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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ ITA 462/2022 and CM APPL. Nos. 49348-49/2022

PR. COMMISSIONER OF INCOME TAX-7 Appellant

Through: Mr.Puneet Rai, Senior Standing
Counsel for the Revenue.

versus

PAWA INFRASTRUCTURE (P) LTD. Respondent

Through: None

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Date of Decision: 18th November, 2022

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

J U D G M E N T

MANMEET PRITAM SINGH ARORA, J (ORAL):

CM APPL. 49348/2022 (for exemption)

Exemption allowed, subject to all just exceptions.

Accordingly, the application stands disposed of.

ITA 462/2022 and CM APPL. 49349/2022 (for condonation of delay)

1. The Appellant, Revenue, in the present appeal has impugned order dated 5th January, 2022 ('impugned order'), passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No. 3829/Del/2018 for the Assessment Year ('AY') 2013-14.

2. Brief facts leading to the filing of the present appeal are that the Respondent, Assessee, is a Real Estate Developer who was allotted a Plot of land in Rajiv Gandhi I.T. Habitat at Goa ('the plot') in an initiative of

Government of Goa. The said allotment was subsequently cancelled by the State of Goa and consequently, the Assessee received a refund of Rs. 28,03,68,246/-. The said refund included a sum of Rs. 9,86,07,762/- as compensation calculated as simple interest @ 10% per annum, over and above the amount paid by the Assessee for the allotment of the said plot of land. The said amount was received by the Assessee during the Financial Year ('FY') 2012-13 and accordingly, the Assessee filed its Return of Income ('ITR') for AY 2013-14, and claimed a long term capital loss of Rs. 2,45,85,883/-.

3. The Assessee e-filed its ITR on 29th September, 2013, for the AY 2013-14, declaring a total income of Rs. 56,41,070/-. The case of the Assessee was selected for scrutiny through CASS for the specified reason, which reads as "*Low capital gain with respect to sales consideration*". The Assessing Officer ('AO'), after perusing the replies and explanations filed by the Assessee with respect to the compensation received on cancellation of the plot, accepted the ITR of the Assessee, vide assessment order dated 15th February, 2016, passed under Section 143(3) of the Income Tax Act, 1961 ('the Act').

4. However, the Principal Commissioner of Income Tax, Delhi-7, New Delhi ('PCIT') after perusing the said assessment order, held it to be erroneous and concluded there was underassessment of income of the Assessee and consequently, issued a Show Cause Notice ('SCN') dated 29th January, 2018, under Section 263 of the Act, directing the Assessee to show cause as to why an order may not be passed against it.

5. The PCIT, after considering the Assessee's reply, passed its order dated 27th March, 2018, setting aside the assessment order passed by the AO by holding it to be erroneous and prejudicial to the interest of Revenue and

further directed the AO to pass a fresh assessment order, with a direction to bear in mind that the Assessee had wrongly treated the property in question as its Capital Asset and that the claim of indexation cost of the property cannot be allowed.

6. The Assessee being aggrieved by the PCIT's order dated 27th March, 2018, filed an appeal before the ITAT, wherein the ITAT vide its impugned order dated 5th January, 2022, allowed the Assessee's appeal by holding that the compensation received for cancellation of the plot to be in the nature of a capital receipt and not a revenue receipt.

7. Learned senior standing counsel for the Revenue states that the ITAT failed to appreciate that the Assessee was granted a lease only for a period of 30 years and ownership right of land was not transferred by the Government of Goa. He states that the Assessee had been granted only the user rights for which the Assessee was liable to pay rent to the lessor. He states that a perusal of the clauses of the registered lease deed ('lease deed') shows that the Assessee was not granted full rights over the property and therefore, it was not the owner of the premise. He states that the taxability of the interest (compensation) receipt, in the hands of the Assessee, has to be adjudged after perusing the terms of the agreement between the lessee and the lessor and that the ITAT failed to appreciate that the Assessee herein was not the owner of the plot.

8. He states that the ITAT failed to appreciate that the lease deed is in the nature of a document of convenience and it is not an instrument of transfer of title, so as to make the Assessee, the owner of the said property. He states that the ITAT failed to appreciate that in the facts of the present case, there were

no two plausible and legally sustainable views permissible and therefore, the judgment of the Supreme Court in *Commissioner of Income Tax, (Central) Ludhiana v. Max India Limited, (2007) 15 SCC 401*, is not applicable to the facts of the present case. He states that the ITAT failed to appreciate that since the property was not held by the Assessee as a Capital Asset, the Assessee is not entitled for a claim of indexation and therefore, the AO erred in accepting the ITR filed by the Assessee and the same has resulted in the passing of the erroneous assessment order dated 15th February, 2016.

9. He states that the ITAT failed to appreciate that the AO had not analysed the aspect that the compensation amount received by the Assessee for cancellation of its lease deed is taxable under the head 'Income from other sources' and therefore, by virtue of lack of application of law by the AO, the assessment order is erroneous.

10. He states that the ITAT failed to appreciate that the AO, before accepting the claim of the Assessee, has not determined whether the compensation received by the Assessee should be taxed under the head 'Income from other sources' or 'Long Term Capital Gains' and therefore, the PCIT rightly invoked its jurisdiction under Section 263 of the Act. He states that the ITAT failed to appreciate that Clause 6(o) of the lease deed prohibited the Assessee from parting with any proportion of the land and therefore, the treatment given by the Assessee to the said asset as being in the nature of the Capital Asset is not correct and thus, the AO had committed an error in accepting the ITR filed by the Assessee.

11. We have perused the paper-book and are unable to accept the contentions of the Revenue. In the present case, the Assessee applied for

allotment of a plot of land vide application dated 10th May, 2006, and was allotted Plot No. 9 in the Rajiv Gandhi I.T. Habitat by Infotech Corporation of Goa Ltd., a Company of the Government of Goa, which was incorporated for setting up 'Rajiv Gandhi I.T. Habitat' ('the Project'). The possession of the said plot was handed-over to the Assessee on 26th September, 2006 and the lease deed was executed and registered in favour of the Assessee for an initial period of 30 years which may be further extended by 60 years, subject to the conditions laid down therein.

12. The Assessee herein had started the Project in AY 2008-09 and opened an office in Goa to effectively manage the Project. The Assessee had shown the property under the head 'Fixed Assets' in its Books of Accounts and claimed it as a Capital Asset within the meaning of Section 2(14) of the Act. However, due to a subsequent change of policy by the Government of Goa, the said Project was initially stalled and finally cancelled. The Government passed a legislation namely The Goa (Rajiv Gandhi IT Habitat - Cancellation/Abolition and Regulation of Allotment of Plots) Act, 2012 ('the Act of 2012') and cancelled the allotment of the said plot in the FY 2012-13.

13. The Assessee was awarded as compensation a sum of Rs.9,86,07,762/- under the Act of 2012, towards cancellation of allotted plot. The total amount refunded was Rs. 28,03,68,246, which included the aforesaid compensation. The assessee claimed total expenses of Rs.19,26,71,567/- and the indexed cost of cancellation at Rs.30,49,54,129/-. Accordingly, the Assessee had claimed a Long Term Capital Loss of Rs.2,45,85,883/-. With the cancellation of the allotment by the aforesaid legislation, the Assessee's rights in the said land stood extinguished. The Assessee therefore stated before the PCIT that it had

correctly offered the compensation received from the Government of Goa under the head 'Capital Gains' in his Return of Income.

14. The Assessee has specifically stated that the transaction in the present case is on account of a registered lease deed executed in favour of the Assessee and it is not a case of a Power of Attorney transaction as erroneously mentioned in the SCN. The Assessee stated that the PCIT fell in error in treating the compensation received by the Assessee as simple interest @10% per annum, as 'Interest' income. The Assessee therefore contended that it has rightly treated the plot and its leasehold rights therein as its Capital Asset.

15. We are unable to agree with the finding of the PCIT that the leasehold interest of the Assessee in the plot was not a Capital Asset. The terms of lease deed evidence that the Assessee was entitled to construct on the plot and offer the built-up space for IT Software and IT enabled Services Industries. Further, the Assessee was also permitted to sub-lease, assign, transfer, alienate and part with the compensation of the constructed building along with proportionate land thereunder for setting up IT Software and IT enabled Services Industries only. The contention of the Revenue that Clause 6(o) of the lease deed does not permit the Assessee to part with any proportion of the land is erroneous and contrary to the plain reading of the said Clause, which reads as under:

"Clause 6(o)

The Lessee who is in real estate developer for offering space for IT Software & ITES shall be permitted to sublease, assign, transfer / assign, alienate or part with possession of constructed building and a proportionate land thereof (in case of proportionate land, only sublease is permissible) for setting IT SOFTWARE/ IT enabled Services Industries only."

16. In the facts of the present case, it is evident that there was a transfer of

right in the land in question in favour of the Assessee under the lease deed. In this case, as noted above, the lease deed is for a period of 30 years with an option of renewal for a further period of 60 years and further, a lease premium was charged from the Assessee for the said lease. In this regard it would be relevant to refer to Clause 1 of the lease deed as reproduced in the order of PCIT, which reads as under:

Clause (1) In pursuance of the aforesaid agreement and in consideration of the lessee agreeing and undertaking to the payment of premium, the annual lease rent and compliance with the terms, conditions and covenants- mentioned hereinafter, the lessor does hereby demise, grant of lease the land and property bearing Plot No. P-9, admeasuring 40558.73 square meters, which is more particularly described in 'Schedule I' annexed to this deed and forming a part and parcel thereof (with its boundaries delineated in colour red) together with all easements and appurtenances whatsoever belonging or in any way appurtenant thereto TO HAVE AND TO HOLD the same for a term of 30 years in the first instance.....

17. The Supreme Court in the case of ***R.K. Palshikhar (HUF) v. Commissioner of Income Tax, M.P., Nagpur, (1988) 3 SCC 594*** has held as under :

“8...In the first place, the lease is for a long period, namely, 99 years, hence it would appear that under the leases in question the assessee has parted with an asset of an enduring nature, namely, the rights to possession and enjoyment of the properties leased for a period of 99 years subject to certain conditions on which the respective leases could be terminated. A premium has been charged by the assessee in all the leases. In these circumstances, we fail to see how it could be said that the provisions of Section 12-B of the said Act cannot be brought into play. The grant of the leases in question, in our view, amounts to a transfer of capital assets as contemplated under Section 12-B of the said Act...”

The Supreme Court in the aforesaid judgment was considering the provision of Income Tax Act, 1922. Section 12-B of the Income Tax Act, 1922 corresponds to Section 45 of the Act. The Supreme Court, thus, held that the

transfer by way of lease would amount to transfer of a capital asset and therefore tax is leviable as capital gains. From a reading of the above referred judgment, it is clear that the transfer by way of lease is treated as transfer of a capital asset on the principle that the lease creates an interest in the land and therefore to that extent, it extinguishes the right of the transferor.

18. The said judgment of the Supreme Court was also followed by the predecessor benches of this Court in *Rajesh Gupta HUF Vs. PCIT-11*, [Judgment and Order dated 26th February, 2018 in ITA 264/2018] and the *CIT Vs. The Indian Newspaper Society*, [Judgment and Order dated 10th December, 2015 in ITA 918/2015].

19. If the facts of the present case are analysed in the context of the law laid down by the Supreme Court, we have no difficulty in holding that the leasehold rights by the Assessee in the plot created an interest in the land in favour of the Assessee. The Assessee under the terms of the agreement not only had the right to construct on this plot but it had a further right to transfer and alienate the building along with the land to third parties and therefore the lease land comes within the definition of Capital Asset as defined under Section 2(14) of the Act.

20. Further, in this case, as noted above, the allotment of land was cancelled by the Government of Goa in pursuance of the Act of 2012. The payment received by the Assessee towards compensation was in terms of sub-section (3) & (5) of Section 3 of the Act of 2012, which reads as under:

“3. *Cancellation/Abolition of Allotments.* –

XXX XXX XXX

(3) Every allottee whose allotment of plot has been cancelled/ abolished as

specified in this section shall be given by the Info Tech Corporation of Goa Limited, an amount equal to the amount of premium/lease rent/license fee paid by the allottee along with simple interest at the rate of ten percent per annum. The Info Tech Corporation of Goa Limited shall, however, not be liable or responsible, in any manner, in respect of the loans, dues, etc., if any, incurred/obtained by the allottees for procuring allotment of the said plots or in connection with the plots allotted.

XXX XXX XXX

(5) Save as provided hereinabove, no other amounts or **compensation** of whatsoever nature, shall be claimable by any allottee in respect of any financial or other loss, damage, hardship, etc., cause to such allottee on account of the cancellation/abolition of allotment of plots under this section.”

(Emphasis supplied)

A reading of the aforesaid Sections of the Act of 2012, evidences that the payment calculated @ 10% per annum over and above the premium by Government of Goa was not by way of interest but was statutorily in the nature of compensation and therefore, the said receipt cannot be treated as Assessee's 'Income from other sources'.

21. We also agree that the finding of the ITAT that in the present case, since the plot allotted to the Assessee was to be used by the Assessee for carrying on its business and was an income producing asset for this company, since the Assessee who is a real estate developer, intended to construct a building and further sub-lease or transfer such a building to third parties to earn income, it would constitute a capital asset as held by the Supreme Court in the case of *C.I.T., Bombay City v. Bombay Burmah Trading Corpn., Bombay, (1986) 3 SCC 709*.

22. The reference to a Power of an Attorney transaction in the grounds of appeal is incorrect since there was no Power of Attorney executed in favour

of the Assessee as noted in the order of the PCIT.

23. We are, therefore, of the considered opinion that the leasehold rights held by the Assessee in the plot was a Capital Asset and that the compensation received by the Assessee from the Government of Goa on the cancellation of the plot was a capital receipt and not a revenue receipt. It is trite law that if an agreement for transfer of rights in an immovable property is not performed by the transferor, the transferee is entitled for compensation as he/she is deprived of the price of escalation. Therefore, the character of payment received as compensation by the transferee bears the character of capital receipt. The payment of interest in the facts of the present case is compensatory in nature and therefore, does not bear the character of revenue receipt. Thus, we hold that the AO's order dated 15th February, 2016, was correct and it did not suffer from any error, justifying the invocation of the PCIT's powers under Section 263 of the Act.

24. In view of the above discussion, no substantial question of law arises for consideration in the present appeal and the same along with the pending application are dismissed.

MANMEET PRITAM SINGH ARORA, J

MANMOHAN, J

NOVEMBER 18, 2022

j/aa