INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "C": NEW DELHI
BEFORE SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 505/Del/2016
(Assessment Year: 2011-12)

INS Finance & Investment P Ltd, A-2/452, Sector-8, Rohini, New Delhi PAN: AABCI4418E	Vs.	ITO, Ward-11(4), New Delhi
(Appellant)		(Respondent)

ITA No. 3099/Del/2016
(Assessment Year: 2011-12)

ITO, Ward-11(4), New Delhi	Vs	INS Finance & Investment P Ltd, A-2/452, Sector-8, Rohini, New Delhi PAN: AABCI4418E
(Appellant)		(Respondent)

Assessee by :	Shri R. S. Singhvi, CA
Revenue by:	Shri S.R. Senapati, Sr. DR
Date of Hearing	26/03/2018
Date of pronouncement	13/04/2018

O R D E R

PER PRASHANT MAHARISHI, A. M.

ITA No. 505/D/2016

1. This is an appeal filed by the assessee against the order of the ld CIT (A)-4, New Delhi dated 17.11.2015 for the Assessment Year 2011-12.

2. The assessee has raised the following grounds of appeal:-

"*1. That on the facts and circumstances of the case, the ld CIT (A) has not properly appreciated and adjudicates our ground that amount of*

Rs. 31907676/- is in the nature of capital receipt being payment of damages for breach of contract.

2. *That on the fact and circumstances of the case, the ld CIT(A) was not justified in the issuing direction to assessing officer for taxing the interest receipt in preceding years on proportionate basis.*

3. *That on the facts and circumstances of the case, the ld CIT(A) was not justified in the issuing direction to assessing officer for taxing the interest receipt in preceding years on proportionate basis."*

3. The brief facts of the case are that Assessee Company is engaged in the business of finance and investment. It filed its return of income on 30.09.2011 for Rs. 422107/-. The assessment u/s 143 (3) of the Act was passed on 30.03.2014 at Rs. 32329780/-. In the assessment proceeding a solo addition of Rs. 31907676/- was made because of sum received by the assessee on cancelation of auction holding it to be revenue receipt. On appeal before CIT (A), this addition was confirmed. Therefore assessee in appeal before us in ITA No 505/ del/2016.

4. Subsequently assessee preferred an application before CIT (A) u/s 154 of the act and in response o th t application ld CIT (A) rectified his order vide order dated 23/3/2016 holding that amount received by the assessee is subjudice and not final and further is a capital receipt. Therefore, revenue is in appeal before that order of CIT (A) in ITA no 3099 / Del/2016

5. In ITA No 505/ Del/2016 by assessee, Ground No 1 is against the charging of Rs. 31907676/- to tax by the ld AO where the claim of the assessee is that it is a capital receipt. It was found by the AO that in the balance sheet of the assessee Rs. 31907676/- was added in capital reserve and assessee has claimed TDS credit of Rs. 5441122/-. On query, the assessee submitted that it has received compensation from Debt Recovery Tribunal (DRT) on sum paid in auction for purchase of property, which after issue of sale certificate was cancelled. Hence, above sum is capita receipt. Therefore, above compensation received from DRT is transferred to capital reserve in the books of accounts. It was further stated that above compensation is on cancellation of auction for purchase

of land. The main contention of the assessee was that above sum is a capital receipt and not chargeable to tax. The assessee submitted that it originally acquired right for purchase of property because of auction carried out by Punjab National Bank. The assessee paid the entire purchase price as per auction. That auction was disputed and matter reached Hon'ble High Court and the property was restored back to the bank. Therefore, assessee was refunded the purchase price as well as damages. Hence, assessee contested that such damages for breach of contract are not revenue receipt but capital in nature and hence, not exigible to tax.

6. The Ld. AO considered the explanation of the assessee. However, he rejected that such amount is not chargeable to tax. According to him, such damages are interest. Therefore, he made an addition of Rs. 31907676/- to the total income of the assessee.

7. The assessee carried matter before the Ld. CIT (A) who dismissed it holding that receipt is clearly in the nature of the interest and is liable for taxation. However he applied the decision of the Hon'ble Supreme Court in the case of Rama Bai Vs. CIT 181 ITR 400 and held that only interest relevant to the year amounting to Rs. 1705573/- is chargeable to tax in this year and the balance sum would be taxed in the different years Therefore, assessee aggrieved with the order of the Ld. CIT (A) has preferred appeal before us.

8. The Ld. AR submitted that the order of the Ld. CIT (A) was subject to rectification and order u/s 154 is passed on 23.03.2016 wherein the Ld. CIT (A) relying on the several judicial precedents have held that matter is still subjudice and appellant could not be considered to have acquired absolute legal right over such claim of amount. It was further stated that such sum is provisional and contingent in nature. He further stated that further the refund was in respect of the capital asset and is in nature of damages and is capital receipt. He therefore, held that Rs. 31907676/- is not interest but a capital receipt. He denied that such sum is an interest

at all referring to section 2 (28A) of the act. He submitted that when the Ld. CIT (A) has already rectified his order based on correct facts after considering the detailed argument following the judicial precedents that the above sum is not chargeable to tax. He further relied on several decisions to state that amount received by the assessee as compensation for breach of contract is a capital receipt. He further submitted that merely because the damages were described as interest it does not partake the character of interest but remains the damages. He submitted that before considering any sum as interest it needs to be tested whether such sum is in relation to any debt incurred by the assessee. He further referred to the order of the Hon'ble Punjab & Haryana High Court dated 25.8.2010, 21.09.2010 to state that amount received by the assessee is not interest but capital receipt.

9. The Ld. DR vehemently contested the argument of the Ld. AR and submitted that in the appeal the CIT (A) has correctly held that above sum is chargeable to tax as interest. He further stated that there is an amendment u/s 56 (1) (viii) wherein any income by way of interest received on compen ation is chargeable to tax as income from other sources. He further stated that such income is revenue receipt.

10. We have carefu ly considered the rival contentions and perused the orders of lower authorities. Admittedly, assessee is not in business of real estate. Brief facts shows that Assessee Company participated in the auction carried out by Punjab National Bank, Chandigarh on 5.12.2006 through Debt Recovery Tribunal in respect of property mortgaged by M/s. Sanmati Rice Mills as a security for borrowed fund. The assessee was declared the highest bidder at Rs. 10.07 crores. The assessee deposited the above sum with DRT in stipulated time as per terms and conditions of the bidder auction. The Debt Recovery Tribunal also issued the certificate of sale to the assessee on 02.03.2007. Subsequently the order of the Debt Recovery Tribunal was challenged before Debt Recovery Appellant Tribunal (DRAT) and orders dated 25.06.2009 was passed wherein it was

ordered that the possession taken by the assessee of the auctioned property be returned back to the original borrower. The assessee challenged the above order before the Hon'ble Punjab and Haryana High Court in CWP number 1470 of 2010. The Hon'ble High Court directed Punjab National Bank to return the whole sum deposited along with interest accrued thereon. Consequently, the DRT recovered the money from Punjab National Bank and refunded the same to the appellant. So assessee was repaid originally auction amount as well as a further sum of Rs 31907676/- . The Punjab National Bank by making the repayment deducted the tax at source in respective years and issued certificates in favour of DRT. Furthermore, the assessee filed a civil suit in the court of Civil Judge Sr. Division, Chandigarh for recovery of damages. It is stated that the above sum was accepted from Punjab National Bank subject to legal right of the petitioner to challenge the compromise arrived between the borrower and the bank. Therefore, it was stated that the dispute had not reached any finality and therefore, no interest or damages have accrued to the assessee finally. The assessee further relied on the decision of Ghaziabad Development Authority Vs. Dr. N. K. Gupta 258 ITR 337 wherein it has been held that merely because the damages are stated to be interest they cannot be subject to tax as interest. We have also carefully perused the order of the Debt Recovery Tribunal, Chandigarh dated 03.12.2008 wherein in para No. 22 has set aside the sale, and the bank was directed to refund the sale consideration originally accepted from the appellant along with any interest accrued on it, which has been kept in the office of the Debt Recovery Tribunal. Therefore, the Debt Recovery Tribunal has not awarded any interest to the appellant but it has just refunded the money deposited by the assessee in auction along with any interest earned by the bank on that sum in favour of DRT. The revenue could not show that at the time of auction there was any condition of payment of interest to the assessee in case the auction is cancelled. In fact as per certificate of sale dated 02.03.2007 even the

possession of the property was also given confirming the sale absolutely in favour of the assessee. Even otherwise as per the provisions of section 2(28A) of the Act interest means interest payable in any manner in respect of money borrowed or debt incurred including a deposit, claim or other similar rights. In the present case, the above sum was not payable to the assessee because of any such debt incurred. The assessee purchased a property in auction which was transferred to assessee, subsequently the sale was cancelled, so assessee was paid original sum and some further amount which was earned by bank as interest thereon from the date assessee paid to the bank till the date of order. Therefore, above sum cannot be considered as interest. Now, it is required to be examined that whether such sum received by the assessee is a capital receipt or revenue in nature. As held by the Hon'ble Supreme Court in CIT Vs. Saurashtra Cement Ltd. 325 ITR 422 that the question whether a particular receipt is capital or revenue it is not possible to formulate any single criteria as decisive in the determination of the question. In the present case, the sum is received by the assessee on cancellation of sale contract as per the auction of Sanmati Rice Mills. Further, the sum received by the assessee had direct nexus to the cancellation of acquisition of the immovable property obtained by him in auction Further, it is clear that excess of amount then what assessee deposited, received by the assessee for a breach of a contract and hence same is a capital receipt. The coordinate bench in DCIT Vs. Winsome Yarns Limited [TS-546-IT-2014 (Chandigarh)] [2014] 50 taxmann.com 318 (Chandigarh - Trib.) decides the identical issue. In that particular case the transaction of sale of industrial plot was set aside by Hon'ble Supreme Court and the assessee was deprived of making future profits on the industrial plot and therefore, the compensation received by the assessee against such surrender was held to be capital receipt not chargeable to tax.

"9. Ground No. 3 - During assessment proceedings the Assessing Officer noticed that the assessee has credited a sum of Rs. 269.83 lakhs in the profit and loss account. The receipt was stated to be on sale of fixed assets. The receipt was stated to be Rs. 6.36 crores and the compensation was received on cancellation of lease deed which has been reduced from profit in the computation chart. On further enquiry it was noticed that there was a company known as M/s Punjab Wireless Systems Ltd (in short Punwire) which was ordered to be wound up on 1.2.2001. Later on on 4.1.2002 Company Judge permitted the official liquidator to sell the assets of Punwire. Sale committee was constituted (consisting of the official liquidator and two of the major creditors, namely Canara Bank and IFCI) to chalk out the modalities of sale. Sale committee divided the assets of Punwire to be sold into 25 separate lots for convenient sale. Official liquidator issued a sale notification dated 15.6.2004 inviting sealed tenders. Sale notice was widely published on 25.6.2004 in leading newspapers. Reserve prices of item No. 17, 19 & 20 as per said notice were as unde :

> *Item 17: Industrial plot bearing No. B- 77, Phase VII, Industrial Area, Mohali (near Chandigarh), Punjab. Measuring 14,550 sqyds with the structure thereon (reserve price Rs . 3 crores) .*
>
> *Item 19: Furnitue in item No. 17 (reserve prices Rs. 4 lakhs)*
>
> *Item 20: Air conditioners and generator sets in item No. 17 (reserve priced Rs. 15 Lakhs).*

The assessee company gave its bid to these three items i.e. item No. 17, 19 & 20 at Rs. 3.14 crores, Rs. 4.5 lakhs and Rs. 15.5.lakhs respectively. On 10.12.2004 there was an inter se bidding between the assessee company and two other perspective tenderers namely M/s Star Point Financial Services Ltd. and M/s S.K. Khaitan Pvt Ltd. The assessee company

increased the offer in respect of item No. 17 to Rs. 3.16 crores. Ultimately the Company Judge vide his order dated 10.12.2004 accepted the offer of Winsome. Winsome had deposited balance sale price on 13.12.2004 and took the possession of various items on 16.12.2004. Since plot No. B-77 comprised in item No. 17 was a lease hold property taken on lease from Punjab Small Industries and Export Corporation Ltd (In short PSIEC), the official liquidator gave no objection certificate for transfer of the lease from the name of Punwire to the name of Winsome on 29.12.2004. In pursuance of it Winsome applied to PSIEC for transfer of the lease in its favour and on payment of a transfer fee of RS. 1178550/- the lease in respect of p ot no. B-77 was transferred to Winsome and the lease deed was executed on 25.10.2005 for a period of 99 years from the date of allotment to the original allottee.

10. In the meantime Sun Group filed C.A. No. 72/2005 in Jan 2005 before the Company Judge offering to take over the entire assets of Punwire (item No. 1 to 25) as a going concern for a price of Rs. 12 crores. Company Judge vide order dated 30.3.2005 allowed the application of Sun Group in part and set aside the confirmation of sale dated 10.12.2004 and directed Winsome to deliver back possession of items 17, 19 & 20 to the official liquidato . Company judge further held that Winsome would be entitled to refund of the sale price along with interest paid by it to its bankers on the loans taken by it. The said order was challenged by Winsome in Company Appeal No. 11 of 2005 before the Division Bench of Hon'ble High Court of Punjab & Haryana. The Hon'ble High Court vide order dated 6.10.2005 allowed the said appeal and set aside the order of the company judge dated 30.3.2005 and restored his order dated 10.12.2004 confirming the sale in favour of Winsome.

11. The order of the Division Bench of Hon'ble High Court was challenged by the Employees Union and Sun Group before the Hon'ble Supreme Court . It was contended by Sun Group before the Hon'ble Supreme Court that sale price at which the item No. 17, 19 & 20 were sold to Winsome was very low and it was further alleged that during the inter se bidding on 10.12.2004 namely Star Point Financial Services Ltd. was a sister concern of Winsome and therefore sale was not legal. The Employees Union of Punwire further contended that notice should have been issued

by the Company Court to the Union before confirming the sale in favour of Winsome as the employees were vitally interested in the outcome of the sale. In response Winsome group contended before the Hon'ble Supreme Court that they have purchased item No. 17, 19 & 20 at the prevailing market rate and sale notification was rightly published in all the leading Newspapers. During detailed arguments before the Hon'ble Supreme Court the Sun Group further submitted that they have purchased the adjoining property and therefore they were interested to purchase plot No. B-77, Ph VII, IA, Mohali and Sun Group was willing to offer the same price of Rs. 11.6 crores for the property (item No. 17). The Employees Union further submitted that in the interest of workers Winsome should take reasonab e profit and give up the property in favour of Sun Group so that the workers and creditors will be benefited. At this juncture the Hon'ble Supreme Court asked Winsome whether Winsome was interested to consider the offer of Sun Group. After sometime and due deliberations ultimately Winsome agreed to the proposal provided it received a sum of Rs. 6.36 crores for item No. 17, 19 & 20 for expenses towards interest etc and compensation for deprivation of its property. There was no objection to the proposal by the other parties. In view of these facts the Hon'ble Supreme Court exercised its powers under Article 142 of the Constitution and accepted the settlement. Accordingly the Hon'ble Supreme Court accepted the settlement on the following terms:

> *Sun group shall pay a sum of Rs. 6.36 crores to Winsome forwards the refund of the sale price and as compensation for depriving Winsome from the enduring benefit of its capital assets.*
>
> *On receipt of the payments as aforesaid by Winsome and the official liquidator, the sale in favour of Winsome in respect of items 17, 19 & 20 shall stand set aside and sale of said items No. 17 (Plot No. B-77 and structures thereon) shall stand confirmed in favour of Sun group. The official liquidator shall issue afresh NOC to enable Sun group to obtain transfer of lease from PSIEC in respect of Plot No. B-77."*

In this way the assessee received Rs. 6.36 crores. According to the Assessing Officer this amount was received in extinguishment

of its rights in Plot No. B-77, Ph VII, IA, Mohali. According to him as per the provisions of section 2(47)(ii) extinguishment of rights in a capital asset amounts to transfer and the capital gain arising thereon shall be taxable as per provisions of section 45. He further observed that the assessee acquired the said capital asset by making payment of Rs. 3.16 crores on 13.12.2004 and possession of the same was taken on 16.12.2004 whereas total sale consideration on transfer of the property to Sun Group was Rs. 6.36 croes which was received by the assessee in August, 2006. Since the holding period of the asset was less than three years the assessee would be liable to short term capital gain and the amount of Rs. 26983000/- was taxed as short term capital gain.

12. The Assessing Officer further observed that without prejudice to the above, if it is considered that gain of Rs. 26983000/- cannot be treated as short term capital gain then same can be said to be in the form of compensation by way of interest given to the assessee by the Hon'ble Supreme Court for depriving the rights of the assessee in property B-77, Ph VII, IA, Mohali. In that case receipt of Rs. 26983000/- would be treated as interest income and would be taxable as revenue receipt.

13. On appeal it was mainly contended that the Hon'ble Supreme Court had set aside the order of Hon'ble High Court by invoking Article 142 of Constitution of India. Reference was also made to Article 142 and it was contended that based on this Article, the Hon'ble Supreme Court took the decision for enforcing the settlement by invoking its extraordinary powers under Article 142, keeping in mind the larger interest of all the parties, including the employees of Punwire. This would mean that the assessee received the amount of Rs. 269.83 lakhs on the basis of negotiated settlement and therefore nature of receipt was capital and was not for transfer of any capital asset so as to be liable to tax under the provisions of the Act. It is to be appreciated that legal effect of the order of the Hon'ble Supreme Court was that sale of land in the first instance, in favour of assessee was set aside which mean that sale was not valid or in other words, the sale through auction itself was honest. Therefore this amount could not be treated as consideration for extinguishment of any capital asset. It was further pleaded that the amount could not be treated as compensation because the amount was received for

the settlement arrived at by the Hon'ble Supreme Court and the compensation was not for transfer of rights.

14. The Ld. CIT(A) found force in the submissions and referred to the decision of Hon'ble Supreme Court in case of CIT v. Saurashtra Cement Ltd. [2010] 325 ITR 422/192 Taxman 300 and Kettlewell Bullen & Co. Ltd. v. CIT [1964] 53 ITR 261 (SC) and ultimately decided the appeal in favour of the assessee vide para 37 which is as under:

'In the case of Saurashtra Cement Ltd. (supra) the Hon'ble High Court was dealing with the compensation paid for delayed supply of a plant and it was held that "the delay in supply could be of the whole plant or a part thereof but the determination of damages was not based upon the calculation made in respect of loss of profit on account of supply of a particular part of the plant. It is evident that the damages to the assessee was directly and intimately linked with the procurement of a capital asset, i.e. the cement plant, which would obviously lead to delay in coming into existence of the profit making apparatus, rather than a receipt in the course of profit earning process." Applying the ratio of this decision if the receipt is not connected with the loss or profit but intimately connected with the capital asset, the receipt would not be in the nature of revenue receipt but would be in the nature of capital receipt because the very source of income is capital asset. In the instant case the Hon'ble Supreme Court has concluded that the compensation is on account of depriving the appellant from the enduring benefit of capital asset. To quote the Hon'ble Supreme Court on this "SUNGROUP" shall pay a sum of Rs. 6.36 crores to WINSOME towards the refund of the sale price and as compensation for depriving WINSOME towards the refund of the sale price and as compensation for depriving WINSOME from the enduring benefit of its capital asset in the following manner……" This clearly shows that the compensation has a direct and intimate connection/nexus with the capital asset i.e. Plot No. B-77 and structure thereon. In view of this the amount of compensation determined by both the parties and duly endorsed by the Hon'ble Apex Court is hereby treated as capital receipt and the addition of Rs. 26983000/- on account of short term capital gain made by the Assessing Officer is deleted.'

15. Before us, the Ld. D.R for the revenue carried us through the facts mentioned in the assessment order and submitted that after the Hon'ble High Court of Punjab & Haryana confirmed the sale in favour of the assessee then assessee became absolute owner of this property. He referred to the contents at page 7 of the assessment order wherein it is clearly mentioned that as property was lease hold and official liquidator had given no objection to for transfer of the lease from the name of Punwire to the name of Winsome on 29.12.2004. In pursuance of this NOC the assessee had applied for transfer of lease to PSIEC and also paid transfer fee amounting to Rs. 1178550/-. Thereafter the lease was transferred in the name of assessee on 25.10.2005. This clearly mentions that the assessee became complete owner of this property and it cannot be said that the assessee was not owner of the property. If this property goes out of existence in view of certain legal operations then same would amount to extinguishment and capital gain on such extinguishment has been rightly charged by the Assessing Officer. In this regard he relied on the decision of Hon'ble Calcutta High Court in case of CIT v. Pramia Engineering (P.) Ltd [1993] 202 ITR 298/[1992] 63 Taxman 579 where surrender of lease was held to be transfer. Similarly Hon'ble Allahabad High Court held in case of Anand Bala Bhushan v. CIT [1996] 217 ITR 144/[1995] 83 Taxman 548.

16. On the other hand, the Ld. Counsel for the assessee submitted tha sale was ultimately set aside by the Hon'ble Supreme Court in pursuance of settlement arrived at among Sun Group, Employees Unit and the assessee-company. In this regard he referred to the order of the Hon'ble Supreme Court (copy of which is placed in the paper book at page 100-106). He particularly invited our attention to page 111 where it is clearly mentioned that sale which was confirmed in favour of Winsome by Hon'ble High Court is set aside. He contended that set aside of the sale would mean that the same becomes void ab-initio or non operational in the eyes of law. He explained this by way of an example by referring to the provisions of section 263 of IT Act and pointed out that if an assessment order is set aside by passing a revisionary order u/s 263 by the Commissioner then such assessment order is no more valid or operative in the eyes of law. Similarly when the sale is set aside by the Hon'ble Supreme Court then that sale was not valid in the eyes of law

and such asset cannot be said to have been transferred leading to the consequences of capital gain. In this regard he referred to the decision of Hon'ble Karnataka High Court in case of Smt. C. Kamala v. CIT [1978] 114 ITR 159 (Kar H.C) where the auction sale was set aside by the Court and it was held that such asset cannot be transferred. He also submitted that decision in case of Pramia Engineering (P.) Ltd. (supra) relied on by the Ld. D.R for the revenue is distinguishable on facts because in that case the deal was not set aside by any Court or law. Similarly the decision in case of Anand Bala Bhushan (supra) is also distinguishable on facts because in that case the assessee has accepted the offer for purchase of land which was earlier given by the Govt. to the assessee.

17. The Ld. Counsel for the assessee pointed out that the Assessing Officer has alternatively assessed the compensation by observing that same was in the nature of interest and therefore chargeable as revenue receipt. He contended that it is totally wrong conclusion. He submitted that the assessee wanted to set up manufacturing unit by purchasing industrial shed and any compensation received against the surrender of capital asset cannot be treated as revenue receipt and in this regard he relied on the following decisions:

Saurashtra Cement Ltd. (supra), Kettlewell Bullen & Co. Ltd. (supra), Oberoi Hotel (P.) Ltd. v. CIT [1999] 236 ITR 903/103 taxman 236 (SC)

18. We have considered the rival submissions carefully. The assessee has originally purchased an industrial plot bearing NO. B-77, Ph VII, IA, Mohali through auction. The auction was conducted by sale committee appointed by Court on winding upon of Punwire. The sale was challenged before the Company judge by Sun Group. The Company judge allowed the application of Sun Group and directed the assessee-company to deliver back the possession of this industrial shed. The assessee challenged this order before Hon'ble High Court and the Hon'ble High Court allowed the appeal of the assessee and confirmed the sale. Aggrieved by this order Sun Group and the Employees Union challenged before the Hon'ble Supreme Court where Sun group offered to pay more consideration and the employees Union also submitted that sale of the plot to Sun Group would be more

beneficial to the Employee's Union. Considering these facts the Hon'ble Supreme Court in Civil Appeal No. 3490 of 2006 vide order dated 8.8.2006 set aside this sale. The Hon'ble Supreme Court has referred to the offer made by Sun Group and the decision vide para 12 to 14 which are as under:

"12. After the matter was argued for sometime the Ld. Counsel for SUNGROUP submitted that having purchased the adjoining property, they were interested in purchasing Plot no. B-77 also and SUNGROUP was willing to offer the same price of Rs. 11.6 crores for the property (Item No. 17. Ld. Counsel for the Employees Union submitted that in the interest of workers, WINSOME should take a reasonable profit and give up the property in favour of SUNGROUP so that the workers and creditors will be benefited. At this stage, Ld. Counsel for the SUNGROUP stated that being interested in the welfare of the workers, in addition to the price of Rs. 11.6 crores offered by them for item No. 17, it will also pay exgratia, a sum of Rs. 50 lakhs to the employees of PUNWIRE as they have been without salary for quite sometime. In view of these submissions, we queried the Ld. Counsel for WINSOME as to whether WINSOME was interested in considering the offer of SUNGROUP.

13. Counsel for WINSOME took time and after obtaining instructions, submitted though with some reluctance, that WINSOME was agreeable for the proposal provided it received a sum of Rs 6.36 crores for items No. 17, 19 & 20 (Mae up of Rs. 3.36 crores towards the refund of price and Rs. 3 crores towards, interest expenses and compensation for deprivation of its property. He submitted that WINSOME had taken agreat risk by borrowing huge amounts from the banks for purchasing the property and that a sum of Rs. 1.64 crores is due to Canara Bank and Rs. 1.38 crores is due to the State Bank of Patiala (respondents 4 & 6 herein). He also submitted that subject to payment of Rs. 6.36 crores WINSOME had no objection either for transfer of its rights to SUNGROUP or for the sale in its favour being set aside and a fresh sale being confirmed in favour of SUNGROUP.

14. There was no objection to the proposal by the other parties, obviously having regard to the fact that everyone is benefited by the said arrangement. In view of the above we consider it a fit

case to exercise our power under Art 142 of the Constitution and accept the settlement as regarded in the lager interest of parties and to benefit the workmen. We take to clear that he sale which has already been confirmed in favour of WINSOME is set aside not on merits, but in pursuance of the negotiated settlement arrived at among SUNGROUP the Employees Union and WINSOME. Accordingly we allow these appeals in part accepting the settlement on the following items:

*(i) to (iv)** ** **

(v) On receipt of the payments as aforesaid by WINSOME and the official liquidator the sale in favour of WINSOME in respect of items 17, 19, 20 shall stand set aside and sale of said item No. 17 (Plot No. b-77 and structure thereon) shall stand confirmed in favour of SUNGROUP. The official liquidator or shall issue a fresh NOC to enable SUNGROUP to obtain transfer of lease from PSIEC in respect of Plot No. B-77."

Reading of above para would clearly show that sale in favour of assessee i.e. WINSOME was clear y set aside. The expression "set aside" has been defined in the Black's Law Dictionary, 6th Edition as under:

"To reverse, vacate, cancel, annul or revoke a judgment, order etc."

From above it becomes clear that set aside would also include "cancel", "annul" and therefore in the present case what has happened is that by setting aside the same the Hon'ble Supreme Court has cancelled the original sale made to the assessee-company. This becomes further clear from Para 14(v). This para clearly states that sale in favour of WINSOME in respect of item No. 17, 19 & 20 shall stand set aside and sale of said items No. 17 (plot no. B-77 and structure thereon has been confirmed in favour of SUNGROUP). Thereafter the Hon'ble Supreme Court has directed the official liquidator to issue fresh NOC to enable the SUNGROUP to transfer the property. This clearly show that Hon'ble High Court clearly cancelled the earlier sale otherwise the Court could have asked the assessee-company i.e. WINSOME to transfer the property to SUNGROUP. The Court has directed the official liquidator to issue fresh NOC so that SUNGROUP could

obtain lease in their favour from PSIEC. This itself shows that sale in favour of WINSOME stands cancelled.

19. Identical issue came up for consideration before the Hon'ble Karnataka High Court in case of Smt. C. Kamala (supra). In that case the assessee was declared as the purchaser of a certain immovable property for Rs. 125 at a court auction held in 1962. The judgment debtors filed an application under rule 90 of Order 21 of the Code of Civil Procedure, to get the sale set aside. That application was dismissed by the executing court. Against the order of the executing court, the judgment debtors filed an appeal under Order 43, rule 1(j) of the Code of Civil Procedure, in R.A. No. 47/1967 on the file of the Ist Additiona Civil Judge, Civil Station, Bangalore. During the pendency of that appeal the dispute between the parties was compromised. Under the compromise the assessee agreed to the sale being set aside on payment of Rs. 20,000 by the person in whose favour the judgment debtors had agreed to execute a sale deed conveying the property in question. The compromise was recorded by the ld. Civil judge and sale was set aside by him. During the assessment year 1968-69 the question of taxability of the sum of Rs. 20,000 received by the assessee arose for consideration before the ITO. The ITO held that the entire sum of Rs. 20,000 represented long term capital gain and was liable to be taxed under the Act. Aggrieved by the order of the ITO, the assessee filed an appea before the Appellate Assistant Commissioner of income-tax and that appeal was dismissed. On further appeal to the Income Tax Appellate Tribunal, it was held that the sum of Rs. 20,000 was an item of capital gain which attracted tax.

20. When the matter traveled to the Hon'ble Karnataka High Court it was held as under:

"Held, that since the court sale itself was set aside ultimately by the appellate court, the assessee never acquired any interest in the property and that it never became a capital asset of the assessee. The department cannot treat the transaction as a transfer of capital asset by he assessee when the assessee had not acquired any interest in the property and had not done any act which would either directly or indirectly amount to a transfer of an asset. The Tribunal was therefore in error in holding that the sum of Rs. 20,000 which was received by the assessee under

the compromise represented long term capital gains liable to tax."

Thus from above it becomes clear that if sale itself is set aside by a Court then it can be said that the assessee never acquired any interest in such property. In the case before us, sale has been set aside by the Hon'ble Supreme Court and therefore it cannot be said that the assessee ever acquired any interest in the property. No doubt extinguishment is also covered in the definition of transfer u/s 2(47)(II). However, extinguishment would normally connote a situation where an asset goes out of existence. For example in case of amalgamation the shares of amalgamating company are extinguished and shares of a amalgamated company are issued then original shares can be said to have extinguished (Reference may be made to the decision of Hon'ble Supreme Court in case of CIT v. Grace Collis [2001] 248 ITR 323/115 Taxman 326. However, when the asset never comes into existence then such asset cannot be extinguished. Therefore in our opinion, there is no extinguishment in the present case because the said property purchased through auction by assessee-company never came into existence because of the order of the Hon'ble Supreme Court through which sale itself was set aside.

21. The Ld. D.R for the revenue has strongly relied on the decision of Hon'ble Calcutta High Court in case of Pramia Engineering (P) Ltd. (supra). In that case the assessee a resident company took on lease several plots of land within the premises known as "Tagore Villa" at Nos. 1 and 1A, Kali Kishen Tagore Street, Calcutta, for periods varying between 30 and 50 years. The assessee agreed to develop the plots at its own cost to lay roads, drainage, etc. and make out small plots for constructing buildings thereon for sale, the proceeds of which were agreed to be shared between the lessor and the lessee as per the agreement. After several years, the Govt. of India negotiated with the lessor for purchase of a substantial portion of Tagore Villa including the portion of land leased out to the lessee free from encumbrance. Thereupon the lessor and the lessee agreed to terminate the lease on terms mutually agreed upon by them. In the meantime the assessee had spent Rs. 117563/- on improvement of the lands, but no building was however, constructed thereon by the lessee. The property was purchased

by the Government on April 18, 1974 and the assessee received Rs. 271110/- on April 26, 1974 out of the sale proceeds as consideration for premature surrender of its leasehold interest in the property. The ITO brought the case of the assessee within the definition of "transfer" contained in section 2(47) of the IT Act, 1961.

22. When the matter traveled to the Hon'ble Calcutta High Court it was held as under:

"Held that leasehold interest is an interest in land. The assessee had acquired the leasehold right for 99 years. This valuable right was acquired by virtue of an agreement entered into by the assessee with the lessor. The interest in land cannot be equated with self created goodwill. The land was acquired by the assessee by an agreement and for possession of the land, moneys were regularly paid under the agreement. This valuable right was surrendered by the lessee and compensation was received for premature termination of the lease. "Transfer" of a capital asset includes not only relinquishment of the asst or extinguishment of any rights therein but also the compulsory acquisition of the asset. The Govt. had a quired the land and the assessee as a leaseholder was given compensation. The assessee prematurely surrendered the lease This was a clear case of capital gains and the transaction squarely comes within section 45 (See penalty proceedings 300G, H, 301A)"

From above it becomes clear that in this case lease was never set aside by any authority or any Court. In fact the Government repurchased the property through an agreement and therefore this case is distinguishable on facts.

23. In the case of Anand Bala Bhushan (supra) the assessee had taken plot No. 16, Young Road, Dehradun on lease from the Defence Department of the Govt. of India. The assessee was permitted to put up construction thereon and the assessee did raise some constructions on the said land somewhere in or about the year, 1950. In Feb 1971 the Defence Department wanted to resume the said land and served a notice dated Feb 22,1971, resuming the land and offering a sum of Rs. 87,887/- as the value of the building belonging to the assessee and existing on the said land. The assessee accepted the offer and received from the Defence Department compensation for the building

amounting to Rs. 87,887/-. The ITO took the view that capital gain had arisen to the assessee from the transfer of the building to the Defence Department.

24. Hon'ble High Court on the above facts held as under:

"Held that by virtue of the acceptance of the offer made by the Govt of India (Defence Department) and the acceptance of compensation in lieu thereof the assessee's right in the said building stood relinquished in favour of Govt of India. There was thus a transfer of the said building within the meaning of section 2(47) of the IT Act, 1961 and the profit arising therefrom was a capital gain taxable under the Act."

Thus in this case the facts are also identical to the case of Pramia Engineering (P.) Ltd. (supra). In this case also the sale was never set aside by any authority or Court of law and therefore this case is again distinguishable from the case before us.

25. In view of above discussion we are of the opinion that surplus arising on account of compensation received by the assessee cannot be assessed under the head "capital gain" because no asset came into existence with the assessee.

26. Coming to the second aspect regarding taxability of the amount as compensation. In this regard clear legal position was enunciated by the Hon'ble Supreme Court in case of Kettlewell Bullen & Co. Ltd. (supra). In that case the assessee-company was carrying on the business of managing agency and was managing agent of six companies including the Fort William Jute Co. Pursuant to an arrangement with Mugneeram Bangur and Co. whereby the latter agreed(i) to purchase the entire holding of shares of the appellant in the Fort William Jute Co., the managed company, (ii) to procure repayment of all loans made by the appellant to that managed company and (iii) to procure that the managed company will compensate the appellant for loss of office by the payment of the sum of Rs. 350,000 after the appellant resigned its managing agency and reimburse that amount to the managed company, the appellant company tendered resignation of the managing agency, and received the sum of Rs. 350,000/- from the managed company. Under the terms of the managing agency agreement, the managed company was not obliged to pay

any compensation to the appellant for voluntary resignation of the managing agency.

27. On these facts the question arose whether the amount received by the assessee-company to relinquish the managing agency was a revenue receipt liable to tax. It was held as under:

"Held on the facts that the arrangement with Mungeeram Bangur and Co. was not in the nature of a trading transaction, but was one in which the appellant parted with an asset of an enduring value., What the assessee was paid was to compensate it for loss of a capital asset and was not, therefore in the nature of a revenue receipt. It mattered little that the appellant did continue to conduct the remaining managing agencies after the determination of its agency with the Fort William Jute Co.

It cannot be said as general rule that what is determinative of the nature of a receipt on the cancellation of a contract of agency or office is extinction or compulsory cessation of the agency or office. Where payment is made to compensate a person for cancellation of a contract which does not affect the trading structure of his business or 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 structu e of the assessee is impaired, or such cancellation results in loss of what may be regarded as the source of the asses ee's income, the payment made to compensate for cancellation of the agency agreement is normally a capital receipt."

From above it becomes clear that if amount is received as compensation in relation to surrender of profit making structure then such compensation is to be treated as capital receipt.

28. Similarly in case of Oberoi Hotel (P.) Ltd. (supra) the assessee-company was operating, managing and administering many hotels belonging to others for a fee at several places. As per the memorandum of association of the company, it was authorized to run hotels on its own account and also to operate, manage and administer hotels belonging to others for a fee. In terms of an agreement dated Nov 2, 1970 the company agreed to

operate the hotel known as Hotel Oberoi Imperial for which the assessee-company was to receive a certain fee called management fee which was calculated on the basis of gross operating profits as provided in the agreement. The agreement was to run for an initial period of ten years; the assessee had the option to ask for renewal of the said agreement for two further periods of 10 years each by mutual agreement. Article XVIII of the said agreement gave the assessee a right to exercise the option of purchasing the hotel in case its owners desired to transfer the same during the currency of the agreement. Thereafter on Sept 14, 1975 a supplementary agreement was executed between the assessee and the receiver who had been appointed for the property. The right to exercise its option was given up by the assessee. It was agreed that the receiver would be at liberty to sell or otherwise dispose of the said property at such price and on such terms as he may deem fit and was not under any obligation regarding the purchaser thereof to enter into any agreement with the operator (assessee) for the purpose of operating and managing the hotel or otherwise and in its return agreed consideration was to be paid to the assessee. On the basis of the agreem nt the assessee received the amount of Rs. 2947500/- and claimed that it was a capital receipt.

29. When the matter traveled to the Hon'ble Supreme Court it was held as under

"Held, reversing the decision of the Hon'ble High Court that the amount received by the assessee was the consideration for giving up its right to purchase and/or to operate the property or for getting it on lease before it was transferred or let out to other persons. It was not for settlement of rights under a trading contract, but the injury was inflicted on the capital asset of the assessee and giving up the contractual right on the basis of he principal agreement had resulted in loss of source of the assessee's income. The receipt in the hands of the assessee was a capital receipt."

From above again same principal emerges i.e. If the compensation is received for surrender of profit making structure or capital asset then such compensation is to be treated as capital receipt. This principal has been against reiterated by the

Hon'ble Supreme Court in case of Saurashtra Cement Ltd. (supra).

30. In the case before us the assessee has acquired an industrial shed for running a manufacturing business and sale was set aside by the Hon'ble Supreme Court and therefore the assessee is clearly deprived of making future profits by surrendering this profit making structure or capital asset and therefore compensation received against such surrender is to be treated as capital receipt. Therefore in our opinion, the compensation cannot be brought to tax as revenue receipt."

11. The ld DR could not controvert above facts and finding that sum is not chargeable to tax as it is capital receipt. Ld DR has heavily relied on the provision of section 56(2) (viii) of the act The above section provides that income shall be chargeable to tax under the head income from other sources if it is income by way of interest received on compensation or on enhanced compensation referred to in clause (b) of section 145A. The provision of section 145A provides that any interest received by the assessee on compensation or enhanced compensation shall be chargeable to tax in the year in which it is received. Therefore, provision of section 145A speaks about the timing of taxability and section 56 (2) (viii) the head under which it is chargeable. However, the character of income should be interest on compensation or enhanced compensation. In the present case, we have already held that it is not interest but compensation. Section 56 (2) (viii) also does not provide for taxation of compensation but only interest on such compensation. In the present case, the assessee has received compensation. Ld DR also could not show that if the amount received is interest on compensation what the amount of compensation itself is. In view of this, we reject the contention of the revenue that provision of section 56 (2) (viii) applies to the impugned amount.

12. In view of above decision of coordinate bench, which has considered identical issue as per principles enunciated by the Hon Sc , we respectfully following it hold that Rs. 31907676/- is a capital receipt

and is not chargeable to tax therefore. Hence, Ground no 1 of the appeal of the assessee is allowed.

13. In view of our decision in Ground no 1, Ground no 2 & 3 are not required to be adjudicated and hence, dismissed.

14. In the result, appeal of the assessee in ITA No 505/Del/2016 is partly allowed.

ITA No 3099/Del/2016

A Y 2011-12

15. Now coming to the appeal of the revenue in ITA No 3099/Del/2016 against the order of the ld CIT (A) passing rectification order u/s 154 of the act.

16. The grievances of the revenue is that when once the ld CIT (A) has passed an order giving detailed reasoning for holding a sum is chargeable to tax, subsequently rectifying it and giving exhaustive further reasoning holding it to be capital receipt itself proves that issue is debatable and hence out of the purview of section 154 of the act.

17. The ld DR also reiterated the same arguments. The ld AR relied up on the order of the ld CIT (A) and submitted that when there was an apparent error the dl CIT (A) has rectified it n accordance with the law.

18. We have carefully considered the rival contentions. In our view, section 154 of the Act was not applicable in this case. *Right to rectify mistakes under section 154 could not be invoked in a case of mere change of opinion. A rectifiable mistake was a mistake, which was obvious, and not something, which had to be established by a long drawn process of reasoning or where two opinions were possible. A decision on a debatable point of law could not be treated as a "mistake apparent from the record." In the present case, firstly it was held that the impugned sum is chargeable to tax as interest and subsequently it was held that it is capital receipt, therefore there is a change of opinion on a debatable*

issue. Hence, we hold that ld CIT (A) has erred in rectifying his order u/s 154 of the act.

19. In the circumstances, we are of the view that one cannot say that this is a case of a mistake apparent from record. Hence, we cancel the order of the ld CIT (A) passed u/s 154 of the act.

20. In the result, appeal of the revenue in ITA No 3099/del/2016 is allowed to that extent.

21. In the result appeal of the assessee in ITA no 505/Del/2016 as well as the appeal of the revenue in ITA no 3099/Del/2016, both for AY 2011-12 are allowed.

Order pronounced in the open court on 13/04/2018.

Sd/-	Sd/-
(SUDHANSHU SRIVASTAVA) JUDICIAL MEMBER	(PRASHANT MAHARISHI) ACCOUNTANT MEMBER

Dated: 13/04/2018
NEHA

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

		Date	
1.	Draft dictated on	12.04.2018	PS
2.	Draft placed before author	12.04.2018	PS
3.	Draft proposed & placed before the second member	12.04.2018	JM/AM
4.	Draft discussed/approved by Second Member.	12.04.2018	JM/AM
5.	Approved Draft comes to the Sr.PS/PS	13.04.2018	PS/PS
6.	Kept for pronouncement on	13.04.2018	PS
7.	File sent to the Bench Clerk	13.04.2018	PS
8.	Date on which file goes to the AR		
9.	Date on which file goes to the Head Clerk.		
10.	Date of dispatch of Order.		