IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH "B", KOLKATA

BEFORE SHRI. RAJESH KUMAR (ACCOUNTANT MEMBER)
AND
SHRI ANIKESH BANERJEE (JUDICIAL MEMBER)

I.T.A. No.489/Kol/2005 - A.Y. 2001-02
I.T.A. No.1811/Kol/2006 - A.Y. 2003-04

Oberoi Hotels Private Limited **4, Mangoe Lane, Kolkata-700 001** **PAN : AAACO3408K**	vs	**DCIT, Circle-8, Kolkata** P-7, Chowringhee Square Kolkata-700 069
APPELLANT		**RESPONDENT**

ITA No.1808/Kol/2006
(Assessment Year 2003-04)

DCIT, Circle-8, Kolkata	vs	**Oberoi Hotels Private Limited** **4, Mangoe Lane, Kolkata-700 001** **PAN : AAACO3408K**
APPELLANT		**RESPONDENT**

Assessee represented by	Shri Akhilesh Gupta, AR and Aritra Nag, AR
Department represented by	Shri Abhijit Kundu, CIT DR

Date of hearing	13-03-2024
Date of pronouncement	30 -05-2024

O R D E R

Per Bench:

All three appealsare filed by the assessee and the revenue against the order of the ld. Commissioner of Income-tax (Appeals)-VIII, Kolkataorder passed under

section 250 of the Income-tax Act, 1961 (in short, 'the Act'), date of order 31/08/2006 for Assessment year 2003-04 and dated 29/12/2004 for A.Y. 2001-02. The impugned orders were emanated from the order of the Ld.DCIT, Circle-8, Kolkata for A.Y. 2001-02 date of order 29/03/2004 and ld. Joint Commissioner of Income-tax (OSD), Kolkata, In charge Circle 8, Kolkata, date of order 31/03/2006 for A.Y. 2003-04,both the orders passed under section 143(3) of the Act.

2. At the time of hearing the Ld. Counsel for the assessee Shri Akhilesh Gupta drew our attention to the order dated 01.09.2023 passed by the Hon'ble High Court of Calcutta setting aside the part of the tribunal order dated 01/05/2008. The relevant portionof the order of Hon'ble Jurisdictional High Court is extracted below:

> *"The main question to be answered was whether on a construction of the agreements, their execution, the conduct of the parties and so on the operation of the two hotels in Iraq by the appellant on a long term basis could be taken as creation of capital or a source of income? Whether on termination of these agreements, the compensation received by the appellant for not being able to carry out the agreements could be taken as one for loss of capital?*
>
> *In those circumstances, we set aside that part of the impugned order of the tribunal dealing with above issue. We remand the matter to the tribunal with a direction upon it to decide the same upon hearing the parties preferably within a period of six months from date.*

The above set aside appeals were placed before the Bench by the Registry on dated 07.03.2024 and were part heard by calling for certain clarification from the ld. Counsel for the assessee by adjourning these appeals for final arguments on dated 13.03.2024. On dated 13.03.2024, these appeals were heard and reserved for order. Hence in compliance to the order of the Hon'ble High Court, the instant order deciding the issues is passed and pronounced.

3. The Assessee and Revenue has taken the following grounds

3.1 **I.T.A. No.489/Kol/2005 (2001-02)(Assessee)**

"1. For that the Ld.CIT(A) has erred in holding that the compensation of Rs.14,509,867 received by the Company from United Nations Compensation Committee for loss of future profit due to embargo imposed by UNO on Iraq in post gulf war period was of revenue nature and therefore taxable though the compensation was in respect of premature termination of agreement to operate hotels in Iraq and agreement to operate hotel is a capital asset of the appellant.

2. For that the Ld.CIT(A) has failed to appreciate the real purpose of investment in shares of EIH Ltd (from which the Company earns royalty) was not for earning dividend income which is tax exempt. Similarly, interest, free advance given to Aravali Polymers Pvt Ltd. for bulk acquisition of shares of EIH Ltd is also to retain the existing royalty earnings from EIH Limited and as such the disallowance of the interest of Rs.8,016,283 on borrowed capital on the ground that it is not allowable U/s. 14A amounts to miscarriage of justice.

3. For that the Ld.CIT(A) has failed to appreciate that the nature of business of the Company is such that it is required to maintain a Guest House for the purpose of its business.

4. For that the Ld.CIT(A) ought to have considered that the Guest-House at Nalla Fort in Jaipur had opened in earlier nineties and since then there has been no dispute in relation to the use of this Guest House for the purpose of the Company's business.

5. For that the Ld.CIT(A) has given undue importance to the deposition of one security personnel who has very limited knowledge for giving any information which is confidential in nature.

6. For that the Ld.CIT(A) has failed to consider that expenses ought to have been incurred for maintenance of the Guest-House even though it is not frequently used.

7. For that the Ld.CIT(A) has failed to appreciate that the principle decided by Gujarat High Court in Sayaji Iron & Engineering Co. Ltd vs CIT (253 ITR 749) that corporate assessee being a juristic person, it cannot have any personal expenditure and when in the past maintenance expenses of Guest House was considered for the purpose of business, the expenditure amounting to Rs.2,980,183 incurred for maintenance of the Guest House

as well as the depreciation amounting to Rs.1,342,658 should not be considered as non-business expenditure and disallowed.

8. *For that the Ld.CIT(A) is not justified in estimating an amount of Rs.5 lakh as expenditure relatable to Dividend Income when in the preceding assessment year the disallowance was only to the extent of Rs.1 Lakh.*

9. *For that the Ld.CIT(A) is wrong in rejecting the claim for deduction U/s 80-O.*

10. *For that the Ld.CIT(A) is not justified in rejecting the claim for relief U/s 90 ignoring the provisions of the DTAA with UAR and the certificate for tax deduction filed at the time of hearing."*

3.2 I.T.A. No.1811/Kol/2005 (A.Y. 2003-04)(Assessee)

1. *That the learned CIT(A) erred in confirming the disallowance of Rs.36,14,273/- on guest house maintenance and Rs.20,79,444/- on depreciation on guest house assets, made by the Assessing Officer.*
2. *That the learned CIT(A) erred in not considering that the guest house at Nalla Fort was used during the relevant previous year for business related activities of the appellant.*
3. *That the learned CIT(A) erred in not considering the submissions of the appellant and solely relying on the observations made by the Assessing Officer in relation to a previous year different from the previous year relevant to the assessment under appeal.*
4. *That the learned CIT(A) erred in confirming the disallowance of interest of Rs.31,43,701/- made by the Assessing Officer allegedly for non business purposes, being interest paid on loan for investment in shares.*
5. *That the learned CIT(A) erred in holding that the appellant was not justified in taking a ground different from the ground taken earlier on the same issue.*
6. *That without prejudice to ground nos.4 and 5 above, the learned CIT(A) erred in not appreciating that the appellant had made a commercial investment by acquiring shares of EIH Limited.*
7. *That the learned CIT(A) while disallowing Rs.10,855/- erred in questioning the chances of recovery of the debt written off by the appellant.*
8. *That the learned CIT(A) erred in confirming the disallowance of Rs.10,855/- made by the Assessing Officer being bad debts written off from the books of account.*
9. *That the learned CIT(A) erred in confirming the disallowance of depreciation amounting to Rs.111,712/- in respect of assets merged in the block of assets on the basis of High Court Order and became inseparable from other business assets of the respective block.*

10. That the learned CIT(A) erred in rejecting the appellant's claim for deduction under section 80-O of the Act, which was supported by specific certificate filed before the appellate commissioner.

11. That the learned CIT(A) erred in not allowing the appellant's claim for tax credit allowable under the different tax treaties and restoring back to the file of Assessing Officer.

12. That the appellant craves leave to add, amend and/or modify the grounds taken herein."

3.3 **ITA No.1808/Kol/2006 (A.Y. 2003-04) (Revenue)**

"1(a). That on the facts and in the circumstances of the case, Ld.CIT(A) has erred in deleting Rs.3,30,168/- treating revenue expenditure on a/c of repair and maintenance as against capital expenditure treated by A.O.

1(b). That on the facts and in the circumstances of the case, Ld.CIT(A) has erred in treating the expenses for new assets amounting to Rs.3,30,168/- in the nature of revenue though the said new assets provide enduring benefit to the assessee.

2(a) That on the facts and in the circumstances of the case for the assessment year 2003-04 under consideration, Ld.CIT(A) has erred in accepting the compensation received amounting to Rs.7,10,35,264/- on relinquishment of all rights of operation in Hotel Lanka Oberoi at Colombo was a capital receipt relying on the decision of Hon'ble Supreme Court dated 10.03.1999 in assessee's own case in Oberoi Hotel Pvt Ltd. –Vs-CIT (236 ITR 903)

2(b) That on the facts and in the circumstances of the case, Ld.CIT(A) has erred in not accepting the provision of section 55(2)(a) of I T Act as amended by Finance Act 2002 w.e.f. 01.04.2003 for the purpose of capital gain where Ld.CIT(A) has accepted the contention of the receipt of compensation amounting to Rs.7,10,35,264/- in the nature of capital receipt on relinquishment of all rights of business operation in the Hotel Lanka Oberoi at Colombo."

4. In the outset, all three appeals are having same nature of fact and having common issue. Both the assessee and revenue have challenged the amount received from compensation on account of termination of contract outside India.

All the appeals are taken together, heard together and disposed of together. **ITA No.1811/Kol/2006** is taken as the lead case.

5. Tersely, we advert the facts of the case. The assessee is a hotelier and expanded business outside India. The assessee was in agreement of business in country, Srilanka. The assessee is Indian company and is engaged in the business of providing technical services for operating luxury hotels of international standards in India and abroad. The assessee owns proprietary right of the trademark (Oberoi & Trident). During the impugned assessment year, the assessee received from the United Nations Compensation Committee for loss of future profit due to embargo imposed by the UNO in the country, Iraq,post-Gulf War period. During the assessment proceedings, ld.AO considered this compensation amount to Rs.1,45,09,867/- received from UNO Compensation Committee (UNCC) as revenue income. The grievance of the assessee is that the ld.AO has totally ignored the order of the Hon'ble **Supreme Court** in assessee's own case reported in **236 ITR 903 (SC),** where the fact was that the assessee company received compensation for giving of right to manage hotel in Singapore. It was considered by Hon'ble Supreme Court that compensation for giving the right to manage hotel or loss of future profit is capital receipt. The aggrieved assessee filed an appeal before the ld. CIT(A), but ld.CIT(A) upheld this issue in favour of the revenue. Being aggrieved, the assessee filed an appeal before the ITAT, Kolkata Bench bearing ITA No.1808/Kol/2006 and 1811/Kol/2006 date of pronouncement 01/05/2008 where the Tribunal accepted that the assessee received amount as compensation is not a revenue receipt but it is the capital receipt. But the coordinate bench of ITAT has taken a new point and directed to compute the

impugned income under the head capital gain, under section 55(2)(a) of the Act and set aside the matter to the ld.AO. The aggrieved assessee filed an appeal before the Hon'ble **High Court at Calcutta** and the Hon'ble jurisdictional Court directed the matter for further consideration to ITAT and set aside the issue before the Bench which is currently the matter of adjudication. Related to A.Y. 2001-02, the assessee has a same issue where the amount was received for termination of contract in the country,Srilanka. Appeal in both the assessment years are filed before the Bench. On the other hand, the Revenue has filed the appeal with the grievance for deletion of addition by the Ld.CIT(A) and prayed for upholding the addition in the point of capital gain under section 55 of the Act. Being aggrieved, both the parties have filed an appeal before us.

6. The ld.AR filed written submissions (in short APB) which are kept in the record. The ld.AR vehemently argued and placed that the issue is arising out of two agreements between the appellant and the Government of Iraq in 1980s. The ld. AR first invited our attention in the order of Hon'ble **High Court at Calcutta ITA No. 8 of 2008 date of order 01/09/2023**. The relevant parts are reproduced as below: -

"It arises out of the two agreements between the appellant and the Government of Iraq in the 1980s, each for running a hotel in that country by the appellant. The first one was entered into on 8th July 1981 to operate a hotel for eight years from 15th October 1984 to 14th October 1992. The second one executed on 25th June 1984 was to operate another hotel for ten years from 1st April 1986 to 31st March 1996. According to the terms and conditions of the agreements, the appellant was to get 8% of the profits.

In 1990-91 the Gulf War broke out. By mutual consent the agreements ' were terminated. The appellant received around Rs.1,45,00,000/- as compensation from the Iraqi authorities for premature termination of the agreements, further to the 'United Nations' recommendation in. the matter.

The Indian tax authorities treated this as a revenue receipt and wanted- to tax it According to the appellant, it was capital a receipt notliable to be taxed.

Mr. J. P. Khaitan, learned senior advocate, appearing for the appellant submits that the agreement to operate each of the hotels on a long-term basis, although on profit sharing terms and conditions, was to be taken as resulting in capital creation and not an ordinary trading transaction. On termination of the agreements by mutual consent, the compensationreceived tantamounted to receiving compensation for loss of capital. This was to be treated as a capital receipt.

Mr. Roy Choudhury, learned advocate for the respondent, submits that the transaction between the parties was a pure and simple business adventure, out of which the appellant was earning 8% profit. Hence the compensation received was to be taxed as revenue receipt.

The leading judgmentof the Supreme Court in this field is Oberoi Hotel Private Limited vs. Commissioner of Income Tax reported in 236 ITR 903. The following principles of law can be enunciated from this wonderfully written judgment.

What is received from loss of capital is capital receipt whereas profit in a trading 'transaction is taxable. Where compensation is received layperson fo$_r$ cancellation of a contract but does, not affect the trading Structure of the business or deprive him of source of income, the receipt is revenue. The termination of the contract is taken as a normal incident of business. Where the trading structure is affected or source of income iswhich is sought to be compensated by paying an amount that ' amount is to be taken as a capital receipt.

We have considered the submissions of learned counsel for the parties.

On scrutiny of the impugned order of the tribunal we do not find that any inquiry or finding has been made by the tribunal in relation to the essential facts. The above judgment .of the Supreme Court was sought to be distinguished on facts. It has been stated by the tribunal that in the facts of the Supreme Court case there was an option to the appellant to buy the hotel, a capital asset which the appellant was deprived of. Here there was no such option.

The said premises on which the tribunal has proceeded is unfortunately flawed.

The main question to be answered was whether on a construction of the agreements, their execution, the conduct of the parties and so on the operation of the two hotels in Iraq by the appellant on a long term basis could be taken as creation of capital or a source of income? Whether on termination of these agreements, the compensation received by the appellant for not being able to carry out the agreements could be taken as one for loss of capital?

In those circumstances, we set aside that part of the impugned order of the tribunal dealing with above issue. We remand the matter to the tribunal with a direction upon it to decide the same upon hearing theparties preferably within a period of six months from date."

7. In argument ld.AR placed that the Memorandum explaining the provision for **Finance Bill, 2018** where the compensation is redrafted and explained. The relevant paragraph is reproduced as below:-

> *"Taxability of compensation in connection to business or employment Under the existing provisions of the Act, certain types of compensation receipts are taxable as business income under section 28. However, the existing provisions of clause (ii) of section 28 is restrictive in its scope as far as taxation of compensation is concerned ; a large segment of compensation receipts in connection with business and employment is out of the purview of taxation leading to base erosion and revenue loss.*
> *Therefore, it is proposed to amend section 28 of the Act to provide that any compensation received or receivable, whether revenue or capital, in connection with the termination or the modification of the terms and conditions of any contract relating to its business shall be taxable as business income. It is further proposed that any compensation received or receivable, whether in the nature of revenue or capital, in connection with the termination or the modification of the terms and conditions of any contract relating to its employment shall be taxable under section 56 of the Act.*
> *These amendments will take effect from. 1st April, 2019 and will, accordingly, apply in relation to assessment year 2019-20 and subsequent assessment years.*
> ***[Clause 3, 9 and 21]"***

8. The ld.AR invited our attention to the order of the coordinate bench of ITAT Kolkata, bearing **ITA No.1808& 1811/Kol/2006** for A.Y. 2003-04 **date of order 01/05/2018** where the coordinate bench has made a view related to receiving of amount as capital receipt but on the other hand, directed to tax as capital gain under section 55. The relevant observation of the Bench is reproduced as below:-

> *"29. We have carefully considered the issue in view of a he material placed on record. rival submissions and the case laws relied upon. On a careful consideration of the fads, and materials placedon record, we are of the considered opinion that the differences pointed out by the learned D.R. in the facts of the case before us and the. facts in the cases of the assessee decided by the Hon'ble Apex Court in 236 ITR 903 are not such as would render the ratio of the decision of the Hon'ble Apex Court in the case of the assessee for the assessment year 1979-80 inapplicable to the case before us. It may be considered that the Hon'ble Supreme Court has held in the case of the assessee for the assessment year 1979-80 (supra) as under:*

"that 'the amount received by the assesses was the consideration for giving up itsright to purchase and/or to operate the property or for getting it on lease before it was transferred or let out to other persons. It was not for settlement of rights under a trading contract but the injury was inflicted on the capital asset ofthe assessee and giving up the contractual right on the basis of the principal agreement had resulted in loss of source of the assessee's income. The receipt in the hands of the assessee was a 'capital receipt. "

(emphasis supplied)

30. It is observed that as is clear from the words "to purchase and/or to operate the property, Hon'ble Apex Court has held that the consideration for giving up the right of the assessee not only to purchase but also to operate the properly was a capita! receipt.We, therefore, hold that the compensation of Rs.74,10,35,264 on relinquishment of allrights of operation in Hotel Lanka Oberoi, Colombo is a capital receipt in view of thedecision of the Hon'ble Apex Court dated 10th March, 1999 for theassessment year 1979-80 inthe assessee's own case, i.e. Oberoi Hotels Pvt, Ltd. vs CJT (236 ITR 90)(SC), Ground No. 2(a) of the appeal of the department is, therefore, dismissed.

31. The alternative contention of the department that the receipt was liable to Capital Gains Tax in view of the provisions of section 55(2)(a)of the Income Tax Act as amended by Finance Act, 2002 with effect from 1st April. 2003, is accepted and the assessee is liable to capital gains lax after taking the cost of capital asset at rupees nil. The learned counsel for the assessee also fairly conceded that the compensation amount of Rs.7,10,35,264 received on relinquishment of all rights of business operation in the Hotel Lanka Oberoi, Colombo was liable to capital gains tax as per provisions of section 55(2)(a) of the Income Tax Act. Ground no.2(b) of the appeal of the revenue is, therefore, allowed.

32. As a result, the appeal of the department is partly allowed."

9. Against the order of the ITAT, the assesseefiled petition before the Hon'ble High Court at Calcutta bearing **ITA 707 of 2008**. The observation of the Hon'ble High Court is reproduced as below: -

The Court:- After hearing the learned Counsel for the appellant the appeal is admitted and the following questions of law are referred for adjudication:

"1. Whether on the facts and in the circumstances of the case and on a proper interpretation of the several rights under the agreement entered into between

Oberoi Hotels (India) Ltd. [now renamed as Oberoi Hotels Pvt Ltd]and Asian Hotels Corpn. Ltd, Sri Lanka the amount of compensation received by the appellant for the cessation and/or termination of several rights under the agreementsbeing held to be a capital receipt, the Tribunal was justified in law in applying Section 55(2)a) of the Act on the basis that such compensation was in relation to aright to carry on the business and therefore the said compensation was treated as a capital gain liable to tax on the basis that such cost of acquisition of the rights was nil?

2. Whether on a true and proper construction of the agreements the several rights which were acquired by the appellant under the said agreements constituted its trading structure and the source of its profit and therefore the termination of such several rights even though held by the Tribunal to be a capital receipt was liable at all a capital gains by invoking the provisions of Section 55(2)(a) of the Act?

3.Whether the Tribunal erred in holding that thelearned Counsel for the assessee fairly conceded that thecompensation amount received on relinquishment of allrights of business operation in the Hotel Lanka Oberoi,Colombo was liable to capital gains tax as per provisionsof Section 55 (2) (a) of the Act and erroneously proceeded on such unwarranted assumption wrongfully and illegallyattributed to the assessee's Counsel?"

Let the Paper Book be filed within 8 weeks from date. Let the appeal be listed for hearing 12 weeks hence.

All parties concerned are to act on a xerox signed copy of this order on the usual undertakings.

Urgent Xerox certified copy of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities."

10. Finally, the ld.AR invited our attention in assessee's own case **Oberoi Hotels (P) Ltd vs. CIT 236 ITR 903 (SC**). The relevant observation is reproduced as below:-

"The aforesaid judgment was considered in the case of Kettlewell Bullvn and Co, Ltd. v, CIT 11964) 53 1TR 261 (SC), wherein the court has held as under (page 270) :

"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 capita! receipt: what is received as profit in a

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."

After considering various decisions it was further held as under (page 272) :

"These cases illustrate the principle that compensation for injury to trading operations, arising from breach of contract or in consequence of exercise of sovereign rights, is revenue. Thesecases must, however, be distinguished from another class of cases where compensation is paid as a Solatium for loss of office. Such compensation may be regarded as capital or revenue : it would be regarded ascapital, if it is for loss of an asset of enduring value to the assessee, but not where payment is received in settlement of loss in a trading transaction."

After analysing a number of cases, the court observed that the following satisfactory measure of consistency in the principle is disclosed (page 282); "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."

The aforesaid principle is relied upon in the case of Karam Chand Thapar and Bros. [1971] 80 1TR 167 (SC). Considering the aforesaid principles laid down as per article XV11I of the principal agreement, the amount received by the assessee is for the consideration for giving up his right to purchase and/or to operate the property or for getting it on lease before it is transferred or let out to other persons. It is not for settlement of rights under a trading contract, but the injury is inflicted on the capital asset of the assessee and giving up the contractual right on the basis of the principal agreement has resulted in loss of source of the assessee's income."

11. The ld.DR vehemently argued and taken ground that the amount should be taxed under the head 'capital gains' and prayed for upholding the view of coordinate bench of ITAT Kolkata.

12. We heard the rival submissions and considered the documents available in the record. The assessee is already covered by the order of the Hon'ble Apex Court in assessee's own case. We respectfully relied on the order of the Apex Court in assessee's own case and accept this income as capital receipt. The coordinate bench of ITAT, Kolkata in order dated 01/05/2008 had tried to distinguish the income from the order of the Hon'ble Apex Court but finally the order of Hon'ble High Court at Calcutta specially fixed the matter in favour of the assessee and directed to reconsider the issue to ITAT. The assessee received this compensation for early termination of contract which was already affected the assessee's future income. In any case, the capital gain cannot be levied on the assessee for this compensation. The Explanation of Finance Bill 2018 has considered by us, but it is not effective from this impugned assessment year:

13. This issue is covered in favour of the assessee by the said judgment of Oberoi Hotels (supra) wherein it was held by the Hon'ble Supreme Court that the amount received on giving up the right to purchase and/or operate the hotel was a capital receipt. In other words, compensation received on giving up of a right to operate is also a capital receipt. In yet other words, there was and/or could be no occasion to distinguish the said judgment of Oberoi Hotels (supra) and the instant case is fully covered by the said judgment.

The coordinate bench had followed the said judgment of Oberoi Hotels (supra) in the assessee's own case on similar facts for assessment year 2003-04 and had held that compensation received relinquishment of right to operate the Hotel in Sri Lanka was a capital receipt in ITA 1808/2006

for AY 2003-04. This finding of the Tribunal was accepted by the revenue and no appeal was filed by the revenue before the Hon'ble Jurisdictional High Court.

Further, in the order of remand, it was held by the Hon'ble High Court atCalcuttathat the premise on which the Tribunal had proceeded, i.e. the reasoning given for distinguishing the said judgment of Oberoi Hotels (supra), was flawed.

While taxing the said compensation as a revenue receipt, the lower authorities have not stated as to whether the aforesaid compensation comes under the purview of section 28 of the Act and/or as to under which clause of section 28 of the Act the said compensation would fall. It is submitted that the said compensation does not fall under any of the clauses of section 28 of the Act as it stood at the relevant point of time.

By the **Finance Act. 2018** w.e.f. assessment year 2019-20 onwards, an amendment was made to section 28 (ii) of the Act by insertion of clause (e) therein for the purposes of bringing within the tax net any compensation received, inter-alia. upon termination of a contract relating to an assessee's business. The Memorandum explaining such amendment clearly states that such compensations were out of the purview of taxation.

On a perusal of the above amendment and its memorandum, it is clear that compensation amounts received prior to assessment year 2019-20 on account of. inter-alia. termination of a contract relating to an assessee's business were not taxable. In other words, the said compensation received

by the assessee in the assessment year 2001-02 on account of pre-mature termination of the said agreements, which was in relation to its business of operating and managing luxury hotels, is not taxable.

13.1. The compensation received by the assessee was USD 312,621 as against a claim of USD 661.843, which is less than half the amount which was claimed. Therefore, it cannot be said that this amount was received in lieu of technical service fee which the assessee would get in future. It is only a lumpsum amount in the form of compensation given to the assessee by the United Nations Compensation Commission for loss of source of income due to pre-mature termination of the agreement. The nomenclature given to such compensation is not relevant for the purposes of determining the true quality and character of the compensation.

13.2. Respectfully reliance is further placed by the ld. AR on the following decisions:-

a. **Kettlewell Bullen and Co. Ltd. v. CIT, [1964] 53 ITR 261 (SC)**

"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.

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.
We accordingly record the answer on the question submitted by the Tribunal in the negative. The appellant would be entitled to its costs in this court."

b. Khanna and Annadhanam v.CIT. [2013] 30taxmann.com322(Delhi).

The relevant paragraphs are reproduced as below: -

***"8.** On behalf of the revenue our attention was drawn to another judgment of the Supreme Court in **CIT**v. Best & Co. (P) Ltd. [1966] 60 ITR 11. This judgment was rendered by the same bench which had earlier rendered the judgment in Kettlewell Bullen & Co. Ltd. (supra). The decision was however in favour of the revenue. The earlier judgment in Kettlewell Bullen & Co. Ltd. (supra) was referred to in the judgment but the Supreme Court observed that the application of the principle laid down in Kettlewell Bullen & Co. Ltd. (supra) must depend on the facts of each case. Their Lordships distinguished the facts and held that in the case of Best & Co. (supra) the assessee had innumerable agencies in different lines and it only gave up one of them and continued to do business without any apparent mishap and that the correspondence showed that the assessee gave up the agency without any protest "presumably because such termination of agencies was part of the normal course of its business". It was on account of this distinction that the ultimate decision went in favour of the revenue. The facts of the case before us, as noted earlier, are not in parimateria with those in Best & Co. (P) Ltd. (supra). In our view the facts are more akin to the case of Kettlewell Bullen & Co. Ltd. (supra) and, therefore, the ratio laid down in that case is more appropriate to be applied to the present case.*

***9.** In the result we answer the substantial question of law by holding that the amount of Rs. 1,15,70,000/- received by the assessee in terms of the release agreement dated 14.11.1996 represents a capital receipt, not assessable to income tax. The appeal of the assessee is allowed with no order as to costs."*

14. The following case laws, which have been relied upon by the revenue authoritiesand also the Coordinate bench, have no application on the facts of the present case for the reasons stated here under-

a. **CIT v. Siewart and Dholakia P. Ltd, [1974] 95 ITR 573 (Calcutta).** We respectfully observe as follows: -

> *The assessee acted as lea broker/agent for foreign buyers. On the recommendation of one such buyer, the assessee took an employee, who before the expiry of employment period, moved to another company. Subsequently, the buyer shifted his business with the assessee to that other company. A suit was filed by assessee against the employee and company and compensation was received, which was in satisfaction of its claim as well as costs incurred by it. It was held that the assessee did not hold any agency and compensation was not for termination of the agency. The buyer was one of the many customers of assessee in its ordinary course of business and the custom of the buyer, which was not for any fixed duration, was not a capital asset of the assessee. Loss of such custom did not impair the trading structure of the assessee. Therefore, the claim was for loss of service and loss of the customer and the compensation represented loss of income/profit and represented compensation for loss of its trade and not for loss of any capital asset and could not be treated as capital receipt.*

b. **Development of Industries (India)'(P.) Ltd. v. CIT, [1968] 68 ITR 310 (Calcutta).** We respectfully observe as follows: -

The assessee-company was given a compensation for loss of managing agency of the managed company which was taken over by the State Government. The Hon'ble Calcutta High Conn held that taking over of the electric supply business of the managed company by the State Government did not by itself, occasion termination of the managing agency. Even after the takeover, the managing agency of the assessee was continuing lor about two years and had to be terminated by a resolution which was made retrospective with effect from the date of the take-over. It was further held that as per section !0(5A) of the Income Tax Act. 1922. such compensation is deemed to be the profits and gains of business.

c. **Peirce Leslie & Co. Ltd. v. CIT. [I960] 38 ITR 356 (Madras)**

We respectfully observe as follows: -

The assessee, in the course of its varied business activities, took up managing agencies of plantation companies, One of such sixteen companies with whom the assessee had managing agencies sold its plantation and went into liquidation and the assessee received certain amount vide a resolution passed by the company. It was held by the Hon'ble Madras High Court that the assessee took up managing agencies along with secretary-ship to plantation companies and other trading rights as part of its normal trading activities. The assessee, amongst other things, dealt in export of lea produced in India and obtaining managing agencies and other rights from plantation companies facilitated the trade in tea. The managing agencies were

liable to termination in which event the assessee received compensation as per the agreement. The termination was brought about in the ordinary course of business and the money paid to the assessee should certainly be regarded as received in the ordinary course of business and was thus a trading receipt.

15. We respectfully relied on the orders of Hon'ble Apex court in **assessee's own case**(supra) and respectfully relied on**Kettlewell Bullen and Co. Ltd** (supra) and order of Hon'ble Delhi High Court in **Khanna and Annadhanam**(supra). The orders relied on by the revenue are respectfully distinguished the fact. In our opinion the pre-mature termination of the assessee's agreements due to Iraq's invasion of Kuwait and the subsequent sanctions on Iraq by the United Nations which resulted in the assessee receiving compensation from the United Nations Compensation Commission cannot be said to have occurred in the normal course of the assessee's business which is capital in nature. We setaside the appeal order. The compensation received on pre-mature termination of the said agreement be treated as capital receipt not liable to tax. The ground of the assessee in this issue is succeeded.

16. The facts of ITA No.1808/Kol/2006 filed by the revenue are identical to the facts narrated above. Therefore, the decision arrived at above shall apply mutatis mutandis to this appeal also. Both the parties have not agitated any other grounds. So, other grounds are not pressed.

17. The appeal of the assessee bearing **ITA No.489/Kol/2005** and **ITA No.1811/Kol/2006** are allowed and appeal of the revenue in **ITA No.1808/Kol/2006** is dismissed.

Order pronounced on 30.05.2024 in accordance with Rule 34(4) of the Income tax (Appellate Tribunal) Rules, 1963.

Sd/-	**Sd/-**
(RAJESH KUMAR)	**(ANIKESH BANERJEE)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Kolkata, Dt : 30th May, 2024
Pavanan

प्रतिलिपिअग्रेषितCopy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी /The Respondent.

3. आयकरआयुक्त CIT
4. विभागीयप्रतिनिधि ,आय.अपी.अधि ,.मुबंई/DR, ITAT, Kolkata
6. गार्डफाइल/Guard file.

BY ORDER,

//True Copy//

Asstt.Registrar / Senior Private Secretary
ITAT, Kolkata