# IN THE INCOME TAX APPELLATE TRIBUNAL
# RAIPUR BENCH, RAIPUR

## BEFORE SH. R.K. PANDA, ACCOUNTANT MEMBER
## AND
## MS. SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA No.157/RPR/2014
Assessment Year: 2011-12

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| Dy. CIT 1 (2)<br>Aayakar Bhawan, Central Revenue, Building, Civil Lines Raipur (CG) | Vs | Rishabh Infrastructure Pvt. Ltd. 4th Floor, Vanijya Bhawan, Jail Road, Sai Nagar, Raipur<br>PAN AACCR4411P |
| **(APPELLANT)** | | **(RESPONDENT)** |

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| Appellant by | Sh. R. K. Singh, CIT DR |
| Respondent by | Sh. Nikhilesh Begani, CA |

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| Date of hearing: | 08/08/2018 |
| Date of Pronouncement: | 23/10/2018 |

## ORDER

**PER R.K. PANDA, AM:**

This appeal filed by the revenue is directed against the order dated 06.06.2014 of the CIT(A), Raipur (CG) relating to A. Y. 2011-12.

2. Facts of the case, in brief, are that the assessee is a company and filed its return of income on 24.09.2011 declaring total income of

Rs.23,33,570/-. During the year under consideration, the assessee derived income from interest chargeable under the head "Income from Profit & Gains of Business". The accounts of its business were audited as required u/s 44AB of the I.T. Act, 1961. During the course of scrutiny proceeding, the AO noticed that an amount of Rs.3,01,47, 107/- is credited to the head "Reserve and Surplus" with a narration capital receipt received. On being questioned by the Assessing Officer, it was explained that the assessee company had entered into a Memorandum of Understanding (MOU) with another company namely "Lafarge India Pvt. Ltd" (LIPL in short) on 19.11.2001. Due to reasons beyond its control, only work relating to acquiring of land, that to partly, could be undertaken by it and other activities as defined in the MOU could not be carried out. Subsequently, disputes arose between both the parties and they entered in to a MOU executed on 31.01.2009, wherein compensation was determined for termination of earlier MOU dated 19.11.2001 on fulfillment of certain terms of the MOU dated 31.01.2009 for which a sum of Rs.3,01,47,107/- was received by the assessee company during the assessment year under consideration. It was finally contended that the aforesaid compensation was determined and received on closure/ termination of its business activity resulting in to "loss of source of income" impairing its profit making structure or sterilization of profit making apparatus, therefore, the assessee company treated the same as "Capital receipt" not chargeable to tax and accordingly has shown the same under the head 'Reserve and Surplus'. In support of this claim, the assessee placed reliance on following citations :-

1. Kettlewell Bullen & Co. Ltd. Vs. CIT (1964) 53 ITR 261 (SC)
2. Oberoi Hotel (P) Ltd. Vs. CIT (1999) 236 ITR 903 (SC)
3. Karam Chand Thapar & Soons Bros. P. Ltd. Vs. CIT (1971) 80 ITR 167 (SC )
4. CIT Vs. Saurashtra Cement Ltd. (2010) 325 ITR 422 (SC)
5. Khanna & Annadhanam Vs. CIT (2013) 351 ITR 110 (Delhi.HC)

6. ACIT Vs. Triupati Udyog Ltd. (2013) 36 CCH 157 (ITAT.Del)
7. Parle Soft Drinks Pvt. Ltd. Vs. JCTI (2013) 37 CCH 099 (ITAT. Mum)
8. 3I Infotech Limited Vs. Addl. CIT ( 2013) 37 CCH 058 (ITAT Mum.)

3. However, the Assessing Officer was not satisfied with the explanation given by the assessee. He examined the relevant portion of the MOU dated 31.01.2009 and observed that on a perusal of the MOU signed between LIPL and RIL [ the assessee company] on 31.1.2009 the word 'compensation' used therein is misleading. He observed that as mentioned in the MOU dated 31.1.2009, LIPL was in need of land from landowners listed in Annexure-A to the MOU dated 31.1.2009 for the proposed Railway track. For this purpose LIPL approached RIL[ the assessee company] to facilitate purchase/ transfer of land required for the railway track alignment alongwith the balance piece of land in lawful manner, as per section 165 of the CG Land Revenue Code, 1959, applicable for transfer of land enlisted in Annexure-A to the MOU dated 31.1.2009. The impugned amount received by the assessee company is, in fact, a taxable consideration received by it in lieu of the following:

- *the efforts made,/ to be made by RIL[ the assessee company] in facilitating the availability & smooth transfer of land from Land owners listed in Annexure-A to the \ MOU dated 31.1.2009 and*
- *the value added services rendered/ to be rendered by RIL[ the assessee company] required for LIPL's proposed Railway track.*

*ensuring the withdrawal of all Writ petitions as well as Writ Appeals filed by the persons listed in Annexure-C to the MOU dated 31.1.2009*

- *extending all cooperation to LIPL in expediting the acquisition of land and obtaining all necessary documents from its nominee land owners at the request of LIPL*
- *If required by CSIDC, which has been entrusted the job of land acquisition for the proposed railway track from Sonadih Cement Plant to Nipaniya Station for LIPL, the assessee company shall, at the time of the issuance of notification by the Slate*

*Govt, under section 4 of the Lnd acquisition Act for the acquisition of the aforesaid land, extend requisite cooperation from the Land owners listed in Annexure-A : MOU dated 31.1.2009 by way of consent letters, sworn declarations, affidavits, documents and other connected papers as provided in Annexure-B giving no objection to the proposed acquisition.*

4. He further noted that in case the land acquired by CSIDC is less than 150.91 acres enlisted in Annexure-A to the MOU dated 31.1.2009, the assessee company shall, extend requisite cooperation for lawful transfer of the land in favour of LIPL.

5. The Assessing Officer after analyzing the various clauses of the MOU noted that there is not even an iota of doubt that the payment received by the assessee company is in consideration of the efforts made by the assessee for facilitating the availability of land and for the services rendered by it although in the MOU the word used is "compensation" but in fact it has to be the word "consideration".

6. Therefore, he held that the impugned amount, although nomenclated as 'compensation' in the MOU dated 31.1.2009, is a normal business receipt which is clearly a Revenue receipt liable to tax. Its payment is dependent upon rendering of certain specific services/acts by the assessee company as per the terms of the MOU *dated* 31.1.2009. By no stretch of imagination can it be called a 'compensation for permanent loss of business or income generating asset'.

7. Without prejudice to the above he held that assuming but not admitting that the impugned amount received by the assessee company is in the nature of compensation, the next question arises as to whether it is a capital receipt or a revenue receipt liable to tax. From the various details filed by the assessee company during the assessment proceeding he noted that the assessee company was incorporated on *27*th September 2000 with the main object of developing, constructing and erecting roads, bridges, railway sidings etc. But, it has entered in to MOU with Lafarge India (P) Ltd on 19.11.2001 i.e. almost 13 months after its incorporation. Thus, the claim of the assessee company that it was

incorporated with the only object of execution of railway siding work for Lafarge India (P) Ltd is totally incorrect.

8. The Assessing Officer referred to the main objects of the company to be pursued on its incorporation which has multiple objects and that too a variety of objects agreement /arrangement /MOU with LIPL or during the continuance thereof or even after it, the company was and is free to undertake any activity of its choice enumerated in its 'Object Clause'. That the assessee on its own sweet will did not take any other activity is another matter.

9. He observed that in the instant case, the assessee has not lost an earning asset and the compensation paid is not for the destruction of such an asset because even subsequent to the signing of the MOU dated 31.1.2009, the receipt- of consideration [so called compensation] is in lieu of and is dependent upon rendering of specific services by the assessee, performance of specific acts by the assessee providing value added services by the assessee to LIPL and - for extending smooth cooperation to CSIDC & LIPL. Even otherwise also he noted that the assessee, even after signing of the MOU dated 31.01.2009, had shown income from business or profession amounting to Rs.88,98,464/- in the return filed for A. Y. 2012-13.

10. He accordingly treated the amount of Rs.3,01,47,107/- received by the assessee as revenue receipt as against capital receipt claimed by the assessee. The Assessing Officer accordingly added the above amount to the taxable income of the assessee.

11. Before CIT(A) the assessee submitted that Lafarge India Private Limited engaged in the cement business, commissioned a Cement Plant at Sonadih, Raseda, Chhattisgarh and for the purpose of streamlining the transportation cost, planned to construct a Railway Siding from Nipania Railway Station to its Sonadih Cement Plant (Approximate Distance of about 20 Kms.) A meeting was held on 10th August 2000 and after meetings and deliberations and getting firm assurance from LIPL as regards construction of Railway Siding on Turnkey Basis, Mr. Pramod Chopda incorporated a new company M/s Rishabh Infrastructure Limited (later on converted into Rishabh Infrastructure Private Limited) viz. the assessee company on 27 September, 2000 with the sole objective of aforesaid infrastructure development activity for LIPL. It was submitted that a MOU was entered into between LIPL and the assessee company on 19th November, 2001 for construction of Railway Siding from Sonadih Cement Plant to Nipaniya Railway Station to facilitate transportation of Clinker and Cement; The assessee company continued with the acquisition of agricultural lands falling within the Nipaniya Railway Station & Sonadih Cement Plant which was required for such Railway Siding and till the assessment year 2003-04, an acquisition of agricultural land admeasuring 63.809 hectares (approx. 157.65acres) was made; In the assessment year 2005-06, by way of various registered sale deeds, the assessee company transferred aforesaid agricultural lands admeasuring 63.809 hectares (approx. 157.65 acres) in favour of LIPL; Since LIPL continued to remain unresponsive as to the problems faced by the assessee company in execution of construction of Railway Siding work and indecisive as to assignment of complete work on Turnkey or B.O.T. basis due to which the said work was stalled by the assessee and accordingly, came to a standstill. Another MOU was entered on 31.01.2009 wherein in lieu of cancellation/termination of the MOU resulting into termination / closure of the business activity of the assessee company, compensation was determined by LIPL which was decided to be paid in tranches upon

fulfillment of terms and conditions stipulated therein; Since the compensation has been determined as a result of termination/cancellation of the earlier MOU dated 19th November, 2001 thereby resulting into loss of permanent source of income, the assessee company treated the Compensation as a "Capital Receipt" not chargeable to tax.

12. Based on the arguments advanced by the assessee, the Ld. CIT(A) allowed the claim of the assessee treating the same as capital receipt by observing as under : -

> ***"****7. I have carefully gone through the clauses of Memorandum of Understandings entered into between the appellant & LIPL, Clarification issued by LIPL, correspondences between both the parties, return of income and financial statements of the appellant for the preceding assessment years & assessment orders passed under section 143(3) of the Act for the preceding assessment years. On a thoughtful consideration of the entire material on record before me which were very well before the AO during the course of assessment proceedings also, it is not in dispute that a Memorandum of Understanding (MOU) was executed on 19th November, 2001 between LIPL and the appellant company with an objective of construction of Railway Track & Siding by the appellant on behalf of LIPL from Nipaniya Railway Station to the Sonadih Plant of LIPL so as to streamline the transportation cost of Cement & Clinker in its Sonadih Plant. It transpires that the construction of Railway Track & Siding involved complex work right from procurement of land, Civil Work/Earth Work, Laying of Railway Tracks, Electrifications, Signaling Arrangement etc. I find from records that the appellant company had been formed with sole objective of undertaking the infrastructure development activity of construction of way Track & Siding on behalf of LIPL which fact is also recorded in the assessment order*
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> *passed under* ***section*** *143(3) of the Act for the A.Y.2003-04. I further find from records that the appellant had only acquired a part of the lands (including some development works) required for the said railway track and siding which were subsequently transferred to LIPL and income arising thereof was shown under the head "Profits & Gains of Business or Profession". I further find from the correspondences filed on record between the appellant and LIPL, that LIPL was indecisive as to execution of the entire work of construction of Railway Track & Siding from the appellant on Turnkey or Build-Operate-Transfer basis and subsequently, owing to various constraints, the balance works assigned to the appellant as per the scope of work as stipulated in the aforesaid MOU were not got executed by LIPL. After a considerable amount of time, another MOU was executed on 31st January, 2009 between LIPL & appellant and in pursuance of the said MOU, the aforesaid "Compensation" has been determined by LIPL. The*

*appellant has vehemently contended that the entire work of construction of the Railway Track and Siding was its sole business and the isolated activity of acquisition of land for such Railway Siding was never visualized by it and further, that since LIPL continued to remain indecisive as to execution of entire work by the appellant & also unresponsive to problems faced by them, the execution of the work was stalled by the appellant and accordingly, came to a standstill. Subsequently, after numerous rounds of deliberations & meetings between LIPL and the appellant company, aforesaid MOU was executed on 31st January, 2009 leading to determination of compensation in lieu of cancellation/ termination of the earlier MOU Dated 19th November, 2001 or in lieu of determination of its rights in the said MOU ultimately leading to loss of source of income. It is the construction of this MOU executed on 31st January, 2009 which ultimately decides the nature of receipt of the impugned amount termed as "Compensation". After delving into the clauses of the said MOU, the AO has reached a conclusion that the impugned amount is infact consideration received by the appellant towards rendering of specific services by the appellant in the normal course of business and is accordingly, a revenue receipt chargeable to tax.*

*It is a settled law that the construction of a particular document depends upon its pith and substance and the paramount test in this regard should be the predominant intention of the parties while executing that particular document. Such intention has to be inferred from the* underlying circumstances and factual background of the case and any document should not be read in isolation. In the present case, in my considered opinion, the MOU Dated 31st January, 2009 has to be necessarily viewed in the light of the circumstantial documentary evidences and factual background particularly in the light of the Clarification issued by LIPL subsequent to execution of the MOU Dated 31st January, 2009 wherein they have categorically confirmed in unambiguous terms as *'M/s.RIPL started acquisition of lands for our company with other valued services for the aforesaid Railway Siding in terms of the aforesaid MOU and performed related works.* **Owing to various constraints, the construction of Railway Siding work remained suspended for a long period of time and ultimately, the work of M/s.RIPL discontinued.** *After various deliberations & meetings, which resulted into determination of final compensation for payment thereof and accordingly, another MOU was entered into on 31st January, 2009 to effectuate the said determination.* **We further confirm that the compensation had been determined and paid by us for stallins the execution of the asreed works as above in terms of the earlier MOU.** ò

9. *In my considered opinion, such clarification is sufficient to draw an inference that LIPL has determined and paid the impugned amount necessarily as a measure to compensate the appellant in lieu of stalling/discontinuing the balance agreed works which could not be executed owing to various constraints however the AO, despite the said Clarification and other documentary evidences filed on record thereby constituting vital aid in construction of the MOU Dated 31st January, 2009, has not properly appreciated the pith & substance of the said evidences and has reached an erroneous conclusion that the impugned amount is a "Consideration" for rendering specific services.*

10. *In the factual background of the instant case, it is pertinent to advert to the legal position emerging from the provisions of the Act and judicial pronouncements; Section 4 brings to charge tax on total income. Prima facie, in order to come within the scope of the charging provision, the receipt in question should bear the character of income. In the absence of any specific provision, like those pertaining to capital gains, a capital receipt shall be outside the scope of section 4.*

11. *The distinction between capital and revenue is material and relevant both for taxation of income and for allowance of expenses and losses and therefore, determination of income from business or profession would necessarily include the ascertainment of the capital or the revenue nature of the receipt apart from determining whether the receipt is of a trading or non-trading nature.*

12. *As the Hon'ble Supreme Court has observed, in the context of determining the capital or revenue nature of an expenditure, in Empire Jute Co. Ltd. vs. CIT (1980) 17 CTR (SC) 113 : (1980) 124 ITR 1 (SC), the capital or revenue nature of an expenditure and similarly the capital or revenue nature of a receipt had been a vexed question and "this question has always presented a difficult problem and continually baffled the Courts, because it has not been possible, despite occasional judicial valour, to formulate a test for distinguishing between capital and revenue expenditure which will provide an infallible answer in all situations. There have been numerous decisions where this question has been debated but it is not possible to reconcile the reasons given in all of them, since each decision has turned upon some particular aspect which has been regarded as crucial and no general principle can be deduced from any decision and applied blindly to a different kind of case where the constellation of facts may be dissimilar and other factors may be present which may give a different hue to the case. Often cases fall on the border line and in such cases, as observed by Lord*

*Greene M.R. in IRC vs. British Salmson Aero Engines Ltd. (1938) 22 Tax Cases 29,43 (CA) 'the spin of a coin would decide the matter almost as satisfactorily as an attempt to find reasons'."*

13. *While determining the nature of a receipt as being a trading receipt taxable as income from business or profession or otherwise, one should be guided by the terms of the agreement genuinely entered into between the parties. The Revenue authorities cannot ignore the genuine agreements between the assessee and the party from whom the amount is received. In the absence of any suggestion or allegation of collusion, fraud or camouflage, the Revenue cannot resort to any attempt to rewrite the agreement with a view to imposing the levy of tax especially when the transactions between the parties are at arms length. This has been made clear by the Delhi High Court in D.S. Bist & Sons vs. CIT (1984) 149 ITR 276 (Del) : TC14R.573 therein it was observed that " the Act does not clothe the taxing authority with any power or jurisdiction to rewrite the terms of agreement entered into, particularly in view of the finding of the Tribunal that there is nothing to suggest that the parties were not dealing with each other at arms length and there is no suggestion of any collusion ; the commercial expediency of the contract is to be adjusted by the contracting party as to its terms." It was further made clear that ' 'under the taxing system it is upto the assessee to conduct his business in his wisdom. The assessee may enter into commercial transactions with another party who is ad idem with the assessee as to terms and conditions. In the absence of the any collusion between the two, it is not possible to vary the terms".*

14. *According to the Hon'ble Supreme Court in the case of National Cement Mines Industries Ltd. vs. CIT (1961) 42 ITR 69 (SC) in assessing the true character of the receipt for the purpose of the IT Act, inability to ascribe to the transaction a definite category is of little consequence. It is not the nature of the receipt under the general law but in commerce that is material. Referring to the above observations, the Bombay High Court has held in the case of CIT vs. Scindia Workshop Ltd. (1979) 119 ITR 526 (Bom) that the*

*Revenue authorities must examine the transaction and arrive at a conclusion having regard to the nature of the receipt from the commercial point of view with particular reference to the relevant provisions of the IT Act.*

15. *Where the receipt in question is such that it is associated with the sterilisation or injury to the capital asset or that the source of income ceases to exist,* ***it would be a capital receipt*** *[Glenboig Union Fire Clay Co. Ltd. vs. IRC (1922) 12 Tax Cases 427, P.L.M. Firm vs. CIT (1968) 68 ITR 856 (Mad) : TC38R.682 and CIT vs. South India Flour Mills Pvt. Ltd. (1970) 75 ITR 147 (Mad) : TC38R.863], In CIT vs. A.S. Wardekar (2005) 199 CTR (Cal) 255 it was held that amount received by assessee for entering into restrictive covenant which restrained the assessee from undertaking any activity, economic, industrial or otherwise, which in any way came in conflict with the activities of the payer company, was a capital receipt.*

16. *In arriving at the decision as to whether the compensation received upon termination (or resignation) of a managing agency is a capital receipt or not, the Courts have looked into the act as to whether the termination (or resignation) resulted in the destruction of the profit- making apparatus or the source of income itself. Where the answer was in the negative, the receipt was held to be a revenue receipt assessable as business income fJuggilal Kamlapat vs. CIT (1969) 73 ITR 702 (SC) : TC13R.1230 affirming the decision of the Allahabad High Court in Juggilal Kamlapat vs. CIT (1963) 49 ITR 458 (All) : TC13R.1231, Kettlewell Bullen & Co. Ltd. vs. CIT (1964) 53 ITR 261 (SC) : (1964) TAX 18(3) 163 : TC13R.1226, reversing the decision of the Calcutta High Court in CIT vs. Kettlewell Bullen & Co. Ltd. (1962) 46 ITR 39 (Cal) : (1962) TAX 15(3) 594 : TC13R.1227. Also Anglo French Exploration Co. Ltd. vs. Clayton (1956) 30 ITR 309 (CA) : TC13R.1234 which was a case relating to resignation from secretaryship of a company.*

17. *On the other hand, where the answer was in the affirmative, the source of income itself being destroyed or severely impaired, the receipt was held to be capital in nature. fCIT vs. Chari & Chari Ltd. (1965) 57 ITR 400 (SC) : (1965) TAX 20(3) 106 : TC13R.1229, Karamchand Thapar & Bros. P. Ltd. vs. CIT (1971) 80 ITR 167 (SC) : TC13R.1235A reversing the decision of the Calcutta High Court in CIT vs. Karamchand Thapar & Bros. P. Ltd. (1968) 67*

*ITR 705 (Cal): TC13R.1236].*

18. *Relying on the proposition of law laid down by the Supreme Court in CIT vs. Chari & Chari (1965) 57 ITR 400 (SC) : (1965) TAX 20(3) 106 : TC13R.1229 and Karamchand Thapar & Bros, vs. CIT (1956) 29 ITR 265 (Chd.) : TC13R.1235, it was laid down by the Calcutta High Court in CIT vs. Oberoi Hotels (India) Pvt. Ltd. (1994) 122 CTR (Cal) 347 : (1994) 209 ITR 732 (Cal) : TC13PS.62 that the assessee-company managing several hotels around the world for a fee as its business, receiving compensation for termination of managing agency of one of such hotels, the compensation receipt being in assessee's course of business was revenue receipt.*

19. *The Hon'ble Supreme Court in Oberoi Hotel (P) Ltd. vs. CIT (1999) 152 CTR (SC) 474 has held that the amount received by assessee-company engaged in managing hotels for giving up right to purchase and/or to operate a hotel before it is transferred or let out to other persons constituted capital receipt, reversing the judgment of Calcutta High Court in CIT vs. Oberoi Hotesl (P) Ltd. (1994) 122 CTR (Cal) 347 : (1994) 209 ITR 732 (Cal) : TC13PS.62.*

20. *In CIT vs. T.I. & M. Sales Ltd. (2003) 259 ITR 116 (Mad) in which principle laid down in P.H. Divecha vs. CIT (1963) 48 ITR 222 (SC) and CIT vs. Seshasavee Bros. (P) Ltd. (1999) 151 CTR (Mad) 598 : (1999) 239 ITR 471 (Mad) was applied, it was held that distributorship agreement on principal to principal basis was not an agency agreement and did not fall within the ambit of s. 28(ii)(c) of the Act and that merely because compensation was quantified on different counts, it could not be said that assessee had been reimbursed the expenses incurred in the past or the profit that was not available as a result of termination of distribution agreement and that compensation represented capital receipt.*

21. *The case of the appellant also finds support from the decision in* ***A.K.T.K.M. Vishnudatta Antharjanam vs. Commissioner of Agricultural Income Tax*** *(1970) 78 ITR 58 (SC) wherein it was held that "It seems to us that the well-known test laid down by the Privy Council in CIT v.v. Shaw Wallace & Co. (1932) 2 Comp. Cas. 276 ;*

*6 ITC178 ; AIR 1932 PC 138 to find out whether a particular receipt is income is not satisfied in the facts and circumstances of the present case. According to that test, income connotes a periodical monetary return coming in with some sort of regularity or expected regularity from definite sources. The source is not necessarily one which is expected to be continuously productive, but it must be one whose object is the production of a definite return excluding anything in the nature of a mere windfall. Once the teak trees were removed together with their roots and there was no prospect of regeneration or of any production of a return therefrom, it could well be said that the source ceased to be one which could produce any income. The Bombay High Court in CIT vs. N.T. Patwardhan (1961) 41 ITR 313 (Bom), said that from the point of view of a person engaging himself in the business of sale of trees the capital structure would be not only the land on which the trees stood but also the roots of the trees from which the wood yielded income. If the trees were sold off with the roots the capital structure would be affected.*

*The High Court in the judgment under appeal was particularly impressed with the profit motive of the assessee in planting teak trees although that was done several years ago. But it was overlooked that profit motive is not decisive of the question whether a particular receipt is capital or income. An accretion to capital does not become taxable income merely because an asset is acquired in the hope that it may be sold at a profit. It must also be remembered that trees so long as they are uncut form a part of the land. If they are cut with roots once and for all a part of the assets is disposed of. The sale proceeds on account of their disposal cannot constitute revenue because by removing the roots the source from which fresh growth of trees 'ake place is also removed. The sale of such trees thus affects capital structure and cannot rise to a revenue receipt. "*

22. *In my considered opinion, the impugned amount has rightly been termed and treated as "Compensation" which in effect, has been determined and paid by LIPL to the appellant in lieu of Cancellation/Termination of the earlier MOU Dated 19.11.2001 and determination of rights of the appellant attached to the said MOU whereby the entire work of Construction of Railway Track & Siding was awarded to the appellant and accordingly, the said determination which represents compensation for the loss of source of income (business of the appellant, in the instant case, itself was eliminated) leading to impairment or sterilization of the profit making structure itself would certainly constitute a "Capital Receipt" not chargeable to tax. This principle of*

*law has been enunciated by the Hon'ble Supreme Court & various High Courts and Tribunals in their judgments time and again.*

23. *Looking to the facts and circumstances of the case as also decisions cited above, I am of the considered opinion that receipt of* ñCompensation ò *by the appellant towards loss of source of income clearly constitutes a "Capital Receipt" not chargeable to tax and hence, the addition made by the AO treating the same as revenue receipt chargeable to tax cannot be sustained.* ***Hence, the addition made by the A.O. is deleted. "***

13. Aggrieved with such order of the CIT (A), the revenue is in appeal before the Tribunal by raising the following grounds :-

1. Whether in law and on facts & circumstances of the case, the learned CIT (A) has erred in deleting the addition of Rs.3,01,47,107/- made by the Assessing Officer on account of amount received from Lafarge India Ltd., as it constitutes a Revenue Receipt chargeable to tax."?
2. "The Order of the Ld. CIT(A) is erroneous both in law and on facts."
3. "Any other ground that may be adduced at the time of hearing."

14. The Ld. DR strongly opposed the order of the CIT (A). He submitted that the findings given by the CIT(A) are factually incorrect. The payment has been made by Lafarge India (P) Ltd. is for the efforts/ services rendered by the assessee and it has to be refunded/ returned in case of any failure on the part of the assessee. Hence, there is no fetter on the assessee to undertake any others project. In fact in subsequent years the assessee has shown very good income. The MOU entered into by the assessee is a make believe arrangement and the income generating apparatus of the assessee company is not sterilized. He submitted that the dominant object has to be seen. Relying on various decision he submitted that the order of CIT(A) be

reversed and that of the Assessing Officer be restored. He also relied on the following decisions :-

1) Mcdowell & Co. (S/C) 154 ITR 148
2) Durga Prasad More Vs.CIT (SC) 82 ITR 540
3) Sumati Dayal Vs. CIT (SC) 214 ITR 801
4) CIT Vs. Amrit Lal 212 ITR 514 (Bombay)
5) DIT Vs. Bharat Diamond 259 ITR 280 (S/C)
6) ACIT Vs. Concord Communication 95 ITD 117 (SB)

15. The Ld. Counsel for the assessee on the other hand heavily relied on the order of the CIT (A). Referring to the copy of the assessment order passed u/s 143 (3) for A. Y. 2003-04, copy of which is placed at paper book page No. 27, the Ld. Counsel for the assessee submitted that the Assessing Officer in the assessment order himself has admitted that the assessee company is found incorporated with an object to take up infrastructure activity of development of railway siding etc. The company is yet to start the business of infrastructure and for this purpose LIPL has advanced an amount of Rs. 2.00 crores out of which Rs.1.00 crore has been invested for acquisition of land for railway siding and another Rs.1.00 crore has been deposited in IDBI Bank which earned interest. Referring to paper book page 31 he submitted that 63.809 hectares of land has been sold for a consideration of Rs.19426716/-. Referring to page No. 36 of the paper book he drew the attention of the Bench to the profit and loss account for the year ending 31.03.2005 and submitted that the assessee has shown profit on sale of agricultural land and other income only. Referring to page 38 of the paper book he submitted that the assessee has not acquired any land during the year and the process of acquisition of land came to a stand still. Referring to various pages of the paper book he submitted that numerous rounds of discussions took place and in 2009 the assessee was forced to sign the MOU as there was no other business activity of the company. He

submitted that the Assessing Officer ignored the entire surrounding circumstances and literally interpreted the MOU ignoring all the evidences placed before him. The Ld. AR submitted that on 19.11.2009 the compensation was received after terminating the MOU and the entire profit making apparatus was sterilized. There is no cogent material to show that the assessee has rendered any service to Lafarge. Referring to the certificate issued by Lafarge India, copy of which is placed at paper book page I, he submitted that they have paid the compensation for stalling the execution of the agreed work as per the MOU and the Ld. CIT (A) after considering the certificate issued by Lafarge has deleted the addition made by the Assessing Officer treating such compensation as capital receipt. Relying on the following decisions he submitted that the order of Ld. CIT(A) being in accordance with law should be upheld :-

1. Oberoi Hotel (P) Ltd. Vs. CIT (1999) 236 ITR 903 (SC)
2. Kettlewell Bullen & Co. Ltd. Vs. CIT (1964) 53 ITR 261 (SC)
3. CIT Vs. Chari & Chari Ltd. (1965) 57 ITR 400 (SC)
4. Karam Chand Thapar & Sons Bros. P. Ltd. Vs. CIT (1971) 80 ITR 167 (SC)
5. CIT Vs. Saurashtra Cement Ltd. (2010) 325 ITR 422 (SC)'
6. Khanna & Annadhanam Vs. CIT (2013) 351 ITR 110 (Del.HC) affirmed by the Hon'ble Supreme Court: SLP filed by the Department Dismissed on 31st March, 2014 SLP (Civil) 18904/2013
7. CIT Vs. Sharda Sinha 92016) 237 Taxman 111 (Delhi HC)
8. ACIT Vs. Tirupati Udyog Ltd. 92013) 36 CCH 157 (ITAT. Del)
9. Parle Soft Drinks Pvt. Ltd. Vs. JCIT (2013) 37 CCH 099 (ITAT. Mum)
10. 3I Infotech Limited Vs. Addl. CIT (2013) 37 CCH 058 (ITAT Mum.)
11. Satyam Food Specialties (P) ltd. Vs. DCIT (2015) 57 taxmann. Com 194 (ITAT Jaipur)
12. CIT Vs. Parle Soft Drinks (Bangalore) P. Ltd. 92017) 88 taxmann. Com 24 (Bom.HC)

16. We have considered the rival arguments made by both the sides, perused the orders of the authorities below and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find a MOU was executed on 19.11.2001 between the assessee and LIPL with an object of construction of railway track and siding by the assessee for LIPL from Nipaniya Railway Station to the Sonadih Plant of LIPL for streamlining the transportation cost of cement and clinker in its Sonadih Plant. The construction of Railway Track & Siding involved complex work right from procurement of land, Civil Work/Earth Work, Laying of Railway Tracks, Electrifications, Signaling Arrangement etc. The assessee company had been formed with the sole objective of undertaking the infrastructure development activity of construction of Railway Track & Siding on behalf of LIPL which fact is also recorded in the assessment order passed under section 143(3) of the I. T. Act for the A.Y.2003-04. We find from records that the assessee had only acquired a part of the lands (including some development works) required for the said railway track and siding which were subsequently transferred to LIPL and income arising thereof was shown under the head "Profits & Gains of Business or Profession". We find from the correspondences filed on record between the assessee and LIPL, that LIPL was indecisive as to execution of the entire work of construction of Railway Track & Siding from the assessee on Turnkey or Build-Operate-Transfer basis and subsequently, owing to various constraints, the balance works assigned to the assessee as per the scope of work as stipulated in the aforesaid MOU were not got executed by LIPL. After a considerable amount of time, another MOU was executed on 31st January, 2009 between LIPL & assessee and in pursuance of the said MOU, the aforesaid "Compensation" has been determined by LIPL. We find merit from the submission of Ld. Counsel for the assessee that the entire work of construction of the Railway Track and Siding was its sole business and the isolated activity of

acquisition of land for such Railway Siding was never visualized by it and further, that since LIPL continued to remain indecisive as to execution of entire work by the assessee & also unresponsive to problems faced by them, the execution of the work was stalled by the assessee and accordingly, came to a standstill. Subsequently, after numerous rounds of deliberations & meetings between LIPL and the assessee company, aforesaid MOU was executed on 31st January, 2009 leading to determination of compensation in lieu of cancellation/termination of the earlier MOU Dated 19th November, 2001 or in lieu of determination of its rights in the said MOU ultimately leading to loss of source of income. It is the construction of this MOU executed on 31st January, 2009 which ultimately decides the nature of receipt of the impugned amount termed as "Compensation". We find the assessee claimed such compensation as capital receipt being loss of source of income where as the Assessing Officer treated the same as revenue receipt. We find the Ld. CIT(A) allowed the claim of the assessee the reasons of which have already been reproduced in the preceding paragraph.

17. We do not find any infirmity in the order of the Ld. CIT (A) on this issue. We find the assessee during the course of appeal proceedings had filed a certificate issued by LIPL where in they have certified that the compensation had been determined and paid by them for stalling the execution of the agreed work as above in terms of the earlier MOU. The above clarification issued by LIPL clearly shows that the compensation received by the assessee is for sterilization of the profit making apparatus of the assessee company.

18. We find Hon'ble Supreme Court in the case of Oberoi Hotel (P) Ltd. Vs. CIT (1999) 236 ITR 903 (SC) has decided somewhat similar case. In that case, the assessee there in was operating, managing & administering many

hotels belonging to others for a fee. In terms of an agreement running into a tenure of ten years, the assessee agreed to operate a Hotel in Singapore for which it was to receive a Management Fee. Article XVIII of the said agreement gave the assessee a right to exercise the option of purchasing the hotel in case the owners decide to transfer the same during the currency of the agreement. Thereafter, a Supplementary Agreement was entered into between the Receiver of the undertaking and the assessee providing for giving up its contractual right to exercise its option to purchase and / or operate the hotel. On the basis of the said agreement the assessee has received a sum of Rs.29,47,500/- from the Receiver after the sale of the hotel. The question which was considered by the IT authorities was whether the receipt of the said amount is capital receipt or revenue receipt. The ITO arrived at a conclusion that it was a revenue receipt, CIT(A) held that it was a capital receipt, the Tribunal confirmed the said finding, on reference to the High Court, the High Court arrived at a conclusion that it was a revenue receipt assessable to income-tax as business income for the asst. yr. 1979-80. On appeal by the assessee the Hon'ble Supreme Court held as under :-

> 3. *"The question whether the receipt is capital or revenue is to be determined by drawing the conclusion of law ultimately from the facts of the particular case and it is not possible to lay down any single test as infallible or any single criterion as decisive. This Court in the case of Karam Chand Thapar & Bros. (P) Ltd. vs. CIT (1971) 80 ITR 167 (SC) : TC 13R.1235 discussed and held that in CIT vs. Chari & Chari Ltd. (1965) 57 ITR 400 (SC) : TC 38R.878 it was held that ordinarily compensation for loss of an office or agency is regarded as capital receipt, but this rule is subject to an exception that payment received even for termination of agency agreement would be revenue and not capital in the case where the agency was one of many which the assessee held and its termination did not impair the profit-making structure of the assessee, but was within the framework of me business, it being a necessary incident of the business that existing agencies may be terminated and fresh agencies may be taken. Thereafter the Court held that it was difficult to lay down a precise principle of universal*

*application but various workable rules have been evolved for guidance.*

4. *Applying the aforesaid test laid down by this Court in the present case, in our view the Tribunal was right in arriving at a conclusion that it was a capital receipt. Reason is that as provided in art. XVIII of the first agreement assessee was having an opt on or right or lien, if owner desired to transfer the hotel or lease or part of the hotel to any other person, the same was required to be offered first to the assessee (operator) or its nominee. This right to exercise its option was given up by a supplementary agreement which was executed in Sept., 1975, between the Receiver and assessee. It was agreed that Receiver would be at liberty to sell or otherwise dispose of the said property at such price and on such terms as he may deem fit and would be at liberty to sell or otherwise dispose of the said property at such price and on such terms as he may deem fit and was not under any obligation requiring the purchaser thereof to enter Into any agreement with the operator (assessee) for the purpose of operating and managing the hotel or otherwise and in its return, agreed consideration was as stated above in cl. X. the basis of the said agreement the assessee has received the amount in question. The amount was received because the assessee had given up its right to purchase and or to operate the property. Further, it is loss of source of income to the assessee and that right is determined for consideration. Obviously, therefore, it is capital receipt and not a revenue receipt.*

5. *Learned counsel for the Revenue relied upon the decision in the case of CIT vs. Rai Bahadur Jairam Valji & Ors. (1959) 35 ITR 148 (SC) : TC 13R.629 and submitted that assessee had the business of running the hotels in various countries and the amount which is received by him is for the termination of first contract which was executed in 1970 and, therefore, it should be considered his revenue receipt. In that case the Court was dealing with a trading contract and held that compensation paid in respect of the rights arising under the trading contract would be a revenue receipt and must be referred to the profits which would be made in carrying out of that contract. The Court has also observed :*

> *"Whether a payment of compensation or termination of an agency is a capital or revenue receipt, it would have to be considered whether the agency was in the nature of capital asset in the hands of the assessee, or whether it was only part of nis stock-in-trade.*

6. *The aforesaid judgment was considered in the case of Kettlewell Bullen & Co. Ltd. vs. CIT (1964) 53 ITR 261 (SC) : TC 13R.1226 wherein the Court has held as*

*under :*

*"Whether a particular receipt is capital or income from business, has frequently engaged the attention of the Courts. It may be broadly stated that what is received for loss of capital is a capital receipt: what is received as profit in a trading transaction is taxable income. But the difficulty arises in ascertaining whether when s received in a given case is compensation for loss of a source of income, or profit in a trade transaction."*

*After considering various decisions it was further held as under :*

*These cases illustrate the principle that compensation for injury to trading operations, arising from breach of contract or in consequence of exercise of sovereign rights, is revenue. These cases must, however, be distinguished from another class of cases where compensation is paid as a solatium for loss of office. Suer: compensation may be regarded as capital or revenue : it would be regarded as capital, if it is for loss of an asset of enduring value to the assessee, but not where payment is received m settlement loss in a trading transaction."*

*After analysing number of cases, the Court observed that following satisfactory measure of consistency In the principle is disclosed :*

*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 leave 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 no- icily a capital receipt."*

7. *The aforesaid principle is relied upon in the case of Karam Chand Thapar & Bros's case (supra). Consideration the aforesaid principles laid down as per art. XVIII of the Principal Agreement, the amount received by the assessee is for the consideration for giving up his right to purchase and or to operate the property on for getting it on lease before it is transformed or let out to other persons. It is not for settlement of rights under trading contract, but the injury is inflicted on the*

*capital asset of the assessee and giving up the contractual right on the basis of Principal Agreement has resulted in loss of source of assessee's income.*

8. *In this view of the matter, the order passed by the High Court is set aside and the appeal is allowed. The question is answered in favour of the assessee and against the Revenue by holding that receipt in the hands of the assessee was capital receipt."*

19. We find in the case of Kettlewell Bullen & Co. Ltd. Vs. CIT (1964) 53 ITR 261 (SC), the assessee therein was appointed as a Managing Agent upon certain terms and conditions. The assessee and its successors in business, whether under the same or any other style or firm, unless they resigned their office were entitled to continue as managing agent until they ceased to hold shares in the capital of the company of the aggregate nominal value of Rs. 1,00,000 and were on that account removed by a special resolution of the company passed at an extraordinary meeting of the company, or until the managing agent's tenure was determined by the winding up of the company. In the event of termination of agency in the contingencies specified, the managing agent was to receive such reasonable compensation for deprivation of office, as may be agreed upon between the managing agent and the company and in case of dispute, as may be determined by two arbitrators. By another clause, the managing agent was at liberty at any time to resign the office of managing agent by leaving at the registered office of the company previous notice in writing of its intention in that behalf. The agreement did not specify any period for which the managing agency was to enure. Besides the managing agency as aforesaid, the assessee held at all material times, managing agencies of five other companies. In pursuance to the conditions, the assessee therein decided to relinquish its managing agency to another person and accordingly received an amount to forgo the agency. The reasons for which the appellant agreed to relinquish were set out in a letter addressed to the members of the company. The managing agency was not, except in the circumstances set

out in cl.2 of the agreement, liable to be determined at the instance of the company before the expiry of specified period and in the event of voluntary resignation, the principal company was not obliged to pay any compensation however, only to facilitate the appointment of the other party as managing agent, who made available the compensation for loss of agency/office to principal company, the agency was terminated prematurely. The High Court held that it was a voluntary resignation for which under the agency agreement, the assessee was not entitled to compensation and this transaction was in the nature and character of a trading or a business deal and hence, income. On further appeal, the Hon'ble Supreme Court held as under :-

> *"21. "On an analysis of these cases which fall on two sides of the dividing line, a satisfactory measure of consistency in principle is disclosed. 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.*
>
> *In the present case, on a review of all the circumstances, we have no doubt that what the assessee was paid was to compensate him for loss of a capital asset. It matters little whether the assessee did continue after the determination of its agency with the Fort William Jute Co. Ltd. to conduct the remaining agencies. The transaction was not in the nature of a trading transaction, but was one in which the assessee parted with an asset of an enduring value. We are, therefore, unable to agree with the High Court that the amount received by the appellant was in the nature of a revenue receipt."*

20. We find the Hon'ble Supreme Court in the case of Karam Chand Thapar & Brokers (P) Ltd. Vs. CIT reported in 80 167 has held as under :-

> ***"9.*** *In the determination of the question whether a receipt is capital or income, it is not possible to lay down any single test as infallible or any single criterion as decisive. The question 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. That, however, is not to say that the question is one of fact, for these questions between capital and income, trading profit or non-trading profit, are questions which, though they may depend to a very great extent on the particular facts of each case, do involve a conclusion of law to be drawn from those facts [see CIT vs. Rai Bahadur Jairam Valji (1955) 35 ITR 148 (SC), P. H. Divecha vs. CIT (1963) 48 ITR 222 (SC), Kettlewell Bullen & Co. Ltd. vs. CIT (1964) 53 ITR 261 (SC), Gillanders Arbuthnot & Co. Ltd. vs. CIT (1964) 53 ITR 283 (SC), and CIT vs. Best & Co. (P.) Ltd. (1966) 60 ITR 11 (SC).*
>
> **10.** *The question whether a particular income arising from the termination of one of the agencies of a multi agency concerned is a capital receipt or a revenue receipt is undoubtedly a difficult question to be answered. The difficulty is inherent in the problem itself. Decisions on this question are numerous. But none of them have laid down a precise principle of universal application, but various workable rules have been evolved for guidance. One of us, speaking for the Court in Kettlewell Bullen & Co.'s case (supra), has laid down the following guidelines for finding out the true nature of such a receipt. The relevant observations read thus :*
>
> *"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."*

*On applying these tests to the facts found by the Tribunal in this case, the receipt must be considered as a capital receipt."*

21. The various other decisions relied on by Ld. Counsel for the assessee also support its case that the impugned receipt is capital in nature. Respectfully following the decisions cited (supra) and in view of the detailed reasoning given by the Ld. CIT (A) treating the receipt as capital in nature, we find no infirmity in the same. Accordingly the order of the Ld. CIT(A) upheld and the grounds raised by the Revenue are dismissed.

22. In the result, the appeal filed by the revenue is dismissed.

Order pronounced in the open court on 23.10.2018.

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| Sd/- | Sd/- |
| **(SUCHITRA KAMBLE)** | **(R.K. PANDA)** |
| **JUDICIAL MEMBER** | **ACCOUNTANT MEMBER** |

**NEHA**
*Date:- 23.10.2018*

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

ASSISTANT REGISTRAR
ITAT NEW DELHI

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| Date of dictation | 11.10.2018 |
| Date on which the typed draft is placed before the dictating Member | |
| Date on which the approved draft comes to the Sr.PS/PS | |
| Date on which the fair order is placed before the Dictating Member for Pronouncement | |
| Date on which the fair order comes back to the Sr. PS/ PS | 23.10.2018 |
| Date on which the final order is uploaded on the website of ITAT | 24.10.2018 |
| Date on which the file goes to the Bench Clerk | |
| Date on which file goes to the Head Clerk. | |
| The date on which file goes to the Assistant Registrar for signature on the order | |
| Date of dispatch of the Order | |