IN THE INCOME TAX APPELLATE TRIBUNAL
"H" BENCH, MUMBAI

BEFORE SHRI ABY T VARKEY, JUDICIAL MEMBER &
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER

ITA No. 2396/Mum/2021
(A.Y.2017-18)

The Asstt. Commissioner of Income Tax, CC-6(4) Room No. 1925, 19th Floor, Air India Building, Nariman Point, Mumbai- 400021	Vs.	Kenneth Builders & Developers Limited 15th Floor, Tower – 1, Indiabulls Finance Center Senapati Bapat Marg, Elphistone, Mumbai - 400013
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AACCK8268P		
Appellant	..	Respondent

Appellant by :	Rakesh Ranjan
Respondent by :	K. Gopal & Om Kandalkar

Date of Hearing	20.10.2022
Date of Pronouncement	30.12.2022

आदेश / O R D E R

Per Amarjit Singh (AM):

The present appeal filed by the revenue is directed against the order passed by the ld. CIT(A)-54, dated 27.09.2021 for A.Y. 2017-18. The revenue has raised the following grounds before us:

"1. On the facts and in the circumstances of the case, whether the learned Ld. CIT(A) was right in deleting the addition of Rs.278 crores, received by the assessee, on account of compensation given by the Hon'ble Delhi High Court, on breach of contract between the assessee and the Delhi Development Authority."

2. On the facts and in the circumstances of the case, whether the learned CTT(A) has erred in not considering any compensation received in respect of stock-in-trade would be trading receipt."

3. *The appellant prays that the order of Commissioner of Income Tax (Appeal) on the above ground be set aside and the order of the Deputy Commissioner of Income-tax be restored.*

4. *The appellant craves, leaves to amend or alter any grounds or add a new ground, which may be necessary."*

2. Fact in brief is that return of income declaring total loss of Rs.1,43,70,54,268/- was filed on 27.10.2017. Subsequently, the return was revised on 05.01.2018 declaring net loss at Rs.1,43,70,54,268/-. The case was subject to scrutiny assessment and notice u/s 143(2) of the Act was issued on 16.08.2018. During the course of assessment the A.O noticed that assesse has treated compensation of Rs.2,78,82,74,243/- received from Delhi Development Authority as a capital receipt not chargeable to tax. The A.O further noticed that in the original return of income the assesse had included this amount in the book profit, however, in the revised return of income this was not included in the total income or in the book profit u/s 115JB of the Act. On query, the assesse explained that it had entered into an agreement with Delhi Development Authority (DDA) for development of a residential project. The DDA could not perform its obligation under the aforesaid development agreement, therefore, the assesse had filed writ petition before the Delhi High Court wherein the High Court vide order dated 30th July 2010 held the project stood frustrated and was incapable of performance and held that the assesse is entitled to refund of the entire sum paid to DDA along with interest @ 6% per annum. The DDA has filed appeal before the Hon'ble Supreme Court which was rejected. The assesse submitted that the compensation received was on account of non-performance of obligation by the DDA, therefore, it was a capital receipt not taxable in the hands of the assesse. The assessing officer has not agreed with the submission of the assesse. The assessing officer was of the view that the entire dispute was under trading contract entered by the assesse and receipt of compensation by the assesse was

a settlement by the Court of the rights of the assesse under trading contract. The assessing officer has placed reliance upon the decision of Hon'ble Delhi High Court in the case of Ansal Properties and Industries Ltd. Vs. CIT (2012) 347 ITR 647 (Delhi High Court) and decision in the case of CIT Vs. South India Pictures Ltd (1956) 29 ITR 910 (SC). Therefore, the A.O was of the view that the amount of Rs.2,78,82,74,243/- was a revenue receipt and not of the capital receipt. Therefore, the same was added to the income under the head profit and gain of business or profession and also u/s 115JB of the Act to the book profit.

3. Aggrieved, the assesse filed the appeal before the ld. CIT(A). The ld. CIT(A)has allowed the appeal of the assesse.

> *5.3 The facts and findings of the AO in the assessment order and the submission made by the appellant has been considered.*
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> *5.3.1 The dispute is regarding the receipt of Rs. 278,82,74,243/- from DDA and whether it is revenue receipt or a capital receipt. The facts of the case are that the appellant entered into an agreement with Delhi Development Authority (DDA) during the financial year 2006-07 for development of a residential project in Tehkhand, Delhi, and paid advance of Rs.450 Crores to DDA for purchase of land. In pursuance of the terms of the aforesaid development agreement with DDA, possession of land was handed over to the appellant in the year 2006 and the appellant incurred development cost on the land parcel to the extent of Rs. 137.73 crores. Accordingly. Development cost Rs.587.73 crores was reflected in the balance sheet of the appellant under the head "inventory cost of the project. The DDA had permitted the appellant to establish the site infrastructure facilities, however, the Forest Department raised objections on the ground that the said site fell within the ridge area and consequently all construction activities had to be suspended. Further, the DDA could not obtain grant of various permissions required for construction of the residential project in Tehkhand. The DDA could not perform its obligations under the aforesaid development agreement. There was virtually no chance of the project going ahead, therefore, the appellant filed writ petition before the Delhi High Court in WP(C) No. 10647 of 2009, seeking set aside of the tender/ auction of the land as also the allotment letter and sought refund of the money paid along with interest thereon. The High Court of Delhi vide order dated 30th July, 2010, held that the project stood frustrated and was incapable of performance, and hence, the appellant was entitled to refund of the entire sum paid to DDA along with interest @ 6% per annum till realization thereof. DDA went in appeal before the Supreme Court against the aforesaid order of the High Court in Civil Appeal No 5370 of 2016 The principal issue raised before the Supreme Court was whether the development agreement entered between DDA and the developer appellant was frustrated within the meaning of section 56 of the Indian Contract Act, 1872*

(the ICA) due to intervening circumstances not contemplated by either party. The Supreme Court, vide order dated 29 June, 2016 dismissed the appeal of DDA and held that the failure of DDA to provide clear passage due to intervening circumstances beyond its contemplation, has resulted in frustration of implementation of the project within the meaning of section 56 of the ICA. The Supreme Court directed the DDA to refund the deposit made by the appellant along-with interest @ 6% p.a. calculated from the date of deposit till realization thereof. Accordingly, the DDA paid amount of Rs.728 crores to the appellant in January. 2017, including interest of 278 crores and the land was repossessed by DDA.

5.3.2. The appellant has submitted that the AO has incorrectly interpreted the ratio of the decision of the Delhi High Court in the case of Ansal Properties & Industries Ltd, vs. CIT [(2012) 347 ITR 647 (Delhi HC)] The appellant has distinguished the facts of the case of Ansal Properties & Industries Ltd. vs. CIT with the case of the appellant. In the case of Ansal Properties Ltd., the agreement was unilaterally terminated by one of the party. The compensation was received by the appellant with the restriction that it would not undertake any project in the vicinity for a period of 3 years with the consent of DCM. Accordingly, the compensation received was treated as revenue receipt.

The appellant has further submitted that all the receipts are not income and receipt of capital in nature is not taxable under the Act. For this, the appellant has relied upon the decisions in the case of CIT vs. Shaw Wallace and Company, Tuticorin Alkali Chemicals & Fertilisers Ltd. vs. Commissioner of Income-tax, 227 ITR 17, Cadell Weaving Mills Company Ltd. vs. CIT 249 ITR 266.

The appellant has further submitted the compensation is not received on transfer of capital asset within the meaning of Section 45 rws 2(14) of the IT Act. In this regard, the appellant has relied upon the decision of the Bombay High Court in the case of CIT vs. Tata Services Ltd. 122 ITR 594. It is also submitted that for profit or gain from the receipt, it must have originated by virtue of transfer within the meaning of section 2(47) of the Income-tax Act, 1961. For this, the appellant has relied upon the decision of CIT vs. Vania Silk Mills Pvt. Ltd. 191 ITR 647(SC).

Further, the appellant has relied upon section 56 of the Indian Contract Act and submitted that the appellant had taken all the necessary steps to commence construction activity on the project but the DDA found it impossible of performance as per the development agreement. Therefore, the Hon'ble High Court of Delhi and the Supreme Court has awarded the compensation to the appellant.

The appellant has also submitted that any compensation received against loss of source of income or profit earning apparatus is a capital receipt and it is not taxable under the Income- tax Act. For this proposition, the appellant has relied upon the decision in the case of CIT vs. Burmah Trading Corporation 161 ITR 386 (SC) Padmaraje R. Kadambande vs. Commissioner of Income-tax [(1992) 62 Taxman 456 (SC)]. Kettlewellbullen and Co. Ltd. vs. CIT 53 ITR 261 (SC), Oberoi Hotel Pvt. Ltd. v. CIT, 236 ITR 904 (SC).

Further, it is submitted that the compensation received from DDA is not on transfer of capital asset because the appellant is engaged in the business of real estate and if the transaction would have been materialized, the same would

have been recorded as stock in trade and not the capital asset. In this respect, the appellant has relied upon the decision of the Hon'ble Supreme Court in the case of CIT vs. Saurashtra Cement Ltd.325 ITR 422 (SC).

Further, in respect of MAT u/s 115JB, the appellant has submitted that the compensation being capital receipt, it is to be reduced from the book profit. The appellant has relied upon the decision of the Hon'ble Supreme Court in the case of Indo Rama Synthetics (1) Ltd. vs. CIT reported in 330 ITR 363.

5.3.3 The main dispute is regarding the nature of the receipt- either capital or revenue. There is no thumb rule to decide whether the receipt is capital or revenue. Hon'ble Supreme court has on various occasion has dealt with this issue.

The Apex Court in ***CIT v. Saurashtra Cement Ltd. [2010] 192 Taxman 300*** *observed that-*

> *"14. The question whether a particular receipt is capital or revenue has frequently engaged the attention of the Courts but it has not been possible to lay down any single criterion as decisive in the determination of the question. Time and again, it has been reiterated that answer to the question must ultimately depend on the facts of a particular case, and the authorities bearing on the question are valuable only as indicating the matters that have to be taken into account in reaching a conclusion.*

In ***CIT v. Rai Bahadur Jairam Valji AIR 1959 SC 291****, it was observed thus (AIR pp. 292- 293, para 2) -*

2. The question whether a receipt is capital or income has frequently come up for determination before the Courts. Various rules have been enunciated as furnishing a key to the solution of the question, but as often observed by the highest authorities, it is not possible to lay down any single test as infallible or any single criterion as decisive in the determination of the question, which must ultimately depend on the facts of the particular case, and the authorities bearing on the question are valuable only as indicating the matters that have to be taken into account in reaching a decision. [Vide Van Den Berghs Ltd. (Inspector of Taxes) v. Clark (1935) 3 ITR (Eng Cas) 17 (HL)]. That, however, is not to say that the question is one of fact, for, as observed in Davies (Inspector of Taxes) v. Shell Company of China Ltd. (1952) 22 ITR Supp 1 (CA):

> *"these questions between capital and income, trading profit or no trading profit, are questions which, though they may depend no doubt to a very great extent on the particular facts of each case, do involve a conclusion of law to be drawn from those facts" (Emphasis supplied)*

In ***P.H. Divecha v. CIT AIR 1964 SC 758****, the Apex Court held that –*

> *12. In determining whether this payment amounts to a retum for loss of a capital asset or is income, profits or gains liable to income-tax, one must have regard to the nature and quality of the payment. If the payment was not received to compensate for a loss of profits of business, the receipt in the hands of the appellant cannot properly be described as income, profits or gains as commonly understood. To constitute income, profits or gains, there must be a source from which the particular receipt*

has arisen, and a connection must exist between the quality of the receipt and the source. if the payment is by another person it must be found out why that payment has been made. It is not the motive of the person who pays that is relevant. More relevance attaches to the nature of the receipt in the hands of the person who receives it though in trying to find out the quality of the receipt one may have to examine the motive out of which the payment was made. It may also be stated as a general rule that the fact that the amount involved was large or that it was periodic in character have no decisive bearing upon the matter. A payment may even be described as "pay" "remuneration", etc., but that does not determine its quality, though the name by which it has been called may be relevant in determining its true nature, because this gives an indication of how the person who paid the money and the person who received it viewed it in the first instance. The periodicity of the payment does not make the payment a recurring income because periodicity may be the result of convenience and not necessarily the result of the establishment of a source expected to be productive over a certain period. These general principles have been settled firmly by this Court in a large number of cases. See, for example, Commr. of Income- tax v. Vazir Sultan & Sons 1959 Supp (2) SCR 375: (AIR 1959 SC 814), Godrej & Co. v. Commr. of Income-tax (1960) 1 SCR 527: (AIR 1959 SC 1352), Commr. of Income-tax v. Jairam Valji (1959) 35 ITR 148: (AIR 1959 SC 291), Senairam Doongarmall v. Commr. of Income Tax (1961) 42 ITR 392 (AIR 1961 SC 1579)."

The Apex Court in Kettlewell Bullen & Co. Ltd. v. CIT AIR 1965 SC 65, has further held-

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

"21. But payment of compensation for loss of office is not always regarded as capital receipt. Where compensation is payable under the terms of the contract which is determined, payment is in the nature of revenue and therefore taxable."……

"36 Where on a consideration of the circumstances, payment is made to "36 compensate a person for cancellation of a contract which does not affect the trading structure of his business, nor deprive him of what in substance is his source of income, termination of the contract being a normal incident of the business, and such cancellation leaves him free to carry on his trade (freed from the contract terminated) the receipt is revenue: Where by the cancellation of an agency the trading structure of the assessee is impaired, or such cancellation results in loss of what may be regarded as the source of the assessee's income, the payment made to compensate for cancellation of the agency agreement is normally a capital receipt." (Emphasis supplied)

*In **Travancore Rubber & Tea Co. Ltd. v. CIT [2000] 3 SCC 715**, the Apex Court observed that-*

> *19. In determining whether compensation received for breach of a contract is a capital or trading receipt, the relevant rule has been formulated by Diplock L., J. in London and Thames Haven Oil Wharves Ltd. vs. Attwooll (Inspector of Taxes) (1968) 70 ITR 460, 488 (CA) as:*
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> *"Where, pursuant to a legal night, a trader receives from another person compensation for the trader's failure to receive a sum of money which, if it had been received, would have been credited to the amount of profits (if any) arising in any year from the trade carried on by him at the time when the compensation is so received. the compensation is to be treated for income-tax purposes in the same way as that sum of money would have been treated if it had been received instead of the compensation."*

*The apex Court in **Gillanders Arbuthnot & Co. Ltd. v. CIT AIR 1965 SC 452**, has held as under.*

> *11. We may now address ourselves to the question, whether compensation paid by the principal company for cancellation of the agency may be regarded as a capital or revenue receipt. We have in a recent case in Kettlewell Bullen and Co. v. CIT CA No. 226 of 1963 D/-1-5-1964: (AIR 1965 SC 65) made a survey of the important cases which have arisen before the courts in the United Kingdom and an Indian in India about the principles which govern the determination of the nature of compensation received on the termination of an agency. We observed in that case:*
>
> *"On an analysis of these cases which fall on two sides of the dividing line, a satisfactory measure of consistency in principle is disclosed where on a consideration of the circumstances, payment is made to compensate a person for cancellation of a contract which does not affect the trading structure of his business, nor deprive him of what in substance is his source of income, termination of the contract being a normal incident of the business, and such cancellation leaves him free to carry on his trade (freed from the contract terminated) the receipt is revenue: Where by the cancellation of an agency the trading structure of the assessee is impaired, or such cancellation results in loss of what may be regarded as the source of the assessee's income, the payment made to compensate for cancellation of the agency agreement is normally a capital receipt"*

From the above judicial precedents, it is very clear that there cannot be any straightjacket formula and whether the receipt is capital or revenue in nature has to be adjudged on the basis of each case. Accordingly, whether the compensation received by the appellant is capital or revenue receipt is decided on the facts of the case of the appellant.

5.3.3 The AO has made the addition in respect of compensation received by the appellant from DDA mainly relying upon the decision of the Delhi High Court in the case of Ansal Properties & Industries Ltd. v. CIT (supra). The AO has held the compensation received as revenue receipt as it was received as a result of settlement of the rights of the assessee under Trading Contract by the Order of the court.

To decide the issue, it is necessary to understand the nature of transaction. As discussed earlier, the appellant entered into an agreement with DDA in the FY 2006-07 for development of a residential project in Delhi. The appellant paid an advance of Rs.450 crores to DA for purchase of land. In accordance with the development agreement, the appellant took possession of the land in the year 2006. The appellant incurred development cost of the land to the extent of Rs.137.73 crores. Thus, the total project of Rs.587.73 crores was shown in the balance sheet as inventory cost. The DDA was not able to perform as per the development agreement to obtain all the approvals from the government agencies. Because of this stalemate, the profit was getting delayed and there was virtually no chance for the project to get started. Therefore, the appellant filed a writ petition before the Delhi High Court. The Delhi High Court decided the issue in favour the appellant and held that the project stood frustrated and the DDA was incapable of performance. Therefore, the court directed the DDA to refund the entire advance paid by the appellant alongwith the interest @6% p.a.. On further appeal to the Supreme Court by the DD, the Hon'ble Supreme Court held that due to failure of DDA to provide clear passage due to intervening circumstances beyond its contemplation, resulted into frustration of the implementation of the project within the meaning of section 56 of Indian Contract Act. The Hon'blle Supreme court also directed the DDA to refund the entire money alongwith the Interest @6% p.a. calculated from the date of deposit till realization thereof. Consequent to the order of the Hon'ble SC, the DDA paid Rs.728 crores to the appellant in January, 2016 including the interest of Rs.278 crores. After this settlement, land has been purchased by DDA.

5.3.4 The series of event and the outcome indicate that the appellant has received a sum of Rs. 450.01 Crore which was deposited by the appellant with DDA and also compensation in the form of interest amounting to Rs.278 Crore. The refund of amount and the compensation was received as per the order of the Hon'ble Delhi High Court and Hon'ble Supreme Court and it was paid by DDA as result of frustration of the contract under section 56 of the Indian Contract Act. The appellant has received the compensation alongwith the interest as a result of the frustration of the contract which was entered into by the appellant with DDA. Therefore, the entire receipt of compensation amounting to Rs.278 crores has to be examined with respect to frustration of contract u/s.56 of the Indian Contract Act.

Section 56 of the Indian Contract Act reads as under.

> *Section 56. Agreement to do impossible act.*
> *An agreement to do an act impossible in itself is void.*
>
> ***Contract to do an act afterwards becoming impossible or unlawful**. -A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.*
>
> ***Compensation for loss through non-performance of act known to be impossible or unlawful.**-Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for*

any loss which such promisee sustains through the non-performance of the promise.

Illustrations

(a) A agrees with B to discover treasure by magic. The agreement is void:

(b) A and B contract to marry each other. Before the time fixed for the marriage, A goes mad. The contract becomes void.

(c) A contracts to marry B, being already married to C, and being forbidden by the law to which he is subject to practise polygamy, A must make compensation to B for the loss caused to her by the non-performance of his promise.

(d) A contracts to take in cargo for B at a foreign port. A's Government afterwards declares war against the country in which the port is situated. The contract becomes void when war is declared
(e) A contracts to act at a theatre for six months in consideration of a sum paid in advance by B. On several occasions A is too ill to act. The contract to act on those occasions becomes void.

The Hon'ble Delhi High Court as well as the Hon'ble Supreme Court has held that failure of DDA to provide clear passage due to intervening circumstances beyond its contemplation, resulted in frustration of implementation of the project within the meaning of section 56 of the Indian Contract Act. Now, it is relevant to understand what frustration of contract and its consequences.

When parties enter into a contract, there is a general assumption that they would want to fulfill their contractual obligations and complete the conditions of the contract, hence, they have entered into a legally binding agreement but there might be circumstances that would lead to this fulfillment of contractual obligations to be impossible or impractical. When these circumstances are out of the control of the parties and when they render the contract to be impossible to fulfill, such a contract is said to be frustrated. Frustration is an umbrella term which covers all the possible circumstances which might lead to fulfillment of the contractual obligation to be impossible or impractical.

The reason why 'the doctrine of frustration' holds an important place in law is that, it provides a mechanism to deal with such unpredictable and unfortunate circumstances which lead to a contract being frustrated.

Even though the Indian Contract Act does not explicitly define the term frustration, it still covers all the bases and provisions of 'doctrine of frustration' under Section 56. The doctrine of frustration is a "doctrine" of a special case of the discharge of contract by an impossibility to perform it.

The concept of frustration of contract has been explained by the Hon'ble Supreme Court in the case of Satyabrata Ghose vs Mugneeram Bangur & Co. 1954 AIR 44, 1954 SCR 310. The Head-note of the case is reproduced as under:

> *The doctrine of frustration is really an aspect or part of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and hence comes within the purview of S. 56 of the Indian Contract Act. The view that s. 56 applies only to cases*

of physical impossibility and that where this section is not applicable recourse can be had to the principles of English law on the subject of frustration is not correct. English cases can have only a persuasive value, and are only helpful in showing how English courts decided cases under similar circumstances. Section 58 of the Indian Contract Act lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties.

According to the Indian Contract Act. a promise may be express implied. In cases, therefore, where the court gathers as a matter of construction that the contract itself contained impliedly or expressly a term, according to which it would stand discharged on certain circumstances, the dissolution of the contract the happening of would take place under the terms of the contract itself and such cases would be outside the purview of S. 56 altogether. Although in English law these cases are treated as cases of frustration, in India they would be dealt with under s. 32 of the Indian Contract Act which deals with contingent contracts or similar other provisions contained in the Act in the large majority of cases however the doctrine of frustration is applied not on the ground that the parties themselves agreed to an implied term which operated to release them from the performance of the contract The Pellet is given by the court on the ground of subsequent impossibility when it finds that the whole purpose or basis of a contract was frustrated by the intrusion or occurrence of an unexpected event or change of circumstances which was beyond what was contemplated by the parties at the time when they entered into the agreement. Here there is no question of finding out an implied term agreed to by the parties embodying a provision for discharge, because the parties did not think about the matter at all nor could possibly have any intention regarding it. When' such an event or change of circumstance occurs which is so, fundamental as to be regarded by law as striking at the root of the contract as a whole, it is the court which can pronounce the contract to be frustrated and at an end. The court undoubtedly has to examine the contract and the circumstances under which it was made. The belief, knowledge and intention of the parties are evidence, but evidence only on which the court has to form its own conclusion whether the changed circum- stances destroyed altogether the basis of the adventure and its underlying object This may be called a rule of construction by English law comes within the purview 56 of the Indian Contract Act. The reason underlying the of English law the doctrine of frustration does not apply contracts for the sale land. is that under the English is soon as the agreement is complete the buyer becomes owner of land in equity. As mere agreement sell does not confer any rights of ownership on the buyer under Indian law, the doctrine of frustration is as applicable in India to agreements for sale of land the case other agreements.

In 1940 integral part a development scheme of extensive entered into contract with plaintiff's predecessor for the sale of Plot land the latter accepting small sum as earnest. It undertook to construct roads and the conveyance be completed soon after the completion of tile roads payment the considerable portion the area comporised the scheme was requisitioned by the Government for military Purposes in 1941, company wrote defendant that road construction could not taken indefinite period and required him to treat agreement as cancelled receive back earnest:

Held, having regard to the nature terms the contracts the actual existence war condition at time when was entered into extent the work involved in the scheme fixing no time limit in the agreement for the construction of roads etc. and fact that the order of requisition was in its very nature of a temporary character, the requisition did not affect the fundamental basis of the contract nor did the performance of the contract become illegal by reason of the requisition, and the contract not therefore become impossible within the meaning of S.56 of the India Contract Act."

5.3.5 The refund amount and the compensation was received as per the Delhi High Court and Hon'ble Supreme Court it paid by DDA as result of the contract under section 56 Indian Contract Act. The relevant observation the Hon'ble Supreme Court Civil Appeal no. 5370 of 2016, is reproduced as under:

".....39. On a conspectus of the facts and the law placed us, we are satisfied that certain circumstances had intervened, making impracticable for Builders commence construction activity on the project land. arriving some clarity the issue had taken a couple of years and that was eventually and unambiguously the report of the CEC, it certainly said that contract between the DDA and Kenneth was impossible of performance within the meaning that word in 56 the Contract Act. Therefore, reject the contention the DDA contract between the DDA and Kenneth Builders was not frustrated...."

The appellant has received the compensation alongwith the interest as a result of the frustration of the contract which was entered into by the appellant with DDA.

The compensation of Rs.278 crores has been received as a result of frustration of the contract. As a result of frustration of the contract, there is a loss of business and loss of source of the income of the appellant. Any receipt which results into loss or impairment of the source of the income is a capital receipt.

5.3.6 From perusal of the P & L account, it is seen that during the year under consideration, the appellant has shown income from Other sources only and there is no business income. The income from other sources consisted of interest income and profit on sale of investment. The income from business of construction of residential project at Delhi was yet to be received. In the meantime, the construction work could not be started due to failure on the part of DDA to get necessary government approval for construction activity. The High Court of Delhi and Hon'ble Supreme Court has also recorded a fact that there was frustration of contract because contract between the DDA and Kenneth Builders was impossible of performance within the meaning of that word in Section 56 of the Contract Act. Had the construction activity started in time bound manner, the appellant could have earned income from construction of the project. However, unforeseen events post-contract resulted into termination of contract and the appellant received refund as well as interest thereon, albeit, as per the directions of the courts. Thus, the compensation received by the appellant was in effect on account of loss of source of income and also sterilization of profit making apparatus.

In this regard, decision in the following cases are relevant

Hon'ble High Court of Bombay, in the case of ***Commissioner of Income-tax-8, Mumbai v. Parle Soft Drinks (Bangalore (P.) Ltd.) [2017] 88 taxmann.com 24 (Bombay)*** *has held that once right of first refusal was assigned to assessee, it would have been source of assessee's income and be a profit making apparatus and, thus, fundamental right for starting bottling business was taken away as a result of breach of said right of first refusal by Coca Cola. Thus, Tribunal was justified in holding that compensation received by assessee from Coca Cola was capital receipt.*

The facts of this case are that the assessee, a Parle Group of Companies, was engaged in the business of manufacturing, bottling and distribution of soft drinks and beverages under several popular brands. The Assessing Officer observed during the assessment that the assessee had received a sum of Rs. 16.06 crores from Coco Cola Company of USA (TCCC), which was claimed to be exempt from tax on account of it being a capital receipt. This compensation was claimed to have been received as compensation related to the 'right of first refusal for bottling rights given to the assessee' in the city of Pune. A reference was made to the master agreement with Coca Cola company of September, 1993 for transfer of intellectual property rights in the nature of trademarks, knowhow, franchisee rights etc. in transfer as master along two persons RC seller and TCCC was the buyer along with Cola South Asia Honding (Inc.) as the confirming party, bottling of soft drink was continued through Parle Company bottling LFFL, having bottling rights the territory Bangalore. In the said agreement itself, a of right first refusal regarding bottling rights also elaborated. However, later on, took strategic decision up its own bottling plant Bangalore. This led to of obligation by TCCC in respect of the 'right first refusal given to Parle Group' master agreement and led dispute between Parle Group and TCCC. This dispute ultimately with TCCC agreeing the assessee 16.06 crore. The Assessing Officer disallowed Rs. 16.06 crore on protective basis. On appeal, the Commissioner (Appeals) passed order holding that sale proceeds relate capital assets the same to be reduced from the block assets. On the revenue's appeal, the held that the compensation received by assessee from Coca-Cola was the capital and since there transfer for extinguishment rights, there was question capital gain and accordingly, the Tribunal dismissed the revenue's appeal.

On further appeal, Hon'ble High Court held that under.

> *.... Under the master agreement, the right first carry out bottling activities in the territory of Bangalore. There was a clear indication that would be formation Bangalore subsidiary and there would an investment agreement also between the parties for this purpose. The necessary guidelines as to how the subsidiary would be formed, various assignments of the bottling rights only to such a newly formed company and to be held and formed by Parle Group and later on the Coca Cola Company will join in after subscribing 30 percent of the shares, are the provisions or guidelines in the master agreement itself. It was to this subsidiary company that the bottling rights were to be given in the territory of Bangalore. This subsidiary company was formed as Parle Soft Drinks Pvt. Ltd. Thus, assessee company was formed only carrying out bottling activities territory Bangalore. There was, no dispute that assessee was entitled receive the compensation amount on breach this agreement from Coca Company. Thus, though the of first refusal was with LFFL, but always agreed upon by the parties that the same should*

be for newly formed subsidiary Bangalore. That Bangalore subsidiary the assessee company These bottling activities were carried for the Coca Company Bangalore territory which the assessee was formed. was necessary that assessee should have installed plant and machinery for carrying on business. The right first refusal itself stated substantial and foundation which the assessee could built its bottling business. such right would have been assigned the assessee, would have been source of assessee's income and profit making apparatus. The assessee has also submitted business plans various modes for carrying out the bottling business to the Coca Cola Company.

There is no dispute that the Coca Cola Company had breached the agreement and particularly the right of first refusal by not assigning the rights. It was on account of breach of this agreement that the compensation amount was settled between the parties. The fundamental right for starting the bottling business was taken away as a result of breach of the right of first refusal by the Coca Cola Company. That is the reason why the Coca Cola Company paid this amount to the assessee and not to LFFL (Para 15]

All the tests that were evolved by the Supreme Court in the decisions noted above, have been applied and to arrive at the correct conclusion. The view of the Tribunal is not in any way erroneous or illegal. Thus, it is not vitiated by any error of law apparent on the face of the record of perversity. [Para 16]

The matter has to be approached from a factual view point. [Para 18]

Even in the case of Parle Bottling Private Limited, where the Assessing Officer has treated the receipt to be taxed as long term capital gains on protective basis and the Commissioner (Appeals) has treated the same receipt to be taxed as casual and non- recurring taxable income under section, 10(3) the argument was that the assessee received this sum of Rs. 16.06 crore as compensation from the Coca Cola Company for breach of the right of first refusal agreement with regard to bottling rights of Pune territory. The Assessing Officer, according to the assessee, solely relied upon the observations and findings in the assessment order dated 30th March, 2001 in the case of Aqua Bisslery Limited, wherein, the receipt was taxed under the head Tong term capital gains. Once the factual basis was laid before the Commissioner (Appeals) and was found that the same was identical to the case of Parle Soft Drinks Private Limited except for the fact that in the present case, the assessee was in the bottling business for Parte Group of Companies, there was a right of first refusal and the assessee was to carry on the business of bottling for the Coca Cola Company A detailed business plan was submitted. However, the Coca Cola Company, without any specific reason, rejected the business plan. Thus, there was a breach of the right of first refusal and after negotiation (sic) received compensation in the above sum, which was shown as non-taxable capital receipt. The argument was identical that the Coca Cola Company had deprived the assessee of all potential right and that was to set up a bottling plant for Pune territory. There was a breach of contract giving rise to a claim for damages and same was paid on account of failure to honour the commitment. That is capital in nature. That source of income, by way of setting up of a bottling plant at

Pune territory was lost forever. Hence, relying upon the judgment in the case of Oberoi Hotel (P) Ltd. v. CIT [1999] 103 Taxman 236/236 ITR 903 (SC), the argument that such a receipt cannot be taxed as revenue receipt or casual income, was accepted. The Tribunal, noted the arguments of the revenue and particularly the summary of the same. Thereafter, the Tribunal dealt with the main dispute and as above. [Para 19]

Therefore, a different view on facts could not have been taken. [Para 20]

SLP filed in this case has been dismissed by the Hon'ble Supreme Court of India, which is reported as ***CIT, Mumbai v. Parle Soft Drinks (Bangalore (P.) Ltd. [2018] 97 taxmann.com 136 (SC)***

In the case of ***B.G. Shah v. Commissioner of Income-tax [1986] 25 Taxman 215 (Bombay)[1986] 162 ITR 23 (Bombay),*** *the Hon'ble High Court of Bombay has held that assessee had entered into tenancy agreement in course of his business, therefore, compensation so received was a capital receipt.*

The facts of this case are that the assessee was an advocate. He entered into an agreement with 'T' for obtaining on monthly tenancy of a ground floor premises and later filed a suit for specific performance of the said agreement. While the suit was pending, the assessee came to learn that one 'B' was interested in the said premises. He approached T and requested him to negotiate with 'B' to their mutual advantage. As a result, the assessee received certain amount from T by way of compensation for non-performance of the said agreement. The assessee claimed that the said compensation received was a capital receipt. The ITO came to the conclusion (i) that the assessee had wanted the said premises for business and that the compensation received for the breach was a revenue receipt, and (ii) that as the said agreement having been entered into in the ordinary course of business, it could not be regarded as capital asset and the compensation received was income liable to tax in the year in which it was received. The Tribunal also concluded that the assessee had entered into the said agreement in the course of his business and as such the compensation received from its termination was a revenue receipt.

On reference, the Hon'ble High Court has held as under:

".....The assessee was carrying on business. He obtained a tenancy intending to use the said premises for the purpose of carrying on his business. Thus, in view of the decision in Bombay Burmah Trading Corpn. Ltd. v. CIT [1971] 81 ITR 777 (Bom.), he intended the premises to be a part of the structure of his profit-making apparatus. There was nothing to suggest that he intended to trade in the tenancy. The tenancy was, therefore, a capital asset. Accordingly, the compensation received by the assessee was a receipt of a capital nature...."

The Hon'ble High Court of Delhi*, in the case of* ***Khanna & Annadhanam v. CIT [2013] 30 taxmann.com 322 (Delhi)*** *has also held that when that source was unexpectedly terminated, it amounted to the impairment of the profit-making structure or apparatus of the assessee-firm. The compensation received due to the loss of the source of income is a capital receipt.*

The Hon'ble High Court has held as under:

> *"……Under the arrangement with DHS there was a regular inflow of referred work from DHS through the Calcutta firm in respect of clients based in Delhi and nearby areas. There is no evidence that the assessee-firm had entered into similar arrangements with other international firms of chartered accountants.*
> *The arrangement with DHS was in vogue for a fairly long period of time (13 years) and had acquired a kind of permanency as a source of income. When that source was unexpectedly terminated, it amounted to the impairment of the profit-making structure or apparatus of the assessee-firm.*
>
> *It is for that loss of the source of income that the compensation was calculated and paid to the assessee. The compensation was thus a substitute for the source. Thus the Tribunal was wrong in treating the receipt as being revenue in nature. [Para 7]*
>
> *Therefore, the amount received by the assessee in terms of the release agreement represents a capital receipt, not assessable to income tax. [Para 9]*

In Kettlewell Bullen & Co. Ltd. v. CIT [1964] 53 ITR 261 the Supreme court drew a distinction between the compensation received for injury to trading operations arising from breach of contract or from the exercise of sovereign rights and compensation received as solatium for loss of office. It was held that the compensation received for loss of an asset of enduring value would be regarded as capital. After a review of the entire case law on the subject, it was ultimately held as follows:-

> *"On an analysis of these cases which fall on two sides of the dividing line, a satisfactory measure of consistency in principle is disclosed Where on a consideration of the circumstances, payment is made to compensate a person for cancellation of a contract which does not affect the trading structure of his business, nor deprive him of what in substance is his source of income, termination of the I contract being a normal incident of the business, and such cancellation leaves him free to carry on his trade (freed from the contract terminated) the receipt is revenue: Where by the cancellation of an agency the trading structure of the assessee is impaired, or such cancellation results in loss of what may be regarded as the source of the assessee's income, the payment made to compensate for cancellation of the agency agreement is normally a capital receipt.*
>
> *In the present case, on a review of all the circumstances, we have no doubt that what the assessee was paid was to compensate him for loss of a capital asset. It matters little whether the assessee did continue after the determination of its agency with the Fort William Jute Co. Ltd. to conduct the remaining agencies. The transaction was not in the nature of a trading transaction, but was one in which the assessee parted with an asset of an enduring value. We are, therefore, unable to agree with the High Court that the amount received by the appellant was in the nature of a revenue receipt."*

The ITAT Chandigarh Bench 'B' had also an occasion to examine this issue in the case of DCIT, Circle 4 (1), Chandigarh v. Winsome Yarns Ltd. [2014] 50 taxmann.com 318 (Chandigarh – Trib).

The facts of this case are that the assessee had originally purchased an industrial plot through auction. The auction was conducted by sale committee appointed by Court on winding upon of a company Punwire. The said sale was challenged before the company Judge by Sun Group. The company Judge allowed the application of Sun Group and directed the assessee-company to deliver back the possession of this industrial shed. The assessee challenged said order before the High Court and the High Court allowed the appeal of the assessee and confirmed the sale. The Sun Group and the employees union took up the matter before the Supreme Court where Sun Group offered to pay more consideration and the employee union also submitted that sale of the plot to Sun Group would be more beneficial to the employee's union. Considering these facts the Supreme Court set aside the sale on receipt of compensation by the assessee from Sun Group. According to the Assessing Officer said amount was received in extinguishment of its rights. According to him as per the provisions of section 2(47) (11) extinguishment of rights in a capital asset amounted to transfer and the capital gain arising thereon would be taxable as per provisions of section 45. The Assessing Officer further opined that without prejudice to the above, if it was considered that gain could not be treated as short-term capital gain then same could be said to be in the form of compensation by way of interest given to the assessee by the Supreme Court for depriving the rights of the assessee in property. In that case receipt would be treated as interest income and would be taxable as revenue receipt. The Commissioner (Appeals), however, taking a view that amount of compensation was in the nature of capital receipt, deleted the addition made by the Assessing Officer.

On revenue's appeal, the ITAT has held as under:

> *"A perusal of order/of Supreme Court would clearly show that sale in favour of assessee was clearly set aside.*
>
> *The term set aside would also include 'cancel annul and therefore in the present case what has happened is that by setting aside the same the Supreme Court has cancelled the original sale made to the assessee-company.*
> *Thereafter the Supreme Court has directed the Official Liquidator to issue fresh NOC to enable the Sun Group to transfer the property. This clearly shows that the Supreme Court clearly cancelled the earlier sale otherwise the Court could have asked the assessee-company to transfer the property to Sun group. The Court has directed the Official Liquidator to issue fresh NOC so that Sun Group could obtain lease in their favour. This itself shows that sale in favour of assessee stands cancelled. [para 18].*
>
> *If sale itself is set aside by a Court then it can be said that the assessee never acquired any interest in such property. In the instant case, sale has been set aside by the Supreme Court and therefore it cannot be said that the assessee ever acquired any interest in the property. No doubt extinguishment is also covered in the definition of transfer under section 2(47)(ii). However, extinguishment would normally connote a situation where an asset goes out of existence.*

However, when the asset never comes into existence then such asset cannot be extinguished. Therefore there is no extinguishment in the present case because the said property purchased through auction by assessee-company never came into existence because of the order of the Supreme Court through which sale itself was set aside. [Para 201
In view of above, it is opined that surplus arising on account of compensation received by the assessee cannot be assessed under the head 'capital gain' because no asset came into existence with the assessee. [Para 25]

Coming to the second aspect regarding taxability of the amount as compensation, it is well settled that if amount is received as compensation in relation to surrender of profitmaking structure then such compensation is to be treated as capital receipt. [Paras 26 and 27]
In the instant case, the assessee had acquired an industrial shed for running a manufacturing business and sale was set aside by the Supreme Court, since assessee was clearly deprived of making future profits by surrendering this profitmaking structure or capital asset compensation received against such surrender was to be treated as capital receipt (Para 30]

In the result, appeal of the revenue is dismissed. [Para 32]."

In the case of ***CIT v. Bombay Burmah Trading Corpn. [1986] 27 Taxman 314 (SC), the Hon'ble Supreme Court of India*** *has held as under:*

"... From a number of decisions it is clear that if there is any capital asset, and if there is any payment made for the acquisition of that capital asset, such payment will amount to a capital payment in the hand of the payee. Secondly, if any payment is made for sterilisation of the very source of profit-making apparatus of the assessee, or a capital asset, then that will also amount to a capital receipt in the hands of the recipient. Further, if assets are merely stock-in-trade and payments are made for taking over the stock-in-trade, then no question of capital receipt arose.
Normally in trade there are two types of capital, one circulating capital and the other fixed capital. Fixed capital is what the owner turns to profit by keeping it in his own possession circulating capital is what he makes profit of by parting with it and letting it change hands. Therefore, circulating capital is capital which is turned over and in the process being turned over, yields profit or loss. It is well settled that what is capital assets in the hands of one person may be trading assets in the hands of the other. The determining factor is the nature of the trade in which the asset was employed. Compensation received for immobilisation, sterilization, destruction or loss, total or partial of a capital asset would be capital receipt. If a sum represented profit in a new form then that was income where the agreement related the structure of assessee's profit-making apparatus and affect conduct of the business, the sums received for cancellation or variation of such agreement would be capital receipt.
In the present case, it was to be held that having regard to the facts, the forest leases affected very structure of the operation of assessee, and thus the same constituted capital assets the assessee, and, therefore, payments made the cancellation sterilization of the rights under these

leases would be capital receipts. Accordingly, the realisation of the impugned sum was to be taken as exempt from tax as being receipt capital nature.
As regards taxability of the realisation against the depreciable assets, for levy a balancing charge under second proviso to section 10(2)(vii), it is absolutely necessary that the depreciable assets should have sold a agreed to between parties. But exchange there is reciprocal transfer of in movable property, corresponding transfer interest another movable property which often denoted 'barter. In present the agreement 1949 had resulted the enforcement the Government's policy nationalisation operation and the agreement did not involve transaction of sale between the assessee and the Union Burma. The assessee paid any money price respect of assets diverted to by the Government. Thus, impugned agreement not transaction of 'sale' but merely an 'exchange. Therefore, the amount realised on account of sale of logs received against the depreciable assets could not be brought to tax against the assesse under the second proviso to section 10(2)(vii).
Accordingly, the High Court was justified in accepting the assessee's claim...."

In the case Chheda Housing Development Corpn. v. Addl. CIT, 32(1), Mumbai [2019] 110 taxmann.com 56 (Mumbai Trib.), ITAT Mumbai 'C' has held where pursuant to cancellation of land development agreement, amount received by assessee was in excess of advance and same was on account of compensation for extinction of its right to sue landowner, since said receipt was not in ordinary course of its business, same was to be construed as capital receipt not liable to tax.

The Tribunal has held as under:

**...As Act does define the 'capital receipt' and 'revenue receipt, therefore, one has depend natural meaning of terms well the precedent of decided cases. According the English Dictionary, the word 'capital" means 'accumulated wealth employed reproductively the word 'revenue' means 'the return yield, or of any property other of income, which comes once return from property of possession, income from source. It settled position that receipt of source of income capital receipt, but a receipt in lieu income is revenue receipt. IN order to determine whether a receipt is capital or revenue in nature, it is necessary to go by its nature in the hand of the recipients. [para 10]*

Turning to the facts of the present case the assessee received a sum of Rs. 20 crore on execution of cancellation deed. From the contents of clause 5 of the cancellation deed it can be noted that the assessee has not transferred any right in favour of the confirming party (third party) in respect with regard to the rights, which were sought to be confirmed in MOU. In facts all those right were already stand transferred by the owners in favour of 'S' Ltd. The assessee received compensation of Rs. 20 crore consisting of refund of the amount paid by assessee to the owners in pursuance of the said Development Agreement read with supplementary agreement along with interest, towards loss of profit/ liquidated damage for loss of opportunity to develop the property and sale of flats in the open market and towards the cost of litigation only.

Therefore, the amount received by the assessee in excess of advance was on account of compensation for extinction of its right to sue the owner, the receipt is a capital receipt not chargeable to tax. Since the assessee has not received the amount in excess of advance in the course of his business it must be construed as capital receipt and not business receipt (Para 20]
In the result, appeal of the assessee is allowed. (Para 24]..."

In the case of ***DCIT v Sak Industries (P.) Ltd. [2005] 1SOT798 (DELHI), the ITAT Delhi Bench 'A'*** *has held as under:*

".....It is well-settled legal position that in order to find out whether a receipt is a capital or revenue receipt, one has to see it in the hands of the receiver and in order to find out whether an expenditure is a capital or revenue expenditure, one has to see what it is in the hands of the payer. [Para 36]
The settlement was of the dispute arising between the assessee-company and Fried Krupp Essen because the assesse company had alleged that Fried Krupp had breached the promotion agreement by the proposed sale by Fried Krupp of all quotas of Krupp Widia (including all of the capital stock/quotas of Meturit). On Fried Krupp Essen agreeing to pay to the assessee-company a sum of DM 10.5 million, the assessee-company agreed and consented to the transfer of Fried Krupp Essen, termination of promotion agreement, full and final settlement of all claims, demands, causes of action, arising under or in connection with the promotion agreement or in breach thereof. In other words, the assessee-company received DM 10.5 million in satisfaction of its claims against Fried Krupp Essen, Krupp Widia GmbH and Meturit AG. Therefore, the assessee-company received the sum of DM 10.5 million in lieu of surrender of its rights and claims against the parties abovementioned in terms of promotion agreement. In substance, the assessee-company gave up its right of first purchase of shares held by Meturit AG in Widia (India) Ltd. on account of perceived/alleged violation of promotion agreement in view of the transfer of ownership of Krupp Widia GmbH. The taxability or otherwise of DM 10.5 million in the hands of the assessee-company was to be viewed and determined on that basis. Therefore, the Commissioner (Appeals) erred in arriving at the finding that the money received by the assessee-company was fortuitous receipt. [Para 38]
The amount received by the assessee was in the nature of compensation for loss of the assessee's perceived/alleged rights. It is now well-settled legal position in this regard that if compensation is received for loss/detriment to the amount of profit, the same would constitute revenue receipt, but if the compensation is received for loss/detriment to profit-making structure, such receipt would not be on revenue account and would constitute capital receipt in the hands of the recipient. [Para 42]
The right, the assessee contested all along, was the right to purchase shares held by Meturit AG of Widia (India) Ltd., in the event of the proposed sale of Krupp Widia GmbH from Fried Krupp Essen to an outsider. That right was given up by the assessee on receipt of DM 10.5 million. If the assessee had succeeded to exercise its supposed right to purchase shareholding of Meturit AG in Widia (India) Ltd., that in itself

would not have given rise to any income in the hands of the assessee but only created an income-earning source in the hands of the assessee. The assessee was supposed to purchase those shares at the price mutually agreed upon. Hence, compensation received by the assessee for surrender of its right could not be viewed as anything other than as compensation received in lieu of profit-making source. [Para 43]

Moreover, in the instant case the first right of purchase was acquired by the assessee by way of promotion agreement and articles of association of Widia (India) Ltd. Even before the commencement of business by Widia (India) Ltd. Hence, by no stretch of logic, the receipt could be viewed as receipt for the business carried on by the assessee. [Para 45]

In the circumstances, that receipt in the hands of the assessee constituted a capital receipt. The Assessing Officer erred in assessing it under the head 'Income from other sources. Therefore, the deletion of the addition as made by the Assessing Officer by the impugned order of the Commissioner (Appeals) was upheld though for different reasons. [Para 46]

In the result, the revenue's appeal was dismissed. [Para 47]."

In the case of DCIT v. Rishabh Infrastructure (P.) Ltd. [2019] 103 taxmann.com 14 (Raipur Trib.), the ITAT Raipur Bench has held that where assessee-company was formed for construction of way track and railway siding on behalf of a company, in view of fact that due to certain disputes arose between parties work was stalled by assessee, compensation paid by said company to assessee for closure of business activity was to be treated as capital receipt not chargeable to tax.

In this case the ITAT has held that-

"…… A MOU was executed between the assesse and LIPL with an object of construction of railway and siding assessee LIPL. The construction railway track siding involved complex right from procurement land, civil work/earth work, laying railway tracks, electrifications, signaling arrangement etc. The assessee had been formed sole objective undertaking the infrastructure development activity of construction railway track siding behalf LIPL fact recorded the assessment order passed under section 143(3) for the assessment year 2003-04. found from records the assessee had only acquired of lands (including some development works) required for the said railway track and siding which subsequently transferred LIPL income arising thereof was shown under head gains of business profession. is found from correspondences filed on record between the assessee and LIPL that LIPL indecisive execution of entire work construction of railway track & from the assessee turnkey or build-operate- transfer basis and subsequently, owing to various constraints, the balance assigned the assessee the scope of work stipulated the aforesaid MOU were got executed by LIPL After a considerable amount of another MOU was executed between LIPL assessee and pursuance the said MOU, aforesaid 'compensation' has been determined LIPL. There is merit in submission the assessee that entire of construction of railway track and siding was sole business and isolated activity acquisition of land such railway siding never visualized by further, since LIPL continued to remain indecisive as execution of entire work by the assessee unresponsive problems faced them, the execution of the was stalled by assessee and accordingly, came to a standstill. Subsequently after numerous rounds of deliberations meetings between and assessee company, aforesaid MOU was executed

on leading to determination of compensation lieu cancellation/termination the earlier MOU or in lieu of determination its rights in the said MOU ultimately leading to loss of source of income. the construction of this subsequent MOU which ultimately decides the nature of receipt the impugned amount as 'compensation' [Para 16]
There no infirmity of the assessee during the course appeal proceedings filed certificate issued LIPL wherein they have certified compensation had been determined and paid by for stalling the execution agreed work as terms of earlier MOU. The above clarification issued LIPL clearly shows that compensation received by the for sterilization profit making apparatus of assessee company. [Para 17]

Accordingly, the order of the Commissioner (Appeals) is upheld and the grounds raised the revenue are dismissed. [Para 21]..."

5.3.7 In the case of the appellant, the appellant could not start the construction of the project due to the failure on the part of the DDA. The circumstances beyond the contemplation by the act of DDA have resulted into frustration of the contract. The appellant has also given back the possession of the land to the DDA, on which the project was to be constructed. This has resulted into permanent loss of source of the income. Therefore, the compensation in the form of interest of 278 crores received by the appellant from DDA, as per the direction of the Hon'ble Supreme Court is a capital receipt. Therefore, the compensation of Rs.278 crores is not taxable as income under the Income-tax Act, 1961. Accordingly, the addition of Rs.278 crores in respect of compensation from DDA made by the AO under normal provision of the Act as well as u/s.115JB of the Act is deleted. The AO is directed accordingly."

4. During the course of appellate proceedings before us the ld. Departmental Representative has contended that the case related to breach of contract and assessing officer has rightly treated the amount of compensation received by the assesse as revenue receipt.

On the other hand, the ld. Counsel has submitted that assesse has signed agreement with Delhi Development Authority for development of a residential project in Tehkhand Delhi and subsequently the forest department raised objection that the said site fail within the ridge area, therefore, construction activities were suspended and assesse had incurred huge losses. He further submitted that DDA could not perform its obligation under the development agreement, therefore, the assesse has approached the Hon'ble High Court by filing writ petition and assesse was granted compensation considering that the project frustrated and was incapable of

performance. The ld. Counsel supported the order of ld. CIT(A) and filed paper book and placed reliance on the various judicial pronouncements also referred in the finding of the ld. CIT(A) as supra.

5. Heard both the sides and perused the material on record. The assesse entered into agreement with DDA during the F.Y. 2006-07 for development of residential project at Tehkhand Delhi and paid advance for Rs.450 crores to DDA for purchase of land. Development cost of Rs.587.73 crores was reflected in the balance sheet of the assesse under the head 'inventory cost' of the project. The forest department raised objections on the ground that the said site fell within the ridge area and consequently all construction activities has to be suspended on account of which the assesse had incurred huge losses. There was the virtual no chance of the project going ahead. Consequently, the assesse filed writ petition before the Hon'ble Delhi High Court and it is held that assesse is entitled to refund of the entire sum paid to the DDA with interest @ 6% per annum. On appeal filed by the revenue, the Hon'ble Supreme Court has dismissed the appeal and held that there was failure of the DDA to provide clear package to the assesse and therefore, upheld the decision of Hon'ble Delhi High Court to refund the deposit made by the assesse along with interest @ 6% per annum calculated from the date of deposit till realization. Consequently, the DDA has paid Rs.727 crores to the assesse in January, 2017 including interest of Rs.278 crores and the land was repossessed by the DDA. The ld. CIT(A) has deleted the addition made by the A.O holding that the assesse could not start the construction of the project due to failure on the part of the DDA which resulted into frustration of the contract and possession of the land was given back to the DDA. The ld. CIT(A) has stated that A.O had incorrectly relied on the decision of Hon'ble High Court in the case of Ansal Properties and Industries Ltd. and distinguished the fact of the case of the assesse as in the case of the Ansal Property & Industry Ltd.

the agreement was unilaterally terminated by one of the party. The ld. CIT(A) has also referred various judicial pronouncements viz. CIT Vs. Saurashtra Cement (2010) 192 taxman 300, and in the case of CIT Vs. Rajbahadur Jayram Valaji AIR (1959) (SC) 291, Kettlewell Bullin & company Ltd. Vs. CIT AIR (1965) (SC) 65, wherein held that where cancellation of contract result in loss of what may be regarded as the source of the assessee's income the payment made to compensate for cancellation of the agency agreement is normally a capital receipt. Similarly, the ld. CIT(A) has also placed reliance on the various judicial pronouncements as referred in his finding as supra in this order. The ld. CIT(A) has also referred section 56 of the Indian Contract Act pertaining to "doctrine of frustration". The doctrine of frustration is a doctrine of special case of the discharge of contract by impossibility to perform. He also referred the decision of Hon'ble Supreme Court in the case of Satyabrata Ghosh Vs. Mugneeram Bangurs & Company (1954) AIR 44, held that it is the court which can pronounce the contract to be frustrated and at an end. In the case of the assesse Hon'ble Delhi High Court and Hon'ble Supreme Court held that there was frustration of contract contract between the DDA and the assesse because of impossible of performance within the meaning of that word in Sec. 56 of the contract Act. Therefore, the compensation received by the assesse was in effect on account of losss of source of income. The ld. CIT(A) has also referred the decision of Satyabrata Ghosh Vs. Mugneeram Bangurs & Company (1954) AIR 44, wherein held that compensation received for loss of any asset of enduring value would be regarded at capital receipt. The ld. CIT(A) is also referred the decision of ITAT, Mumbai in the case of Chheda Housing Development Corporation Vs. Addl. CIT and held that on cancellation of land development agreement, amount received by assesse in excess of the advance was to be considered as capital receipt. We have also perused the decision of Hon'ble Delhi High Court

in the case of PCIT Vs. Arein R. Infrastructure Ltd (2018) 404 ITR 318 (Delhi) referred by the ld. Counsel wherein held that on failure of the seller to perform commitment under agreement to sell the compensation received was a capital receipt. In view of the above facts and finding we don't find any infirmity in the decision of ld. CIT(A) holding that amount of compensation received was a capital receipt, therefore ground of appeal of the revenue stand dismissed.

6. In the result, the appeal of the revenue stand dismissed.

Order pronounced in the open court on 30.12.2022

Sd/-	Sd/-
(Aby T Varkey) Judicial Member	(Amarjit Singh) Accountant Member

Place: Mumbai
Date 30.12.2022
Rohit: PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//
आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण/ ITAT, Bench, Mumbai.