UNREPORTED

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **ITA No.183/2008**

M/S. ANSAL PROPERTIES & INDUSTRIES LTD.
PRESENTLY KNOWN AS
(M/S. ANSAL PROPERTIES & INFRASTRUCTURE LTD.)

..... Appellant

Through: Mr. Satyen Sethi and Mr. Johnson Bara, Advocates.

versus

COMMISSIONER OF INCOME TAX (CENTRAL-I)

.... Respondents

Through: Ms. Prem Lata Bansal with Ms. Anshul Sharma and Mr. Paras Chaudhry, Advocates.

% Date of Reserve : September 28, 2010
Date of Decision : November 19, 2010

CORAM:
HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MS. JUSTICE REVA KHETRAPAL

1. Whether reporters of local papers may be allowed to see the judgment?

2. To be referred to the Reporter or not?

3. Whether judgment should be reported in Digest?

: **<u>REVA KHETRAPAL, J.</u>**

1. In this appeal the appellant seeks to assail the order of the Income Tax Appellate Tribunal dated 3rd August, 2007 whereby the Tribunal held that the amount of ₹ 4.25 crores received by the appellant from the Delhi Cloth & General Mills Co. Ltd. (briefly "DCM") in terms of the Agreement dated 30th October, 2000 was not a capital receipt but a revenue receipt.

2. The facts may be briefly delineated as follows: -

M/s. DCM and Kailash Nath & Associates (briefly KNA) entered into a Collaboration Agreement dated 17th July, 1986 *inter alia* with respect to the development of 66.53 acres of land owned by DCM situated at Bara Hindu Rao, New Rohtak Road, Delhi. Under this Agreement, the KNA was to develop and construct multistoried residential flats, flatted factories, shopping complex, schools etc. on the aforesaid land belonging to the DCM. Owing to the magnitude of the project, however, with the mutual consent of DCM and KNA, the appellant-company, M/s. Ansals Properties and Industries Ltd., presently known as M/s. Ansals Properties & Infrastructure Ltd. (for

short "ANSALS") was inducted for implementation of the project by an Agreement dated 24th November, 1988 entered into between the DCM, KNA and ANSALS. Subsequently, agreements in modification or supplemental thereto were also entered into between all the three parties.

3. By virtue of the aforesaid Agreement, KNA and ANSALS were to develop and construct for DCM, flats/buildings on the said land and to make provisional bookings and enter into agreements with prospective buyers for sale of the proposed built-up and saleable areas falling to their respective shares under the agreements. Both the KNA and the ANSALS were to develop and construct for the DCM, the project equal to the extent of 50% each and meet all costs and expenses in equal shares. In consideration thereof, both KNA and ANSALS were entitled to a specified percentage of the residential complex and other saleable areas. It was also specifically agreed that subject to the terms of the agreement, KNA and ANSALS shall have right to enter into contracts to book and sell their respective areas.

4. By a notice dated 24th June, 1998, DCM unilaterally terminated the agreement dated 24th November, 1988 with KNA and the appellant. This led to disputes between the parties. A number of legal proceedings challenging the termination of the Agreement dated 24th November, 1988 were filed including the proceedings under the Arbitration and Conciliation Act, 1996. On 30th October, 2000, however, a settlement agreement was entered into amongst the parties. Clauses 2 and 3 of the said agreement which are apposite to the present controversy are reproduced herein: -

> "2. That KNA and ANSALS have agreed to abandon/cessation of all their rights, claims, interests and activities whatsoever there might have been under the Principal Agreement, which stands annulled, in relation to the 66.53 acres of land owned by DCM at Bara Hindu Rao, Rohtak Road and Kishan Ganj, New Rohtak Road, Delhi, or construction already raised or to be raised thereon. DCM has agreed to acquire all such rights, claims, interests etc. of KNA and ANSALS. DCM shall hereafter take over from KNA and ANSALS the construction of flatted factory complex and residential group housing complex on the said land hitherto carried on by KNA and ANSALS under the annulled Principal Agreement, and all the assets, excluding Security Deposit, relating to the Project including any construction carried out at the

Project site respectively belonging to KNA and ANSALS. KNA and ANSALS have further agreed that they shall not undertake without prior written consent of DCM similar project in the vicinity of the project for a period of three years from the date of signing of this agreement.

3. That in consideration of the above, DCM has agreed to take over all the liabilities/obligations of both KNA and ANSALS respectively under the provisional bookings made and/or arrangements/agreements entered into by them with their respective prospective buyers, as per particulars in the Annexures 'C' and 'D' hereto, including the amounts towards basic price and which amounts on the execution hereof stand transferred to the books of accounts of DCM and DCM is now in its books showing the said amounts to the credit of the said prospective buyers. DCM undertakes with KNA and ANSALS to pay, satisfy and fulfill all the duties, liabilities, obligations, contracts and engagements of KNA and ANSALS against all proceedings, claims, demands, damages and compensation in respect thereof and the amounts towards basic price as aforesaid.

DCM has further agreed to pay compensation for annulment of the very rights of KNA and ANSALS to carry on business of completing the project under the Principal Agreement and for being deprived of the potential income which could have arisen from carrying on such business, a sum of ₹ 6.75 crores to KNA, which is inclusive of refund of

> Security Deposit of ₹ 3.90 crores, and a sum of ₹ 8.25 crores to ANSALS, which is inclusive of refund of Security Deposit of ₹ 4 crores respectively, as under…….”

5. It would be apposite at this juncture to note that apart from the aforesaid sum of ₹ 4.25 crores received as compensation by the appellant, which is the subject matter of the present appeal, the appellant earned a surplus of ₹ 2,15,50,721/- (according to the appellant a sum of ₹ 6,40,50,722/- only) from the project on its termination which has been separately assessed to tax in the assessment year 2001-02 and is not the subject matter of any dispute.

5. For the assessment year in question, that is, the assessment year 2001-02, the return declaring income of ₹ 9,40,86,340/- was filed by the appellant on 31st October, 2001. In computing the taxable income, the amount of ₹ 4.25 crores received from DCM under the Agreement dated 30th October, 2000 was, however, not claimed as a ‘capital receipt’. The said amount was credited to the profit and loss account under the head “other income”. During the course of assessment proceedings, the appellant by a letter dated 24th

September, 2003 claimed that the said sum of ₹ 4.25 crores was a 'capital receipt'.

6. The Assessing Officer in computing the assessment at ₹ 25,87,98,377/- did not consider the above claim of the appellant and in the assessment order dated 26th March, 2004, this issue was not discussed and as a matter of fact, was not referred to at all.

7. Being aggrieved by the order of the Assessing Officer, the appellant preferred an appeal before the Commissioner of Income tax (Appeals) [for short 'CIT (A)'] . The CIT(A) by his order dated 18th June, 2004, after considering the claim of the appellant held that the amount of ₹ 4.25 crores was not in the nature of a trading receipt, held as follows: -

> "8.1 From the copy of settlement agreement filed with the written submission, it is seen that the appellant had agreed that they shall not undertake, without prior written consent of DCM, similar project in the vicinity of the project for a period of three years from the date of signing of this agreement. It has not been clarified as to what will constitute a similar project and which are will be treated as "in the vicinity of the project". Moreover, it was not a absolute prohibition as with the consent of DCM any project could be undertaken. Therefore, the

> claim of the appellant that the cessation agreement was not in the nature of trading transaction, but was the one by which the appellant had parted with or extinguished one of its important sources of income either fully or partly, is not acceptable. In view of the above, this ground of the appeal is dismissed."

8. The appellant preferred a second appeal before the Income-Tax Appellate Tribunal (for short 'ITAT'). The ITAT after hearing both the parties at considerable length and running through the gamut of case law held that it was unable to carve out any amount as towards restrictive covenant. It unequivocally found that the compensation was for loss of future profit and also for the development already undertaken by the assessee, the expenses in relation to each development had been claimed and allowed as 'revenue expenditure'. Thus, the ITAT held that what had been paid was towards the liabilities taken over and for the deprivation of the potential income. Therefore, the entire amount was to be treated as 'revenue receipt' and chargeable to tax as such. Yet again aggrieved by the order of the revenue authorities, the appellant has preferred the present appeal.

9. It is the case of the appellant that the aforesaid sum of ₹ 4.25 crores constitutes capital receipt in the hands of the appellant which was not chargeable to tax. The said amount was received towards the restrictive covenant, as incorporated in clause 3 of the Agreement, whereby the appellant undertook to restrain from undertaking any similar project in the vicinity of the aforesaid project for a period of three years from the date of the signing of the agreement. In respect of this proposition, the learned counsel for the appellant has relied upon a number of precedents including the following: -

> "(i) CIT vs. Best & Co. 60 ITR 11.
> (ii) Gillanders Arbuthnot & Co. Ltd., 53 ITR 283 (SC)
> (iii) Hari Kailash & Co. vs. CIT, 22 ITR 195 (All.)
> (iv) Gomti Credits (P) Ltd. vs. DCIT, 100 TTJ (Del) 1132;
> (v) CIT vs. Wazir Sultan 36 ITR 175."

10. We shall presently advert to the aforesaid decisions but before we do so, we may reproduce instructions - F.No.225/83/99-ITA-II dated 17th March, 1999 issued by the Board which are heavily relied upon by the learned counsel for the appellant: -

> "Where the capital asset transferred is in the nature of a right to manufacture, produce or process an article or thing recourse to section 55(2) can be made only from assessment year 1998-99 in respect of consideration received for the transfer thereof which includes extinguishments or curtailment of such right. In this connection, attention is invited to clause 19 of the Memorandum explaining the provisions of the Finance Bill 1997, wherein it has been pointed out that consideration received on extinguishments of such a right is in the nature of capital receipt and is not liable to tax under the head "Capital Gains" upto assessment year 1997-98. It is clarified that even where such transfer, extinguishments or curtailment of such a right is complete or in part, the taxability of this consideration will remain un-affected i.e. the same will not be taxable under the head capital gains only upto assessment year 1997-98 and will become taxable from the assessment year 1998-99 and subsequent year."

11. The learned counsel for the appellant, Mr. Satyen Sethi, in the above context relied upon the judgment of this Court in the case of ***Commissioner of Income tax vs. Milk Food Ltd. (2006)280 ITR 331 (Delhi)***. He contended that this Court had settled this issue by holding that once the Board has issued instructions that receipts on account of restrictive covenant were not liable to tax, the Revenue was not entitled to raise a contention to the contrary.

12. Ms. Prem Lata Bansal, the learned counsel for the Department sought to counter the contentions of the learned counsel for the appellant by urging that the Settlement Agreement dated 30th October, 2000 clearly depicted an unequivocal understanding between the parties that the compensation was for annulment of the rights of the appellant to carry on the business of completing the project and for deprivation of the potential income from the project which could have arisen from carrying on such business till the completion of the project. Thus, what was sought to be compensated was the loss of income itself and not the loss of profit earning apparatus. Therefore, according to Ms. Bansal, the amount in question was liable to be considered as a revenue receipt and not as a capital receipt, as claimed by the appellant. In this regard, Ms. Bansal relied upon a number of decisions including the following: -

> "(i) Parry & Co. Ltd. vs. DCIT, 269 ITR 177 (Mad.)
> (ii) Matheson Bosanquet Co. Ltd. vs. CIT, 171 ITR 359 (Mad.)
> (iii) Bishamber Nath Swaroop Narain vs. CIT, 119 ITR 681 (All.)
> (iv) CIT vs. R.B. Jairam Valji, 35 ITR 48 (SC).

(v) Bombay Burmah Trading Corporation Ltd., 81 ITR 777 (Bom.) &
(vi) Kettle Well Bullen & Co. Ltd. vs. CIT, 53 ITR 261 (SC)."

13. The question for our consideration, therefore, is whether the amount received by the appellant pursuant to the agreement dated 30th October, 2000, between the DCM and the appellant is to be treated as a capital receipt or a revenue receipt.

14. It is trite that the question whether any particular receipt is income or not will depend on the nature of the receipt and the true scope and effect of the relevant taxing provisions. It is also trite that it is for the Revenue to prove that the receipt is chargeable to tax under the provisions of the Income-tax Act, but once it is shown that the receipt is income under the Act, it is for the assessee to prove that the same is either exempt or that the assessee is eligible for deduction of the same. It is also well-known that the definition of 'income' in Section 2(24) of the Income Tax Act is an inclusive definition. It is a term of elastic import not confined by the use of the words "profits and gains". So in each case, the decision of the question as to

whether any receipt is income or not must depend entirely upon the nature of the receipt and the scope of the relevant taxing provision.

15. The question of burden to prove is, therefore, of some importance. In ***Commissioner of Income Tax vs. Chari and Chari Ltd. (1965) 57 ITR 400, 407 (SC)***, the Supreme Court observed: -

> "…………..it must *in the first instance* be observed that it is for the Revenue to establish that a particular receipt is income liable to tax……….."

16. The same three-Judge Bench in the case of ***Commissioner of Income Tax, Madras vs. Best & Co. Private Ltd., (1966) LX ITR 11, 18*** clarified that in its earlier judgment in ***Chari and Chari Ltd.*** (supra), it did not lay down that the burden to establish that an income was taxable was on the Revenue was immutable in the sense that it never shifted to the assessee. The expression "in the first instance" clearly indicated that the onus was a shifting one. It said : -

> "While the Income tax authorities have to gather the relevant material to establish that the compensation given for the loss of agency was a taxable income, adverse inference could be drawn against the assessee if he had suppressed

> documents and evidence, which were exclusively within his knowledge and keeping."

17. On facts, the Court, however, held that the compensation agreed to be paid to the respondent by its Principal, M/s. Imperial Chemical Industries (Exports) Ltd., Glasgow, was not only in lieu of giving up of the agency but also for the assessee accepting the restrictive covenant for a specific period. The Court, therefore, held that a part of the compensation attributable to the restrictive covenant was a capital receipt and hence not assessable to tax. The question whether the compensation paid was severable, was answered as follows: -

> "21. The next question is whether the compensation paid is severable. If the compensation paid was in respect of two distinct matters, one taking the character of a capital receipt and the other of revenue receipt, we do not see any principle which prevents the apportionment of the income between the two matters. The difficulty in apportionment cannot be a ground for rejecting the claim either of the Revenue or of the assessee. Such an apportionment was sanctioned by courts in *Wales v. Tilley* [1942] 25 Tax Cas. 136, *Carter v. Wadman* [1946] 28 Tax Cas. 41 and *T.*

> *Sadasivam v. Commissioner of Income-tax, Madras* [1955] 28 ITR 435(Mad) . In the present case apportionment of the compensation has to be made on a reasonable basis between the loss of the agency in the usual course of business and the restrictive covenant. The manner of such apportionment has perforce to be left to the assessing authorities."

18. In ***Gillanders Arbuthnot and Co. Ltd. vs. The Commissioner of Income-tax, Calcutta, (1964) 53 ITR 283 (SC)*** the facts of the case were somewhat akin to the facts in the case of ***Best & Co. Pvt. Ltd.*** (supra). The agency was terminated and by way of compensation, the Imperial Chemical Industries (Exports) Ltd. paid for the first three years after the termination of the tenancy 2/5ths of the commission accrued on its sales in the territory of the appellant's agencies computed at the rates at which the appellant had formerly been paid and in addition in the third year full commission for the sale affected in that year at the same rates. The Imperial Chemical Industries (Exports) Ltd. had intended to take a formal undertaking from the appellant to refrain from selling or accepting any agency for explosives or other competitive commodities, but no such agreement

in writing was taken or insisted upon. The question arose whether the amounts received by the appellant for those three years were of the nature of 'capital' or 'revenue receipt'. A three-Judge Bench of the Supreme Court held that the amounts paid were of the nature of income and, therefore, assessable to tax on the following reasoning: -

> "The appellant was conducting business as selling or distributing agent of numerous principals……….It may reasonably be held, having regard to the vast array of business done by the appellant as agents, that the acquisition of agencies was in the normal course of business and determination of individual agencies, a normal incident, not affecting or impairing the trading structure of the appellant. The appellant was compensated by payment to it, the loss of profit it suffered by the cancellation of its agency, leaving it free to conduct its remaining business."
>
> It further held :-
>
> 19. There is, in our judgment, no immutable principle that compensation received on cancellation of an agency must always be regarded as capital. In each case the question has to be determined in the light of the attendant circumstances. In the judgment in Kettlewall Bullen and Co.'s case [1964] 53 ITR 261 (SC) we have explained that the judgment of the Judicial Committee in the Commissioner of Income-tax v. Shaw Wallace and Co. L.R. 59 IndAp 206 was not intended to, and did not lay

> down that in every case, cancellation of an agency resulted in loss of a source of revenue or that amounts paid to compensate for loss of agency must be regarded as capital loss.
>
> 20. On a careful consideration of all the circumstances we agree with the High Court that cancellation of the contract of agency did not effect the profit-making structure of the appellant, nor did it involve a loss of an enduring trading asset; it merely deprived the appellant of a trading avenue, leaving him free to devote his energies after the cancellation to carry on the rest of the business, and to replace the contract lost by a similar contrac.t The compensation paid, therefore, did not represent the price paid for loss of a capital assert. We therefore dismiss the appeals with costs."

19. In the case of ***Commissioner of Income-tax vs. Chari and Chari Ltd.*** (supra), the same principles were reiterated and re-emphasized, but on the facts of the case, the Supreme Court came to the conclusion that the compensation paid for the loss of agency was a capital asset in view of the fact that there was no evidence to show that by reason of extinction of the managing agency any enduring asset was lost to the respondent (Chari and Chari Ltd.), or its trading organization was adversely affected. It was held that the receipt is 'revenue' and not 'capital' in nature for the reason that even after the

surrender of one of the agencies, the company carried on its business as before within the framework of the business, it being a necessary incident of business that the existing agencies may be terminated and fresh agencies may be taken.

20. In ***Kettlewell Bullen and Co. vs. Commissioner of Income-tax, Calcutta (1964) 53 ITR 261,*** the Supreme Court after analysis of a large number of cases falling on the two sides of the dividing line came to the conclusion that a satisfactory measure of consistency in principle is disclosed therefrom and laid down the following test:-

> "Where on a consideration of the circumstances, payment is made to compensate a person for cancellation of a contract which does not affect the trading structure of his business, nor deprive him of what in substance is his source of income, termination of the contract being a normal incident of the business, and such cancellation leaves him free to carry on his trade (freed from the contract terminated) the receipt is revenue : Where by the cancellation of an agency the trading structure of the assessee is impaired, or such cancellation results in loss of what may be regarded as the source of the assessee's income, the payment made to compensate for cancellation of the agency agreement is normally a capital receipt.

> 41. In the present case, on a review of all the circumstances, we have no doubt that what the assessee was paid was to compensate him for loss of a capital asset. It matters little whether the assessee did continue after the determination of its agency with the Fort William Jute Co. Ltd. to conduct the remaining agencies. The transaction was not in the nature of a trading transaction, but was one in which the assessee parted with an asset of an enduring value. We are, therefore, unable to agree with the High Court that the amount received by the appellant was in the nature of a revenue receipt."

21. In ***Commissioner of Income-tax vs. Rai Bahadur Jairam Valji [(1959) Supp. 1 S.C.R. 110, 113]***, it was laid down as follows: -

> "The question whether a receipt is capital or income has frequently come up for determination before the courts. Various rules have been enunciated as furnishing a key to the solution of the question, but as often observed by the highest authorities, it is not possible to lay down any single test as infallible or any single criterion as decisive in the determination of the question, which must ultimately depend on the facts of the particular case, and the authorities bearing on the question are valuable only as indicating the matters that have to be taken

> into account in reaching a decision. Vide, Van Den Berghs Ltd. v. Clark (1935) 3 I.T.R. 17. That, however is not to say that the question is one of fact, for as observed in Davies (H.M. Inspector of Taxes v. Shell Company of China Ltd., (1952) 22 I.T.R. (Suppl.) 1 'these questions between capital and income, trading profit or no trading profit, are question which, though they may depend no doubt to a very great extent on the particular facts of each case, do involve a conclusion of law to be drawn from those facts'."

22. The question that arose in the aforesaid case related to a sum of ₹ 2,50,000/- received by the assessee as damages/compensation for the premature termination of a contract. The High Court on a reference under Section 66(1) of the Income Tax Act had held that the sum was a capital receipt in the hands of the assessee and as such not liable to be taxed. The Court, on the facts and circumstances of the case, came to the conclusion that the contract in question was entered into by the assessee in the ordinary course of business and was one entered into in the carrying on of that business and the receipt was therefore held to be an amount paid as solatium for the cancellation of a contract entered into by a person in the ordinary course of business.

Emphasizing the distinction between an agency agreement and a contract made in the usual course of business, the Court pointed out that once it was found that the contract was entered into in the ordinary course of business, any compensation received for its termination would be a revenue receipt, irrespective of whether its performance was to consist of a single act or a series of acts, spread over a period. In this context, the court also made the following observations: -

> "30. Therefore, when a question arises whether a payment of compensation for termination of an agency is a capital or a revenue receipt, it would have to be considered whether the agency was in the nature of capital asset in the hands of the assesses, or whether it was only part of his stock-in-trade. Thus, in Barr Crombie & Sons Ltd. v. Commissioners of Inland Revenue the agency was found to be practically the sole business of the assesses, and the receipt of compensation on account of it was accordingly held to be a capital receipt, while in Kelsall's case the agency which was terminated was one of several agencies held by the assesses and the compensation amount received therefore was held to be a revenue receipt, and that was also the case in Commissioner of Income-tax v. South India Pictures Ltd.

31. We may in this context also note the further observations made by this court :-

"But apart from these and similar instances it might, in general, be stated that payments made in settlement of rights under a trading contract are trading receipts and are assessable to revenue. But where a person who is carrying on business is prevented from doing so by an external authority in the exercise of a paramount power and is awarded compensation therefore, whether that receipt is a capital receipt or a revenue receipt will depend upon whether it is compensation for injury inflicted on a capital asset or on a stock-in-trade. The decision in Glenboig Union Fireclay Co., Ltd. v. Commissioners of Inland Revenue applies to this category of cases. There, the assesses was carrying on business in the manufacture of fireclay goods and had, for the performance of that business, acquired a fireclay field on lease. The Caledonian Railway which passed over the field prohibited the assesses from excavating the field within a certain distance of the rails, and paid compensation therefore in accordance with the provisions of a statute. It was held by the House of Lords that this was a capital receipt and was not taxable on the ground that the compensation was really the price paid 'for sterilising the asset from which otherwise profit might have been obtained.' That is to say, the fireclay field was a capital asset which was to be utilised for the carrying on of the business of manufacturing fireclay goods and when the assesses was prohibited from exploiting the field, it was an injury inflicted on his capital

> asset. Where, however, the compensation is referable to injury inflicted on the stock-in-trade, it would be a revenue receipt (Vide Commissioner of Inland Revenue v. Newcastle Breweries Ltd.").”

23. This Court, in the case of ***Commissioner of Income-tax vs. Manoranjon Pictures Corporation, 288 ITR 202 (Del.)*** made the following pertinent observations: -

> “It is not possible to lay down any single or exhaustive test, as infallible or any single criterion as decisive, for determination of the question whether a receipt is capital or revenue in nature. Broadly stated, to determine the character of a receipt what has to be seen is whether the venture in which an assessee is giving up its rights was by itself the profit earning apparatus and such an action would disrupt the entire profit earning structure of the assessee. If that be so, anything received would partake of the character of a capital receipt. But, where, however, the venture is only for the purpose of carrying on the existing business by taking the help of another, compensation received for relinquishing a right in such a venture would be a revenue receipt.”

24. On the above conspectus of law, the Tribunal, as noted above, opined that the compensation was for the loss of future profits and for the development already undertaken by the assessee, the expenses in

relation to such development having already been claimed and allowed as revenue expenditure. Thus, the Tribunal held that what was paid was for the deprivation of the potential income.

25. We concur with the findings of the Tribunal for the reason that we find that the Tribunal rightly noted that there was not even a mention in the Agreement that the amount paid was towards the restrictive covenant and on the other hand a reading of the Settlement Agreement entered into between the parties clearly shows that the DCM had agreed to pay compensation for the "annulment of the very rights of KNA and ANSALS to carry on business of completing the project under the Principal Agreement and for being deprived of the potential income which could have arisen from carrying on such business, a sum of ₹ 6.75 crores to KNA, which is inclusive of refund of Security Deposit of ₹ 3.90 crores and a sum of ₹ 8.25 crores to ANSALS, which is inclusive of refund of security deposit of 4 crores respectively………"

26. Undoubtedly, in the preceding clause, i.e. Clause 2, it is mentioned that KNA and ANSALS had agreed that they shall not

undertake, without prior written consent of the DCM, similar projects in the vicinity of the said project for a period of 3 years from the date of the signing of the Agreement, but the sum of ₹ 8.25 crores, as is clear from a cumulative reading of clauses 2 and 3 of the Agreement, was paid as compensation for the termination of the Agreement to carry on the business of completing the project under the "Principal Agreement" and "for being deprived of the potential income which could have arisen from carrying on such business." The intention of the parties, it is settled law, is conveyed by the terms of the Agreement. In the absence of any ambiguity in the Agreement, in our opinion, the Tribunal was fully justified in construing the intention of the parties, as aforesaid.

27. We are buttressed in coming to the aforesaid conclusion by the fact that it is a matter of record that even in respect of the abandoned project, the appellant had earned a profit of ₹ 6,40,50,722/-. This apart, under Clause 2 of the Settlement Agreement, the DCM had agreed to take over all the liabilities/obligations of KNA and ANSALS under the provisional bookings made by them or the

agreements entered into by them with their respective prospective buyers (as per the particulars in the annexures C and D of the Agreement) including the amount towards the basic price which henceforth were to stand transferred to the books of accounts of the DCM as shown to the credit of the said prospective buyers. DCM gave an unequivocal undertaking to the appellant and the KNA (to pay, satisfy and fulfill all the duties, liabilities, obligations, contracts and engagements of KNA) and ANSALS (in relation to their respective prospective buyers and under the said provisional bookings/agreements/arrangements made with them) and to indemnify KNA and ANSALS against the proceedings, claims, demands, damages and compensation in respect thereof and the amounts towards the basic price as aforesaid."

28. Thus, what was agreed to be paid by the DCM was for the deprivation of potential income and loss of future profit.

29. As regards the restrictive covenant, it cannot be lost sight of that what was prohibited was not to undertake similar project anywhere in or around Delhi, but not to undertake a similar project in

the vicinity and that too for the limited duration of 3 years. This was subject to another rider. The restrictive clause was not to undertake a similar project in the vicinity of the existing project for a period of three years, without the written consent of the DCM. To be noted that with the approval of the DCM, it was open to the appellant to undertake a similar project, assuming the site for such a project to be available.

29. Further, in our view, the scope and ambit of the restrictive covenant must be examined in the backdrop of the entire fact situation. Thus examined, we find that the clause has limited significance, being to save the interest of the DCM which was to develop the property as an absolute owner. By no stretch of imagination, such a clause was intended to divest the appellant of its income earning apparatus. Had the clause resulted in depriving the appellant of its income earning apparatus, and prohibited it from taking up a similar project anywhere in Delhi, there might have been some strength in the contention of the appellant that it had lost a capital asset and the amount which accrued to it for the loss of the

capital asset must be viewed as a capital receipt not assessable to tax. This was not so; the Agreement between the parties was in the normal course of business. In other words, the normal incidence of business. Prohibition to carry on a similar project in the vicinity was on account of the nature of the business and was more by way of affording a safety valve to DCM.

30. The learned counsel for the appellant has sought to draw strength from the decision rendered by the Supreme Court in the case of ***Best & Co. Pvt. Ltd.*** (supra) where the duration of the restrictive covenant was five years. Yet, it was viewed by the Supreme Court as an independent obligation which came into operation on the termination of the agency and hence not taxable as a revenue receipt. We may note that there is a marked difference in the facts of the said case when placed in juxtaposition to the facts of the instant case. That conclusion was drawn by the Supreme Court on the basis that the restrictive covenant in the said case was a condition for the payment of compensation as evidenced from the documentary

evidence on record, where the following condition had been specifically inserted:-

> "As a condition of our paying compensation on the basis outlined above, we would request you to be good enough to give us a formal undertaking to refrain from selling or accepting any agency for explosives or other commodities competitive with those covered by the agency agreement now being terminated."

31. In the aforesaid backdrop, the Supreme Court held that the compensation agreed to be paid was not only in lieu of the giving up of the agency but was also for the assessee accepting the restrictive covenant for the specific period of five years. In the present case, a reading of the agreement makes it abundantly clear that the compensation paid to the appellant in the instant case by the DCM was not on account of the restrictive covenant which was treated as an incidental matter, but on account of the dispute between the parties relating to the termination of the agreement dated 24th November, 1988.

32. In any case, the restriction placed was far from absolute in that it was to remain operative for a limited duration of time and pertained

to a limited geographical area within the contours of Delhi. This apart, it was left open to the appellant to approach DCM for its written approval to the appellant carrying on a similar project in the vicinity (assuming such a project was available in the vicinity). Since all disputes were being set at rest, this undertaking appears to have been incorporated in an incidental manner so as to avoid any conflict of interest amongst the erstwhile partners in the project. Viewed from any angle, we see it as a safety valve for the DCM rather than an absolute restriction on the appellant from carrying on its business. Even otherwise, it could hardly be said that given the nature of the restrictive covenant in the Agreement, the appellant was hampered from operating its profit making apparatus in other spheres and even in the very same sphere. Apparently for this reason it did not even strike the appellant at the time of filing of its return, to claim that the sum of ₹ 4.25 crores was a capital receipt. Subsequently, it appears that on account of legal advice received by the appellant during the course of the assessment proceedings and about two years after the filing of its return, the appellant, by a letter dated 24th

September, 2003 staked the claim that the sum in question was a capital receipt. Even thereafter, the claim does not appear to have been seriously pressed as is quite obvious from the fact that it was not even dealt with by the Assessing Officer and the CIT (A) also while dealing with this aspect of the matter dealt with it incidentally. It was only when the matter reached the Tribunal that this claim of the appellant appears to have been seriously pressed.

33. Be that as it may, we are of the considered view that the amount of ₹4.25 crores was in the nature of trading receipt and the revenue authorities have rightly held it to be so.

34. In view of the aforesaid, no substantial question of law arises to be determined in the present appeal. The appeal is accordingly dismissed.

REVA KHETRAPAL
(JUDGE)

A.K. SIKRI
(JUDGE)

November 19, 2010
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