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NEWSLETTER MAY 20

"Strive not to be success but rather to be of value"

WHAT'S INSIDE

DIRECT TAX

INCOME TAX

Income has to be taxed in the hands of assessee when the right to receive the same has been established and not at the actual receipt of the Income. Thus, where assessee fails to perform certain obligations, partial payment received cannot be treated as Income.

Income Tax Officer v. Newtech (India) Developers [2020] 116 taxmann.com 898 (Mumbai - Trib.)

Facts of the case:

- The assessee was engaged in the business as builder and developer. The assessment was completed at NIL income. The case was reopened on the basis that the assessee has transferred development rights to M/s. Shivalik Ventures Pvt Ltd for a consideration of Rs. 5.40 crores and only Rs. 86.40 lakhs is being received during the year under consideration.
- On being asked the assessee stated that the payment schedule was that 16% (i.e. Rs. 86.40 lakhs) will be paid at the time of entering the Joint Development Agreement (JDA), 42% will be paid on obtaining IOA (full form) and commencement certificate and balance 42% will be paid upon all the slum dwellers vacating said property and shifting to alternate temporary transit accommodation. Further it was explained that the said amount received was being treated as Advance until at least 25% of the slum dewellers vacate the premises within 5 years and if not then the assessee has to be refunded the amount to M/s. Shivalik Ventures Pvt Ltd without any interest.
- The AO was of the view that assessee is following mercantile system of accounting under which the transactions are recognized as and when they take place and under this method, the revenue is recorded when it is earned and the expenses are reported when they are incurred. In the instant case the assessee has transferred the development rights and handed over the possession of the property and such transfer qualifies as 'transfer' under section 53A of the Transfer of Property Act, 1872 and therefore the income was earned when the transfer is complete. The condition of 25% occupants vacated the property is nothing but a colourable device to evade taxes. The AO thus added the entire amount of Rs. 5.40 crores to the income of the assessee
- Aggrieved by the above addition assessee preferred the appeal before CIT(A) and CIT(A) deleted the said addition on account of merits.
- On appeal by Revenue before the ITAT following decision was announced.

Held

- The essence of the arrangement was the performance of obligations by the assessee so far as the above obligations are concerned. All the terms of the agreement were to be read in conjunction of each other. No amount can be treated as income in the hands of the assessee where the assessee has to perform certain obligations and the assessee has not performed the same nor he is in a position to perform the same. In the instant case the obligations were not performed by the assessee and thus income was never accrued in the hands of the assessee. Principle of conservatism, which has been recognized by the Hon'ble Supreme Court right from Chainrup Sampatram v. CIT [(1953) 24 ITR 481 (SC)], has, at its foundation, simple approach that while a loss is to be accounted for as soon as it can be reasonably anticipated, the anticipated profits are not accounted for until these profits actually arise.
- Even under mercantile system of accounting the relevant point is right to receive the income and not the time of receipt. The person cannot be forced to account for amounts received under the mercantile system of accounting even when those amounts are received for which obligations are to be performed in future.
- As held by Hon'ble Supreme Court, in the case of CIT v. Shoorji Ballabhdas & Co [(1962) 46 ITR 144 (SC)], "Income-tax is a levy on income. No doubt, the Income-tax Act takes into account two points of time at which the liability to tax is attracted, viz., the accrual of the income or its receipt; but the substance of the matter is the income. If income does not result at all, there cannot be a tax, even though in book-keeping, an entry is made about a "hypothetical income", which does not materialise." Thus, when the obligations under the JDA are not performed there cannot be any occasion to bring the consideration to tax.
- It cannot be open to the Assessing Officer to disregard the supplementary, or modification- only because it's result is clear and unambiguous negation of tax liability. Thus, in light of the above discussion the taxability of Rs. 5.40 crores is devoid of merits.
- The appeal is thus dismissed.

INCOME TAX : Where an assessee has obligation to perform something and he failed to perform these obligations, it cannot be said that a partial payment for fulfilling these obligations can be treated as income in hands of assessee. Where assessee-developer entered into joint venture agreement to transfer development right of a property to a company and it had received only 25 per cent as advance and further balance payment was to be received by him on getting the said property vacant by occupants and if it could not get the said property vacated, it had to refund entire amount to said company, since assessee could not perform said obligation till date, it could not be said that that income had accrued to assessee on account of transfer of rights in property

[2020] 116 taxmann.com 898 (Mumbai - Trib.)
IN THE ITAT MUMBAI BENCH 'B'
Income Tax Officer, Ward 22(2)(4)
v.
Newtech (India) Developers
P.P. BHATT, PRESIDENT
AND PRAMOD KUMAR, VICE-PRESIDENT
IT APPEAL NO. 3251 (MUM.) OF 2018
[ASSESSMENT YEAR 2009-10]
MAY 27, 2020

Kumar Padam Pani Bora *for the Appellant.* **Hiro Rai** *for the Respondent.*

ORDER

- This appeal, filed by the Assessing Officer, is directed against the order dated 26th February 2018 passed by the CIT(A) in the matter of assessment under section 143(3) r.w.s. 147 of the Income Tax Act, 1961, for the assessment year 2009-10.

- Grievances raised by the appellant Assessing Officer in the grounds of appeal, which are by way of questions posed for our adjudication and which we will take up together, are as follows:
  - Whether on the facts and circumstances of the case and in-law, the learned CIT(Appeal) erred in deleting the addition made on account of sale of development rights amounting to Rs. 5,40,00,000/- without appreciating the fact that this amount had accrued to the assessee on account of transfer of its rights in the property and therefore was liable to offer this amount for taxation as income from capital gains.
  - Whether on the facts and circumstances of the case and in-law, the learned CIT(Appeal) erred in deleting the addition made on account of sale of development rights amounting to Rs. 5,40,00,000/- without appreciating the fact that this amount had accrued to the assessee on account of transfer of its rights in the property and therefore this amount cannot be treated as an advance in the nature of capital assets.
  - Whether on the facts and circumstances of the case and in-law, the learned CIT(Appeal) erred in deleting the addition made on account of sale of development rights amounting to Rs. 5,40,00,000/- without appreciating the fact that the assessee had submitted the modified deed for transfer of the property at the fag end of the assessment proceedings and therefore the said deed was not verified during the assessment proceedings.
  - Whether on the facts and circumstances of the case and in-law, the learned CIT(Appeal) erred in deleting the addition made on account of sale of development rights amounting to Rs. 5,40,00,000/- without appreciating the fact that the assessee had not proved the facts claimed in the modified deed for transfer and therefore the said deed is merely an afterthought and a colorable device fabricated for the purpose of tax evasion.

- Whether on the facts and circumstances of the case and in-law, the learned CIT(Appeal) erred in deleting the addition made on account of sale of development rights amounting to Rs. 5,40,00,000/- on the basis of the submission of the assessee, without affording an opportunity to the Assessing Officer to verify the facts as required by Rule 46A of the I.T. Rules.
- The appellant craves to leave to amend or alter any ground or add a new ground which may be necessary.

- The issue in appeal lies in rather narrow compass of material facts. The assessee before us is engaged in the business as builder and developer. The assessment was originally completed at NIL income. Subsequently, however, the assessment was reopened on the basis of information received from investigation wing of the income tax department, to the effect that the assessee had transferred development rights, for a consideration of Rs 5.40 crores, to Shivalik Ventures Pvt Ltd, and out of this sum of Rs 5.40 crores, the assessee had already received Rs 86.40 lakhs during the relevant previous year. When the Assessing Officer examined this aspect of the matter, it was explained by the assessee that under the joint venture agreement that the assessee had entered into, with Shivalik Ventures Pvt Ltd, the assessee was to receive Rs 5.40 crores, on account of development rights, from the joint venture and this payment was to be entirely funded by Shivalik Ventures Pvt Ltd, the other participant in the joint venture. Out of this amount, the assessee was paid Rs 86.40 lakhs (being 16% of total agreed consideration) at the time of entering into the joint venture agreement, Rs 226.80 lakhs (being 42% of the total agreed consideration) was to be paid on "obtaining IOA and commencement certificate" by the joint venture, and Rs 226.80 lakhs (being balance 42% of the total agreed consideration) was upon "all the slum dwellers vacating said property and shifting to alternate temporary transit accommodation). It was also explained that in terms of the arrangement the amount of Rs 86.40 lakhs was to be treated as an advance until the point of time when at least 25% of the slum dwellers occupying the said property vacate the promises, and it was further provided that in case the assessee is unable to get even 25% of the slum dwellers occupying the said property even within 5 years to vacate the occupied property, entire money will have to be refunded to Shivalik Ventures Pvt Ltd, though without any interest, within 60 days of the completion of five years time limit. It was further explained that even today the assessee has not been able to get the occupants of property to vacate the property, and, as such, no income has arises in the hands of the assessee. This explanation, however, did not satisfy the Assessing Officer. He was of the view that the "assessee is following mercantile method of accounting" under which "the transactions are recognized as and when they take place" and "under this method, the revenue is recorded when it is earned and the expenses are reported when they are incurred". It was observed by the Assessing Officer that "the assessee has already received an amount of Rs 86,40,000 during the year, and the balance amount will be received by the assessee in instalments after the fulfilment of the conditions as mentioned in the agreement". It was also observed that "since the assessee has transferred the development rights and handed over the possession of the property, the transfer, therefore, qualified be treated as 'transfer' under section 53A of the Transfer of Property Act, 1872". A great deal of emphasis was placed on the fact that the assessee followed the mercantile method of accounting and the stand that "under the mercantile system, the accrual of income does not depend on the receipt of income" and, therefore, the income was earned when transfer was complete i.e. in the relevant previous year. As regards the agreement terms, the Assessing Officer was of the view that since the stipulation about the payment being treated as an advance till at least 25% occupants have vacated the property was by way of a modification agreement, it was nothing but a colourable device to evade taxes. The Assessing Officer thus proceeded to bring the entire amount of Rs 5,40,00,000 to tax in the relevant previous year. Aggrieved, assessee carried the matter in appeal. Learned CIT(A) upheld the plea of the assessee on merits,, and deleted the addition of Rs 5,40,00,000 by observing as follows:

5.2.11 I have perused the judicial precedents cited by the appellant as well on this matter. The crux of the issue is whether the income has accrued to the appellant and he has the right to receive the amount, even if later, and such right is legally enforceable. The basic concept is that the appellant should have acquired a right to receive the income.

5.2.12 In R & A Corporate Consultants India v. ACIT (ITA No. 222/Hyd/2012), the Hyderabad Tribunal has held that though the assessee received the fee in advance for which no service was rendered in the assessment under consideration, it cannot be held as taxable in the hands of the assessee in the year of receipt even though such income was reflected in the books of the assessee, as not only actual receipt to be seen but constructive receipt to be seen to tax the income in the assessment under consideration. Being so, in the present case, admittedly services are not performed in the current assessment year under consideration and till the performance of the service by the assessee, the assessee could not be said to be received the amount on accrual as the assessee could not exercise its dominion over the receipt and the impugned amounts should be taxed in the year in which the assessee renders service to the payee.

5.3.13 In K.K. Khullar v. Deputy Commissioner of Income Tax - 2008 (1) TMI 447- ITAT Delhi-I the assessee received certain amount for services to be performed over a period of time. The amount relatable to the services rendered in the year under consideration was shown as income, the reason being that the assessee became entitled to receive that amount from the client in respect of the services rendered. In other words, the High Court held that debt to the extent of the amount pertaining to services rendered only got vested in the assessee. The rest of the amount was taken as liability to be adjusted in subsequent years as and when the service was rendered. It is but clear that the excess amount would have to be returned in case the service was not performed in subsequent year and therefore in respect of such amount no debt came into existence in favour of the assessee. Therefore this amount did not become the income. The High Court was of the view that the Commissioner (Appeals) erred in finding that the assessee was following the hybrid system of accounting on the ground that the whole of the amount received from the clients was not declared as income in the year of the receipt of the amount.

5.2.14 In this case, the income can be considered to accrue or arise only when the appellant is able to evacuate 25% slum dwellers as per the agreement/deed. If in case the appellant is unable to comply with, appellant will have to return the same to Shivalik.

5.2.15 This item of agreement/deed is also supported by the financial statements of the appellant. the amount received of Rs. 86,40,000 is reflected as advance received. The appellant has also submitted that the balance amount of Rs. 4,53,60,000 has neither been received by the appellant nor the same is accrued to the appellant.

5.2.16 In response to notice issued u/s. 133(6) of the Act, Shivalik has also confirmed all of the above facts to the AO. The AO has not disputed the same and accepted the submissions of the party concerned.

5.2.17 The appellant is into the business of builders and developers. The appellant enters into various agreements based on the projects that it thinks feasible to carry on. Based on the facts and circumstances, the appellant may, subsequently, enter into modification or cancellation or addendum agreements, as may be required from business prudence. The law is clear that one cannot step into the shoes of the business man and he is free to take any business decision. In this case, the AO has raised doubts on the Deed of Modification merely because the same was submitted towards the end of the assessment. This is no ground to reject a document. Any documentary evidence furnished by the appellant has to be rejected with proper base and reasonings. No document can be rejected on one's own surmises and conjectures.

5.2.18 Further, as per AS-9, the revenue is to be recognized at the time of sale or rendering of services. However, if there is significant uncertainty in ultimate collected of revenues. the revenue recognition is postponed and the revenue is recognized only when it becomes reasonable certain. In this case, there is a huge uncertainty as regards the revenue accruing to the appellant as the appellant has to comply with the condition of evacuating 25% of the slumdwellers. If the appellant is unable to do so, the appellant is required to refund the advance received. Thus, following the AS-9, the appellant is not required to recognize the revenue until the certainty is established.

5.2.19 Having regard to the facts, legal analysis and judicial precedents, I am of the view that the income has not accrued to the assessee in the year in appeal and hence, the addition made by the AO is to be deleted. These ground of appeal are allowed.

- The Assessing Officer is aggrieved of the relief so granted by the CIT(A) and is in appeal before us.

- We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

- It is important to understand the nature of arrangement under which the assessee was to receive Rs 5.40 crores towards the transfer of development rights. It was a joint venture arrangement between the assessee and Shivalik Ventures Pvt Ltd. There were six cooperative societies, names and details of which were set out in this joint venture agreement, which were formed by certain slum dwellers and these slum dwellers were in use and occupation of certain area of land "seized and possessed of, or otherwise well and sufficiently entitled" by the Maharashtra Housing Area Development Authority. These slum dwellers, who were members of these six societies and as noted in the said joint venture agreement, were "economically weaker, and due to their personal commitments, being unable to personally develop the said property" and, therefore, "the members of the said societies have held general body meetings, in which it has been unanimously resolved to grant development rights to M/s New Tech Enterprises (i.e. the assessee before us) to redevelop the said property". At the same time, this joint venture agreement also took note of the facts that "the competent authority (MHADA i.e. Maharashtra Housing Area Development Authority) has issued in respect of said societies certifying the names of the eligible slum dwellers that are entitled to a permanent alternate accommodation in lieu of the slum dwelling unit in their respective use, occupation and possession upon development of the said property" . Under this joint venture agreement, the assessee was to, inter alia, perform the following obligations:

  6.1 They shall alongwith Shivalik help in procuring/obtaining the LOI and IOA from the Slum Rehabilitation Authority and such further and other requisite documents as may be required to be filed before Slum Rehabilitation Authority from time to time and furnish the same to Joint Ventures.
  6.2 They shall help to procure the resolution passed by all the said societies viz, (1) Sanagam Co-operative Housing Society (proposed), (2) Janashakti Cooperative Housing Society (proposed), (3) Shree Janashakti Co-operative Housing Society (proposed), (4) Vishwaamitra Co-operative Housing Society (proposed), (5) Shree Laxminarayan Co-operative Housing Society (proposed), and (6) Kamdhenu Co-operative Housing Society (proposed), in its General Body Meeting respectively agreeing to (1) consenting to the redevelopment of the said Property by Shivalik in Joint Venture (2) consenting to Construction Multistoreyed Building for rehabilitation of its members (3) to shift to permanent rehabilitation tenement in the nearby vicinity from the said property, and furnish the same to the Joint Venture.
  6.3 They shall help to procure the resignation and NOC from the Architects appointed by the New Tech developers in favour of the Architect that would be appointed by the Shivalik. All payment of costs, charges and expenses payable to Architects, appointed by the New Tech Developers shall be bore and paid by the New Tech Developer and furnish the said NOC (No Objection Certificate) to Shivalik.
  6.4 They shall cause to shift to all the slum dwellers from the said property to the temporary alternate accommodation vacating the said Property and hand over the same to the Joint Venture for re-development in accordance with this agreement.
  6.5 They shall cause to shift all the Slum Dwellers/Occupants from temporary alternate accommodation to permanent accommodation constructed.

- What was to be received by the assessee was from a joint venture, in which assessee itself was a participant, but, under the said arrangement, it was to be entirely funded by Shivalik Ventures Pvt Ltd. The essence of the arrangement was the performance of obligations by the assessee so far as the above obligations are concerned. In our humble understanding of the situation, while the assessee was to help the assessee get the development rights in favour of the joint venture, the payment was to be received by hum "as original developer appointed by the said societies" and this payment cannot be read in isolation with all its obligations under the joint venture arrangement. It was a composite agreement, and, irrespective of whether we look at the modifications or not, and

all the terms of the agreement were to be read in conjunction of each other. When an assessee had an obligation to perform something, and the assessee had not performed those obligations nor does he even seem to be in a position to perform these obligations, it cannot be said that a partial payment for fulfilling these obligations can be treated as income in the hands of the assessee. The obligations under the agreement, as extracted above, have not been performed till date, as is the uncontroverted stand of the assessee. Clearly, therefore, the income in question never accrued to the assessee. Principle of conservatism, which has been recognized by the Hon'ble Supreme Court right from Chainrup Sampatram v. CIT [(1953) 24 ITR 481 (SC)], has, at its foundation, simple approach that while a loss is to be accounted for as soon as it can be reasonably anticipated, the anticipated profits are not accounted for until these profits actually arise. In the case of E D Sassoon & Co Ltd v. CT [(1954) 36 ITR 27 (SC)] , on which learned counsel for the assessee has placed heavy reliance, holds that while the assessee had no doubt rendered services as managing agents of the companies for the broken periods, unless and until they completed their performance, viz., the completion of the definite period of service of a year which was a condition precedent to their being entitled to receive the remuneration or commission stipulated thereunder, no debt payable by the companies was created in their favour and they had no right to receive any payment from the companies. No remuneration or commission could, therefore, be said to have accrued to them at the dates of the respective transfers. What essentially flows from this decision is that until the obligations for performance of which an amount is received, such a receipt cannot have an income character in the hands of the person who is still to perform such obligations. On a similar note, a special bench of this Tribunal, in the case of ACIT v. Mahindra Holiday Resorts Pvt Ltd [(2010) 3 ITR(T) 600 (Chennai)] has held that , the entire amount of timeshare membership fee receivable by the assessee up front at the time of enrolment of a member is not the income chargeable to tax in the initial year on account of contractual obligation that is fastened to the receipt to provide services in future over the term of contract. It is, therefore, not the right to receive simplictor, but the right to receive the same in income character and without strings of future obligations, de hors the actual receipt, which is relevant for accounting for the same as income. Even under mercantile method of accounting, the relevant point of time is not the actual receipt of income but the point of time when right to receive that income, in income character, crystallized. Just because someone is following mercantile method of accounting, that person cannot be forced to account for the monies, as income, even when these monies are received for performance of obligations in future. All it says that once someone has earned the right to receive the money in income character, its immaterial, for recognition of the same as income, as to whether the income is received or not. As held by Hon'ble Supreme Court, in the case of CIT v. Shoorji Ballabhdas & Co [(1962) 46 ITR 144 (SC)], "Income-tax is a levy on income. No doubt, the Income-tax Act takes into account two points of time at which the liability to tax is attracted, viz., the accrual of the income or its receipt; but the substance of the matter is the income. If income does not result at all, there cannot be a tax, even though in book-keeping, an entry is made about a "hypothetical income", which does not materialise." When obligations of the assessee under the joint venture agreement are not yet performed, there cannot be any occasion to bring the consideration, for performance of such obligations, to tax. The very foundation of the impugned taxability is thus devoid of any legally sustainable basis. As regards the supplementary agreement, in our humble understanding, even if we are to disregard it, the fact remains that income could accrue only on performance of obligations under the joint venture agreement. In any case, it cannot be open to the Assessing Officer to disregard the supplementary, or modification- whichever way one terms it, agreement, only because it's result is clear and unambiguous negation of tax liability in the hands of the assessee. As to whether the amount is actually refunded or not, nothing turns on that aspect either. Just because the assessee does not pay the amounts to be paid by the assessee as income of the assessee. In the light of these discussions, as also bearing in mind entirety of the case, the taxability of Rs 5.40 crores, on account of what is alleged to be, transfer of development rights is wholly devoid of merits.

- For the detailed reasons set out above, as also finding ourselves in agreement with the line of reasoning adopted by the learned CIT(A), we approve the conclusions arrived at by the learned CIT(A) and decline to interfere in the matter.

- As we part with the matter, we may take note of the fact that the hearing in this case was concluded on 19th February 2020 but the order is being passed today on 19th day of May 2020, i.e. well after 90 days, but then given the extraordinary times that we are going through in these days of Covid 19 epidemic, the period of lockdown is required to excluded in computation of the 90 days. In support of this proposition we find support from a coordinate bench decision in the case of DCIT v. JSW Ltd, and vice versa [2020] 116 taxmann.com 565 (Mumbai - Trib.):

7. However, before we part with the matter, we must deal with one procedural issue as well. While hearing of these appeals was concluded on 7th January 2020, this order thereon is being pronounced today on 14th day of May, 2020, much after the expiry of 90 days from the date of conclusion of hearing. We are also alive to the fact that rule 34(5) of the Income Tax Appellate Tribunal Rules 1963, which deals with pronouncement of orders, provides as follows:

(5) The pronouncement may be in any of the following manners:—

(a) The Bench may pronounce the order immediately upon the conclusion of the hearing.

(b) In case where the order is not pronounced immediately on the conclusion of the hearing, the Bench shall give a date for pronouncement.

(c) In a case where no date of pronouncement is given by the Bench, every endeavour shall be made by the Bench to pronounce the order within 60 days from the date on which the hearing of the case was concluded but, where it is not practicable so to do on the ground of exceptional and extraordinary circumstances of the case, the Bench shall fix a future day for pronouncement of the order, and such date shall not ordinarily (emphasis supplied by us now) be a day beyond a further period of 30 days and due notice of the day so fixed shall be given on the notice board.

8. Quite clearly, "ordinarily " the order on an appeal should be pronounced by the bench within no more than 90 days from the date of concluding the hearing. It is, however, important to note that the expression "ordinarily "has been used in the said rule itself. This rule was inserted as a result of directions of Hon'ble jurisdictional High Court in the case of Shivsagar Veg Restaurant v. ACIT [(2009) 317 ITR 433 (Bom)] wherein Their Lordships had, inter alia, directed that 'We, therefore, direct the President of the Appellate Tribunal to frame and lay down the guidelines in the similar lines as are laid down by the Apex Court in the case of Anil Rai (supra) and to issue appropriate administrative directions to all the benches of the Tribunal in that behalf. We hope and trust that suitable guidelines shall be framed and issued by the President of the Appellate Tribunal within shortest reasonable time and followed strictly by all the Benches of the Tribunal. In the meanwhile (emphasis, by underlining, supplied by us now), all the revisional and appellate authorities under the Income-tax Act are directed to decide matters heard by them within a period of three months from the date case is closed for judgment". In the ruled so framed, as a result of these directions, the expression "ordinarily "has been inserted in the requirement to pronounce the order within a period of 90 days. The question then arises whether the passing of this order, beyond ninety days, was necessitated by any "extraordinary "circumstances.

9. Let us in this light revert to the prevailing situation in the country. On 24th March, 2020, Hon'ble Prime Minister of India took the bold step of imposing a nationwide lockdown, for 21 days, to prevent the spread of Covid 19 epidemic, and this lockdown was extended from time to time. As a matter of fact, even before this formal nationwide lockdown, the functioning of the Income Tax Appellate Tribunal at Mumbai was severely restricted on account of lockdown by the Maharashtra Government, and on account of strict enforcement of health advisories with a view of checking spread of Covid 19. The epidemic situation in Mumbai being grave, there was not much of a relaxation in subsequent lockdowns also. In any case, there was unprecedented disruption of judicial wok all over the country. As a matter of fact, it has been such an unprecedented situation, causing disruption in the functioning of judicial machinery, that Hon'ble Supreme Court of India, in an unprecedented order in the history of India and vide order dated 6-5-2020 read with order dated 23.3.2020, extended the limitation to exclude not only this lockdown period but also a few more days prior to, and after, the lockdown by observing that 'In case the limitation has expired after 15.03.2020 then the period from 15.03.2020 till the date on which the lockdown is lifted in the jurisdictional area where the dispute lies or where the cause of action arises shall be extended for a period of 15 days after the lifting of lockdown ". Hon'ble Bombay High Court, in an order dated 15th April 2020, has, besides extending the validity of all interim orders, has also observed that, "It

is also clarified that while calculating time for disposal of matters made time-bound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly ", and also observed that "arrangement continued by an order dated 26th March 2020 till 30th April 2020 shall continue further till 15th June 2020 " It has been an unprecedented situation not only in India but all over the world. Government of India has, vide notification dated 19th February 2020, taken the stand that, the coronavirus "should be considered a case of natural calamity and FMC (i.e. force majeure clause) maybe invoked, wherever considered appropriate, following the due procedure..." The term 'force majeure' has been defined in Black's Law Dictionary, as 'an event or effect that can be neither anticipated nor controlled' When such is the position, and it is officially so notified by the Government of India and the Covid-19 epidemic has been notified as a disaster under the National Disaster Management Act, 2005, and also in the light of the discussions above, the period during which lockdown was in force can be anything but an "ordinary "period.

10. In the light of the above discussions, we are of the considered view that rather than taking a pedantic view of the rule requiring pronouncement of orders within 90 days, disregarding the important fact that the entire country was in lockdown, we should compute the period of 90 days by excluding at least the period during which the lockdown was in force. We must factor ground realities in mind while interpreting the time limit for the pronouncement of the order. Law is not brooding omnipotence in the sky. It is a pragmatic tool of the social order. The tenets of law being enacted on the basis of pragmatism, and that is how the law is required to interpreted. The interpretation so assigned by us is not only in consonance with the letter and spirit of rule 34(5) but is also a pragmatic approach at a time when a disaster, notified under the Disaster Management Act 2005, is causing unprecedented disruption in the functioning of our justice delivery system. Undoubtedly, in the case of Otters Club v. DIT [(2017) 392 ITR 244 (Bom)], Hon'ble Bombay High Court did not approve an order being passed by the Tribunal beyond a period of 90 days, but then in the present situation Hon'ble Bombay High Court itself has, vide judgment dated 15th April 2020, held that directed "while calculating the time for disposal of matters made time - bound by this Court, the periodfor which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly". The extraordinary steps taken suo motu by Hon'ble jurisdictional High Court and Hon'ble Supreme Court also indicate that this period of lockdown cannot be treated as an ordinary period during which the normal time limits are to remain in force. In our considered view, even without the words "ordinarily ", in the light of the above analysis of the legal position, the period during which lockout was in force is to excluded for the purpose of time limits set out in rule 34(5) of the Appellate Tribunal Rules, 1963. Viewed thus, the exception, to 90-day time-limit for pronouncement of orders, inherent in rule 34(5)(c), with respect to the pronouncement of orders within ninety days, clearly comes into play in the present case. Of course, there is no, and there cannot be any, bar on the discretion of the benches to refix the matters for clarifications because of considerable time lag between the point of time when the hearing is concluded and the point of time when the order thereon is being finalized, but then, in our considered view, no such exercise was required to be carried out on the facts of this case.

- Viewed thus the order was passed within the time limit laid down under rule 34(5) of the Income Tax (Appellate Tribunal) Rules, 1962

- In the result, the appeal is dismissed. Order pronounced under rule 34(4) of the Income Tax (Appellate Tribunal) Rules, 1962, by placing the details on the notice board.

Indirect Taxation

INCOME TAX : Where in terms of one time settlement, creditor bank waived off principal amount of loan payable by assessee, said amount could not be brought to tax under section 41(1) because assessee never claimed same as deductible expenditure in earlier assessment years

[2020] 117 taxmann.com 236 (Visakhapatnam - Trib.)
IN THE ITAT VISAKHAPATNAM BENCH
Income Tax Officer
v.
Sri Vasavi Polymers (P.) Ltd.*
V. DURGA RAO, JUDICIAL MEMBER
AND D.S. SUNDER SINGH, ACCOUNTANT MEMBER
IT APPEAL NO. 606 (VIZ.) OF 2018
[ASSESSMENT YEAR 2013-14]
JUNE 5, 2020

Section 41(1) of the Income-tax Act, 1961 - Remission or cessation of trading liability - (Loan) - Assessment year 2013-14 - During relevant year, assessee received certain benefit as a result of one time settlement of loan with creditor bank - In course of assessment, Assessing Officer brought principal amount of loan waived off to tax under section 41(1)- Commissioner (Appeals) deleted said addition - Whether an amount can be brought to tax under section 41(1) when benefit received by assessee relating to such expenditure has been claimed and allowed in earlier years - Held, yes -Whether , since , in instant case, assessee never claimed principal amount of loan as deductible expenditure in earlier assessment years, benefit received in respect of same could not be brought to tax under section 41(1) - Held, yes [Para 7] [In favour of assessee]
S. Ravi Shankar Narayan, *CIT-DR for the Appellant*. **Y.A. Rao,** AR *for the Respondent.*

ORDER

1. **D.S. Sunder Singh, Accountant Member** - This appeal is filed by the revenue against the order of the Commissioner of Income Tax (Appeals) [CIT(A)]-9, Hyderabad in ITA No.10300/CIT(A)-9, Hyd/2017-18 dated 09.08.2018 for the Assessment Year (A.Y.) 2013-14. with the delay of 1 day. The department has filed condonation petition and submitted that the delay was due to the administrative reasons beyond the control of the department, hence requested to condone the delay and admit the appeal. After hearing both the parties, we condone the delay and admit the appeal.

2. All the grounds of appeal are related to the addition made by the Assessing Officer (AO) for a sum of Rs.1,70,00,000/- u/s 41(1) of the Income Tax Act, 1961 (in short 'Act') which was deleted by the Ld.CIT(A). During the course of assessment proceedings, the AO found that the assessee had received the benefit of Rs.1,70,00,000/- as a result of one time settlement of loan by the Indian Overseas bank. The assessee was due to Indian Overseas Bank, Visakha patnam in respect of term loan & OCC for a sum of Rs. 4.3 crores which included the interest subsidy as well as the working capital loan. The interest of Rs.43,81,572/- was added back to income and taxed u/s 43B of the Act. However, the sum of Rs.1.7 crores which represent the waiver of working capital loan was added as income u/s 41(1) of the Act.

3. Against the order u/s 143(3), the assessee went on appeal before the CIT(A) and the Ld.CIT(A) deleted the addition following the order of Hon'ble ITAT Mumbai in the case of M/s SHRM Food & Allied Services Pvt. Ltd., in I.T.A.No.657/Mum/2009, 595/Mum/2008 & 1116/Mum/2013 and ITAT Hyderabad in the case of Tini Pharma Ltd., Hyderabad dated 23.05.2018 and also the decision of Hon'ble Apex Court in the case of Mahindra & Mahindra.

4. Against which the department has filed appeal before this Tribunal. The department has raised following grounds in this appeal.

- The Ld. CIT(A) erred on both facts and law in deleting the addition made by the AO of Rs. 1.70 crores on account of benefit of waiver of OCC loan amount received by the assessee during the year.
- The Ld. CIT(A) ought to have appreciated that the 0CC facility was availed by assessee for working capital requirements and waiver of any such 0CC loan amount either partly or fully is a revenue receipt u/s. 28(i) of the I.T. Act, in view of the decision of the Apex Court in the case of CIT v. T.V. Sundaramlyengar and Sons Ltd. (222 ITR 344).
- The Ld. CIT(A) ought to have further considered that the assessee itself carried the loan amount waived of Rs. 1.70 crore to any 'other reserve' instead of capital reserve under the head 'reserves and surplus in the balance sheet as on 31.03.2013 and therefore such benefit is liable to be assessed as income u/s. 28(i) of the I.T. Act.
- The Ld. CIT(A) ought to have also appreciated that the 0CC loan facility, a part of which was waived during the year, was not taken directly or indirectly for the purpose of acquisition of any capital asset though the assessee claimed that the part of the OCC loan was utilized indirectly for repayment of old term loans availed by the assessee from SBI.
- The appellant craves leave to add or delete or substitute or amend any ground of appeal before and / or at the time of hearing of the appeal.

5. During the appeal hearing, the Ld.DR submitted that the amount of Rs.1,70,00,000/- represent waiver of working capital loan which was used for day to day running of the business, therefore, submitted that the same required to be brought to tax u/s 28(i) of the Act. The Ld.DR relied on the following decisions.

- Hon'ble High Court of Bombay in the case of Solid Containers Ltd. v. Dy.Commissioner of Income Tax
- Hon'ble High Court of Delhi in the case of Rollatainers Ltd. v. Commissioner of Income Tax (2011) 15 taxmann.com 111 (Delhi)
- Hon'ble High Court of Madras in the case of Commissioner of Income Tax, Chennai v. Ramaniyam Homes (P.) Ltd. [2016] 68 taxmann.com 289 (Madras)

6. On the other hand, the Ld.AR submitted that the AO made addition u/s 41(1) of the Act, but not under section 28(i) of the Act. The amount waived by the bank was relating to working capital loan which is not covered u/s 41(1) of the Act. The AO disallowed the interest debited to Profit and Loss account in the year, therefore, there is no trading liability claimed by the assessee representing the working capital in the earlier years, hence, argued that there is no case for taxing the waiver of working capital u/s 41(1) of the Act, therefore, argued that the Ld.CIT(A) has rightly deleted the addition and no interference is called for. The Ld.AR further argued that the AO's case is the addition u/s 41(1) of the Act, but not the case of section 28(i)/(iv) of the Act, hence, submitted that the department's grounds and arguments with regard to taxing the waiver under section 28(i)/(vi) are not relevant to the addition made and the same should not be considered since, neither the AO nor the Ld.CIT(A) considered the issue u/s 28(i) of the Act. The Ld.AR relied on the decisions relied upon by the Ld.CIT(A).

7. We have heard both the parties and perused the material placed on record. The AO made the addition u/s 41(1) of the Act, but not u/s 28 of the Act. As per section 41(1) of the Act, trading liability or expenditure or the loan which was already claimed as incurred by the assessee and subsequently during any previous year received the benefit in respect of such trading liability by way of remission or cessation of liability is deemed to be profits and gains of the business or profession and accordingly chargeable to tax as the income of the previous year. From section 41(1), it is observed that there must be trading liability or expenditure or loss which was incurred by the assessee in the earlier years and allowed the same as deduction to tax the same u/s 41(1). The twin conditions required to be satisfied for taxing the benefit received by the assessee. i.e., the expenditure should be Revenue expenditure or the loss incurred and the same ought to have been allowed as deduction. The benefit received by the assessee should be relating to such expenditure which was claimed and allowed in the earlier years. In the instant case, the trading liability or the expenditure or deduction was claimed by the assessee in respect of interest paid on the OCC loan. In respect of

principal amount, though the assessee has gained the benefit by way of one time settlement the same cannot be brought to tax u/s 41(1) because the OCC loan represents the principal which was never claimed as expenditure. The AO also did not make out a case that the principal amount was debited to the Profit & Loss account in the earlier years. Therefore there is no case for making addition u/s 41(1) in respect of the principal amount. The Hon'ble Supreme Court in the case of CIT v. Mahindra & Mahindra Ltd considered the similar issue and held as under :

> "15. On a perusal of the said provision, it is evident that it is a sine qua non that there should be an allowance or deduction claimed by the assessee in any assessment for any year in respect of loss, expenditure or trading liability incurred by the assessee. Then, subsequently, during any previous year, if the creditor remits or waives any such liability, then the assessee is liable to pay tax under Section 41 of the IT Act. The objective behind this Section is simple. It is made to ensure that the assessee does not get away with a double benefit once by way of deduction and another by not being taxed on the benefit received by him in the later year with reference to deduction allowed earlier in case of remission of such liability. It is undisputed fact that the Respondent had been paying interest at 6 % per annum to the KJC as per the contract but the assessee never claimed deduction for payment of interest under Section 36(1)(iii) of the IT Act. In the case at hand, learned CIT (A) relied upon Section 41 (1) of the IT Act and held that the Respondent had received amortization benefit. Amortization is an accounting term that refers to the process of allocating the cost of an asset over a period of time, hence, it is nothing else than depreciation. Depreciation is a reduction in the value of an asset over time, in particular, to wear and tear. Therefore, the deduction claimed by the Respondent in previous assessment years was due to the deprecation of the machine and not on the interest paid by it.
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> 16. Moreover, the purchase effected from the Kaiser Jeep Corporation is in respect of plant, machinery and tooling equipments which are capital assets of the Respondent. It is important to note that the said purchase amount had not been debited to the trading account or to the profit or loss account in any of the assessment years. Here, we deem it proper to mention that there is difference between 'trading liability' and 'other liability'. Section 41 (1) of the IT Act particularly deals with the remission of trading liability. Whereas in the instant case, waiver of loan amounts to cessation of liability other than trading liability. Hence, we find no force in the argument of the Revenue that the case of the Respondent would fall under Section 41 (1) of the IT Act.
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> 17. To sum up, we are not inclined to interfere with the judgment and order passed by the High court in view of the following reasons:
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> (a) Section 28(iv) of the IT Act does not apply on the present case since the receipts of Rs 57,74,064/- are in the nature of cash or money.
>
> (b) Section 41(1) of the IT Act does not apply since waiver of loan does not amount to cessation of trading liability. It is a matter of record that the Respondent has not claimed any deduction under Section 36 (1) (iii) of the IT Act qua the payment of interest in any previous year.

The Hon'ble Supreme Court also considered the issue with regard to taxing the remission of liability u/s 28(iv) and decided the issue against the revenue and in favour of the assessee, since, the receipt was in the nature of cash or money. The Hon'ble Supreme Court held that section 28(iv) of the Act has no application since the receipt was in the nature of cash or money. In the instant case what the assessee has received was remission of liability which was in the form of cash or money and the difference amount of principal which was settled by onetime payment was never debited to Profit & Loss account. Therefore, the decision of Hon'ble Supreme Court is squarely applicable in the instant case. The Ld.DR relied on the decision of Hon'ble Delhi High Court in the case of Rollatainers Ltd. v. Commissioner of Income Tax [2011] 15 taxmann.com 111 (Delhi) and the decision of Hon'ble High Court of Madras in the case of Commissioner of Income Tax, Chennai v. Ramaniyam Homes (P.) Ltd., the judgements were delivered prior to the judgement of Hon'ble Supreme Court in the case of Mahindra and Mahindra supra and the Hon'ble High Courts have no occasion to consider the decision of Hon'ble Supreme Court. Therefore, we do not find any reason to interfere with the order of the Ld.CIT(A) and accordingly, we uphold the same. The appeal of the revenue is dismissed.

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

Indirect Taxation

Usage of the property has to be considered in determining whether the property is Residential Property or Commercial Property.
Navin Jolly v. ITO [2020] 117 taxmann.com 323 (Karnataka HC)

Facts

1. The assessee being an individual filed its return of income for AY 2006-07 declaring total income of Rs. 53 Lakhs. The assessee sold shares of M/s. Corporate Leisure Resorts and Hotels Pvt. Ltd and earned long term capital gains of Rs. 1.55 crores, against which assessee claimed exemption u/s 54F, for constructing residential property, to the tune of Rs. 1.55 cores.

2. During the assessment proceedings, the AO pointed out that the assessee owns 9 residential flats and deriving income from each such flat and offering the same under Income from house property (IFHP). In view of proviso (a)(i) and (b) to Section 54F (1), AO denied exemption u/s 54F as the properties were residential apartments.

3. CIT(A) & ITAT both confirmed the addition made by AO stating that it is immaterial that the property is utilized for residential purpose or commercial purpose so long as these units were recognized as residential units.

Held

1. It is pertinent to note that under section 22 of the Act any income from any buildings irrespective of the use has to be treated under the head 'IHFP'. It is well settled legal proposition that a provision in a taxing statute providing incentive for promoting growth and development has to be construed liberally so as to advance the object of the Section and not to frustrate it.

2. In case of Sambandam Uday Kumar Supra while interpreting Section 54F of the Act has held that provisions of Section 54F is a beneficial provision for promoting construction of residential houses and has to be construed liberally. Kerala, Delhi, Allahabad, Calcutta and Hyderabad High Courts have taken a view that usage of the property has to be considered in determining whether it is a residential property or a commercial property and Madras High Court in C.H.KESVA RAO supra has held that expression 'residence' implies some sought of permanency and cannot be equated to the expression 'temporary stay' as a lodger.

3. Thus, the usage of the property has to be taken into consideration in determining whether the property is residential property or commercial property. Similar view was also taken by Delhi High Court in case of Geeta Guggal wherein it was held that a residential house which consists of several independent residential units would be entitled to exemption under section 54F(1) of the Act. SLP was also dismissed by the Supreme Court against such High Court Order.

4. Thus, the appeal is allowed and in favour of the assessee.

Indirect Taxation

INCOME TAX : Assessee's claim for deduction under section 54F(1) was to be allowed where two apartments owned by him even though had been sanctioned for residential purpose, yet same were infact being used for commercial purpose as service apartments

[2020] 117 taxmann.com 323 (Karnataka)

HIGH COURT OF KARNATAKA

Navin Jolly

v.

Income Tax Officer*

ALOK ARADHE AND M. NAGAPRASANNA, JJ.

IT APPEAL NO. 320 OF 2011†

JUNE 18, 2020

Section 54F of the Income-tax Act, 1961 - Capital gains - Exemption of, in case of investment in residential use (Useage of property) - Assessment year 2006-07 - During relevant year assessee earned long term capital gain from sale of shares - He constructed residential house property and claimed deduction under section 54F - Assessing Officer held that assessee owned nine residential flats in his name and, thus, he was not eligible to claim deduction in terms of proviso (a)(I) and (b) to section 54F(1) - Tribunal confirmed order passed by Assessing Officer - It was noticed that out of nine apartments, seven had been sanctioned for commercial purpose - As regards remaining two apartments, even though those apartments had been sanctioned for residential purpose, yet same were being used for commercial purpose as serviced apartments - Whether usage of property has to be considered for determining whether property in question is a residential property or a commercial property - Held, yes - Whether since it was not in dispute that two apartments in question were being put to commercial use, said apartments could not be treated as residential apartments - Held, yes - Whether, even otherwise, in view of fact that assessee owned two apartments of 500 square in same building ,they were to be regarded as one residential unit and, thus, assessee was entitled to benefit of deduction under section 54F(1) - Held, yes - Whether,in view of aforesaid, impugned order passed by authorities below was to be set aside - Held, yes [Paras 10 and 11] [In favour of assessee]

A. Shankar, Sr. Adv. and **M. Lava,** Adv. *for the Appellant.* **K.V. Aravind,** Adv. *for the Respondent.*

JUDGMENT

Alok Aradhe, J. - This appeal under section 260A of the Income-tax Act, 1961 (hereinafter referred to as the Act for short) has been preferred by the assessee. The subject matter of the appeal pertains to the Assessment year 2006-07. The appeal was admitted by a bench of this Court vide order dated 6-6-2012 on the following substantial questions of law:

- Whether the tribunal is justified in law in confirming the denial of exemption claimed by the appellant under section 54F of the Income-Tax Act, 1961, on the facts and circumstances of the case?
- Whether the tribunal erred in law in interpreting the meaning of the word residential house used in Section 54F(1) proviso (a) (i) of the Income-tax Act?
- Whether the authorities below are justified in law in holding that a property used for the commercial purpose, falls within the meaning of residential house as per the proviso (a) (i) to Section 54F(1) of the Act on the facts and circumstances of the case?

2. Facts leading to filing of this appeal briefly stated are that assessee is an individual and is Director of M/s Aburge India Property Services Pvt. Ltd., Bangalore. The assessee filed his return of income for Assessment year 2006-07 on 30-10-2006 declaring income of Rs. 53,06,473/-. The return filed by the assessee was selected for scrutiny and notice under section 143(2) of the Act was issued. The assessee stated that he had sold shares in the company viz., M/s. Corporate Leisure Resorts and Hotels Pvt. Ltd., during financial year 2005-06 and derived long term capital gain of Rs. 1,55,47,315/-. The appellant further declared that he had constructed a residential property during the year situate at 808/7 and 808/8 Kaikondanahalli, Sarjapur, Bangalore. The appellant claimed exemption under section 54F of the Act to the extent of Rs. 1,55,47,315/-. Before the assessing officer, the assessee agreed voluntarily to offer a sum of Rs. 4,17,339/- for taxation.

3. The assessing officer vide order dated 31-12-2008 inter alia held that the assessee owns nine residential flats in his name and that he is deriving the income from the residential flats and declared the same under the head income from house property during Assessment year 2006-07 and is therefore, not eligible to claim exemption by invoking proviso (a)(I) and (b) to Section 54F (1). The assessing officer further recorded a finding that properties owned by the appellant are residential apartments. Accordingly, exemption under section 54F of the Act was denied.

4. Being aggrieved, the assessee filed an appeal. The Commissioner of Income-tax (Appeals) by an order dated 31-5-2010 inter alia held that by virtue of clauses (a)(I) and (b) of proviso to Section 54F(1), the assessee is ineligible to claim exemption. It was further held that from perusal of the record, it is evident that out of nine properties two properties viz., Unit No. 204 and 605 of Oxford Suites have got plan sanction of residential in nature and therefore, the claim of the assessee that the properties be not treated as residential houses cannot be accepted. It was further held that on the date of transfer of original asset the assessee was in possession of atleast two residential houses and therefore, the appellant is not entitled to the benefit of exemption under section 54F of the Act. It was also held that in respect of six out of seven properties, from the records it is evident that they have been let out by the assessee to different companies and rental income is being shown regularly in the returns as income from house property and even if the nature of plan sanction is commercial, the appellant cannot be allowed to take a different stand and to contend that the properties are not residential houses. It was also noted that by explanatory circular dated 30-6-1982, the word 'residential house' includes not only self occupied properties but also let out properties. It was further held that the assessee is not entitled to benefit of deduction under section 54F of the Act. Accordingly, the appeal was dismissed.

5. The assessee approached the Income-tax Appellate Tribunal. The tribunal by an order dated 29-3-2011 inter alia held that assessee should not have more than one residential unit on the date of transfer of the original asset. It was further held that it is immaterial as to how the assessee utilized the residential units and whether these residential units are used for commercial purposes or residential purposes, so long as these units were recognized as residential units. Therefore, it was held that the assessee cannot claim the benefit of exemption under section 54F of the Act. The appeal preferred by the assessee was therefore, dismissed. In the aforesaid factual background, this appeal has been filed.

6. Learned Senior Counsel for the assessee submitted that apartments No. 204 and 605 viz., Oxford suites is a building comprising units offered for serviced apartments and each floor consists of eight apartments of 500 square feet floor area and the appellant had let out both the properties to be used as commercial/serviced apartments. Therefore, the aforesaid serviced apartments could not have been treated as residential units and in fact the same were commercial units and were being used by serviced apartments by the companies to accommodate their guests. It is also urged that clause (a) (i) of proviso to Section 54F(1) are not attracted and clause (b) of proviso to Section 54F(1) are also not attracted. It is further submitted that the authorities erred in law in interpreting the meaning of the word 'residential house' used in proviso (a)(i) to Section 54F(1) of the Act and it is submitted that the expression 'residence' implies some sought for permanency and cannot be equated to the expression 'temporary stay' as a lodger. It is also argued that usage of property has to be taken into account while determining whether the property is a residential property or commercial property and the beneficial provisions of the Act have to be construed liberally in order to achieve the purpose for which it were incorporated. Alternatively, it is submitted that even if two apartments are treated to be residential, then also since, they are situate in the same building, therefore, the apartments have to be treated as one residential only. In support of aforesaid submissions, reliance has been placed on the following decisions 'CIT v. I. Ifthiqar Ashiq', (2016) 239 Taxman 443 (Madras), 'Firm Ganga Ram Kishore Chand v. Firm Jai Ram Bhagat Ram', AIR 1957 Punjab 293, 'Globe Theatres Ltd. v. Khan Saheb Abdul Gani and another', 1956 Mysore 57 ((s) AIR v 43 C 25

Dec.), 'C.H. Kesava Rao v. CIT', (1985) 156 ITR 369 (Madras), 'CIT v. Ouseph Chacko', 271 ITR 29 (Kerala), 'Sanjeev Puri v. DCIT', (2016) 180 TTJ 649 (Delhi - Trib), 'P.N. Shukla v. CIT', (2005) 276 ITR 642 (Allahabad), 'CIT v. Smt. Shyama Devi Dalmia', (1992) 194 ITR 114 (Calcutta), 'ITO v. Smt. Rohini Reddy', (2010) 122 ITD 1 (Hyderabad), 'Bajaj Tempo Ltd. v. CIT', (1992) 196 ITR 188 (SC), 'CIT v. Srisambandam Udaykumar', (2012) 345 ITR 389 (Karnataka), 'Gita Duggal (2013) 357 ITR 153 (Delhi) and 'Gita Duggal (2015) 228 taxman 62 (SC).

7. On the other hand learned counsel for the revenue submitted that clause (a) to proviso to Section 54F(1) does not apply but clause (b) to proviso to Section 54F(1) applies to the fact situation of the case. It is submitted that the question whether the property is a residential or commercial property has to be determined on the basis of the sanction granted in respect of the same and the nature of its use by the assessee is not the criteria. It is also argued that the classification of the property either as residential or commercial has to be taken into account for the purpose of taxation. It is however submitted that out of nine flats, seven flats have been sanctioned for commercial purposes and only two flats have been sanctioned as residential units which are being used for commercial purposes. It is also urged that requirement as prescribed in proviso to Section 54F(1) is of owning a residential house and not of its user. Our attention has also been invited to Section 32(1) of the Act and it has been stated that the legislature in Section 32(1) of the Act has used the expression 'owned' and 'used' simultaneously, whereas, the same has not been done in proviso to Section 54F(1) of the Act. It is argued that language of a taxing statute should ordinarily be understood in the sense in which it is harmonious with the object of statute to effectuate the legislative animation and taxing statute deserves to be strictly construed. In support of aforesaid proposition, reliance has been placed on decision of the supreme court in 'Commissioner of Income-tax-III v. Calcutta Knitwears', (2014) 43 taxmann.com 446 (SC).

8. We have considered the submissions made on both the sides and have perused the record. Before proceeding further, it is apposite to take note to Section 54F(1) of the Act, which is reproduced below for the facility of reference:

> 54F. (1) Subject to the provisions of sub-section (4), where, in the case of an assessee being an individual or a Hindu undivided family, the capital gain arises from the transfer of any long-term capital asset, not being a residential house (hereafter in this section referred to as the original asset), and the assessee has, within a period of one year before or two years after the date on which the transfer took place purchased, or has within a period of three years after that date constructed, one residential house in India (hereafter in this section referred to as the new asset), the capital gain shall be dealt with in accordance with the following provisions of this section, that is to say,—
>
> - if the cost of the new asset is not less than the net consideration in respect of the original asset, the whole of such capital gain shall not be charged under section 45 ;
> - if the cost of the new asset is less than the net consideration in respect of the original asset, so much of the capital gain as bears to the whole of the capital gain the same proportion as the cost of the new asset bears to the net consideration, shall not be charged under section 45:
>
> Provided that nothing contained in this sub-section shall apply where—
>
> (a) the assessee,—
>
> (i) owns more than one residential house, other than the new asset, on the date of transfer of the original asset; or
>
> (ii purchases any residential house, other than the new asset, within a period of one year after the date of transfer of the original asset; or
>
> (iii) constructs any residential house, other than the new asset, within a period of three years after the date of transfer of the original asset; and
>
> (b) the income from such residential house, other than the one residential house owned on the date of transfer of the original asset, is chargeable under the head "Income from house property".
>
> Explanation.—For the purposes of this section,—
>
> "net consideration", in relation to the transfer of a capital asset, means the full value of the consideration received or accruing as a result of the transfer of the capital asset as reduced by any expenditure incurred wholly and exclusively in connection with such transfer.

9. From close scrutiny of Section 54F(1) of the Act, it is evident that in order to attract Section 54F(1) of the Act, the conditions stipulated in clauses (a) and (b) of proviso to Section 54F(1) have to be complied with as the legislature has used the expression 'and' at the end of clause (a) of proviso to Section 54F(1) of the Act. It is pertinent to note that under section 22 of the Act any income from any buildings irrespective of which the use which has to be treated under

the head 'income from house property'. It is well settled legal proposition that a provision in a taxing statute providing incentive for promoting growth and development has to be construed liberally so as to advance the object of the Section and not to frustrate it. [See: 'CIT v. Strawboard Mfg. Co. Ltd.', (1989) 177 ITR 431 (SC) and 'Bajaj Tempo Ltd. Supra]. A bench of this court in Sambandam Uday Kumar Supra while interpreting Section 54F of the Act has held that provisions of Section 54F is a beneficial provision for promoting construction of residential houses and has to be construed liberally. Kerala, Delhi, Allahabad, Calcutta and Hyderabad High Courts have taken a view that usage of the property has to be considered in determining whether it is a residential property or a commercial property and Madras High Court in C.H.KESVA RAO supra has held that expression 'residence' implies some sought of permanency and cannot be equated to the expression 'temporary stay' as a lodger.

10. In the backdrop of aforesaid well settled legal principles, the facts of the case in hand may be examined. Learned counsel for the revenue have fairly submitted that out of nine apartments, seven flats have been sanctioned for commercial purposes. Therefore, the dispute only survives in respect of two apartments, which have been sanctioned for residential purposes and are being used for commercial purposes as serviced apartments. The usage of the property has to be considered for determining whether the property in question is a residential property or a commercial property. It is not in dispute that the aforesaid two apartments are being put to commercial use and therefore, the aforesaid apartments cannot be treated as residential apartments. The contention of the revenue that the apartments cannot be taxed on the basis of the usage does not deserve acceptance in view of decisions of Kerala, Delhi, Allahabad, Calcutta and Hyderabad High Courts with which we respectfully concur.

11. Alternatively, we hold that assessee even otherwise is entitled to the benefit of exemption under section 54F(1) of the Act as the assessee owns two apartments of 500 square feet in same building and therefore, it has to be treated as one residential unit. The aforesaid fact cannot be permitted to act as impediment to allowance of exemption under section 54F(1) of the Act. Similar view was taken by Delhi High Court in case of Geeta Duggal wherein the issue whether a residential house which consists of several independent residential units would be entitled to exemption under section 54F(1) of the Act was dealt with and the same was answered in the affirmative. The appeal against the aforesaid decision was dismissed by the Supreme Court by an order reported in (2014) 52 taxmann.com 246 (SC). We agree with the view taken by Delhi High Court.

12. For the aforementioned reasons, the substantial questions of law are answered in favour of the assessee and against the revenue. In the result, the orders of the assessing officer and Commissioner of Income Tax (Appeals) and Income Tax Appellate Tribunal insofar as it pertains to denial of exemption under section 54F(1) of the Act to the appellant is hereby quashed. In the result, appeal is allowed.

Indirect Taxation

Waiver of Working Capital Loan will not be taxed u/s 41(1), where no deduction has been claimed in earlier years.
ITO v. Sri Vasavi Polymers (P.) Ltd [2020] 117 taxmann.com 236 (Visakhapatnam - Trib.)

Facts

1. During the assessment proceedings, the AO found that the assessee has received a benefit of Rs. 1.70 crores as a result of one-time settlement of loan by the Indian Overseas bank. Thus, AO added the same to the total income of the assessee u/s 41(1) of the Act considering it as cessation of trading liability.

2. On Appeal to the CIT(A), CIT(A) deleted the said addition made by AO.

3. Aggrieved by the said order, Revenue preferred an appeal before the ITAT.

Held

1. It is observed that section 41(1) is applicable when the assessee has incurred any trading liability or expenditure or loss and claimed the deduction of the same in earlier years. Two conditions for taxing the benefit received by the assessee is the expenditure should be Revenue Expenditure or loss incurred and the same has been claimed as deduction in earlier years. In the instant case the assessee has never claimed the amount of principal loan as deduction in earlier years and hence the same cannot be taxed u/s 41(1) on waiver of the said loan. The AO also did not make out a case that the principal amount was debited to the Profit & Loss account in the earlier years.

2. Hon'ble Supreme Court in the case of CIT v. Mahindra & Mahindra Ltd considered the similar issue and held as under
   a. The objective behind this Section is simple. It is made to ensure that the assessee does not get away with a double benefit once by way of deduction and another by not being taxed on the benefit received by him in the later year with reference to deduction allowed earlier in case of remission of such liability.
   b. We deem it proper to mention that there is difference between 'trading liability' and 'other liability'. Section 41 (1) of the IT Act particularly deals with the remission of trading liability. Whereas in the instant case, waiver of loan amounts to cessation of liability other than trading liability. Hence, we find no force in the argument of the Revenue that the case of the Respondent would fall under Section 41 (1) of the IT Act.
   c. Section 28(iv) of the IT Act does not apply on the present case since the receipts of Rs 57,74,064/- are in the nature of cash or money.

3. Appeal of the revenue is thus dismissed

GST Notification

- **File GSTR-3B through EVC & nil return through mobile OTP**

  GSTR-3B can be filed by companies and body corporate using the Electronic Verification code (EVC) option between **21st April 2020 and 30th June 2020.** Any taxpayer who wants to file Nil GSTR-3B can do so via SMS from registered mobile number from a date yet to be notified.
  (Notification No. 38/2020-Central Tax dated 05 May 2020)

- **Amendments made to special procedure for corporate debtors undergoing the corporate insolvency resolution process under Insolvency and Bankruptcy Code, 2016 (IBC).**

  Interim Resolution Professional (IRP) must obtain separate GST registration in every state/Union Territory, where the corporate debtor was earlier registered. The time limit allowed is later of either t**hirty days from his appointment or 30 June 2020.**

  The special procedure notified via CGST notification number 11/2020 dated 21st March 2020 shall not apply to those corporate debtors who have already filed GSTR-1 and GSTR-3B returns for all tax periods prior to the appointment of IRP.

  The new registration by IRP/RP shall be required only once, and in case of any change in IRP/RP after initial appointment under IBC, it would be deemed to be change of authorized signatory and it would not be considered as a distinct person on every such change after initial appointment. Accordingly, it is clarified that such a change would need only change of authorized signatory which can be done by the authorized signatory of the Company. who can add IRP /RP as new authorized signatory or failing that it can be added by the concerned jurisdictional officer on request by IRP/RP.

  (Notification No. 39/2020-Central Tax dated 05 May 2020) read with (Circular No. 138/08/2020-GST, dated 06 May 2020)

- **Extension to the validity of e-way bills**

  Any e-way bill generated on or before 24 March 2020 remains valid until **31 May 2020**, if its validity period expires anytime between 20 March 2020 and 15 April 2020.

  (Notification No. 40/2020-Central Tax dated 05 May 2020)

- **Extension to the due date for furnishing of FORM GSTR 9/9C for FY 2018-19**

  Due date to file GSTR-9 and GSTR-9C for FY 2018-19 now extended up to **30 September 2020.**

  (Notification No. 41/2020-Central Tax dated 05 May 2020)

- **Extension to due date for furnishing of FORM GSTR-3B for taxpayers of UT of J&K and UT of Ladakh.**

Sr. No.	UT	Period	Due Date
1.	Jammu & Kashmir	November 2019 to February 2020	24 March 2020
2.	Ladakh	November 2019 to December 2020	24 March 2020
3.	Ladakh	January 2020 to March 2020	20 May 2020

(Notification No. 42/2020-Central Tax dated 05 May 2020)

- **Enforcement date of the provision of Section 128 of CGST Act,2020.**

  Central Government hereby appoints 18 May 2020, as the date on which provisions of section 128 of Finance Act, 2020, providing a retrospective amendment in section 140 of CGST Act, granting power to prescribe a time limit for transitioning credit, shall come into force.

  (Notification No. 43/2020-Central Tax dated 05 May 2020)

MCA UPDATES

AMENDMENT OF ITEM NO. (VIII) IN THE SCHEDULE VII OF THE COMPANIES ACT, 2013:

- On May 26, 2020 MCA notified and amended Schedule VII to the Companies Act, 2013 and included 'PM CARES Fund' as an eligible Corporate Social Responsibility (CSR) expenditure under item (viii) effective from March 28, 2020, the day when MCA had issued Office Memo specifying that any contribution to PM CARES Fund shall qualify as CSR Expenditure.
- In the past also Central Government had similarly notified that contribution to the funds set up by the Central Government like, Swach Bharat Kosh for the promotion of sanitation and Clean Ganga Fund for rejuvenation of river Ganga shall qualify for CSR expenditure under item (i) and (iv) of Schedule VII to the Companies Act, 2013.
- The link for the aforesaid Notification is mentioned below: http://www.mca.gov.in/Ministry/pdf/Notice_27052020.pdf

FURTHER EXTENSION FOR NAMES RESERVED AND RESUBMISSION OF FORMS:

- In view of the situation arising due to COVID-19 pandemic and extended lockdown period, MCA decided to extend the days for Names Reserved and Re-Submission of Forms on its website. Details are as below:

Sr. No.	Issue Description	No. of days/period extended for any name expiring /issue falling between 15th March, 2020 till 31st May, 2020.
1	SPICe+ Part B needs to be filed within 20 days of name reservation for new company incorporation	Extended by 20 days beyond 31st May 2020
2	INC-24 for change of name of the company needs to be filed within 60 days of name reservation	Extended by 60 days beyond 31st May 2020
3	Extension of RSUB validity for companies	additional 15 days beyond 31st May 2020 would be allowed for all pending SRNs. However, for SRNs already marked under NTBR, extension would be provided on case to case basis
4	FiLLiP/Form 5 needs to be filed within 90 days of name reservation for new LLP incorporation/change of name	Extended by 20 days beyond 31st May 2020.
5	RSUB validity extension for LLPs	An additional 15 days beyond May 31, 2020 is allowed for resubmission falling within above dates. However, for SRNs already marked under NBTR (Not to be taken on Record), extension would be provided on case to case basis
6	Extension for marking IEPF-5 SRNs to 'Pending for Rejection u/r 7(3)' and 'Pending for Rejection u/r 7(7)'	Now, the SRNs where last date of filing eVerification Report (for both Normal as well as Re-submission filing) falls between above dates, would be allowed to file the form till September 30, 2020. However, for SRNs already marked under 'Pending for Rejection u/r 7(3)' and 'Pending for Rejection u/r 7(7)', extension would be provided on case to case basis

- The link for the aforesaid Notification is mentioned below: http://www.mca.gov.in/Ministry/pdf/Extension_22042020.pdf

CLARIFICATION FOR DISPATCH OF NOTICE OF RIGHT ISSUES OPENING UPTO JULY 31, 2020:

- As per section 62 (1) (a) (i) of the Companies Act, 2013 a Company having a share capital proposes to increase its subscribed capital by issue of further shares, such shares shall be offered to persons who, at the date of the offer, are the holders of equity shares of the company in proportion, as nearly as circumstances admit, to the paid up share capital on those shares by sending a letter of offer made by notice specifying the number of shares offered and limiting a time not being less than 15 days and not exceeding 30 days from the date of the offer within which the offer, if not accepted, shall be deemed to have been declined.
- As per Section 62 (2) of the Companies Act, 2013, the notice referred in above point (i) shall be dispatched through registered post or speed post or through electronic mode or courier or any other mode having proof of delivery to all the existing shareholders at least 3 days before the opening of the issue.
- Due to COVID-19 pandemic, the Companies are facing difficulties in sending notices through postal or courier services under section 62 (2) of the Companies Act, 2013.
- In view of the above, MCA had received representations from various stakeholders regarding difficulties faced by them while sending notices through postal or courier services due to and in continuation to SEBI circular no. SEBI/HO/CFD/DIL2/CIR/P/2020/78 dated May 06, 2020 (details for the same are covered under the section of SEBI Updates for the Month of May, 2020), MCA vide its General Circular no. 21/2020 dated May 11, 2020 has clarified that, in case of listed companies, for rights issues opening upto 31st July, 2020 inability to dispatch the notice to its shareholders through registered post or speed post or courier would not be viewed as violation of section 62(2) of the Companies Act, 2013.
- The Link for aforesaid circular is mentioned below: http://www.mca.gov.in/Ministry/pdf/Circular21_11052020.pdf

CLARIFICATION ON HOLDING OF AGM THROUGH VIDEOCONFERENCING OR OTHER AUDIO VISUAL MEANS:

- Ministry of Corporate Affairs (MCA) had issued a General Circular No. 14/2020 (Circular-1) on April 08 2020 for passing of resolutions of members for Special Business (Not Ordinary Businesses) during this period of nationwide lock down to June 30 ,2020.
- Later on April 13, 2020 MCA had issued one more General Circular No. 17/ 2020 (Circular-2) clarifying on various difficulties faced by the Company in serving Notice for conducting EGM as per Circular-1 and provided with clarity on modalities/mechanism for conducting EGM or transacting items through Postal Ballot without conducting EGM. With the Circular-2, MCA has also extended the time for holding EGM till June 30, 2020 or till further Order whichever is earlier.
- Now, after receiving various representations and in view of the continuing restrictions on the movement of persons at several places in the country, MCA has on May 05, 2020 vide General Circular No.20/ 2020 provided relaxation to Companies to conduct the Annual General Meeting (AGM) of their members through Video Conferencing (VC) or Other Audio Visual Means (OAVM), during the calendar year 2020 which the Companies are required to conduct as per Section 96 of the Companies Act, 2013 (the Act) , subject to the fulfilment of various requirements as mentioned in Circular.
- The link for the above notification is as below: http://www.mca.gov.in/Ministry/pdf/Circular20_05052020.pdf

SEBI UPDATES

RELAXATIONS RELATING TO PROCEDURAL MATTERS—ISSUES AND LISTING:

- SEBI on May 06, 2020 vide its Circular No. SEBI/HO/CFD/DIL2/CIR/P/2020/78 has granted relaxations in procedural matters relating to issues and listings under the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018. In the wake of global pandemic COVID-19, SEBI has issued relaxations for all the openings happening till July 31, 2020. However, these relaxations are a one-time enforcement as detailed below. This circular has come into force with immediate effect.
    - No use of postal services for service of abridged letter of offer. However the issuer must use electronic mode.
    - The flexibility to publish the dispatch issue related advertisement in additional newspapers, on website of the Issuer, Registrar, Lead Managers, and Stock Exchanges and make use of advertisements in television channels, radio, internet etc. including by way of crawlers/ tickers, to disseminate information relating to the application process.
    - Dematerialization of rights entitlement for physical shareholders
    - Introducing some other non-cash means, other than ASBA, in case of application for right issue subject to ensuring that no third party payments shall be allowed in respect of any application.
    - For all offer documents - authentication/ certification/ Undertaking(s) in respect of offer documents, may be done using digital signature certifications and also the issuer along with lead manager(s) shall provide procedure for inspection of material documents electronically.
- The link for aforesaid circular is mentioned below: https://www.sebi.gov.in/legal/circulars/may-2020/relaxations-relating-to-proceduralmatters-issues-and-listing_46652.html

ADVISORY ON DISCLOSURE OF MATERIAL IMPACT OF COVID–19 PANDEMIC ON LISTED ENTITIES UNDER SEBI (LODR) REGULATIONS, 2015:

- SEBI vide its Circular No. SEBI/HO/CFD/CMD1/CIR/P/ 2020/84 dated May 20, 2020 has advised / encouraged listed entities to evaluate the impact of the COVID-19 pandemic on their business, performance and financials, both qualitatively and quantitatively, to the extent possible and disseminate the same to the Stock Exchanges. This circular has come into force with immediate effect.
- This Circular is issued in the wake of COVID-19 where SEBI‟s concern is that due to the gaps in information available about the operations of a listed entity, it can lead to distortions in the market. Hence, it is important for a listed entity to ensure that all available information about the impact of COVID-19 on the company and its operations is communicated in a timely and cogent manner to its investors and stakeholders.
- Various provisions under LODR, 2015 require listed entities to disclose material events which have a bearing on its performance / operations. Regulation 30(3) of LODR, 2015 specifies that a listed entity shall make disclosures of events specified in Para B of Part A of Schedule III of LODR, 2015 based on application of the guidelines for materiality. Clause 6 of Para B of Part A of Schedule III of LODR ,2015 specifies events.
- The link for aforesaid Circular is mentioned below: https://www.sebi.gov.in/legal/circulars/may-2020/advisory-on-disclosure-of-materialimpact-of-covid-19-pandemic-on-listed-entities-under-sebi-listing-obligations-anddisclosure-requirements-regulations-2015_46688.html

RELAXATIONS RELATING TO PROCEDURAL MATTERS—TAKEOVERS AND BUY-BACK:

- SEBI vide its Circular No. SEBI/CIR/CFD/DCR1/CIR/P/2020/83 dated May 14, 2020 has with immediate effect granted one time relaxations from strict enforcement of certain regulations of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (hereafter "Takeover Regulations) and SEBI (Buy-back of Securities) Regulations, 2018 (hereafter "Buy-back Regulations) pertaining to open offers and buy-back tender offers opening upto July 31, 2020, which are as under:
  - Allowing the servicing of letter of offer and /or tender form by electronic transmission for Takeover Regulations, subject to
  - publishing of all such documents on website of the company
  - adequate steps taken by acquirer/company along with lead manager to reach out to shareholders
  - advertisement of letter of offer and tender form available on website of the company
  - flexibility to publish the dispatch advertisement in additional newspapers
  - use of advertisements in television channels, radio, internet etc. to disseminate information relating to the tendering process
  - All the advertisement issued should also be made available on the website of the company, Registrar, Managers to the offer, and Stock Exchanges
  - Provide for inspection of documents electronically

- The link for aforesaid Circular is mentioned below: https://www.sebi.gov.in/legal/circulars/may-2020/relaxations-relating-to-proceduralmatters-takeovers-and-buy-back_46672.html

RELAXATION FROM COMPLIANCE OF MINIMUM PUBLIC SHAREHOLDING (MPS) REQUIREMENTS:

- SEBI on May 14, 2020 vide Circular No. SEBI/HO/CFD/CMD1/CIR/P/ 2020/81(hereinafter referred to as „this Circular") has relaxed listed entities from the compliance of its Circular dated October 10, 2017 which mandates Minimum Public Shareholding (MPS) requirements.

- SEBI has provided relaxation for listed entities for whom the deadline to comply with MPS requirements falls between the period from March 1, 2020 to August 31, 2020 and also advised the Stock exchange not to take any penal action against such entities. SEBI also directed stock exchanges that penal action, if any initiated by stock exchanges, from March 01, 2020 till date of non-compliances of MPS requirements by such listed entities may be withdrawn.

- The link for aforesaid Circular is mentioned below: https://www.sebi.gov.in/legal/circulars/may-2020/relaxation-from-the-applicability-ofsebi-circular-dated-october-10-2017-on-non-compliance-with-the-minimum-publicshareholding-mps-requirements_46669.html

ON MAY 12, 2020 SEBI ANNOUNCED CERTAIN RELAXATIONS AS BELOW:

- In view of certain relaxations granted by the Ministry of Corporate Affairs (MCA) for conducting Extraordinary General Meeting (EGM) and Annual General Meeting (AGM) through electronic mode and gave relaxation by dispensing with the printing and despatch of annual reports to shareholders and the same can be made available through electronic mode SEBI has relaxed following requirements of LODR , 2015 compliances:
  - Sending physical copies of annual report to shareholders and also for entities which have listed their NCDs and NCRPS.
  - Requirement of right to appoint proxy in general meetings held through electronic mode
  - Requirement of dividend warrants/cheques to be issued in favour of shareholders not having proper electronic mode of payment, to be applied upon normalisation of postal services.
  - In view of continuing lock-down relaxation with respect to printing of advertisement in newspapers is extended till 30th June, 2020
  - Relaxation from publishing quarterly consolidated financial results under regulation 33(3)(b) of the LODR for certain categories of listed entities.
- The link for aforesaid Circular is mentioned below: https://www.sebi.gov.in/legal/Circulars/may-2020/additional-relaxation-in-relation-tocompliance-with-certain-provisions-of-sebi-listing-obligations-and-disclosurerequirements-Regulations-2015-covid-19-pandemic_46661.html

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