IN THE INCOME TAX APPELLATE TRIBUNAL

"E" BENCH, MUMBAI

BEFORE SHRI G.S. PANNU, PRESIDENT, AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no.802/Mum./2023
(Assessment Year : 2011–12)

Mahendra Corporation
Premises no.19, 55, Shah House
3rd Floor, Shahid Bhagat Singh Road
Colaba Causeway, Opp. Colaba Police Station
Mumbai 400 039 PAN – AASFM6555C ..... Appellant

v/s

Dy. Commissioner of Income Tax
Central Circle–8(4), Mumbai ..... Respondent

ITA no.803/Mum./2023
(Assessment Year : 2011–12)

Shirin Mahendra Shah
Apt–4, 12th & 13th Floor, 7, Marine Drive
B.N. Cross Lane–1, Chowpatty Road
Mumbai 400 007 PAN – \AQYPS1819D ..... Appellant

v/s

Dy. Commissioner of Income Tax
Central Circle–8(4), Mumbai ..... Respondent

ITA no.804/Mum./2023
(Assessment Year : 2011–12)

Pratibha Mahindra Shah
Apt–4, 12th & 13th Floor, 7, Marine Drive
B.N. Cross Lane–1, Chowpatty Road
Mumbai 400 007 PAN – AQYPS1819D ..... Appellant

v/s

Dy. Commissioner of Income Tax
Central Circle–8(4), Mumbai ..... Respondent

ITA no.805/Mum./2023
(Assessment Year : 2011–12)

Emvee Shah Real Estate Pvt. Ltd.
(Formerly known as Emvee Shah Holdings Pvt. Ltd.), Apt–4, 12th & 13th Floor
7, Marine Drive, B.N. Cross Lane–1
Chowpatty Road, Mumbai 400 007
PAN – AACCE5458P

..... Appellant

v/s

Dy. Commissioner of Income Tax
Central Circle–8(4), Mumbai

..... Respondent

Assessee by : Shri P.J. Pardiwala a/w
Shri Niraj Sheth & Shri Jay Bhansali
Revenue by : Shri Biswanath Das

Date of Hearing – 08/05/2023	Date of Order – 29/05/2023

ORDER

The present batch of four appeals has been filed by different assessees challenging separate impugned orders of even date 02/03/2023, passed under section 250 of the Income Tax Act, 1961 (*"the Act"*) by the learned Commissioner of Income Tax (Appeals)–50, Mumbai, [*"learned CIT(A)"*], for the assessment year 2011–12.

2. Since the factual matrix giving rise to the impugned addition in all the appeals is the same, therefore, as a matter of convenience, these appeals were heard together and are being disposed off by way of this consolidated order. With the consent of the parties, the appeal being ITA no.802/Mum./ 2023 (in Mahendra Corporation) is taken up as a lead case, since the addition in this appeal has been made on a substantive basis, while in other appeals the addition is on a protective basis.

ITA no. 802/Mum./2023
Assessee's Appeal – A.Y. 2011–12 (Mahendra Corporation)

3. In this appeal, the assessee has raised the following grounds:–

"1. The Commissioner of Income Tax (Appeals) -50, Mumbai (hereinafter referred to as "the CIT(A)"] erred in upholding the action of the Assessing Officer [hereinafter referred to as "the AO"] in reopening the case of the assessee u/s 147/ 148 of the Income-tax Act, 1961 [hereinafter referred to as "the Act"] without appreciating that where an assessment is pursuant to search proceedings. assessment ought to be made with recourse to procedure laid in section 153A of the Act. Accordingly, the impugned reassessment proceedings and the reassessment order u/s 143(3) r.w.s 147 of the Act is bad in law and liable to be quashed:

2. The AO/CIT(A) failed to appreciate that the sum of Rs. 135 crores received-by the assessee was a capital receipt and not chargeable to tax and accordingly reopening the case of the assessee dehors "reason to believe" that income chargeable to tax has escaped assessment, renders the reassessment proceedings bad in law and liable to be quashed;

3. The CIT(A) erred in upholding the action of the AO in reopening the case of the assessee although the same was on a borrowed satisfaction based upon the report of the investigation wing without independent application of mind;

4. The CIT(A) erred in upholding the action of the AO in taxing a sum of Rs.134,58,72,917/- as long term capital gains with respect to the consideration received towards "right to sue". The reasons given by him for doing so, are wrong, contrary to the facts of the case and against the provision of law;

5. The AO/CIT(A) failed to appreciate that the consideration received by the assessee is against the assessee's "right to sue" which is a capital receipt not chargeable to tax as the same does not constitute a capital asset within the meaning of section 2(14) of the Act.

6. The above grounds/sub-grounds are without prejudice to each other.

7. The appellant craves the leave to add, amend or alter all or any of the grounds of appeal."

4. Grounds no.1-3 raised in assessee"s appeal, challenging the initiation of reassessment proceedings under section 147 of the Act, were not pressed during the hearing. Accordingly, grounds no.1-3 are dismissed as not pressed.

5. The issue arising in grounds no.4 and 5, raised in assessee"s appeal, is pertaining to the addition of a sum of Rs.134,58,72,917 as long-term capital

gains.

6. The brief facts of the case pertaining to this issue are: The assessee is a firm, which did not conduct any business during the year under consideration and had originally filed its return of income on 02/10/2011 declaring a total income of Rs. Nil. The return was processed under section 143(1) of the Act. A search and seizure action under section 132 of the Act was conducted in the case of the assessee and group on 22/03/2018. During the aforesaid search and seizure action, a consent decree adjudicated by Hon"ble Bombay High Court dated 28/01/2011 was found. Further, a modified consent decree adjudicated by Hon"ble Bombay High Court dated 15/07/2015 was also found. Both the decrees pertain to the monetary payouts made by R A Realty Ventures LLP (earlier R A Realty Ventures Private Limited) to Smt. Pratibha Shah, Smt. Shirin Shah, Emvee Shah Holdings Private Ltd, and the assessee in lieu of foregoing interest in the property named "*Villa Nirmala*" at Carmichael Road, Mumbai. In the year 1974, the assessee had entered into an agreement to purchase the said property vide agreement dated 20/12/1974. However, the seller had conveyed the said property to the tenants, instead of the assessee, by a registered deed of conveyance dated 03/05/1975. Subsequently, R A Realty Ventures Private Limited, the builder, entered into an agreement with the tenants/their heirs to transfer the property to the builder. This resulted in a legal dispute between the assessee and R A Realty Ventures Private Limited over the said property. In order to settle the dispute between the parties, the terms of settlement were set out in the original consent decree dated 28/01/2011. On the basis of information received from the Investigation Wing, Mumbai regarding the aforesaid search and seizure action, proceedings

under section 147 of the Act were initiated in the case of the assessee, and notice under section 148 of the Act was issued to the assessee on 30/03/2018. In response to the said notice, the assessee filed its return of income on 18/05/2018 declaring the interest income of Rs.59,49,370 received from R A Realty Ventures Private Limited under the head „*income from other sources*". Pursuant to the receipt of reasons recorded for reopening the assessment, the assessee filed its objections which were disposed off by the Assessing Officer ("*AO*") vide order dated 06/07/2018.

7. During the reassessment proceedings, the AO, from the perusal of para 10 of the decree dated 28/01/2011, found that the assessee relinquished its rights in the said property in favour of its partners, and as a result of relinquishment, capital gains accrued in the hands of the assessee which was not offered to tax. The AO further observed that none of the sums paid to any of the partners were offered to tax, either in the hands of the partners or in the hands of the assessee firm except the interest income of Rs.94,82,41,119 and Rs.2,77,71,683 offered to tax in the assessment years 2016-17 and 2017-18, respectively. Accordingly, the assessee was asked to explain as to why the amount of Rs.135 crore, as per the consent decree, be not treated as sale consideration/compensation towards interest in the property named "*Villa Nirmala*" and capital gains be worked out accordingly. In response thereto, the assessee submitted that the property was sold and conveyed to the two tenants and therefore the assessee had no right in the property but only the right to sue to get compensation or damages. It was further submitted that since the tenants had a full title to the property, the same was sold to the developer. It was also submitted that the sum of Rs.135 crore was agreed

among the parties to the suit in order to settle the suit filed by the assessee and the consideration received by the assessee is merely against the right to sue and not any right in the property, as the assessee did not have the same. It was also submitted that the „*right to sue*" does not constitute a capital asset as defined in section 2(14) of the Act and therefore the gain or receipt in lieu of the „*right to sue*" cannot be made liable to tax as a capital gain. Accordingly, it was submitted that the receipt of Rs.135 crore in lieu of the „*right to sue*" that is withdrawal of Suit No. 17 of 1978 by consent terms is a capital receipt not liable to income tax. The AO vide order dated 24/12/2018 passed under section 143(3) r/w section 147 of the Act did not agree with the submissions of the assessee and held that filing a suit for specific performance and/or damages against the original vendor has its basis in the original agreement dated 20/12/1974. By referring to Clause No.24 of the consent decree dated 28/01/2011, the AO held that the assessee agreed to forgo its rights/interest in the property in return for monetary payouts. Further, it was held that there is no mention of consent terms having been agreed in lieu of any right to sue and in fact, all the monetary payouts by R A Realty to the partners of the assessee were for foregoing the interest in the property "*Villa Nirmala*". Accordingly, the AO held that capital gain arose to the assessee on account of the transfer of its interest in the immovable property, which it acquired by way of a purchase agreement dated 20/12/1974. By referring to Clause No.10 of the consent decree dated 28/01/2011, the AO held that the assessee should have offered the capital gains for tax on relinquishment of its rights in favour of its partners in the previous year relevant to the assessment year under consideration, which the assessee firm has not offered. Thus, the assessee firm has neither offered capital gains on the transfer of its right in the property

nor at the time of relinquishment of its rights in favour of its partners. Accordingly, the AO computed the long-term capital gains of Rs.134,58,72,917 and added the same to the total income of the assessee.

8. The learned CIT(A) vide impugned order dismissed the appeal filed by the assessee and held that the subject consideration of Rs. 135 crore has been received by the assessee by virtue of the release and relinquishment of the rights/interest/claims of the assessee in the property, i.e. Villa Nirmala and not in lieu of the right to sue, and therefore the action of the AO in bringing the sum to tax as long-term capital gains deserve to be upheld. Being aggrieved, the assessee is in appeal before us.

9. During the hearing, the learned Sr. Counsel, appearing for the assessee, submitted that the original vendor has conveyed the property to the tenant and the tenant thereafter transferred the same to R A Realty and therefore there was no transfer by the assessee. The learned Sr. Counsel further submitted that pursuant to the consent decree passed by the Hon"ble Bombay High Court, assessee"s claim of specific performance of the Agreement to Sell was rejected and as a consequence, the assessee received the damages, which is in nature of capital receipt and thus not taxable.

10. On the contrary, the learned Departmental Representative ("*learned DR*") by vehemently relying upon the orders passed by the lower authorities submitted that there is no mention of „*right to sue*" in the consent decree and therefore, it cannot be held that the payment received by the assessee from R A Realty is in lieu of the right to sue. By referring to the terms of the consent decree, the learned DR submitted that all the settlement among the parties is

in respect of the suit property and therefore the sum received pursuant to the consent decree has rightly been taxed as long-term capital gains.

11. We have considered the submissions of both sides and perused the material available on record. In the present case, on 20/12/1974, the assessee, through its partners, entered into an Agreement to Sell, whereby the assessee agreed to purchase the property known as "*Villa Nirmala*" from Shrimant Maharaj Kumar Khanderao Shivajirao Gaekwar for a total consideration of Rs.2,75,000. Under the said agreement, forming part of the paper book from pages 28-46, it was also agreed that the assessee shall pay an advance of Rs.27,500 upon execution of the agreement. It is undisputed that the said advance payment was duly paid by the assessee to the vendor of the property. In Clause No. 14 of the aforesaid agreement, it was also agreed that in the event of the sale being not completed due to any wilful delay or default on the part of the vendor, the assessee, inter-alia, can file a suit for specific performance and/or damages against the vendor. However, on 03/05/1975, inspite of the Agreement to Sell with the assessee, the vendor decided to sell the aforesaid property to its tenants. In this regard, the vendor, i.e. Shrimant Maharaj Kumar Khanderao Shivajirao Gaekwar executed a conveyance deed dated 03/05/1975 conveying the property "*Villa Nirmala*" in favour of its tenants. From the perusal of the said conveyance deed dated 03/05/1975, forming part of the paper book from pages 50-58, it is evident that the purchasers, i.e. the tenants, were granted the right to possession of the property "*Villa Nirmala*", free from all charges. Pursuant to the aforesaid Deed of Conveyance, the property was transferred to the tenants, and the

property card was issued in their name. Thereafter, the tenants agreed to transfer the property to R A Realty Ventures Private Limited, the builder.

12. When the aforesaid conveyance deed came to the attention of the assessee, it filed a suit for specific performance of Agreement to Sell before Hon"ble Bombay High Court vide Suit No. 70 of 1978 against the vendor/his legal heirs, its tenants/the legal heirs and the builder. As per the assessee, since the legal dispute was going on for the past 33 years, the parties agreed to settle the same outside the court and entered into consent terms. Simultaneously with the execution of the aforesaid consent terms, the tenants/the legal heirs executed consent terms with R A Realty transferring and conveying the property to R A Realty as the ultimate transferee/owner of the property. Under the aforesaid consent terms, R A Realty agreed to settle all claims of the assessee in the suit for specific performance of the Agreement to Sell and/or in respect of the property for a total consideration of Rs.135 crore. The said consent terms were filed before the Hon"ble Bombay High Court and the Hon"ble Court vide order dated 28/01/2011 disposed of the suit for specific performance of the Agreement to Sell as per the consent terms agreed between the parties. Since R A Realty could not deliver the flats as per the consent terms, the said terms were revised vide consent decree dated 15/07/2015 passed by the Hon"ble Bombay High Court and R A Realty agreed to pay Rs.70.20 crore along with interest of Rs.94.30 crore.

13. Thus, the dispute, in the present case, is regarding the taxability of Rs.135 crore received by the assessee as per the consent decree passed by the Hon"ble Bombay High Court in the suit for specific performance of the

Agreement to Sell filed by the assessee. The main allegation of the Revenue is that the amount paid to the assessee is not in lieu of „*right to sue*", rather the same was paid to the assessee since it transferred/sold its rights/interest in the property, i.e. Villa Nirmala to R A Realty and therefore, capital gain arose to the assessee. In this regard, reliance has been placed, inter alia, on Clause No.5 of the consent terms dated 28/01/2011, which reads as under:-

> *"5. As Disputes and difference had arisen between the Original Plaintiff and Original Defendants, the Original Plaintiff filed the present Suit for specific performance of Agreement of Sale dated 20th December 1974 for the relief/s more particularly set out therein."*

14. Further, the reliance has also been placed, inter alia, on Clause No.24 of the consent terms dated 28/01/2011, which reads as under:-

> *"In view of the above settlement recorded in the Consent Terms, the Plaintiff hereby release and relinquish all claims in Suit No. 70 of 1978 and/or in respect of the Suit Property."*

15. Before proceeding further, it is pertinent to note that vide agreement dated 20/12/1974 entered into between the assessee and the vendor, the assessee only agreed to purchase and the vendor agreed to sell the property, i.e. Villa Nirmala, free from all encumbrances. This aspect is sufficiently evident from Clause No. 1 of the aforesaid agreement, on page 31 of the paper book. Thus, the agreement dated 20/12/1974 was not a Sale Deed, rather it was an Agreement to Sell, which was entered between the assessee and the vendor. This fact is further substantiated by Clause No.10, on page 39 of the paper book, which specifically provides that the sale shall be completed within 60 days from the date hereof. Thus, the question of transferring/selling any right or interest in the property can only arise when the same is vested in the

assessee. The fact that the sale was not completed due to the default on the part of the vendor was the reason the assessee approached the Hon"ble Bombay High Court seeking specific performance of Agreement to Sell dated 20/12/1974. Therefore, in view of the above, we are of the considered opinion that the Agreement to Sell of the immovable property itself does not create any right, title, or interest in the immovable property but only grants the right to obtain specific performance of the agreement by approaching the court of law and seeking a decree of specific performance. Further, it is undisputed that the vendor executed the conveyance deed dated 03/05/1975 in favour of its tenants and possession of the property, i.e. Villa Nirmala, was also handed over to the tenants. Thus, only the tenants of the vendor, in the present case, can be said to have any right, title, or interest in the immovable property, which was subsequently transferred to R A Realty. Therefore, we are of the considered view that the reliance placed on Clause No.5 or Clause No.24 of the consent decree by the Revenue does not lead to the conclusion that the assessee had the right, title, or interest in the property, which was transferred to R A Realty for payment of Rs.135 crore.

16. We find that in Sterling Construction & Investments v/s ACIT, [2015] 374 ITR 474 (Bom.), inter alia, the following question of law came up for consideration before the Hon"ble jurisdictional High Court:-

> *"(ii) Whether the Tribunal was justified in holding that the compensation received by the Appellant as per the Consent Terms dated 19.08.1994 was on account of relinquishment of the claim for specific performance and, therefore, the same was liable to capital gains tax?"*

17. While deciding the aforesaid question in favour of the assessee, the

Hon"ble jurisdictional High Court observed as under:-

> *"25. Thereafter, the alternate argument of the Revenue that the right to receive damages for breach of contract represented the consideration of the original right has been dealt with. The Division Bench concluded that even if the widest possible interpretation accepted, still the amount of damages cannot be taxed as capital gains. That has been held to be a compensation in money for breach of the contract. That, as appearing in this case, is something which will be the substitution for the original relief. It is in lieu of specific performance. There is no right then to claim the property but to be compensated for breach of an agreement to transfer the immovable property and in future. Once such a transfer cannot be obtained as the Decree for specific performance has been refused, then, the receipt of monetary sum cannot be taxed as claimed by the Revenue. This is apparent from a reading of paras 8 and 9 of the Division Bench Judgment. In these circumstances, the reliance placed on another Division Bench Judgment of this Court need not be considered.*
>
> *26. In the present Appeal, the Tribunal failed to note that in this case as well the specific performance of the agreement was refused. It is erroneously held that the claim of the Assessee regarding specific performance had never been rejected by this Court. A reading of the order passed by the Division Bench leaves us in no manner of doubt that such a Decree was expressly denied. The Consent Terms may constitute an agreement or contract between the parties, however, a Consent Decree is passed after the agreement is placed before the Court and the Court applies its mind and records a satisfaction that the terms are not contrary to law or public policy. That they can be accepted and based on that a Decree can be passed. Therefore, it is not an agreement between the parties, by which the Suit was disposed of but on that agreement there is a seal of approval or satisfaction of the Court and in terms of Order XXIII Rule 3 of the Civil Procedure Code, 1908. In such circumstances, even if there was any interim order in favour of the Assessee in the present case eventually the Suit ended in the Assessee's claim for specific performance being refused and he being entitled to receive the sum stipulated in this Court's order in lieu of the specific performance. In these circumstances, the Assessee was right in urging that he has no right, title or interest in the immovable property. The Tribunal completely misread and misconstrued this Court's order. In the Consent Terms, which are drawn up and based on which the Suit is decreed by the Court, it does not deal with the rival cases on merits. There is no requirement of the Court then passing an order and Judgment on merits of the claim of the parties. The Court is required to apply its mind and consider as to whether the arrangement reached by the parties can be accepted by it. Once it is accepted and an order or decree is passed in terms thereof, then, it is an order of the Court. Thus, the Court has not undertaken any mechanical exercise or has not casually and lightly accepted the terms and approved the same. It has performed a conscious act and in terms of Order XXIII Rule 3 of the Civil Procedure Code, 1908. This clearly means that the relief was refused. One cannot then pick up a stray sentence or observation from the Judgment of this Court and apply it to the given fact situation. We find that the present case was similar to that of Abbasbhoy A. Dehgamwalla (supra). In this case this Court declared that the Plaintiff/Assessee has no right, title or interest in the immovable property. That specific performance is therefore clearly refused. The other observations of the Division Bench deciding the case of Abbasbhoy A. Dehgamwalla (supra) and Vijay Flexible Containers (supra) need not be*

considered. We do not think that the Assessee had any right left or remaining in him to claim the immovable property, which is subject matter of the oral agreement. That right got extinguished once the specific performance was refused. Even if the refund of earnest money or compensation is the relief granted, it is apparent on a reading of the Specific Relief Act, 1963 that the Court has power to grant relief of possession, partition or refund of earnest money if any person sues for specific performance of a contract for the transfer of immovable property. That power is to be found in section 22 of the Specific Relief Act, 1963. By section 21, the Court has a power to award compensation in certain cases and by sub-section (1) thereof, it is clarified that in a Suit for specific performance of a contract, the Plaintiff may also claim compensation for its breach, either in addition to, or in substitution of such performance. When such relief is claimed in substitution of performance, then, by virtue of sub-section (2) of section 21, the Court can award the Plaintiff compensation even if it decides the specific performance ought not be granted. However, there are specific provisions which the Plaintiff must comply with. Eventually, the jurisdiction to decree specific performance conferred in a Court is discretionary and it is not bound to grant such relief merely because it is lawful to do so (see section 20 of the Specific Relief Act, 1963).”

18. Therefore, the Hon“ble jurisdictional High Court in the aforesaid decision held that the consent terms may constitute an agreement or contract between the parties, however, a consent decree is passed after the said terms are placed before the Court and the Court applies its mind and records a satisfaction that the terms are not contrary to law or public policy. Thus, the suit is not disposed off on the basis of the agreement between the parties but on the basis of the consent order passed by the Court after the application of its mind. Accordingly, the Hon“ble jurisdictional High Court held that once the suit for specific performance has been refused then the receipt of monetary sum cannot be taxed as claimed by the Revenue as the same is in the nature of compensation in money for breach of the contract. Since in the present case also, pursuant to the consent decree in a suit for specific performance amount was paid, therefore, the said amount cannot be said to be liable to capital gains tax.

19. Further, as regards the reliance placed on Clause No.10 of the consent

decree, we are of the considered view that the said clause is merely an arrangement amongst the parties, whereby the payment will be directly made to the partners as set out in the consent terms instead of the assessee and thus, cannot be said to be a relinquishment of any right in favour of the partners giving rise to any capital gains in the hands of the assessee.

20. Therefore, in view of the above, we are of the considered opinion that the amount of Rs.135 crore received by the assessee pursuant to the consent decrees dated 20/01/2011 and 15/07/2015 passed by the Hon"ble Bombay High Court is not in respect of the transfer of any right, title, or interest in the property i.e. Villa Nirmala, and therefore, cannot be taxed under the head „*capital gains*" in the hands of the assessee. As a result, grounds No. 4 and 5 raised in assessee"s appeal are allowed.

21. In the result, the appeal by the assessee is partly allowed.

ITAs no. 803-805/Mum./2023
Assessee's Appeal – A.Y. 2011–12 (Shirin Mahendra Shah, Pratibha Mahindra Shah and Emvee Shah Real Estate Pvt. Ltd.)

22. In case of other assessees, namely Shirin Mahendra Shah, Pratibha Mahindra Shah and Emvee Shah Real Estate Pvt. Ltd. being partners in Mahendra Corporation, the AO, by placing reliance on Clause No.10 of the consent decree dated 28/01/2011, made an addition of one-third (i.e. 33.33%) of capital gains on a protective basis. The learned CIT(A) vide impugned order in appeals of the partners directed deletion of the addition made on a protective basis, since substantive addition was upheld in the hands of the firm. However, the learned CIT(A) further directed that if in the future the said substantive addition is reduced in the case of the firm then the

protective addition shall become substantive to that extent. Since we have already concluded in the case of the firm that the amount received pursuant to consent decree is not taxable as capital gains and have also found Clause No.10 to be merely an arrangement for payment being made directly to the partners, therefore the addition in hands of the partners, either on a substantive basis or protective basis, also do not survive. Accordingly, grounds no.4-6 raised on merits in the other appeals are allowed. While grounds no.1-3 challenging the initiation of reassessment proceedings under section 147 of the Act are dismissed as not pressed.

23. In the result, the appeals being ITAs no. 803-805/Mum./2023 are partly allowed.

24. To sum up, all the appeals are partly allowed.

Order pronounced in the open Court on 29/05/2023

Sd/-
G.S. PANNU
PRESIDENT

Sd/-
SANDEEP SINGH KARHAIL
JUDICIAL MEMBER

MUMBAI, DATED: 29/05/2023

Copy of the order forwarded to:

(1) The Assessee;
(2) The Revenue;
(3) The PCIT / CIT (Judicial);
(4) The DR, ITAT, Mumbai; and
(5) Guard file.

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

Assistant Registrar
ITAT, Mumbai