आयकर अपीलीय अधिकरण, पुणे न्यायपीठ "बी" पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "B", PUNE

श्री डी. करुणाकरा राव , लेखा सदस्य
एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष

BEFORE SHRI D.KARUNAKARA RAO, AM
AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA No.1277/PUN/2016
निर्धारण वर्ष / Assessment Year : 2011-12

DCIT, Circle-1(2),
Pune .... अपीलार्थी/Appellant

Vs.

Dishti Industries Ltd.,
Gat 106, Ranje, Khedshivapur,
Tal. Bhor, Pune – 412 205
PAN : AAACD1428L .... प्रत्यर्थी / Respondent

Assessee by : Shri Hari Krishan
Revenue by : Dr. Vivek Aggarwal

सुनवाई की तारीख / **Date of Hearing : 26.04.2018**		घोषणा की तारीख / **Date of Pronouncement: 25.06.2018**

आदेश / ORDER

PER D. KARUNAKARA RAO, AM :

This is the appeal filed by the Revenue against the order of CIT(A)-1, Pune, dated 23-03-2016 for the Assessment Year 2011-12.

2. Grounds raised by the Revenue are extracted here as under :

"1. The order of Ld.CIT(A) is contrary to law and to the facts and circumstances of the case.

2. The Ld.CIT(A) grossly erred in deleting the addition made by the AO u/s.2(47) of the I.T. Act of Rs.4,84,34,491/- instead of confirming the said addition as the same is not allowable to the assessee.

3. The Ld.CIT(A) erred in allowing the ground in favour of assessee ignoring the provisions of section 2(47) however the same is applicable in the case of assessee.

4. The Ld.CIT(A) grossly erred in deleting the disallowance made by the AO being excess depreciation claimed on capital subsidies ignoring the explanation 10 to section 43(1) which is applicable in the present case.

5. The Ld.CIT(A) grossly erred in deleting the addition made by the AO on account of disallowance u/s.14A relying on the decision of Hon.Bombay High Court in ITA No.110 of 2009 in the case of CIT Vs. Delite Enterprises dated 26/2/2009 which has not been accepted by the Department and is contested in appeal before the Hon'ble Supreme Court by filing SLP.

6. For these and such other grounds as may be urged at the time of hearing, the order of the Ld.CIT(A) may be vacated and that of the AO be restored.

7. The appellant craves to add, amend, alter or delete any of the grounds of appeal during the course of appellate proceedings before the Hon'ble Tribunal."

3. From the above grounds, it is evident that Ground Nos. 1, 6 and 7 are general in nature and after hearing the parties, they are dismissed as such. That leaves Ground Nos. 2 to 5. Ground Nos. 2 and 3 deals with the issue relating to the addition of Rs.4,84,34,491/-. Ground No.4 relates to disallowance on account of excess depreciation claimed on the capital subsidies ignoring the provisions of Explanation 10 to section 43(1) of the Act and finally Ground No.5 relates to disallowance u/s.14A of the Act. Of all the 3 issues, the addition of Rs.4,84,34,491/- is a major issue and the relevant details are discussed as follows.

4. The general facts include that the assessee is a company and is engaged in the business of manufacturer of Monofilament Yarn. Assessee filed the return of income on 29-11-2011 declaring total income of Rs.1,20,43,794/-. During the assessment proceedings, the issue relating to the taxability of the receipt of Rs.4,84,34,491/- was the major bone of contention between the parties. In this regard, assessee submitted that it had a proposal to enter into a Hotel business and the assessee identified the Kolte Patil Developers (in short 'KPD') and Kolte Patil Enterprises (in short 'KPE') as the developers. As per the proposal, the said KPD and KPE have the land at Sy.No.198/1A, Lohegaon, Pune and there is a proposal to construct service apartments/hotel on part of the said land. As per the terms of agreement, assessee had to make payment of Rs.3,17,46,900/- to

the Developer. There was an agreement that, on completion of the said hotel, the Developers would transfer the hotel to the assessee at a certain fixed price and the assessee would run hotel on its own or by giving management rights to the third party and earn income on the said hotel/service apartments. Assessee paid the said sum and reflected the said advance payment in his books as capital work-in-progress in the balance sheet of the assessee. It is mentioned in the written submissions of the assessee that a dispute broke out between the agreeing parties which led the assessee to file a suit in the court of law, i.e. before Civil Judge, Senior Division, Pune vide the Suit No. is 1923/06. Meanwhile, the parties reached the out of the court settlement as per the terms of a "Compromise Agreement" dated 18-05-2010. The Developers, i.e. KPD and KPE agreed to pay the assessee a sum of Rs.8 crores as full and final settlement. This sum includes the amount received from the assessee of Rs.3,17,46,900/- leaving the excess mount received at Rs.4,82,53,100/-. Assessee reflected this excess amount as capital reserve in the financial statement under the head "Reserves and Surplus". In the assessment, AO proposed to tax the same as a Revenue receipt. The compromise terms are extracted in Para No.3.8 of the assessment order. In the said Civil Suit No.1923/06, assessee sought a specific purpose and mandatory injunction. On finding the said Civil Suit of the assessee was dismissed, another Civil appeal bearing No.680/06 was filed before the Hon'ble High Court on 08-12-2008. On seeing the losing of the case in the High Court, an SLP is filed before the Supreme Court and the matter is still pending for final hearing. Pending the same, as discussed above, a compromise agreement was reached, which mandates the assessee to receive a payment of Rs.8 crores including the advance paid by the assessee. In lieu of the same, the assessee shall withdraw all its complaints,

allegations unconditionally. The assessee waived off, given up/relinquished its whatsoever rights, benefits and privileges in respect of the said property which is prescribed in the schedule of the agreement. The relevant compromise terms are extracted here as under :

"*It is agreed by and between the parties hereto as under:*

(a) The Party of the Second Part has paid ***lump sum amount Rs. 8,00,00,000/- (Rupees Eight Crore Only),*** *which is inclusive of amount paid by the First Party to the Second Party, being full and final settlement amount.*

(b) The Party of the First Part has ***withdrawn all its complaints, allegations made by them against*** *the Party of the Second Part, unconditionally. The First Party has* ***waived, given up and/or relinquished its whatever rights, benefits and privileges*** *in respect of the said property, which is more particularly described in the Schedule written hereunder.*

(c) The Party of the First Part and Second Part shall jointly file these 'compromise terms' before the Hon'ble Civil Judge, Senior Division-Pune in Special Civil Suit No. 1923/06 as well as before Hon'ble Supreme Court in Special Leave Petition No. 5017-5018 of 2009 and shall get the matter decreed and decided in terms of the said compromise or shall withdraw the matter as settled.

(d) The Party of the Second Part has paid the aforesaid compromise/settlement amount of Rs.8,00,00,000/- (Rupees Eight Crores Only) to the Party of the First Part as under:

(i.) Rs. 1,00,00,000/- paid by the Party of the Second Part to the Party of the First Part by Demand Draft bearing No. 347976 dated 09/0412010 drawn on Vijaya Bank. (The payment and receipt whereof the First Party doeth hereby admits and acknowledge)

(ii.) Rs. 8,00,00,000/- paid by the Party of the Second Part to the Party of the First Part by Demand Draft bearing No. 348252 dated 18/05/2010 drawn on Vijaya Bank. (The payment and receipt whereof the First Party doeth hereby admits and acknowledge)

(e) The Party of the First Part does hereby state and declare that it has no any right, title, interest of whatsoever nature to the property described in the Schedule written hereunder and the Party of the Second Part shall have exclusive right to sell the said property or part/ s thereof to any other third person/ s, on such terms and conditions, which Second Party may deem fit and proper.

(f) It is specifically agreed by the Party of the First Part that it has not agreed to sell, transfer or assign its rights acquired by aforesaid alleged Agreement to any other third person/s by any oral or written Agreement of whatsoever nature, nor has created charge or encumbrance on the said property or part thereof. However, any person/s claims any right of whatsoever nature through, or on behalf of the Party of the First Part, then the First Party alone shall be responsible for settling such claims, demands together with all costs and damages etc. and for the said purpose, the First Party hereby agrees to indemnify and always keep indemnified the Second Party forever, against all such suits, claims, demands etc., if any.

(g) The Party of the First Part agrees to sign and execute all such . Cancellation' Deed/s, .documents etc. on requisite stamp paper and shall present the same for registration by admitting contents therein and execution thereof. However stamp duty and registration fees required in that' behalf shall be paid by the Second Party only.

5. AO held in Para No.3.7 of his order that the said payment is received in lieu of the rights given up as per clause (b) of the compromise deed, AO is of the opinion that certain rights/benefits/privileges are created on the said property on which the Developer was to construct a hotel/service apartments on the plot of area admeasuring 52,500 sq.ft. at Sy.No.198/1A, situated at Lohegaon, Nagar Road, Pune. AO discussed the provisions of section 2(47) (vi) of the Act and held that it is a case of arrangement or any other manner whatsoever within the meaning of the said clause (vi) of the provisions of section 2(47) of the Act. Accordingly, the AO proceeded to treat the sum of Rs.4,84,34,491/- as capital gain arising on transfer of rights in the property as per Para Nos. 3.9 and 3.10 of his order. Contents of the said paras read as under :

"3.9 The use of words "any arrangement or any other manners whatsoever brings into its ambit the all the above transaction. It may be emphasized here that the assessee has made a payment of Rs. 3,17,46,900/- to the developers as consideration for acquiring the rights in the . property described in the schedule a "All that piece and parcel of the property i.e., 95,000 sq. ft. built-up (approximately consisting of Ground + 6 Floors to be constructed on plot area admeasuring 52,500 sq.ft. bearing Survey No. 198/1A, situated at Mouze Lohegaon, Nagar Road, Pune within the Municipal limits of Pune". Therefore the assessee is liable to pay Capital Gain on relinquished its rights, benefits and privileges in respect of the said property. Asseessee has relied on certain decisions in support of the claim. However it is to be observed that all these decisions are with reference to assessment years before the amendment was brought in the definition of (transfer in relation to a capital asset. Therefore these decisions have no applicability to the case of the assessee.

3.10 An amount of ***Rs.4,84,34,491 is therefore treated as Capital Gain arising from transfer of rights in the . property described as "All that piece and parcel of the property i.e., 95,000 sq. ft. built-up*** *(approximately) consisting of Ground + 6 Floors to be constructed on plot area ad measuring 52,500 sq. ft. bearing Survey No. 198/1A situated at Mouze Lohegaon, Nagar Road, Pune within the Municipal limits of Pune" and added back to the income of the assessee."*

6. Aggrieved with the same, the assessee filed an appeal before the CIT(A).

7. Assessee made elaborate written submissions dated 31-01-2014 referring to various legal propositions. CIT(A) extracted the various paragraphs from the assessment order and discussed the said terms of the compromise agreement dated 18-05-2010. CIT(A) extracted the contents of written submissions of the assessee dated 15-12-2015 in Para No.3 of his order and summarized the submissions of the assessee on pages 51 and 52 of his order before concluding that the facts of the case are identical to the facts relating to the judgment of Hon'ble Supreme Court in the case of Oberoi Hotel Pvt. Ltd. Vs. CIT in (Appeal No.7418/1994, dated 10-03-1999). Eventually, the CIT(A) agreed with the assessee stating that the said amount of Rs.4,84,34,491/- constitutes capital receipt. The summary of the assessee's contentions before the CIT(A) are extracted as under :

> *"1. The assessee's claim of agreement to purchase the land was based on the letter dtd.16.06.2005 issued by M/s. Kolte Patil Developers Pvt Ltd., the vendors;*
>
> *2. When it came to the assessee's knowledge that the vendor's were not going to complete the deal, the assessee filed a suit against them before the Special Civil Judge, Pune for interim injunction, temporary injunction and mandatory injunction;*
>
> *3. The Special Civil Judge while, Pune while disposing off the assessee's interim application for injunction held that there was no concluded contract/agreement between the assessee and it's vendors. Against this order of the Special judge, Pune the assessee filed a writ petition before the Hon'ble High Court of Bombay. The Hon 'ble High Court of Bombay , also held that there was no concluded agreement / contract between the assessee and the vendors;*
>
> *4. Once there is no agreement between the assessee and the vendors for the sale of property, there can be no question of the assessee acquiring any rights in the property. Thus, no asset in the shape of any rights in the property has come into possession of the assessee;*

5. Once, there is no asset / right in the property with the assessee, there is no question of any transfer of any asset / right in the property by the assessee;

6. At the time of reaching the settlement with the vendor's the assessee's suit was pending before the Civil Judge Senior Division , Pune and SLP was pending before the Supreme Court;

7. The compensation of Rs. 4,84,34,491/- received from the vendor's is therefore for withdrawal of all litigation i.e suit pending before the Special Civil Judge, Pune and the SLP pending before the Hon'ble Supreme Court;

8. The legal position at Point No. 4 and 5 has been settled by the Hon'ble Bombay high Court in their judgement in case of Sterling Construction & Investments/ (2015) 58 Taxmann. Com 199 (Bombay) and by the Mumbai Bench of the Hon'ble ITAT in their judgement in case of Dhruv N. Shah(2004) 88 ITD 118 (Mumbai) (TM) ;

9. Once no capital gains have arisen to the assessee, there is no question of the capital gains being of long term or short term kind;

10. In the case of Raman Iron Foundry AIR 1974 SC 1265 / the Hon'ble Supreme Court held that it is only in the event of a breach of agreement / contract that a party acquires any right to sue against the other party who are responsible for breaching the contract;

11. Since, in the present case there was no concluded contract / agreement between the assessee and the vendor's, the assessee had not acquired any right to SUE;

12. Even if without prejudice, it is to be argued that the assessee has acquired a right to sue, no income can arise to the assessee on account of compensation received in lieu of the right to sue, as the right to sue is not an actionable claim and the same cannot be transferred. This legal position has been lain down by the Hon'ble Supreme Court in case of Union of India Vis Raman Iron Foundry 1974 AIR 1265 SC ;

13. The Mumbai Bench of the Hon'ble ITAT in case of Dhruv N. Shah 88 ITO 118 (Mumbai)(TM) has held that where there was no valid agreement to purchase a property , the assessee does not get a legal right' in the properly end consequently the damages /compensation received for ending a litigation with the other party is not chargeable to capital gains, or as business income, or as income from other sources;

14. The Jaipur bench of the Hon ble ITAT in case of Sat yam Food Specialities Pvt Ltd (2015) 57 taxmann.com 194 Jaipur has held that the compensation received for giving up the right to sue the other party and to withdraw all the claims and complaints and the pending litigation was a capital receipt and not chargeable to tax as business income under Section 28 of the Income Tax Act 1961;

15. Also, the Hon'ble Supreme Court of India in Oberoi Hotel (P) Ltd. Vis CIT held that the injury inflicted on a capital asset of the assessee for giving up contractual rights on the basis of principal agreement resulted into loss of income to the assessee and the compensation so received is a capital receipt;

16. Thus, compensation of Rs. 4,84,34,491/- is not even taxable as business income. A receipt has to be characterised as income to be treated as Income under the head "other sources". A receipt of capital nature cannot be brought to tax as "income from other sources";

17. Therefore, in lieu of the above, the compensation received by the assessee to the tune of Rs. 4,84,34,491/- far withdrawal of litigation against the vendor's, i.e. not taxable as capital gains nor as business income and neither as income from other sources."

8. Before deciding the in favour of the assessee, the CIT(A) extracted Para No.10 of the cited judgment. In the said judgment, it is held that arrangement between the assessee and the Developers does not constitute a "concluded contract". However, the CIT(A) did not discuss anything about the alleged "arrangement or any manner thereto", the expressions mentioned in section 2(47) of the Act, on which the AO kept his reliance. Contents of Para No.13 and 14 of the order of CIT(A) are relevant and therefore, the same are extracted here as under :

"13. Thus, from the above order, it is quite clear that there was no concluded contract between the parties capable of specific performance. This being so, it is clear that by virtue of payment of Rs.3,17,46,900/- to the developers and offer letter dated 16/8/2005 the appellant had not got any right in the said property which can be defined as an asset. Against this order, the appellant filed SLP before Supreme Court, however, the SLP was dismissed by Hon. Court on 13/8/2010 in view of the settlement arrived between the two parties. The AO has relied upon certain clauses in respect of consent terms as per which it is clear that amount in question was paid for appellant's rights, benefits and privilege in respect of property discussed in the Schedule. The appellant claims that the defendants like any other party had mentioned these words in order to protect their interest in the property which is quite normal but the fact remains that the appellant had no enforceable right in the property as held by Civil Judge, Sr. Divn., Pune as well as Hon. Bombay High Court. In this regard I find sufficient force in the argument of the appellant and the wordings in the consent term cannot override findings of the courts which is quite clear and does not recognize any right of the appellant in the said property in view of no concluded contract which can be enforced in the court of law. This being so, it is clear that the appellant did not acquire any right in the said property.

14. The appellant has placed reliance on the decision of Hon. Supreme Court in the case of Oberoi Hotel Pvt. Ltd. Vs. CIT (Appeal No.7418 of 1994) dated 10/3/1999 for the proposition that ***injury inflicted on the capital asset has resulted in loss of source of income and therefore, receipt in this regard was capital receipt.*** *In that case Oberoi group agreed to operate the hotel known as Hotel Oberoi Imperial, Singapore for which Oberoi Hotel Pvt. Ltd. was to receive certain fee called Management fee which was calculated on the basis of gross operating profits as per agreement. However, the Hotel was sold and through supplementary agreement, the appellant had received certain amount which was claimed as capital receipt. The ITO treated the same as revenue receipt. The CIT(A)*

treated the same as capital receipt which was upheld by the Tribunal. The High Court treated the same as revenue receipt. The Hon. Supreme Court reversed the finding of High Court and held that since receipt was in lieu of loss of source of revenue and therefore, it was capital receipt. In my view, the appellant's case is quite similar to the facts of above mentioned case as in this case too there is loss of source of revenue. Accordingly Rs.4,84,34,491/- is treated as capital receipt. Further, there is no enforceable right in the said property as held by courts. This being so, it is held that the AO was not justified in treating the amount of Rs.4,84,34,491/- as capital gain. Accordingly, he is directed to delete the addition and the ground is allowed."

9. Aggrieved with the relief granted by the CIT(A) on this issue, the Revenue is in appeal before us. In addition, AO also made other additions on account of disallowance u/s.14A and also on account of excess depreciation qua the subsidy issue.

BEFORE THE TRIBUNAL

10. **Revenue's Submissions** : Ld. DR for the Revenue also filed the written submissions. Ld. DR drew our attention to the clause (b) and clause (b) of the compromise agreement and submitted that the said compensation was received in this case for waiving, giving up and/or relinquishing its rights, benefits and privileges in respect of the property proposed to acquire from Kolte Patil Group. Giving the reasons, Ld. DR contended that the case law in the case of Oberoi Hotel Pvt.Ltd. (supra) as well as the contentions of the assessee are misplaced. Therefore, the said compensation of Rs.4,83,34,491/- falls under the definition of transfer of capital asset and the same is taxable u/s.2(47) of the Act. The said reasons are extracted below :

"(i) The assessee company had filed a suit for specific performance by stating that it had rights in the property. This suit was still pending before Trial Court on the date of out of Court Settlement.

(ii) Even, the assessee had not accepted the decision of Hon'ble Bombay High court with regard to temporary injunction and had filed SLP before Hon'ble SC which was also pending as on the date of out of Court Settlement.

(iii) The assessee company had issued a public notice before filling the suit cautioning the public not to enter transaction with regard to the property with Kolte Patil Group as it has purchased the property.

(iv) The Hon'ble Trial court Bombay High Court have decided only that the offer letter given by the builder is not a concluded contract and therefore, cannot lead to a order of temporary injunction.

(v) The proceeding before the Civil Court and Income Tax Authorities are different proceedings. The Civil Court was only deciding the issue of temporary injunction with regard to contract law which deals with absolute rights of the party vis a vis the contract entered. Whereas in the Income Tax Act u/s. 2 (47) defines transfer which includes extinguishment of any rights therein. This definition is wide enough to include even disputed rights and not only absolute rights.

(vi) Even from the bare reading of consent terms it is abundantly clear that that even the Kolte Patil Group recognizes the disputed rights of the assessee and for waiving/relinquishing these rights only the compensation was paid."

10.1 In support of his arguments, Ld. DR relied on the following judgments :

1. *Vijay Flexible Containers 186 ITR 693 (Bom.)*
2. *Tata Services Limited 1 Taxman 427 (Bom.)*
3. *Laxmi Devi Rattani 296 ITR 363 (MP)*
4. *K.R. Sri Nath 268 ITR 436 (Mad.)*

10.2 Further, he submitted that the decisions relied on by the Ld. Counsel for the assessee in the cases of Sterling Construction and Investments 374 ITR 474 (Bom.), Abbasbhoy A. Dehgamwalla 195 ITR 28 (Bom.), CIT Vs. J. Dalmia 149 ITR 215 (Delhi), Bharat Forge Co. Ltd. 205 ITR 339 (Bom.), Oberoi Hotel Pvt. Ltd. 236 ITR 903 (SC) and Saurashtra Cement Ltd. 325 ITR 422 (SC) are all distinguishable on facts. Making a special reference to the judgment in the case of Oberoi Hotel Pvt. Ltd. (supra) Ld. DR critically explained stating that the said case is the one, where the source of income is terminated whereas in the present case, it is the case of surrender/extinguishment of certain rights in the immovable property and there is no way, the said case apply to the facts of the present case.

11. **Assessee's submissions** : Per Contra, Ld. Counsel for the assessee submitted a **note** and drew our attention to the object clause (3) of the company and the same reads as under :

> *"3. To engage in and deal in all respect of the business to undertake, promote, run, manage organize...hotel, restaurant, cafes...."*

He stated that, with the object of setting up hotel business, the assessee entered into negotiations with M/s. Kolte Patil Developer Ltd., M/s. Dream Giga Ventures, M/s. Dream Developer and M/s. Kolte Patil Enterprises to acquire the capital asset in the form of hotel building consisting of 95,000 sq.ft. built up area to be constructed on a plot of 52,500 sq.ft. However, the said deal was not materialised. Aggrieved with the developers, the assessee filed a suit before the Civil Judge, Pune for granting of temporary injunction and an order dated 30-06-2008 was passed. In the said order, it was held that there was no "concluded contract" between the assessee and respondent parties. The matter was carried to Hon'ble Bombay High Court vide C.A.No.680/2008. The High Court also held that there was "no concluded contract" between the assessee and the respondent parties. The matter travelled to Hon'ble Supreme Court vide SLP and the same is pending. While the same is pending, the parties settled the dispute outside the court. Under these consent terms, assessee received compensation of Rs.4,82,53,100/- for withdrawing the Special Civil Suit and relied on the clauses of the compromise contract (supra).

11.1 Ld. Counsel drew our attention to the summary of the submissions; wherein it is stated that by virtue of judgment of Hon'ble Bombay High Court, the assessee had no rights in the property and thus there is no question of capital gain arising in this case. The assessee does not possess any right to sue against the respondent parties since the contract

was not a concluded one. The compensation is not received in settlement of any trading contract or in the course of business. Therefore, it cannot fall in the ambit of business activities u/s.28 of the Act. The compensation received is for withdrawing the litigation against the respondents and therefore, it cannot be taxed even as 'income from other sources'. Right to withdraw the litigation is a personal right and it cannot be transferred to a third party. The compensation so received cannot give rise to any income. The said compensation has to be treated as capital receipt since it is in the process of acquiring capital asset. The compensation is not related to giving up any rights in the property and hence, there is no question of capital gain. In support of his arguments, Ld. Counsel for the assessee relied on the following judgments :

1. *CIT Vs. J. Dalmia 149 ITR 215 (Delhi*
2. *CIT Vs. Abbashboy A. Dehgamwalla 195 ITR 28 (Bom.)*
3. *Baroda Cement and Chemicals Ltd. Vs. CIT 158 ITR 636 (Guj.)*
4. *Dhruv N. Shah 88 ITD 118 (Mumb Trib.)*

12. We heard both the sides, perused the orders of the Revenue authorities on the issue of taxability of capital gain u/s.2(47) of the Act. We have also perused the decisions relied on by both the representatives. This is the appeal by the Revenue and it relies on the applicability of the provisions of section 2(47) of the Act. The undisputed fact include that there was a proposal between the assessee and the developers for construction of a hotel/service apartments and hand over the same to the assessee. Assessee paid a sum of Rs.3,17,46,900/- to the developers as a part of the proposal. For some reasons, the proposal did not take off. The developer did not construct the desired hotel/service apartments. The reasons are not brought on record. Aggrieved with the failure of the developers, assessee approached the judiciary. While the assessee lost the

case before the lower court as well as the High Court on the ground that there is no "concluded contract" between the assessee and the developer. The matter is now subjudice and the same is pending before the Supreme Court. Further, there is no dispute about the reaching of out of court settlement which is evidenced by the Compromise Agreement (supra) which mandates the developers to pay a sum of Rs.8 crores which is far excess of the advance received by them. The dispute is taxability of the said excess amount of Rs.4,84,34,491/-.

12.1 The case of the Revenue in this regard is that the developer has given the said amount in lieu of the withdrawal of rights to complain and file allegations, relinquishment/waiver of the rights/benefits and the privileges the assessee has in respect of the said property linked to the advances given by the assessee to the developer. The contents of clause (a) and (b) of the Compromise Agreement are relevant and the same are extracted for the sake of completeness here as under :

> *"(a) The Party of the Second Part has paid **lump sum amount Rs. 8,00,00,000/- (Rupees Eight Crore Only),** which is inclusive of amount paid by the First Party to the Second Party, being full and final settlement amount.*
>
> *(b) The Party of the First Part has **withdrawn all its complaints, allegations made by them against** the Party of the Second Part, unconditionally. The First Party has **waived, given up and/or relinquished its whatever rights, benefits and privileges** in respect of the said property, which is more particularly described in the Schedule written hereunder."*

12.2 Referring to the contents of the operational para and the order of CIT(A) at Para Nos. 13 and 14, Ld. DR for the Revenue submitted that the CIT(A) has not discussed none of the above referred issues or arguments raised by the Ld. Counsel for the assessee. CIT(A) merely granted relief to the assessee relying on the Supreme Court judgment in the case of Oberoi Hotel Pvt.Ltd. (supra) which is completely different on facts when

compared with the facts of the assessee. As we understand, as per the Ld. DR, the capital rights or bundle of rights and on transfer, some of them may yield the taxable gains and other may go out of the scope of tax. In this case, the assessee is blessed with some of the rights in connection with the cited immovable property. It is not correct to state that the assessee did not possess any right even though assessee paid a sum of Rs.3,17,46,900/- as advance in the beginning. The contract may not be a concluded one, nevertheless, assessee can still have some of the rights on the capital assets which stands surrendered/extinguished those rights and the same should constitute the receipts taxable under the head 'capital gains'. CIT(A) needs to crystallise the same after hearing the assessee in the remand proceedings. As such, Ld. Counsel made elaborate and painstaking arguments and filed written submission to state that the excess sum is outside the tax.

12.3 Further, we have perused the said judgment of Supreme Court in the case of Oberoi Hotel Pvt. Ltd. (supra) and find it is the case where the hotel has to receive Management Fee in connection with an operation of a hotel known as "Hotel Oberoi Imperial, Singapore". At the time of sale of that Hotel, assessee received certain amount and the taxability of the said receipt was the issue in that case. Hon'ble Supreme Court held in that case, that the said amount constitutes a 'capital receipt' due to the fact that the source of income for that assessee is terminated. We find the said facts are no way comparable to the facts of the present case of the assessee.

12.4 In the instant case, the said excess amount of Rs.4,84,34,491/- is not paid to the assessee for termination of the source of income from the developers qua the hotel/service apartments etc., proposed in the

proposal. It is for the reasons specified in clause (b) of the compromise agreement (supra). In our considered view, the CIT(A) has erred in relying on an inapplicable ratio of the Supreme Court judgment in the case of Oberoi Hotel Pvt. Ltd. (supra). To that extent, the order of CIT(A) is required to be reversed. Further, on the issue of reasoning of the CIT(A) that there is "no concluded contract" between the assessee and the developers and therefore, the excess amount received by the assessee constitutes a 'capital receipt', we find the CIT(A) did not consider the theory relating to the bundle of rights and the taxable of the gains relatable to the sale proceeds of such rights, if any, and if the same becomes taxable as 'capital gains'. Further also, we find the Compromise Agreement clearly mentions that the assessee receives the amount for relinquishment/waiver/surrender of rights as per the content of clause (b) of the Agreement. The CIT(A) did not adjudicate discussing these issues as to why and what factually, the assessee surrendered in order to receive the said amount of Rs.4,84,34,491/-. From all this points of view, we are of the opinion that the order of CIT(A) is required to be set aside.

12.5 Further, on the cited decision, we have also perused the decisions cited by the Ld. Counsel for the assessee and find there is no case precisely comparable on facts to the facts of the present case.

12.6 Further, it was argued by the Ld. Counsel for the assessee that the amount received as compensation for right to sue the developers and the same is not a transferable right. In any case, the amount attributable to the sale/surrender of such right constitutes a 'capital receipt' and not taxable under the Income-Tax Act. Further, he argues that the right to sue is not a transferable right and therefore, the excess money received by the assessee is not attributable to the transfer of said rights. This aspect

also needs attention of the CIT(A) in the remand proceedings. As stated above, these arguments are found unadjudicated by the CIT(A). Considering of the above, we are of the opinion that the issue relating to applicability of the provisions of section 2(47) qua the various clauses of the compromise agreement are required to be adjudicated by the CIT(A) as his order is silent on these core issues. CIT(A) needs to determine the points for adjudication and mention the reasons for the developers to make the excess payment of Rs.4,84,34,491/- and utilising the rights of the assessee in the said property and extinguishment of such rights if any in the light of the written clauses of the compromise agreement. From this point of view, the order of the CIT(A) cannot be considered as a speaking order within the meaning of section 250 (6) of the I.T. Act. In the remand proceedings, the CIT(A) shall grant reasonable opportunity of being heard to the assessee in accordance with the set principles of natural justice. Accordingly, the Ground Nos. 1 to 3 raised by the Revenue are allowed for statistical purposes.

13. Ground No.4 relates to allowing of an excess depreciation claimed on capital subsidies. In the assessment, AO noticed from the balance sheet of the assessee as on 31-03-2011 that the assessee shown an amount of Rs.15 lakhs as Central Subsidy and Rs.30 lakhs as Special Capital Incentives under the head “Reserves and Surplus”. AO called for the explanation of the assessee as to why the above subsidy/special capital incentive was not reduced from the cost of fixed assets. The assessee reasoned that they were received for setting up a plant in the backward area. Assessee also explained that as per CBDT Circular No.142, dated 01-08-1974 the same was required to be treated as capital receipt. Assessee relied on various case laws for the proposition that the same should not be reduced from the cost of specific assets. However, the

AO rejected the assessee's explanation and opined that the same should be reduced as per Explanation 10 to section 43(1) of the Act w.e.f. 01-04-1999. Thus, he allowed Rs.16,82,400/- being excess depreciation. Subsequently, the AO vide his rectification order dated restricted the disallowance on account of depreciation to Rs.6,64,495/-.

13.1 In the First Appellate proceedings, the assessee submitted the details regarding capital subsidies and explained that these subsidies/incentives were given to promote industries in the selected backward areas. Assessee proposed to set up Dishti Industries Ltd., at C-54, MIDC, Mirajale, Dist. Ratnagiri with a fixed capital investment at Rs.118.76 lakhs. After considering the submissions and the Explanation 10 to section 43(1) of the Act, the CIT(A) opined that the incentive has not been granted to the assessee for acquiring the capital but for establishing its unit in the underdeveloped regions in the State of Maharashtra. CIT(A) therefore concluded that the assessee does not fall under the purview of Explanation 10 to section 43(1) of the Act. While holding so, he relied on the decision of Pune Bench of the Tribunal in the case of Rohit Exhaust Systems Pvt. Ltd. Vs. ACIT in ITA No.686 & 687/PN/2011, dated 05-10-2012, Soham Electroplast Pvt. Vs. ITO in ITA No.1578/PN/2008, dated 28-10-2010 and others. Eventually, the CIT(A) deleted the disallowance made by the AO. Contents of Para No.18 of the order of CIT(A) are relevant.

13.2 Aggrieved with the order of CIT(A) the revenue is in appeal before us.

13.3 After hearing both the sides and perusing the order of CIT(A) on this issue, we find it relevant to extract the finding given by the Tribunal and the same reads as under :

"18. I have carefully considered the facts of the case as well as reply of the appellant. I have also perused the sanction letters in this regard. It is seen that the appellant has received 10% Central Subsidy amounting to Rs.15 lacs under Subsidy Scheme, 1971 and Rs.5 lacs and Rs.25 lacs under Maharashtra's 1983 and 1988 Package Scheme of incentives. From the perusal of scheme it is seen that disbursal of subsidy is linked to investment made by the appellant in the notified backward area and the same is not linked to acquisition of asset. This being so, Explanation 10 to section 43(1) will not apply to the present case. It is also seen that the appellant's case is covered in its favour by Pune Tribunal's decision in the case of ***Rohit Exhaust Systems Pvt. Ltd. Vs. ACIT****, ITA No.696/PN/2011 and ITA No.687/PN/2011 dated 5/10/2012 as well as* ***Soham Electroplast Pvt. Ltd. Vs. ITO,*** *ITA No.1578/PN/2008 for A.Y. 2005-06 dated 28/10/2010, wherein subsidy received for acceleration of industrial development was considered to be out of scope of Explanation 10 to section 43(1) of the I.T. Act, 1961 as the same was not linked to acquisition of any specific assets. Accordingly, considering the totality of facts and also relying upon the above decisions of Pune Tribunal, it is held that the AO was not justified in disallowing excess depreciation of Rs.16,82,400/- (subsequently rectified at Rs.6,64,495/-). Accordingly, he is directed to delete the same. Thus, the ground is allowed."*

13.4 From the above, it is evident that the AO's decision in applying Explanation 10 to section 43(1) of the Act to the case of the assessee is misplaced. The conclusion of the CIT(A) that the incentives sanctioned to the assessee by the Central/State Govt. are for establishing a plant in the specified backward area and not for acquiring the capital asset is a reasoned one and therefore, we uphold the order of CIT(A) on this issue. CIT(A) granted relief to the assessee relying on the Pune Bench decision in the case of Rohit Exhaust Systems Pvt. Ltd. Vs. ACIT and Soham Electroplast Pvt. Ltd. Vs. ITO (supra). As such, Revenue has not brought out any other judgment to demonstrate that the cited decisions of ITAT, Pune Bench are distinguishable. Accordingly, the Ground No.4 raised by the Revenue is dismissed.

14. Ground No.5 raised by the Revenue relates to the relief granted by the CIT(A) u/s.14A on account of investment in mutual funds. Relevant facts on this issue include that, in the assessment, AO noticed that assessee has shown an amount of Rs.2,90,99,131/- as investment in Mutual Funds and Investment in Partnership Firm named 'The Byerly

Stud' amounting to Rs.2,54,04,131/- which was later changed as investment in 'Dishti Hotels and Resorts Pvt. Ltd.' The AO called for the details of dividend earned by the assessee on such investments. In response, the assessee replied that no income was earned on the same. However, at the end of proceedings u/s.143(3) of the Act, the AO invoked the provisions of section 14A r.w. Rule 8D and made disallowance of Rs.5,59,358/-.

14.1 Before the CIT(A), assessee filed written submissions giving the details of investments and reiterated that assessee company has not received any dividend on investments in the previous year or subsequent year and relied on various decisions in support of his claim including the decision of Jurisdictional High Court in the case of CIT Vs. M/s. Delite Enterprises, dated 26-02-2009. Eventually, the CIT(A) deleted the disallowance made by the AO holding that assessee has not earned any exempt income either from the partnership firm or from the investment in Mutual Funds. Contents of Para No.21 of the order of CIT(A) are relevant.

14.2 After hearing both the sides, we find it relevant to draw our attention to the finding given by the CIT(A). Therefore, the said finding is extracted as follows :

> *"21. I have carefully considered the facts of the case as well as reply of the appellant. In this case it is seen that the appellant has not earned any exempt income either from partnership firm or from the investment in Mutual funds and accordingly no income was claimed as exempt in the Return of income filed by the appellant. This being so, the issue is covered in favour of the appellant by the decision of Hon. Bombay High Court in ITA No.110 of 2009 in the case of CIT Vs. Delite Enterprises dated 26/2/2009 wherein it was held that when there was no exempt income, question of disallowance does not arise. Further, there are three decisions of different High Courts on this issue for the proposition that in absence of exempt income, no disallowance u/s.14A can be made. The same are as under :*
>
> *i. CIT Vs. Winsome Textile Indust.Ltd. [2009] 319 ITR 204 (P&H)*
> *ii. CIT Vs. Corrtech Energy P. Ltd. [2014] 223 taxmann 130 (Guj.)*
> *iii. CIT Vs. Shivam Motors P. Ltd. ITA No.88 of 2014 (All.)*

This being so, it is held that the AO was not justified in invoking the provisions of section 14A of the IT Act when there was no exempt income shown in the return of income. Accordingly, the AO is directed to delete the addition of Rs.5,59,358/- made u/s.14A of the I.T. Act, 1961. Thus the ground is allowed."

Considering the binding precedent on this issue, we affirm the order of the CIT(A) in holding that when assessee has not shown any exempt income in the return of income, there is no justification to invoke the provisions of section u/s.14A r.w. Rule 8D of the Act. Accordingly, Ground No.5 raised by the Revenue is dismissed.

15. In the result, the appeal of the Revenue is partly allowed for statistical purposes.

Order pronounced in the open court on this 25th day of June, 2018.

Sd/-	Sd/-
(VIKAS AWASTHY)	**(D. KARUNAKARA RAO)**
न्यायिक सदस्य /JUDICIAL MEMBER	**लेखा सदस्य / ACCOUNTANT MEMBER**

पुणे Pune; दिनांक Dated : 25th June, 2018
सतीश

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. The CIT(A)-1, Pune
4. The Pr.CIT-1, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "B Bench" Pune;
6. गार्ड फाईल / Guard file.

// True Copy //

आदेशानुसार/ BY ORDER,

Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune