IN THE INCOME TAX APPELLATE TRIBUNAL, 'F' BENCH MUMBAI

BEFORE: SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER

ITA No.1654/Mum/2023
(**Assessment Year : 2018-19**)

Shri Virendra Bhavanji Gala 1, Ground Floor Anil Villa Plot No.592, Jame Jamshed Road Matunga (Cr. Railway) Mumbai Maharashtra-400019	Vs.	PCIT (Central) Mumbai - 4
PAN/GIR No.AAAPG9747J		
(Appellant)	..	**(Respondent)**

Assessee by	Shri Pradip Kapasi
Revenue by	Ms. Zeenia Handa
Date of Hearing	**18/07/2023**
Date of Pronouncement	**30/08/2023**

आदेश / O R D E R

PER AMIT SHUKLA (J.M):

The aforesaid appeal has been filed by the assessee against order dated 29/03/2023 passed by PCIT (Central Mumbai-4) in his revisionary jurisdiction u/s.263 for the A.Y.2018-19.

2. In various grounds of appeal assessee has challenged the order of the ld. PCIT passed u/s.263 on various legal and factual grounds. The main issue on merits is with regard to taxability of receipt of damages which was claimed as capital receipt not chargeable to tax, whereas the ld. PCIT has held it to be in the nature of income.

3. The facts in brief are that the assessee is an individual, who had entered into an MOU with Aadi Properties LLP on 08/07/2010 with the intention to book commercial space to be developed and constructed in a proposed project by M/s. Aadi Properties LLP on a plot of land for consideration of Rs.10,75,00,000/-. Accordingly, payment of Rs.25,00,000/- by cheque No.017447 drawn on bank of India dated 02/07/2010 was paid by the assessee. This amount of Rs.25,00,000/- was nearly 2.33% of the total consideration payable by the assessee. Later on, the said project did not materialize and was aborted and accordingly, the builder had cancelled the allotment returning the advance of Rs.25,00,000/- vide cheque dated 29/07/2014 which amount was not deposited in the bank by the assessee. The assessee then filed suit on 30/11/2015 before the Hon'ble Bombay High Court, being suit No.21/2016 for claiming damages, that an agreement sale u/s .4 of Maharashtra Ownership Flats Act (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act (MOFA) was entered for the suit premises and prayed for perpetual injunction restraining the Defendant from selling or dealing with, disposing of, alienating, encumbering, parting with possession or creating

third party rights of any nature whatsoever in respect of the suit area or part thereof.

4. Aadi Property LLP contested the assessee's suit on the following grounds and expressed its inability to provide the agreed commercial space and refused to meet the claims of the assessee in the suit;

- by seeking reference of the dispute in the Suit to Arbitration under the provisions of the Arbitration and Conciliation Act, 1996.
- claiming that the MOU was for finance purpose and not for sale of flats.
- MOU was cancelled in 2014 by legal notice.
- the money was returned on cancellation by cheque.
- the plaintiff had failed to perform his obligations and there was No readiness or willingness on the part of the plaintiff to perform the contract.
- the said MOU was not capable of specific performance.
- the MOU was not stamped or registered and was admissible in evidence.
- it was never planned to or possible to develop commercial premises.
- that no case made out for specific performance by plaintiff of MOU,
- the Plaintiff was estopped from claiming allotment of the suit premises.
- claiming that the Suit was not maintainable.

- suppression of material facts and circumstances by the Plaintiff.
- the suit was not bonafide and was merely an afterthought.
- claiming that the Plaintiff has failed to make out the case for the grant of ad-interim reliefs.

5. Thereafter, a consent decree dated 10/07/2017 was passed by the Hon'ble Bombay High Court on the basis of consent terms filed by the parties. As per the consent decree an amount of Rs.7,65,26,000/- was agreed to be paid by the Aadi Properties LLP by way of damages for its inability to provide the commercial space and the assessee not waiving the 'right to sue' as per Para 9 and 10 of the consent decree dated 10/07/2017 which reads as under:-

"9. In Course of the discussions and negotiations between the Parties, the Plaintiff released that due to the constant changes in the applicable laws governing planning, FSI and other development accept the Defendant was forced to abort the Old Project and the Defendant have aborted the Old Project and undertaken the development of the project, had made significant progress in the construction of the project which was in stark variance with the Old Project in which the Plaintiff had agreed to invest by way of allotment of 25,000 square feet (Saleable area) of the commercial premises therein and consequently, the contours of the Old Project by completely different from that of the Project as is presently envisaged. The Old Project was comprised of mostly commercial buildings whereas the Project is predominantly residential and very little commercial user. In fact, the location where the commercial premises were to be provided, residential buildings are being put up there. The Defendant, having made significant progress in the construction

of the Project and also having created other party rights in the Project, it was realized that the original allotment of office space is not even constructed in the new plan. Since, specific performance of the allotment of 25000 square feet (Saleable area) of the commercial premises is not possible, damages in lieu of the Plaintiff's right to sue would thus be the only relief/ remedy that the Plaintiff would be eventually entitled in the caption suit. Considering that specific performance of the MOU is not possible, it has been agreed that damages shall be paid by the Defendant to the Plaintiff in lieu of the Plaintiff's right to sue."

"10. In accordance with the aforesaid discussions, the parties have agreed to mutually end amicably settle the aforesaid dispute and differences between them. It has been decided between the parties that the plaintiff is entitled to damages of Rs. 7,65,26000 (Rupees Seven crores sixty-five lakhs twenty-six thousand only) in lieu of the plaintiff's right to sue, in full and final settlement of all the plaintiff's claims under the captioned suit, the Notice of Motion in Commercial Division No. 179 of 2016 (converted from Notice of Motion of No. 205 of 2016), Notice of Motion in Commercial Division No. 180 of 2016 (converted from Notice of Motion No. 499 of 2016) and the MOU, and the amount of Rs. 25,00,000/- (Rupees Twenty Five Lakh only) paid by the Plaintiff to the Defendant on 08th July, 2010 under the MOU, shall also be refunded without interest by Defendant to the Plaintiff and is included in the aforesaid sum of Rs. 7,65,26,000/- (Rupees Seven Crore Sixty Five Lakh Twenty Six Thousand only) payable by Defendant to the Plaintiff."

6. The return of income was filed on 30/10/2018 declaring income of Rs.7,48,63,770/-. In the said return of income assessee claimed that compensation of Rs.7,65,26,000/- received for not suing the M/s. Aadi Properties LLP was a capital

receipt not liable to be taxed. The case of the assessee was selected for scrutiny under the E-assessment Scheme 2019 for verifying the claim of exemption. In the course of assessment proceedings, the ld. AO issued notices from time to time inquiring about, whether the receipts of Rs.7,65,26,000/- towards compensation under consent decree was taxable or not? The assessee in response has complied with all the notices and filed its reply alongwith the case laws in support electronically before the ld. AO and the copies of all the replies alongwith details and evidences, which have been placed in the paper book before us also from pages 41-254 of the paper book. The Assessing Officer after considering the details and the judgments furnished by the assessee, completed the assessment u/s.143(3) vide order dated 24/02/2021 accepting the return of income and confirmed that capital receipt received of Rs.7,65,26,000/- was not taxable.

7. Post completion of assessment u/s 143(3), on same issue, notice u/s. 148A (b) dated 24/03/2022 was issued requiring the assessee to show-cause as to why notice u/s.148 should not be issued in his case for A.Y.2018-19 and to explain as to why the receipt of compensation of Rs.7,65,26,000/- should not be treated as income escaping assessment. Again in response to the said notice assessee furnished all the relevant documents and explanations with respect to the information in question, vide letter dated 29/03/2022 explaining that no income had escaped assessment and the damages received were not liable to tax.

From the records it appears that after considering the reply of the assessee, order u/s. 148A(d) dated 07/04/2022 was passed wherein it was concluded that the case of the assessee was not a fit case for issue of notice u/s.148. The copy of notices and the replies have been placed in the paper book from pages 264-279 of the paper book.

8. After the completion of the assessment of Section 143(3) in the aforesaid manner and the issuance of notice u/s.148A and dropping of such proceedings, the ld. PCIT in his revisionary jurisdiction issued a notice u/s. 263 on 02/03/2023, again on the same issue of taxability of receipt of compensation of Rs.7,65,26,000/-. In the show-cause notice, ld. PCIT held that the ld. AO accepting the claim of the assessee in his order passed u/s.143(3) dated 24/02/2021 was passed ignoring the decision of the Bombay High Court in the case of **CIT vs. Vijay Flexi Containers (Bom) reported in (1990) 186 ITR 693** which makes assessment order passed by the ld. AO erroneous in so far as prejudicial to the interest of the revenue as per *clause (d)* of *Explanation 2* to Section 263. He further observed that in another similar matter with same kind of transaction with the same builder, in the case of Kaushal Agarwal who has also booked commercial space of 25,000 sq.ft on 08/07/2010 and had received similar compensation of Rs.7,65,26,000/-, the ld. AO has made the addition on account of capital gain on such compensation received.

9. In the reply to the show-cause notice assessee submitted that the case of the assessee is not covered by the judgment of the Hon'ble Bombay High Court in the case of Vijay Flexi Containers supra, because the said judgment relate to specific performance of the impugned contract but here in this case the specific performance of the contractor was not possible and therefore, there was no possibility to impose the performance of the contract and here assessee had only 'right to sue'. Assessee also relied upon the decision of the Hon'ble Madras High Court in the case of **Venkateswara Aiyer vs. Kallor LLLath Raman Nambudri, AIR 1917 Mad 358**, wherein the Hon'ble Madras High Court has considered the case of CIT vs. Vijay Flexi Containers supra and decided that right to sue in such cases is a capital receipt and not chargeable to tax. Apart from that, assessee had also relied all other judgments which has been referred in the impugned order. The ld. PCIT rejected the replies / explanation of the assessee and held that the Assessing Officer neither during the assessment proceedings u/s.143(3) nor in the proceedings u/s.148A(d) has considered the decision of the Hon'ble Jurisdictional High Court in the case of CIT vs. Vijay Flexi Containers supra and accordingly, he cancelled the assessment order passed by the ld. AO holding it to be erroneous in so far prejudicial to the interest of the Revenue and set aside the assessment order to pass the assessment order afresh in light of his observation about the judgment Hon'ble Bombay High Court.

10. On the perusal of the impugned order of ld. PCIT, it seems that the only ground for setting aside the assessment order passed by the ld. AO is failure to consider the judgment of the Hon'ble Jurisdictional High Court in the case of **CIT vs. Vijay Flexi Containers** supra and accordingly, in terms of *Clause-(d)* to *Explanation 2* to Section 263 are attracted and therefore, it is deemed to be erroneous and prejudicial to the interest of the Revenue.

11. We have heard both the parties at length and also perused the relevant finding given in the impugned order as well as various materials referred to before us at the time to hearing. To put the issue succinctly, whether the compensation received by the assessee as per the consent decree dated 10/07/2017 of the Hon'ble Bombay High Court which was based on the basis of consent terms filed by the parties, can be brought to tax or it is a capital receipt not chargeable to tax. As noted above in the consent decree of the Hon'ble Bombay High Court, in para 9, it has been clearly stated that since specific performance of allotment of 25,000 sq.ft (salable area) of the commercial premises is not possible, damages in lieu of the plaintiff's right to sue would thus be the only relief/ remedy that the Plaintiff would be eventually entitled in the caption suit. Considering that specific performance of the MOU is not possible, it has been agreed that damages shall be paid by the Defendant to the Plaintiff in lieu of the **Plaintiff's right to sue**. Para 10 also clearly states that it has been vested between parties that the plaintiff is entitled to damage of Rs.7,65,46,000/- in view of

plaintiff's right to sue, full and final settlement of all the plaintiff's claims under the captioned suit.

12. As per the Transfer of Property Act, Section 6 which provides property may be transferred. It has been categorically provided a mere right to sue cannot be transferred. The relevant portion of Section 6 of Transfer of Property Act reads as under:-

What may be transferred

6. Property of any kind may be transferred, except as otherwise provided by this Act or by any other law for the time being in force-

(a) The chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature, cannot be transferred.

(b) A mere right of re-entry for breach of a condition subsequent cannot be transferred to anyone except the owner of the property affected thereby.

(c) An easement cannot be transferred apart from the dominant heritage. (d) An interest in property restricted in its enjoyment to the owner personally cannot be transferred by him.

(d) A right to future maintenance, in whatsoever manner arising, secured or determined, cannot be transferred

(e) A mere right to sue cannot be transferred

(f) A public office cannot be transferred, nor can the salary of a public officer, whether before or after it has become payable.

(g) Stipends allowed to military, naval, air-force and civil pensioners of the government and political pensions cannot be transferred.

(h) No transfer can be made (1) insofar as it is opposed to the nature of the interest affected thereby, or (2) for an unlawful object or consideration within the meaning of section 23 of the Indian Contract Act, 1872 (9 of 1872), or (3) to a person legally disqualified to be transferee.

(i) Nothing in this section shall be deemed to authorise a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate, under the management of a Court of Wards, to assign his interest as such tenant, farmer or lessee.

13. Now whether the damage received by the assessee can be said to be in respect of transfer of capital asset and if there was a breach of contract and the assessee received damages on account of mere 'right to sue' for the damages, can it be held to be transfer of the property. As noted above, Section 6 of the Transfer of Property Act clearly provides that ***"a mere right to sue cannot be transferred"***, even if it is to be treated as "property" U/s.5 of the Transfer Property Act. Transfer of property means the act by which a person conveys a property to another and to transfer property is to perform such act. The mere right to sue may or may not be property but certainly it cannot be transferred as per law.

14. Before coming to the decision of the Hon'ble Bombay High Court as has been referred and relied upon by the ld. PCIT in the case of CIT vs. Vijay Flexible Containers supra, there is another decision of the **Hon'ble Bombay High Court in the case of CIT**

vs. Abbasbhoy D Deghghamwala, 195 ITR 28 (Bom), which held otherwise. The relevant gist of the judgment is as under:-

Facts:

Taxpayer had entered into contract for acquiring lease rights in property from Government. The vendor committed breach and contract was cancelled. The court directed that specific performance was not to be insisted and taxpayer could claim compensation for breach.

Held:

Compensation so received was held to be a non chargeable capital receipt. HC held that a right to sue for damages is not an actionable claim; it cannot be assigned. Transfer of such right is illegal and is opposed to public policy. Not being capital asset and not being transferable, receipt of compensation is not liable to capital gains as claimed by tax authority.

Relevant extracts of the judgment

"right to receive compensation is statutory right, the right that a person acquires on the establishment of a 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 s. 2(14), a right to a capital asset must fall within the expression property of any kind' and must not fall within the exceptions. ***Sec. 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 there under 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 as much opposed to public policy as is gambling in*

litigation. ***As such, it will not be quite correct to say that such a right constituted a 'capital asset which in turn has to be 'an interest in property of any kind...***

the right acquired in lieu thereof was only a mere right to sue, it cannot be accepted that the amount was received as consideration for the transfer of a 'capital asset, Le, right to the execution of a lease deed in terms of the 1945 agreement, during the previous year. In that view of the matter, no part of the amount was taxable as capital gains."

14.1 Thus, the sequitur of the said judgment can be summarized in the following manner:-

i. The right that a person acquires on the establishment of the Breach of Contract is a mere right to sue.

ii. Despite the definition of capital asset in the wildest possible terms in s. 2(14), a right to a capital asset must fall within the expression 'property of any kind'.

iii. S.6 of Transfer of Property Act, 1882 uses the same expression 'property of any kind' in the context of transferability of any property under that Act.

iv. The said S. 6 of Transfer of Property Act, 1882 makes an exception for 'a right to sue' while defining property of any kind.

v. Such right to sue for damages is held to be not an actionable claim and it cannot be assigned.

vi. Transfer of such a right to sue for damages is opposed to public policy as is gambling in litigation

vii. It is not correct to say that such a right to such damages is a "Capital Asset" being on interest in property of any kind;

viii. Both parties had filed their objections in the suit and but for the compromise, there would have been prolonged litigation and uncertainty about fate of litigation.

ix. The right to receive damages accrued on the date of consent decree only and not before.

15. In the case of the assessee also MOU was not capable of specific performance under the Specific Relief Act and was confirmed by the Hon'ble Bombay High Court vide para 9 of the consent decree dated 10/07/2017 and it was decreed that the only right available to the assessee was the right to sue for damages and the compensation was paid under the decree towards the said right to sue.

16. In another judgment of the Hon'ble Bombay High Court in the case of **Sterling Construction Investment vs. ACIT reported in (2015) 374 ITR 474,** wherein the decision of CIT vs. Vijay Flexi Containers have been considered at length by the Hon'ble High Court. The facts in that case were that the assessee had entered into an oral agreement with 'ECL' to purchase factory premises to give it on lease and earn lease rent. At the time of finalizing the sale agreement, ECL backed out of said oral agreement. The assessee filed suit before Trial Court of 'specific performance' and to grant of damages for breach of said agreement. The Court passed consent decree, under which ECL agreed to pay 5 crores to assessee by way of damages.

16.1 The Assessing Officer made a reference under section 144A to the Deputy Commissioner seeking his opinion regarding taxability of amount received by assessee. The Deputy Commissioner gave directions to Assessing Officer to the effect that said receipt of damages was not taxable in the hands of the appellant neither as business income nor as capital gains, nor as casual or non-recurring receipt. Accordingly, the Assessing Officer completed the assessment.

16.2 The Commissioner exercising his powers under section 263 passed a revisional order holding that while making the assessment, the Assessing Officer failed to consider the decision of the Bombay High Court in the case of *CIT* v. *Vijay Flexible Containers* [1990] 186 ITR 693/48 Taxman 86 and, therefore, the order passed by the Assessing Officer was erroneous as well as prejudicial to the interest of the revenue. The Hon'ble High Court observed and held as under:-

> *"23. The question of law was, "whether the right conferred upon the Assessee by the sale agreement of "property of any kind?" It is in that context that the Division Bench arrived at the conclusion that the right acquired is not a mere right to sue. The Assessee acquired under the said agreement for sale the right to have the immovable property conveyed to him. He was, under the law, entitled to exercise that right not only against his vendors but also against a transferee with notice or a gratuitous transferee. He could assign that right. What he acquired under the said agreement for sale was, therefore property within the meaning of the IT Act and consequently a capital asset. In the Suit that he filed, a settlement was arrived at, at which point of*

time, the Assessee gave up his right to claim specific performance and took only damages. His giving up of the right to claim specific performance by conveyance to him of the immovable property was relinquishment of the capital asset. There was, therefore, a transfer of a capital asset within the meaning of the IT Act. It is this view which was placed before this Court in the case of Abbasbhoy A. Dehgamwalla (supra).

24. However, the Division Bench deciding the issue in the case of Abbasbhoy A. Dehgamwalla (supra) noted that once the Assessee's claim to specific performance of the agreement was rejected, then, the alternative claim for damages for breach of agreement even if worded the receipt of that sum could be taxed as the Assessee's income under the head capital gains. That could not have been taxed as such after the Assessee's right to obtain specific performance was extinguished when the Court refused to grant such a relief.

25. Thereafter, the alternate argument of the Revenue that the right to receive damages for breach of contract represented the consideration of the original right has been dealt with. The Division Bench concluded that even if the widest possible interpretation accepted, still the amount of damages cannot be taxed as capital gains. That has been held to be a compensation in money for breach of the contract. That, as appearing in this case, is something which will be the substitution for the original relief. It is in lieu of specific performance. There is no right then to claim the property but to be compensated for breach of an agreement to transfer the immovable property and in future. Once such a transfer cannot be obtained as the Decree for specific performance has been refused, then, the receipt of monetary sum cannot be taxed as claimed by the Revenue. This is apparent from a reading of paras 8 and 9 of the Division Bench Judgment. In these circumstances, the reliance placed on another Division Bench Judgment of this Court need not be considered.

26. In the present Appeal, the Tribunal failed to note that in this case as well the specific performance of the agreement was refused. It is erroneously held that the claim of the Assessee regarding specific performance had never been rejected by this Court. A reading of the order passed by the Division Bench leaves us in no manner of doubt that such a Decree was expressly denied. The Consent Terms may constitute an agreement or contract between the parties, however, a Consent Decree is passed after the agreement is placed before the Court and the Court applies its mind and records a satisfaction that the terms are not contrary to law or public policy. That they can be accepted and based on that a Decree can be passed. Therefore, it is not an agreement between the parties, by which the Suit was disposed of but on that agreement there is a seal of approval or satisfaction of the Court and in terms of Order XXIII Rule 3 of the Civil Procedure Code, 1908. In such circumstances, even if there was any interim order in favour of the Assessee in the present case eventually the Suit ended in the Assessee's claim for specific performance being refused and he being entitled to receive the sum stipulated in this Court's order in lieu of the specific performance. In these circumstances, the Assessee was right in urging that he has no right, title or interest in the immovable property. The Tribunal completely misread and misconstrued this Court's order. In the Consent Terms, which are drawn up and based on which the Suit is decreed by the Court, it does not deal with the rival cases on merits. There is no requirement of the Court then passing an order and Judgment on merits of the claim of the parties. The Court is required to apply its mind and consider as to whether the arrangement reached by the parties can be accepted by it. Once it is accepted and an order or decree is passed in terms thereof, then, it is an order of the Court. Thus, the Court has not undertaken any mechanical exercise or has not casually and lightly accepted the terms and approved the same. It has performed a conscious act and in terms of Order XXIII Rule 3 of

the Civil Procedure Code, 1908. This clearly means that the relief was refused. One cannot then pick up a stray sentence or observation from the Judgment of this Court and apply it to the given fact situation. We find that the present case was similar to that of Abbasbhoy A. Dehgamwalla (supra). In this case this Court declared that the Plaintiff/Assessee has no right, title or interest in the immovable property. That specific performance is therefore clearly refused. The other observations of the Division Bench deciding the case of Abbasbhoy A. Dehgamwalla (supra) and Vijay Flexible Containers (supra) need not be considered. We do not think that the Assessee had any right left or remaining in him to claim the immovable property, which is subject matter of the oral agreement. That right got extinguished once the specific performance was refused. Even if the refund of earnest money or compensation is the relief granted, it is apparent on a reading of the Specific Relief Act, 1963 that the Court has power to grant relief of possession, partition or refund of earnest money if any person sues for specific performance of a contract for the transfer of immovable property. That power is to be found in section 22 of the Specific Relief Act, 1963. By section 21, the Court has a power to award compensation in certain cases and by sub-section (1) thereof, it is clarified that in a Suit for specific performance of a contract, the Plaintiff may also claim compensation for its breach, either in addition to, or in substitution of such performance. When such relief is claimed in substitution of performance, then, by virtue of sub-section (2) of section 21, the Court can award the Plaintiff compensation even if it decides the specific performance ought not be granted. However, there are specific provisions which the Plaintiff must comply with. Eventually, the jurisdiction to decree specific performance conferred in a Court is discretionary and it is not bound to grant such relief merely because it is lawful to do so (see section 20 of the Specific Relief Act, 1963).

27. The agreement for sale of immovable property itself does not create any right, title or interest in the immovable property,

which is subject matter of such agreement but creates a right to obtain performance of the agreement by approaching Court of law and seeking a Decree of specific performance in terms of the Specific Relief Act, 1963. It is that limited right which is recognised by law and the difference between contract for sale of an immovable property and sale as emerging from section 54 of the Transfer of property Act, 1882 is thus explained.

28. ……
…….

29. In such circumstances, we do not think that the Tribunal's finding and from paras 6 to 11 need to be referred to. In this case as well, the specific performance was refused by this Court. In any event, there was enough doubt and the legal position was not clear. This was not a case where power under section 263 of the Income Tax Act could have been exercised.

30. In view of the above, we are of the opinion that the Appeal must succeed. The substantial questions of law, as framed and on debatable issues need to be answered as under:—

"Answers to Question Nos. :-

(i) *The Tribunal was not justified in holding that the order passed by the Assessing Officer under section 143(3) read with section 144 A was erroneous and prejudicial to the interest of the Revenue and, therefore, the Commissioner of Income Tax was justified in exercising the jurisdiction under section 263 of the IT Act.*

(ii) *The answer is in favour of the Assessee and against the Revenue by holding that the amount of compensation received by the Assessee/Appellant was not liable to capital gains tax.*

(iii) *It is held that the Appellant's case was covered by the ratio of this Court in the case of Commissioner of Income Tax v. Abbasbhoy A. Dehgamwalla and Ors. reported in (1992) 195 ITR 28.*

(iv) Once we have answered the issue on merits against the Revenue and in favour of the Assessee, question No. 4 will not survive."

17. Thus, the Hon'ble High Court have clearly explained the applicability of both the judgments where specific performance can be done and where it cannot be done and it is a mere right to sue and held that exercising power u/s.263 based on the decision of Vijay Flexi Containers (Bom) cannot be exercised where there is compensation is on account of right to sue. Hon'ble Court has clearly highlighted the issue involved in both the judgments and under such circumstances the judgment of Vijay Flexi Containers cannot be complied with.

18. Now coming to the decision of Vijay Flexi Containers (supra), in that case, the parties had entered into agreement for sale deed dated 10/11/1959 to purchase immovable property which was stamped and registered and right to have the immovable property was acquired under the said agreement. Thereafter, an amount of Rs.17,500/- was paid to the vendors as earnest money as per the agreement for sale. However, vendor did not perform his obligations. Thereafter a suit was filed in the Hon'ble Bombay High Court for specific performance of the said agreement of sale and only in alternative, damage of Rs.1,17,500/- for the breach of the agreement was claimed and must be paid. In that case, the project was in existence to claim the right in the property and the specific performance was possible, however, the buyer settled for damages. There the buyer gave up his right to claim specific performance and took

only damages for non-performance and not for right to sue and accordingly, consent terms were arrived. There was no such clause which accepted that no Specific Performance was possible, neither a clause which said that compensation was paid for right to sue.

19. On the contrary here in this case, the facts are entirely different, because the provision of Specific Relief Act was not possible and therefore, right to sue was the only remedy u/s.6 of Transfer of Property Act. Here, the specific performance was not possible since the project was itself aborted. Since the property for which right in the property was claimed, was not in existence, the question of giving up the right in the property does not arise at all. Thus, the judgment of Viay Flexible Containers is not applicable at all and therefore, the ld. PCIT has erred in law and on facts in setting aside the assessment order solely relying upon the judgment of M/s. Vijay Flexible Containers.

20. Apart from that there are various other High Court Judgments directly on this issue wherein, they have held that a damage on account of right to sue is a capital receipt not chargeable to tax. Some of the judgments for the sake of clarity are as under:-

1. ***C.I.T. Vs. Dalmia (1984) [149 ITR 215] (Del.)***

Facts: Pursuant to agreement to sell, taxpayer acquired right to the property under construction from builder. Final sale deed was to be executed on completion of construction. Agreement provided purchaser with a right to specific performance. On builder's failure to execute sale deed post completion of

construction, taxpayer filed suit for injunction against the builder restraining him for selling or alienating property. After dispute being referred to arbitration, taxpayer was awarded certain sum as damages for breach of contract. Consequently, taxpayer agreed to give up his claim for specific performance enabling builder to transfer the property to third party.

Held:
HC held that mere contract for sale of immoveable property does not create by itself any interest in or charge on the property under TOPA. On breach of the contract, taxpayer had mere right to sue for damages which is not transferrable. Damages received cannot be said to be on account of relinquishment of any asset or extinguishment of right of specific performance under the contract of sale. Hence, damages not liable to capital gains.

Relevant extracts of the ruling are below:

... In Sidhrajbhai vs. State of Gujarat AIR 1963 SC 540, it was held that the word 'property' in Art. 19(1) must doubtless be extended to all those recognized types of interest which have the Insignia or characteristic of proprietary rights. We are to determine whether damages received by the assessee were in respect of transfer of a 'capital asset' There was a breach of contract and the assessee received damages in satisfaction thereof. He had a mere right to sue for damages. Assuming the same to be 'property' this could not be transferred under s. 6(e) of the Transfer of Property Act.....

The damages which were received by the assessee cannot be said to be on account of relinquishment of any of his assets or on account of extinguishment of his right of specific performance under the contract for sale.....

Under s. 5 of the Transfer of Property Act, transfer of property means an act by which a person conveys property to another and 'to transfer property' is to perform such act. A mere right to sue may or may not be property but it certainly cannot be transferred. There cannot be any dispute with the proposition that in order that

receipt or accrual of income may attract the charge of tax on capital gains the sine qua non is that the receipt or accrual must have originated in a 'transfer' within the meaning of s. 45 r/w s. 2(47). Since there could not be any transfer in the instant case, it has to be held that the amount of Rs. 1,02,500 received by the assessee as damages was not assessable as capital gains"

2. ***Baroda Cement & Chemicals Ltd. V/s. C.I.T [158 ITR 636] (Guj.)***

Facts: Seller company contracted to sell a second hand mill to taxpayer for agreed consideration. In breach of contract, seller company sold the mill to third party. Taxpayer received compensation from seller in settlement of claims of the taxpayer for breach of the contract which was claimed as non-chargeable capital receipt.

Held:

HC held that once there is a breach of contract and defaulting party not only refuse to perform his part of contract but also disposes of the subject-matter, the injured party has nothing left in the contract except right to sue for damages. A right to sue not being an actionable claim cannot be considered as capital asset and hence, there is no question of it resulted in transfer by extinguishment of taxpayer's right. Also, compensation received does not represent consideration for transfer as for computation under S.45 the taxpayer ought to have incurred cost. If the Revenue fails to show that the taxpayer had incurred a cost as in the present case, it would be impossible to compute the income chargeable to tax under the head 'capital gains' and what the Revenue would be charging would be the capital value of the asset and not any profit or gain. Therefore damages cannot be held to be chargeable as capital gains. Basis the above, damages were not liable to capital gains tax levy.

Relevant Extracts:

".....once there is a breach of contract and the defaulting party not only refuses to perform his part of the contract but also disposes of the subject-matter, the injured party has nothing left in the contract except the right to sue for damages.....

a mere right to sue, whether arising out of tortious act or ex-contractual is not transferable. In Mulla's Transfer of Property Act, Seventh edn., we find the following statement:

"But a debt or actionable claim must be distinguished from a right to sue for damages. After breach of a contract for the sale of goods nothing is left but a right to sue for damages which cannot be transferred. But before breach the benefit of an executory contract for the sale of goods may generally be transferred and the buyer has the right sue for to the goods.....

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 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 capital asset; the latter would suggest payment to make amends for loss or injury occasioned on the breach of contract or tort. Both s. 45 and 48 postulate the existence of a capital asset and consideration received thereof.....

.....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...."

"...The asset referred to in s. 45 must be one in the acquisition whereof the assessee had incurred a cost. If the Revenue fails to show that the assessee had incurred a cost as in the present case, it would be impossible to compute the income chargeable to tax under the head 'capital gains' and what the Revenue would be charging would be the capital value of the asset and not any profit or gain..... The Tribunal was not justified in holding that the amount received by the assessee by way of damages for breach of contract of sale was chargeable to tax under the head 'Capital gains!"

21. In view of the aforesaid judgments of various High Courts including the two judgments of the Hon'ble Jurisdictional High Court in favour of the assessee, the impugned order of the ld. PCIT cancelling the assessment order solely relying on the judgment of M/s. Vijay Flexible Containers which is not applicable on the facts of the assessee's case cannot be sustained and is hereby set aside and the order of the Assessing Officer accepting the claim is upheld.

22. In so far as other issues are concerned, i.e., once the ld. AO has examined this issue threadbare relying upon the various judgments of the High Court which was cited before him accepting the claim, then ld. PCIT cannot set aside the assessment order within the scope of u/s. 263 is not adjudicated as we have already held on merits that the judgment of the ld.

PCIT is incorrect in law. Accordingly, the appeal of the assessee is allowed.

23. In the result appeal of the assessee is allowed.

Order pronounced on 30th August,2023.

Sd/-	**Sd/-**
(AMARJIT SINGH)	**(AMIT SHUKLA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai; Dated 30/08/2023
KARUNA, *sr.ps*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai