tribunal by raising the following grounds of appeal:

1. On the facts & circumstances of the case the Learned Commr. of Income Tax (A) has erred in confirming the addition of Rs.71,56,00,000/- while computing the long term capital gain in case of slump sale of business during A.Y. 2012-13. The Learned Commr. Of Income Tax (A) has erred in concluding that the capital gains accrued to the extent of Rs.71,56,00,000/- during the A.Y. 2012-13 and is chargeable to tax. The conclusion reached by the Learned Commr. of Income Tax (A) is erroneous and the appellant prays that the addition of Rs.71,56,00,000/- may be deleted.

2. On the facts & circumstances of the case the Learned Commr. of Income Tax (A) has erred in concluding that sale consideration of Rs.567.07 crores for transfer of marketing division accrued to the appellant during A.Y. 2012-13 and consequently the resultant chargeable long term capital gain is to be increased by Rs.71,56,00,000/-. The appellant prays that during A.Y. 2012-13 the sale consideration of Rs.477.30 crores only accrued to the appellant and the long term capital gain is to be worked out based on the sale consideration accrued to the appellant amounting to Rs.477.30. The appellant prays that the addition made by the Learned Assessing Officer and confirmed by the Learned Commr. of Income Tax (A) amounting to Rs.71,56,00,000/- may be deleted.

3. On the facts & circumstances of the case the Learned Commr. of Income Tax (A) has erred in rejecting the claim of the appellant that the sum of Rs.89.45 crores being the part sale consideration out of Rs.567.07 crores did accrue to the appellant and the appellant was entitled to the said sum only on happening of certain events in future. The sale consideration of Rs.89.45 crores was to accrue in future depending upon fulfillment of certain obligations undertaken by the appellant. At the point of time when the Transfer of Business took place the sale consideration of Rs.477.30 crores was only accrued and the appellant prays that the long term capital gains in case of slump sale of business be computed considering the sale consideration of Rs.477.30 crores and consequently the addition made by the Learned Assessing Officer and confirmed by Learned Commr. of Income Tax (A) amounting to Rs.71,56,00,000/- may be deleted.

4. On the facts & circumstances of the case the appellant prays that the sale consideration which did not accrue and which was not received by the appellant and kept under Escrow account amounting to Rs.89.45 crores may not be treated as the sale consideration accrued to the appellant for the purpose of computing long term capital gain in case of slump sale of business for A. Y. 2012-13.

5. On the facts & circumstances of the case the Learned Commr. of Income Tax (A) has erred in rejecting the claim of the appellant of the defalcation loss of Rs.5,00,00,000/-. The Learned Commi. of Income (A) erred in concluding that the appellant cannot raise the ground regarding the deflation

loss of Rs.5,00,00,000/- in A.Y. 2012-13. The conclusion reached by Learned Commr. of Income Tax(A) is erroneous and the appellant prays that the loss suffered on account of defalcation loss amounting to Rs.5,00,00,000/- may be allowed while computing the total income.

6. The Learned Commr. of Income Tax (A) has erred in rejecting the claim of appellant that no interest u/s 234B be levied for A.Y. 2012-13. On the facts & circumstances of the case the appellant prays that interest levied u/s 234B by Learned Assessing Officer and confirmed by the Learned Commr. Of Income Tax (A) be deleted.

11.The assessee vide application dated 09.09.2017 raised the following additional grounds of appeal:

On the facts and circumstances of the case and in law, the Ld.AO and the Ld.CIT(A) erred in computing capital gains arising from transfer of the "Marketing Division" even when the "Full Value of Consideration" arising as a result of transfer of the said division was not determinable and, thus, the mechanism to compute capital gains failed.

12.On service/filing the additional ground of appeal, the revenue filed its Cross Objection (CO) by raising following grounds of cross objection:

"Whether on the facts and circumstances of the case and in law, the assessee is justified in filing additional grounds of appeal disputing calculation of capital gain by AO, which was upheld by CIT(A), on the ground that the full value of consideration arising as a result of transfer of said division was not determinable, even though the company itself declared the said transfer as a slump sale by filing Audit Report in Form 3CEA and the purchaser M/ s Sanofi India Ltd has reflected the entire amount i.e. Rs. 567.07cr in A.Y 2012-13".

13. We have heard the submission of Shri J.D. Mistry, Id. senior Counsel/Authorised Representative (AR) of the assessee and Miss. S. Padmaja, Id. CIT-DR for revenue and perused the record carefully. We

have also gone through the orders of lower authorities with the active assistance with Id. Sr. Counsel and Id. CIT-DR for the revenue. In support of submission of additional ground of appeal, the Id. AR of the assessee submits that vide application dated 09.09.2017, the assessee has raised the additional ground of appeal, which is purely legal in nature. The Id. Sr. Counsel submits that no additional facts are required to be brought on record. The facts relating to the raising of additional ground of appeal are emanating from the order of lower authorities. The Id. Sr. Counsel submits that the revenue has filed cross objection. The cross objection is barred by limitation. No proper application for condonation of delay of Cross Objection is filed by revenue, the Id. Sr. Counsel submits that the cross objection raised/filed by revenue are liable to be rejected out-rightly.

14. On the other hand, the Id. CIT-DR submits that the assessee has raised additional grounds of appeal vide application dated 09.09.2017, which was handed over during the hearing of the appeal and the additional ground of appeal, was referred to the Assessing Officer. Thereafter, the Assessing Officer after obtaining necessary approval from the Id. Principal Commissioner of Income tax (Id. PCIT) filed cross objection and simultaneously application for condoning the delay. The Id. CIT-DR further submits that the cause of action for filing Cross Objection against the additional ground of appeal arose only on service/supply of additional

ground of appeal. The Id. CIT-DR prayed that considering the contents of application for condonation of delay, if any delay the Assessing Officer has requested that due to administrative reason and paucity of staff and transfers, the objection could not be filed in time. The Id. CIT-DR submits that there is sufficient ground for condoning such delay which is bonafide and there was no intentional and deliberate delay.

15. We have considered the submission of both the parties and noted that in the additional ground of appeal, the assessee has claimed that in computing capital gain on the transfer of marketing division as a result of transfer of said division was not determinable and thus, the mechanism of computing capital gain fails. In our view for deciding additional ground of appeal, no new facts are required. The facts are emanating from the order of lower authorities. Therefore, considering the fact that when no new facts are necessary to be brought on record and that the facts are emanating from the orders of lower authorities. We are inclined to admit the additional ground of appeal raised by assessee.

16. Now turning to the Cross Objection filed by revenue/Assessing Officer. In our considered view, the cause of action for filing cross objection against the additional ground of appeal arises only on service of the additional ground of appeal. The Cross Objections are filed on 07.11.2017. Considering the contention of Assessing Officer/revenue that the delay was due to administrative reason and paucity of staff.

Moreover, we have noted that there is a delay of about 21 days in filing the said cross objection. We have noted that Id. AR of the assessee has not explained as to when the copy /notice of additional ground of appeal was served upon the revenue. However, on perusal of order-sheet, it is revealed that the hearing of this appeal was fixed on 15.09.2017, thus we assume that the additional ground of appeal was served upon the revenue on 15.09.2017 and that the Assessing Officer/revenue could file its cross objection till 15th October 2017, however, the cross objection filed on 07.11.2017. Thus, there is delay of about 20/21 days. Considering the contents of application for condonation of delay that the delay in filing the Cross Objection is neither intentional nor deliberate but due to bonafide reason, the delay in filing the Cross Objection was condoned.

17.The admission of additional grounds of appeal and the Cross Objections including the condonation of delay was communicated to the parties while hearing the submissions of the parties.

18.Now advertng to the merits of the appeal. Ground No. 1 to 4 relates to the addition on account of amount kept in Escrow Account. The Id. AR of the assessee submits that assessee-company is engaged in the business of manufacturing and marketing pharmaceuticals and nutraceutical products. During the previous year, the assessee sold its marketing division to Aventis Pharma Limited (which is known as Sanofi India Ltd.) through business purchase agreement (BPA) dated 24.08.2011 by

way of slump sale. Copy of business purchase agreement is filed on record. Under the Business Purchase Agreement the gross consideration was agreed at Rs. 567.07 crores, out of which Rs. 477.62 crores accrued and became payable upon transfer and balance of Rs. 89.44 crores was placed in Escrow Account and would accrued and payable to the assessee annually in five equal instalments of Rs. 17.89 Crore each. Pursuant to the business purchase agreement, the assessee entered into Escrow Agreement dated 28.10.2011 with the purchaser, wherein purchaser as per the clause 3.1 of the Escrow Agreement was required to deposit the said contingent portion of consideration in Escrow Account. The copy of Escrow Agreement is also placed on record.

19. During the submission, the Id. AR of the assessee also read over various clauses of Business Purchase Agreement and Escrow Agreement and would submit that deposit of Rs. 89.45 crore in a Escrow Account was agreed term with fulfilment of certain condition and in the event, the assessee did not fulfil those conditions, the amount kept in Escrow Account was not receivable by assessee. The Id. AR of the assessee further submits that while filing return of income, the assessee offered a lump-sum payment of Rs. 477.30 crore as well as Rs. 17.89 crore (out of Rs. 89.45 crore), accrued to the assessee during the previous year. The Id. AR of the assessee also referred annual accounts, wherein the assessee has disclosed sale of marketing division as a slump sale. The Id. AR o the

assessee submits that balance of Rs. 71.56 crore was offered in four subsequent AYs. The balance offered by assessee in four subsequent year i.e. in A.Y. 2013-14 to A.Y. 2016-17 was accepted by revenue in assessment order passed under section 143(3), copies of assessment order with the computation of income is also placed on record. The Assessing Officer and the Id. CIT(A) treated the business purchase agreement and Escrow Agreement independent to each other and held that Escrow Account could not be linked to supply agreement and therefore, entire consideration of Rs. 567.07 crore accrued to the assessee in the Assessment Year itself. The Id. AR of the assessee submits that ground no.1 to 4 relates to contingent consideration kept in Escrow Account. The Id. AR of the assessee submits that perusal of various clause of Business Purchase Agreement and Escrow Agreement clearly demonstrate that maintaining of Escrow Account was an integral part of Business Purchase Agreement, the sale would be incomplete without the same. The amount kept in Escrow Account would accrue to the assessee only upon fulfilment of certain condition, can be offered to tax only upon accrual and not otherwise. The Id. AR of the assessee submits that as per the various clauses mentioned in the Business Purchase Agreement, the “closing” of the transaction has been defined to mean as completion of sale and purchase of business pursuant to clause-7 of the Business Purchase Agreement. Further, “closing amount” has been defined as an

amount equal to purchase price less Escrow Account. Further Clause-7 defines the closing events of transfer. Clause-7.3 states that on closing, the purchaser which pays the closing amount directly to the seller and deposits the Escrow amount in Escrow Account. Further, Clause-7.4 provides that if purchaser failed to complete with its obligation under clause-7.3, the seller shall be entitled to terminate this agreement. Thus, a combined reading of clause-7.3 & 7.4 clearly proves that if the condition laid down in clause-7.3 are not fulfilled the Business Purchase Agreement, will be terminated, therefore, the deposit of Escrow amount in the Escrow Account is intrinsic and integral part of transfer of the marketing division under the Business Purchase Agreement. The Id. AR of the assessee further submits that Clause-3 & 3.9 prescribes that assessee and the purchaser shall enter into an agreement for the supply by the seller of pharmaceutical products that are manufactured by assessee. A draft of supply agreement is an integral part of Business Purchase Agreement.

20. On the observation of Assessing Officer and Id. CIT(A) that Escrow agreement has no connection to the transfer of undertaking, but is a result of supply agreement. The Id. AR of the assessee point out that recital-II of Escrow Agreement clearly states that it has been entered pursuant to the term of Business Purchase Agreement. The Escrow Account refers to the Business Purchase Agreement dated 24.08.2011. The Escrow amount

is defined as amount deposited by purchaser as per agreed term in the Escrow Account. The Id. AR would submit that the facts and clauses therein clearly reflects that Escrow arrangement was an integral part of the Business Purchase Agreement, without which the Business Purchase Agreement would not have closed and that supply agreement is an integral part of Business Purchase Agreement but has no mention of Escrow Account. From the above facts, it is clear that contingent consideration deposit in Escrow Account by purchaser was on account of transfer of marketing division on slum sale basis and such contingent consideration was to accrue only upon fulfilment of conditions over a period of five years. Accordingly, the assessee offered the said amount in respect of orders without it was accrued and was taxed in the year in which the said amounts were offered.

21. On the observation of Assessing Officer that interest accrued to the seller on this issue, it was pointed out that interest amount was received in as much as the first instalment has accrued to the assessee. Therefore, the interest accrued until such date has also accrued to the assessee. The said interest was duly offered to tax. In the event, contingent consideration was not receivable by assessee, the interest thereon would have to be refunded back to the purchaser such to same adjustment. Thus, interest was to be treated in accordance with the term of contractual agreement between the parties and cannot be considered as basis for calculating the

entire contingent account accrued to the assessee. The Assessing Officer himself assessed the amount deposited in Escrow Account as capital gain of assessee. If the deposit in the Escrow Account was linked only to supply agreement then the same would be in the nature of Business Income and not capital gain. Once accepted that deposit in the Escrow Account is in the nature of capital gain, the only question arise is the point of accrual of such capital gain. On the observation of Id. CIT(A) regarding that Escrow Agreement does not have any impact and process of sale of business, it was explained that Id. CIT(A) completely misread the agreement. Paragraph no. 4.1 to 4.3, 7.3 and 7.4 of Business Purchase Agreement clearly proves that if the conditions lay down in clause-7.3 (payment of closing amount and deposit in Escrow Account) are not fulfilled then the business agreement will be terminated. The Id. AR of the assessee finally submits that there is no dispute about the transfer took place in the year under consideration. However, the limited issue is whether the capital gain in respect of the portion of consideration which was contingent upon fulfilment of condition “accrued to the assessee during the current year”. Section 45 r.w.s. 48 provides that capital gain is charged only when income is received or has “accrued” as a result of transfer of capital asset. The assessee did not acquire any right to receive the income; inasmuch as such alleged right was dependent upon necessary condition being fulfilled. The Assessing Officer himself

assessed the amount deposited in Escrow Account as capital gain of the assessee. If the deposit in Escrow Account was not linked only to supply agreement than the same would be in the nature of business income and not capital gain. Once accepted that the deposit in Escrow Account is in the nature of capital gain, the only question which arise is the point of accrual of such capital gain. The revenue in subsequent years too, has taxed the amount withdrawn from Escrow Account as a capital gain of the assessee. It was further submitted that if the view of the AO that the entire amount of Rs. 567 crore is the amount to be considered for capital gain, than as stated earlier the amount of Rs. 89.45 crore was contingent consideration, which may or may not have accrued/arisen to the assessee (depending on future condition being fulfilled) and therefore, in this Assessment Year it was not possible to compute “full value of consideration”.

22. In support of his submission, the Id. AR of the assessee relied upon the decision of Hon'ble Supreme Court in Sunil Siddharthbhai [156 ITR 509 (SC)] and in CIT vs. Gorge Henderson & Co. Ltd. [66 ITR 622 (SC)] wherein it was held that absence of quantifiable consideration result in failure of the assessee for charging capital gain tax. Accordingly, if contention of AO accepted then following the aforesaid ratio of Hon'ble Apex Court, full value of consideration not being determinable, the Capital Gain accruing on account of Slum sale was not determinable at

all. It was submitted that fundamental rule of law on taxation is that unless otherwise expressly provided, the income cannot be taxed twice. Thus, the lower authority erred in assessing the entire amount as chargeable to tax in the current year. In support of his other submission, the Id. AR of the assessee also relied on the following decisions:

- CIT vs. Mrs. Hemal Raju Shete (239 Taxmann 176 (Bom. HC).
- CIT vs. Balbir Singh Maini (398 ITR 531(SC).
- E.D. Sassoon & Co. Ltd. vs. CIT (AIR 1954 SC 470).
- CIT vs. Excel Industries (358 ITR 295 SC).
- Morvi Industries Ltd. vs. CIT (82 ITR 835 SC).
- Late Shri Gordhandas S. Garodia (Through LR's vs. DCIT (ITA No. 5097/Mum/2015.
- CIT vs. M/s Nagarjuna Fertiliser (ITTA No. 100 of 2003 (AP High Court.
- DCIT vs. Rohan Projects (113 taxmann.com 339 Bom.)

23. The assessee has placed following documents on record;

- ❖ (i) LTCG working statement from AY 2013-14 to 2015-16,
- ❖ (ii) HSBC Bank Statement showing the amount received for sale consideration of assessee's marketing division on 03.11.2011,
- ❖ (iii) Copy of Escrow agreement between assessee, purchaser and HSBC Bank,
- ❖ (iv) Copy of Escrow release letter and receipt of accounts in HSBC A/c for AY 2012-13 to 2015-16 and
- ❖ (v) Copy of computation of income for AY 2012-13 with annual accounts.

24. On the other hand, the ld. DR for the revenue supported the order of lower authorities. The ld. DR submits that assessee sold its marketing division to Aventis Pharma Ltd., now known as Sanofi India Ltd.(SIL). The assessee claimed the sale as a slump sale. According to the assessee, the consideration of sale was Rs. 567.07 crore. The assessee claimed that only Rs. 477.30 crore was relevant for the computation of capital gain in A.Y. 20012-13. And Rs. 89.45 Crore was placed in Escrow Account against a supply agreement with the SIL. The assessee filed its Audit Report in Form No. 3CEA relating to computation of capital gain in slump sale. It was submitted that as per section 45, Capital Gain arising from transfer of capital asset affected in the previous year is chargeable to tax under the head “Capital Gain” and shall be deemed to be income of previous year in which transfer took place. The ld. DR further submits that section 48 is the computation section for capital gains and referred to only two deductions, namely (i) expenditure incurred wholly and exclusively in connection with such transfer and (ii) the cost of acquisition of asset and any improvement thereto. The ld. DR submits that deduction claimed by assessee on account of amount of Rs. 89.45 crore placed in Escrow Account is not allowable as per section 48.
25. On the submission of ld. AR of the assessee that the remaining amount of Rs. 89.45 crore has been offered in the subsequent years, the ld. DR submits that the chargeability arises only in the year in which transfer

took place and the relevant A.Y. is 2012-13 only. In any event the assessee has set it off against losses which would never have been the case had it been offered to tax in the year of transfer which is in A.Y. 2012-13 in this case. The ld. DR further submits that the assessee has shown Rs. 17.89 crore for each of subsequent AYs as net capital gain on transfer of business purchase agreement. However, for A.Y. 2014-15 and 2015-16 this amount of Rs. 17.89 crore in each year, has been set off against the Long Term Capital Loss on sale of mutual funds of Rs. 7.55 crore and Rs. 4.36 crore respectively. However, it is not known as to what amount were declared for A.Y. 2016-17.

26. The ld. DR further submits that in the business purchase agreement dated 24.08.2011 between assessee and Aventis Pharma Ltd. there is recital “(A) *The seller is, inter alia engaged in the business (as defined below). Geltec is, inter alia engaged in the business of manufacturing nutraceutical and pharmaceutical product*”. (B) *The seller has agreed to sale the business and to assume the obligation imposed on the seller under this agreement. (C) The promoter collectively holds 100% of the issued and paid-up share capital of the seller and Geltec. (D) The purchaser had agreed to purchase the business of a going concern and on a slump sale basis, and to assume the obligation imposed on the purchaser under this agreement.*” The ld. DR submits that from the above recital it is evident that the transaction between assessee and

Aventis Pharma is that of slump sale and obligation imposed on the purchaser are separate from the slump sale transaction. The ld. DR further submits that clause 2 of Business Purchase Agreement (BPA) is the agreement to sale the business, thus what is sold are the asset mentioned and the so-called deduction of Rs. 89.45 crore on account of supplementary agreement is not a part of slump sale. Further, the other clause of the business purchase agreement, it is clearly establishes that slump sale consideration is Rs. 567.07 crore. This price is subject to adjustment is an event only subsequent to the slump sale. A sale of going concern is either slump sale or not a slump sale. The assessee cannot claim to slump sale under section 50B and at the same time can stay claim that it is not a going concern transaction but subject to adjustment. The ld. DR vehemently submits that the transfer of business on which the Capital Gains arise is not dependent on the supply agreement. In support of her submission, the ld. DR for the revenue relied upon the following decisions:

- T.A. Taylor (P.) Ltd. (ITA No. 622/Chny/2017 dt. 19.07.2018.
- CIT vs. Rohtak Textiles Ltd. 138 ITR 195 (Del.)
- Ajay Guliya vs. ACIT [2012] 24 taxman.com 276(Del.) dt. 16.07.2012.
- E.D. Sasson & Co. Ltd. vs. CIT (267 ITR 27 (SC).
- Morvi Industries Ltd. vs. CIT [1971] 82 ITR 835.
- CIT vs. Ashokbhai Chimanbhai [1965] 56 ITR 42 (SC).
- CIT vs. Equinox Solution (P.) Ltd. [2017] 393 ITR 566 (SC).

27. The Id. DR for the revenue also furnished her written submission running into 22 pages. The relevant part of her submission are extracted below :

1. Clearly the deduction claimed by the appellant on account of amount of Rs 89.45 cr placed in escrow are not allowable per Sec 48. Further, the computation of capital gains in a slump sale is per Sec 50 B and the appellant has not demonstrated how the deduction of Rs 89.45 cr is per Sec 50B. This is in the face of the argument of the Ld Counsel stating that, "slump sale is not a different animal."

2. With respect to the Ld Counsel's argument that this long term capital gains of Rs 89.45 cr has been offered in the subsequent years, it is submitted that the chargeability arises in the year in which the transfer happened and this is relevant AY 12-13 only. In any event, the appellant has set it off against losses which "ould never have been the case had it been offered to tax in the year of transfer, that is 12-13.

The appellant filed a paper book on 17th August 2017 which contains 322 pages.

Please see pp 1-31 at S1. No.1 of Index which is LTCG Working Statement from AY. 2013-14 to AY. 2015-16 along with computation of Income for claiming of Escrow Amount from AY. 13-14 to A.Y. 15-16. The appellant has shown Rs.17,89,00,000/- for each of the following assessment years i.e. AY. 2013-14, 2014-15 and 2015-16 as Net Capital Gain on transfer of Business Purchase Agreement, However, for AY. 2014-15 and 15-16, this amount of Rs.17,89,00,000/- in each year, has been set off against Long Term Capital Loss on sale of mutual funds of Rs. ,55,32,730/- and Rs. 4,36,86,371/ respectively. It is not known what amounts were declared for AY. 2016-17.

3. Please see Business Purchase Agreement at S1. o. 5 of the Index which is at pp 82-196. This Business Purchase Agreement is dated 24.08.2011 and is between Aventis Ph arm a Ltd. and Universal Medicare Pvt. Ltd. Please see pp 91 where the recital is as follows"

(A) the seller is, inter-alia engaged in the Business (as defined below). Geltec is, inter-alia engaged in the business of manufacturing nutraceutical and pharmaceutical products.

(B) The seller has agreed to sell the Business and to assume the obligations imposed on the Seller under this agreement. (C) The Promoters, collectively, hold 100% of the issued and paid-up share capital of the Seller and Geltec. (D) The Purchaser has agreed to purchase the Business as a going concern and on a slump sale basis, and to assume the obligations imposed on the Purchaser under this Agreement."

It is evident from this recital that the transaction between Universal Medicare Pvt. Ltd. and Aventis Ph arm a Ltd. is that of a slump sale and the obligations imposed on the Purchaser i.e. Aventis Pharma Ltd. are separate from the slump sale transaction.

4. Please see Clause 2 at internal pp 14 of the BPA and pp 101 of the PB which is "Agreement to sell the Business" and the recital is as follows: "2.1 Sale of the Business.2.1.1 On and subject to the terms of this agreement, the Seller agrees to sell and the Purchaser agrees to purchase the Business, as on the Closing Date, as a going concern, on a slump sale basis. "At Clause 2.1.2

the business to be sold is detailed at sub clause (i) to (xi) and this comprises inter-alia, products, business IPR, contracts, permissions, inventory etc.

Thus, what is sold are the assets mentioned, and the deduction on of Rs 89.45 cr on account of supplementary agreement is therefore not part of the slump sale.

5. Please see Clause 4 in internal pp 21 of BPA which is pp 108 of PB. Clause 4 is "Consideration and Escrow Arrangement". Clause 4.1 reads as follows "On the Closing date, the Purchaser shall pay Rs. 5,670,700,000 (Rupees five billion six hundred seventy million seven hundred thousand) as the lump sum consideration for the sale and transfer of the Business under this agreement as and by way of slump sale as a whole as a going concern (the Purchase Price)". The Purchase Price paid at Closing is subject to the adjustments set out in Clause 8.3 and Clause 8.4 of this agreement:"

This clause establishes that the lump sum consideration for slump sale i.e. the purchase price is Rs.567,07,00,000/-. That this purchase price is subject to adjustments is an event only subsequent to the slump sale. A sale as a going concern is either a slump sale or not a slump sale. Assessee cannot stake a claim to slump sale u/s. 50B and in the same breath stake a claim that it is not a going concern transaction but subject to adjustments. Having claimed the said transaction with Aventis Pharma as transfer of a going concern as slump sale, the computation of capital gains is against the lump sum consideration of Rs. 567,07,00,000/-. If the assessee is staking a claim that lump sum consideration of Rs. 567,07,00,000/- is subject to adjustment then it cannot be taxed as a slump sale u/s. 50B and the assessee would have to calculate Capital Gains of individual assets.

6. Please see Clause 4.2 which reads as follows "The Seller will instruct the Purchaser to place an amount of Rs. 894,500,000 (Rupees eight hundred ninety four million five hundred thousand) (the "Escrow Amount"] out of the Purchase Price payable under this Agreement in Escrow in an interest bearing bank account (the Escrow Account) opened with the Escrow Bank. The Escrow account will be operated by the Escrow Agent in accordance with the terms and conditions of the Escrow Agreement."

This clause makes it amply clear that the amount of Rs.894,500,000/- placed in the Escrow Account is out of the purchase price payable under this agreement. Thus, this Rs.894,500,000/- is an application of the lump sum consideration of Rs.567,07,00,000/-.

7. Please see Clause 6.4 which is "Termination- Material Adverse Change". It reads as follows "If prior to Closing any Material Change shall occur, the Purchaser shall be entitled by notice in writing to the Seller to terminate this Agreement (other than provisions of Clause 1 (Definitions and Interpretation). 16, 17.2 to 17.14,18,19 and 20). The termination of this Agreement under this Clause 6.4 shall not release any Party from any liability which at the time of termination has already accrued to another Party, or which thereafter may accrue in respect of any act or omission prior to such termination. "Also see Clause 7.4 which is "Breach of Closing Obligations".

None of these clauses stipulate that in the event of not meeting any requirement, the going concern will revert to the Seller; when such is the case there is no question of a part of the lump sum consideration being payable to the seller contingent on the fulfillment of certain obligation by the Seller.

8. Please see schedule 21 at pp 168 of the PB which is a Supply Agreement (date unknown) between Aventis Pharma Ltd. and Universal Medicare Pvt. Ltd. From the recital it is clear that this Agreement is pursuant to the BPA and that pursuant to the BPA, APL is desirous of purchasing products from Universal Medicare and Universal Medicare has agreed to manufacture and supply products to APL on the terms and conditions set out in this agreement. Thus, this Supply Agreement cannot be read into the BPA to draw an inference of deduction against the lump sum consideration.

9. Please see Clause 12 at pp 190 of PB which are the consequences of termination and it is evident from this clause that Termination does not entail the going concern to reverted to the Seller i.e. Universal Medicare Pvt. Ltd.

10. Please refer to internal pp 5 and 92 of the PB, wherein "Closing Amount" means an amount equal to the Purchase Price less the Escrow Amount.

11. Please refer to internal pp 10 and 97 of the PB, wherein "Purchase Price" has the meaning set out in Clause 4.1;

12. Please refer to internal pp 14 and 101 of the PB, wherein Clause 2 reads as,

“Agreement to Sell the Business

Sale of the Business

12.1.1 On an subject to the terms of this agreement, the Seller agrees to sell, and the purchaser agrees to purchase, the Business, as on the closing date, as going concern on a slump sale basis.

12.1.2 Subject to the terms of this Agreement, the Business to be sold pursuant to this Agreement shall comprise of:

(i) the Products;

[ii] the Business IPR;

[iii] the Contracts (which are in force on the Closing Date), subject to the provisions Part 4 of Schedule 2;

(iv) the Permissions, to the extent they can be transferred under law;

(v) the Inventory subject to the provisions of Clause 6.2;

(vi) the complete customer files and receivables thereon;

[vii] the Relevant Employees of the Seller, together with any advances given to such Relevant Employees, subject to Clauses 5.1.3 and 5.3.2;

(viii) the Books and Records, subject to Clause 9.4.5;

[ix] the goodwill relating to the Business, together with the exclusive right for the Purchaser to represent itself as carrying on the Business in succession to the Seller.

(x) The Assumed Liabilities, and

(xi) All tangible assets related to or held for use exclusively in connection with the Business as set out in Schedule 19.

2.1.3. The seller agrees and acknowledges that the assets-and liabilities being transferred as a part of the Business pursuant to Clause 2.1.2 (above) are sufficient to ensure the continuity of the Business by the Purchaser, as from the Closing Date, as a going concern.

2.1.4 The Business shall be sold free from all Encumbrances. "

3.4 Escrow Agreement

The Seller, the Purchaser and the Escrow Agent will enter into an Escrow Agreement which will inter alia set out the terms and conditions upon which the Escrow Amount will be deposited into the Escrow Account and released by the Escrow Agent to the Seller and/or the Purchaser, as the case may be, in accordance with the provisions of Schedule

16. The Escrow Agreement shall be entered into at Closing. The Escrow Agreement will provide for the release of monies deposited into the Escrow Account pursuant to the receipt by the Escrow Agent of an instruction from the Seller or the Purchaser as per Schedule 29, upon the occurrence of the events set out in Schedule 16 to the Agreement. Each of the Parties to this Agreement agrees to work together in good faith and use their respective reasonable efforts to agree the terms of the Escrow Agreement with the Escrow Agent prior to the Closing.

4. Consideration and escrow arrangement

4.1 On the Closing Date, the Purchaser shall pay Rs.5,670,700,000 (Rupees five billion six hundred seventy million seven hundred thousand) as the lump sum consideration for the sale and transfer of the Business under this Agreement as and by way of slump sale as a whole as a going concern (the "Purchase Price"). The Purchase Price paid at Closing is subject to the adjustments set out in Clause 8.3 and Clause 8.4 of this Agreement.

4.2 The Seller will instruct the Purchaser to place an amount of Rs. 894,500,000 (Rupees eight hundred ninety four million five hundred thousand) (the "Escrow Amount") out of the Purchase Price payable under this Agreement in escrow in an interest bearing bank account (the "Escrow Account") opened with the Escrow Bank. The Escrow Account will be operated by the Escrow Agent in accordance with the terms and conditions of the Escrow Agreement.

4.3 The Escrow Amount (together with the relevant proportion of interest accrued thereon) will be released to the Seller and /or the Purchaser, as the case may be, in accordance with terms and conditions set out in Schedule 16 of this Agreement and the Escrow Agreement.

8.3 Adjustment of the Purchase Price for Liabilities

(i) If there are any liabilities (other than liabilities relating to Expired Products) that have been transferred to the Purchaser as per the Closing Balance Sheet in addition to the Assumed Liabilities, the Seller shall repay (and the Promoters shall procure that the Seller shall repay) to the Purchaser an amount equal to such additional Liabilities as assumed by Purchaser as at Closing.

(ii) If the Assumed Liabilities set out in the Closing Balance Sheet are more than Rs.3,800,000 (Rupees three million eight hundred thousand), the Seller shall repay (and the Promoters shall procure that the Seller shall repay) to the Purchaser an amount equal to Assumed Liabilities set out in the Closing Balance Sheet less Rs.3,800,000 (Rupees three million eight hundred thousand).

(iii) If the Assumed Liabilities set out in the Closing Balance Sheet are less than Rs. 3,800,000 (Rupees three million eight hundred thousand), the Purchaser shall pay to the Seller an additional amount equal to Rs. 3,800,000 (Rupees three million eight hundred thousand) less the Assumed Liabilities set out in the Closing Balance Sheet.

(iv) Any payment pursuant to this Clause 8.3 shall be made on or before 10 (ten) Business Days after the date on which the process described in paragraph 3 of Part 1 of Schedule 9 is complete.

8.4 Adjustment of the Purchase Price for Net Working Capital

(i) If the Net Working Capital set out in the Closing Balance Sheet is less than Rs.73,250,000 (seventy three million two hundred fifty thousand), the Seller shall repay (and the Promoters shall procure that the Seller shall repay) to the

Purchaser an amount equal to Rs.73,250,000 (seventy three million two hundred fifty thousand), less the Net Working Capital set out in the Closing Balance Sheet.

(ii) If the Net Working Capital set out in the Closing Balance Sheet is more than Rs.73,250,000 (seventy three million two hundred fifty thousand), the Purchaser will pay to the Seller an additional amount equal to the Net Working Capital set out in the Closing Balance Sheet less Rs.73,250,000 (seventy three million two hundred fifty thousand) and

Any payment pursuant to this Clause 8.3 shall be made on or before 10 (ten) Business Days after the date on which the process described in paragraph 3 of Part 1 of Schedule 9 is completed. II

It is amply clear from the above that on the Closing Date, the Purchaser shall pay Rs.5,670,700,000 as the lump sum consideration for the sale and transfer of the Business by way of slump sale as a whole as a going concern and this Rs.5,670,700,000 is the "Purchase Price" which is to be paid at Closing and this is subject only to the adjustments set out in Clause 8.3 and Clause 8.4 which are "Adjustment of the Purchase Price for Liabilities" and "Adjustment of the Purchase Price for Net Working Capital" and these clauses do not refer to the Escrow amount and /or the supply agreement. Thus, deduction of amount placed in escrow account cannot be claimed against the lump sale consideration.

It is also evident that the amount is placed in escrow at the instructions of the Seller; the amount placed in escrow account is thus an application of the lump sum sale consideration arising from slump sale and not allowable as a deduction therefore.

13. Please see Form No 3CEA filed by assessee appellant in the AY 12-13. Form 3 CEA is the "Report of an accountant to be furnished by an assessee under sub-section (3) of Section 50 B of the Income Tax Act, 1961 relating to computation of capital gains in case of slump sale".

14. Also see copy of letter dt. 3.2.2012 , placed at Annexure 1, which is a letter addressed to Aventis Pharma Limited from Universal Medicare Pvt. Ltd, the subject line of which reads,

“Re: Adjustment of the Purchase Price Pursuant to Clause 8 of the Business Purchase Agreement dated 24th August 2011”. This letter reads as follows, " ... Accordingly, the net consideration received by us for sale of the Business is as follows:

Amount received from you on the Closing Date	Rs. 5,670,700,0000
Less: amount refunded to you as mentioned above	Rs. 58,504,174

Net Consideration Received	Rs.5,612,195,826/-"

15. Please see PB 4 filed by appellant. Pp 21 and 29 is submission of assessee appellant vide letter dated 18.08.2016 and 21.03.2017 addressed to DCIT Central Circle 3(2), Mumbai and CIT A respectively. Herein it is unequivocally stated that, " our client has entered into an agreement dated 24.08.2011 for sale of Marketing Division for a total consideration of Rs 567.07 crores, out of the above consideration Rs 89.45 crores was deposited in an Escrow Account with HSBC and these amounts were payable to our client only on satisfaction of certain conditions ... ".

It is amply clear that the consideration was Rs 567.07 cr and out of this Rs 89.45 cr was placed in Escrow Account.

16. Please refer to pp 35 of this PB 4 which is " Notes to Financial Statements for the Year Ended March 31, 2014" . Here too , it unequivocally stated that the gross consideration is Rs 5,670,700,000/- out of which Rs 894,500,000/- is placed by the Purchaser in Escrow Account opened with the Hongkong and Shanghai Banking Corporation Limited, which will be paid to the Company annually in five equal installments subject to achievement of certain performance targets every year." Thus, the amount placed in Escrow is only an application of the gross consideration of Rs 5,670,700,000; and therefore no deduction against this lump sum consideration is allowable per Sec 50 B.

17. Please see prayer for admission additional evidence u/r 29 of ITAT Rules, 1962 filed by Revenue vide letter dated 2.7.2018. This is the Auditor's Report of Sanofi India Ltd. (formerly Aventis Pharma Ltd.) for the accounts for Y.E. 31.03.2012 and this report is dated 12.11.2012. Please pp 28 which is the Schedules annexed to and forming part of the Financial Statement for the Y.E. 31.03.2012 of Sanofi India Ltd. (formerly Aventis Pharma Ltd.). Please see Clause 16 which discusses the BPA with Universal Medicare Pvt. Ltd. the narration is as follows "During the year, the company entered into Business Purchase Agreement (the "Agreement" with Universal Medicare Private Limited (UML) for purchase of marketing and distribution business of branded nutraceutical formulations in India on a going concern basis via slump sale effective from November 3, 2011 for a consideration of Rs.5,670,700/- thousands. Subsequently due to change in net working capital, the consideration was revised to Rs.5,612,195 thousands."

Thus, it is evident that the purchaser, SIL, in this slump sale transaction has accounted for it entirely to the extent of a consideration of Rs.5,670,700 thousands and revised the same to Rs.5,612,195 thousands owing to change in net working capital, which is as per the BPA wherein the purchase consideration was subject to "Adjustment of the Purchase Price for Liabilities" and "Adjustment of the Purchase Price for Net Working Capital". The argument that the lump sum consideration was contingent on the supply agreement cannot hold for only one party to the transaction; the slump sale consideration if at all it were to be contingent on the supply agreement would apply to both parties to the transaction, that is the seller and the purchaser. It cannot be that the contingency applies only to the seller and not to the purchaser. Thus, in this conspectus of the facts, the entire lump sum consideration is to be subject to capital gains tax.

18. There is nothing in the BPA which defines the mechanism by which the transfer of marketing division shall fail, should there be a breach of the supply agreement. One cannot envisage a transaction which is contingent on the fulfillment of obligation in a supply agreement, which involves a consideration for transfer of intangible or tangible assets, in which the contingency and breach of obligation is not spelt out contractually and which defines the mechanism of the transfer falling through - this has not been brought out by the Ld Counsel in his arguments nor is it to be found anywhere in the documents filed.

28. We have considered the submissions of the Id. Sr Counsel (Id. AR) for the assessee and the Id. Commissioner of Income- Tax Departmental Representative (Id. CIT-DR) for the revenue. We have also deliberated on the various case laws relied by the Id. representatives of the parties. During the assessment the assessing officer noted that during the previous year the assessee has sold its marketing division to Aventis Pharma Ltd (APL) for consideration of Rs. 567.07 Crore, however in the computation of income the assessee has shown Capital Gain of Rs. 477 Crore and remaining of Rs. 89.73 Crore was kept in Escrow account with HSBC Ltd. On show cause the assessee explained that Rs. 89.73 Crore will accrue to the assessee in five equal yearly instalment of Rs. 17.89 Crore each, on fulfilment of certain obligation being on achieving of performance of targets, starting from March 2012 and up to March 2016. It was also explained that out of Rs. 89.73 Crore, first instalment of Rs. 17.89 Crore was received by the assessee in the financial year under consideration and have been offered to tax. The explanation/ reply of the assessee was not accepted by the assessing officer. Assessing Officer by took his view that section 50B clearly define states that any profit or gain arising from slump sale effected in the previous year shall be chargeable to tax as Capital Gain arising out from the transfer of Long Term Capital Asset and shall be deemed to be income of the previous year in which transfer took place. The Capital Gain on slump sale earned was

transferred on 03.11.2011 accordingly; the Capital Gain from transfer cannot accrue in instalments. The assessee is following the accrual system of accounting and the income earned is accrued to the assessee on sale of transfer. In case of slump sale of the marketing division which is transferred as a whole, single unit without values being attached to the new asset and liabilities. The consideration of Rs. 567 Crore earned on transfer of marketing division, does not have any bearing on any other conditions. Once the agreement to sale is executed, the transfer took place and any payment or obligation can spread over some time, this does not mean that transfer is also happening over a period of time. The transfer is one time event whereas payment can happen over a period which is agreed between the parties and major part of consideration Rs. 477.62 crore was received on 03.11.2011 i.e. 84% of total consideration. The amount kept in Escrow Account has no relation, whatsoever with the transfer of marketing division. It has only bearing of supply agreement between the parties. And the amount kept in Escrow Account belong to the seller and that assessee has offered interest of Rs. 3.03 crore accrued on full Escrow Account from 03.11.2011 to 31.03.2012. On the aforesaid observation the Assessing Officer brought the remaining amount of Rs. 71.57 crore, kept in Escrow Account to tax is income of assessee for the assessment year under consideration.

29. Before Id. CIT(A) the assessee made its detail submissions and submitted that the amount accrued to the assessee on fulfilment of certain obligation and the same was offered to tax as and when it accrued. The income taxed by the assessing officer is infact not accrued to the assessee. The income on hypothetical basis cannot be taxed. The assessee also relied on the various clauses of Escrow release agreement.
30. The Id CIT(A) on perusal of supply agreement took his view that the assessee are require to supply certain product to purchaser(APL). And as per the Escrow agreement the amount of Rs. 89.73 crore was kept in Escrow account in HSBC Bank. The claim of the assessee that amount of Rs. 17.89 Crore is liable to release in five annual equal instalments would accrue to the assessee whenever said instalment is realized; which is subject to fulfilling of certain conditions and should be taxed in relevant Assessment Year. However, as per business purchase agreement the date, place of closing, closing event, payment of closing and breach of closing obligation, the closing events also define in Schedule-6 of the Agreement. And on further scrutiny of agreement, the Id. CIT(A) took the view that purchaser has paid the entire amount of closing date and it is the assessee who had instructed the purchaser to keep the amount in the Escrow Account. The sale of business is irrevocable and complete on the closing date mentioned in the agreement. The capital gain is accrued on the date of sale.

31. The Id. CIT (A) also took his view that on conjoint reading of various clauses of the agreement it can be held sale transfer is not linked to Escrow Account and the assessee, as the guarantee of supply agreement placed certain amount in the Escrow Account and the same is not linked to the sale of business. The Id CIT(A) concluded that sale of marketing division is completed on the closing date mentioned on the agreement and finally concluded that he concur with the finding of Assessing Officer that amount kept in Escrow Account has no relation whatsoever to the transfer of marketing division and affirmed the action of Assessing Officer.

32. We have perused the various clauses which are referred and relied by respective parties of business purchase agreement dated 24.08.2011, supply agreement which is schedule to the business purchase agreement and Escrow Account agreement dated 28.10.2011. Perusal of aforesaid clauses of business purchase agreement, the clauses of supply agreement (annexure to BPA) and Escrow Agreement demonstrate that maintaining of Escrow Account was inconsequence of business purchase agreement. The conditions of supply agreement cannot be delinked from business purchase agreement dated 24.08.2011. The Escrow Agreement was executed on 28.10.2011. The Escrow account agreement was executed in furtherance of BPA. Further, the amount in Escrow Account would accrue to the assessee only on fulfilment of certain condition. Further, a

joint reading of clause 7.3 and clause 7.4 shows that if the condition mentioned in clause 7.3 is not fulfilled, then business purchase agreement will be terminated. Thus, the deposit in Escrow Account is intrinsic and integral to the transfer of marketing division under business purchase agreement without it, the sale shall be incomplete. Further, clause 3.1 and clause 3.9 is prescribed that assessee and the purchaser shall enter into agreement for the supply by the seller of pharmaceutical product that is manufactured by assessee. A draft of supply agreement was also prepared as a part of business purchase agreement as a schedule to the agreement.

33. In our view, once the condition of contract is reduced in writing, one must look at the substance of term of the contract. The contract must be read as a whole and not in a pick and choose manner. Further, the intention of parties must be found in the words used by them and if more than one interpretation is possible, one which gives effect and proper meaning of all parts of the contract should be adopted.

34. The Hon'ble Supreme Court in Bharat Aluminium Company vs. Kaiser Aluminium Technical Services Inc. (Civil Appeal No. 7019 of 2005) (SC) and in Delhi Development Authority vs. Durga Chand (AIR 1973 SC 2609) also held that if two interpretations of the document are reasonably possible, as it seems possible, the principle to apply would be that the interpretation favouring the grantee as against the grantor should be accepted.

35. As we have noted above the Id. AR of the assessee vehemently submitted that Capital Gain is chargeable to tax only when income “accrues” to assessee. The contingent consideration accrued only upon compliance of condition in subsequent Assessment Years, the same was chargeable only in the years in which the said income accrued. The Id. AR also furnished the copy of income tax return and the income offered to tax a capital gain of Rs. 17.89 crore each in A.Ys. 2013-14, 2014-15, 2015-16 & 2016-17.

36. The Hon’ble Bombay High Court in CIT vs. Mrs. Hemal Raju Shete (supra) held that only income that was actually received or accrued to assessee upon sale of shares had to be taxed and not any contingent deferred income. Hon’ble Supreme Court in CIT vs. Balbir Singh Maini (supra) held that when for want of permissions, entire transaction of development of land envisaged in Joint Development Agreement (JDA) fell through; there would be no profit or gain which arose from transfer of capital asset, which could be brought to tax under section 45, read with section 48.

37. The Hon’ble Supreme Court in E.D. Sassoon & Co. Ltd. v. CIT AIR 1954 SC held that income may accrue to an assessee without the actual receipt of the same. If the assessee acquires a right to receive the income, the income can be said to have accrued to him though it may be received later on its being ascertained. The basic conception is that he must have

acquired a right to receive the income. It was further held that unless and until there is created in favour of the assessee a debt due by somebody it cannot be said that he has acquired a right to receive the income or that income has accrued to him.

38. Further, in *CIT v. Excel Industries* [2013] 358 ITR 295/219 Taxman 379/38 taxmann.com 100 (SC) the Hon'ble Court by referring to various judgments on the expression "accrues", and then held it is now well settled that income tax cannot be levied on hypothetical income. In *CIT v. Shoorji Vallabhdas and Co.* [*CIT v. Shoorji Vallabhdas and Co.*, (1962) 46 ITR 144 (SC)] it was held that Income tax is a levy on income. No doubt, the Income Tax Act takes into account two points of time at which the liability to tax is attracted, viz., the accrual of the income or its receipt; but the substance of the matter is the income. If income does not result at all, there cannot be a tax, even though in book keeping, an entry is made about a 'hypothetical income', which does not materialize. Where income has, in fact, been received and is subsequently given up in such circumstances that it remains the income of the recipient, even though given up, the tax may be payable. Where, however, the income can be said not to have resulted at all, there is obviously neither accrual nor receipt of income, even though an entry to that effect might, in certain circumstances, have been made in the books of account. In *Morvi Industries Ltd. v. CIT* [*Morvi Industries Ltd. v. CIT*, (1972) 4 SCC 451 :

1974 SCC (Tax) 140 : (1971) 82 ITR 835] the Hon'ble Apex Court also considered the dictionary meaning of the word "accrue" and held that income can be said to accrue when it becomes due.

39. The Hon'ble Bombay High Court in PCIT vs. Rohan Projects (supra) held that where assessee sold a land during relevant assessment year and as per Memo of Understanding (MOU), part of sale consideration was payable by purchasers on completion of assessee's obligation under MOU, assessee having not met conditions of MOU during relevant year such amount was not taxable in relevant assessment year. The Hon'ble High Court also referred its earlier decision in CIT vs. Nagri Mills Co. Ltd. [1958] 33 ITR 681 (Bom)] wherein it was held that as under:

“3. We have often wondered why the Income-tax authorities, in a matter such as this where the deduction is obviously a permissible deduction under the Income-tax Act, raise disputes as to the year in which the deduction should be allowed. The question as to the year in which a deduction is allowable may be material when the rate of tax chargeable on the assessee in two different years is different; but in the case of income of a company, tax is attracted at a uniform rate, and whether the deduction in respect of bonus was granted in the assessment year 1952-53 or in the assessment year corresponding to the accounting year 1952, that is in the assessment year 1953-54, should be a matter of no consequence to the Department; and one should have thought that the Department would not fritter away its energies in fighting matters of this kind. But, obviously, judging from the references that come up to us every now and then, the Department appears to delight in raising points of this character which do not affect the taxability of the assessee or the tax that the Department is likely to collect from him whether in one year or the other.”

40. In view of the aforesaid discussion, we are of the view that the income for the year under consideration of Rs. 447.30 crore and further Rs. 17.89 crore was accrued to the assessee. The assessee offered the same under the head Capital Gain and no other income which is not accrued to the assessee is not liable to tax in the year under consideration. The remaining income was accrued only in subsequent Assessment Year i.e. A.Y. 2013-14 to 2016-17 that is an amount of Rs. 17.89 Crore each in four subsequent years, and the same has been offered for taxation under the head Capital Gain. Even this fact is not disputed by the revenue.

41. The objection of Id. DR for the revenue is that the assessee in subsequent year claim set off of Long Term Capital Loss on sale of mutual funds of Rs. 7.55 crore and Rs. 4.36 crore. In our view, the assessee is legally entitled to claim the set off of legitimate losses under the same head if it accrues to the assessee.

42. As noted above the Hon'ble Jurisdictional High Court in CIT vs. Nagri Mills Co. Ltd. (supra) held that as to why the Income-tax authorities, in a matter such as where the deduction is obviously a permissible deduction under the Income-tax Act, raise disputes as to the year in which the deduction should be allowed. The question as to the year in which a deduction is allowable may be material when the rate of tax chargeable on the assessee in two different years is different; but in the case of

income of a company, tax is attracted at a uniform rate. Applying the same analogy that the assessee being a corporate entity is taxed at the marginal rate, the revenue should not fritter away its energies in fighting matters.

43. The case law relied by the Id. DR for the revenue are not applicable on the facts of the present case as the same are based on different set of facts. In CIT vs. Rohtak Textiles Ltd. (supra) it was held that section 55 clearly laid down that capital gains are to be deemed to be income of the previous year in which the transfer of the asset took place. There was no dispute about the point of time at which transfer took place. It was held that capital arise from the transfer were rightly charged in the year when undertaken vested in the Government, irrespective of whether the sale became complete on those dates or on later when price was determined and became payable. However, in the present case, though the price was determined but was payable on fulfillment of certain condition as agreed in Escrow Agreement and the same were paid subsequently. In E.D Sasson & Co. Ltd. (supra) (also relied by Id. AR) wherein it was held that income may accrue to an assessee without the actual receipt of the same. If the assessee acquires a right to receive the income, the income can be said to have accrued to him though it may be received later on its being ascertained. The basic conception is that he must have acquired a right to receive the income. Thus, the ratio of this decision is more favourable to

the assessee. In *Morvi Industries Ltd. vs. CIT* (supra) the facts of the case are entirely different, wherein it was held that if the income for the year in question were given up unilaterally by assessee after they had accrued to it, the assessee company could escape the liability to tax. However, in the present case, the assessee has offered the capital gain in subsequent Assessment Years. In *CIT vs. Ashokbhai Chimanbhai* (supra) the facts are entirely different. In said case it was held under Income Tax, the income is taxable when it accrues, arises or received, or when it is by fiction deemed to accrue, arises or deemed to receive. The receipt is not the only test of chargeable to tax; if income accrues or arise it may become liable to tax. The word “accruing” and arising are used to contraindistinguish the word “receive”. Income is said to be received when it reaches to the assessee; when right to receive the income vested to the assessee, it is said to be accrue or arise. The dormant profit cannot be equated with charged to tax under section 3 & 4 of the Income Tax Act.

44. In *Ajay Gulliya vs. ACIT* (supra) there was no evidence on record in agreement suggesting that entire consideration or part was not paid or the title to the shares will revert to the seller. In *T.A. Taylor (P.) Ltd.* (supra) there was no deferred consideration mentioned in the slump sale agreement. Depositing a part of consideration in an Escrow Account, equivalent to deferred consideration (para-8 of the order). In *CIT vs. Equinox Solution (P.) Ltd.* (supra) the assessee sold its entire running

business with all assets and liability and one go. In CIT vs. Mrs. Hemal Raju Shete (supra) was not a case of slump sale and only income that was actually received or accrued to the assessee upon sale of shares was taxed and not any contingent deferred income.

45. Considering the aforesaid factual and legal discussions, we are of the view that the accrued capital gain in the year under consideration was offered by the assessee to tax and the remaining of the capital gain which was accrued only in the subsequent years have been offered to tax in AY 2013-14 to 2016-17. The assessee has placed on record the copy of computation and return of income for AY 2013-14 to 2016-17

46. In the result the ground No. 1 to 4 are allowed.

47. Ground No. 5 relates to defalcation loss of Rs. 5.00 Crore. The ld. AR for the assessee submits that assessee suffered loss on account of defalcation of Rs.19.04 Crore which was detected in AY 2006-07. The assessing officer while passing the assessment order for AY 2006-07 accepted the fact that the assessee suffered losses and in the assessment order gave working of the loss suffered year wise. However, the assessing officer reduced the claim of loss by Rs. 5.00 Crore and accepted the claim of Rs. 14.04 Crore as the Economic offence Wing attached the property of the culprit. The assessee, subsequently in the return filed in pursuance of notice under section 153A claimed the same

loss of Rs. 5 crore as there was no recovery from the employee (culprit). However, the same was not accepted by AO on the ground that no new claim can be made while filing return of income in response to notice under section 153A. For the year under consideration, the assessee raised a claim of Rs. 5 crore in the First Appellate proceeding in A.Y. 2006-07 as well as in A.Y. 2012-13 on the ground that no recovery has been made. The Tribunal in the appeal for A.Y. 2006-07 while adjudicating the corresponding ground held that no new claim can be made under section 153A and that issue with respect to the claim of defalcation was remitted back to the file of AO. The ld. AR prayed to remand back the issue to the file of AO for the year under consideration as well to avoid the duplicity of the claim.

48. The assessee has also filed the copy of assessment order for A.Y. 2006-07 under section 143(3) dated 31.12.2008 for allowing loss of embezzlement of Rs. 5.00 crore, copy of assessment order under section 153A rws 143(3) for not allowing the loss of embezzlement of Rs. 5.00 crore and final report of Economic offence wing on the complaint of embezzlement of Rs. 5.00 crore by an employee.

49. On the other hand the ld. DR for the revenue submits that this ground of appeal does not arise from the impugned assessment order or from the order of ld. CIT(A). Since the ld. AR during the hearing submitted that in

ITA No. 2967-2971/M/16 for A.Y. 2006-07 to 2009-10 the Tribunal set aside the matter to the AO and submitted that defalcation loss must be allowed in one or the other and matter may be set aside to the file of AO. The ld. DR submits that issue may be restored to the file of AO and no comment on the merit of grounds was made.

50. We have considered the rival submissions of the parties and have gone through the orders of the lower authorities. We have noted that in assessee's appeal for A.Y. 2006-07 to 2009-10 in ITA No. 2967-2971/M/16 the claim of assessee with regard to defalcation loss has been restored to the file of AO. Therefore, to avoid the duplicity, the issue is restored to the file of AO to examine the claim and pass the order in accordance with law. In the result this ground of appeal is allowed for statistical purpose.

51. We found on record that the assessee vide application dated 01.09.2017 and the revenue vide its application dated 24.10.2017 made application for admission of additional evidence. However, we have noted that while making submission as well as in written submission, none of the parties have made their submission for admission of the additional ground nor was referred any contents for other reference, therefore, both the applications are dismissed. Any other application if pending and not brought to our notice for any order or direction is also dismissed.

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

C.O. No. 268/Mum/2017 by revenue

53. The additional ground of appeal of assessee and the cross objection of revenue are interconnected. We have noted that while making submission, the Id. AR of the assessee has not made any specific submission on the additional ground of appeal nor file any written submission, therefore, the same is treated as not pressed and dismissed accordingly. As we have dismissed the additional ground of appeal, therefore, the grounds in cross objection are become academic.

54. In the result, additional ground of appeal and cross objection of revenue is dismissed.

Order pronounced in the open court on 06/03/2020.

Sd/-
S. RIFAUH RAHMAN
ACCOUNTANT MEMBER

Sd/-
PAWAN SINGH
JUDICIAL MEMBER

Mumbai, Date: 06.03.2020
SK

Copy of the Order forwarded to :

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|-------------------------------|----------------------|
| 1. Assessee | 2. Respondent |
| 3. The concerned CIT(A) | 4. The concerned CIT |
| 5. DR "F" Bench, ITAT, Mumbai | |
| 6. Guard File | |

BY ORDER,

Dy./Asst. Registrar
ITAT, Mumbai