

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

**BEFORE SHRI SATBEER SINGH GODARA, JUDICIAL MEMBER
AND
SHRI M. BALAGANESH, ACCOUNTANT MEMBER**

ITA Nos. 3850 to 3852, 3854/Del/2016
Assessment Years: 2007-08 to 2009-10 & 2011-12

With

ITA Nos. 4296 & 4297/Del/2016
Assessment Years: 2012-13 & 2013-14

With

ITA Nos. 4791 to 4796 /Del/2016
Assessment Years: 2007-08 to 2012-13

Dy. CIT, Circle-1, Ghaziabad	Vs.	M/s. Devidayal Aluminium Industries Pvt. Ltd., C/o- Hotel Gopal Plaza, Choti Bazaria, Railway Road, Ghaziabad
PAN :AAACD6390F		
(Appellant)		(Respondent)

With

ITA Nos. 4609 to 4614/Del/2016
Assessment Years: 2007-08 to 2012-13

With

ITA Nos. 4387 & 4388/Del/2016
Assessment Years: 2012-13 & 2013-14

With

ITA No. 7291/Del/2018
Assessment Years: 2015-16

M/s. Devidayal Aluminium Industries Pvt. Ltd., C/o- Raj Kumar & Associates, CAs, L-7A (LGF), South Extension Part-2, New Delhi	Vs.	DCIT, Circle-1, Ghaziabad
PAN: AAACD6390F		
(Appellant)		(Respondent)

Assessee by	Sh. Rajkumar Gupta, CA Sh. J.P. Sharma, CA
Department by	Sh. B.S. Anand, Sr. DR

Date of hearing	27.11.2024
Date of pronouncement	08.01.2025

ORDER

PER SATBEER SINGH GODARA, JM

The instant batch of twenty-one appeals/cross appeals, as the case may be, pertains to the single assessee herein M/s. Devidayal Aluminium Industries Pvt. Ltd. We further note that the Revenue's four appeals ITA Nos. 3850, 3851, 3852 & 3854/Del/2016 (for AYs 2007-08, 2008-09, 2009-10 & 2011-12) arise against the CIT(A), Meerut's common order dated 28.03.2016 in case nos. 47/322/2014-15; 46/321/2014-15; 45/320/2014-15, 44/319/2014-15, 43/318/2014-15 respectively. It's remaining two cases with assessee's as may cross appeals ITA Nos. 4296 & 4297/Del/2016 with ITA Nos.4387 & 4388/Del/2016 (for AYs 2012-13 & 2013-14), are directed against the CIT(A), Ghaziabad's twin orders; both dated 12.05.2016 in case no 025/2015-16/GZB for AY 2012-13 and case no. 196/2015-16/GZB in latter assessment year respectively. The latter's appeal ITA No. 7291/Del/2018 (for AY 2015-16) arises against the CIT(A),

Ghaziabad's order dated 08.08.2018 in case no. 364733251150118. Relevant proceedings in assessment years 2007-08 to 2009-10 and 2011-12 herein are under section 147 r.w.s. 143(3) and for the latter three assessment years 2012-13, 2013-14 and 2015-16 are under section 143(3) of the Income-tax Act, 1961 (in short "the Act"), respectively.

As against this, the latter batch of twelve cases i.e. assessee's and Revenue's six cross appeals each i.e. ITA Nos. 4609 to 4614/Del/2016 and ITA Nos. 4791 to 4796/Del/2016 for assessment years 2007-08 to 2012-13; are directed against the CIT(A), Ghaziabad's common order dated 29.06.2016 in case nos. 341 to 346/2015-16/GZB; respectively, in proceedings under section 221(1) of the Act.

Heard both the parties at length. Case files perused.

2. The Revenue's "lead" quantum appeal ITA No. 3850/Del/2016 for the first and foremost assessment year 2007-08 raises the following substantive grounds:

- 1. The Ld. CIT(A) has erred in law as well as on fact in not appreciating the Intention of legislature envisaged in Article 2(47)(vi) of the I. T. Act, 1961 which clearly says that an arrangement which allows enjoyment of immovable property shall also be called as transfer.*

2. *The Ld. CIT(A) has erred in law as well as on fact in not appreciating that agreement between M/s Devidayal Aluminum Industries Pvt Ltd and M/s Parsavnath Developers Ltd entered on 28.10.2004 and further supplementary agreement was an arrangement to bestow the right on the land.*
 3. *The Ld. CIT(A) has erred in law as well as on facts in not appreciating the fact the assessee (M/s Devidayal Aluminum Industries Pvt Ltd) received non- refundable security deposit which also makes it clear that the said security was for the right to enjoy the land.*
 4. *The Ld. CIT(A) has erred in law as well as on facts in not appreciating the fact that the fair market value of the converted assets (Capital Asset to Stock in Trade) shall be taken to calculate profit as per Income-tax Act, 1961.*
 5. *Therefore, the order of Ld. CIT(A) may be set aside and that of the AO be restored.*
3. Both the learned representative next invited our attention to the CIT(A)'s lower appellate discussion reversing the assessment findings holding the assessee to have transferred the land(s) in question to M/s. Parswanath Developers "developer" as under:

*"Now all the other grounds have been taken together as under: -
First of all, the question arises whether there is any transfer of property or not as per the development agreements which is to be decided: -*

In the instant case as per the clauses of development agreements reproduced below, and facts of the case, there is no transfer of land as per provision of section 2(47) of the Act and there is no sale that has taken place for the lands under the development the development agreements during the Asst. year 2007-08 as none of the conditions have been satisfied that sale/transfer has taken place during the Assessment year 2007-08. Considering the following clauses of the development agreements the ownership of the land has not been

transferred to the Developer. The appellant has stated in the written submissions as under: -

Clause No.4.4 of the Original Development Agreements

"That at the time of signing this Agreement, the First Party has allowed the Second Party to enter upon the schedule property to carry out measurements, surveys, prepare the scheme of development, preparation of building plans for construction of independent floors/dwelling units/flats/houses/apartments etc. However, the legal possession of the schedule property shall remain with the First Party."

Clause 8.6 of the Original Development Agreements

"That the Sale Deeds in respect of the independent floors/dwelling units/flats/houses/apartments so marketed/sold shall be got registered in favour of the purchasers/allottees/members/nominees/transferees on or before handing over possession of each unit by the First Party and the Second Party shall signs the same as the Confirming Party. The stamp duty, registration charges, out of pocket expenses etc. shall be borne by the prospective buyers."

No authority is needed in support of the proposition that profit on sale of stock in trade u/s 28 of the Act can be assessed in the year of sale irrespective of the advance received even if substantial in accordance with the method of accounting regularly employed by assessee. This proposition is well supported in favour of the appellant by the following recent decisions:

(a) Commissioner of Income Tax XI vs. DLF Commercial project corporation (2015) (7) TMI 576 (Delhi) in ITA No. 627/2012, ITA 507/2013 dt. 15-07-2015

Transfer of development rights whether could be treated as sale consideration in the circumstances of the case? - Held that:-

In the instance case, since no sale occurred, no income can be said to have accrued to the assessee. The assessee's submission that sale is deemed to have taken place when proper conveyance is executed, in the circumstances is sound. In the absence of any sale, the revenue's attempt to bring to tax the advances received by the assessee must also fail, given that such advances were not towards any income that the assessee was entitled to receive in the two assessment years. Indeed, the Business Development Agreement

dated 02.08.2006 between M/s DLF Ltd. and the assessee and the Memorandum of Understanding dated 06.12.2006 between, M/s DLF Ltd. and CBDL were for sale of developments rights. Since the assessee failed to sell any such rights in the two years in question, the advances received cannot be classified as income. This Court affirms the ITAT's ruling on the first question of law and holds that the AO had erroneously added the amounts to the assessee's income on account of sale of development rights for AY 2007-08 and AY 2008-09. Decide against revenue.

(b) Dheeraj Amin vs. ACIT Cir 2(1) Decision of ITAT Bangalore 'A' bench in ITA No. 1709/Banu/2013 for asst. year 2010-11 dt. 30-06-2014 on facts squarely identical with the appellant's facts.

The relevant abstract of the ITAT's Order in the case of Dheeraj Amin Vs. Assistant Commissioner of Income-tax, Circle 2(1), Mangalore.

Relevant Para 19 & 20 are reproduced below:-

- 19. What the assessee has got today is only a right to sell the 1,28,940.26 fts of constructed area in the Alexandria project and the profits, howsoever certain they may appear to be, will only fructify and be realized, and can even be quantified, only when this right is exercised-in part or in full. That stage has not yet come, and until that stage comes, in our considered view, such profit cannot be taxed. Unlike in a case of a capital gain which arises on parting the capital asset at the first stage itself, it is a case of business transaction which is completed when the rights so acquired by the assessee are exercised; none can make profits by dealing with himself, as is the settled legal position in the light of the settled legal position in the case of Sir Kikabhai Premchand Vs. CIT [(1953)] 24 ITR 506 (SC)]. It is for this reason that we are unable to uphold the action of the authorities below on the facts of this case. No matter how reasonable is it to assume that the assessee will make these profits, these profits cannot be brought to tax at this stage. That is what the legal position, for the detailed reasons set out above, is.*
- 20. In our considered view, therefore, the authorities below indeed erred in bringing to tax the anticipated business profits on assessee's entering into a development agreement with Menorah Realities Pvt. Ltd in respect of the land held by the assessee as stock in trade. The impugned addition of Rs. 17,28,81,276 is thus deleted.*

Second, *the amount received by the Appellant company has been shown under the head Security deposit/advances till the final*

settlement was done in Assessment year 2015-16 wherein the income has been duly declared by the appellant in respect of two of the three projects "Regalia" and "Sterling". The third project "Exotica" is under dispute and as the Agreement has already expired. The appellant has stated as under:

The lands in question for which the Development Agreements have been entered into by the appellant company are no longer Capital Assets once they are converted into stock in trade within the meaning of section 45(1) of the Act and can only be assessed under section 45(2) of the Act in the year of sale. Without prejudice to the contention that section 45(1) has no applicability to the facts in the case of the appellant, it is submitted that no capital gains at all has accrued as no transfer has taken place within the meaning of section 2(47)(v) of the Act has taken place.

In support of the above submissions reliance has placed on the following decisions by the appellant:

6. *C. S. Atwal vs. CIT Ludhiana & Another (2015) 59 Taxman.com 359 (P & H)*
: There can be no "transfer" u/s 2(47)(v) of the Act read with sec.53A of the Transfer of Property Act, 1882 under an unregistered agreement in view of sub-section (1A) of section 17 of the Registration Act, 1908. Also, there is no transfer under the provisions if possession is delivered to developer in his capacity as licensee for the development of property and not in his capacity as transferee:
7. *Dilip Anand Vazirani vs. ITO (2015) SOT 1 (Mum) Where assessee entered into a development agreement and had given only license to the developer to enter into property but no possession thereof was given, transfer of property did not take place on the date of execution of development agreement:*
8. *Smt. Ranjana P. Doshi Vs. Dy CIT Circle 2 (2015) 2 TMI 893 ITAT Pune dt. 06-02-15.-PB No.2-page 190-211*
9. *AIT 2011 482 ITAT (Hyd) K. Radhika& Others Vs. DCTT Central circle 2 (Hyderabad). PB No.2-page 212-225*
10. *ITAT 'E' Bench Mumbai in ITA No. 29/Mum/ 99 dt. 07-12-99 MegjiMathrada vs. Jt. CIT Special Range 5.- PB No.2-page 226-238*

I have gone through the above decisions cited by the appellant given above and find merit in the contention of the appellant as in the above decisions the facts are similar to that of the appellant.

Third, the amount of refundable/non-refundable security deposit in terms of the Development and Supplementary Development agreements has been duly accounted for as Income in the year of transfer and the non-refundable security deposit has been adjusted in the dues receivable by the appellant company in terms of the clauses of the development and 1 supplementary developments agreements. The same has been stated by the appellant in the written submissions as reproduced below:

The Assessing Officer has wrongly interpreted the Clauses in Supplementary Agreements for all the three Projects which were duly accepted by the Developer (PDL) and the appellant Company and was not dislodged by the Assessing Officer and the appellant company has strictly followed all of the amended clauses executed in the Supplementary Development Agreements in respect of the security deposits received by it as referred as under: -

- a) Exotica Project-Clause No.1(a), 1(b) sub clause (i), (ii), and (iii)- PB Page No. 122-123 and Clause 4(i), (ii) and (iii).*
- b) Regalia Project-Clause No.1 and Clause 4 sub clause (i), (ii) and (iii)-PB Page No. 76-77*
- c) Sterling Project-Clause 1 and Clause 4. PB Page No. 98-99*

All the above clauses referred in the Supplementary Development Agreements read with Clause 10.1 of the main Development Agreements have been duly followed by the Appellant Company and by the Developer in total. All the Non- refundable security deposit received under the supplementary development agreements were transferred to advances received in terms of Clause 4(iii) of the supplementary agreements.

Fourth, the conclusion of the A.O that no recognition of sale revenue has been done by the appellant company does not stand ground as the income has been duly reflected by the appellant for two of the projects for which final settlement was completed on 17.02.2015 and the Income-tax Return duly filed and all taxes paid on the same.

Fifth, no amount has been considered by the Appellant Company as Capital Receipt in nature neither the amounts received in Escrow account nor the refundable / non- refundable security deposit have been treated as Capital Receipts. Income recognition on final

settlement/transfer and the total amount received offered for taxation under the heads Capital Gains and Business Income as per the relevant provisions of the Income tax Act, 1961.

Sixth, the Capital Asset converted into stock in trade in the assessment year 2007-08 is not required to be shown at the market value as the date of conversion in the books of accounts and the provisions of section 45(2) clearly mentions that the Fair market value should be adopted on the date of conversion of the capital asset into stock in trade for calculation of income under the head Capital Gains on the date of conversion which would be assessed under section 45(2) of the Income Tax Act, 1961 in the year of sale/transfer.

Seventh. Further there were no misrepresentation of facts by the appellant as no discrepancy of any sort nor any incriminating evidence was found which pointed out to escapement of Income for any assessment years under appeal or other year which has been brought forward by the Assessing Officer, even there is no rejection of the books of accounts by the A.O. and he has relied upon the Audited Books of Accounts of the appellant.

Finally, the Appellant company has recognized the sale revenue based on the method of accounting (Mercantile Basis) being followed by them since inception which fact has been duly accepted by the Department till date and even in the Assessment orders under appeal the A.O has clearly mentioned the Method of Accounting as "Mercantile" in all his assessment orders.

The appellant has stated as under:-

- The Appellant Company right from the inception has been regularly following Mercantile Method of Accounting in respect of its Business Income.*
- This method has been duly accepted in all the assessments made upto and including the Assessment year 2012-13.*
- The Appellant being a Company under the provisions of the Companies Act, 1956 to which it is governed it can only follow Mercantile method of accounting.*
- According to the provision of section 145 of the Act as substituted by Finance Act, 1995 w.e.f. 01-04-1997 an assessee can follow either 'Cash' or 'Mercantile' method of accounting regularly employed by the assessee. As a result thereof 'Mixed' or 'Hybrid' system of accounting which an assessee could employ upto assessment year 1996-97 was done away with.*
- There was no rejection by the Assessing Officer of the method of accounting being followed by the Appellant under section 145*

of the Act as the same has been accepted by the Department in the original assessments under section 143(1) and the Scrutiny assessments under section 143(3) and even in the re-assessments under section 147/143(3) there is no rejection of the Books of Accounts by the Assessing Officer.

- *That despite the fact that the Assessing Officer himself has held so in the assessment Orders under appeal for the Assessment years 2007-08 to 2011-12 (First page of all the Assessment orders) that the method followed is 'Mercantile Method'. Surprisingly he has assessed the business income on this account on receipt basis which is contrary to law. The Assessing Officer while assessing the Incomes from Business under both heads of income on Mercantile and Cash business ie 'Mixed method which is not permitted under section 145(1) of the Act. He has also not followed the mandate of section 145(3) of the Act. The factors enumerated by the A.O. in his orders under appeal and to clarify the issue in particular it is submitted that:*

(a) The stock in trade in respect of the three projects is no longer a capital asset. In any event capital gain can take place only when transfer takes place within the meaning of section 2 (47) of the Act.

(b) The sales revenue can be recognized in the year of sale which in fact has been booked in the year 31-03-2015 in respect of "regalia" and "sterling" projects as brought out herein above.

(c) No receipts have been excluded by treating them as capital receipts. In fact all receipts have been shown as advance against sales.

(d) There is no provision in the Act which obliges the appellant to show the value of the converted stock at its fair market value which is required to be taken into account in the year of sale for the purpose of computing capital gain u/s 45 (2) of the Act.

In the circumstances it is submitted that the AO did not appreciate that the decision in the case of Realest Builder and Services Pvt Ltd (307 ITR 202) (SC) & CIT vs. Wood World Governor 312 ITR 254 (SC) fully applied.- PB No.2 - Page 126-129

The AO in adopting cash method of accounting in respect of a part of business of the appellant has not followed the mandate of law and has also not followed the mandate w/s 145 (3) of the Act. In support of the above contention reliance is placed on following decisions:

(d) (2008) 307 ITR 202 (SC) in the case of Realest Builder and Services Pvt Ltd. Your Honour's kind references is invited last para of the judgment which speaks for itself. PB No.2 - Page no. 126-129

(e) (2013) 219 Taxman 362 (Allahabad) CIT vs. Kisan Cooperative Sugar Factory Ltd. Pilibhit. Your Honour's kind attention is invited to section para 9 and 10 of the order-PB No.2 Page no.130-132

(f) 2012 (5) TMI 148 ITAT Delhi in ITA No. 4085 (Delhi) 4009 dt. 20-04-12 in Dy. CIT Circle 1 (1) vs. Malibu Estates Pvt. Ltd. PB No.2-page 133-145

Method of Accounting Treatment of advance received from customers as sales - Application of AS-7 to construction contractors and to builder or real estate developers. The findings of the Assessing Officer for including the sale proceeds of the plots/floors in respect of which assessee has received advance. However, sale deeds have not been registered in this year. Now, the case of Assessing Officer is that merely on account of non-registration of sale deed, it cannot be construed that transaction has not been completed between the parties. The assessee cannot defer or postpone the recognition of the revenue in respect of these plots.-held that: - In the case of assessee, it is a developer and recognized the sale of the plots on execution of the conveyance deed duly registered. Taking into consideration all these aspects, we do not find any reason to change the method of accounting in this year Which was accepted in the past. The A.O. has not assigned any reason for this change. - Decided in favor of assessee.

After going through the appellant submissions and the above decisions which have been relied upon by the appellant, I find no merit in AO's contention regarding the changing of method of accounting to Receipt basis for the purpose of revenue recognition in the case of the appellant.

Since, assessee company had not transferred the land in question as per development agreements and assessing officer has wrongly treated it as transfer. When there is no transfer of land in question in all above the assessment years, then assessing officer has wrongly treated it as transfer. When there is no transfer, then provision of section 45(2) of the Act has no application in the assessment years as mentioned above because, the assessee has only converted the land in to the stock in trade in the Assessment year 2007-08 but no sale/transfer has taken place during these assessment years under appeal. Assessee also submitted that the conclusion of the A.O that no recognition of sale revenue has been done by the appellant company does not stand ground as the income has been duly reflected

for two of the projects for which final settlement was completed on 17.02.2015 and the Income-tax Return duly filed and all taxes paid on the same.

Considering the above, grounds of appellant are allowed and additions made by assessing officer are hereby deleted as per following details:-

For Assessment year Additions amount (in Rs.)

<i>1) 2007-08 Capital Gains</i>	<i>59,78,80,808</i>
<i><u>Less: Share of co-owner</u></i>	<i><u>8,37,75,265</u></i>
<i>Net Capital Gains addition</i>	<i>51,41,05,543</i>
<i>2007-08 Business Loss</i>	
<i>(59,78,80,808 - 18,75,31,803) (-) 41,03,49,005</i>	
<i>Capital Gains after set off</i>	<i>10,37,56,538</i>
<i>2) 2008-09 Business Income</i>	<i>21,74,12,289</i>
<i>3) 2009-10 Business Income</i>	<i>5,84,98,543</i>
<i>4) 2010-11 Business Income</i>	<i>1,09,06,685</i>
<i>5) 2011-12 Business Income</i>	<i>3,76,74,480</i>

In the result, appeal of the assessee is partly allowed.”

4. We now advert to the basic relevant facts common in all the instant cases. The assessee herein, namely, M/s. Devilal Aluminium Industries Pvt. Ltd. is a company manufacturing aluminium utensils. It admittedly owned and possessed the three land parcels/capital assets herein. It had executed as many development agreements with the above developer, namely, Regalia & Exotica (both dated 28.10.2004) and Sterling projects. We make

it clear that Assessment Year 2004-05 does not form subject matter of our adjudication herein. And that it was thereafter in the relevant previous year 2006-07 i.e. 28.09.2006, 26.07.2006 and all followed the corresponding supplementary agreement regarding Regalia (dated 20.09.2006), Exotica (dated 14.06.2007) and Sterling (main agreement dated 26.07.2006); as the case may be, which are sought to be treated as involving “transfer” under section 2(47)(v) of the Act. There is no quarrel between the parties that the assessee had converted these three parcels of land earlier treated as capital asset(s) to stock in trade in financial year 2006-07 relevant to assessment 2007-08 in issue.

5. Coming to the learned Assessing Officer’s assessment order dated 15.01.2015 in the “lead” assessment year 2007-08, he was of the view that the assessee’s former twin projects i.e. Regalia & Sterling had not only transferred possession under section 2(47)(v) of the Act read with section 53A of the Transfer of Property Act, 1882, but also it had received non-refundable security deposits and assigned the authority of further alienation in favour of the “developer”.

6. It is at this stage that we sought to know about the payments' schedule in all these impugned assessment years. We are informed that the corresponding terms between the assessee and the developer; modified subsequently from time to time dealing with as quantum-wise stipulation and escrow account to be maintained and apportioned thereof, had to be credited in the assessee's account. It is in this factual backdrop that the learned Assessing Officer treated the assessee's foregoing development agreement(s) in FY 2006-07 as in the nature of a "transfer" u/s 2(47)(v) of the Act and accordingly assessed long-term capital gains in the impugned "lead" assessment year 2007-08 by applying section 45(2) of the Act and thereafter, in all succeeding assessment years, he assessed the assessee herein qua the corresponding amounts coming from the escrow account (supra) as its business income.

7. That being the case, the sole substantive issue which arises for our apt adjudication in the Revenue's instant "lead" appeal ITA No. 3850/Del/2016 is as to whether the assessee's foregoing development agreement(s) would amount to a transfer within the meaning of section 2(47)(v) of the Act in the given facts, or not.

8. Learned CIT(DR) takes us to the first and foremost agreement's (between the assessee and the developer) clause 4.4 at page 30 that the latter party had been allowed to take possession followed by clause 8.6 therein that it had to act as the confirming party, which sufficiently indicates that the Assessing Officer had rightly treated the development agreement(s) as a "transfer" of capital assets after conversion thereof as stock-in-trade (supra), giving rise to the capital gain assessable under section 45(2) of the Act in assessment year 2007-08 and under the head "business income" in subsequent assessment years.

9. Learned counsel on the other hand seeks to buttress the point that the said clause 4.4 itself makes it clear that the legal possession of the corresponding parcels of lands continued to be vested with the assessee only and the developer had been assigned a limited permission to enter upon the schedule property(ies) for the purposes of measurements, surveys, preparations of building, plants etc. strictly in tune with the agreement terms. Coming to clause 8.6 at page 36, learned counsel clarifies that since the title and possession of the assessee's land herein continued to be vested

exclusively in its name, the developer/second party had to merely act as the confirming party, than the title holder.

10. We have given our thoughtful consideration to the Revenue's and assessee's foregoing vehement contentions. There is indeed no dispute between the parties that such long-term capital gains are assessable on accrual basis only. We reiterate that the sole substantive question before us as framed in the preceding paragraphs is that of applicability of section 2(47)(v) of the Act in the given facts of the case. We are of the considered view that the assessee's foregoing development agreement(s) nowhere amounted to transfer so as to be assessed for the consequential capital gains or business income (supra), as the case may be. This is for the precise reason that the corresponding recitals in these three separate development agreements have nowhere assigned or conveyed or transferred any title or possession in favour of the developer attracting section 2(47)(v) of the Act. As rightly pointed out by learned counsel, the assessee had merely granted a limited permission to the developer to enter in the said premises for the sole purpose of development or for raising construction thereupon and therefore, the same amounts to mere license under section 52

of the Indian Easement Act, 1882 not conferring any right or title so as to be covered either under section 53A of the Transfer of Property Act being part performance or under any of the stipulations under section 2(47)(v) of the Act.

11. In addition to this, there also arose commercial disputes between the assessee and the developer which reached upto hon'ble Supreme Court wherein an arbitration was ordered regarding "Exotica" project. Their lordships made an arbitration reference to the hon'ble justice Mr. A.P. Shah (Retd. Chief Justice & arbitrator), which culminated in the award dated November 4, 2020 and therefore, even going by accrual principle, we quote Chainrup Sampatram Vs. CIT (1953) 24 ITR 481 (SC) that no income could be said to have accrued to assessee in absence of any reasonable certainty in view of ongoing litigations. Their lordships said landmark decision also draws a distinction qua an expenditure claim which could be booked at the first sign of reasonable probability. We observe in this peculiar factual backdrop that once the assessee and it's developer had been contesting the cases upto hon'ble apex court regarding the third project herein, namely, Exotica, there was no element of a

reasonable certainty that the said former twin agreements pertaining to Regalia and Sterling stood settled giving rise to taxable income on accrual basis, as the case may be.

12. We further sought to know from assessee's side regarding the finality of projects as on date. Learned counsel submits that it had duly declaring the corresponding income derived from these former twin projects in assessment years 2015-16 which is accepted by the Revenue side as well. Learned CIT-DR raised a vehement contention that even if there is no quarrel between the parties qua the assessment of assessee's business income in assessment year 2015-16, that does not absolve it from getting assessed qua the corresponding capital gains or business income in assessment years 2007-08 to 2013-14 herein. We find no merit in the Revenue's instant arguments once again as there is no element of "transfer" noticed in the assessee's corresponding development agreements executed in assessment year 2006-07 pertaining to Regalia and Sterling projects and its advances received in the intervening years could not be held taxable in absence of project completion or reasonable certainty(supra). It would indeed not be out of place to observe here that the instant issue of a development

agreement being treated as a transfer in the past had caused genuine hardships and the legislature later on introduced section 45(5A) by the Finance Act, 2017 w.e.f. 01.04.2018 that subject to certain conditions of registration etc., such an agreement would not attract the long-term capital gains till completion of the project. So far as Revenue's endeavour to assess the assessee's capital gains herein is concerned, we quote Balbir Singh Maini [2017] 86 taxmann.com 94 (SC) that once the entire transaction of land forming subject matter of joint development agreement did not sail through since caught in various litigations and hurdles as in the present case, it does not amount to a transfer under section 2(47)(v) of the Act giving rise to assessment of capital gains. Their lordship's latter decision Seshasayee Steels Pvt Ltd Vs. PCIT 115 taxmann.com 5 (SC) has also settled the issue in assessee's favour that such a permissive licence as discussed hereinabove does not amount to a transfer under the very provisions. We thus take into account all these relevant facts and the foregoing judicial precedents to conclude that the learned CIT(A) has rightly reversed the assessment findings holding the assessee to have transferred its lands in question to the developer in financial year 2006-07

relevant to assessment year 2007-08 giving rise to assessment of capital gains in its hands. This Revenue's "lead" appeal ITA No. 3850/Del/2016 fails in very terms. Ordered accordingly.

13. Coming to the remaining eight quantum appeals between the parties i.e. Revenue's five appeals ITA No.3851, 3852, 3854, 4296 and 4297/Del/2016 (for AYs 2008-09, 2009-10, 2011-12, 2012-13 and 2013-14) with the assessee's cross appeals ITA No.4387 & 4388/Del/2016 (for AYs 2012-13 and 2013-14) along with its last appeal ITA No. 7291/Del/2018 for assessment year 2015-16, it emerges that the CIT(A)'s findings had sought to know the assessee's receipts from escrow account(s) (supra) from time to time in part. We are of the considered view in light of two preceding facts that the said advances could neither be assessed as assessee's capital gains or business income, as the case may be, since the project(s) in issue attained final completion in AY 2015-16 only (supra). We thus accept the assessee's arguments in its respective appeals to the very effect and reject the Revenue's subsequent ground as a necessary corollary therefore.

14. Learned counsel takes us to the assessee's third substantive ground in assessment year 2015-16 appeal that no interest under

section 234C ought to have been charged qua the first three installments of advance tax stated to be due on 15th June, 15th September and 15th December, respectively, as the project's corresponding transfer had taken place only on 17.02.2015 i.e. the date on which the consequential capital gains arose for the first time.

15. We reiterate in this factual backdrop that once it has already come on record that the assessee has been duly assessed in the last assessment year 2015-16 herein, and this date of transfer coming to 17.12.2015 to this clinching effect is not in dispute, the impugned interest u/s 234C read with 2nd proviso thereto, deserves to be restored back to the learned Assessing Officer for his afresh appropriate computation and factual verification in very terms. Ordered accordingly.

16. We make it clear in nutshell that these Revenue's five appeals ITA No. 3851, 3852, 3854, 4296 and 4297/Del/2016 raising the corresponding substantive grounds seeking to assess the assessee having derived the corresponding assessable capital gains or business income, as the case may be, in the impugned intervening assessment years, stand declined in very terms. The assessee's

three appeals ITA No. 4387 & 4388/Del/2016 succeed and its last appeal ITA No. 7291/Del/2018 in assessment year 2015-16 is partly allowed, in very terms.

17. We now deal with the assessee's and department's six cross appeals each i.e. ITA Nos. 4609 to 4614/Del/2016 and 4791 to 4796/Del/2016; in assessment years 2007-08 to 2012-13 respectively, raising the identical issue of the consequential section 221 penalty on the issue of the former's alleged default in payment of the taxes forming subject matter of all the preceding quantum appeals. We are of the considered view that once we have decided the foregoing identical sole legal issue in assessee's favour, the impugned consequential penalties have no legs to stand.

18. That being the case, learned CIT(A)'s findings partly confirming the Assessing Officer's action levying impugned section 221 penalties in all these assessment years involving varying sums, stand reversed in entirety in assessee's favour and against the department. Former's six appeals ITA Nos. 4609 to 4614/Del/2016 are accepted and latter's as many cross appeals ITA Nos.4791 to 4796/Del/2016 are hereby dismissed in very terms.

19. No other grounds or arguments has been pressed before us.

20. To sum up, these department's twelve appeals ITA Nos. 3850, 3851, 3852, 3854, 4296 and 4297/Del/2016 (quantum) and ITA Nos. 4791 to 4796/Del/2016 (penalty) are dismissed and the assessee's nine appeals i.e. ITA Nos. 4387 & 4388/Del/2016 are allowed; its third appeal ITA No.7291/Del/2016 is partly allowed and the remaining six appeals ITA Nos. 4609 to 4614/Del/2016 are allowed in the preceding terms. A copy of this common order be placed in the respective case files.

Order pronounced in the open court on 8th January, 2025

Sd/-
(M. BALAGANESH)
ACCOUNTANT MEMBER

Sd/-
(SATBEER SINGH GODARA)
JUDICIAL MEMBER

Dated: 8th January, 2025.

RK/-

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi