आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'C' अहमदाबाद ।

IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH, AHMEDABAD

BEFORE SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER
& SHRI MAHAVIR PRASAD, JUDICIAL MEMEBR

आयकर अपील सं./I.T.A. No. 2449/Ahd/2016
(**निर्धारण वर्ष /** Assessment Year : 2008-09)

Bhojison Infrastructure Pvt. Ltd. 4, Shri Ghanshyam Park Co.Op. Hou. Socy. Ltd., B/h. Paraskunj Society, Satellite Road, Jodhpur, Ahmedabad - 380015	**बनाम**/ Vs.	**The Income Tax Officer** Ward – 1(1)(2), Ahmedabad
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACB7764K		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

अपीलार्थी ओर से /**Appellant by :**	Shri Dhiren Shah, A.R.
प्रत्यर्थी की ओर से / **Respondent by :**	Shri Apoorva Bhardwaj, Sr.D.R.

सुनवाई की तारीख / **Date of Hearing**	13/08/2018
घोषणा की तारीख /**Date of Pronouncement**	17/09/2018

आदेश/O R D E R

PER PRADIP KUMAR KEDIA - AM:

The captioned appeal has been filed at the instance of the assessee against the order of the CIT(A)-1, Ahmedabad ('CIT(A)' in short), dated 26.07.2016 arising in the assessment order dated 11.03.2015 passed by the Assessing Officer (AO) under s. 143(3) r.w.s. 147 of the Income Tax Act, 1961 (the Act) concerning assessment year 2008-09.

2. The grounds of appeal raised by the assessee reads as under:-

> *" I.* ***Addition on account of Long term capital gain treating as wrong claim – Rs.1,51,988/-.***
>
> *"1. The Ld. CIT(A) has erred both in law and on facts in confirming the addition of Rs.1,51,988/- as made by the Ld. A.O. on account of long term capital gain treating as wrong claim. The Ld. CIT (A) has failed to properly consider the written submission filed by the appellant.*
>
> ***II. Addition on account of exempt income claimed treating the same as business income- Rs. 2,47,03,600/-***
>
> *I. The Ld. CIT (A) has erred in law and on facts in confirming the addition of Rs. 2,47,03,500/- as made by the Ld. A.O while treating the exempt income as income from. business and profession.*
>
> *2. The Ld. CIT (A) has erred in law and on facts in failing to properly consider appellant company's detailed written submission and various judicial pronouncements relied upon by the appellant company.*
>
> *3. That the Ld. CIT (A) has failed to consider the fact that as per the decision of the Hon'ble Jurisdictional Gujarat High Court in the case of Baroda Cement & Chemicals Ltd vs CIT (1986) 53 CTR 260 (Guj) and other judicial pronouncements, "Right to sue" as per the provisions of section 6(e) of the Transfer of Property Act, is not a property and therefore it is not a "Capital Asset" and as a consequence, impugned receipt of Rs. 2,47,03,600/- received as compensation / damages for relinquishment of right to sue in the Courts of law would only be a capital receipt in the hands of the appellant company not subject to tax."*

3. Ground No.1 relates to addition of Rs.1,51,988/- by denying the indexation on cost of acquisition while computing the long term capital gains.

4. Addressing the issue, the learned AR for the assessee submitted that the limited controversy on the issue pertains to denial of indexation benefits on the cost of acquisition of land under sale giving rise of the long term capital gains. The learned AR pointed out that notwithstanding the fact that documents in respect of land acquired 7-8 years back could not be produced, the land was duly reflected in the balance sheet for last many years. It was thereafter contended that the AO has duly accepted the long term capital gain on sale of such land parcels. This being so the cost of acquisition of Rs.4,19,533/-

requires to be accepted as sacrosanct. The AO has granted long term capital gain based on the aforesaid amount of cost of acquisition but however has denied indexation benefit which is inexplicable. Per contra, the learned DR relied upon the order of the AO & CIT(A).

5. A simple perusal of the orders of the authorities below suggest that the cost of acquisition of Rs.4,19,533/- has been admitted and the long term capital gain have also been accepted. Therefore, the benefit of statutory indexation cost to offset the effect of inflation cannot be denied. Once, the cost of acquisition is determined and the land under sale was found to be a long term capital asset, indexation of cost of acquisition becomes automatic as per the statutory provisions of the Act. Therefore, we do not find any rationale for denial of indexation benefits. Therefore, the aforesaid addition of Rs.1,51,988/- arising on account of such denial requires to be reversed. The AO is directed to delete the addition on this score.

6. In the result, Ground No.1 of the assessee's appeal is allowed.

7. Ground No.2 concerns treatment of capital receipt claim as revenue income by the AO.

8. The learned AR for the assessee in this regard pointed out that the assessee entered into a development agreement dated 30.03.2007 by virtue of which a right in the property/land was created in favour of the assessee by the owner of the land, Shri Sureshbhai M. Patel. The learned AR submitted that despite development agreement entered into by the landlord, it has decided to sale the said land to other parties instead of continuing with development proposal of the said land as per the terms and conditions of the development agreement. Thus, quoted from the decision of Hon'ble Gujarat High Court in Baroda

Cement & Chemicals Ltd. vs. CIT 158 ITR 636 (Guj) the only recourse available to the assessee company was to file a suit in the Courts of law for specific performance of preemptive right to purchase the land as per the development agreement. Such right to file a suit in the Courts of law for specific performance of preemptive right to purchase the land as per development agreement is nothing but a 'right to sue' and as per the provisions of Section 6(e) of the Transfer of the Property Act, 'right to sue' is not capable of being transferred. The learned AR pointed out that after the breach of development agreement, the only right survives for the assessee was right to sue the vendor. The learned AR canvassed that such 'right to sue' for damages is not an actionable claim and is not transferrable on account of embargo cast upon by Section 6(e) of the Transfer of Property Act. It was further contended that 'right to sue' also does not have any cost of acquisition. The learned AR professed that there is no property in such 'right to sue' as discussed in wide ranging decisions rendered by the Courts and Tribunals. Such 'right to sue' does not fall within the sweep of definition of 'capital asset' under s. 2(14) of the Act. This apart, the 'right to sue' is a personal right and is not susceptible to 'transfer' for its taxability. Consequently, the damages received from the potential purchaser for such relinquishment of 'right to sue' in the Courts of law for breach of development agreement is clearly a non-taxable capital receipt.

8.1 The learned AR submitted that the issue is no longer *res integra* and is squarely covered in favour of the assessee by following the decisions including the decision of the Hon'ble Jurisdictional High Court:

i. Baroda Cement & Chemicals Ltd. vs. CIT [1986] 158 ITR 636 (Gujarat)
ii. CIT vs. Ashoka Marketing Ltd. [1986] 164 ITR 664 (Calcutta)

iii. CIT vs. J. Dalmia [1985] 149 ITR 215 (Delhi)

iv. Shri Sekhar G. Patel L/h. of Late Shri Govindbhai C. Patel ITA No. 1997/Ahd/2010 (Ahmedabad – Trib)

v. Popular Estate Management Ltd. vs. ITO (AY: 2009-10) ITA No. 212/Ahd/2014 (Ahmedabad – Trib)

vi. Popular Estate Management Ltd. vs. ITO (AY: 2008-09) ITA No. 3116/Ahd/2015 (Ahmedabad – Trib)

vii. Saytam Food Specialties (P) Ltd. v. DCIT [2015] 57 taxmann.com 194 (Jaipur – Trib)

viii. Govindbhai C. Patel vs. DCIT [2010] 36 SOT 0270 (Ahmedabad-Trib.)

ix. Lead Counsel of Qualified Settlement Fund [2016] 381 ITR 1 (AAR)

x. Aberdeen Claims Administration INC. [2016] 381 ITR 55 (AAR)

xi. Satyam Food Specialities (P.) Ltd. vs. DCIT [2015] 57 taxmann.com 194 (Jaipur-Trib)

8.2 The learned AR accordingly submitted that the consideration received in lieu of 'right to sue' is a capital receipt which is not taxable at all since there is no property involved in it for it to be regarded as capital asset u/s. 2(14) of the Act. The learned AR also quipped that assets connected to business can also be regarded as capital asset under s.2(14) of the Act provided such asset is in the nature of property. The 'right to sue' not being in the nature of property is not chargeable to tax being a capital receipt.

8.3 The learned AR next submitted that Section 28(va) was inserted to include certain sum receivable in the nature of forgoing right in certain intangible properties as business income. However the present case also does not fall under s. 28(va) of the Act as receipt is not in the nature of activities specified therein. Elaborating further, the

learned AR contended that the compensation amount received is in respect of relinquishment of assessee's 'right to sue' in a Court of law which right cannot be regarded as revenue receipt taxable as business income under s.28(va) of the Act. The provisions of Section 28(va) of the Act are very clear that the compensation received in lieu of 'right to sue' does not fall under these provisions. The learned AR accordingly submitted that the action of the AO and CIT(A) is opposed to be legal principles delineated in the judicial precedents and thus requires to be set aside and relief as requested in the grounds of appeal be allowed.

9. The learned DR on the other hand relied upon the orders of the AO & CIT(A).

10. We have carefully considered the rival submissions and perused the orders of the authorities below as well as the material referred to in terms of Rule 18(6) of the ITAT Rules, 1963 and also the case laws cited. The substantive question that arises for consideration is whether damages received by the assessee for breach of development agreement are capital in nature or otherwise chargeable to tax. It is the case of the assessee that the compensation/damages received by the assessee from the purchaser on transfer of land under development agreement is capital in nature. It is the case of the assessee that the only right that accrues to the assessee who complains of the breach is right to file a suit for recovery of damages from the defaulting party. The breach of contract does not give rise to any debt and therefore a right to recover damages is not assignable because it is not a chose-in-action. For actionable claim to be assigned, there must be a debt in the sense of an existing obligation to consider it to be an actionable claim. It is the case of assessee that the assessee had a mere 'right to sue' which is neither a capital asset within the meaning of Section

2(14) of the Act nor is capable to being transferred and therefore not chargeable under s.45 of the Act.

10.1 The essence of long list of judicial pronouncements cited on behalf of assessee is that Section 6 of the Transfer of Property Act which uses the same expression 'property of any kind' in the context of transferability makes an exception in the case of a mere right to sue. The decisions thereunder make it abundantly clear that the 'right to sue' for damages is not an actionable claim. It cannot be assigned. Transfer of such a right is opposed to public policy as it tantamounts to gambling in litigation. Hence, such a 'right to sue' does not constitute a 'capital asset' which in turn has to be 'an interest in property of any kind'. Despite the definition of expression 'capital asset' in the widest possible terms in Section 2(14) of the Act, a right to a capital asset must fall with the expression 'property of any kind' subject to certain exclusions. Notwithstanding widest import assigned to the term 'property' which signifies every possible interest which a person can hold and enjoy, the 'right to sue' is a right *in personam* and such right cannot certainly be transferred. In order to attract the charge of tax on capital gains, the *sin qua non* is that the receipt must have originated in a 'transfer' within the meaning of Section 45 r.w.s. 2(47) of the Act. In the absence of its transferability, the compensation/damages received by assessee is not assessable as capital gains.

10.2 The co-ordinate bench of ITAT, Ahmedabad in the case of Deputy CIT(A) vs. Shekhar G. Patel ITA No.1997/Ahd/2010 order dated 19.03.2014 relied upon on behalf of the assessee has made reference to host of judicial pronouncements including the decision of the Hon'ble Gujarat High Court in the case of Baroda Cement and Chemicals Ltd. (supra) and concluded the issue in faovur of assessee.

The Co-ordinate bench highlighted the relevant part of the decision of the Hon'ble Gujarat High Court which is reproduced hereunder:

> *"18. The assessee had undoubtedly a right to sue M/s K.C.P. Ltd. for damages for breach of contract. Instead of litigating in a Court of law, the parties arrived at a settlement whereunder compensation in the sum of Rs.1,40,000 came to be paid in full and final satisfaction to the assessee. Counsel for the Revenue contends that the compromise/arrangement resulted in extinguishment of the assessee's right to sue for damages within the meaning of s. 2(47) of the Act. While accepting this contention the Tribunal has placed reliance on the decision of this Court in CIT vs. R.M. Amin (1971) 82 ITR 194 (Guj). In that case this Court observed that the use of the word 'include' in the definition of the word 'transfer' in s. 2(47) was intended to enlarge the meaning of 'transfer' beyond its natural import so as to include extinguishment/relinquishment of rights in the capital asset for the purpose of s. 45 of the Act. Since the transfer contemplated by s. 45 is one as a result whereof consideration has passed to the assessee or has accrued to him, extinguishment of the right must relate to that 'capital asset', corporeal or incorporeal. It is, therefore obvious that a transfer of a capital asset in order to attract liability to tax under the head 'Capital gains' must be a 'transfer' as a result whereof some consideration is received by or accrues to the assessee. If the transfer does not yield any consideration, the computation of profits or gains as provided by s. 48 of the Act would not be possible. If the transfer takes effect on extinguishment of a right in the capital asset, there must be receipt of consideration for such extinguishment to attract liability to tax. Now, in legal parlance, the terms 'consideration' and 'compensation' or 'damages' have distinct connotations. The former in the context of ss. 45 and 48 would connote payment of a sum of money to secure transfer of a capital asset; the latter would suggest payment to make amends for loss or injury occasioned on the breach of contract or tort. Both ss. 45 and 48 postulate the existence of a capital asset and the consideration received on transfer thereof. But, as discussed earlier, once there is a breach of contract by one party and the other party does not keep it alive but acquiesces in the breach and decides to receive compensation therefor, the injured party cannot have any right in the capital asset which could be transferred by extinguishment to the defaulter for valuable consideration. That is because a right to sue for damages not being an actionable claim, a capital asset, there could be no question of transfer by extinguishment of the assessee's rights therein since such a transfer would be hit by s. 6(e) of the Transfer of Property Act. In any view of the matter, it is difficult to hold that the sum of Rs.1,40,000 received by way of compensation by the assessee was consideration for the transfer of a capital asset."*

10.3 The Hon'ble Gujarat High Court in Baroda Cement (supra), in turn, referred to the concept of breach of contract as discussed by the Hon'ble Bombay High Court in the case of Iron and Hardware (India) Co. vs. Shamlal & Bros. AIR 1954 Bom 423 as under (p. 645 of 158 ITR):

> *"10. Chagla, C.J., had an occasion to consider this aspect of the law in Iron and Hardware (India) Co. vs. Shamlal & Bros. AIR 1954 Bom 423. The learned Chief Justice observed as under(p. 425) :*
>
> > *'It is well settled that when there is a breach of contract, the only right that accrues to the person who complains of the breach is the right to file a suit for recovering damages. The breach of contract does not give rise to any debt and, therefore, it has been held that a right to recover assignable because it is not a chose-in-action. An actionable claim can be assigned, but in order that there should be an actionable claim there must be a debt in the sense of an existing obligation. But inasmuch as a breach of contract does not result in any existing obligation on the part of the person who commits the breach, the right to recover damages is not an actionable claim and cannot be assigned.'*
>
> *Proceeding further, the learned Chief Justice stated (p. 425) :*
>
> > *'In my opinion, it would not be true to say that a person who commits a breach of the contract incurs any pecuniary liability, nor would it be true to say that the other party to the contract who complains of the breach has any amount due to him from the other party.*
> >
> > *As already stated, the only right which he has the right to go to a Court of law and recover damages. Now, damages are the compensation which a Court of law gives to a party for the injury which he has sustained. But, and this is most important to note, he does not get damages or compensation by reason of any existing obligation on the part of the person who has committed the breach. He gets compensation as a result of the fiat of the Court, Therefore, no pecuniary liability arises till the Court has determined that the party complaining of the breach is entitled to damages. Therefore, when damages are assessed, it would not be true to say that what the Court is doing is ascertaining a pecuniary liability which already exists. The Court in the first place must decide that the defendant is liable is liable and then it proceeds to assess what that liability is. But till that determination there is no liability at all upon the defendant.'*
> >
> > *It would appear from the above observations that on breach of contract the defaulter does not incur any pecuniary liability nor does the injured party becomes entitled to any specific amount, but he only has a right to sue and claim damages which may or may not*

be decreed in his favour. He will have to prove (i) that the opposite party had committed breach of contract and (ii) that he had suffered pecuniary loss on account thereof.

11. The above observations of Chagla, CJ., were quoted with approval by the Supreme Court in Union of India vs. Raman Iron Foundry AIR 1974 SC 1265. In para 9 of the judgment, the Supreme Court considered the claim for liquidated damages for breach of contract between the parties. Pointing out that so far as the law in India is concerned, there is no qualitative difference in the nature of the claim, whether it be for liquidated damages or unliquidated damages, the Supreme Court proceeded to state the law as under (p. 1273):

''When there is a breach of contract, the party who commits the breach does not eo instanti incur any pecuniary obligation, nor does the party complaining of the breach becomes entitled to a debt due from the other party. The only right which the party aggrieved by the breach of the contract has is the right to sue for damages. That is not an actionable claim and this position is made amply clear by the amendment in s. 6(e) of the Transfer of Property Act, which provides that a mere right to sue for damages cannot be transferred.'

Quoting the statement of law enunciated by Chagla C.J., which is extracted earlier, the Supreme Court stated (p. 1273) : 'This statement in our view represents the correct legal position and has our full concurrence'.

12. It would seem well-settled from the above discussion that after there is a breach of contract for sale of goods, nothing is left in the injured party save the right to sue for damages or specific performance which cannot be transferred under s. 6(e) of the Transfer of Property Act since it is a mere right to sue and not an actionable claim."

10.4 In view of the above facts and in the light of plethora of case laws relied upon, we are disposed to hold that the receipt towards compensation in lieu of 'right to sue' is of capital nature which is not chargeable to tax under s.45 of the Act.

11. At this juncture, it may be pertinent to observe that the Revenue has *inter alia* questioned the basis giving rise to the cause of action for creation of 'right to sue'. We do not see any purport in such aspect. A development agreement was executed which enabled the assessee to utilize the land for construction and for sharing of profits.

This right/advantage accrued to the assessee was sought to be taken away from the assessee by way of sale of land. The prospective purchaser as well as the defaulting party (owner) perceived threat of filing suit by developer and consequently paid damages/compensation to shun the possible legal battle. The intrinsic point with respect to accrual of 'right to sue' has to be seen in the light of overriding circumstances as to how the parties have perceived the presence of looming legal battle from their point of view. It is an admitted position that the defaulting party has made the assessee a confirming party in the sale by virtue of such development agreement and a compensation was paid to avoid litigation. This amply shows the existence of 'right to sue' in the perception of the defaulting party. Thus, the existence of 'right to sue' could not be brushed aside.

12. We shall now advert to the claim of the Revenue that amount received towards relinquishment of such right is purely a revenue receipt. In this regard, we notice that the compensation was not received as a result of termination of advantages associated with development rights but was claimed to be received to relinquish the rights of the assessee to sue against the vendor of the land. The assessee has received the compensation amount on sale of property occasioned due to breach of development agreement. The development agreement was thus frustrated by sale of land by the owner. The observation of the CIT(A) that assessee had obtained the possession of the property from seller is beleaguered one. As pointed out on behalf of the assessee, the possession are typically given to a developer for the purposes of development. Such act is in the nature of license to develop the property while the possession of the property continues to remain vested with the vendor. On a plain reading, we observe that consideration received for relinquishment of 'right to sue' does not fall under the provisions of Section 28(va) of the Act.

We further find from the facts of the case that assessee has not received this amount under an agreement for not carrying out activity in relation to any business or not to share in knowhow, patent, copyright, trademark, license etc. as specified under s.28(va) of the Act enacted for its taxability under the head of business income. Consequently, we are of the considered view that compensation received in lieu of 'right to sue' could not be regarded as revenue receipt. Therefore, we find merit in the appeal of the assessee.

13. Consequently, Ground No.2 of the assessee's appeal is allowed.

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

This Order pronounced in Open Court on 17/09/2018

Sd/-	Sd/-
(MAHAVIR PRASAD)	(PRADIP KUMAR KEDIA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Ahmedabad: Dated 17/09/2018

True Copy

S. K. SINHA

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. राजस्व / Revenue
2. आवेदक / Assessee
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाइल / Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण, अहमदाबाद ।