IN THE INCOME-TAX APPELLATE TRIBUNAL "C" BENCH MUMBAI

BEFORE SHRI G.S. PANNU, VICE-PRESIDENT AND
SHRI PAWAN SINGH, JUDICIAL MEMBER

ITA No. 86/Mum/2017 (Assessment Year 2012-13)

M/s Chheda Housing Development Corporation 109-111, Goyal Shopping Centre, Opp. Railway Station, Borivali (W), Mumbai-400092. **PAN: AAEFC1484E**	Vs.	Addl. CIT-32(1) 2nd Floor, C-11, Pratyakshkar Bhavan, Bandra-Kurla Complex, Bandra East, Mumbai-400051.
Appellant		Respondent

Appellant by : Dr. K. Shivaram with
Shri Rahul K. Hakkani (AR)

Respondent by : Shri H.N. Singh CIT –DR with
Shri Rajeev Gubgotra (Sr.DR)

Date of Hearing : 05.04.2019

Date of Pronouncement : 29.05.2019

ORDER UNDER SECTION 254(1)OF INCOME TAX ACT

PER PAWAN SINGH, JUDICIAL MEMBER;

1. This appeal by assessee is directed against the order of ld. Commissioner of Income-tax (Appeals)-44 [hereinafter referred as ld CIT (A)], Mumbai dated 29.03.2016 for Assessment Year 2012-13. The assessee has raised the following grounds of appeal:

    1. The learned CIT(A) erred in confirming the compensation of Rs. 20,00,00,000 received by the appellant firm, as a capital asset and levying long term capital gains of Rs. 15,76,13,391. The Ld. CIT(A) had erroneously confirmed the findings of the Ld.AO and jumbled up the chronology of events presented by the appellant firm and completely disregarded that –

(a.) the said compensation was received by the appellant firm for criminal breach of contract; and

(b.) due to the fraudulent Development Agreement, the appellant firm never received any right to claim specific performance and consequently there was no transfer of capital asset as envisaged in section 2(14) of the Income-tax Act, 1961.

2. The Ld. CIT(A) had confirmed the view of Ld.AO that the appellant firm even after paying an advance tax of Rs. 3 crores, had shown nil income as a pretense for making false claims for the purpose of evading tax.

2. Brief facts of the case are that the assessee is a partnership firm stated to be engaged in the business of financing, construction and development. The assessee filed its return of income for Assessment Year 2012-13 on 31.07.2012 declaring Nil income and claimed the refund of tax Rs. 3 Crore already paid in advance. The return of income was selected for scrutiny. During the assessment proceeding, the Assessing Officer noted that assessee has received Rs. 20 Crore as compensation, which is inclusive of advance of Rs.2.50 Crore paid by assessee. The assessee claimed the receipt of Rs. 20 Crore as capital receipt not chargeable to tax. The assessee received the said compensation under agreement for relinquishing his right to sue in a development agreement dated 20.04.2004. The Assessing Officer treated the receipt of Rs. 20 Crore as income and taxed the same as Long Term Capital Gain (LTCG). On appeal before the ld. CIT (A), the action of Assessing Officer was confirmed. Thus, further aggrieved by the order of ld. CIT (A), the assessee has filed the present appeal before us.

3. We have heard the submission of both the parties and have gone through the orders of authorities below. We have also deliberated on various case law relied by lower authorities as well as by representative of the parties. Though, the assessee has raised multiple grounds of appeal, however, in our considered view, the core issue involved in this case whether the receipt of compensation is a capital receipt within the meaning of section 2(47) of the Act or capital gain and liable to tax as long term capital gain (LTCG). The ld. authorized representative (AR) of the assessee submits that assessee is a partnership firm engaged in the business of financing, construction and development. During the financial year relevant to Assessment Year under consideration, the assessee-firm was in receipt of Rs. 20 Crore by way of compensation in lieu of surrender of right sue. Based on the receipt of compensation, the assessee deposited a sum of Rs. 3 Crore as advance tax under the belief that the said receipt may be taxable. However, while filing the return of income, the assessee was advised that said receipt is not taxable; consequently, the assessee filed its return declaring Nil income and claimed refund of advance tax paid already paid.

4. The ld. AR of the assessee submits that there are certain important facts and events which are necessary for appreciation of facts as to how the assessee received a compensation of Rs. 20 Crore. The assessee entered into a memorandum of understanding (MOU) on 20.04.2005 with

Mohammed Husain Merchant for developing saleable right of floor surface index (FSI) of 8,00,000/- Sq. ft. on a plot of land situated in village-Boiser, Kandivali (E), Taluka-Borivali in sub-district of Bandra. On execution of MOU the assessee paid advance of Rs. 3.00 Crore to the owner of the said land. The owner of the land claimed that the land is free from encumbrances and having marketable title and have shown certificate dated 16.03.2004 that the land is free from all encumbrances. In the MOU it was agreed that the parties shall execute Joint Development agreement. Further a supplementary agreement was executed on 24.03.2005 by assessee and wherein besides the earlier conditions, it was agreed that the assessee would pay additional as sum of Rs. 3.35 Crore to the landowner on account of consideration of development right of 2,00,000 Sq ft FSI. As per the conditions of the MOU and supplementary agreement the owner of the land was required to obtained commencement certificate from local authorities, however, the same was not provided to the assessee. Later on the assessee came to know that the owner of said land already transferred the development right of entire 8,00,000 sq. ft. to M/s Star Habitat Pvt. Ltd. M/s Star Habitat Pvt ltd was company of family members of the land owners. The land owner Mohammed Husain Merchant not disclosed these facts to the assessee while executing MOU that the development right has already transferred to M/s Star Habitat. After a prolong negotiations the owners

of said land failed to execute Joint Development Agreement on one pretext of the other. On 17.05.2005 the assessee issued a legal notice to the owner of the land that some excavation work was being carried out on the land which was the subject matter of MOU with assessee. The owner on the receipt of the legal notice denied the existence of the MOU and claimed that amount of Rs. 2.50 Crore was received by them for working capital for business purpose. The owner of the land Mohammed Husain Merchant for first time disclosed that much before the execution of MOU, the land was transferred to M/s Star Habitat, wherein his son is director. The assessee immediately filed a Civil Suit No. 1796 of 2005 before High Court of Bombay for seeking the relief for Specific Performance of the MOU and to execute the joint development agreement, seeking the declaration that the agreement dated 22/01/2004 executed in between land owner and M/s Star Habitat is not binding on the assessee and in alternative the assessee claimed damage for breach of contract. The assessee also filed Criminal Complaint against the land owner, co-owner Tanveer Merchant and their Advocate Sharad Damodar Chitnis. On the complain of the assessee a First Information Report (FIR) was registered against the owner, his son Tanveer and their Advocate, under section 406/420/34 of Indian Penal Code (IPC). The assessee also filed a Criminal Complaint before Metropolitan Magistrate Boriwali. On the Criminal Complaints filed by the assessee the land

owner Mohammad Merchant, co-owner Tanveer Merchant and their Advocate Sharad Damodar Chitnis was arrested on 04.04.2006. In fact a fraud was committed with the assessee by making conspiracy by land owner, his son and their Advocate, who were arrested by the Police.

5. The litigation in various legal forums including before Bombay High Court continued from 2005 till 2011, when one of the well wisher namely Prashant Jaswant Parekh, Director of M/s Kashtamanup Developers and a common friends of the parties to the MOU intervene and persuaded both the party to settle the dispute. After a prolong discussions the assessee and the owners of the land agreed to cancel the development agreement dated 24.03.2005 and the supplementary agreement dated 25.03.2005 and therefore, deed of cancellation was executed on 10.09.2011. The cancellation deed was also signed on behalf of M/s Kashtamanup Developers as a confirming party. In the cancellation deed the assessee agreed the assessee agreed to withdraw the Criminal Complaint pending before Metropolitan Magistrate and the Civil Suit pending before High Court. The owner and the other co-owners also agreed to withdraw all allegations and counter allegation or claim against each other. The assessee also agreed for not to create any third party right, title or interest in respect of the right created under MOU. On execution of cancellation deed dated 10.09.2011 the assessee was paid Rs. 20 Crore by confirming party on account of refund of the

advance with interest, loss of profit, liquidated damage and loss of opportunity to develop his own property and cost of litigation.

6. The ld. AR for the assessee further submits that the lower authorities failed to appreciate that the right title and interest in the property in respect of which are development agreement was executed was in dispute, the said property was transferred by the owners to third party prior to entering into agreement with the assessee. In fact, the owners at the time of executing the MOU have no right to do so as they have already transferred the land to M/s Star Habitat Private Ltd. The MOU was void -ab-initio, the assessee had never got right to claim specific performance. By entering into deed of cancellation, the assessee surrendered his right to sue against the owner as well as the persons who entered in agreement with the owner. There was no assignment of said right to third party by assessee which is clear from the fact that original MOU was cancelled and third-party had to deal independently with the owner as per cancellation deed. The property / asset was never transferred to the assessee. Therefore, the compensation received by assessee under the deed of cancellation was in respect of damages for breach of contract which cannot be taxed as Capital Gain. The learned AR further argued that right to sue is a right in persona, which is not assignable as per section 6(e) of Transfer of Property Act, thus the

amount received by way of compensation in cancellation deed is not chargeable to tax under section 45 of Income tax act.

7. In support of his submission the learned AR of the assessee relied upon the following decisions :

(i) Bhojison Infrastructure (P) Ltd Vs ITO [2018] 99 taxmann.com 26 (Ahmedabad Tribunal),
(ii) Caddell Weaving Mills Co. (P) Ltd Vs CIT 249 ITR 265(Bombay),
(iii) CIT Vs J Dalmia (149 ITR 215 Delhi),
(iv) Bharat Forge Co Ltd Vs CIT (205 ITR 339 Bombay),
(v) CIT Vs Abbasbhoy A Dehgamwalla (195 ITR 28 Mumbai
(vi) CIT Vs Asoka Marketing Ltd (164 ITR 664 Calcutta)
(vii) DCIT Vs Ýogen Sinhgwi (ITA No.477/M/2011 dated 01.11.2017)
(viii) ACIT Vs Jackie Shroff (2018) 194 TTJ 760 (Mumbai)
(ix) CIT Vs Saurashtra Cement Ltd (325 ITR 422 SC)
(x) CIT Vs Tata services Ltd (122 ITR 594 Bombay)
(xi) CIT Vs Vijay Flexible Container (186 ITR 693 Bombay)
(xii) K.R. Smith Vs ACIT (268ITR 436 Mad),
(xiii) CIT Vs Smt. Laxmidevi Ratni (2008) (296 ITE 363 MP-HC)

The learned AR of the assessee submits that the case laws relied by assessing officer in Tata Services (supra) and Vijay Flexible Containers (supra) are not applicable on the facts of the present case as the facts of these cases are different. The ld. AR also filed the copy of following documents.

(a) Copy of agreement executed between Mohammad Merchant and Star Habitat Private Ltd dated 22nd of January 2004.

(b) Copy of Memorandum of joint development agreement between Mohammad Merchant and assessee dated 24th of March 2004.

(c) Copy of Supplementary agreement between assessee and Mohammed Marchant Husain dated 25th March 2005.

(d) First information report (FIR) under section 406, 402 and 34 of Indian Penal Code dated 21 August 2005,

(e) Copy final report and bail order dated 4th April 2006,

(f) High Court order granting injunction in favour of assessee,

(g) Copy of complaint filed before Metropolitan Magistrate Borivali in case No. PW/853 of 2006,

(h) Copy of cancellation dated 10th September 2011

(i) Copy of consent term in Civil Suit No. 2180 of 2004.

8. On the other hand the learned AR for the revenue supported the order of lower authorities. The ld. DR for the revenue further submits that the word 'capital gain' means property of any kind held by the assessee. The right to execute the Joint development right of immovable property falls within the expression of "property of any kind" as used in section 2(24) and consequently is a capital asset. And giving up a right of specific performance as claimed by the assessee amounts to relinquishment of capital asset. Therefore, there was a transfer of capital asset under the provision of the Income –tax Act. The ld DR prayed for confirming the order of the ld CIT(A) and to dismiss the appeal of assessee.

9. We have considered the rival submissions of the parties and have gone through the orders of the authorities below. We have also deliberated on various case laws relied by the lower authorizes and the ld. AR for the

assessee and the various documentary evidences filed by the ld. AR for the assessee. During the assessment the assessing officer noted that the assessee paid advance tax of Rs. 3.00 Crore during the relevant financial year. The assessee dispute depositing advance tax file Nill return of income and claimed refund of the advance tax. The return was selected for scrutiny. The assessing officer issued show cause notice to the assessee to explain the facts. The assessee filed its written submissions dated 19.11.2013 and further on 13.12.2013. In the reply the assessee explained the facts as explained before us by ld. AR for the assessee. The assessing officer recorded the submission of the assessee in para 2.1 of his order, which we are not repeating here for the sake of brevity. The assessee also relied on various case laws as relied before us. The contention of assessee was not accepted by Assessing Officer holding that after payment of advance tax on a sum of Rs. 20 Crore received during the financial year 2011-12, however, at the time of filing return of income, the assessee claimed that the receipt is not taxable. The Assessing Officer observed that the assessee was contesting before the court for specific performance of MOU, however, at the time of assessment of income; the assessee came up with the argument that it never had a right of performance. The reliance of assessee on the provisions of Specific Relief Act is also of no consequence. The Assessing Officer further observed that the assessee was became aware

of the ongoing dispute between the co-owner sometime during the Financial Year 2004-05, a new agreement was executed on 24.03.2005 by representing the seller to the assessee that it was not possible to transfer the development right in respect of entire piece of land, wherein a development right of 2,00,000 sq. ft. were sold to the assessee for a specific consideration and against which a credit of advance of Rs. 50,00,000/- already given was extended to the assessee. The assessee has given advance of Rs. 2.5 Crore against the purchase of development right of 2,00,000 sq.ft. of FSI on the aforesaid piece of land. The assessee failed to explain while they entered into agreement once they became aware of the dispute between the co-owners. On the basis of above referred observation, the Assessing Officer concluded that the transaction made by assessee was a development-cum-sale transaction which involved transfer of capital asset and was liable for taxation under the Income-tax Act. The cancellation deed dated 10.09.2011 nowhere speak of giving up the right to shown as claimed by assessee. As per cancellation deed, the compensation was paid to the assessee for loss of profit, liquidated damage, for loss of opportunity, to develop the property and sale of flat in open market. The Assessing Officer concluded that by no stretch of imagination can any part of compensation be considered as liquidated damage. The initial investment of assessee of Rs. 2.50 Crore whopped 800%. The Assessing Officer also concluded that contractual

rights obtained under the contract of sale are a valuable right and considered as property. The contractual right of purchaser to obtain title to immovable property or development right there on for a price is capable of specific performance. It is also assignable. Therefore, a right to obtain conveyance of immovable property or development right is clearly "property" as prescribed by section 2(14) of the Act. The Assessing Officer further strengthen his conclusion by referring that extinguishment of any right, giving up of a right of specific performance by the assessee, to get development right of immovable property, in lieu of receiving a consideration resulting in extinguishment of right in property and attract rigor of section 2(14) read with section 247. The Assessing Officer on the basis of his observation and conclusion conclude that compensation/consideration received in lieu of giving up the said right, any amount received, constitutes capital gain and liable to tax. The ld CIT(A) confirmed the action of the assessing officer holding that the assessing officer has made a water tight case against the assessee which does not require any interference.

10. As Income-tax Act does not define the term "capital receipt" and "revenue receipt", therefore, one has to be depend on the natural meaning of the terms as well as on the precedent of the decided cases. According to the *Oxford English Dictionary* , the word 'capital' means "accumulated wealth employed reproductively" the word 'revenue'

means " the return yield , or profit of any lands, property or other source of income, which comes in to once a return from property of possession; income from any source". It is settled position that a receipt in lieu of source of income is a capital receipt, but a receipt in lieu of income is revenue receipt. In our view to determine whether a receipt is capital or revenue in nature, we have to go by its nature in the hand of the recipients.

11. The coordinate bench of Ahmedabad Tribunal in Bhojison Infrastructure (P) Ltd Vs ITO (supra), while relying on the decision of Hon'ble Gujarat High Court in the case of *Baroda Cement and Chemicals Ltd.* (*supra*) while dealing with almost on similar set of facts held as under:

> **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 tantamount 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 *sine 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 *Shekhar G. Patel* 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 favour 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 where under 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 v. 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 therefore, 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.* v. *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.* v. *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 v. 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'.
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> 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 know-how, 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."

12. The Hon'ble Supreme Court in CIT Vs Saurashtra Cement Ltd (supra) wherein the assessee was engaged in manufacture of cement entered into an agreement with the supplier for acquiring an additional cement plant. The agreement contained a condition that in the event of delay in supply of machinery the assessee would be eligible for damages without proof of actual loss of an amount not exceeding 5% of the total price of machinery. The assessee received liquidated damages as the supply was delayed. The Court held that the amount received by way of damages was directly linked to acquisition of capital asset and led to delay in coming into existence of

the profit-making apparatus. Accordingly, it was held that the amount so received was a capital receipt and could not be taxed as income. The relevant part of the order is extracted below;

> **"11.** The question whether a particular receipt is capital or revenue has frequently engaged the attention of the Courts but it has not been possible to lay down any single criterion as decisive in the determination of the question. Time and again, it has been reiterated that answer to the question must ultimately depend on the facts of a particular case, and the authorities bearing on the question are valuable only as indicating the matters that have to be taken into account in reaching a conclusion. In *Rai Bahadur Jairam Valji's* case (*supra*), it was observed thus :
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> > "The question whether a receipt is capital or income has frequently come up for determination before the courts. Various rules have been enunciated as furnishing a key to the solution of the question, but as often observed by the highest authorities, it is not possible to lay down any single test as infallible or any single criterion as decisive in the determination of the question, which must ultimately depend on the facts of the particular case, and the authorities bearing on the question are valuable only as indicating the matters that have to be taken into account in reaching a decision. *Vide Van Den Berghs Ltd.* v. *Clark* [1935] 3 ITR (Eng. Cas.) 17. That, however, is not to say that the question is one of fact, for, as observed in *Davies (H.M. Inspector of Taxes)* v. *Shell Company of China Ltd.* [1952] 22 ITR (Suppl.) 1, "these questions between capital and income, trading profit or no trading profit, are questions which, though they may depend no doubt to a very great extent on the particular facts of each case, do involve a conclusion of law to be drawn from those facts."
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> **12.** In *Kettlewell Bullen & Co. Ltd.'s* case (*supra*), dealing with the question whether compensation received by an agent for premature determination of the contract of agency is a capital or a revenue receipt, echoing the views expressed in *Rai Bahadur Jairam Valji's* case (*supra*) and analysing

numerous judgments on the point, this Court laid down the following broad principle, which may be taken into account in reaching a decision on the issue :

> "Where on a consideration of the circumstances, payment is made to compensate a person for cancellation of a contract which does not affect the trading structure of his business, nor deprive him of what in substance is his source of income, termination of the contract being a normal incident of the business, and such cancellation leaves him free to carry on his trade (freed from the contract terminated) the receipt is revenue : Where by the cancellation of an agency the trading structure of the assessee is impaired, or such cancellation results in loss of what may be regarded as the source of the assessee's income, the payment made to compensate for cancellation of the agency agreement is normally a capital receipt."

13. We have considered the matter in the light of the afore-noted broad principle. It is clear from clause No. 6 of the agreement dated 1-9-1967, extracted above, that the liquidated damages were to be calculated at 0.5 per cent of the price of the respective machinery and equipment to which the items were delivered late, for each month of delay in delivery completion, without proof of the actual damages the assessee would have suffered on account of the delay. The delay in supply could be of the whole plant or a part thereof but the determination of damages was not based upon the calculation made in respect of loss of profit on account of supply of a particular part of the plant. It is evident that the damages to the assessee was directly and intimately linked with the procurement of a capital asset, *i.e.,* the cement plant, which would obviously lead to delay in coming into existence of the profit-making apparatus, rather than a receipt in the course of profit-earning process. Compensation paid for the delay in procurement of capital asset amounted to sterilization of the capital asset of the assessee as supplier had failed to supply the plant within time as stipulated in the agreement and clause No. 6 thereof came into play. The afore-stated amount received by the assessee towards compensation for sterilization of the profit-earning source, not in the ordinary course of their business, in our opinion, was a capital

receipt in the hands of the assessee. We are, therefore, in agreement with the opinion recorded by the High Court on question Nos. (*i*) and (*ii*) extracted in Para 1 (*supra*) and hold that the amount of Rs. 8,50,000 received by the assessee from the suppliers of the plant was in the nature of a capital receipt."

13. The Hon'ble Delhi High Court in CIT Vs J. Dalmia [1984] 149 ITR 215/[1985] 20 Taxman 86 (Delhi), wherein the assessee entered into agreement with contractor for construction of a building. The contractor failed to execute his part of the agreement and the assessee gave up the claim to specific performance but retained the right to damages. In Arbitration award, the assessee became eligible for compensation which was held as not chargeable to tax as the right to damages was a mere "right to sue" and could not be transferred.

14. The Hon'ble Bombay High Court in Bharat Forge Co. Ltd Vs CIT (supra) held that when assessee-company decided to set up a unit for manufacture of crankshafts and for this purposes it obtained import license to import plant and machinery. The cost of plant and machinery was paid in foreign exchange by obtaining a loan. The repayment of this loan was in installments. The machinery was imported and installed, the assessee realized possibility of devaluation of Rupee and it instructed its banker to make a forward purchase of foreign exchange at a forward rate. A contract was signed by assessee and his Banker. The Banker was required to obtain prior approval of RBI for aforesaid agreement. However, no such approval was obtained. The assessee was informed late by banker about the

cancellation of the contract between the assessee and the banker and in meanwhile rupee had been devalued. The assessee, thus, suffered loss and claimed compensation/ damages from banker. On settlement banker agreed to pay a sum of Rs. 24.92 lakhs to assessee. The aforesaid receipt of Rs. 24.92 lakhs was held as not assessable as capital gains in hands of assessee.

15. Further, Hon'ble Bombay High Court in CIT Vs Abbasbhoy A. Dehgamwalla (supra) on the facts of case that in the year 1945 the assessee had agreed to take on lease certain land and the Government of India also agreed to give it to the assessee. The deal did not go through and the assessee filed suit for specific performance with alternative claim for damages for breach of contract. The suit was decreed on 20-9-1961 and claim for specific performance rejected. But claim for compensation for breach of contract having taken place on 7-1-1958 was upheld. After prolonged litigation there was a compromise between the parties and a consent decree was passed on 11-6-1969 and the Union of India was directed to pay a sum of Rs. 2,52,000/- as damages as well as a sum as interest from 30-1-1959 up to the date of the consent decree. In the assessment for the assessment year 1970-71 the Income Tax Officer (ITO) held that the assessee had an enforceable right as a result of acceptance of his offer by the Union of India in 1945 and the said right was acquired back by the Government of India on payment of Rs. 2,52,000 in the year 1969.

The ITO, therefore, held that the amount of Rs. 2,52,000 was taxable as capital gains in the assessment year 1970-71. The assistant appellate Commissioner (AAC) held that the assessee had no capital asset and the amount of Rs. 2,52,000/- could not be treated as capital gains. As regards the interest awarded to the assessee, the AAC held that it was rightly taxed in the year in question. The Tribunal upheld the AAC's order. On further appeal to Hon'ble Bombay High Court it was held that it is a trite law that income can be held to accrue only when the assessee acquires a right to receive the income. Unlike compensation payable by the State when it acquires a citizen's land under Acts such as Land Acquisition Act where the right to receive compensation is statutory right, the right that a person acquires on the establishment of breach of contract is at best a mere right to sue. Despite the definition of the expression capital asset in the widest possible terms in section 2(14), a right to a capital asset must fall within the expression 'property of any kind' and must not fall within the exceptions. Section 6 of the Transfer of Property Act which uses the expression 'property of any kind' in the context of transferability makes an exception in the case of mere right to sue. The decisions there under make it abundantly clear that the right to sue for damages is not an actionable claim. It cannot be assigned and its transfer is opposed to public policy. As such it will not be quite correct to say that such a right constituted capital asset which in turn has to be an interest in 'property of any kind.' The right

to sue for damages for breach of contract no doubt is capable of maturing into a right to receive damages for breach of contract. But that happens only when damages claimed are admitted or decreed after passing through various stages e.g., establishment of claim for breach of contract, loss suffered, suits, appeals, etc. The only reasonable conclusion was that the right to receive damages in this case accrued to the assessee on the date of the consent decree only; since the right under the agreement came to an end in the year 1961, if not earlier, and the right acquired in lieu thereof was only a mere right to sue, it could not be accepted that Rs. 2,52,000 were received as consideration for the transfer of capital asset, i.e., the right to the execution of lease deed in terms of the 1945 agreement during the previous year in question. Thus, in the instant case, no part of compensation was taxable as capital gains. The interest amount was, however, a revenue receipt. It was taxable as if it had accrued from year to year from 30-1-1959 to the date of the consent decree.

16. The Hon'ble Gujarat High Court in Baroda Cements & Chemicals Ltd. v. CIT [1986] 158 ITR 636/25 Taxman 324 (Guj.) held that the assessee engaged in manufacture and sale of sugar contracted to buy a second hand mill for an agreed price. Subsequently, the vendor committed breach of contract which entitled the assessee to receive damages. The court held that since a "right to sue" for damage was not an actionable claim, there could be no question of extinguishment of rights therein. Since it was not a

transfer the amount received thereon was not chargeable to tax under the head 'capital gains'.

17. Further Hon'ble Calcutta High Court in CIT v. Ashoka Marketing Ltd. 26 Taxman 215 (Cal.) the assessee entered into an agreement for purchase of certain property. In the event of default by the vendor a sum of Rs. 1 lakh was payable to the assessee by way of liquidated damages. The vendor failed to complete the transaction as there was a prior mortgage of the property with the Uttar Pradesh Government and it was not possible for the assessee to purchase the property. It was held that for the transaction there was no element of cost for receiving the compensation of Rs. 1 lakh. Accordingly, it was held that as there was no element of cost involved in the acquisition of damages received and, hence, it could not be treated either as capital gain or as a revenue receipt.

18. Further the coordinate bench of Mumbai Tribunal in ACIT Vs Jackie Shroff (supra) held that amount received by assessee as compensation for withdrawing a criminal case against accused who forged his signature for sale of shares, was to be regarded as capital receipt.

19. Now turning to the facts of the present case the assessee received a sum of Rs. 20 Crore on execution of cancellation deed dated 11.09.2011. The relevant clause No. 5 of cancellation deed is reproduced below:

"5. The developer declare that simultaneous upon the execution of these presents the developer have received back from the confirming party the consideration amount of Rs. 20,00,00,000/- (Rupee Twenty Crore only) being refund of the amount paid by the developers to the owners in pursuance of the said Development Agreement dated 24th March, 2005 read with supplementary agreement dated 25th March,2005 along with interest, towards loss of profit/ liquidated damage for loss of opportunity to develop the property and sale of flats in the open market and towards the cost of litigation, receipt whereof the Developers do hereby admit and acknowledge and the developer have now no claim whatsoever nature against the Owners and /or Confirming party in respect thereof."

20. From the contents of clause 5 of the cancellation deed dated 11th September 2011, we have noted that the assessee has not transferred any right in favour of the confirming party (third Party) in respect with regard to the rights, which were sought to be confirmed in MOU dated 24th March and 25Th March 2005. In facts all those right were already stand transferred by the owners in favour of M/s Star Habitat Pvt Ltd. The assessee received compensation of Rs. 20 Crore consisting of refund of the amount paid by assessee to the owners in pursuance of the said Development Agreement dated 24th March, 2005 read with supplementary agreement dated 25th March, 2005 along with interest, towards loss of profit/ liquidated damage for loss of opportunity to develop the property and sale of flats in the open market and towards the cost of litigation only. Therefore, in view of the

ratio of decisions of Hon'ble Delhi High Court in CIT Vs J Dalmia (supra), Bombay High Court in CIT Vs Abbasbhoy A. Dehgamwalla (supra), Hon'ble Supreme Court in Saughtra Cement Ltd (supra) and decisions of Mumbai Tribunal in Jackie Shroff (supra) and Ahmedabad Tribunal in Bhojison Infrastructure (P) Ltd (supra), the amount received by the assessee in excess of advance is on account of compensation for extinction of its right to sue the owner, the receipt is a Capital receipt not chargeable to tax. Since the assessee has not received the amount in excess of advance in the course of his business it must be construed as capital receipt and not business receipt.

21. The case law of Hon'ble Madras High Court in K.R.Srinath Vs ACIT (supra) relied by assessing officer is not applicable on the facts of the present case. In K.R. Srinath (supra) it was held that the amount received as consideration for giving up right of specific performance which was acquired under agreement to sale, is liable to capital gain tax. However, in the case in hand the right of assessee was in dispute as the owner of the land has already transferred such right to third party. Rather the original agreement was cancelled.

22. In CIT Vs Tata Services Ltd (supra) the right, title and interest was assigned by the assessee to third party. The right, title and interest of the assessee was not in dispute, however, the assessee in the present case was litigating for creation of his right in the property.

23. Similarly in CITVs Vijay Flexible Containers (supra) the right, title and interest of the assessee were not in dispute. However, the right, title or interest of the assessee was in dispute, the assessee was only entitled for damage and for loss of business. In the result the grounds of appeal raised by the assessee are allowed.

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

Order pronounced in the open court on 29/05/2019.

Sd/-	**Sd/-**
G.S. PANNU	**PAWAN SINGH**
VICE-PRESIDENT	**JUDICIAL MEMBER**

Mumbai, Date: 29.05.2019
SK

Copy of the Order forwarded to :

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

BY ORDER,

Dy./Asst. Registrar
ITAT, Mumbai