आयकर अपीलीय अधिकरण, 'डी' न्यायपीठ, चेन्नई। **IN THE INCOME TAX APPELLATE TRIBUNAL** **'D' BENCH: CHENNAI** **श्री एबी टी. वर्की, न्यायिक सदस्य एवं** श्री जगदीश, लेखा सदस्य **के समक्ष** **BEFORE SHRI ABY T. VARKEY, JUDICIAL MEMBER AND** **SHRI JAGADISH, ACCOUNTANT MEMBER**		
आयकर अपील सं./**ITA No.870/Chny/2017** निर्धारणवर्ष**/Assessment Year: 2012-13** **&** आयकर अपील सं./**ITA Nos.338 & 339/Chny/2020** निर्धारणवर्ष**/Assessment Years: 2013-14 & 2014-15**		
M/s.Mahindra Residential-Developers Ltd., Administrative Block, Mahindra World City, Natham Sub-Post Office-603 004. Chengalpattu.	**v.**	The ITO, Corporate Ward-4(1), Chennai.
[**PAN: AAFCM 4258 E**]		
(अपीलार्थी**/Appellant)**		**(**प्रत्यर्थी**/Respondent)**
अपीलार्थी की ओर से/ Appellant by	:	Mr.Raghavan-Ramabadram, Adv. Ms. Bharathi Krishnaprasad, CA
प्रत्यर्थी की ओर से /Respondent by	:	Shri A. Sasikumar, CIT
सुनवाईकीतारीख/Date of Hearing	:	24.06.2024
घोषणाकीतारीख /Date of Pronouncement	:	06.09.2024

आदेश **/ O R D E R**

PER ABY T. VARKEY, JM:

These appeals have been preferred by the assessee against the orders dated 10.12.2017 & 31.12.2019 passed by the Ld. Commissioner of Income Tax (Appeals) (hereinafter 'Ld.CIT(A)') in relation to the

assessment orders passed by the AO u/s 143(3) of the Income Tax Act, 1961 (hereinafter 'the Act') for AYs 2012-13, 2013-14 & 2014-15.

2. It is noted that, in all these appeals, the common grievance of the assessee relates to the Ld. CIT(A)'s action of denying the benefit of deduction claimed u/s 80-IAB of the Act. Both the parties agreed that the facts involved in all these years are identical and therefore AY 2012-13 was agreed to be taken to be the lead assessment year whose result shall *mutatis mutandis* apply to AYs 2013-14 & 2014-15 as well.

3. Briefly the facts as noted are that, the assessee (M/s. MRDL) is a company approved as a Co-Developer for sector-specific SEZ in the Mahindra World City Developers SEZ at Chennai. For AY 2012-13, the assessee had filed its original return of income for AY 2012-13 on 29.09.2012 declaring NIL income, after claiming deduction u/s.10AA of the Act, amounting to Rs.13,61,22,751/-. Thereafter, the assessee is noted to have filed the revised return on 17.04.2013 showing total income at Rs.NIL but claiming deduction u/s.80-IAB of the Act, amounting to Rs.11,08,19,915/-. The case of the assessee was selected for scrutiny and notices u/s 143(2) and 142(1) were issued, which were complied with by the assessee. At the onset, the AO noted that the assessee didn't file the Form 10CCB within the due date of filing of return of income and

therefore he opined that the deduction claimed u/s 80-IAB ought to be disallowed on this count alone. On merits, the AO noted that, the assessee had developed residential infrastructure in 22.26 hectares at Mahindra World City, Chennai in the capacity of Co-Developer pursuant to an agreement with M/s. Mahindra World City Developers Limited (M/s. MWCDL) who was the main Owner/Developer of the SEZ. It was seen that the assessee had claimed deduction u/s 80-IAB of the Act in relation to the profits derived from the development of the aforesaid residential infrastructure. The AO observed that the deduction claimed u/s 80-IAB of the Act was untenable since the appellant had not undertaken any development of SEZ in accordance with the Special Economic Zones Act 2005 [hereinafter the SEZ Act] & Special Economic Zones Rules, 2006 [hereinafter, the Rules]. The AO taking note of the provisions of SEZ Act, set out the role & responsibility of Developer which was not only development of infrastructural facilities but maintenance and operation of the same. The AO took cognizance of the fact that the assessee was approved as a Co-Developer and therefore it was to be treated at par as a 'Developer' for all intent and purpose. The AO thereafter took note of the concept of 'processing area' and 'non-processing area' set out in the SEZ Act & Rules and noted that the creation of social infrastructure in the 'non-processing area' was meant to aid the persons who are involved or

linked with the infrastructure in the 'Processing zone'. The Legislative intent according to him, was to aid the main activities in the processing Area by making available all the civic amenities like Hotel, Hospital, Schools, shopping mall, Residence, Entertainment, which are called 'Social Infrastructure'. The AO further took note of the sub-Rules (9) and (10) of Rule 11 of SEZ Rules which read as follows: -

> "11(9) The Developer **shall not sell** the land in a Special Economic Zone.
>
> 11(10) No vacant land in the non-processing area shall be leased for business and social purposes such as educational institutions, hospitals, hotels, recreation and entertainment facilities, residential and business complexes, to any person except a co-developer approved by the Board.
>
> Provides that the developer or co-developer may lease the completed infrastructure along with the vacant land appurtenant thereto for such purposes:
>
> Provided also that the Developer or Co-Developer shall strive to provide adequate housing facilities not only for the management and office staff but also for the workers of the Special Economic Zone Units."

4. In light of the above, the AO noted that, the Developer of SEZ could not sell the land in the SEZ area and that the social infrastructure in the "Non-Processing Area' viz., the housing activity as approved by the Board in the SEZ was to provide adequate housing facilities for the management, office staff and the workers of the SEZ units. Having taken note of these legal provisions and rules, the AO observed that the assessee had acted in complete violation thereof and therefore the

assessee was ineligible to claim deduction u/s 80-IAB of the Act. The AO particularly noted that, the payment made by the assessee to M/s Mahindra World City Developers Limited to obtain perpetual lease over the vacant land was recognized as 'Land' signifying that the assessee had acquired the same. The AO observed that this act was in violation of the prescribed SEZ laws and the relevant findings of the AO, as taken note of by us, is as follows:-

> "…it is seen that, the payment of Rs.28,59,73000/ by the assessee company to M/s.Mahindra Integrated Township Limited towards refundable premium is treated as land cost by the assessee company for the working of revenue recognition. The premium is not seen in the balance sheet of the assessee as lease hold right.
>
> **Land:** The assesse as already mentioned has taken the land of the Developer on perpetual lease. The Developer is under an obligation not to transfer the land in a Non Processing Area except to the Co-Developer on a lease basis for a period not exceeding 20 years. Verification of the fixed assets schedule of the assessee shows that there is no mention of any leasehold land. It is therefore clear that the leasehold land is treated as stock-in trade and forms part of the Cost of construction. It is relevant to recall that the Developer and Co developer stand on the same footing and what is prohibited in the case of the Developer is equally prohibited in the case of the Co-Developer as well irrespective of the nature of rights attached to the land in SEZ Non Processing Area zone."

5. The AO further observed from the customer-wise details regarding revenue recognition that, the assessee has transferred residential units to outsiders including non-residents, which were in violation of SEZ Act and Rules. The AO accordingly denied the deduction claimed by the assessee u/s 80-IAB of the Act. The relevant findings of the AO, in this regard, are noted to be as follows:-

"Built-up Area: It is the claim of the assessee in response to show cause notice dated 27.3.15, submitted by the assessee on 27.3.15, that lease is a permitted mode of exploitation of the infrastructure created and lease includes 'Lease in Perpetuity' as well. It is also the contention of the assessee that such a lease would not amount to sale. Once again, it is relevant to make sure how the assessee has assured itself of its right over the property given on ease in perpetuity. The property is described in the Schedule to the Lease Deed. It consist of "Leasehold Land' and 'Freehold Superstructure'. It is already mentioned that the assessee treated the leasehold land as part of stock in trade. The Freehold superstructure also is not forming part of the fixed assets schedule of the assessee. The assesse has not brought into existence in its books any 'SOCIAL INFRASTRUCTURE' in the form of residential property for maintenance and operation. Instead, it acted as a pure and simple Real Estate Developer. In such a case, the profits claimed to have been generated cannot be the subject matter of deduction u/s.80IAB

5.10 Covenants in the Lease Deed conclusively prove that the assessee has not reserved to itself any right over the property including the leasehold land.

1. The lessee takes on perpetual lease basis from the lessor, a villa, about ….sq ft of built up area, corresponding to …. Sq. ft. of carpet area equivalent to ...sq. ft. of saleable area along with car parking space, together with the constructed on …. of land area …. Sq. ft. shall hereinafter be collectively referred to as either Schedule 'B' …… at Phase 13, AQUALITY, Mahindra World City, New Chennai for a total consideration of Rs.1,26,29,120/- paid in accordance with the payment terms...

2. Schedule-B: All that place & parcel of land bearing Plot no. ….. measuring … sq.ft. of land area, along with premiere villa/deluxe villa/luxury villa/deluxe admeasuring a built up area of 2402 sq. Comprised in survey numbers...

3: ASSIGNMENT/ TRANSFER:

The Lessee shell be entitled to assign/mortgage/transfer his/her/its rights under this Lease Deed in favour of any person, provided all the dues payable by the LESSEE to the LESSOR are fully paid up and subject to the LESSEE not being guilty of breach of or non-observance of any of the terms and conditions of this Lease Deed.

4. a. Till completion of all phases, if any additional FSI would be available to LESSOR as a result of any favourable relaxation/ …. the LESSOR shall be entitled to utilize such Additional FSI on Schedule A Property only with the consent of the LESSEE.

4.b. Post completion but before handing over of the affairs to Association of Owners as may be decided by me LESSOR, if any

> Additional FSI would be available as a result of any favourable relaxation… to Schedule A Property, the LESSOR shall be entitled to utilize such additional FSI on Schedule A Property only with the consent of the LESSEE.
>
> 5.11 From the discussions made above, it can be conclusively proved that, the assessee was engaged in sale of residential flats and profit so earned from such transactions have been claimed as deduction u/s.80IAB. The cost of construction including the land cost, infrastructure cost and construction cost on the whole has been claimed as revenue expenditure against the revenue recognized on sale of residential fiats. As this is against the provisions as laid down in Section 80IAB of the income tax Act and the provisions of SEZ Act, the claim made by the assessee under Section 80IAB of the income tax Act is withdrawn and added to the total income. As discussed earlier, the deduction u/s.80IAB was restricted to Rs.9,58,62,495/-, as interest income was excluded for the purpose of computation of profits and gains for the purpose of deduction u/s.80IAB, the said amount is disallowed and added to the total income."

6. Being aggrieved by this action of the AO, the assessee preferred appeal before the Ld. CIT(A). It is noted that, the Ld. CIT(A) held that the filing of Form 10CCB in course of assessment was sufficient compliance and its non-filing along with return of income could not be reason enough to disallow deduction claimed u/s 80-IAB of the Act. The Ld. CIT(A) however, on merits, upheld the disallowance made by the AO. Aggrieved by the aforesaid action of the Ld. CIT(A), the assessee is now in appeal before us.

7. Assailing the action of the Ld. CIT(A), the Ld.AR contended that the assessee has complied with all conditions of Section 80-IAB of the Act. According to the assessee, it was only required to fulfil two conditions to claim deduction u/s 80-IAB, viz., (i) the assessee should be a developer

and (ii) profits and gains are to be derived from the business of developing SEZ. The Ld. AR for the assessee invited our attention to the letter of approval issued by Ministry of Commerce and Industry dated 25.04.2008, copy of which was placed at Pages 106-109 of the paper-book and contended that the assessee was a 'co-developer' and therefore it qualified as a developer as defined in Section 2(g) of the SEZ Act. According to the assessee therefore, the first condition stood fulfilled.

8. The assessee further submitted that pursuant to the letter of approval, it had pursued the co-developer agreement dated 10.03.2008 and accordingly undertaken development of residential infrastructure. The assessee contended that the development of residential infrastructure qualified as development of SEZ and therefore, it was entitled to the deduction claimed u/s 80-IAB of the Act. In this regard, the Ld. AR for the assessee relied upon the letter dated 06.07.2010 issued by the Ministry of Commerce and Industry exempting it from payment of income tax, copy of which was placed at Page 112 of the paper-book. The Ld. AR for the assessee argued that, the observations and findings rendered by the lower authorities to deny the deduction claimed u/s 80-IAB of the Act alleging that the assessee had acted in violation of SEZ Act and Rules, was unjustified. The assessee submitted that, there was no bar under the SEZ Act for perpetually leasing the completed residential infrastructure to

outsiders. The assessee was of the view that, Rule 11(10) of SEZ Rules 2006 had been incorrectly interpreted by the lower authorities. The assessee contended that it had strived to provide housing facilities first to the management, office staff and workers of SEZ units and only because they had not availed the same that it was constrained to offer the housing units to outsiders. To put it simply, the contention of the assessee is that it was in compliance with Rule 11(10) of the SEZ Rules 2006. The assessee further argued that the lower authorities had erred in equating the perpetual lease of units to sale of units. The assessee first contended that provisions of Rule 11(5) had no application in this case and that Rule 11(9) read with Rule 11(10) had been complied with as it had not sold any area but had only granted perpetual lease to the buyers, which according to the assessee, was permitted under the SEZ Act and Rules. The Ld. AR of the assessee also took us through sample lease agreements entered into with unit holders, copies of which were placed at Pages 124-200 of the paper-book. The assessee thus urged that the deduction claimed u/s 80-IAB ought to be allowed.

9. Per contra, the Ld. CIT, DR appearing for the Revenue, has filed written submissions setting out extensive reasons as to why the orders of the lower authorities ought to be upheld. At the onset, the Ld. CIT, DR placed on record the decision of Hon'ble Delhi High Court in the case of

CIT vs DLF Commercial Developers Ltd. (92 taxmann.com 10) wherein on similar facts, the Hon'ble High Court had observed that sale of residential units by co-developer in the SEZ was not an activity of development of SEZ and had thus upheld the AO's action disallowing the deduction u/s 80-IAB of the Act. The Ld. CIT, DR thereafter took us through the provisions contained in the SEZ Act and the SEZ Rules and explained the purpose behind the deduction granted u/s 80-IAB of the Act, which was to promote the development of infrastructure in the SEZ. The Ld. CIT, DR particularly invited our attention to sub-rules (6) and (7) of Rule 11 of SEZ Rules, 2006 which read as under:

> "(6) The Developer holding land on lease basis shall assign lease-hold right to the entrepreneur holding valid Letter of Approval.
>
> (7) Any transfer by way of sub-lease or any other mode by the Developer shall be valid only if the same is made to a person holding a valid Letter of Approval issued by the Development Commissioner."

10. In light of the above, the Ld. CIT, DR contended that any transfer by way of lease or sub-lease by the developer could be undertaken only if the person to whom the transfer has been made held a valid letter of approval issued by the Development Commissioner of SEZ. He contended that in the present case, the assessee had perpetually leased the residential infrastructure to outsiders who did not hold valid letters of approval and therefore there was a violation of SEZ Rules. The Ld. CIT,

DR thereafter drew our attention to sub-rules (9) and (10) of Rule 11 of the SEZ Rules *(supra)* and submitted that the following three restrictions have been imposed on the Developer/co-developer:

a) The developer does not have the power to sell the land in SEZ and that no vacant land can be leased to any person except the co-developer.

b) However, the developer or the co-developer can lease the completed infrastructure along with vacant land. These are the basic conditions stipulated in Rule 11 of the SEZ Rules

c) It is also to be noted that a duty is cast on the Developer or the Co-developer as they are expected to strive for providing housing facilities not only for the management and office staff but also for the workers of SEZ Units.

11. The Ld. CIT, DR contended that the assessee had violated all the above mentioned restrictions. Taking us through the lease agreement, the Ld. CIT, DR showed that it amounted to sale of land along with building; and that no rights were retained by the assessee. He further showed that, the assessee was given approval by the Board only in respect of listed activities, which did not include transfer of the impugned residential units.

The Ld. CIT, DR thus contended that the assessee had deployed a colorable scheme to sell the land in SEZ in the guise of leasing it. He further argued that the assessee did not lease the completed infrastructure. Rather, the assessee had leased the land to outsiders and thereafter agreed to construct and give possession of building, once completed. This according to the Ld. CIT, DR showed that the lease was not of a 'completed project' but a 'to-be-constructed' project. Lastly, the Ld. CIT, DR reiterated the findings of the lower authorities that the sale of units to outsiders was in violation of Rule 11(10) of the SEZ Rules.

12. To further buttress his contention, the Ld. CIT, DR also invited our attention to Rule 11A of the SEZ Rules, 2006 which was inserted in 2015, which was meant to retro-actively address the difficulties being faced by developers in carrying out other activities in the non-processing area. Rule 11A permitted the developers to undertake development in the non-processing areas for the benefit of the outsiders, but at the same time, it stated that no exemptions, concessions or drawbacks or tax benefits shall be admissible for the same. By this rule, the earlier actions of the developers of SEZs leasing out social infrastructure to outsiders was ratified, subject to the condition that no tax benefit was claimed. The said Rule also prescribed the manner in which the benefits, drawback, concessions and tax benefits claimed in earlier years for such activities

could be refunded by the developer. This rule, according to the Ld. CIT, DR, further corroborated the AO's case that the development of social infrastructure for outsiders did not constitute development of SEZ for availing deduction u/s 80-IAB of the Act. The Ld. CIT, DR also brought on record Instruction No. 65 dated 27.10.2010 issued by the Department of Commerce (SEZ Division), which was contended to have been violated by the assessee. The Ld. CIT, DR also drew our attention to a show cause notice issued to the assessee for violation of Rule 25 of SEZ Rules 2006 for refund/payment of indirect taxes in relation to the residential units which were allotted to the outsiders. All these facts and evidences cumulatively, according to the Revenue, supported the stance of the lower authorities that the assessee was not entitled to claim deduction u/s 80-IAB of the Act.

13. The assessee, in their rejoinder argued that, the assertions made by the Revenue were misplaced and incorrect. The assessee contended that Rule 11(6) and (7) cited by the Revenue was applicable where sub-lease/leases were being made in 'processing area', whereas the infrastructure had been created in non-processing area, to which these rules did not apply. The assessee reiterated that it had not violated Rule 11(10) of the SEZ Rules. The assessee further submitted that it had only entered into agreement prior to completion but the possession was

transferred only upon completion of the infrastructure and therefore the argument of the Ld. CIT, DR that the assessee had not leased completed infrastructure but under construction project was untenable. As far as Revenue's reliance on Rule 11A was concerned, the Ld. AR for the assessee argued that it was inserted only on 02.01.2015 and therefore had prospective application. Alternatively, he argued that Rule 11A did not withdraw the benefit accorded under the Income Tax Act. The assessee further submitted that the decisions cited by the Revenue including the above-mentioned decision of Hon'ble Delhi High Court *(supra)* was distinguishable. The assessee also filed written submissions in this regard.

14. We have heard both the parties, perused the relevant provisions of the Act as well as SEZ Act and Rules, gone through the material placed on record and considered the rival written submissions. From the material placed before us, it is noted that, M/s. Mahindra World City Developers Ltd. (M/s. MWCDL), the original developer, was awarded approval for building social infrastructure at Mahindra World City, Chennai SEZ vide letter dated 19.06.2007, subsequently modified vide corrigendum dated 20.06.2007, which inter alia included the following authorized activity:

> "1. 15000 housing - to be allowed in phases of 20% in each phase, linked to occupation in the processing area;"

15. Pursuant to the above approval, M/s. MWCDL is noted to have entered into a co-developer agreement dated 10.03.2008 with the assessee (M/s. MRDL) for development of residential infrastructure in an extent of area of 55 acres of land which was referred to as 'Phase-I Residential Infrastructure', which is found placed at Pages 98-105 of the paper-book. In terms of the aforesaid agreement, the assessee had sought approval to be designated as a co-developer vide letter dated 01.02.2008 and the same was approved by the Ministry of Commerce and Industry vide letter dated 25.04.2008. It is noted from the terms of General Conditions set out in this letter of approval that the assessee shall provide infrastructure facilities in terms of the SEZ Act and the Rules and orders made thereunder. The relevant clauses (i), (iv), (ix), (x), (xi), (xii), (xiv) are noted to be as follows:

> "(i) The Co-developer shall provide infrastructure facilities, mentioned above, in the IT Special Economic Zone of Mahindra World City Developers Limited in terms of the Special Economic Zones Act, 2005 and the rules and the orders made there-under;
>
> (iv) The project shall be implemented and operated in terms of the Special Economic Zones Act, 2005 and the rules and the orders made there-under;
>
> (ix) This approval is liable to be suspended in case of violation of any of the terms and conditions stipulated herein;
>
> (x) The operation and maintenance of the facilities will be made as per the standards specified in the proposal and to the satisfaction of the users;

(xi) The Co-developer shall maintain adequate manpower to provide the facilities;

(xii) The user charges will be finalized in consultation with the Development Commissioner and the users. This shall be subject to revision as per the agreed terms.

(xiv) The authorized operations shall be carried out in terms of the parameters laid down in the Special Economic Zones Act, 2005 the rules and the orders made there-under and in accordance with the proposal approved therein."

16. It is noted that, later on, the Assistant Development Commissioner, vide letter dated 06.07.2010, placed at Page 112 of the paper-book, had exempted the assessee from the following duties and levies, subject to rules and regulations in this regard.

"This is to certify that Ms. Mahindra Residential Developers Ltd., approved as a Co-Developer in the sector specific SEZ for IT/Hardware/Bio-informatics at Chennai, Tamil Nadu, developed by Ms. Mahindra World city Developers Ltd., and holder of Letter of Approval No. 2/5/2004/EPZ dated 25/4/2008, is exempted from the following duties and levies subject to rules/regulations in this regard:

1. Payment of customs duty for goods or services imported into SEZ for its operations and goods exported or services provided from SEZ outside India.

2. Payment of Excise duty for goods brought from Domestic Tariff Area to SEZ for its authorized operations.

3. Payment of Income Tax for any ten consecutive assessment years out of 15 years from the date of SEZ Notification.

4. Payment of minimum alternate tax under section 115 JB of the Income Tax Act.

5. Payment of dividend distribution tax under section 115 O of the Income Tax Act

6. Payment of Central Sales Tax for its authorized operations.

7. Payment of Service Tax under Chapter V of the Finance Act 1994 on taxable services consumed for its authorized operation.

8. Payment of VAT for the purchases made within the State of Tamil Nadu under TN VAT Act."

17. In compliance with the SEZ laws, the assessee is also noted to have executed a bond cum legal undertaking dated 27.08.2010, wherein it is noted to have undertaken as follows:

"1. We, the obligors shall observe all the provisions of the Special Economic Zones Act, 2005 and the rules and the orders made there-under in respect of the said goods.

2. We, the obligors shall refund an amount equal to the benefits of exemption, drawback, cess and concessions availed on account of the goods and services in terms of provisions of rule 25 of the Special Economic Zones Rules 2006.

7. We, the obligators shall fulfill other conditions stipulated in the Special Economic Zones Act, 2005, Special Economic Zones Rules, 2006 and the orders made there-under, as amended from time-to-time."

18. In light of the above facts, it is therefore noted that, the assessee was notified as a 'co-developer' and having regard to the definition set out in Section 2(g) of the SEZ Act, the assessee was to be regarded as a 'developer' for the purposes of Section 80-IAB of the Act. Reading of the relevant letter of approval dated 25.04.2008, letter of exemption dated 06.07.2010 as well as letter of undertaking dated 14.09.2010 clearly shows that the assessee is required to be in compliance with the SEZ Rules and regulations so as to avail any concessions or tax benefits including exemption from income tax u/s 80-IAB of the Act. To that

extent, it is noted that there is no quarrel between the rival parties. The narrow issue therefore, which requires our adjudication is, whether the assessee had undertaken development of SEZ in accordance with the SEZ Act and Rules so as to avail the benefit of Section 80-IAB of the Act.

19. The case of the Revenue is that, the assessee had violated Rule 11 of the SEZ Rules on several fronts, by selling the units to outsiders who did not hold valid letter of approval, the units were sold in violation of Rule 11(9) and that to, to outsiders, which was not permitted under Rule 11(10). The Revenue also contended that the perpetual lease was not granted for completed infrastructure but for under construction project and therefore this also constituted violation of SEZ Rules. The assessee on the other hand rebutted each of these arguments of the Revenue and contended that it had acted in compliance with the SEZ Act and Rules and therefore it was legally entitled to deduction u/s 80-IAB of the Act.

20. In order to adjudicate the issue before us, it is first relevant to examine the SEZ provisions and Rules, which are applicable to the assessee. The relevant Rule 11 of the SEZ Rules 2006, being referred to by both the parties, as it stood then, read as follows:

> "11. Processing and non-processing area.—
>
> (1) The Development Commissioner shall demarcate the area and issue demarcation order under the provision of section 6, specifying the

survey numbers and boundaries of area of the Special Economic Zone as specified in the notification issued under rule 8.

(2) The processing area and Free Trade and Warehousing Zone shall have specified entry and exit points and be fully secured by taking such measures as approved by the Board of Approval.

Provided that in case of a Special Economic Zone for information technology or information technology enabled services or electronic hardware or biotechnology, the Development Commissioner shall approve such measures and inform the Board accordingly:

Provided further that in case the developer proposes to create two hundred and forty centimeter high wall with top sixty centimeter being barbed wire fencing and single entry and exit point, no separate approval shall be required under this sub-rule

(3) The Development Commissioner shall ensure compliance of the requirements of sub-rule (2).

(4) The persons authorized by the Development Commissioner shall only be allowed to enter the processing area of a Special Economic Zone.

(5) The land or built up space in the processing area or Free Trade and Warehousing Zone shall be given on lease only to the entrepreneurs holding a valid Letter of Approval issued under rule 19 and the lease period shall not be less than five years but notwithstanding any other condition in the lease deed the lease rights would cease to exist in case of the expiry or cancellation of the Letter of Approval

Provided that the Developer may, with the prior approval of the Approval Committee, grant on lease land or built-up space, for creating facilities such as canteen, public telephone booths, first aid centers, creche and such other facilities as may be required for the exclusive use of the Unit.

(6) The Developer holding land on lease basis shall assign lease-hold right to the entrepreneur holding valid Letter of Approval.

(7) Any transfer by way of sub-lease or any other mode by the Developer shall be valid only if the same is made to a person holding a valid Letter of Approval issued by the Development Commissioner.

(8) The Developer may allot land in the processing area on lease basis to a person desiring to create infrastructure facilities for use by the prospective Units.

(9) The Developer shall not sell the land in a Special Economic Zone.

(10) No vacant land in the non-processing area shall be leased for business and social purposes such as educational institutions, hospitals, hotels, recreation and entertainment facilities, residential and business complexes, to any person except a co-developer approved by the Board:

Provided that the developer or co-developer may lease the completed infrastructure along with the vacant land appurtenant thereto for such purposes:

Provided also that the Developer or Co-Developer shall strive to provide adequate housing facilities not only for the management and office staff but also for the workers of the Special Economic Zones Units:

(11) The Special Economic Zone shall be deemed to be a port, airport, inland container deport, land customs station under section 7 of the Customs Act in accordance with the provisions of section 53 from the date notified in this behalf:

Provided that Specified Officer may designate any area or area(s) in the Special Economic Zone as an area for loading and unloading of import or export cargo:

Provided further that in case the said port, airport, inland container depot, land customs station area is to be used for loading and unloading of import or export cargo meant for Domestic Tariff Area importers and exporters also, storage for such cargo shall be in a separate enclosure and deliveries for such cargo shall be allowed by the Authorized Officer of the Special Economic Zone based on Bill of Entry, assessed by the Assistant or Deputy Commissioner of Customs having jurisdiction over the said customs station.

(12) The Central Government may lay down guidelines for development, operation and maintenance of Special Economic Zones."

21. From the above, we first note that the Revenue's contention that, the assessee was in violation of Rule 11(6) and (7) of the SEZ Rules, is misplaced. Rule 11(5) provides that the land or built-up space in the

'processing area' can be given on lease only to entrepreneurs holding valid letter of approval from the prescribed authority. Rule 11(6) states that the developer shall only assign the leasehold right in the land to the entrepreneur holding the valid letter of approval. Rule 11(7) states that any transfer by way of sub-lease or any other mode, by the developer shall be valid only if it is made to a person holding valid letter of approval. Rule 11(8) further states that the developer may allot land in the 'processing area' on lease basis to such persons which is desirous of creating infrastructure facilities for use by the prospective units. It is therefore noted that Rule 11(5), (6), (7) and (8) are inter related and pertain to the transfer of land or built-up space in the *'processing area'*. In the present case admittedly, the assessee has created infrastructure in the *'non-processing area'* and therefore we are in agreement with the assessee that, Rule 11(6) and (7) are not applicable in the present case.

22. Coming to Sub-rule (9) of Rule 11, it is noted that this Rule applies to *'non-processing area'* as well. The said sub-rule states that, the developer shall not sell the land in a Special Economic Zone. According to the assessee however, it has not sold the land but has only granted perpetual lease to the unit holders and therefore such perpetual lease cannot be equated with sale. We however are unable to countenance this

contention of the assessee for several reasons, as discussed in ensuing paragraphs.

23. Firstly, we find that the documents relating to acquisition of title in land by the assessee are not completely forthcoming. It is noted that, the assessee had obtained perpetual lease from M/s. MWCDL (Developer) vide agreement dated 10.03.2008. Perusal of the terms of the co-developer agreement shows that, the development of the residential infrastructure was the sole responsibility of the assessee for which it was to undertake development and incur cost at its own expense. Surprisingly however, the said co-developer agreement is silent as to the consideration paid by the assessee for obtaining the perpetual lease. The AO is found to have noted that, the assessee had debited payment of Rs.28.59 crores to *another* company M/s. Mahindra Integrated Township Ltd (M/s. MITL). This fact has not been controverted by the assessee. Furthermore, perusal of the recitals of the sample lease agreement with the unit holders shows that, the assessee had stated that, Developer-M/s. MWCDL had granted perpetual lease to M/s. MITL for land admeasuring 218.982 acres through various lease deeds and later on, it was M/s. MITL which had transferred the perpetual lease for 54.607 acres to the assessee. The relevant recitals taken note of by us are as follows:

> "b. The Owner has granted on perpetual lease to Mahindra Integrated Township Limited (MITL) having its registered office at Administrative Block, Central Avenue, Mahindra World City, Mahindra World City (PO), Chengalpet Taluk, Kancheepuram District, Pin-code - 603 002, land admeasuring 218.982 acres or thereabouts through various Lease Deeds for the development of residential facilities upon its getting a Letter of Approval as a Co-Developer from the SEZ Authorities and on the terms & conditions mentioned therein.
>
> C. The LESSOR has received a Letter dated 25.04.2008 from Board of Approval (BOA), Ministry of Commerce, Government of India, approving THE LESSOR as a Co-Developer for the development of residential facilities on Schedule "A" Property. By various Deeds of Transfer of Lease, MITL has transferred the lands on perpetual lease basis admeasuring 54.607 acres or thereabouts out of 218.982 acres to MRDL for the development of residential facilities on terms, conditions and obligations mentioned therein and in accordance with the applicable local laws and the SEZ Act and the Rules made thereunder from time to time. The said 54.607 acres is situated at Plot No. 33, 1st Cross Road, 1st Main Road, Mahindra World City, Chengalpet Taluk, Kancheepurar 603002 more particularly described in Schedule "A" hereunder hereinafter referred to as Schedule "A" Property."

24. The above recitals are noted to be contrary to the co-developer agreement dated 10.03.2008, which was purportedly furnished before the SEZ authorities for seeking letter of approval. In the co-developer agreement, the perpetual lease is noted to have been granted directly by M/s. MWCDL (Developer) to the assessee and M/s. MITL is conspicuously absent from this agreement, whereas the lease agreement with unit holders as well as the entries in the books of accounts shows that the perpetual lease was obtained from M/s. MITL. For these reasons, we find that the assessee has not clearly brought out the correct facts regarding

the passing of perpetual lease title to it as well as the purported consideration paid for the same.

25. We also note from the assessment order that, the assessee had debited payment of Rs.28.59 crores to M/s. MITL by way of land premium, which was treated as land cost by the assessee in the books of accounts. The AO has also noted that, the said land was not reflected by way of fixed asset but treated as stock-in-trade, which was later on reflected by way of sale to the unit holders. Having regard to the relevant documents and conduct of the assessee as well as the uncontroverted entries passed in the books of accounts, it is noted that the perpetual lease obtained by assessee for all intent & purpose was purchase of land for development.

26. We now come to the terms of the sample lease deed between the assessee and the unit holder. The relevant Clauses (1) & (2) reads as follows:-

> "1). **LEASE:**
>
> The LESSEE agreed to take on perpetual lease from the LESSOR and LESSOR has agreed to grant to LESSEE on perpetual lease basis a residential unit being Villa / Twin Home No.50. Unit Type Premiere Villa PV-F-01 , admeasuring about 2322 sq. ft. of carpet area equivalent to 3375 sq. ft. of saleable area along with Car Parking Space, to be constructed on Plot No. 81 (divided / undivided share in / of land area 4430 sq.ft. ~ 1.85 ground or thereabouts), more particularly described in **Schedule B** and hereinafter referred to as the '**Schedule 'B'**

Property', and shown on **plan 1** (plan showing boundaries of the plot of land of Schedule B property) and **plan 2** (floor plan of Schedule B property) annexed hereto in accordance with the specifications agreed upon between the Parties and mentioned in **Schedule 'C'** hereunder at Phase 1C, Aqualily, Mahindra World City, New Chennai for a total consideration of Rs.1,66,23,75Q/-(Rupees One Crore Sixty Six Lakhs Ninety Three Thousand Seven Hundred and Fifty only).

2). **CONSIDERATION FOR LEASE:**

In consideration of the agreement as aforesaid to grant on perpetual Lease of the **Schedule 'B' Property**, the LESSEE undertakes to pay the consideration mentioned herein below as per the payment schedule mentioned at **Schedule D**:

i. Unit Value: Rs.1,52,78.500/-

(This includes Land Cost: Rs.53,36,000/- and Construction cost: Rs. 1,04,62,500/-)

ii. Premium Location Charges: Rs. 1,63,750/-

Basic Consideration: Rs.1,59,47.250/-

The LESSEE has paid Rs of Rs.16,44,725/-(Rupees Sixteen Lakhs Forty Four Thousand Seven hundred and Twenty Five Only) towards part payment of the total consideration of Rs.1,66,93,750/-(Rupees One Crore Sixty Six Lakhs Ninety Three Thousand Seven Hundred and Fifty only) at the time of booking the residential unit, the receipt whereof the LESSOR hereby acknowledges. The Lessee undertakes to pay the balance consideration of Rs.1,50,49,025 / - (Rupees One Crore Fifty Lakhs Forty Nine Thousand and Twenty Five Only) in accordance with the payment schedule mentioned in the **Schedule 'D'**."

27. From the above, it is evident that the unit holder has acquired saleable space from the assessee and the consideration agreed upon includes land cost of Rs.53,36,000/-. The language used in this Clause clearly shows that the assessee has sold the residential unit to the buyer. We agree with the Ld. CIT(A)'s findings that, the terms and conditions of

the perpetual lease agreement is akin to sale of land for the reason that, there is no clause for termination of lease, there is no lease rent which the unit holder is required to pay and further the Developer has also agreed to later on hand over the project to residential association, if any, made by the occupiers of the building. Clearly, there are no characteristics of a lease but the transaction is that of sale. The relevant findings of the Ld. CIT(A), in this regard, is noted to be as follows:-

> "The appellant furnished a sample of "Agreement to Lease" entered into with one of their "lessees", in connection with a residential apartment bearing' unit No.A2-202 having saleable area of 1947 Sq.ft., along with a car park in support of their contention. As per this Agreement to Lease, the total consideration for sale stands at Rs.66,17,785/-, the lessee is entitled to assign/transfer this agreement in favour of any person. Upon completion, the lessor would hand over the affairs of the residential project (Aqualily) to the Association of Owners. The lessee shall be liable for all taxes, charges, levies and other outgoings payable in respect of their unit. Most importantly, no lease rent whatsoever is payable by the lessee to the lessor and there is no reference to the time period of the lease except for the term perpetual lease which essentially depends upon the will of the transferee. All the above stipulations confirm the fact, as rightly observed by the Assessing Officer, to be a sale for all practical purposes although as per Rule 11(9) of the SEZ Rules, the Developer (or the Co-developer) cannot sell any property located within SEZ area. Under no circumstances can it be considered to be a simple lease since some of the vital characteristics of a lease are totally missing in this transaction. Therefore, I find that the Assessing Officer has rightly observed that the entire transaction has to be equated to a sale which is not permissible under the SEZ Rules."

28. The assessee however has strenuously contended that the grant of perpetual lease is not sale and therefore there is no violation of Rule 11(9) of SEZ Rules. In this regard, we find that, the Hon'ble Delhi High Court in the case of Rajesh Gupta HUF Vs PCIT (ITA No. 246 of 2018) dated 26.02.2018 has held, in the context of Section 50C of the Act that,

perpetual lease is akin to sale of property. The relevant findings of the Hon'ble High Court is noted to be as follows:-

> "4. This court is of opinion that there is no merit in the appellant/assessee's contentions that the occupancy rights are not in the nature of capital assets, the transfer of which do not attract capital gains, as to exclude application of Section 50C. The rights (towards occupancy) are nearly permanent, having regard to the nature of holding. Moreover, the issue of transfer of lease rights (in the case of lease for 99 years, relating to agricultural land) was considered in R.K. Palshikar (HUF) v. Commissioner of Income Tax, AIR 1988 SC 1305. The court observed as follows:
>
> "The next question which we have to consider is whether the provisions of Section 12-B of the said Act can be brought into play, although, what was transferred was only lease hold interests in the lands in question. In this connection, it is significant that the leases are for a long period of 99 years and in all the transactions of lease premium has been charged by the assessee for the grant of the lease concerned. In Traders and Mines Ltd v Commissioner of Income Tax, [1955] 27 ITR p. 341 a case decided by a Division Bench of the Patna High Court, the assessee let on lease for 99 years a portion of a Zamindari acquired by it. The lease related to the surface right together with nine mica mines located in that area. The consideration for the lease was the payment of a 'salami' and a reserve rent per year. The Income-tax Officer determined the cost to the assessee of the mineral rights and after deducting this amount from the salami, he assessed the balance to tax as capital gains under Section 12-B of the said Act. It was held by the Patna High Court that the gains arising from the said transaction were rightly taxed. This decision has been cited without comment by Kanga and Palkhivala in their commentary on the Law of Income-tax (7th Edition) at page 550 and no contrary case has been cited in the said text book or has been brought to our attention. It is true that the decision of the Patna High Court relates to a case of mining lease, but to our mind, the principle laid down in that case can well be applied to the case before us. In the first place, the lease is for a long period, namely, 99 years, hence it would appear held that under the leases in question the assessee has parted with an asset of an enduring nature, namely, the rights to possession and enjoyment to the properties leased for a period of 99 years subject to certain conditions on which the respective leases could be terminated. A premium has been charged by the assessee in all the leases. In these circumstances, we fail to see how it could be said that

> the provisions of Section 12-B of the said Act cannot be brought into play. The grant of the leases in question, in our view, amounts to a transfer of capital assets as contemplated under Section 12-B of the said Act."
>
> The above decision in Palshikar (supra) was approved in a subsequent judgment i.e. A.R. Krishnamoorthy v. Commissioner of Income Tax, (1989) 176 ITR 417 (SC).
>
> It is therefore held that no question of law arises; the appeal is consequently dismissed as unmerited."

29. It is noted that, even in relation to provisions of Section 50C, the prevailing jurisprudence is that, the said deeming fiction only applies to sale of land & building and not where only leasehold rights are transferred for a finite period. In this context, the Hon'ble Delhi High Court (supra) has clarified that, grant of perpetual lease is a permanent transfer and thus akin to sale. The ratio laid down in this judgment is squarely applicable to the facts of the present case. Hence for the reasons discussed above and in light of the decision of Hon'ble Delhi High Court (supra), as well as the decision of the Hon'ble jurisdictional High Court in the case of A.K. Krishnamurthy & A.R. Rajagopal v. CIT reported in [1982] 133 ITR 922 (Mad-HC), wherein, the Hon'ble High Court held as under:

> 1. The assessee, a body of individuals, filed a return for the assessment year 1971-72, admitting a total income of Rs. 43,953 from business and other sources. During the curse of the assessment proceedings, the ITO noticed that the assessee had purchased an extent of 11.23 acres of land for Rs. 12,700 on October 17, 1966, and another extent of 3.32 acres on May 31, 1966, for a sum of Rs. 14,562 and thus they owned an extent of 14.55 acres costing about Rs. 27,260. He further noticed that by what is styled an instrument of lease-cum-licence, dated 10th September, 1970, they granted a mining lease in

favour of M/s. Sri Krishna Tiles & Potteries (Madras) Private Ltd. (hereinafter called "the company"), an allied concern of the assessee. Under the document, the lessee had to pay a premium or salami of Rs. 5 lakhs in addition to the payment of a royalty calculated at Rs. 12 per 100 cubic feet of clay extracted by the lessee, subject to a minimum royalty of Rs. 60,000 per year. The lease was for a period of ten years from 10th September, 1970, with a clause for renewal at the expiry of the term of the lease on such terms as may be mutually agreed upon. Before the ITO, the assessee contended that though a grant of the lease of the land may constitute "transfer" within the meaning of s. 45 of the I.T. ACt, in view of the decision in CIT v. K. Rathnam Nadar [1969] 71 ITR 433 (Mad), no capital gains would arise for taxation. The ITO overruled this objection in the view that the entire rights of which the leasehold right in one were in part acquired by the assessee for a consideration of Rs. 27,260 and that the cost of the leasehold right imbedded in such cost does not mean that there is no cost in this regard. The ITO then proceeded to work out the cost of such leasehold interest. He found that if the entire property was to be sold, the fair market value would amount to Rs. 8 lakhs. The leasehold interest was transferred for Rs. 5 lakhs. He, therefore, came to the conclusion that 5/8ths of the total cost of acquisition would represent the leasehold value. Accordingly, he worked out the cost of acquisition of the leasehold right at 5/8ths of Rs. 27,260, namely, Rs. 17,040 and after reducing this cost from Rs. 5 lakhs, brought the balance of Rs. 4,82,960 as long-term capital gains.

2. The assessee preferred an appeal to the AAC. Before the AAC, in addition to contending that the rights transferred under the document cannot be considered to be a capital asset, it was also contended that there was no transfer of any capital asset. The AAC held that the term "property" would include, in the case of land, the right to enjoy such land and there was a transfer for a consideration of Rs. 5 lakhs of such right of enjoyment in the land and that, therefore, it is a case of transfer of a capital asset. He then proceeded to consider the cost of acquisition of such right and held that, on the facts of the case, the cost for the purpose of ascertaining the capital gains would be the sum of Rs. 27,260 and did not approve of the manner of ascertaining the cost of leasehold right as found by the ITO in the assessment order.

3. The assessee preferred an appeal to the Tribunal. The Tribunal treated the case as if there was a transfer of a leasehold interest, that the term "capital assets" in s. 2(14) would include a leasehold interest as held in Traders and Miners Ltd. v. CIT [1955]27 ITR 341 (Pat), and that, therefore, s. 45 was attracted. On the further finding that the sum of Rs. 5 lakhs was paid as consideration for the transfer of such leasehold interest in favour of the company and that the principle in CIT v. Rathnam Nadar [1969] 71 ITR 433 (Mad) will not be applicable to the facts of the case, the Tribunal confirmed the order of the AAC and dismissed the appeal.

4. At the instance of the assessee, the following two questions have been referred by the Tribunal under s. 256(1) of the Act :

> "1. Whether, on the facts and in the circumstances of this case, the instrument of lease dated September 10, 1970, effected the transfer of a capital asset within the meaning of s. 45 of the Income-tax Act, 1961, and, accordingly, liable to capital gains tax ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal is right in law in holding that the cost of leasehold right is capable of valuation and, as such, capital gains can be computed ?"

5. As already stated, the document dated 10th September, 1970, is styled as an instrument of lease-cum-licence under which the assessee granted "a lease-cum-licence to the company to extract clay from the schedule lands in consideration of the payment of Rs. 5 lakhs (rupees five lakhs only) as and by way of premium or salami for a period of 10 years". The other clauses in the deed provided that the company shall pay royalty calculated at Rs. 12 (rupees twelve only) per 100 cubic feet of clay, extracted by the company subject to a minimum royalty of Rs. 60,000 per year. The company shall be entitled to use the land for extracting clay up to the available depth. The company was also permitted to sub-lease the right granted under the document after obtaining the written consent of the assessee. The period of the lease was 10 years commencing from 10th September, 1970, with a right to the company to get a renewal of the lease at the expiry of the term of the lease on such terms which may then be mutually agreed upon. The default clause provided that in the event of the company failing to pay the royalty as per the terms and conditions of the document and within the time stipulated therein, the assessee shall be at liberty to terminate the lease-cum-licence and re-enter the property.

6. The learned counsel for the assessee contended that the right conferred under the lease on the company is a right to enjoy the property and not a full right in the hand itself. Even that right was not an indefeasible right but it was a right to be in possession for a period of ten years subject to cancellation even within that period on certain situations. No title in the property or any portion of property as such was transferred. So far as the assessee is concerned, the "capital asset" in his hands is the land and each one of the rights in respect of that land owned cannot be treated as separate and distinct "capital assets". In the circumstances, therefore, it cannot be considered that the right conferred on the company was a "capital asset" in the hands of the assessee within the meaning of s. 2(14) of the Act. He further contended that even it it were to be held that the right to possession and enjoyment vested in the owner can be separated from ownership and treated as a separate capital asset of the owner, there was no transfer of such capital asset in favour of the company within the meaning of s. 2(47) of the Act. According to the learned counsel, the definition in s. 2(47) of the Act, though in form appears to be an inclusive definition the words "sale, exchange or relinquishment of the asset or extinguishment of any rights therein or the compulsory acquisition thereof under any law" are illustrative and that the definition is exhaustive. So construed, unless it is a transaction of sale, exchange or relinquishment of the asset or the extinguishment of any rights therein or the compulsory acquisition, the transaction could not be treated as a "transfer" of a "capital asset". The lease deed of the type with which we are now concerned is such that it cannot be treated as amounting to a transfer of a capital asset.

7. The relevant portion of s. 2(14) defines "capital asset" as meaning "property of any kind held by the assessee, whether or not concerned with his business or profession". The definition excludes certain categories of assets with which we are not concerned. Under s. 45 any profits or gains arising from the transfer of a capital asset effected in the previous year, shall be chargeable to income-tax under the head "Capital gains", and shall be deemed to be the income of the previous year in which the transfer took place. "Transfer" is defined in s. 2(47) and states that "`transfer', in relation to a capital asset

includes the sale, exchange or relinquishment of an asset or the extinguishment of any rights therein or the compulsory acquisition thereof under any law". Section 105 of the Transfer of Property Act defines a lease of immovable property as "a transfer of a right to enjoy such property, made for a certain time, express or implied or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms. The transferor is called the lessor the transferee is called the lessee, the price is called the premium and the money, share, service or other thing to be so rendered is called the rent". A lease thus consists of a right to the possession and use of the property owned by some other person. It is an outcome of the separation of ownership and possession. The lessor of the land is he who owned and possessed it, but has transferred the possession of it to another. The price paid for the transfer of possession or the right to enjoy the property is called the premium under s. 105 of the Transfer of Property Act. The periodical payments made for the continuous enjoyment of the benefits under the lease are called rents or royalties.

8. In one of the earliest decisions in Kamakshya Narian Singh v. CIT [1943] 1 ITR 513 the Privy Council, dealing with leases for mining, held thus (p. 519) :

> "The payments which under the leases are exigible by the lessor may be classed under three categories : (i) the salami or premium; (ii) the minimum royalty; (iii) the royalties per ton. The salami has been,rightly in their Lordships' opinion, treated as capital receipt. It is a single payment made for the acquisition of the right of the lesses to enjoy the benefits granted to them by the lease. That general right may properly be regarded as a capital asset, and the money paid to purchase it may properly be held to be a payment on capital account. But the royalties are on a different footing."

9. In Member for the Board of Agrl. I.T. v. Sindhurani Chaudhurani [1957] 32 ITR 169, the Supreme Court discussed the characteristics and incidence of salami : The indicia of salami are (1) its single non-recurring character, and (2) payment prior to the creation of the tenancy. It is the consideration paid by the tenant for being let into possession and can be neither rent nor revenue but is a capital receipt in the hands of the landlord.

10. This was further elaborated in a later decision of the Supreme Court in CIT v. Panbari Tea Co. Ltd. [1965] 57 ITR 422. It was held in that case that it was not necessary that there should be a single lump sum payment and that salami could be paid by a single payment or by instalments. After referring to the definition in s. 105 of the Transfer of Property Act, the Supreme Court further observed (p. 425) :

> "The section, therefore, brings out the distinction between a price paid for a transfer of a right to enjoy the property and the rent to be paid periodically to the lessor. When the interest of the lessor is parted with for a price, the price paid is premium or salami. But the periodical payments made for the continuous enjoyment of the benefits under the lease are in the nature of rent. The former is a capital income and the latter a revenue receipt."

11. The Supreme Court against had an occasion to consider this question in Maharaja Chintamani Saran Nath Sah Deo v. CIT [9171] 82 ITR 464. It was held (p. 467) :

> "Salami is a single payment made for the acquisition of the right of the lessor by the lessee to enjoy the benefits granted to him by the lease. The general right may properly be regarded as a capital asset and the money paid to purchase it may properly be held to be a payment on capital account".

12. The Supreme Court, thus, in these decisions, had regarded the right of the owner to be in possession and enjoyment as such owner as a distinct right and a capital asset which can be transferred for a price separately from the right to receive royalties or rents from tenants for a continued enjoyment of that right. It is also clear from these decisions that it is not necessary in every case that there should be a price paid for the grant of lease. Sometimes it may be a payment or a part payment of royalty in advance but it will have to be determined with reference to the terms and conditions of the lease and the intention of the parties. These decisions are also authorities for the position that the general right of the owner to be in possession and enjoyment of the property could be regarded as a capital asset, though that is also one of the incidence of ownership as any other right in the property as such owner. We may also mention, though that cannot conclude the question, that in a number of cases, the leasehold interest in the hands of the lessee has been held to be a capital asset. We are, therefore, of the opinion that the right conferred on the lessee under the lease deed was also a capital asset in the hands of the assessee-lessor.

13. In support of the argument that in order to attract capital gains, the transfer of the capital asset should be one of the types of transfers mentioned in s. 2(47) and a transfer by way of lease would not be covered by s. 45, the learned counsel relied on the decision of the Judicial Committee of the Privy Council in Dilworth v. Commissioner of Stamps [1899] AC 99 and the decision of the Supreme Court in South Gujarat Roofing Tiles Manufacturers Association v. State of Gujarat, . In the first of these two cases, the Privy Council in construing s. 2 of the Charitable Gift Duties Exemption Act, 1883, which defined the term "charitable purposes" as including devises, bequests, and legacies of real or personal property respectively of whatever description etc., observed (p. 105) :

> "The Word `include' is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statue; and when it is so used these words or phrases must be constructed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. But the word `include' is susceptible of another construction, which may become imperative, if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expression defined. It may be equivalent to "mean and include" and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expression."

14. This passage was quoted with approval by the Supreme Court in the other case referred to above. In that case, the question turned on the construction of the Explanation to entry 22 in Part I of the Schedule to the Minimum Wages Act, 1948, which read as follows :

> "Employment in potteries industry.
>
> Explanation. - For the purpose of this entry potteries industry includes the manufacture of the following articles of pottery, namely :-...." (Then it lists out 9 times of potteries).

15. The argument was that the words "potteries industry" should be understood in the wide sense as taking in all objects that are made from clay and hardened by fire and as such they will include Mangalore pattern roofing tiles which was not one of the 9 items listed in the Explanation. The Supreme Court referring to the Explanation which said that potteries industry includes the manufacture of the 9 articles of pottery specified therein, held that the word "include" has been used in the sense of "means".

16. Relying on these decisions the learned counsel for the assessee contended that there could be no doubt that sale and exchange are "transfers". There are decisions holding that compulsory acquisition are also transfers. Relinquishment and extinguishment of rights are also certain special types of transfers and in these circumstances, when the Legislature specifically mentioned only these items after the word "includes" in the definition it should be held that "includes" was used in the definition in the sense of "means". In that sense, the word "includes" in the definition is not a word of extension, but a word of limitation. This argument is not open to the learned counsel as the Gujarat High Court in CIT v. R. M. Amin [1971] 82 ITR 194 has considered the definition in s. 2(47) and observed that is an inclusive definition and that there can be no doubt that the inclusive definition is intended to enlarge the meaning and connotation of the word "transfer". In the words of the Gujarat High Court (p. 200):

> "Now the word `include' is ordinarily used `in order to enlarge the meaning of the words or phrases occurring in the body of the statue; and, when it is so used these words and phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include'. It gives an extended statutory meaning to the word defined which is in addition to its ordinary popular and natural sense. Now, sale and exchange would clearly be covered by the ordinary natural meaning of the word "transfer" but relinquishment would not be so covered as held by the Supreme Court in CIT v. Provident Investments Co. Ltd. [1957] 32 ITR 190. The legislature, therefore, included relinquishment within the definition of "transfer" by an artificial extension of the meaning of that word. Similarly, the legislature also introduced extinguishment of any rights in a capital asset within the artificial definition of "transfer" so as to enlarge the meaning and content of the word "transfer" for the purpose of section. 45. When a right in a capital asset is extinguished and the right ceases to exist, it is difficult to assimilate this process to the juridical concept of transfer, for transfer as ordinarily understood postulates the continued existence of the subject-matter transferred to that what belonged to one prior to the transfer vests in another as a

> result of the transfer. To call extinguishment of a right in a capital asset as a transfer would be doing violence to the language but that is expressly authorised by the inclusive definition of `transfer'."

17. There can be no doubt therefore, that we cannot give any restricted meaning to the word "transfer" in s. 2(47).

18. The learned counsel also referred to a decision of the Andhra Pradesh High Court in Ghanshyamadas Kishan Chander v. CIT [1980] 121 ITR 121. In that case, the equity of redemption was brought to sale in execution of a money decree against the owner of the equity of redemption. The contention of the assessee, who was the owner of the equity of redemption, was that the value of the equity of redemption would be the total mortgage money plus interest due and as such there would be no capital gains. He also pleaded that there was a transfer of the assets under s. 45 even at the time when mortgage deed was created. Repelling this contention, the Bench held that mortgage is a transfer of an interest in immovable property and that is different from the transfer of a totality of interest in respect of capital asset and that a mere delivery of immovable property, cannot be treated as equivalent to a conveyance of the immovable property so as to come within the definition of "transfer". This decision is no authority either for the contention that in order to constitute a transfer within the meaning of s. 2(47) there should be a transfer of a totality of the interest in the land and that the right to possession and enjoyment alone cannot be treated as a capital asset capable of being transferred. In fact, in Traders and Miners Ltd. v. CIT [1955] 27 ITR 341, the Patna High Court held that the lease relating to the surface right together with nine mica mines located in that area was held to be a transfer of the capital asset within the meaning of s. 12B of the Indian I.T. Act, 1922. Though there is no discussion the point was directly decided. We, therefore, hold that there was a transfer of a capital asset for a consideration of Rs. 5 lakhs under the instrument dated 10th September, 1970.

19. It was next contended by the learned counsel for the assessee that in order to attract capital gains tax, there should be a cost of acquisition in terms of money to the assessee, and in this case, there is no separate cost of acquisition for possession and enjoyment and as such the income is not chargeable to capital gains tax. In this connection he relied on the decision in CIT v. K. Rathnam Nadar [1969] 71 ITR 433 (Mad) and Addl. CIT v. K. S. Sheikh Mohideen [1978] 115 ITR 243 (Mad) [FB]. It is true that in these two decisions it was said that unless the asset had cost something in terms of money for its acquisition, it was not possible to conceive of capital gains as envisaged by the statue though an asset of a capital nature has been transferred. The learned counsel also referred to ss. 48 and 49 in this connection. Section 48 refers to actual cost and s. 49 refers to what we may call, costs to be determined in terms of the provision. The learned counsel contended that there is no third definition and that either there should be an actual costs or cost as determined under the provisions of s. 49. We have already seen that the rights of the owner of a land include a right to be in a possession and enjoyment as well. The right of enjoyment vested in the assessee in the present case is the right to exploit the land by extracting clay. This right of exploitation of the land formed part of the cost of acquiring the land. The land by itself may have no value except for its usefulness in extracting clay. Therefore, the value of the right to excavate clay in the land in terms of money must have formed part of the price paid by the assessee for the land. Whatever difficulty there may be is assessing its value, it may not be

correct to assume that there was no cost for the value of the right to excavate the land in terms of money. The AAC had considered these aspects and held that the entire sum of Rs. 27,260 may be allowed as a cost of acquisition for the purpose of determining the capital gains. We are therefore, of the opinion that there is no basis for the contention that in the right to possession and enjoyment transferred to the company was not paid for the by the assessee when it acquired the property itself.

20. We, accordingly, answer the two questions referred in the affirmative. The revenue will be entitled to its costs. Counsel's fee Rs. 500.

30. The aforesaid order of the Hon'ble Madras High Court has been upheld by the Hon'ble Supreme Court. In this case reported in A.R. Krishnamoorthy v. Commissioner of Income Tax, (1989) 176 ITR 417 (SC), the Hon'ble Supreme Court held as under;-

The question in this appeal is whether the grant of a mining lease for a period of ten years by the assessee can give rise to a capital gain taxable under section 45 of Income-tax Act, 1961.

The assessee, a body of individuals, purchased two pieces of land in the year 1966 measuring 14.55 acres at a price of Rs.27,260. By an instrument of lease-cum-licence dated 10th September, 1970 they granted a mining lease in favour of M/s. Sri Krishna Tiles and Potteries (Madras) Private Limited (hereinafter called the 'Company'), an allied concern of the assessee. The lease was for a period of 10 years and the lessee had to pay a premium or salami of Rs.5 lakhs in addition to the payment of royalty of Rs. 12 per hundred cubic ft. of clay extracted subject to a minimum of Rs.60,000 per year.

The Income-tax Officer construed the lease deed as transferring a lease-hold interest in the land in favour of the company and came to the conclusion that the transfer was assessable to capital gains tax. For the purpose of comput- ing the extent of tax the Income-tax Officer assessed the market value of the entire land at Rs.8 lakhs. Since the lease-hold interest was transferred for a sum of Rs.5 lakhs, he valued the lease-hold interest at 5/8th of the sale price of the entire land. On that basis the Income-tax Officer computed the cost of acquisition of the lease-hold interest at Rs. 17,040, being 5/8th of Rs.271,260. Thereafter deduct- ing Rs. 17,040 from the sale consideration of Rs.5 lakhs, he treated the sum of Rs.4,82,960 as long-term capital gains.

The assessee preferred an appeal to the Appellate As- sistant Commissioner. The Appellate Commissioner held that the value of the right to excavate the land in terms of money is included in the purchase price paid by the assessee for the land. He rejected the argument of the assessee that the cost of acquisition of the said assets could not be determined. He then proceeded to consider the cost of acqui- sition of such right and differing with

the Income Tax Officer held that on the facts of the case the cost for the purpose of ascertaining the capital gains would be the total price of the land paid by the assessee, that is, Rs.27,260. On all other points he upheld the order of the Income-tax Officer.

The assessee preferred an appeal to the Tribunal. The Tribunal observed that the entire ownership of the property means the ownership of a bundle of rights and a limited interest which can be severed and disposed off for a speci- fied period in the form of lease or mortgage or the like is part of that bundle. According to the Tribunal the purchase price paid by the assessee for the land includes therein a component of purchase price attributable to various kinds of interests embedded in the said land. The Tribunal confirmed the order of the Appellate Commissioner and dismissed the appeal.

Arising from the said decision of the Tribunal. the following two. questions were referred to the High Court for determination:

> (i) Whether, on the facts and in the cir-cumstances of this case, the instrument of lease dated September 10, 1970 effected the transfer of a capital asset within the meaning of section 45 of the Income-tax Act, 1961 and, accordingly, liable to capital gains tax?
>
> (ii) Whether, on the facts and in the circumstances of the case the Tribunal is right in law in holding that the cost of lease hold right is capable of valuation and, as such, capital gains can be computed?

The High Court opined that the right conferred on the lessee under the lease deed was also a capital asset in the hands of the assessee-lessor. By giving a liberal meaning to the word "transfer" in section 2(47) of the Act the High Court held that there was a transfer of capital asset for a consideration of Rs. 5 lakhs under the instrument dated 10th September, 1970. It was further held that the rights of owner of a land include a fight to grant the lease to ex-ploit the land. The High Court answered the two questions in the affirmative and against the assessee. The High Court granted a certificate under section 261 of the Act to appeal to this Court.

The relevant provisions of sub-section 14 of section 2 which defines "capital asset" and section 45(1) of the said Act which provides for the levy of tax on capital gains is as under:

> "2(14) "capital asset" means property of any kind held by an assessee, whether or not connected with his business or profession, but does not include--.
>
> 45(1) Any profits or gains arising from the transfer of a capital asset effected in the previous year shall, save as otherwise provid- ed in section be chargeable to income-tax under the head "Capital gains", and shall be deemed to be the income of the previous year in which the transfer took place. "

Mr. Harish Salve, learned counsel appearing for the appellant, without disputing that the grant of a lease would constitute a transfer of an ,asset, has raised the following two contentions:

(i) That conceptually there is no "cost of acquisition" which is attributable to the right of limited enjoyment transferred by the grant of the lease. There is no nexus between the "cost of acquisition" of the free-hold land and the right granted under the lease. For the same reason it is contended that there is no question of apportionment of such "cost of acquisition".

(ii) That since the cost of acquisition of the right granted under the lease cannot be determined the computation provisions under the Act cannot apply at all and as such sec- tion 45 of the Act is not attracted. Reliance for this contention is placed on the judgment of this Court in C.I.T.v.B.C. Srinivas Shetty, 128 ITR 294.

As regards the first contention, section 2(14) of the Act defines "capital asset" as "property of any kind held by an assessee". What is parted with under the terms of the lease-deed is the right to exploit the land by extracting clay which fight directly flows from the ownership of the land. The said right evaluated in terms of money forms part of the cost of acquiring the land. In Traders and Mining Ltd. v. C.I.T., 27 ITR 341, a Division Bench of the Patna High Court, interpreting the expression "transfer of a capital asset" held as under:

"We think that the expression "transfer" in the section includes not only a permanent transfer but also a temporary transfer of title to the property in question and lease of mines for any period would fall within the ambit of section 12B of the Act. It was also contended by Mr. Dutt that a transaction of a lease was not tantamount to a transfer of a title but that a mere contractual right was created. We do not think that this argument is correct. A lease of land is transfer of inter- est in the land and creates a right in rem: and there is a transfer of title in favour of the lessee though the lessor has right of reversion after the period of the lease termi- nates."

This decision has been referred to with approval by this Court in R.K. Palshikar (HUF) v. Commissioner of Income. Tax, M.P. Nagpur, [1988] 3 SCC 549. If transfer of capital asset in section 45 of the Act includes grant of Mining Lease for any period .then obviously the "cost of acquisi- tion" of the land would include the "cost of acquisition" Of the Mining right under the lease. Undisputedly the grant of alease being a transfer of an asset there is no escape from the conclusion that there is a live nexus between the "cost of acquisition" of the land and the rights granted under the lease. The amount of Rs.27,260 paid by the Assessee was not only the cost of acquiring the land but also of acquiring bundle of fights in the said land including the right to grant lease. There is, thus no force in the contention of the learned counsel that conceptually there is no "cost of acquisition" which is attributable to the fight of limited enjoyment transferred by the grant of the lease. So far as the apportionment of the cost of acquisition is concerned it is a question of fact to be determined by the Income-Tax Officer in each case on the basis of evidence. The determination of the cost of the right to excavate clay in the land in terms of money may be difficult but is none-the-less of a money value and the best valuation possible must be made. Viscount Simon in Gold Coast Selection Trust Ltd. v. Inspector of Taxes, 17 ITR 19 (supp) observed "valuation is not an exact science. Mathe- matical certainty is not demanded, nor indeed is it possi- ble." The Income-tax Officer in this case worked out the cost of lease hold interest by adopting the 5/8th ratio, though the Appellate Commissioner gave the benefit to the Assessee of the Full Price of the land paid by him. In Traders and Mines Ltd. v. Commissioner of Income-tax,

(supra) the Income-tax Officer had also determined the cost of the lease hold fights on proportionate basis. Once the cost of the lease-hold fights is determined then there is no difficulty in making apportionment. We, therefore, do not find any force in the first contention of Mr. Salve and reject the same.

In view of our finding on the first contention the second contention does not survive. The value of lease hold fights in the cost of acquisition of land being determinable the computation provisions under the Act are applicable and section 45 would be attracted. In Shetty's case the question was whether the transfer of the goodwill of a newly com- menced business can give rise to a capital gain taxable under section 45 of the Act. This Court answered the ques- tion in the negative. Referring to the charging section and the computation provisions under the Act this Court held that none of those provisions suggest the inclusion of an asset under the Head "Capital Gain," in the acquisition of which no cost at all can be conceived. Good will generated in an individual's business was held to be an asset in which no cost element can be identified or envisaged. It was also held that the date of acquisition of the asset is a material factor in applying the computation provisions pertaining to capital gains and in the case of self-generated good will it is not possible to determine the same. The third reason for holding that the good will generated in a newly commenced business cannot be described as an 'asset' within the terms of section 45 of the Act was that it is impossible to determine its cost of acquisition. None of the three reasons given by this Court in Shetty's case are applicable in the present case. We have held that the cost of acquisition of lease hold rights can be determined. The date of acquisition of the right to grant lease has to be the same as the date of acquiring the free hold rights. The ratio of Shetty's case is thus not attract- ed to the question involved in the present case. We, there- fore, do not find any force in the second contention also. Accordingly the appeal is dismissed with costs.

31. In the light of the discussion and judicial precedence, it cannot be held in the facts and circumstances of this case that, the assessee had merely leased out the properties, but we are of the opinion that assessee had sold the property/land to the unit holders which wasn't permitted in terms of Rule 11(9) of SEZ Rules and for other reasons stated infra.

32. Now we take up Rule 11(10) of the SEZ Rules. It is noted that, the proviso to the said Rule contains two conditions viz., **(a)** the developer can lease out only completed infrastructure and **(b)** the Developer shall strive to provide the residential units to not only the management and

office staff of the SEZ unit-holders but also the workers employed there. Perusal of the lease agreement with unit holders reveals that, the assessee had perpetually leased the land and also sold the freehold structure built thereupon and the consideration agreed upon was bifurcated into these two components. As noted above, the consideration for land was separately provided therein. The assessee is noted to have leased the land to outsiders and agreed to receive portion of consideration upfront and thereafter in phase-wise manner in line with the construction of the building. The assessee has accordingly leased out the land and agreed to construct super structure thereon. The relevant clause 2(g) of the lease agreement, taken note of, by us, is as follows:-

> "g. The LESSEE has approached the LESSOR and has agreed to take on perpetual lease from the LESSOR a residential unit being a Villa/Twin Höme No.59, Unit Type Premiere Villa PV-F-01, admeasuring about 2372 sa. ft. of carpet area equivalent to 3375 sq. ft. of saleable area along with Car Parking Space, to be constructed on Plot No.81(divided / undivided share in / of land area 4430 sq.ft. ~ 1.85 ground or thereabouts), more particularly described in Schedule B and hereinafter referred to as the "**Schedule 'B' Property**", and shown on **plan 1** (plan showing boundaries of the plot of land of Schedule B property) and **plan 2** (floor plan of Schedule B property) annexed hereto in accordance with the specifications agreed upon between the Parties and mentioned in **Schedule 'C'** hereunder at Phase 1C, Aqualily, Mahindra World City, New Chennai for a total consideration of Rs.1,66,93,750/-(Rupees. One Crore Sixty Six Lakhs Ninety Three Thousand Seven Hundred and Fifty only). (This includes land and construction cost in the manner stipulated in clauses 2.3,4 & 5 of this agreement)."

33. We thus find merit in the submission of Ld. CIT DR for the Revenue that, the assessee had leased the land and agreed to construct and hand

over super structure thereupon. Upon execution of this agreement, the unit-holder had acquired valuable right to specific performance over the land. Hence, we find that, the assessee had not leased out completed infrastructure but an under-construction project. The assessee, on the other hand, has laid emphasis of Clause (6) of the lease agreement which states that the possession shall be handed over only post completion of the infrastructure. In our considered view, the handing over of possession is immaterial to ascertain compliance with the first proviso to Rule 11(10) of SEZ Rules. It may be relevant to state at this juncture that, this was not a case of ordinary lease *(as already noted earlier).* Also, there was no lease rental provided in the agreement, and rather, the land cost was to be paid by the unit-holder. Hence, the argument of the assessee would have held some water, had the lease period or the rental payment started post completion and handing over of the completed infrastructure, as then it would have meant compliance with proviso to Rule 11(10). In the present case, there is neither defined lease period nor is there any termination clause nor is the unit-holder required to pay any periodic rent. Instead, the assessee had received upfront payment aggregating to 95% of the total consideration prior to completion of the infrastructure. On these specific facts of this case, we accordingly hold that, the assessee

was unable to prove that, it had leased out '*completed infrastructure'*, and thus the condition set out in first proviso to Rule 11(10) was not met.

34. The second proviso to Rule 11(10) states that, the assessee was ordinarily required to lease out the residential units to management and office staff of the SEZ unit-holders but it ought to also strive to provide housing facilities to workers located there. From the admitted facts placed before us, it is noted that, the assessee has not complied with this proviso and that *the residential units were sold to outsiders*. The assessee however contended that this second proviso was complied with, by making a bald statement that, it had made efforts to first allot the residential units to management, office staff & workers and because they didn't get much traction from them, that it was constrained to offer these residential units to outsiders. Neither before us nor before the lower authorities has the assessee brought any material or evidence whatsoever on record to support such an averment. According to us therefore, this contention of the assessee is untenable and is accordingly rejected.

35. Overall, therefore, we find that, the assessee had indeed violated the SEZ rules and regulations and therefore the lower authorities had rightly denied the deduction claimed u/s 80-IAB of the Act. We also note that, the Ministry of Commerce & Industry, Government of India vide

Notification No. 1846 (E) dated 27th October, 2006 had specified the authorized operations for which exemption could be availed. Having perused the details of authorized operations, it is noted that the activity of development of residential infrastructure did not find any mention therein.

36. Before us, the assessee has laid emphasis on the letter of exemption issued by Assistant Development Commissioner, MPEZ SEZ Tamil Nadu. However, careful perusal of the same shows that it was a sector specific approval for authorized activity of 'IT/Hardware/Bio-informatics'. The said letter nowhere mentions exemption from income-tax for development of residential infrastructure. According to us therefore, this letter of exemption is not of any assistance to the assessee.

37. The Ld. CIT, DR has also relied upon Rule 11A, which was inserted in the SEZ Rules from 02.01.2015 to support the order of the lower authorities. The assessee, on the other hand, has objected to the same stating that the said Rule cannot be applied retrospectively. For this, he drew our attention to the provision contained in Rule 11A of the SEZ Rules, inserted from 02.01.2015, which read as under:-

> "11A. BIFURCATION OF NON-PROCESSING AREA: The non-processing area can be bifurcated into two parts, namely: -

(1) Where the social or commercial infrastructure and other facilities are permitted to be used by both the Special Economic Zone and Domestic Tariff Area entities:

No exemptions, concessions or drawback shall be admissible for creation of such Infrastructure. The Customs duty, Central Excise duty, Service Tax, and such other Central levies and tax benefits already availed for creation of such infrastructure shall be refunded by the Developer in full, without interest. However, in cases of short payment of the amount refundable to the Government on account of dual use permission, interest will have to be paid at the rate of fifteen per cent per annum from the day the said amount becomes payable to the date of actual payment. Utilization of SEZ land shall be subject to following conditions:

(a) the land is to be put to only such use which is as per the regulations of the concerned State Government or local bodies;

(b) if any exemption or refund has been taken from State or local taxes like stamp duty, change of land uses, etc., the same shall be refunded back to State Government or local authorities and a certificate to this effect shall be produced from the concerned authorities:

(c) No Objection Certificate (NOC) from the concerned State Government shall be produced before the consideration of the request by Board of Approval (BoA). State Government may issue No Objection Certificate (NOC) taking into consideration (a) and (b) above.

(2) Where the social or commercial infrastructure and other facilities are permitted to be used only by Special Economic Zone entities:

This portion shall be bonded and physically segregated from the Domestic Tariff Area, non-processing area, specified at (1) above and the processing area of the Special Economic Zone. The infrastructure, as may be approved by the Board, for this part of non-processing area shall be eligible for exemptions, concessions and drawback.

(3) The Department of Commerce has provided the following norms with respect to areas to be earmarked for residential, commercial and other social facilities:-

(a) The Developer or Co-developer shall submit an application in the format as specified by the Central Government to the Development Commissioner indicating there in the portion of the non-processing area where social or commercial infrastructure and other facilities are proposed to be used by bath Special Economic Zone and Domestic Tariff Area entries and the said application shall be accompanied with a copy of the Infrastructure Plan and No Objection Certificate from the concerned State Government and supporting documents

(b) The Development Commissioner shall forward the said application to the Board of Approval (BoA) for approval

(c) The area restrictions for duty paid dual use non processing area in the Special Economic Zones shall be as follows:

(i) Housing-not more than twenty five per cent of non-processing area:

(ii) Commercial- not more than ten per cent of non-processing area

(iii) Open area and circulation area-not less than forty five per cent of non- processing area;

(iv) Social and institutional infrastructure including schools, colleges, socio-cultural centers, training institutes, banks, post office, etc., in the remaining area.

(d) Floor Area Ratio or Floor Space Index shall conform to the norms of the concerned local authorities.

(e) No sale shall be permitted of such duty paid dual use infrastructure in the non- processing area and only lease hold rights can devolve upon the users of transferees of the said dual use duty paid infrastructure in Non-Processing Area of Special Economic Zones, and

(f) Any other conditions as may be specified by the Department of Commerce or Board of Approval"

38. According to Ld CITDR the said Rule was notified to bring clarity regarding the bifurcation of '*non-processing area'*. It has classified the '*non-processing area'* into two components, viz., area which will be used by the SEZ entities and area which can be used by other than SEZ entities. By this Rule, the Govt of India has brought in the much-needed clarity that the social infrastructure including residential units can be used by domestic tariff area entities as well, which was earlier ambiguous due to the language used in the second proviso to Rule 11(10). The said Rule according to him, further provides that, no exemption shall be admissible

for creation of social infrastructure. It further states that, wherever such tax benefits have already been availed, the same shall be refunded by the Developer. It has specifically clarified that, only where the social infrastructure is to be used by the SEZ entities that the developer may be entitled to avail exemption. The said Rule, according to Ld CITDR, thus brought in clarity regarding the tax benefits, concessions and exemptions in relation to social infrastructure.

39. Thus, according to Ld CITDR, Rule 11A, brought in clarity, more particularly in the language used in Rule 11(10) suggested that the residential infrastructure could only be made available to SEZ entities. In such circumstance, according to him, the perpetual lease granted by the assessee to outsiders itself was violative of the SEZ laws. It was also brought to our notice that the assessee had been served with a notice [SCN] in this regard by the Development Commissioner, MPEZ SEZ dated 14.02.2014, wherein the competent authority has taken cognizance of this violation and had sought to withdraw the tax benefits and exemptions availed by the assessee in this regard. And that the assessee filed a writ petition against the said SCN before the Hon'ble Madras High Court, but the Ld. AR for the assessee was unable to show that, either the SCN has been stayed and/or quashed by the Hon'ble High Court, and it is still pending before Hon'ble High Court. Be that as it may, we are not inclined

to look in to the effect of Rule 11A which was inserted from 02.01.2015; and therefore, reliance placed by the CIT-DR on Rule 11A to further corroborate the findings of the AO, according to us, need not be looked into, since we have already held that assessee was in violation of Rule 11. Accordingly, we are not returning any finding on the retrospective operation of Rule 11A and the ibid issue is left open.

40. Before parting we would like to discuss about the decision of Delhi Tribunal in DCIT Vs DLF Commercial Developers Ltd in ITA No. 2503 & 4453/Del/2013 dated 17.11.2021, which was relied by Ld. AR for the assessee. The facts involved in this decision and the issue adjudicated by the Tribunal [Delhi] are found to be totally distinguishable. The facts involved in that case, as noted by us, was that assessee had obtained sanction to develop SEZ and had accordingly developed the infrastructure and leased the bare shell building blocks. The AO had originally accepted and allowed the deduction claimed u/s 80IAB of the Act. The PCIT u/s 263 however held that the assessee had only developed the SEZ but didn't operate and maintain the same. The PCIT further held that the assessee had made extraordinary profits and therefore sought to deny the deduction u/s 80IAB of the Act. Upon remand by the Hon'ble Delhi High Court, the Tribunal examined the facts noted that, the assessee had developed the SEZ infrastructure in accordance with the approval

accorded by SEZ authorities and that there was no pre-condition in Section 80IAB that the Developer was required to operate and maintain the same as well. Accordingly, the impugned revisionary order passed u/s 263 of the Act was held to be untenable. In that case, the jurisdiction to invoke revisionary jurisdiction u/s 263 of the Act was tested by Delhi Tribunal. But in the present case however, the question relates to allowability of deduction claimed u/s 80IAB in relation to development of social infrastructure over the non-processing area which was undertaken in violation of SEZ laws. The facts before us are noted to be totally different, and hence the said decision is found to be of no relevance.

41. For the reasons discussed above, the grounds raised by the assessee against the denial of deduction u/s 80IAB of the Act stands dismissed. Since we have upheld the order of the Ld CIT(A) holding that the assessee was not eligible to claim deduction u/s 80IAB of the Act, other grounds raised by the assessee regarding admissibility of certain species of other income, viz., interest on deposits, cancellation income, etc. for deduction u/s 80IAB of the Act has become academic in nature and therefore are not being separately adjudicated upon.

42. Since the facts and circumstances in the lead case for AY 2012-13 under consideration is identical to AYs 2013-14 & 2014-15, our decision in

A.Y. 2012-13 of the assessee's appeal shall apply *mutatis mutandis* to the assessee`s appeals in ITA Nos. 338 & 339/Chny/2020 for AYs 2013-14 & 2014-15. Hence, these appeals for AYs 2013-14 & 2014-15 also stands dismissed.

43. In the result, the appeals of the assessee for AYs 2012-13, 2013-14 & 2014-15 stands dismissed.

Order pronounced on the 06th day of September, 2024, in Chennai.

Sd/-	**Sd/-**
(जगदीश**)**	**(एबी टी. वर्की)**
(JAGADISH)	**(ABY T. VARKEY)**
लेखा सदस्य**/ACCOUNTANT MEMBER**	न्यायिक सदस्य**/JUDICIAL MEMBER**

चेन्नई/Chennai,
दिनांक/Dated: 06th September, 2024.
TLN, Sr.PS

आदेशकीप्रतिलिपिअग्रेषित**/Copy to:**
1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकरआयुक्त/CIT, Chennai / Madurai / Salem / Coimbatore.
4. विभागीयप्रतिनिधि/DR
5. गार्डफाईल/GF