IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH "A" NEW DELHI)
BEFORE SHRI I.C. SUDHIR AND SHRI J.S. REDDY
ITA No. 5054/Del/2011
Assessment Yea: 2007-08

Aerens Developers and Engineers Ltd., 6th Floor, Mohindra Tower, 2A-Bhikaji Cama Place, New Delhi. (PAN: AAACA2199R)	Vs.	ACIT, Central Circel-8, New Delhi.
(Appellant)		(Respondent)

ITA No.5058/Del/2011
Assessment Yea: 2007-08

Aerens R. Infra-structure Ltd., 6th Floor, Mohindra Tower, 2A-Bhikaji Cama Place, New Delhi. (PAN: AAACA2199R)	Vs.	ACIT, Central Circel-8, New Delhi.
(Appellant)		(Respondent)

Assessee by: Shri P.C. Yadav, Adv.
Department by: Shri R.K. Garg, DR
Date of hearing : 19.05.2016
Date of pronouncement: 12 :08.2016

ORDER

PER I.C. SUDHIR: JUDICIAL MEMBER

The assessees have questioned the first appellate order on the following common grounds of appeals:

The order of Learned CIT(Appeals) is bad in law and on facts.

1. On the facts and in the circumstances of the case, the Learned CIT(Appeals) has erred in taxing the compensation of Rs. 1 crore as Revenue receipt ignoring the various judicial pronouncements and submissions of the assessee.
2. On the facts and in the circumstances of the case, the Learned CIT(Appeals) has wrongly rejected the additional evidence, I the shape of fard of land and resolution of the company, produced by the as per the provision of Rule 46A.

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3. The Learned CIT(Appeals) has erred in not appreciating that sufficient cause was there due to which the assessee could not place these evidences before the A.O.
4. Learned CIT(Appeals) has erred in ignoring that the assessee was not the dealer of agricultural land and the object clauses of the company also does not authorize the assessee to deal in trading of agricultural land.
5. The order of the Learned CIT(Appeals) is contradictory having regard to the fact that on one hand it has been observed that agricultural land was there and on the other hand it has been held that necessary approvals vis-à-vis land was obtained by the assessee.
6. The order of the Learned CIT(Appeals) is contrary to the facts and evidences produced before him during the course of hearing.
7. Learned CIT(Appeals) has failed to appreciate that the additional evidences which were produced before him as per the provision of Rule 46A proves beyond doubt that the land in relation to which the compensation was received by the assessee was an agricultural land.
8. Learned CIT(Appeals) has further failed to appreciate that from day 1 the assessee has treated this amount as investment in his books of account and has neither claimed the amount as Revenue expenses nor capitalized.
9. The Learned CIT(Appeals) has wrongly observed that trading structure of business of the assessee was not affected and hence the impugned receipt was Revenue receipt.

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10. That the Appellant craves leave to amend alters, add or forego any of the above grounds.

2. Heard and considered the arguments advanced by the parties in view of orders of the authorities below, material available on record and the decisions relied upon.

3. Out of the above grounds, ground No.1 is general in nature and ground Nos. 3, 4 and 8 questioning the action of the Learned CIT(Appeals) in rejection of the application for additional evidence have not been pressed. These grounds assessee accordingly rejected as not pressed.

4. The main issue raised in ground No.2 is as to whether the Learned CIT(Appeals) was justified in upholding the action of the Assessing Officer in taxing the compensation of Rs.1 crore as Revenue receipts against the claim of the assessee as capital receipts.

5. The relevant facts are that the assessee company engaged in the business of real estate had entered into a consortium agreement dated 02.03.2005 amounts its associates defining their rolls, rights and responsibilities along with their respective shares in the consortium. Thereafter, the consortium companies, namely, Aerens R Infra-structure (P)

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Ltd. formerly known as Visage Properties (P) Ltd., Samurai Entertainment P. Ltd., Shivgiri Suppliers (P) Ltd., the assessee and Aerens Goldsok International Ltd. through their lead company, namely, A.R. Developers (P) Ltd. entered into an agreement to sell dated 02.03.2005 with GMA Buildcom (P) Ltd. to purchase 10 acres of land for a consideration of Rs.15 crores in village Bhattian, Tehsil and District Ludhiana (Punjab). Since GMA Buildcom (P) Ltd. failed to transfer minimum land of 10 acres within the prescribed and extended time limits as per the terms of the agreement. The matter was settled through arbitration award dated 11.8.2006 wherein following compensations were awarded to the entities involved:

M/s. A.R. Developers (P) Ltd.	Rs.1,00,00,000
M/s. Samurai Entertainment P. Ltd.	Rs.3,50,00,000
M/s. Shivgiri Suppliers P. Ltd.,	Rs.1,00,00,000
M/s. Aerens R. Infrastructure (P) Ltd. Formerly known as Visage Properties (P) Ltd.	Rs.1,00,00,000 Rs.1,00,00,000
M/s. Aerens Developers & Engg. (P) Ltd.	Rs.1,00,00,000
M/s. Aerens Goldsuck International Ltd.	Rs.1,00,00,000

6. The assessee company credited the amount of compensation so received in its books of account more particularly in the audited profit and loss account. In the notes of accounts, the auditor has commented that the

said income was earned by the assessee in pursuance to an agreement dated 05.03.2006, executed with JMA Buildcom (P) Ltd. towards non-fulfillment of terms and conditions of the earlier agreement, however, in the computation of income the assessee claimed this income as exempt and reduced this income while computing its taxable profit. The Assessing Officer, however, held that the compensation received was on account of breach of agreement in the normal course of business of the assessee and, therefore, the same is a Revenue receipts. The Learned CIT(Appeals) upheld this action of the Assessing Officer, which has been questioned by the assessee before the ITAT.

7. In support of the grounds, the Learned AR furnished following submissions:

1. **"Agreement entered into normal course of business**:- One of the observation of the authorities below, for treating this amount as revenue receipt, is that the agreement was entered into normal course of business by the consortium. Finding/ observation of the CIT(A) in this regard are at **Page No 17 Para-11** of the CIT(A) order:- In rebuttal to this observation the submissions of the assessee are as under:-

    a. Consortium was formed for the first time in 2005 and there is no material on record to prove otherwise. It is submitted that expression "normal course of business" presuppose some

business and in this case the assessee and its associates for the first time joined hands together and formed a consortium to carryon business in state of Punjab. However, before the business of the consortium would have commenced the deal got spoiled and the business was demolished completely even before the setting up of the business. Therefore the averment that the agreement was entered into normal course of business has no relevance. This fact is evident from the agreement to sell **See Page No 35** of the PB.

b. It is submitted that the AO and CIT (A), though categorically observed in their respective orders that the assessee and its associates have entered into agreement to sell with JMA buildcon, however failed to appreciate that the assessee in its individual capacity, had not entered into agreement to sell with JMA buildcon. It is submitted that had it been a case where assessee would have entered into the agreement independently then situation would have been completely different.

c. The lower authorities failed to appreciate that it is not the case that the consortium has lost one of his arm of its business. It is case where the entire business of the consortium got demolished even prior to the setting up of the new project. It is further relevant to mention here that the consortium was completely vanished after the demise of this deal and has not carried out any business.

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d. It is next submitted that it is not the business of the assessee to form consortium day in day out therefore normal course of business proposition completely ruled out.

e. It is settled position of law that under taxing provisions every step of a transaction would have to be seen carefully before reaching to any conclusion. A reference can be made to the decision of Hon'ble Apex Court in the case of Vodaphone reported in **341 ITR 1 (SC)**.

f. Further assessee seeks to rely on the judgment of Hon'ble Pune Bench of the Tribunal in the case of Aquapharam in ITA No 372/Pune/2002 dated 29.02.2012. Copy of the decision is enclosed in Paper Book of decision and the relevant observation of the Hon'ble Bench are at **Page No-15-**,(**Findings of the case starts from Page No13**) wherein it has been held that expression "normal course of business" presupposes some business and compensation received on account of loss of new line of business is a capital receipt.

g. Hon'ble ITAT in the case of Aquapharam further observed that the where profit making apparatus is damaged then receipt is capital receipt- See **Page No 14- Objection A**

h. In this very case of Aquapharam the Hon'ble Bench of the ITAT while dealing objection C of the revenue, has held that compensation received by the assessee for an injury because of

which an assessee failed to commence a new business would be capital receipt.**(See Page No 19 of the PB)**

2. **Object clause of assessee does not exclude deals of agriculture land and the assessee was not an agriculturist**:- The CIT(A) in its order in Para 8 at Page no 16 and in Para 12 at Page No 17, has observed that the objects of the assessee would not exclude agriculture land and hence it can be presumed that the assessee was dealing in agriculture land. Similar observations are made by the AO in his remand report dated 03.06.2011- **Pg No-94 of the PB**:- In this regard the submissions of the assessee without prejudice to the other submissions made in subsequent Para(s) are as under:-

    a. Before CIT (A) it was interalia argued that even if it is presumed that the compensation was received as a result of termination of an agreement entered into by the assessee in normal course of business then too the amount is not taxable as revenue receipt because what was lost was agriculture land and not a piece of land ready for sale immediately after purchase.

    b. However, the CIT (A) wrongly interpretating the clauses of the MOA of the Company has held that the object clause does not exclude agriculture land The Copy of Memorandum of association and Article of association of the assessee company are in **Paper Book page No 3-9 and 10-16** respectively, a perusal of these objects of would abundantly show that the assessee was not dealer of agriculture land.

c. Therefore the above observations of the CIT (A) are factually incorrect. It is next submitted that the assessee in order to prove that the land in question was an agriculture land produced certified copy of Khasra Khatoni, which is a public document, the CIT (A) and AO denied the admission of this document however impliedly accepted that the land was an agriculture land.

d. The AO in his two remand reports **(Page No 81-82 and 93-97)** have not denied the status of the impugned land as agriculture land. However discarded the claim of the assessee on the ground that assessee was not an agriculturist and intention of the assessee was to develop the upcoming project- See observation of the AO at Page No 81-82 and in subsequent remand report. Therefore, it can be said that the AO has accepted that the land in question was an agriculture land on the date when the agreement was entered into.

e. It is next submitted that despite the acceptance of AO **vis-à-vis** character of agriculture land the CIT (A) without brining any material on record contrary to the evidence filed by the assessee has held that the land in question was not an agriculture land.

f. Thereafter, the CIT (A) and AO have held that assessee was a non-agriculturist and the intention of the assessee was to commence project on that land and not to start agriculture over

there. In this regard the AO and CIT (A) have relied on the decision of **Sarifabibi reported in 204 ITR 631 (SC)** for holding that cultivation of land is sine-qua-non for treating some land as agriculture land. Finding of CIT(A) in this regard as page no 17 of the CIT(A) order.-

3. In this regard it is submitted that status of an assessee whether he is agriculturist or not is not relevant and what is relevant is the character of land at the time of entering into the agreement to sell. This proposition is further supported by two High Court and three Tribunal judgments- which are referred in below Para(s).

4. The assessee first seeks to rely on the judgment of Hon'ble Delhi High Court in the case of DLF universal Limited reported in 158 ITR 342(Del). Which judgment was quoted before the authority below:- Quoted portion can be seen from Page No-13 of CIT(A) order.

5. It is submitted that both the authorities has overlooked the judgment of Hon'ble Delhi High Court in the case of **Hindustan Industrial Resources Vs ACIT reported in 335 ITR 77 (Del) wherein it** has been held that the fact that the assessee has not cultivated the land since long does not change the character of the land. Relevant observations of their lordship are reproduced hereunder:-

> "The fact that the assessee intended to use the land for industrial purposes did not in any way alter the nature and character of the land. The further fact that the assessee did not carry out any agricultural operations did not also result in any conversion of the agricultural land into an industrial land. It is

nobody's case that the assessee carried out any operations for setting up any plant or machinery or of the like nature so as to lead to an inference that the nature and character of the land had been changed from agricultural to industrial. The mere fact that the assessee did not carry out any agricultural operations did not alter the nature and character of the land. In any event, this discussion is not relevant in the backdrop of the clear finding given by the Tribunal that on the date of the purchase and as also on the date of acquisition, the land in question was agricultural land. Having come to such a conclusion, the Tribunal ought not to have gone into question of intention of the assessee and definitely not into the question of intention of the land acquiring authority, the latter being a wholly irrelevant consideration. In these circumstances, the land acquired from the ownership of the assessee was agricultural land."

6. It is submitted that decision of **Sarifabibi (supra) has been distinguished by the Pune Bench of the ITAT in the case of Harish V Milani VS JCIT reported in 114 ITD 428(Pune) wherein the Hon'ble Bench has held as under:-**

"From the perusal of the said entries in the extract of 7/12, it is thus clear that the aforesaid lands were subjected to land revenue and assessment of the land revenue was accordingly entered into the extract of 7/12. It is also seen that the total cultivatable land has also been shown therein. The area mentioned in the extract of 7/12 has been classified as cultivable land. In the 7/12 extracts, it is also indicated that the land was cultivated by the owner himself, i.e. Khudd. The nature of crop produced is mentioned as rice and animal feed grass in Gat Nos. 418, 419, 420, 421 and 422, rice and jawar in Gat No. 423, animal feed grass in Gat No. 424 and rice and animal feed grass in Gat No. 426. On perusal of the details of 7/12 extracts, the following facts are found:

(1)that the land was undoubtedly classified in the Revenue records as agricultural lands,
(2) that the land was subjected to payment of land revenue,

(3) that the land was used by the owner himself,
(4) that the nature of the agricultural produce produced from the said land are rice, jawar and animal feed grass.

It is also equally true that the assessee has not given any evidence of incurring any expenditure on agricultural operations carried out on the said land. No direct evidence has been produced by the assessee to show and establish that the agricultural produce in the nature of rice, jawar andanimal feed grass were produced from the said land. On the other hand, no evidence has also been produced by the Revenue to show and establish that the land was used for some other purposes other than agricultural purposes. It is nobody's case that the assessee had used the land for non-agricultural purposes before selling the same. No permission for non-agricultural use has also been obtained by the assessee. No evidence to that effect that the assessee had ever used the land for non-agricultural purposes was brought on record. The evidence in the form of 7/12 extracts clearly shows that agricultural operations were carried out on the land in question. The extract also gives the details and kinds of agricultural produce produced or cultivated on the said land

It is further pertinent to note that mere inclusion of land in the industrial zone without any infrastructure development thereupon or without establishing and proving that the land was put into use for non-agricultural purposes does not and cannot convert the agricultural land into non-agricultural land"

7. Similarly the Pune Bench of the ITAT in the case of lavleen Singhal Vs DCIT reported in **111 TTJ 326** has held that merely because a land is not cultivated since **<u>last 14 years</u>** that does not mean that it has losses its character of agricultural land. Copy of the judgment is annexed with this synopsis-

8. It is next submitted that the assessee further seeks to rely on the judgment of Delhi Bench of the ITAT in the case of Chand Prabha

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Jain copy of the decision is annexed in PB at **<u>Page- 49-97</u>** of the Paper Book. Relevant observations of the Hon'ble Bench are at page No 82 on wards of the decision's paper book.

9. It is next submitted that memorandum of association of the assessee Company permits the assessee to deal in land but not in agricultural land. It is very pertinent to mention here that in cases where the real estate dealers purchase some agricultural land, the dealers don't include the land in their stock in trade till the conversion of the same into developed land. The AO in his first remand report has also accepted that land in question was to be converted into non-agriculture land after taking approvals from Govt.

10. It is submitted that no material has been brought on record either from the balance sheet and other documents to prove that the assessee has taken steps towards the development of land. In fact the fact of the matter is that prior to the conceivement of the ownership the deal got spoil. Therefore, the case of the assessee is on stronger footage when compare to the case of DLF and others. In fact the CIT(A) has also admitted that land in question has never come into possession of the assessee.

11. Without prejudice to the above argument it is submitted that land for which compensation was received was never become the stock in trade of the assessee:- It is next submitted that the observation of the AO in the body of assessment order and in remand report number-1 also support the factum land was never become the stock in trade of

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assessee. This fact is also evident from the words "in the present case of the assessee, the land was proposed to be purchased as part of stock in trade by the assessee Company".

12. It is view of the facts mentioned in Asst order and remand report it is an admitted fact that "stock in trade" was never conceived by the assessee therefore, merely because an agreement has been entered into does not change the nature of receipt. In other words the fact that the land was never become the part of stock in trade is evident from two things (i) the deal was spoiled prior to its maturity (ii) the AO in assessment order and in remand report has categorically admitted this fact as correct (iii) the assessee has never debited the expenses in its P& L rather has shown the amount as mere investment via consortium. Therefore, the principle of law as laid down by the apex court in the case of **Universal Radiator reported in 201 ITR 800** are squarely applicable to the facts of the assesee's case. Copy of the decision is annexed decision Paper Book, wherein it has been held that compensation received on destruction of some product from which stock in trade was to be manufactured is a capital receipt".

8. The Learned DR on the other hand placed reliance on the orders of the authorities below. He submitted that initially compensation was awarded for Rs.73 lacs but later on it was enhanced to Rs.1 crore. He submitted that no tangible asset has been lost to treat the receipts in compensation as capital loss. He submitted that the land did not belong to the assessee is an admitted

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fact and hence the decisions relied upon by the Learned AR are not helpful to the assessee. In the case of Aquapharam – ITA No. 372/Pune/2002 dated 29.2.2012 (supra) before the Pune Bench, the other party of Germany had failed to supply the knowhow against which compensation was awarded. He placed reliance on the following decisions:

i) Sumati Dayal Vs. CIT (1995) – 214 ITR 801 (SC);

ii) Durga Prasad More vs. CIT (1971) – 82 ITR 540 (SC).

9. In rejoinder, the Learned AR submitted that there is no any allegation of colorable device to obtain the award and the only issue involved is as to whether the compensation received on the breach of the agreement by the assessee is Revenue or capital in nature.

10. Considering the above submissions, we find that the issue involved in the grounds is as to whether the compensation received by the assessee through award on breach of the contract is a Revenue or capital receipts in the hands of the assessee. It is an established proposition of law that there cannot be a standard test to determine the nature of receipt as to whether it is capital or Revenue in nature. The nature of receipts depend on facts of each case. The claim of the assessee remained that it is capital in nature and the Assessing Officer has held it as revenue in nature. In support of its claim, as

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discussed above, the assessee contended that the agreement with JMA Buildcom (P) Ltd. to arrange land was entered into normal course of business observed by the Assessing Officer has no relevance as the consortium between some entities as one part and JMA Buildcom (P) Ltd. as other part of the agreement had for the first time joined hands together to carry on business in the state of Punjab. However, before the business of the consortium would have commenced the deal got spoiled and the business was demolished completely even before the setting up of the business. Their contentions remained that the assessee had not entered into agreement to sell with JMA Buildcom in its individual capacity and thus the entire business of the consortium got demolished even prior to the setting up of the new projects. It was submitted that business of the assessee is not to form consortium day in and day out therefore normal course of business proposition by the Assessing Officer does not stand. It was contended that under taxing provisions, every step of a transaction would have to be seen carefully before reaching to any conclusion. Heavy reliance has been placed by the Learned AR on the decision of Pune Bench of the ITAT in the case of Aquapharm Chemical Co. Ltd. vs. JCIT (supra). Having gone through that decision, we find that in that case the assessee company was incorporated in 1974 with its primary object of manufacturing sea water desalting it for the

Indian Air Force and Indian Navy. In early 1980, it diversify its operation by entering into the manufacturing of non-toxic, non-pollutant water treatment chemicals. The assessee company entered into an agreement with AIK-Germany, for supply of technical knowhow for manufacture of fire retardant chemicals. The company decided to set up the project at Prangude. As per the agreement with AIK-Germany, the assessee company paid first installment of technical knowhow fees and it received certain technical information and drawing from AIK. Since the information provided by AIK was not sufficient, the assessee could not start its manufacturing activity of fire retardant chemicals. Despite repeated requests by it, AIK refused to divulge any further information and took the stand that it had supplied all the necessary information. The assessee company left with no alternative but to go into arbitration as per technical knowhow agreement and to claim compensation. An award of Rs.4,53,86,124 was awarded during the year to the assessee as compensation for settlement of dispute. The authorities below treated the receipts as Revenue in nature against the claim of the assessee as capital receipts. Before the ITAT, the assessee argued that the previous year relevant to the assessment year under consideration was first year of manufacturing of anti-fire chemicals and compensation received was an award for non-fulfilling of their part of the contract by AIK. It was

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damaged for non-performance of the contractual obligation by the AIK. It was contended that the authorities below while deciding the issue against the assessee have not appreciated the injury caused to the profit making apparatus and that the knowhow was foundation of the business of the assessee. Appreciating the same, huge compensation was awarded by the arbitrator. The basis of award remained the lost profit due to non-supply of the knowhow and not on loss of profit and that newly installed machinery in absence of supply of knowhow have gone completely wasted. Reliance was placed on several decisions. After dealing with the issue in detail, the ITAT has decided the issue in favour of the assessee. When we examine the facts of the present case in view of the above cited decision of Pune Bench of the ITAT, we find that in the present case before us also the injury was caused to the profit making apparatus as the land which was profit making apparatus for the assessee was not supplied by JMA Buildcom (P) Ltd. as per the agreement entered into between the assessee and associates, and JMA Buildcom (P) Ltd. Appreciating the same, compensation was awarded in the arbitration proceedings initiated against JMA Buildcom.(P) Ltd. In other words, the basis of award remained the lost profit due to non-supply of the land i.e. profit making apparatus and not on loss of profit. We thus find that the only inference can be drawn is that the compensation received by

way of reward due to non-supply of land by JMA Buildcom (P) Ltd. under the agreement was capital receipt. We hold as such. The ground No.2 is accordingly allowed. In view of this finding, the remaining grounds 5, 6, 7 and 9 have become academic only and these grounds are accordingly disposed off.

11. In result, appeals are allowed.

Order pronounced in the open court on 12.08.2016

Sd/-	Sd/-
(J.S. REDDY)	(I.C. SUDHIR)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Dated: 12 /08/2016
Mohan Lal

Copy forwarded to:
1) Appellant
2) Respondent
3) CIT
4) CIT(Appeals)
5) DR:ITAT

ASSISTANT REGISTRAR

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