

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'जे', मुंबई ।
IN THE INCOME TAX APPELLATE TRIBUNAL "J", BENCH MUMBAI
BEFORE SHRI R.C.SHARMA, AM
&
SHRI RAM LAL NEGI, JM

आयकर अपील सं./ITA No.4922/Mum/2013

(निर्धारण वर्ष / Assessment Year :2001-02)

DCIT-CC-44, Mumbai-20	Vs.	JIK Industries Limited (Formerly Known as M/s Krishna Finstock Limited), 16, Gundecha Chambers, N.M.Road, Fort, Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AABCJ 2982 J		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

राजस्व की ओर से /Revenue by : Ms. Rajeshwari Motwani
निर्धारिती की ओर से /Assessee by : Shri Neelkanth Khandelwal

सुनवाई की तारीख / Date of Hearing : **25/04/2016**
घोषणा की तारीख/Date of Pronouncement **25/05/2016**

आदेश / O R D E R

PER R.C.SHARMA (A.M):

This is an appeal filed by the revenue against the order of CIT(A)-
Mumbai, dated 15-03-2013, for the assessment year 2001-02, in the
matter of order passed u/s.143(3) of the I.T.Act, on the following grounds:-

"1. On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in treating the liquidated damages of Rs. 4,50, 00, 000/- received from M/s Windia Power Ltd. as capital receipt without appreciating that the assessee failed to prove the genuineness of transactions with M/s Windia Power Ltd and existence of a valid contract.

2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in treating the compensation of Rs.1,23,75,000/- received from M/ s Weizmann Ltd. as capital receipt without appreciating that the assessee failed to prove the genuineness of transactions with M/s Weizmann Ltd and existence of a valid contract.

The appellant prays that the order of the CIT(A) on the above grounds be set aside and that of the Assessing Officer be restored."

2. Rival contentions have been heard and record perused. Facts of the case are that the AO made following additions on account of :

- a) *Liquidated damages from M/s. Windia Power Ltd taxed as Income from other sources of Rs.4,50,00,000/-*
- b) *Compensation from Weizmann Ltd. amounting to Rs.1,23,75,000/- taxed as Short Term Capital Gain.*
- c) *Disallowance of Deferred Revenue expenditure of Rs.11,11,0931/-*

The assessee preferred appeal before CIT(A) and vide order dated 29/9/2004 the appeal was dismissed on ground of non compliance to the provisions of S.249(4) of the Act. The Tribunal vide order dated 13/08/2007, set aside the order of the CIT(A) and directed CIT(A) to admit and decide the appeal of the assessee on merit. In the second round the assessee had filed a paper book, written submission and application U/R 46A for filing additional evidence before the CIT(A). The matter was therefore remanded by the CIT(A) to the AO for consideration of the Additional Evidence so filed. The Remand Report dt. 29/17/2011 was received from AO which was forwarded to the assessee by CIT(A) for their comments. The reply to the said remand report was submitted on 23-8-2011. On considering the same the CIT(Appeal) once again referred the matter for second Remand report in August, 2011. The second remand report dtd 30-11-2012 was received and forwarded to the Assessee for his comments.

3. From the record we find that during the course of assessment the AO treated liquidated damages of Rs.4.50 crores received from M/s Windia Power Ltd. as income from other sources and declined assessee's claim of capital receipt.

4. By the impugned order, the CIT(A) deleted the addition after observing as under :-

“4.2The facts of the case have been considered:

4.2.1 A. Various correspondences/ document are on record in r /o contract with Windia Power Ltd.

(i) Letter dated 03.07.1998 to Windia Power Ltd regarding setting up of Windfarm on turnkey basis

(ii) Quotation received vide letter dated 18.07.1998 for Windfarm Development

(iii) Purchase order/Contract with M/s Windia Power Ltd dated 01.08.1998

(iv) Letter dated 09.06.1999 from M/s Windia Power Ltd proposing Amendment to purchase order dated 01.08.1998 wherein Windia pointed out certain difficulties with their technical collaborators thereby proposing to change Micon Machine with WEGs. It was stated that contract completion date be extended by 30.04.2000.

(v) JIK Industries letter dated 29.07.1999 addressed to Windia Power Ltd after negotiations agreed to the fresh purchase order I amendment subject to completion of the project by 30.04.2000.

(vi) Letter dated 10.04.2000 from JIK Industries Ltd. addressed to M/s Windia Power Ltd pointing out that there was inordinate delay in completion of the project. M/s JIK Industries Ltd raised a debit note for liquidity damages of Rs. 450 crs.

(vii) Confirmation letter dated 20/03/2004 from Windia Power Ltd. addressed to JIK Industries Ltd., sub.: information to I T Department confirming payment of Liquidated charge as under:

Date	Cheque No.	Name of the bank	Amount
14.10.2000	885745	Bank of Madura	19837500
14.10.2000	885747	Bank of Madura	5200000
14.10.2000	885744	Bank of Madura	20000000
			45037500
Amount paid wrongly in excess received back by us			
24.11.2001	020868	Union Bank of India	37500
			45000000

B) Thus, the receipt of amount of Rs. 4.50 crs from M/s Windia Power Ltd as liquidated damages are evidenced by various documentary evidences i.e., right from proposal stage to quotation/entering into contract! correspondence for further negotiations on account of changed circumstances/non completion of project in spite of amended purchase order and extended time/lodging of claim for liquidated damages and finally payment of Liquidated charges.

C) Letter dated 21.08.2012 alongwith summons u/s 131 was issued by the AO to M/s Windia Power Ltd during the course of remand proceedings. The authorized representative of M/s Windia Power Ltd, Shri Haridas Pathak, CA attended and furnished the following details vide his letter dated 29.08.2012. ,

(a) "We have paid liquidated damages of Rs. 4.50 crs to JIK Industries for not fulfilling the commitment of supply, erection and commissioning of windmills .

We are submitting the copy of accounts which was given to JIK Industries Ltd., vide our letter dated 20.03.2004.

(b) As per commitment we had to supply and erect 9.5 megawatts Wind Farm and later on the same was changed to 9 megawatts. We were totally dependent for the supply of Wind Farm from Nedwind. Since the said party had closed down its business, ultimately we had to pay liquidated damages of Rs. 4.50 crs to JIK Industries Ltd.

(c) Copy of assessment order of M/s Windia Power Ltd for A.Y. 2001-02 alongwith their audited statement of accounts and Return of Income for A.Y. 2001-02 was also filed before the AO."

D) The Annual Report of M/s Windia Power Ltd submitted during the course of remand proceedings by the Authorised representative of M/s Windia Power Ltd before the AO shows that M/s Windia Power Ltd is in the business of supplying Windmills. The total turnover during the F.Y. was Rs. 237,007,923/-

E) The AO has failed to bring any material on record to prove the aforesaid documents facts were not genuine/fabricated.

F) Under these facts and circumstances, the AO's conclusion that assessee's transaction with M/s Windia Power Ltd lacks transparency and the explanation offered by the assessee is not satisfactory without bringing any material on record to disprove the various documentary evidences/facts is based on mere presumptions and surmises.

G) Under these facts and circumstances, it is held that the appellant has received liquidated damages from M/s Windia Power Ltd. for non performance of the contract.

4.2.2 As regards the nature of the receipt of liquidated damages, reference is invited to the ratio laid down by the various courts in this regard the Hon'ble Supreme Court in the case of Saurashtra Cement Ltd. (2010) 325 ITR 422(SC) followed broad principle that, Where by cancellation of any contract the trading structure of the assessee is impaired, or such cancellation results in loss of what may be regarded as the source of the assessee's income , the payment made to compensate for cancellation of contract is considered as capital receipt, and held that amount received by the assessee towards compensation for sterilization of the profit earning source , not in the ordinary course of their business is considered as capital receipt.

The Gujarat High Court in Saurashtra Cement & Chemicals Industries Ltd. (2002) 253 ITR 373 (Guj.) observed that the liquidated damages represents the source of income, which is amount connected with the profit making apparatus rather than a receipt in the course of profit earning process and thus, liquidated damages were not a revenue receipt. The other decisions in the matter of S. Zoraster & Co., (2010) 322 ITR 35(Raj.) reiterated the above laid principle and held that Amount received as compensation for breach of contract is a capital receipt.

4.2.3 Following the ratio laid down in the aforesaid case laws, the liquidated damages are received as compensation for sterilisation of the profit earning source. Hence, the same is capital receipt.

4.3 This ground of appeal is therefore allowed.”

5. Against the order of CIT(A), revenue is in further appeal before us.
6. We have considered rival contentions and found from the record that the assessee wanted to expand its business activities by entry in the business of generation of power through Wind Mills. The assessee entered into contract with 'M/s Windia Power Ltd. dated 1/08/1998, for generation of power through windmills by setting up of 9.5 MW wind farms on turnkey basis, comprising of 19 Nos. Ned wind I Windia make WEGs at Vankusawade in Satara District in the State of Maharashtra. The assessee had addressed a letter dated 31/7/1998 to Windia Power Ltd regarding setting up of Wind farm on turnkey basis. Quotation received for Wind farm development dated 18/17/1998. It was agreed between the assessee and M/s Windia Power Ltd. that assessee shall pay 10% of the cost on the laying of foundation at the site. The essence of contract was that the contract was to be completed latest by 31/3/99 as per clause 5. After several negotiations final date for completion of contract was fixed on 30/04/2000. Vide letter dated 9/6/1999.
7. We also found that the assessee in furtherance to the above permitted change of make of WEGs from Net Wind/Windia to Mecon to facilitate the completion of project. Despite of several opportunities and facilitation of change

of technology M/s Windia failed to complete the contract within stipulated time period. In this regard the correspondences with Windia Power Ltd. dated 24/16/99 was made. There after afresh purchase order was placed vide letter dated 29-7-1999. Thereafter once again the assessee company received letter dated 17/112000 from Windia Power informing that the contract would be delayed. Pursuant to the assessee's letter dated 3/312000 regarding status of the project, Windia Power informed vide letter dated 8/4/2000 that the Project would be completed in 2 or 3 months. The assessee company involved clause 6 of the contract for claim of liquidated damages to the term of Rs. 450 lacs. The assessee raised debit note for Rs.450 lacs. The assessee received letter dated 15/512000 for Windia Power Ltd for settlement. Confirmation from Windia dated 20/312004 with PAN No., cheque details, Bank Name, dates and figures, The above details were filed before the AO vide letter dated 1813/2004 and 23/3/2004. The assessee claimed and received liquidated damages amounting to Rs. 450 lakhs as reason for non completion of contract, which is essentially in the nature of capital receipt. The AO in the course of assessment proceedings taxed the above stated amount under 'Income from Other Sources'. As per the terms of contract with M/s Windia Power Ltd., we found that injury was inflicted on capital asset of the Company viz. the business of generation of power and in fact by virtue of non-performance of contract by M/s Windia. Power Ltd., the source of income was completely sterilised, depriving the assessee company from earning any income there from. The right to receive compensation is an apparatus to place the assessee in the same position as if breach had not taken place and thus, in the nature of capital receipt . We had carefully gone through the correspondence between the parties which comprises of letter dated 3-7-1998 written by the assessee to M/s Windia Power Limited, purchase order with

Windia Power Limited dated 1-8-1998, letter dated 9-6-1999 from Windia Power Limited proposing amounting to purchase order dated 1-8-1998, wherein contract completion date was extended by 30th April, 2000. We had also verified the letter dated 29-7-1999 addressed by assessee to Windia Power Ltd., wherein project completion was by 30th April, 2000. We had also gone through the confirmation letter dated 20-3-2004 from Windia Power Ltd. to the assessee confirming power of liquidator charges. All these documentary evidence clearly reveals the receipt of Rs.4.5 crores from Windia Power Limited as liquidated damages. However, the AO has failed to bring any material on record to prove the aforesaid documents as not genuine/fabricated. Detailed finding recorded by CIT(A) at para 4.2 has not been controverted by Id. DR, wherein CIT(A) after considering various documents placed on record came to the conclusion that right to receive compensation was an apparatus to place the assessee in the same position as if breach had not taken place, thus, in the nature of capital receipt not liable to tax. The finding recorded by CIT(A) are as per material on record, therefore, do not require any interference on our part.

8. The revenue is also aggrieved by the order of CIT(A) for treating compensation from M/s Weizmann Ltd. of Rs.1,23,75,000/- as short term capital gains. Facts in brief are that during the year under appeal the assessee had also received Rs.12375000/-from one M/s Weizmann Ltd. as consideration for transfer of "right to do business" granted by Government of Maharashtra. The assessee company vide its letter dated 20th January 2004 explained the entire transaction and contended that Right to do business was not doubt a capital asset but since there was no cost of acquisition, no liability to capital gains was attracted. It was also contended that this was the receipt before the commencement of the new business and therefore following the Delhi High

Court decision in the matter of CIT Vs. Manoranjan Pictures as reported in 228 ITR 202, the same is a capital receipt. Further vide letter dated 18-3-2004 it was further contended that what was transferred was not a “right to manufacture” but “right to do business” and transfer of “right to do business” was taxable only w.e.f.01.04.2003 and since the assessee company’s transaction was prior to that, the amount cannot be taxed as “capital gains” since “right to do business” had no cost of acquisition. However, rejecting the various contentions the AO has taxed the amount of Rs.1,23,75,000/- received from M/s Weizmann Ltd. as short term capital gains.

9. By the impugned order CIT(A) held the same as capital receipt not liable to tax after having the following observations :-

“5.2 The facts of the case have been considered:

Since the appellant has foregone right to carry on business, the same is treated as capital receipt. As held in various case laws viz Saurashtra Cement Ltd 325 ITR 422 (Supreme Court), S. Zorastar & Company 322 ITR 35 (Rajasthan), Held, where the profit earning source itself has been foregone any compensation received in lieu thereof is a capital receipt.

Without prejudice Sec. 55(2) taking the cost of acquisition of right to do business as Nil has been introduced w.e.f. 01.04.2003.' As such before 01.04.2003 when there is no cost of acquisition - the machinery section for calculation of capital gain fails. Following the ratio in case of CIT V/s Srinivas Shetty 128 ITR 294 (Supreme Court), - no capital gain can be computed if the machinery section fails.

5.3 In view of the aforesaid facts, the addition of Rs. 1,23,75,000/- made by the AO treating the same as short term capital gain is not maintainable. Hence addition made by the AO is deleted.”

10. We have considered rival contentions and carefully gone through the orders of the authorities below and found from the record that to commence the business of generation of power, sanction of Government of Maharashtra was required. The assessee had addressed a letter dated 22/11/99 to MSEB u/s. 44 of Electricity Supply Act 1948 enclosing application for Obtaining clearance from

MSEB alongwith technical particulars at the WEG. The Maharashtra Energy Development Agency (MEDA) vide letter dated 12/11/2000 had accepted the proposal subject to conditions. The MEDA address at letter dated 28/3/2000 granting rival permission for installation and commission of Wind form Project alongwith documents. Due to financial constrains and tremendous competition the assessee decided to transfer the project to do the business to M/s Weizmann Ltd. who was supposed to commence same business in the same area with capacity of generating 15 MW power. The assessee transferred the project vide agreement dated 18/7/2000 and in return received an amount of Rs. 1,23,75,000/- as compensation. In this regards application was filed with MEDA for transfer of the project to Weizmann Ltd. However, the AO taxed the said amount as Short Term Capital Gains in assessee's hands. From the record we found that what was transferred by assessee was right to do business and for which there is no cost of acquisition. It is settled principal of law that when there is no cost of acquisition there cannot be any question of any capital gains. Reliance is placed on the decision of Hon'ble Supreme Court in the case of CIT Vs Srinivas Shetty, 128 ITR 294 (SC) wherein it was held that right to do business is no doubt a capital asset within the meaning of section 2(14) of the Income Tax Act, but since it had no cost of acquisition no capital gain can be charged. Section 55 has been amended w. e. f. 1st April, 2003 so as to take cost of acquisition as nil in respect of right to do business, since the said amendment is not retrospective, the same is not applicable for the year under reference and therefore the assessee is not liable to pay any tax on account of this capital receipt. Furthermore, the assessee had not commenced the said business and even before the commencement of the said business, agreement was entered in to for the transfer of right to do business and thus, any receipt

before the start of the business is a "capital receipt" and not liable to tax. Detailed finding has been given by CIT(A) to the effect that assessee has foregone right to carry on business, therefore, amount so received is to be treated as capital receipt and for arriving at this conclusion he has relied on the decision of the Hon'ble Supreme Court in the case of Saurashtra Cement Ltd., 325 ITR 422. Furthermore, we found that provisions of Section 55(2) taking the cost of acquisition of right to do business as nil has been introduced w.e.f.1-4-2003 i.e. A.Y.2003-04, whereas relevant assessment year under consideration i.e. 2001-02, accordingly provisions of section 55(2) is not applicable to the year under consideration. The finding recorded by CIT(A) are as per material on record which has not been controverted by department by bringing any positive material on record. Accordingly, we do not find any reason to interfere in the order of CIT(A) treating the compensation receipt as capital receipt.

11. In the result, appeal of revenue is dismissed.

Order pronounced in the open court on this 25/05/ 2016.

**Sd/-
(RAM LAL NEGI)**

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated 25/05/2016

प्र.कु.मि/pkm, नि.स/ PS

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

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

सत्यापित प्रति //True Copy//

**Sd/-
(R.C.SHARMA)**

लेखा सदस्य / ACCOUNTANT MEMBER

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार

(Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai