आयकर अपीलीय अधिकरण,चण्डीगढ़ न्यायपीठ,चण्डीगढ़

IN THE INCOME TAX APPELLATE TRIBUNAL
DIVISION BENCH, "A", CHANDIGARH

BEFORE SMT. DIVA SINGH, JUDICIAL MEMBER &
SHRI VIKRAM SINGH YADAV, ACCOUNTANT MEMBER

आयकरअपीलसं./**ITA No.296/CHD/2020**

निर्धारण वर्ष / Assessment Year :2016-17

Indian Sulphacid Industries Limited, 110, Daryaganj, Ground Floor, Near Gurudwara, New Delhi 110002	बनाम	The DCIT, Circle Kurukshetra
स्थायीलेखासं./PAN NO: AAACI3718E		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारितीकीओरसे/Assessee by : Sh.Pariskhit Aggarwal, CA and
Sh. Sunny Jain, CA

राजस्वकीओरसे/ Revenue by : Sh. Vivek Nangia, CIT DR

सुनवाईकीतारीख/Date of Hearing : 02.11.2022

उदघोषणाकीतारीख/Date of Pronouncement : 15.12.2022

अंतरिम आदेश/ Interim Order

Per Vikram Singh Yadav, Accountant Member:

This is an appeal filed by the assessee against the order of Ld. CIT(A), Karnal dated 28.05.2020 wherein the assessee has taken the following grounds of appeal:

1. "That on law, facts & circumstances of the case, the Ld, AO has erred in holding Rs. 1,95,33,960 as revenue receipt taxable under the head Income from other Sources instead of Capital Receipt taking basis of his own pre-conceived notions and disregarding submissions made by the appellant.

2. That on law, facts & circumstances of the case, the Ld. AO has erred in disallowing cost of improvement of Rs.3,98,85,000/- incurred and paid by the appellant from Long Term Capital Gain which disallowance made was without understanding complete facts of the case, based on his own whims and fences, pre-conceived notions and by disregarding submissions made before him.

Each ground of appeal is independent of the other ground. The appellant craves leave to add, alter, amend or vary the aforesaid grounds of appeal at or before the time of hearing."

2. During the course of hearing, the Ld. AR sought permission to raise following additional grounds of appeal under Rule 11 of the ITAT Rules, 1963:

> *"1. That on law, facts and circumstances of the case, the Worthy CIT(A) has grossly erred in upholding the action of the Ld. AO wherein he had held that the consideration (settlement amount) of Rs. 1,95,33,960/- is a taxable receipt even when it was a non taxable capital receipt"*
>
> *2. That on law, facts and circumstances of the case, the declaration of consideration (settlement amount) of Rs. 1,95,33,960/- as a taxable LTCG by the appellant suo-moto in the ITR even when it was a capital receipt could not have been brought to tax by the Ld. AO and confirmed by Worthy CIT(A) and the same deserved to be held as non-taxable capital receipt."*

3. In this regard, it was submitted by the ld AR that the assessee had let out its property to various tenants. The assessee has since settled the litigation with its tenants. The matter was earlier ongoing before the Hon'ble Delhi High Court in some cases and before the Hon'ble trial court in some other cases of the same tenant group. As part of the settlement, the assessee received certain amount from the

tenants and the assessee released all his rights in the property/ litigation.

4. It was submitted that the question involved in the present appeal is about the taxation of the settlement amount received by the assessee from its tenants and in this regard, it was submitted that:

a. In the ITR filed by the assessee, before the Ld. Assessing officer during assessment proceedings and before the ld. CIT(A) during appellate proceedings, the assessee contended that the proceeds received are in respect of rights relinquished in the property and hence it is amounting to LTCG.

b. During assessment, the AO held it to be extra amount extracted from the tenant and hence it was held that this is income from other sources. In appeal, the ld. CIT appeal also upheld the action of the AO.

c. In appeal before the Tribunal, as part of original appeal memo, assessee challenged the action of the AO in holding this receiptto be income from other sources and prayed that it may be assessed as LTCG. At the same time, the assessee filed application under Rule 11 wherein it prayed that if the above receipt is held as

having been received to settle the suit, the same is not at all taxable and deserves to be declared as capital receipt.

d. It is evident from above brief facts itself that to decide the above referred additional ground, no new facts are required to be gone into by the Tribunal and the issue raised is purely legal in nature. Therefore, this additional ground deserves to be admitted with by the Tribunal.

5. It was submitted that in respect of an issue for which all facts are already on record, no new facts are required tobe gone into and the issue raised is purely legal in nature, the said issue deserves to be admitted as additional ground for the first time before the Tribunal and in support, reliance was placed on the following decisions:

- National Thermal Power Co Ltd Vs. CIT [1998] 229 ITR 0383
- Wipro Finance ltd Vs. CIT [2022] 326 ITR 113 (SC)
- Avery Cycle Industries Ltd Vs. CIT [2007] 292 ITR 493 (P&H)
- Chitturi Subbanna Vs. Kudapa Subbanna & Others [1964] 1965 AIR 1325 (SC)
- CIT Vs. Hazarimal Nagji & Co. [1962] 46 ITR 1168 (Bom.)

6. It was further submitted that in respect of an issue for which all facts are on record, the assessee can raise

alternate arguments and in support, the reliance was placed on following decisions:

- CIT Vs. Barat General Reinsurance Co. Ltd [1971] 81 ITR 303 (Delhi.)
- M/s Areva T&D India Ltd Vs. CIT, Tax Case Appeal No. 673 of 2018(Mad.)
- Pappayammai Vs. Palanisamy Sellammal (Died) and Ors. [2005] AIR 2005 Mad 431 (Mad.)
- CIT Vs. Ram Sanehi Gian Chand [1972] 86 ITR 724 (P&H)
- CIT Vs. Mohan Engineering Co. [1985] 151 ITR 571 (Pat.)

7. It was further submitted that in respect of an issue for which all facts are on record, an assessee can raise new plea which was not raised before any of the lower authorities and in support, reliance was placed on following decisions:

- CIT Vs. S.Nelliappan [1967] 66 ITR 722 (SC)
- All Cargo Global Logistics Ltd Vs. DCIT [2012] 16 ITR (Trib.) 380 (ITAT Mum.)
- Bector Food Specialties Ltd Vs. JCIT [2019] ITA No. 396/Chd/2013 (ITAT Chandigarh)
- Hukumchand Mills Ltd Vs. CIT [1967] 63 ITR 232 (SC)
- VMT Spinning Co Ltd. Vs. CIT [2016] 389 ITR 326 (P&H)
- CIT Vs. Cellulose Products of India Ltd.[1984] 151 ITR 499 (Guj.)

8. It was further submitted that in respect of an issue for which all facts are on record, an assessee can make claim of deduction/ exemption for first time even before the Tribunal:

- CIT Vs. Pruthvi Brokers & Shareholders (P) Ltd [2012] 349 ITR 336 (Mum.)
- CIT Vs. Bhopal Sugar Industries Ltd. [1998] 233 ITR 429

- Steel Ingots (P) Ltd [1996] 135 CTR 379 (M.P.)
- CIT Vs. Sam Global Securities Ltd. [2013] ITA 214/2013 (Del.)

9. It was further submitted that to decide an issue judiciously, in respect of which all facts are on record, it is duty of the Tribunal to deal with all angles / tangents on that issue and in support, reliance was placed on following decisions:

- CIT Vs. Steel Cast Corporation [1977] 107 ITR 683(Guj.)
- State of Tamil Nadue Vs. Arulmurugan & Co. [2982] 51 STC 381 (Mad.)
- Armco Cements Ltd Vs. DCIT [2015] 373 ITR 146 (Mad.)

10. In light of aforesaid submissions and legal propositions so laid down by the Courts, it was submitted that the additional ground raised by the assessee may please be admitted.

11. Per contra, the Ld. CIT/DR vehemently contested raising of additional ground of appeal by the assessee and submitted as under:-

i) The assessee has sought to change the character of receipt which is not permissible. Before the AO and first appellate authority, the assessee has maintained that he is the owner of the plot which was sold and

therefore the receipt was taxable under the head capital gains. Now with alternate plea, the assessee has claimed that such receipt is not taxable and it was only right to sue which was surrendered. This in effect amounts to assessee admitting that he was not the owner of said plot. The assessee is estopped from taking two contradictory stands simultaneously. He cannot plead owner of plot and not owner of plot at same time.

ii) It is not a claim which assessee is entitled to as per direct legal provisions either by operation of Income Tax Act or by any Apex court decision. It is not a claim which assessee inadvertently overlooked while filing of Return. The Return of income was filed by assessee vociferously claiming that he is the owner of said plots. It is a claim which is inconsistent with the original claim and the assessee needs to drop one of the two diametrically opposite claims. Moreover it was never raised before any income tax authority and does not emerge from the Return of Income.

iii) In the case of Wipro Finance relied upon by Ld. AR, no objection by the Departmental Representative recorded expressly by Hon'ble ITAT weighed heavily on the mind and influenced the decision of Hon'ble

Apex Court (para 10 of the order cited supra). In the instant appeal, that is not the case.

iv) In all these cases, the additional ground replaced or substituted the original ground. In the instant case the assessee seeks simultaneous operation of both grounds which are contradictory and inconsistent, which is neither permissible nor possible.

v) The assessee's contention that new ground which changes the entire character of receipt and is directly related to ownership rights of assessee will not require additional evidence or facts is not supported or proven by AR with any tangible arguments. The authorities need to examine the ownership rights of assessee with entirely different perspective now and assessee cannot remain confused with his own rights and has to clarify beforehand his stand in unequivocal terms before the authorities as to whether he is owner of said plots or not before seeking any relief.

12. In view of above, it was submitted that the additional grounds of appeal so sought to be raised by the assessee should not be admitted.

13. In rejoinder, the ld AR submitted as under:

i) The Revenue is contending that the assessee is seeking to change the character of receipt which in their opinion is not permissible. In this regard, first of all, the assessee has never sought to change the character of receipt. The assessee has declared the relevant receipt as taxable under the head capital gains. It is the Ld. AO as well as the ld CIT(A) who held it to be received for surrender of right to sue. In counter to that contention of the Department, as an officer of the Court, to assist the Hon'ble Bench, we have been contending that if the relevant receipt is held as having been received for surrender of right to sue, the same cannot automatically be taxed as income from other sources and would rather be a capital receipt not taxable. At the same time, for dispensation of justice, it is necessary to arrive at the right taxation and not what the assessee has offered it in the ITR. This principle has been enshrined in Article 265 of our Constitution which lays down that 'no tax can be levied without authority of law'. Therefore, if the relevant transaction is proceeds of sale of property or is received of surrender of right to sue, it is a necessary to decide the right taxation

for this transaction. It is only in this perspective that we have been arguing this ground. Further, the right to make an alternate prayer is an inherent right of the appellant in appeal before the Tribunal.

The contention of the Revenue that we have admitted that we were not the owner of the said plot is totally and strongly denied. We are not taking contradictory stands but arc only laying the correct facts before the Tribunal and to provide assistance to arrive at the right taxation on the transaction in question.

ii. As regards the contention that we need to drop one of the two diametrically opposite claims, we again reiterate that we are only making alternate prayer before this Tribunal and are only laying the correct facts before the Tribunal on the issue in question. We have already filed copies of number of judgments from various Courts of the country which have laid down that a claim not made before the lower authorities can be made for the first time before the Tribunal.

iii) The contention of the Revenue that the decision of the Hon'ble Supreme Court in Wipro Finance cannot be relied upon since in that case no objection given by the DR was expressly recorded by the Tribunal and it weighed heavily on the mind and influenced the decision of Hon'ble Apex court, it is most respectfully submitted that on a reading of this decision, though this fact has been recorded in the order but the decision is not at all based on this fact but is rather based on principles already laid down in number of earlier decisions holding that a claim made for the 1st time before the Tribunal can be entertained.

iv) The raising of additional ground does not bar the making of alternate claim and hence this contention of the Revenue deserves to be rejected.

v) For deciding the issue as to whether the transaction in question is realisation of sale of property or receipt of amount for surrender of right to sue, in the present case, no new facts are required to be gone into. It is on the basis of same set of facts and documents already on record of both the lower authorities that this question can

be decided. Hence, this contention of the Revenue also deserves to be rejected.

In view of above, it was submitted that the additional ground deserves to be admitted.

14. We have heard the rival contentions and purused the material available on record. It is noticed that during the course of assessment proceedings, the Assessing officer noticed that the assessee has received an amount of Rs 1,95,33,960/- from members of the Bhandari Family in connection with transfer of immovable property and after perusal of the return of income where the said sum has been shown under the head “long term capital gains”, settlement agreement and other documents furnished by the assessee, a show cause was issued by the Assessing officer as to why the said receipts should not be treated as revenue receipts. Thereafter, after taking into consideration the submissions of the assessee and at the same time, not agreeing with the same that the said sum was received from the Bhandari family in connection with plots sold earlier and was a capital receipt liable to be taxed under the head “long term capital gains”, the AO held the receipt as revenue receipt and brought the same to tax under the head “Income from other Sources”.

15. On appeal, the ld CIT(A) has recorded his findings in para 3.2 of the impugned order as under:

3.2 ***Findings***

The facts related to this ground reveal that the assessee has received 3 compensation of Rs, 1,95,33,960/- during the year from various parties termed as Bhandari Group. The assessee submitted that it had transferred some of its properties under long term lease with unconditional rights way back in 1985, and possession was delivered to them. Then, in 2008, the assessee filed suits against the lessees and against these suits, an out of court settlement deed was prepared with these plot owners and the assessee received a compensation of- Rs. 1,95,33,960/- which was claimed as Capita! Gain in its return. However, the Assessing Officer (A.O.) treated this amount as revenue profit in his assessment order.

An examination of the assessee's submissions reveals that it has not submitted any detail regarding the position of capita! gains on property transferred in 1985, nor has the position of the land in the books of the assessee been given. Admittedly, no cost has been claimed against the amount so received and, therefore, no cost pertaining to the asset has been carried by it in its books. The assessee cfasmed that since tne amount so received from the 'Bhandari Group' was in lieu of surrender of its right to file suit which was qua the property it had previously transferred under long cerm lease dead, it is taxable as capital gains and submitted various case laws on the same.

This argument is not accepted, as there has been no transfer of capital asset since the right to sue is not a transferable right. Thus the amount received is under a compromise or amicable settlement, which is in the nature of profit and should to be assessed as revenue receipts only and not capital received. This view is bolstered by the decision of the Apex Court in the case of Seth Banarsi Das Gupta vs. CIT (1987) 166 ITR 783 and in the case of CIT Vs. Best & Co. Pvt. Ltd. 60 ITR 11 (SC), wherein it was held that where compensation is received for loss of an enduring asset, it would be a capita! receipt but where it is received in the ordinary course of business, it shall be a revenue receipt. It was also held that no injury had been caused to the capital structure of the assessee and, therefore, the receipt was revenue in nature.

The question here is whether the receipt is on capital account or revenue account. In the case of Gillanders Arbuthnot & Company Ltd. (1964) 53 ITR 283 (SC), the facts were that Gillanders Arbuthnot & Company was the sole selling agent and distributor in India of explosives manufactured by Imperial Chemical Industries (Export Ltd.), the latter being the principal company. The agency agreement was terminable at the option of the principal company. In May, 1945, the principal company wanted to set up its own organisation for distribution of its products and intimated the assessee about its intention to cancel the agreement after two or three years. Thereafter, a date was fixed for termination, i.e., 01.04.1948. The principal company wanted to compensate the said agent company. Consequently, three different amounts were paid to the said company in the years ending on 31.03.1949, 31.03.1950 and 31.03.1951. These amounts were included in the profit and loss account as commission received. But, during the course of assessment proceedings, it was claimed that the amounts were in the nature of compensation received on termination of the agency and, therefore, not includaole in the total income, being receipts of capita! nature. It was

claimed that the said agent company had employed expert officers who were accustomed to handle explosives and cancellation of the agency seriously affected the organisation. The assessee was undoubtedly dealing in several inflammable substances such as petroleum, kerosene oil etc. It was found that 80% of the staff attached to the magazine section was maintained at the expense of the principal company; out of which the services of five officers were taken over by the principal company and six were retained by the agency company.There is no doubt that one of the agencies was lost and there was temporary dislocation in the organisation of the business. However, there was nothing on record to show that the agency could not repair tre dislocation. Therefore, the Hon'ble Apex Court concurred with the High Court in its finding that the termination of the agency did not affect profit making structure of the appellant company nor did it involve loss of a trading asset of enduring nature. In the case of CIT vs. Best & Co. Pvt. Ltd. (supra), the aforesaid case was followed and it was held that compensation received towards loss of agency was 3 revenue receipt as the loss of agency was a normal trading loss.

In the case of CIT Vs. J. Dalma (1984) 149 ITR 215, a property was under construction of which M/s Satish Kumar Sood & Sons were the owners. They entered into an agreement to sell the property to Sh Krishan Prashad on 29.11.1966 for a consideration of Rs. 4,95,000/-. A sum of Rs. 20,000/- was received in cash as earnest money. The construction was completed in accordance with certain specifications which were annexed to the agreement to sell. Sh. Krishan Prashad could get the property conveyed in his name or in the name(s) of his. nominee(s). The purchaser was entitled to specific performance of the contract through a court of law at the cost of the seller who would also be liable to pay damages in accordance with the prevalent market price. On 26.12.1966, Sh. Krishan Prashad nominated J. Dalmia for purchase of the property, The balance purchase consideration was now to be paid by J. Dalmia to Sh. Krishan Prashad. On 18.04.1967, J. Dalmia sent a notice to the seller regarding obtaining of completion certificate so that the sale deed could be executed in terms of the agreement. When no reply was received, he filed a suit for injunction against the seller to restrain him from selling, alienating or transferring the property in any other manner. Sh. Krishan Prashad was also impleaded as a defendant. In the suit, j. Dalmia agreed to give up his claim of specific performance which relieved the seller from the obligation of not alienating the property. The matter was referred to the arbitrator who awarded a sum of Rs. 1,02,500/- as damages or compensation payable for breach of contract. In the return of income, 1. Dalmia claimed that the amount received by him was a windfall or a casual gain and that it was not a capital gain since there was neither any capita! asset nor relinquishment of right in any asset. The Hon'ble Court referred to Section 5 of the Transfer of Property Act and mentioned that a mere right to sue may or may not be property but it cannot be transferred. No cost could also be attributed to the right. Hence, the sum of Rs. 1,02,500/- received by him was not assessable as capital gains. Therefore, the question was answered in favour of the assessee.

In the case of Seth Banarsi Das Gupta(supra), the relevant facts were that the assessee and five brothers were partners in a firm, each having 1/6th share. Two brothers leased out their shares to the assessee on the basis of an annual payment but the lease was cancelled. These two brothers undertook to pay certain amounts for five years to the assessee. It was mentioned that the amounts were received under a compromise or by way of amicable arrangement. Therefore the receipts were in the nature of profits received by the assessee for the interest held in the business The relevant portion of the judgment reads as under:

"We have heard learned counsel for the assessee-appellant at length. He has referred to several authorities in support of the assessee's stand of admissibility of the claim' on both scores. According to him, the proper test to be adopted should have been to find out whether the arrangement constituted an apparatus to earn profit; whether the arrangement was one in course of business activity, and whether what was received constituted a part of the circulating capital or was a part of the fixed asset. We have considered the submissions of the learned counsel for the appellant but are not in a position to accept the same. There is hardly any scope to doubt that the benefit of Section 10(2)(vi) of the Act would be admissible only where the assessee is the owner of tne property. It, too, is not admissible in respect of a fractional claim. Similarly, we are of the view, in agreement with the High Court, that the amounts which the assessee received under the compromise or by amicable arrangement was in the nature of profits to be received by the assessee for the interest held in the business and, therefore, constituted taxable income. No other point WHS canvassed before us. This appeal has to fail and is hereby dismissed,"

The assessee has not shown any ownership of the property qua which the capital gain has been claimed nor is it carrying the same in its balance sheet:; rather the agreement made was m respect of its right to sue which cannot be treated as capital receipts. Therefore, the A.O. has rightly assessed the compensation of Rs. 1,95,33,960/- as revenue profits.

This ground of appeal is dismissed."

16. The ld CIT(A) has accordingly held that the settlement agreement was in respect of right to sue and the amount so received under the said agreement cannot be treated as capital receipts and the AO has rightly assessed the compensation as revenue receipts.

17. In the original ground of appeal before us (ground no. 1 of assessee's appeal), the assessee has challenged the action of the AO in holding the aforesaid receipts as revenue receipts instead of capital receipts and in the additional ground of appeal no.1 so sought to be raised, the assessee has challenged the action of the ld CIT(A) in upholding the findings of the AO where he has held the receipts to be

taxable receipt as against non-taxable capital receipt. In the additional ground no. 2 so sought to be raised by the assessee, it has been stated that even where the assessee has shown the consideration as taxable LTCG in the return of income, it couldn't be brought to tax by the AO and confirmed by the ld CIT(A).

18. We therefore find that the dispute is regarding the characterization of receipts under the settlement agreement and whether the receipts under the settlement agreement are revenue or capital in nature. Where it is held to be capital in nature, whether the same would be liable to be taxed under the head "Capital gains" especially guided by the fact that the assessee has suo-moto offered the same in the return of income under the head "long term capital gains" or it would be in nature of non-taxable capital receipt.

19. As far as characterization of receipts is considered and whether the amount received is in respect of relinquishment of rights in the property sold or in respect of surrender of right to sue and whether the same qualifies as revenue or capital in nature, the authorities below have already given their respective findings based on material on record and no new facts are required to be examined or brought on record and the assessee has already challenged the said findings

before us and in the additional ground of appeal, the assessee has challenged the findings of the ld CIT(A) where the amount in respect of surrender of right to sue has been held to be revenue receipt by the ld CIT(A) as against non-taxable capital receipts as so contended by the assessee. The said ground of appeal as to whether amount in respect of surrender of right to sue is revenue or non-taxable capital receipt has to be decided taking into consideration the relevant facts already on record and after applying the legal proposition as laid down by the various authorities including the one relied upon by the ld CIT(A) and therefore, the assessee cannot be precluded from raising the same before us where the same is clearly emerging from the findings of the ld CIT(A).

20. Further, the fact that the assessee has suo-moto offered the receipts in the return of income under the head “Long term capital gains” is an undisputed fact and only issue that remains to be examined is whether the said act on part of the assessee can be held against the assessee in deciding the ultimate taxability of the receipt in its hands. We find that the same is purely a legal question and the assessee has all the rights under the law to raised it by way of additional

ground of appeal before the Tribunal as what can be brought to tax is the real income in its hands and not otherwise.

21. In light of aforesaid discussion and following the dicta laid down by the Hon'ble Supreme Court in case of NTPC vs CIT *(Supra),* the additional grounds of appeal taken by the assessee are hereby admitted for adjudication and to be heard along with other grounds of appeal on 10/01/2023. Ordered accordingly.

Order pronounced on 15/12/2022.

Sd/-	**Sd/-**
(DIVA SINGH)	**(VIKRAM SINGH YADAV)**
Judicial Member	**Accountant Member**

Dated : 15.12.2022
"आर.के."

आदेशकीप्रतिलिपिअग्रेषित/ Copy of the order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त/ CIT
4. आयकरआयुक्त (अपील)/ The CIT(A)
5. विभागीयप्रतिनिधि, आयकरअपीलीयआधिकरण, चण्डीगढ़/ DR, ITAT, CHANDIGARH
6. गार्डफाईल/ Guard File

आदेशानुसार/ By order,
सहायकपंजीकार/ Assistant Registrar