

आयकर अपीलीय अधिकरण “बी” न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH, PUNE

BEFORE SHRI S.S.GODARA, JM
AND SHRI G.D. PADMAHSHALI, AM

आयकर अपील सं. / ITA No.572/PUN/2019
निर्धारण वर्ष / Assessment Year : 2015-16

Rohan and Rajdeep Infrastructure,
CTS No. 2254, 1 Modibaug,
3rd Floor, Ganeshkhind Road,
Shivaji Nagar,
PUNE – 411 016

PAN : AAFFR9455F

.....अपीलार्थी / Appellant

बनाम / V/s.

DCIT, Circle - 3, Pune

.....प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA No.692/PUN/2019
निर्धारण वर्ष / Assessment Year : 2015-16

ACIT, Circle - 3, Pune

.....प्रत्यर्थी / Respondent

बनाम / V/s.

Rohan and Rajdeep Infrastructure,
CTS No. 2254, 1 Modibaug,
3rd Floor, Ganeshkhind Road,
Shivaji Nagar,
PUNE – 411 016

PAN : AAFFR9455F

.....अपीलार्थी / Appellant

Assessee by : Shri Nikhil Pathak
Revenue by : Shri Sardar Singh Meena, CIT-DR &
Shri M.G. Jasnani, Sr. DR

सुनवाई की तारीख / Date of Hearing : 03.10.2022

घोषणा की तारीख / Date of Pronouncement : 04.11.2022

आदेश / ORDER

PER S. S. GODARA, JM :

1. These assessee's and Revenue's cross appeals ITA Nos.575 and 692/PUN/2019 for A.Y. 2015-16, arise against the CIT(A)-3, Pune's order

dated 04/02/2019 passed in case no.PN/CIT(A)-3/Cir-3, Pn/255/2017-18/691, in proceedings u/s.143(3) of the Income Tax Act, 1961; in short "the Act".

Heard both the parties. Case files perused.

2. The assessee's appeal ITA No.572/PUN/2019 raises the following substantive grounds :-

- “1. *The learned CIT(A) erred in holding that the amount received by the assessee firm of Rs. 18,51,61,000/- was taxable as an income u/s. 28(ii)(d) of the Act without appreciating that the said amount was received by the assessee firm as a compensation for pre-closure of its BOT projects and therefore, the said amount was a capital receipt not chargeable to tax.*
2. *The learned CIT(A) further erred in holding that the amount of Rs. 18,51,61,000/- was taxable as a revenue receipt in the hands of the assessee firm since it represented the net present value of the future cash flows to be received by the assessee.*
3. *The learned CIT(A) failed to appreciate that the amount received by the assessee was on account of pre-closure of its BOT projects and therefore, the same was a capital receipt and the provisions of section 28(ii)(d) were not applicable to the facts of the present case.*
4. *The learned CIT(A) ought to have appreciated that even though the amount of compensation was quantified by considering the net present value of the future income, the income earning source of the assessee was extinguished and accordingly, the compensation received was a capital receipt in the hands of the assessee.*
5. *The appellant craves leave to add, alter, amend or delete any of the above grounds of appeal.”*

3. We next note that the Revenue's cross appeal ITA No.692/PUN/2019 challenges correctness of CIT(A)'s action partly accepting the assessee's section 80-IA deduction claim *qua* the forgoing sum of Rs.18,51,61,000/- thereby treating it as a revenue receipt. It thus emerges that in case the assessee's forgoing sole substantive grievance regarding nature of its impugned compensation the natural corollary thereof would be rejection of Revenue's cross appeal only. We thus proceed to decide the assessee's appeal ITA No.572/PUN/2019 first.

4. Both the learned representative invited our attention to the CIT(A)'s detailed deduction upholding assessment findings treating the foregoing compensation sum of Rs.18,51,61,000/- as a revenue receipt as follows :-

"5. GROUND No.1:- in this ground the appellant has contended that the A.O. erred in holding that the amount received by the assessee firm of Rs. 18,51,61,000/- was taxable as in income u/s 28(ii)(d) without appreciating that the said amount was received by the assessee firm as compensation or pre-closure of its BOT projects and therefore, the said amount was a capital receipt not chargeable to tax.

5.1. OBSERVATION OF THE A.O.:- On this issue, the AO has made the following observations in the assessment order:

"7. Compensation Rs. 18,51,61.000/- credited to capital account of partners: During the course of assessment proceedings, abiding by the directions received u/s. 144A, the AR of the assessee vide proceeding sheet entry dated 11.12.2017 was asked as to why the amount of Rs. 18,51,61,000/- credited to partners' capital account should not be treated as revenue receipt and added back to the total income of the assessee u/s. 28(ii)(d) of the Income Tax Act, 1961 and also

considering the fact that the amount has not been received on account of compensation for closure of business, but has been received as the present value of future cash flows which would accrue to the assessee had the toll booths been operational.

7.1 *The AR of the assessee vide letter dated 12.12.2017 submitted his reply, the same has been taken on record vide proceeding sheet entry dated 15.12.2017. The reply submitted by the AR."*

7.2 *The Submission made by the AR of the assessee has been perused and due consideration has been given to the contentions put forward therein. However, it is not acceptable for following reasons:*

7.2.1. *The contention of the assessee that Loss of source of income being the basis for treating the amount of Rs.18,51,61,000/- received as a capital receipt is not acceptable as the accounting treatment adopted by the assessee by crediting the amount of Rs.18,51,61,000/- to the capital accounts of the partners is a violation of provisions of Sec. 28(ii)(d) of the Income Tax Act, 1961. The relevant portion of Sec 28 Profits & Sains of Business or Profession is reproduced below:*

"28. The following income shall be chargeable to income-tax under the head "Profits and gains of business or profession",—

(i) ..

(ii) any compensation or other payment due to or received by,— (a).,(b)..(c)....

(d) any person, for or in, connection with the vesting in the Government, or in any corporation owned or controlled by the Government, under any law for the time being in force, of the management of any property or business;"

On perusal of the provisions of Sec, 28(ii)(d) it is evident that any amount received by way of compensation or other payment due to or received by any person for or in connection with the management of any property or business of the government or any corporation owned or controlled by the government is taxable as a revenue receipt,

Further, what the assessee has received is the Net Present Value of the future cash flows that the assessee would have received if the toll plaza's had been operational. Hence, what the Government of Maharashtra has given the assessee is the present value of future cash flows and not a capital amount to compensate the loss of a income source. Rather, the entire income stream has been paid at its present value and as such there isn't any loss of source of income the assessee as the entire income stream has been paid at its present value.

Hence the amount of Rs. 18,51,61,000/- is added back to the total income of the assessee u/s. 28(ii)(d),

7.2.2 Further, Case laws relied upon by the assessee in support of its claim of treating the amount of Rs, 18,51,61,000/- as a capital receipt have been given due consideration and not found relevant to this case as the case laws relied upon by assessee in support of its claim are totally out of context as the facts of the said case laws are totally different and relate to license revocation where the tax payer did not have a legal right to continue with the same business or for default of a contractual obligation. ”

5.2. SUBMISSION OF THE A.R.:- *During appellate proceedings the Ld AR of the appellant has given following written submission vide letter dated 21-02-2019:*

“Ground No. 1

1.1] “The assessed firm is engaged in development of infrastructure facilities. The assessee firm was allotted following projects on BOT basis –

Sr No.	Name of Project
1	Taklikazi Kharda Road Phase I & II
2	Nagar- Ashti
3	Dondaicha ROB

1.2] As per the terms of the contract, the assessee firm was to develop the roads and maintain the same for a specified years. In return, the assessee firm was eligible to collect toll for the specified years. Now, the Govt, of Maharashtra in the public interest decided to close down small toll projects which were in public private partnership model. The closure of the toll projects was as a result of certain agitation. All the three projects undertaken by the assessee were closed by Govt, of Maharashtra and the assessee firm was paid compensation totaling to Rs.18,51,61,000/- by Govt of Maharashtra on account of the closure of three toll projects. The project wise bifurcation of the compensation received is as under-

Sr.No.	Name of Project	Amount of compensation received (Rs.)
1	Takilkazi Kharda Road Phase I & II	11,66,21,000
2	Nagar- Ashti	2,04,08,000
3	Dondaicha ROB	4,81,32,000
	Total	18,51,61,000

1.3] The assessee in its return claimed the amount received as a capital receipt not chargeable to tax. The learned A.O. has not accepted the claim made by the assessee. According to him, the amount of compensation received is a revenue receipt. The

learned A. O. has stated that the assessee has only received the net present value of the future cash flows that it would have received had the toll plazas were in operation. The learned A.O. stated that the Govt, of Maharashtra has given to the assessee present value of the future cash flow statements and according to him, the assessee has received the entire income stream at its present value. Hence, the learned A.O. has held that there is no loss of source of income to the assessee. The learned A.O. has also referred to the provisions of section 28(i)(d) and according to him, as per the said provision, the compensation received is a revenue receipt. Thus, the learned A.O. has held that the compensation received of Rs. 18,51,61,000/- is a revenue receipt.

1.4] *The assessee submits that the learned A.O. is not justified in treating the compensation received as a revenue receipt. The learned A.O. has referred to the provisions of section 28(ii)(d). It is submitted that the provisions of said section are not applicable to the present case. Section 28(ii)(d) reads as under-*

“ any person, for or in connection with the vesting in the Government, or in any corporation owned or controlled by the Government, under any law for the time being in force, of the management of any property or business..

1.5] *As per the said section, any compensation received by the assessee on account of vesting in the Govt, or any Corporation owned by the Govt, the management of any property or business. Thus, as per the said section, the management of the property or business*

has to be transferred to the Govt, and the compensation received thereof is taxable. In this case, the assessee has not transferred the management of any property or any business to the Govt. The toll plazas are cancelled and therefore, compensation is received. In fact, the toll plazas are discontinued by the Govt. For attracting the provisions of section 28(ii)(d), the management of the property or business is to be handed over to the Govt. Thus, it implies that there is a continuation of the property or business. In the present case, there is no continuation of the toll plazas and in fact, the toll plazas are discontinued by the Govt. Accordingly, the assessee submits that the provisions of section 28(ii) (d) are not applicable to the facts of the present case and therefore, the compensation received is not taxable under the said provision.

1.6] *The learned A.O. has further held that the assessee has received only the net present value of the future cash flows and therefore, there is no loss of income stream to the assessee. In this context, the assessee submits that on account of closure of tolls, it has received the compensation. Though the compensation is worked out on the basis of the present value of the future cash flows, the income source of the assessee has extinguished and therefore, the compensation received is a capital receipt not chargeable to tax. For this proposition, the assessee places reliance on the following decisions –*

I. *CIT vs Bombay Burmah Trading Corporation (1986)
 161ITR 386 (SC)*

Compensation received for immobilization, sterilization, destruction or loss, total or partial of

capital asset would be capital receipt. Where the agreement relates to the structure of assessee's profit making apparatus & affects the conduct of business, the sum received for cancellation or variation of such agreement would be capital receipt.

II. *Oberoi Hotels Pvt Ltd vs CIT (1999) 103 Taxman 236 (SC)*

Where certain amount was received because the assessee has to give up its right to purchase and / or to operate certain hotel & it was loss of source of income to the assessee, amount received by the assessee would be capital receipt.

III. *CIT vs State Trading Corporation (2001) 247 ITR 114 (Delhi) & CIT vs Prabhu Dayal(1971) 82 ITR 804 (SC)*

Whereby due to cancellation of contract, the trading structure of the assessee is impaired or such a cancellation results in loss of what may be regarded as the source of assessee's income, the payment made to compensate for cancellation of agreement is capital receipt.

IV. ***Charge of income-tax-Capital or revenue-Termination of Agreement- Compensation so received was capital receipt and hence, not taxable. [S.28(i)]***

Compensation was received by assessee for termination of agreement for providing back office Support services to bank Assessee had parted with personnel who were handling this activity of Assessee Company to give them on role of bank and hank

handled such activity itself. Compensation so received was capital receipt and hence not taxable. (AYs. 2003-04 to 2006-07)

3i-Infotech Ltd vs. Add. CIT (2014) 146 ITD 405 / (2013) 38 Taxmann. Com 422/(2014) 162 TTJ 84 / 10 DTR 151 (Mum.)(Trib.)

V. ***Aquapharm Chemical Co Ltd, Pune v/s CIT***

JM ITA No. 372/PN/2002 The assessee has questioned first appellate order on the following grounds : "(1). That the learned CIT(A) erred in law and on facts in rejecting the claim of the Appellant that the Compensation of Rs. 4,53,86,124/- received under settlement of dispute with AIK Germany was a capital receipt not liable to income tax. The learned CIT(A) erred in not appreciating that, since in substance the claim awarded by the International Council of Arbitration to the Appellant represented damages for non fulfillment of the contractual obligations by AIK Germany due to which the Appellant could not implement the project, and since there was sterilization of the profit earning sources of the Appellant, such compensation or damages awarded for breach of Aqua pharm Chemical Co Ltd. be treated as capital receipt- Held in favour of assessee.

Considering the above facts, the assessee submits that the amount received on account of closure of toll plazas is a capital receipt and the learned A.O. is not justified in treating the same as a revenue receipt. ”

5.3 ***DECISION :-*** *The observations of the AO, submissions of the appellant and the material on record have been considered.*

- 5.4 *In this case, the appellant firm was allotted few projects on BOT (Built, Operate, Transfer) basis for construction of roads by using their own funds & on other hand given right to collect the toll for certain period as per agreement. During the Financial year 2014-15 the firm was having three projects from where the firm was collecting the toll. The government of Maharashtra (GOM) has taken a decision (vide notification dated 27.06.2014) to close down the small toll projects which were in Public Private Partnership Model. Due to this decision of GOM all the three toll projects of the firm were closed down from 30.06.2014 (mid-night) on receipt of letters from the office of Executive Engineer, PWD. Due to this decision of the government, all its toll projects were taken over by the GOM right from 01.07.2014 before the concession period already agreed upon. The government then gave an amount of Rs 18,51,61,000/- as compensation for such action.*
- 5.5 *The appellant insisted before the AO that as all the projects of the appellant firm were closed based on the termination letters of the GOM, the appellant firm was left with no assets and the total source of income of the appellant firm was abandoned. Therefore, the appellant firm, on loss of source of income, has written off the cost of projects appearing in the books of account as capital loss & debited to partner's capital accounts in the profit sharing ratio. Similarly the firm credited the compensation received from the GOM on closure of all the toll projects of the firm to partner's capital account in the profit sharing ratio treating the same as capital receipt against the loss of source of income.*
- 5.6 *Whereas the AO was of the opinion that such*

compensation was business income of the appellant.

5.7 *The observation of the AO and the submission of the appellant have been considered.*

5.8 *In this regard, it is relevant to refer to the provisions of the sec 28(ii)(d) of the Act which are reproduced below:*

"28. The following income shall be chargeable to income-tax under the head "Profits and gains of business or profession",—

(i).....

(ii) any compensation or other payment due to or received by,—

(a)

(b)

(c)

(d) any person, for or in, connection with the vesting in the Government, or in any corporation owned or controlled by the Government, under any law for the time being in force, of the management of any property or business;"

On perusal of the provisions of Sec 28(ii)(d) of the Act, it is clear that any amount received by way of compensation or other payment due to or received by any person for or in connection with the management of any property or business of the government or any corporation owned or controlled by the government is taxable as a revenue receipt. In my humble opinion, the compensation received by the appellant is covered by the provisions of the Sec 28(ii)(d) of the Act.

5.9 *Further, it is seen that the appellant has received the*

*amount of Rs,18,51,61,000/- from Govt, of Maharashtra as Net Present Value of the project towards closure of tolls of the appellant. The nature of this receipt relates to the regular activity of the appellant firm. The appellant was running 3 tolls on BOT basis in the state of Maharashtra, which were closed from mid-night of 30.06.2017 as per Govt, of Maharashtra Notification, Accordingly the NPV Present Value) was calculated which was based on IRR (Internal Rate of Return) of the project and paid to the appellant. Here, it is pertinent to note that the Govt, of Maharashtra has not paid the compensation to cancel the agreement but has paid the net present value of the toll income which was based on the accepted cash flow from the toll collection and inflation factor. The appellant has received the Net Present Value of the revenue receipt which it was going to earn in future years. Thus, the compensation for the closure of toll plazas cannot be called as capital receipt. The receipt of Rs,18,51,61,000/- is a revenue receipts as it was lump sum compensation in lieu of expected revenue in future years calculated at Net Present Value. Accordingly, Ground No.1 of the appellant is **DIMISSED.**"*

5. There is hardly any dispute that the assessee had received the impugned compensation amount i.e. Rs.18,51,61,000/- from the government of Maharashtra in lieu of closure of its "BOT" projects at three locations with effect from 30.06.2014. Both the learned lower authorities have invoked section 28(ii)(d) of the Act (supra) that such a compensation received partakes character of a revenue receipt as taxable income only. Learned CIT(DR) has also quoted (2018) 97 taxmann.com 136 (SC) CIT V/s. Parle Soft Drinks Bangalore Pvt. Ltd. which is not found germane to the instant issue since not

dealing with specific application of section 28(ii)(d) involving compensation received from a government as is the case before us.

6. It emerges during the course of hearing that the forgoing statutory provision section 28(ii)(d) stood inserted in the Act by the Finance Act 1973 with retrospective effect from 01.04.1972. Relevant memo of explanation thereto clarified that "Several laws have been enacted in recent years for taking over the management of industrial undertakings, mines, insurance companies etc. pending their final takeover by the Government. These laws provided for the payment of compensation in respect of the vesting in the Government of the management of the business of industrial undertakings etc. taken over by the government". This statutory provision later on underwent interpretation by hon'ble Calcutta high court in Ram Saran Das & Brothers V/s. CIT (1995) 78 TAXMAN 569 (Cal.) wherein their lordships have made it clear that the same does not get attracted when a government takes over both the management as well as assets followed by payment of compensation as follows :-

"3. *The facts found by the Tribunal are as under :*

The assessee is a firm which maintains accounts under the mercantile system of accounting. In respect of the previous year ending on 30-9-1973 relevant to the assessment year 1974-75 the assessee submitted initially a return showing a loss of Rs. 1,08,139 which was subsequently revised showing enhanced loss of Rs. 2,09,091. Along with the revised return the assessee submitted copies of revised profit and loss account and balance sheet. The ITO on scrutiny of the balance sheet found that the assessee debited an amount of Rs. 4,57,844 in the profit and loss account being loss sustained by the assessee on compulsory acquisition of collieries owned by it. The ITO held that the loss debited in the accounts to the tune of Rs. 4,57,844 was in the nature of capital loss and, hence, disallowable in computing the business income of the assessee. On appeal, the Commissioner (Appeals) in allowing the assessee's appeal directed the ITO to treat the loss as arising from business and the reasoning given in that regard vide paragraph 7 of his order is as follows :

"Section 28(ii)(d) enacts that any compensation paid for or in connection with the resting of the management of any property or business in the Government or a Government controlled corporation shall be deemed to be business profits. In such cases therefore the question whether the compensation is a capital or income receipt cannot now arise. In the present case the management of the appellant's coal mines was taken

over initially on 31-3-1973 followed by complete nationalisation or take over from 1-5-1973. Since the loss of Rs. 4,57,844 arose appropos of the compensation in pursuance to the taking over or nationalisation it should be deemed to be business loss and treated as such."

The department being aggrieved with the Commissioner (Appeals) order came up in appeal before the Tribunal and the only contention raised was that the Commissioner (Appeals) was not justified in holding that the sum of Rs. 4,57,844 was a business loss and not a capital loss as held by the ITO. The Tribunal reversed the order of the Commissioner (Appeals) by observing, inter alia, that section 28(ii)(d) of the Act had no application to the assessee's case and it was held that the loss of Rs. 4,57,844 was a capital loss and not a business loss. The reasoning given by the Tribunal may be found in paragraph 2 of their order which reads as follows :

"The Commissioner of Income-tax (Appeals) held that as there was a provision for treating the compensation received as business income if there was a loss in the matter of take over of the business by the Government, the loss would be a business loss on the same analogy. The Departmental representative argued that here not only the management was taken over but all the assets were taken over and compensation given for the same. It was argued that section 28(ii)(d) which has been relied upon by the Commissioner of Income-tax (Appeals) would operate only if merely the management had been taken over by the Government and not the property or business (sic) only the management but all the assets and business were taken over and hence the provisions of section 28(ii)(d) are not applicable. The Authorised Representative argued that the order of the Commissioner of Income-tax (Appeals) was correct and he referred to the Memorandum pertaining to the said amendment of section 28 vide Finance Bill 1973. We have gone through the said memorandum and we do not find that there is anything therein which would support the case of the assessee. We have given our due consideration. The Authorised Representative has also referred to page 1093 of Sampath Iyenger (7th Edition). We have gone through even the said book and we do not find that there is anything anywhere to support the view that even where assets and business were taken over by the Government, section 28(ii)(d) would come into play. We hold that the order of the Commissioner of Income-tax (Appeals) was not a correct order at all and that section 28(ii)(d) was not applicable. The appeal of the Department is allowed and the loss of Rs. 4,57,844 is held to be a capital loss and not a business loss."

4. *It has now been contended on behalf of the assessee that there is a further question of section 32(1)(iii) of the Act. The assessee's case is that what the assessee received by way of compensation was less than the depreciated value of some of the assets, which were taken over by the Government. It has been stated that in such a situation the assessee was allowed to claim depreciation on the loss. A part of the loss was on account of compensation paid on the depreciable assets."*

7. The Revenue's vehement arguments supporting the learned lower authorities' action treating the impugned compensation as a revenue receipt fail to evoke our acceptance. This is for the reason that the Government of Maharashtra herein had acquired the assessee's BOT project(s); lock, stock

and barrel by way of gazette notification(s) dated 27.06.2014 thereby rescinding its earlier notification dated 08.04.2000 introducing the toll scheme in issue. We conclude in the light of these clinching facts and settled legal proposition that the hon'ble Calcutta high court's view would squarely apply since not only the assessee's business stood closed but also its intangible asset(s) by way of right to collect the toll u/s.32(i)(ii) and building, plant and machinery, as the case may be, vested with the government.

8. We further deem it appropriate to observe that the legislature has also inserted clause (e) in section 28(ii) of the Act by the Finance Act 2018 w.e.f. 01.04.2019 wherein any compensation or such payment received "at or in connection with termination or the modification of the terms and conditions, if any, contract relating to his business" is assessed has seem held taxable as profits and gains of business or profession. This latter amendment is applicable w.e.f. 01.04.2019 whereas we are in AY 2015-16 only. We also take note of the explanatory memo thereof that this latter amendment proposes to invoke section 28 of the Act *qua* any compensation; including both revenue as well as capital u/s.28 of the Act. We thus conclude that both the learned authorities have erred in law and on facts in invoking section 28(ii)(d) *qua* assessee's impugned compensation of Rs.18,51,61,000/- thereby holding it as a revenue receipt. The assessee succeeds in its sole substantive grievance as well as the main appeal ITA No.572/PUN/2019. The Revenue's cross appeal ITA No.692/PUN/2019 is rejected as the necessary consequence in treating terms. Ordered accordingly.

9. To sum up, the assessee's appeal ITA No.572/PUN/2019 is allowed and Revenue's cross appeal ITA No.692/PUN/2019 is dismissed in above terms.
 A Copy of this common order be placed in the respective case files

Order pronounced in the Open Court on this 04th day of November, 2022.

Sd/-

(G.D. PADMAHALI)
 लेखा सदस्य/ **ACCOUNTANT MEMBER**

Sd/-

(S.S. GODARA)
 न्यायिक सदस्य/**JUDICIAL MEMBER**

पुणे / Pune; दिनांक / Dated : 04th November, 2022.
 Ashwini/Sujeet

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A)-3 Pune.
4. The Pr.CIT-2, Pune.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "बी" बेंच,
पुणे / DR, ITAT, "B" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

Senior Private Secretary
 आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.