IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'E': NEW DELHI

BEFORE SHRI S.RIFAUR RAHMAN, ACCOUNTANT MEMBER
and
SHRI VIMAL KUMAR, JUDICIAL MEMBER

ITA No.4519/DEL/2009
(Assessment Year: 2001-02)

M/s. Mawana Sugar Ltd., (formerly known as Siel Limited) 5th Floor, Kirti Mahal, 19, Rajendra Place, New Delhi – 110 008. **(PAN : AAACS4902Q)**	vs.	DCIT (LTU), New Delhi.

ITA No.3498/DEL/2013
(Assessment Year: 2001-02)

DCIT (LTU), New Delhi.	vs.	M/s. Mawana Sugar Ltd., 5th Floor, Kirti Mahal, 19, Rajendra Place, New Delhi. **(PAN : AAACS4902Q)**
(APPELLANT)		(RESPONDENT)

ASSESSEE BY : Shri Tarandeep Singh, Advocate
Shri Sandeep Yadav, Advocate
REVENUE BY : Shri Subhra Jyoti Chakraborty, CIT DR

Date of Hearing : 04.06.2024
Date of Order : 30.08.2024

ORDER

PER S.RIFAUR RAHMAN,AM:

The assessee has filed appeal against the order of the Learned Commissioner of Income Tax (Appeals)-XI, New Delhi ["Ld. CIT(A)", for short] dated 30.10.2009 for the Assessment Year 2001-02 by raising following grounds of appeal :-

"1. That on facts and in law the CIT(A) erred in upholding that the sum of Rs.11 crores (received by the assessee on account of sale of Trade Mark) was liable to tax.

1.1 That on facts the CIT(A) erred in observing that the consideration of Rs 11 crores was received by the assessee a account of a decline in the turnover of Vanaspati business.

2. That on facts and in law the CIT(A) erred in upholding the disallowance of Rs.9,16,000/- being the Provision made for Leave Encashment.

2.1 That on facts and in law the CIT(A) erred in relying upon the amendment made in section 43B(f) inserted by Finance Act 2001 w.e.f. 01st April 2002.

3. That on facts and in law the CIT(A) erred in not accepting the capital loss of Rs.1,16,17,56,990/- suffered on surrender of land to DDA in the year of account.

4. That on facts and in law the CIT(A) erred in not adjudicating upon ground no.8 taken before him in the Memorandum of Appeal.

4.1 That on facts and in law the AO erred in ado tin the figure of Taxable Capital Gains at Rs.6,98,80,603/- instead of Rs.6,90,79,603/-.

5. That on facts and in law to the extent the order of CIT(A) is prejudicial to the assessee it is bad in law and void ab-initio in whole and in part."

2. The Revenue has filed appeal against the order of the Learned Commissioner of Income Tax (Appeals)-LTU, New Delhi ["Ld. CIT(A)", for short] dated 18.03.2013 for the Assessment Year 2001-02.

3. Both the appeals are interconnected having common facts and Revenue had filed appeal against the deletion of penalty by the ld. CIT (A). Therefore, both the appeals are heard together and disposed off by this common order.

4. First we deal with various grounds raised by the assessee.

5. Brief facts of the case relating to ground no.1 raised by the assessee are, during the assessment proceedings, AO observed that a sum of Rs.11 crores

being non-compete fee paid by ITC Agro Tech Ltd. (in short 'ITC') on account of agreement entered with them not to compete directly or indirectly with ITC in Hydro Generated Vegetable Oil (Vanaspati) i.e. consumer pack market of 10 litres unit volume which lasts for a period of 60 months from the date of agreement, nor used the brand name "Rath" for any product category. This policy was also on account of sale of its trade-mark Rath. He observed that the assessee has considered as income and reflected in the profit & loss account as an "exceptional income" but was claimed non-taxable being a capital receipt while computing taxable income under Income-tax Act, 1961 (for short 'the Act'). The same was disclosed by the assessee on Note-4 to the Statement of Computation of Income with the explanation that in the computation of taxable income, the said amount being a capital receipt has not been considered as taxable income and relied on the decision of Hon'ble Supreme Court in the case of CIT v. B. C. Srinivasa Setty, 128 ITR 294. Similar note was also given at Schedule 12 to Notes of Accounts to the Balance Sheet. Before AO, assessee also submitted a note on non-taxability of Rs.11 crores received on sale of trademark along with copy of agreement with ITC vide letter dated 03.03.2004. The same is reproduced by the AO at page 20, 21 & 22 of his order. After considering the above submissions, the AO observed that it is an admitted fact that assessee was also deriving income from business of Vanaspati as a result of sale of trademark Rath, Vanaspati business did not stop. In fact from November

1996, the assessee was getting the Vanaspati manufactured from third parties and is still getting it manufactured. They did not get out of the business of manufacturing Vanaspati. He observed that assessee also stated in their submission that the sale of their product fell down after the transfer of the trademark and consideration of Rs.11 crores was received from the decline in the sale indicates that what was received is a consideration in lieu thereof. He further observed that the assessee was in the business of manufacturing and sale of Vanaspati still continued to do the business, consideration received with respect to the commodity is a trading receipt and hence taxable.

6. Further, the AO observed that the receipt on account of transfer of trademark was a capital receipt was also considered. As per the provisions of section 32, any intangible assets including trademark is entitled for depreciation. Further, under the provisions of section 50 of the Act, any receipt on account of depreciable assets is liable to short term capital gain tax. He observed that the contention of the assessee is no capital gain is chargeable since there was no cost of acquisition, cannot be accepted. He observed that the capital gain is chargeable even in a case where the cost of acquisition is nil. The decision relied upon by the assessee was in respect of transfer of goodwill, pertaining to which also the law stands amended. With the above observation, the AO added the consideration received by the assessee for transfer of trademark as taxable in the hands of the assessee.

7. Aggrieved with the above order, assessee preferred an appeal before the ld. CIT (A). The assessee filed detailed submissions before the ld. CIT (A). After considering the submissions of the assessee, ld. CIT (A) sustained the addition made by the AO.

8. Aggrieved, the assessee is in appeal before us.

9. At the time of hearing, ld. AR for the assessee brought to our notice findings of the AO at page 22 of the order and further he brought to our notice page 70 of the paper book which is the submissions made by the assessee before AO and he brought to our notice the details of agreements entered by the assessee with ITC, he brought to our notice preamble to the agreement. Finally, he brought to our notice the relevant clause, which says now, when the agreement of sale and purchase was entered into in May 2000, the status was that SIEL (erstwhile name of the assessee company) had stopped manufacturing vegetable oil (stopped in 1996). But since it had brand name "Rath", it was outsourcing the product from various manufacturers and selling it under that brand name. Although intellectual property assets in the agreement are featuring as conglomerate of various other assets, what was sought to be transferred and was actually transferred was only Rath trademark. Further, he also brought to our notice page 52 of the paper book which is the submissions made by the assessee before ld. CIT (A). He brought to our notice a rebuttal to the findings of the AO, which was submitted before the ld. CIT (A) that the

assessee did not go out of the Vanaspati business and was still getting it manufactured. In this regard, it was submitted that the manufacturing of Vanaspati was stopped on 30.11.1996 but as it had brand name Rath, it was outsourcing product from various manufacturers and selling it under a brand name. But when the agreement with the ITC was entered in May 2000 the outsourcing was stopped. He also brought to our notice various submissions made before ld. CIT (A). He also brought to our notice page 94 of the paper book which is deed of assignment as per which assessee has transferred the trademark Rath to ITC. He also brought to our notice the main agreement of sale and purchase agreement with SIEL and ITC Agro. He brought to our notice that SIEL is the owner of the intellectual property and it had agreed to sell and assign intellectual property assets along with the goodwill to ITC and he also brought to our notice various clauses of this agreement and relevant compensation for transfer of the trademark Rath. He also brought to our notice the relevant clause of non-compete. He also brought to our notice page 90 of the paper book in which ownership of the intellectual property was disclosed in the abovesaid agreement as per which a brand was owned exclusively by SIEL. With regard to turnover of Vanasapti, the Bench directed the ld. AR for the assessee to submit break-up of sales and service revenue of Vanaspati during the year and details of trademark owned by the assessee, in this regard ld. AR submitted as under :-

"(1) Break up of sales and service revenue of Rs 45,339 lakhs (Refer page 8 of PB) - Hon'ble Bench wanted to know the revenue figures from vanaspati business post agreement are dated 22-05-2000 (copy at pages 74 to 99 of PB). In this regard it is submitted that since this case pertains to FY 2000-01 which is more than 23 years old the 'A' is not having grouping details of financial statements for that period. Accounting software's I packages have also got changed several times in this period. Hence, it will be difficult to answer the query raised by Hon'ble bench directly. However, from facts on record it is submitted as under:

(a) Prior to agreement for sale of tradename "Rath" to ITC vide agreement dated 'A' 22-05-2000, 'A' was engaged in business of sale of vanaspati business under tradename "Rath" and "Pang hat" . "Rath" was sold in consumer packs of less than 10 Litre, whereas "Panghat" was sold in bulk packs of more than 10 litre ..... Refer page 22, para 14 of AO order

(b) Post sale of tradename "Rath" no sale of vanaspati in consumer packs of less than 10kg was made by the 'A'. It was therefore unable to carry out its business of sale of "Rath" post sale of tradename. This fact is substantiated by the non-compete covenant of agreement dated 22-05-2000 (refer page 86 of PB, clause 26). Non-compete clause restricts 'A' to "directly or indirectly compete with ITC AT in the Hydrogenated Vegetable Oil (Vanaspati) consumer pack market i.e a packs of 10 liters unit volume or less for a period of. 60 months".

(c) During assessment vide letter dated 08-03-2004 (copy enclosed at pages 100 to 103 of PB - relevant at page 101, para 3), it was submitted by the 'A' that post agreement dated 22-05-2000, although, it continued to sell vanaspati under the trademark "Pangath" however the sale under the Trademark "Rath" got adversely affected. Comparative sales figures were also submitted as under:

FY	"Rath" - Sales	"Pangath"-Sales	Total
1999-00	114.42 cr	30.02cr	144.44cr
2000-01	10.77 cr	20.85cr	31.62cr

(d) Owing to non-compete clause 'A' could not sell 'Hath". However, there is no change in level of business for sale of "Pang hat". Therefore, the case made out by AO when he notes at page 22, 2nd last para of his order that "consideration of Rs 11 crore was received for decline in the sale indicates that what was received is a consideration in lieu thereof' is factually incorrect.

(e) We reiterate that Rs 11 crores is a consideration for transfer of tradename "Rath" which is a Capital Asset as per provisions of section 2(14) of the Income Tax Act. Without Prejudice, even if it is construed that sum of Rs 11 crore (or part thereof) was received on account of non-compete covenant under the agreement then too it is capital receipt not liable to tax. Apex Court in case of Gufic Chem (P) Ltd 332 ITR 602(SC) has held that

where compensation is received for loss of agency then it is taxable as revenue received, however, receipts attributable to negative covenants for not to carry on a business is capital receipt not liable to tax. In Rohit Chand reported in 306 ITR 242(Oel) it is held that receipt of non-compete fee may not alter the structure of assesse's activity" ... but it certainly impairs the carrying on of his activity. To that extent it is a loss of a source of income .... " Kindly also refer ITAT order dated 31-01-2024 in case of 'A' for AY 1997-98 in ITA No. 2659/Del/2004 - relevant at paras 13 to 18.

(2) What are the Trademarks of 122.40 lakh at page 17 of PB ? - It is submitted that these are other trademarks owned by the 'A' other than "Rath" which as on 31-03-2000 "were yet to be registered in name of the company" - refer note 5 at page 17. This is an asset by the tradename "Carnal a" acquired by the '{:\ in the year 1996-97. "Rath" being a self-generated tradename was never recognized as an assets by the 'A' in its books of accounts. That is precisely why, the entire receipt of Rs 11 crores has been credited to P&L account as extraordinary income (refer page 8 of PB - P&L account and page 34, para 13 - notes to accounts). It is also clarified that in the Fixed Asset Schedule for Income Tax Purposes, there is no "trademark" shown as asset. Refer Annexures to tax audit report for the year under consideration enclosed herewith as Appendix A.

(3) Whether Trademark "Rath" was registered in name of 'A' ? - Answer is Yes, it got registered vide registration no. 428273 in year 1984. As is apparent from facts on record trademark "Rath" was sold by the 'A' to ITC Agro-Tech Limited. Thereafter, ITC Agro-Tech Limited name changed to M/s Agro Tech Foods Limited. M/s Agro Tech Foods Limited further sold this tradename to M/s Cargill India Private Limited in year 2011. A copy of letter of M/s Anand & Anand, Advocates of M/s Cargill India Private Limited retrieved from the trademark portal (which is self-explanatory) is attached herewith for your kind consideration as Appendix B.

It is further submitted that provisions of sections 50 and 32 of the Act are not applicable as the tradename "Rath" was self-generated and hence not a depreciable asset.

AO has also tried to equate "trademark" with "goodwill". While doing so he has not appreciated that that there is a clear difference between "goodwill" and "tradename". In this regard kind reference is invited as under:

(i) 'trademark' was included in section 55(2)(a) by Finance Act 2001 w.e.f., 01.04.2002 i.e., from AY 2002-03 onwards.

(ii) Also refer CBOT Circular No.14 of 2001 reported in 252 ITR 65 (St) @ 96 reproduced @ page 54 of PB. It is accepted by Board that "certain self-generated intangible assets like brand name or trademark may not be considered to form part of the goodwill of a business .... "

(iii) In the case of Modern Home Care Products reported in 174 ITO 209 (Del) at paras 32 and 33 it is held by Hon'ble ITAT that goodwill and trademark are distinct.

(iv) Further again in case of Kwality Biscuits (P) Ltd reported in 135 ITO 35 (Bang) (TM) at para para 12 (vii) and 12(viii) the Hon'ble Third Member has held that "tradename" is different from "goodwill"

It is now well settled law that prior to A Y 2002-03 consideration received for sale of "trade name" is not taxable. Refer:

(a) Modern Home Care Products (supra) /
(b) Kwality Biscuits (P) Ltd (supra) @ paras 11 and 13 {amendment made in section 55(2)(a) is not retrospective}
(c) Institute of Micronutrient Technology reported in 43 taxmann.com 426(Pune) @ para 12"

10. On the other hand, ld. DR for the Revenue supported the findings of the lower authorities and submitted that business of manufacturing and selling of Vanaspati was not stopped by the assessee. Since the assessee has continued to sell the Vanaspati it is their revenue receipt for the business and he submitted that in the similar issue under consideration, ITAT, Ahmedabad Bench in the case of ACIT vs. India Gelatine & Chemicals Ltd. (2011) 12 taxmann.com 475 (Ahmedabad-ITAT) held that whether to become a revenue or capital receipt, the distinction is whether the assessee's source of income continues to survive or comes to an end. The relevant compensation is held to be chargeable to tax.

11. Considered the rival submissions and material placed on record. We observed that assessee has transferred and assigned the brand name Rath (unit of 10 litres to ITC with the agreement that it transferred its own intellectual property assets relating to the brand Rath along with commitment not to engage in manufacture or sale of Vanaspati using the brand Rath and also with non-

compete clause not to deal with the manufacturing or sale of Vanaspati for a period of 60 months. In return, assessee has received Rs.11 crores as compensation. The assessee submitted before lower authorities as well as before us that the trademark Rathi owned by the assessee is self-generated intangible assets without there being cost incurred by the assessee. Since the trademark is self- generated trademark without incurring any cost, it is a capital receipt not taxable under the Act by relying on the decision of Hon'ble Supreme Court in the case of B.C. Srinivasa Setty (supra).

12. After considering the submissions of the assessee and relevant facts on record, we observed that no doubt, assessee has stopped manufacturing of Vanaspati using trade name Rath till they transferred the trade name to ITC. It is also fact on record that assessee has registered the trade name Rath and it is used by the assessee as intellectual property and selling the Vanaspati in the market. The assessee submitted before us that it is a self-generated trademark without incurring any cost. We fail to understand that the trade name when registered, it has to incur certain expenditure on registration of the trademark and operating the trademark within the company. The assessee also in its submission to the query raised by the Bench it has confirmed that the assessee got it registered the trade name vide Registration No.428273 in the year 1984. It clearly shows that assessee registered the above trademark and incurred certain expenditure which was claimed by the assessee as revenue expenditure.

The assessee has manufactured and sold Vanaspati using the trade name till it transferred the same to ITC in May 2000. When the cost of getting the trade name registered as claimed as revenue expenditure and not capitalized the same, then it has claimed 100% of cost as expenditure is nothing but claim of 100% depreciation then and there, therefore, as per the facts on record, trade name was the asset of the company without being capitalized in the balance sheet and relevant expenditures were already written off by the assessee in the regular course of business. We are not in a position to agree with the assessee that the assessee has not incurred any cost on registration of the trade name "Rath". No doubt, its value has increased over the years, which is closely linked to the turnover of the assessee company over the period. Therefore, it cannot be claimed that no expenditure incurred to register the brand and it is factual matter that the goodwill and trademark are two different concepts. Before us, it was claimed that it is a self-generated non-depreciable asset, the assessee has relied on the decision of B.C. Srinivasa Setty (supra). However, facts on record are distinguishable to the facts of the above case.

13. As discussed in the above paragraph, assessee has already claimed the cost of registration of trademark and other relevant costs during the course of business. It can be termed as a capital asset and as far as the trademark as a capital asset, the assessee also made a submission before the AO agreeing that it is a capital asset as defined under section 2(14) of the Act. Since it is the capital

asset, the transfer of such capital asset will come under the head capital gains. Since the cost of registration of the trademark is already claimed as an expenditure it can only be a short term capital asset chargeable to tax as short term capital gain. Therefore, the present transaction of transfer of trademark to ITC is a capital asset chargeable to tax under the head capital gain. The Revenue authorities treated the same as business receipt by linking above transaction with non-compete clause mentioned in the agreement. In our considered view, any transaction with intellectual property like trademark, the non-compete clause is automatic and part of the any agreement entered with parties. Therefore, what is relevant is transfer of intellectual assets not consequential clause mentioned in the agreement. Therefore, present transfer is chargeable to tax under the head capital gains. In the result, ground raised by the assessee is dismissed.

14. With regard to ground no.2, the AO observed during assessment proceedings that provisions for employees leave encashment which was increased from Rs.49.25 lakhs to Rs.58.41 lakhs was not added back in the computation of income. AO disallowed the difference of above provision of Rs.9.16 lakhs and added back to the income of the assessee.

15. When the same was agitated before ld. CIT (A), ld. CIT (A) dismissed the same with the observation that certificate of actuary account cannot supersede the provisions of the law and accordingly he sustained the action of the AO.

16. Aggrieved assessee is in appeal before us.

17. At the time of hearing, ld. AR for the assessee brought to our notice findings of the AO & ld. CIT (A) and submitted that the issue under consideration is squarely covered by the decision of Hon'ble Supreme Court in the case of Bharat Earthmovers Ltd. vs. CIT 245 ITR 428 (SC).

18. On the other hand, ld. DR for the Revenue relied on the orders of the lower authorities.

19. Considered the rival submissions and material placed on record. We observed that the issue under consideration is squarely covered by the decision of Hon'ble Supreme Court in the case of Bharat Earthmovers Ltd. (supra) and Hon'ble Supreme Court held as under :-

> "4. The law is settled: if a business liability has definitely arisen in the accounting year, the deduction should be allowed although the liability may have to be quantified and discharged at a future date. What should be certain is the incurring of the liability. It should also be capable of being estimated with reasonable certainty though the actual quantification may not be possible. If these requirements are satisfied the liability is not a contingent one. The liability is in *praesenti* though it will be discharged at a future date. It does not make any difference if the future date on which the liability shall have to be discharged is not certain."

20. Respectfully following the above decision, ground raised by the assessee is allowed.

21. With regard to ground no.3, the relevant facts are, the assessee has surrendered the land as per the decision of Hon'ble Supreme Court to DDA of Rs.116,17,56,990/- and the same was claimed by the assessee as capital loss. However, the AO has disallowed the abovesaid claim. The issue under

consideration is that the assessee has surrendered the land based on the order of Hon'ble Supreme Court and, same was elaborately discussed at page 8 of the assessment order and the DDA has actually acquired the possession in AY 2004-05 vide letter dated 23.10.2003. Assessee has claimed the identical amount in AY 2004-05 only the actual possession was taken over by the DDA. Since the assessee has claimed loss in AY 2004-05 the AO has disallowed the similar claim made by the assessee in the current assessment year i.e. 2001-02.

22. Aggrieved assessee preferred an appeal before the ld. CIT (A). Ld. CIT(A) dismissed the ground raised by the assessee with the observation that the claim of the assessee is not related to the year under consideration, therefore, he sustained the findings of the AO.

23. Aggrieved the assessee is in appeal before us.

24. At the time of hearing, ld. AR for the assessee submitted that the submissions made by the assessee as additional ground while preferring the appeal in the relevant AY 2004-05. For the sake of brevity, the same is reproduced below :-

> "In this regard it is submitted that pursuant to a Scheme of Arrangement approved by the Hon'ble High Court of Delhi vide order dated 16.04.1990, DCM Ltd. was recognized whereby different units of DCM together with their assets and liabilities were allocated to separate companies. In accordance with the said scheme a unit named SIEL Foods and Fertilizers Industries Delhi was vested with 'A'. The total land area occupied by this unit was 71.466 acres. A Writ Petition (Civil) No.4677 of 1985 was filed by Shri M. C. Mehta, wherein it was sought that hazardous / noxious/heavy and large industries should shift out of Delhi. The petition was heard by the apex court and the Hon'ble Court ordered that after leaving the part of the land with the owner for developing the same in accordance with the permissible land-use under the Master Plan, the remaining land should be

surrendered to the Delhi Development Authority (DDA) for developing the same to meet the community needs. The final order was to the effect that the land which would become available on account of shifting / relocation of hazardous/ noxious / heavy and large industries from the city of Delhi shall be used in the following manner. The order applicable to the assessee was as under :-

i. Percentage to be surrendered and dedicated to the DDA for development of green belts and other space 68%.

ii. Percentage to be developed by the owner for his own benefit in accordance with the user permitted under the master plan 32%.

By a subsequent order passed on 8-7-96 {fact relevant to AY 1997 -98} - reported in (1996) 4 see 750, the Hon'ble Supreme Court directed that 168 industries listed in the order (which included the SFFI unit of the 'A') shall stop functioning and operating in the city of Delhi w.e.f., 30-11-1996. It was also directed that the closure order w.e.f., 30-11-1996 shall be unconditional and that even if the relocation of industries is not complete they shall stop functioning in Delhi w.e.f., November 30. 1996.

Later an application (IA No.129) was filed by Mr. M. C. Mehta and the main prayer of the petitioner was that the order of the Hon'ble Supreme Court dated 10th May, 1996 should be ordered to be implemented. The grievance of the petitioner was that though the industries have been closed, a large number of them had not surrendered the excess land to the DDA. After hearing the parties, the Hon'ble Court vide order dated 28-4-2000 {fact relevant to AY 2001-02} - reported in (2009) 17 see 541, directed that within one month all the industries which were required to surrender the land in terms of the Court's order dated 10th May, 1996 should voluntarily surrender the same to the Delhi Development Authority and if that was not done, DDA will be duty bound to file applications for execution of Court's order before the District Judge, Delhi. The District Judge, Delhi shall thereupon execute this Court's order dated 10th May, 1996 and report compliance within four weeks of the filing of the execution application(s). The execution application(s) were required to be filed by the DDA not later than eight weeks from 28-4-2000.

In pursuance of the order dated 28.4.2000, the 'A' surrendered 68% of the land to the Commissioner (Land Management) Delhi Development Authority, New Delhi vide letter dated 25th May, 2000 {fact relevant to AY 2001-02}.

Meanwhile on 23-10-2003 {fact relevant to AY 2004-05} vide letter No. F2(26)/02/NL/WZ/PT DDA took physical possession of the land. The said surrender was also discussed in the order dated 15-05-2004 passed by the district Judge, Delhi wherein the fact am of surrender of land and actual physical possession by DDA was accepted.

It is submitted that 'A' has claimed that considering the above facts "Capital Loss" be allowed and it has raised claims in this regard as under:

- Additional Ground NO.8 before Hon'ble ITAT in A Y 1997-98
- Claim in ROI in AY 2001-02 .... ITA No. 4519/0el/2009
- Claim in revised ROI in AY 2004-05 "".ITA No. 1244/0el/2014

It is submitted that both the lower authorities have not allowed the claim for "Capital Loss" in any of the above years. They has purposely not granted the due relief and have adjudicated as under:

(i) A Y 2001-02 - In quantum proceedings AO concludes that "this is not a complete surrender what surrender is conditional and hence the surrender has not taken place that is only the process is going on." {refer page 18 of AO in ITA 4519/0eI/2009}. However then at page 19 of his order for AY 01-02 in ITA No. 4519/del/2009 the AO holds as under:

> "In this case, the industry was closed in November, 1996 and the surrender was, therefore, operative from the date. The capital loss, if there is any, did not belong to the year in question i.e., relevant to A Y 2001-02. The order of the Supreme Court dated 28th April, 2000 did not deal with the surrender of the land or assessee's rights therein. It only deals with the execution of the Supreme Court order dated 10th May, 1996. It appears that the only contention raised on behalf of the assessee was about the compensation. The Hon'ble Supreme Court observed that the contention about the compensation was not raised either because "Perhaps they were happy to have an increase FAR which would have enabled them to construct more and would have offset and loss of land without payment of money". The contention of the assessee, therefore, that the surrender was without consideration, is not relevant in view of the , above observation of the Supreme Court. The loss, if there is any, on account of surrender is offset by the use of the land which remains in the possession of the assessee. The following observation of the Supreme Court is relevant:
>
> > " In view of the huge increase of price of land in Delhi, the reuse of the vacant land is bound to bring lots of money which can meet the cost of reallocation. "
>
> In view of this, therefore, assessee's claim is not permissible first on account of the fact that the loss if any did not relate to the assessment year in question as the Supreme Court has already passed the order in 1996, secondly, the consideration is received in terms of the reuse of the land to enable the assessee to construct for FAR."

CIT(A) in quantum proceedings (refer page 6, para 2.12 of CIT(A) in ITA 45191De1l2009} holds as under:

> "The AO has made a detailed discussion on this issue in his assessment order dated 31/03/04. It is a fact that the appellant had made double claim of the identical amount once in assessment year 01-02 i.e., year under appeal and again on A Y 04-05. It is not clear as to whether an appellant

> can make a claim of the same amount for two different years. It was stated before me that in the A Y 04-05 the claim was qualified with a note. Nevertheless, the appellant has lodged an identical claim, on its own admission on two occasions for two assessment years which is beyond the provisions of the law. Such claim, admittedly is not related to the year under review furthermore the AO has not noted that the consideration was received in terms of the reuse of the land to enable the assessee to construct for FAR. I find no reason to interfere with the order of the AO and accordingly the ground of the appellant is dismissed."

(ii) AY 2004-05 - At page 7, para 6.3 of AO order in ITA No. 1244/Del/2014 it is held by AO that 'The asseesse's submissions have been considered. The claim was made in the AY 2001-02 and the same was disallowed for the reasons stated therein. The Ld CIT(A) confirmed the disallowance. The assessee has further filed an appeal in the Hon 'ble ITA T on this issue. The matter being sub-judice the loss claimed cannot be allowed and shall be considered only after disposal of assesses appeal by Hon'ble ITA T, if found necessary."

However, thereafter CIT(A) (at page 10 and 11) in quantum proceedings in ITA No. 1244/0el/2014 holds as under:

> "Since the condition precedent for the surrender as directed by the Hon'ble Supreme Court, once the appellant had extinguished all its rights in the said land, so far as the appellant is concerned, the asset may be considered to have been irrevocably transferred to DDA in the F. Y.2000-01. Since the said transfer was in view of the clear cut directions of the highest Court of the land, there was no basis to not treat the transfer as a valid one in the absence of a written agreement in this regard. In that case, the Ld. CIT(A), while deciding the appeal on this issue for A. Y.2001-02 had disallowed the claim of loss in that year. However, the appellant's second appeal is pending before the ITA T. However, I had the occasion to deal with the issue at the time of deciding the issue of penalty under Section 271(1)(c) in A. Y.2001-02. In my order dated 18.03.2013, I had cancelled the order of levy of penalty both on the legality of the issue and on the facts of the case. In my considered view, I had held that since the appellant had unconditionally ejected itself permanently which was the only condition precedent in the surrender in terms of the order of the Supreme Court and had conveyed to the DDA within one month of the Supreme Court's order for taking possession of the said land, keeping in view the binding nature of the Hon'ble Supreme Court's order, the appellant had transferred the rights in the land to the DDA on 25.05.2000, relating to A. Y.2001-02. In view of the above, I hold that the appellant could not have claimed the loss on the same transfer of land in the current A. Y. as well. Accordingly, the Long Term Capital Loss of land transferred to DDA is held to be not allowable in the current year as the transfer of land had taken place in F. Y. 2000-01 and not in the Financial Year 2003-04 relating to the current Assessment Year."

25. Further, ld. AR for the assessee submitted that the coordinate Bench had not allowed the claim of the assessee in AY 2004-05. He filed the copy of order of ITAT in ITA No.1244/Del/2014 before us.

26. On the other hand, ld. DR relied on the orders of the authorities below.

27. Considered the rival submissions and material placed on record. We observed that assessee has made similar claim in AY 2004-05. However, vide ITA No.1244/Del/2014, the coordinate Bench decided the issue against the assessee with the submission made by the assessee that the assessee has claimed the loss by way of revised return only and it was stated that this loss of surrender of land to DDA was claimed in AY 2001-02 wherein the claim has been disallowed and without prejudice to the claim in AY 2001-02, the claim is made in AY 2004-05 as an abundant precaution. Based on the above declaration, the claim of the assessee in AY 2004-05 is dismissed. Considering the above facts on record, we are inclined to allow the ground raised by the assessee that assessee has incurred the abovesaid loss and it is allowed to claim the same in the year of claim. Accordingly, we direct the AO to allow the claim in the current AY 2001-02.

28. With regard to ground no.4, at the time of hearing, it was submitted that the AO wrongly adopted the figure of taxable capital gains at Rs.6,98,80,603/- instead of Rs.6,90,79,603/- since it is a typographical error, the issue under consideration is remitted back to AO to verify the same and do the needful as

per law. Accordingly, ground no.4 raised by the assessee is allowed for statistical purposes.

29. With regard to Departmental appeal, the brief facts of the case are, in the penalty proceedings, AO observed that in assessment order passed under section 143(3) of the Act, additions were made in the following issues :-

(i) Trade mark fees received of Rs.11,00,00,000/- was treated as capital receipt by the assessee whereas in the assessment order it was treated as revenue receipt.

(ii) Provision for employee leave encashment of Rs.9,16,000/- was disallowed.

(iii) Claim of capital loss of Rs.1,16,17,56,990/- was disallowed.

30. Since the assessee has claimed transfer of trademark and treated the same as capital receipt not chargeable to tax, claim of provision for employee leave encashment and claim of capital loss of transfer of land to DDA,he held that the assessee has made unsubstantiated claim which is a false claim within the meaning of section 271(1)(c) of the Act and it amounts to concealment, penalty is levied 100% of the tax sought to be evaded to the extent of Rs.50,33,42,168/-.

31. Aggrieved with the above order, assessee filed an appeal before the ld. CIT (A). Ld. CIT (A) considered the detailed submission of the assessee and decided the issue in favour of the assessee by deleting the penalty levied.

32. Aggrieved, Revenue is in appeal before us by raising following ground of appeal :-

"On the facts and the circumstances of the case and in law, the Ld. CIT (Appeals) has erred in cancelling the order of penalty u/s 271(1)© of the I.T. Act."

33. At the time of hearing, ld. DR for the Revenue brought to our notice relevant facts on record and submitted that the issue under consideration is already in appeal before the Bench and the issue under consideration is already dismissed by the ld. CIT (A) in quantum appeal, therefore, he relied on the penalty imposed by the AO.

34. On the other hand, ld. AR for the assessee brought to our notice findings of the ld. CIT (A) and relied on the order of ld. CIT (A).

35. Considered the rival submissions and material placed on record. We observed that the assessee has claimed receipt from transfer of trademark as capital receipt not chargeable to tax, claimed provision for employee leave encashment based on the actual report and claimed capital loss of transfer of land to DDA. No doubt, the above claim of the assessee is debatable, however these claims were rejected by the AO and does not attract penalties automatically. After carefully considering the findings of the ld. CIT (A) vide paras 6 to 6.3 at pages 28 to 33 of his order, for the sake of brevity, we reproduce the same as under :-

> "6. I have carefully considered the facts of the case in the light of the detailed submissions made by the Appellant, impugned order of penalty, the relevant assessment order u/s 143(3) and the Appellate order thereon and the applicable law in the matter. In view of the same, my decision on various grounds of appeal is as under:
>
> 6.2 The Ground No.1 and 2 of the Appeal, which both effectively address to the fact that despite the additions made in the assessment order, the Appellant was assessed at loss in the regular scheme of computation and the tax liability was

computed under MAT provisions u/s 115 JB, which did not change even after the additions made to the returned income under the regular scheme of computation.

The Hon'ble Jurisdictional High Court in the case of CIT v. Nalwa Sons Investments Ltd. [2010] 327 ITR 543 (Delhi) has held that where tax is levied under section 115JB on book profits, there could be no concealment inferable with reference to the additions in computation of regular income. Such computation of statutory income is made only for comparison of tax on such income with tax on book profits. In coming to the conclusion, the High Court referred to the decision of the Supreme Court in CIT v. Gold Coin Health Food ltd. [2008] 304 ITR 308, which was relied upon by the Revenue, pointing out that it was a case of over-statement of loss specifically deemed as concealment under Explanation 4 to section 271(l)(c) and found that this decision had no application to the assessee's facts. The Hon'ble high Court while deciding the case had observed as under:

> "The question, however, in the present case, would be, as to whether furnishing of such wrong particulars had any effect on the amount of tax sought to be evaded. Under the scheme of the Act, the total income of the assessee is first computed under the normal provisions of the Act and tax payable on such total income is compared with the prescribed percentage of the "book profits" computed under section 115J8 of the Act. The higher of the two amounts is regarded as total income and tax is payable with reference to such total income. If the tax payable under the normal provisions is higher, such amount is the total income of the assessee, otherwise, "book profits" are deemed as the total income of the appellant in terms of section 115J8 of the Act.
>
> In the present case, the income computed as per the normal procedure was less than the income determined by the legal fiction, namely, "book profits" under section 115J8 of the Act. On the basis of normal provision, the income was assessed in the negative, i.e., at a loss of Rs. 36,95,21,018. On the other hand, assessment under section 115J8 of the Act resulted in calculation of profits at Rs. 4,01,63,180. In view thereof, in conclusion, the assessment order records as follows: "Assessed at Rs. 4,01,63,180 under section 115J8, being higher of two. Interest under sections 2348 and 234C has been charged as per the provisions of the Income-tax Act, 1961. Penalty proceedings under section 271(l)(c) of the Income-tax Act, 1961 have been initiated. Issue necessary forms. " The income of the assessee was thus assessed under section 115J8 and not under the normal provisions. It is in this context that we have to see and examine the application of Explanation 4. The judgment in the case of Gold Coin [2008] 304 ITR 308, obviously, does not deal with such a situation. What is held by the Supreme Court in that case is that even if in the income-tax return filed by the assessee losses are shown, penalty can still be imposed in a case where on setting off the concealed income against any loss incurred by the assessee under other heads of income or brought forward from earlier years, the total income is reduced to a figure lower than the

> concealed income or even a minus figure. The court was of the opinion that "the tax sought to be evaded" will mean the tax chargeable on the concealed income as if it were the total income. Once, we apply this rotionale to Explanation 4 given by the Supreme Court, in the present case, it will be difficult to sustain the penalty proceedings. Reason is simple. No doubt, there was concealment but that had its repercussions only when the assessment was done under the normal procedure. The assessment as per the normal procedure was, however, not acted upon. On the contrary, it is the deemed income assessed under section 115)8 of the Act which has become the basis of assessment as it was higher of the two. Tax is thus paid on the income assessed under section 115)8 of the Act. Hence, when the computation was made under section 115)8 of the Act, the aforesaid concealment had no role to play and was totally irrelevant. Therefore, the concealment did not lead to tax evasion at all."

This decision was later also followed by the Hon'ble Delhi High Court in the case of CIT vs. Central Warehousing Corporation ltd. (ITA No.999/2011 and 1091/2011) dated 18.4.2012.

Keeping in view the above, since the facts of the case of the Appellant are similar, penalty u/s 271(1)(c) cannot be levied in respect of additions made under the regular scheme of computation, while the income of the appellant was chargeable to tax u/s 115 JB and the additions made by the Appellant did not have any effect on the book profits, which is the basis for Section 115 JB, hence for the purpose of penalty the 'tax sought to be evaded' cannot be calculated.

In view of the same, since the Appellant's case is duly covered by the decision of the Jurisdictional High Court in the case of (IT v. Nalwa Sons Investments Ltd. (Supra), no penalty could be levied u/s 271(1)(c) on these grounds.

6.3 Without prejudice to the above, the penalty levied on the three claims which were denied by the Ld. AO (and upheld by the CIT (Appeal)) also cannot be sustained on the merit of the case. The Ld. AO could not substantiate the nature of default in respect of the above claims as to whether there was concealment or filing of inaccurate particulars of income. In respect of claim for sale of trade mark for a consideration of Rs. 11 crores the company had specifically made disclosure in the Accounts as well as in the return of income. The AO had made the disallowance in the order making certain wrong observations. Since full facts were duly explained, and keeping in view the decision (IT v. B.C. Srinivasa Setty, 128 ITR 294 (SC) the claim could not have been disallowed being a receipt on transfer of a capital asset, being the non-compete fee which was specifically brought to taxation by the Finance Act 2002 prospectively w.e.f 1.4.2003 whereby clause (va) to Section 28 was inserted penalty u/s 271(1)(c) could not have been levied on this ground. Undisputedly, it was a debatable issue and hence did not call for levy of penalty. Further, regarding the second ground of addition relating to claim of loss on transfer of land to DDA also, full disclosure in the return of income was made. The

Appellant company was asked to surrender 68% of its land pertaining to SFFI premise to DDA by the Hon'ble Supreme Court vide their order in 1996. The Appellant and other affected parties had filed petitions in this regard and hence such land was not transferred to the DDA. However, subsequently, when taken up before it, the Supreme Court issued firm and clear direction vide its order dated 9.5.2000 and directed that the land be transferred to DDA within one month. The Appellant in compliance with the same had made the proposal to DDA vide letter dated 25.5.2000 in this regard. It is evident that both parties, i.e. DDA and the Appellant were bound by the directions of the Hon'ble Apex court of which the first and foremost step required the Appellant to surrender the land within one month of the order dated 9.5.2000. In pursuance of this order, the Appellant had done its bid by conveying to the DDA in writing to take over the land. Since the Appellant had unconditionally ejected itself permanently and that was the only condition precedent for the surrender as directed by the Hon'ble Supreme Court, once the Appellant had extinguished all its rights in the said land, so far as the Appellant is concerned, the asset may be considered to have been irrevocably transferred to DDA. Since the said transfer was in view of the clear cut directions of the highest court of the land, to assume that there was no transfer due to the fact that there was no written agreement in this regard is frivolous. I find that the Assessing Officer had taken a view that loss is not allowable in this year but may be allowable in A.Y. 2004-05. Accordingly, based on this, the Appellant also disclosed the loss in respect of this land in its return for A.Y. 2004-05 however, later while passing the assessment order for the A.Y. 2004-05, the AO has again denied it. Thus, it is evident that even AO himself is not certain about the accuracy of facts in the matter. In view of this, since accuracy of particulars is yet to be determined, penalty on the grounds of furnishing of inaccurate particulars could not have been levied. The fact of the matter is that the Appellant did not get any benefit in disclosing the loss in the current year and it was informed that its claim in A.Y. 2004-05 on this issue would have been even more beneficial to the Appellant and therefore, it cannot be said that claim was made in A.Y. 2001-(92 with any malafide intention keeping in view the decision in the case of CIT v. Reliance Petroproducts Pvt. ltd r 322 ITR 158 (SC)) and CIT v. Brahmaputra Consortium ltd., ITA No. 1582/2011. Regarding the third issue in respect of the claim in respect of provision for leave encashment, prior to amendment in Section 438 the same was duly allowable in the year under appeal as per the law applicable to the year since the provision was made on actuarial basis. Necessary disclosure in respect of accounting policy was there in Final Accounts. The Appellant's case is squarely covered in the decision of the Hon'ble Supreme Court in the cases of Bharat Earth Movers v. CIT 245 ITR 428 (SC) and CIT Vs. Shyam Tex International limited, 148-DTR [Del.] 19. Keeping in view the above, even on merit of the additions sustained by the CIT (Appeal), there was no case for levy of penalty u/s 271(1)(c).”

36. After considering the detailed findings of the ld. CIT (A), we do not see any reason to disturb the findings of the ld.CIT (A). Accordingly, the appeal of the Revenue is dismissed.

37. In the result, the appeal filed by the assessee being ITA No.4519/Del/2009 is partly allowed as mentioned above and the appeal filed by the Revenue being ITA No.3498/Del/2023 is dismissed.

Order pronounced in the open court on this 30th day of August, 2024.

Sd/-	**sd/-**
(VIMAL KUMAR)	**(S.RIFAUR RAHMAN)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 30.08.2024
TS

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)-XI, New Delhi..
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI