Bhansali Infotech P.Ltd, Navi Mumbai vs Dcit (Osd) 10(3), Mumbai on 6 June, 2018

IN THE INCOME TAX APPELLATE TRIBUNAL "B ", BENCH MUMBAI BEFORE SHRI R.C.SHARMA, AM & SHRI RAVISH SOOD, JM (Assessment Year :2011-12) M/s. Bhansali Infotech Pvt. Ltd., Vs. Dy. Commissioner of Office No. 5 & 6 Income Tax (OSD) 10(3) Shakti Arcade Aayakar Bhavan Plot No.5, Sector - 19D 4 t h Floor, Vashi, Navi Mumbai - 400705 Room No.517, M.K. Road Mumbai - 400 020 PAN/GIR No.AACCB7808E Appellant) .. Respondent) Assessee by Ms. Ritika Agarwal Revenue by Shri Ramjirao Pantulu Date of Hearing 01/05/2018 Date of Pronouncement 06/06/2018 / O R D E R PER R.C.SHARMA (A.M):

> This is an appeal filed by the assessee against the order of CIT(A)- 24, Mumbai dated 18/12/2015 for the A.Y.2011-12 in the matter of order passed u/s.143 r.w. Section 147 of the IT Act.

2. Rival contentions have been heard and record perused.

3. Facts in brief are that assessee is engaged in providing services to IT Sectors and BPO. The case of the assessee was selected for scrutiny. The AO observed that assessee-company has declared a long term capital loss of Rs.14,79,76,879/-. The said loss has been computed after indexing M/s. Bhansali Infotech Pvt. Ltd., the cost of acquisition of Rs.40 Crores and reducing the sale consideration of Rs.40 Crores from the same. The AO declined the same. In this regard we observe that the assessee company was registered under the provision of Companies Act, 1956 with an object to conduct business of Information Technology. The assessee-company increased its authorised share capital from Rs.1 lakh to Rs.40 Crores for the purpose of raising funds for acquisition of Information Technology Unit for carrying on business as enumerated in the MOA. During the year, assessee entered into a registered „Memorandum of Understanding (MOU) with the Builder namely B. Raheja Builders Pvt. Ltd. (hereinafter referred to as a "Builder") for acquiring right, title and interest in 213,000 sq.ft. in an upcoming IT project on Plot no. IT-5, Airoli Knowledge Part of Trans Thane Creek industrial Area, Airoli, Taluka Thane for a total consideration of Rs.40 crores which was paid. It obtained "Allotment letter" from the Builder for the transfer of all the rights, title and interest in 213,000 sq.ft. to be constructed (hereinafter referred to as "Allotted area"). The assessee company paid Rs.40 crores vide cheque no. 773058 dated 03/04/2007 to the Builder in respect of acquisition of right, title and interest acquired in above plot. As per the terms of MOU read along with Allotment letter, the Builder was obliged to give the possession of the allotted area within a period of 13 months from the date of execution of the Agreement to Lease with Maharashtra Industrial Development Corporation Ltd (MIDC). However, the Builder defaulted in timely delivery M/s. Bhansali Infotech Pvt. Ltd., of allotted area. Thus, a dispute arose as to fulfilment of the obligations by the Builder as per MOU read along with Allotment letter. Therefore, the assessee company claimed damages for loss of "source of income". Various letters and legal notices were exchanged between the assessee company and the Builder. Through the advocate a letter was issued to the builder to the effect that the Builder has failed to perform his obligations as stated in MOU read along with Allotment letter and thereby requesting the Builder to perform the terms and conditions

of the said MOU and hand over immediate vacant and peaceful possession of the said area. The assessee company had also requested the Builder to pay the damages being caused due to delay in handing over the possession from 18th October, 2009 till the date of performance of the terms and conditions of the said MOU. Assessee also issued letter to Builder through ALMT legal, Advocates stating that the dispute are referable to arbitrator due to non-compliance with the terms of MOD and letter of allotment and failure to pay the damages caused due to delay in giving possession of the area. The Mumbai High Court appointed ex-chief Justice of India Shn S. P. Bharucha as arbitrator in the matter. The assessee company and Builder entered into a cancellation of MOU whereby the assessee company relinquished its right, title and interest in the constructed area and was refunded the total consideration of Rs.40 crores paid in 2007 vide cheque no. 029870 dated 27/10/2010. Accordingly, settlement Deed was entered between the assessee M/s. Bhansali Infotech Pvt. Ltd., Company and Builder through which the assessee company received 'Liquidated Damages" to the tune of Rs.10 crores | vide cheque no. 029871 elated 27/10/2010 due to non-fulfillment of term of MOU read with Allotment letter by the Builder. The assessee company filed its return of income declaring total income of Rs.116,55,980/-. In the computation of income, the assessee company claimed "Long Term Capital Loss" amounting to Rs.4,79,76,879/- on refund of Rs.40 Crores consequent to cancellation of MOU of constructed area. Secondly, an amount of Rs.10 Crores "Liquidated damages" so received was claimed exempt on the plea that it was compensation for loss of "source of income" and not against regular business activity carried on by the assessee company.

4. AO framed assessment u/s.143(3) wherein assessee s following claim was rejected.

i) Rejected the claim of "Long appeal memo. Term Capital Loss"

amounting to Rs.14,79,76,879/-.

ii) Treated receipt of Rs.10 crores being "Liquidated Damages" as "Short term Capital Gain" and thereby calculating MAT u/s. 115JBof the Act;

(iii) Disallowed expenses amounting to Rs.587,400/-claimed u/s. 35D of the Act.

5. By the impugned order, CIT(A) confirmed all the three additions against which assessee is in further appeal before us.

6. We have considered rival contentions and carefully gone through the orders of the authorities below. We had also deliberated on the judicial pronouncements referred by lower authorities in their respective orders as well as cited by learned AR and DR during the course of hearing M/s. Bhansali Infotech Pvt. Ltd., before us in the factual matrix of the case. From the record we found that assessee has acquired the right to acquire property got created by the MOU dated 26/03/2007 followed up by allotment letter dated 03/04/2007 in pursuance to which the assessee company paid an amount of Rs.40 crores for acquiring the constructed property from the Builder in allotted area at Airoli, Navi Mumbai. Thus, the right to acquire the property was acquired on 26/03/2007. The said right was relinquished / got extinguished vide MOU doted 27/10/2010. As this right in property was with assessee for more than 36 months the assessee company calculated "Long Term Capital

Loss" amounting to Rs.14,79,76,879/- and offered the same in return of income for AY 2011-12. However, AO disallowed the claim on the ground that the construction of the premises for which the amount was paid had never taken place and by virtue of MOU and Allotment letter it cannot be accepted that "transfer" of a capital asset, as defined in Transfer of Property Act has been completed, by virtue of which the assessee company is holding right, title and interest in the office premises.

7. As per provisions of section 2(14) of the Act "Capital asset" means property of any kind held by an assessee whether or not connected with business or profession. The word Property has been defined in explanation which states that "Property" includes and shall be deemed to have always included "any right" in or in relation to an India Company, including rights of management or control or any othei rights whatsoever.

M/s. Bhansali Infotech Pvt. Ltd., That the word "property", used in section 2(14) of the T. Act, is a word . of the widest amplitude and the definition has re-emphasised this by use of the words "of any kind" Thus, any right which can be called property will be included in the definition of "capital asset".

8. Further under section 2(47), a "transfer" in relation to a "capital asset is defined as including the sale, exchange or relinquishment of the asset or the astonishment of "any right" therein or the compulsory acquisition thereof under any law. If the rights in the property are transferred during the period when construction is in progress and he has not obtained possession of the property, the right of the buyer would be in the nature of capital assets and accordingly, gain arising on such transfer would be in the nature of long term or short terms gain depending upon the period of holding.

9. In the instant case, the assessee company had acquired vested right in terms section 19 of Transfer of Property Act, 1882. This lega l proposition is based on the premise that the contract of immovable property fall under the provisions of section 54 of Transfer of Property Act, 1882. A transaction for sale of immovable property contains several obligations on parties as enshrined in contracts (MOU and Allotment letter therein). These contracts are specifically enforceable under section 10 of the Specific Re ief Act 1 963 because vested interest is created under section 19 of Transfer of Properly Act, 1882 , such rights are "Capital Asset" u/s. 2(14) of the Act.

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10. Thus in the present case, the assessee company has acquired rights in the allotted area by virtue of MOU duly registered read along with Allotment letter. On perusal of the Allotment letter it can be noted that there is a specific clause which states that "This allotment letter shall be governed by the provisions of Maharashtra Ownership Fiat Act (MOFA)". In order to support this contention, reliance can be placed on the decision of Harshal Developers Pvt. Ltd. v. Manohar Gopal Bavdekar bearing Second Appeal No. 18 of 2012 and Civil Application No. 347 of 201 2, Order dated 26.11.2012 wherein it has been held by the jurisdictional High Court that allotment letter is binding under MOFA. Even the Punjab and Haryana High Court in the case of Mrs. Madhu Kaul v. CIT 2014 (2) TMl 1117 has held that the allottee gets title to the property on the issuance of an allotment letter

and the payment of instalments is only a consequential action upon which the delivery of possession flows.

11. Reliance can also be placed on the decision of Apex Court in the case of Sanjeev Lot v. CIT (2014) 46 taxmonn.com 30O (SC) wherein it has been held that :

> "20. .... In normal circumstances by executing an agreement to seil in respect of an immovable property, a right in personam is created in favour of the transferee / vendee. When such a right is created in favour of the vendee, the vendor is restrained from selling the said property to someone else because the vendee, in whose favour the right in personam is credited, has a legitimate right to enforce specific performance of the agreement, if the vendor, for some reason is not executing the said deed. Thus, by virtue of the agreement to seli some right is given by the vendor to the vendee. The question is whether the entire property can be said to have been soid at the time when an agreement to seil is entered into. In M/s. Bhansali Infotech Pvt. Ltd., normal circumstances, the aforestated question has to be answered in the negative. However, looking at the provisions of section 2(47) of the Act, which defines the word "transfer" in relation to a capital asset, one can say that if a right in the property is extinguished by execution of an agreement to sell, the capital asset can be deemed to have been transferred."

12. Similarly, the Delhi High Court in the case of Simka Hotels & Resorts v. DOT (2013) 85 DTR (Del) 249, laid down the proposition that even when the assessee entitled to an undefined and undivided share in property, through an agreement, which he later relinquishes, the gain has to be assessed as "income from capital gains". Thus, loss arising from the extinguishment of the right in constructed area acquired in 2007 and relinquished in 2010 is long term loss under the head "Capital Gains"

> chargeable within the provisions of section 45 of the Act. The loss has arisen only due to the benefit of indexation to cost of acquisition of Rs. 40 crores available to the assessee company within the provisions of second proviso to section 48 of the Act. To support this contention reliance can be placed on the judgment of Hon'ble Punjab and Haryana High Court in the case of Vinod Kumor Jain v. Commissioner of Income Tax and others (2010) 46 DTR 185 wherein it has been held that the right of assessee emanates from the issuance of allotment letter as in the facts of case of the assessee. Similar view has been taken by the Mumbai ITAT in the case of Smt. Lota G Rohira v. DOT (2008) 21 SOT 541 (Mum). Therefore, u/s 2(47) the "relinquishment" of any right in a capital asset fails within the definition of the term "transfer" of capita! asset. Therefore, there is M/s. Bhansali Infotech Pvt. Ltd., "transfer" of capital asset and hence the long term capital loss calc ulated is ought to be allowed.

13. As per record, the assessee company in terms of separate settlement deed dated 27/10/2010 further received "Liquidated damages"

> to the tune of Rs. 10 crores. It was contention of assessee before the AO that due to the fact that assessee could not get the possession of said premises there was loss of "source of income" by assessee company due to non-fulfillment of terms of MOU read with Allotment letter by the Builder since the assessee company could not start the business activity from the allotted area within the stipulated time. Accordingly, it was contention of assessee that liquidated damage so received was not liable to tax. It was contention of assessee that the profit earning apparatus of the assessee company was eroded due to non-receipt of possession of constructed area. Thus damages received for the relinquishment of "source of income is capital receipt no liable for tax under the Act. We do not find any merit in this contention of the assessee in so far as there was no loss of source of income as business of assessee continued even thereafter.

14. From the record we found that the main object of the assessee company as per the Memorandum of Association of the Company which states as under:

> "To carry on business about internet, internet technology, information technology, business process outsourcing (BPO) info-tech education,, developing improving, niointaining web M/s. Bhansali Infotech Pvt. Ltd., sites, portals launching, running of portais, to do E-commerce related activities and provide complete E-commerce and WAP solutions do the business of imparting, training, creating, developing, improving, designing, marketing, selling, importing, exporting software, programmes, information technology, systems, its devices product of all descriptions and to carry on business of application development, its maintenance, hosting of sites, all other activities related to information technology in India & abroad ....."

15. That for the purpose of carrying on the aforesaid business the assessee company intended to acquire the allotted area in the IT project of the Builder situated at Airoli as narrated above. Accordingly, the assessee company entered into an MOU with the builder to acquire the allotted area. However, due to delay in construction by the Builder, the assessee company through inter entered into a settlement deed with the Builder and received "Liquidated damages" due to delay and subsequent cancellation of MOU.

16. Since the first and second issue involved is interrelated, We, therefore, decided to dispose of both these issues together. The first issue relates to claim of Long Term Capital Loss as per Memorandum of Understanding amounting to Rs 14,79,76,879/-. Facts relating to this issue are that the assessee entered into a registered MEMORANDUM OF UNDERSTANDING on 26.3.2007 with the builder namely B Raheja Builders Pvt Ltd for acquiring 213000 sq ft area in an upcoming IT project or- plot no. IT-5, Airoli Knowledge Park of Trans Thane Creek Industrial Area, Airoli Taluka, Thane for total consideration of Rs 40 crs which were M/s. Bhansali Infotech Pvt. Ltd., duly paid by the assessee vide cheque no 773058 dt 3.4.2007. MEMORANDUM OF UNDERSTANDING was duly registered under Registration Act 1908. M/s B Raheja Builders Pvt Ltd accordingly vide allotment letter dt. 3.4.2007 allotted 213000 sq ft area to be constructed in building no. 1 as per the plans annexed to the MEMORANDUM OF UNDERSTANDING. The copy of MEMORANDUM OF UNDERSTANDING is at Pb pgs 53 to 61 & copy of allotment letter at pgs 62 to 66 which were

referred during the course of the hearing. As per terms of MEMORANDUM OF UNDERSTANDING read with allotment letter, Builder was obliged to give the possession of allotted area to the assessee within a period of 18 months from the date of execution of the agreement to lease with Maharashtra Industrial Development Corporation Ltd. The assessee vide his letter dt 18.12.2007 called the builder to hand over physical possession and parking spaces to the assessee within 18 months from the agreement to lease Executed by builder with MIDC and a grace period of 6 months is also given in case of delay. Ultimately, assessee on 12.1.2010 issued legal notice to the builder referring to the MEMORANDUM OF UNDERSTANDING and allotment letter asking the builder to perform terms and conditions of the said MEMORANDUM OF UNDERSTANDING & hand over immediate vacant and peaceful possession of the said area alongwith damages for loss of source of income caused due to delay in possession from 18.10.2009 till the date of performance of the terms & conditions of the said MEMORANDUM OF UNDERSTANDING, the copy of M/s. Bhansali Infotech Pvt. Ltd., which is available at pg 79-80 of PB, Again on 13.1.2010, notice was issued to the builder. The builder vide his letter through his advocate dt 22.1.2010 & 8.3.2010 denied payment of the damages to be paid to the assessee. Ultimately, the assessee approached Mumbai High Court for appointment of Arbitrator. On 12.10.2010, Mumbai High Court appointed Ex-Chief Justice of India Justice S P Bharucha as Arbitrator, copy of the same is available at pg 92-96 of Pb, Consequently, on 27.10.10, the assessee and the builder entered into cancellation of MEMORANDUM OF UNDERSTANDING which was duly registered whereby the assessee company relinquished its rights, title & interest in the allotted area & received a refund of total consideration of Rs 40 crs paid in 2007 vide cheque no. 029870 dt 27.10.10. On 27.10.10 a Settlement Deed was also entered into between the assessee and the builder through which the assessee was given 'Liquidated Damages' to the tune of Rs 10 crs vide cheque no 029871 dt 27.10.10 due to non-fulfillment of terms of terms of MEMORANDUM OF UNDERSTANDING read with allotment letter by builder. Since the assessee could not start business activity from the allotted area within the stipulated time. Assessee computed Long *' Term Capital Loss to Rs. 147,97,68,879/- on refund of Rs 40 crs by indexing the cost of acquisition consequent to cancellation of MEMORANDUM OF UNDERSTANDING for the constructed area. Assessee transferred a sum of Rs 10 crs received as 'Liquidated Damages' to Capital Reserve since said sum was received as compensation for the loss of 'source of income' M/s. Bhansali Infotech Pvt. Ltd., and not against Regular Business Activity carried on by the assessee. AO treated Rs 10 crs as Short Term Capital Gain while AO did not allow Long Term Capital Loss. CIT(A) confirmed action of AO not allowing Long Term capital Loss. CIT{A) confirmed action of AO not allowing long term capital Loss but treated sum of Rs 10 Crores as Revenue Receipt.

17. The first issue relates to claim of Long Term Capital Loss while 2 nd issue relates to the said sum of Rs 10 crs claimed by the assessee as Capital Receipt. Ld AR before us submitted that the assessee vide MEMORANDUM OF UNDERSTANDING dt 26.3.2007 duly registered under Indian Registration Act, 1908 , alongwith allotment letter dt 3.4.2007 acquired the area yet to be constructed measuring 213000 sq ft in Building no 1 of IT project on Plot no IT-5 in Airoli Knowledge Park for which attention was drawn towards copy of MEMORANDUM OF UNDERSTANDING & allotment letter dt 3.4.2007. Attention was also drawn towards the fact that allotment was made by builder of the said area on receipt of consideration of Rs 40 crs. The said consideration was paid through cheque. This fact has not been denied by the Revenue. Allotment letter is governed by Maharashtra Ownership Flat Act and hence an enforceable right got created in

favour of the assessee. Reliance was placed in this regard on decision of Mumbai High Court in the case of Bina Indra Kumar 370 ITR 552 (Mumbai). It was further submitted that MEMORANDUM OF UNDERSTANDING, allotment letter and cancellation deed are to be read in context of Section 19 & 54 of M/s. Bhansali Infotech Pvt. Ltd., Transfer of Property Act 1882 & S.10 of Specific Relief Act 1963. From these provisions, it is apparent that a vested right in the nature of capital assets u/s 2{14) of the income Tax Act, 1961 was created on 3.4.2007 when the assessee paid the consideration amounting to Rs 40 crs & allotment letter of the area to be constructed is issued by the builder in favour of the assessee. In terms of MEMORANDUM OF UNDERSTANDING entered into on 26.3.2007, the said capital assets got transferred as defined u/s 2(47) when the assessee in terms of cancellation of MEMORANDUM OF UNDERSTANDING relinquished its right in the said allotted area after receipt of consideration of Rs. 40 crs towards cancellation deed will Rs.10 Crores as the liquidated damages. It was further submitted that if the rights in property are transferred during the period when construction is in progress and the possession of the property was not obtained, the right of the buyer is in the nature of capital asset and therefore gain arising on such transfer would be in the nature of long term or short term gain depending upon the period of holding. Reliance was placed in this regard on following decisions:

> i. SanjeevLal (2014) 46 taxmann.com 300 (SC) ii. Simka Resorts and Hotels (2013) 85 DTR (Del) 249 iii. Vinod Kumar Jain (2010) 46 DTR 185 P & H iv. Lahar Singh Siroya v ACIT (2016) 138 DTR 331 (Kar-HC) v. ITO v Smt Jayshree H Jain (2016) (2) TMI 346 (Mum ITAT) vi. CIT v Ram Gopal ITA no. 70/2015, order dt 09/02/2015 (Delhi HC) vii. CIT v Sterling Investment Corporation Ltd (1980) 123 ITR 441 (Bom) viii. CIT v Ms. Bina Indrakumar (2015) 370 ITR 552 (Bom) M/s. Bhansali Infotech Pvt. Ltd., ix. Ahmed G.H. Ariff v Commissioner of Wealth Tax (1970) 76 ITR 471(SC)

18. It was contended that neither AO nor CIT(A) has appreciated the facts with respect to provisions of Section 2(14) & 2(47) read with Section 45 of the income tax Act. With regard to 2nd issue, claim of sum of Rs 10 Crs received by the assessee as liquidated damages on cancellation of MEMORANDUM OF UNDERSTANDING dt 27.3.2007 as capital receipt, the Ld AR submitted that there was separate settlement Deed dt 27.10.2010 in pursuance thereof, the assessee received liquidated damages to the tune of Rs 10 crs against cancellation of right to acquire the property. The said sum was received as 'liquidated damages' of 'source of income' due to non-fulfillment of terms of MEMORANDUM OF UNDERSTANDING read with allotment letter by builder since the assessee company could not start business activity from the allotted area within the stipulated time. In this regard, attention was drawn towards the main object of the assessee company as per Memorandum of Association of the company.

19. The assessee intended to acquire allotted area for Rs 40 Crores as in IT project of builder for the purpose of carrying on the business, however, since builder could not give possession of allotted area, therefore the assessee has to enter into cancellation Deed as well as Settlement Deed by which the assessee received refund of Rs.40 cr and Rs.10 cr liquidated damages.

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20. It was also contention of learned AR that there is contradiction in the stand of revenue. On the one hand, assessing officer is not ready to appreciate the fact that the payment of 40 Crs is for acquisition of right in allotted area is a capital asset but on the other hand Assessing officer taxed said sum of 10Cr being 'liquidated damages' as short term capital gain. The A R in this regard relied on the following decisions:-

(i) CIT vs. Parle soft Drinks(Banglore) (P) Ltd. (2018J61DTR (Bom)86.

(ii) Kettlewel Bullen & co. Ltd. 1964(5) TMI 4 (SC). (Hi) Oberoi Hotel Pvt. Ltd. (1999)236 ITR 422 (SC).

(iv) Saurastra Cement Ltd. (2010) 325 ITR 422 (SC).

(v) BG Shah (1986)162 11K 23 (Bom).

21. It was further submitted that even if assessing officer's stand is accepted, consideration received for giving up "right to sue" is a capital receipt. In this regard, reliance was placed on the decision of Jurisdictional High Court in the case of Abbasbhoy A. Dehgamwalla and Ors (1992) 195 ITR 28 (Bm).

22. Ld. DR in respect of first issue regarding sum of Rs.40 Cr contended that since property was not in existence when the Memorandum of Understanding was entered into and in consequence of which area to be constructed was allotted to assessee, no right in the nature of capital asset came into existence. Thus CIT(A) has rightly confirmed action of Assessing officer disallowing claim of assessee regarding the Long term M/s. Bhansali Infotech Pvt. Ltd., capital loss amounting to Rs.147976879/- by not allowing indexation on the sum of Rs.40 Cr. In this regard, the Ld. DR relied on the decision of S Narende Kumar & co. 63 Taxmann .com 184 (Mum Itat).

23. We heard rival submission and carefully considered the same. It is an undisputed fact that the assessee has booked with Raheja Builders through MEMORANDUM OF UNDERSTANDING measuring 213000 sq ft area in its upcoming IT Project on plot No IT-5, Airoli Knowledge part of trans Thane Creek Industrial Area , Airoli Taluka, Thane for a consideration of 40 Cr vide registered Memorandum of Understanding dt.

26.3.2007. Assessee company in terms of said Memorandum of Understanding paid 40 Cr vide cheque no. 773058 dt. 3.4.2007 to B Raheja Builders Pvt Limited consideration for booking the said 213000 sq ft area and got the allotment letter dt. 3.4.2007 from the builder. The question before us is whether any right of the assessee company in the nature of capital assets has been created in terms of Memorandum of Understanding dt. 26.3.2007 alongwith allotment letter dt. 3.4.2007 in respect of 213000sq ft. area in an upcoming IT Project to be constructed by the said B Raheja Builders P Ltd. Whether the said Memorandum of Understanding entered into was merely a

financial arrangement between assessee and the builder. It is not denied that Builder could not give possession of allotted area within stipulated time i.e. 18 months from Lne date of execution of agreement to lease with Maharashtra Industrial Development Corporation. Assessee, therefore, issued legal notice M/s. Bhansali Infotech Pvt. Ltd., through its advocate to the said builder and claimed damages for the delay in possession of the area as well as loss of 'source of income'. The matter ultimately was referred to Arbitrator and Mumbai High Court appointed Ex Chief Justice of India J. S.P Bharucha as arbitrator in the said matter. Mumbai High Court in arbitration No.89 of 2010 in assessee's own case upheld the binding nature of the said Memorandum of Understanding and allotment letter and allowed relief to the assessee by holding as under:-

> "The letter of allotment that was issued by the developer to the appellant was in implementation of the terms and conditions spelt out in the Memorandum of Understanding. In fact, the letter of allotment dated April 2007 states that it is pursuant to the Memorandum of Understanding that the developer was unconditionally and absolutely allotting and handing over to the applicant right, title and interest in the office premises admeasuring 213000 sq. ft. since the applicant had paid the full consideration of Rs.40 crores. The letter of allotment states that the other terms and conditions of allotment as set out in the Memorandum of Understandings shall continue to be binding on the parties thereto to the extent to which they are not inconsistent with the terms and conditions set out in the letter of allotment. All the terms and conditions contained in the Memorandum of Understanding continue to bind the parties to the extent consideration of Rs.40 Crores. The letter of allotment is a document which implements the obligation of the developer to allot premises to the applicant in pursuance of the Memorandum of Understanding against the receipt of full consideration."

24. From the said finding of Hon'ble High Court, the authenticity and genuineness of the transaction entered into between the assessee and the builder has been proved. The Agreement was not treated to be a M/s. Bhansali Infotech Pvt. Ltd., financial transaction agreement. In our view, as per the terms and conditions of the MEMORANDUM OF UNDERSTANDING, a right in the immovable property to be constructed has been created in favour of the assessee when the assessee has made payment of Rs. 40 crores and the specific area in the upcoming project of the builder measuring 2130CO sq ft is allotted to the assessee vide letter dt 3.4.2007. Right to acquire immovable property is a capital asset. The MEMORANDUM OF UNDERSTANDING entered into was enforceable under the Maharashtra Ownership of Flat Act 1963. We have gone through case law as cited before us by Ld AR. We noted that in the case of Blna Indrakumar 370 ITR 552 (Bom) jurisdictional High Court has held that where Agreement was enforceable under Maharashtra Ownership of Flat Act 1963, the rights were capable of being enforced. Allotment letter creates a right in the immovable property yet to be constructed and such right on immovable property can be assigned/transferred when the allotment letter is received in terms of registered MEMORANDUM OF UNDERSTANDING that will be the date of creating the enforceable right in the immovable property. Right in immovable property is a capital asset u/s 2(14) of the Income Tax. Act in view of decision of Hon'ble Supreme Court in Sanjeev Lal 46 Taxman.com 300 (SC). We have gone through decision S Narendra Kumar 63 taxrnan.com 184 (Mumbai ITAT) as relied on by learned DR. The

said decision in our view will not assist the Revenue as in the said case fabricated documents were filed by assessee. Tribunal also M/s. Bhansali Infotech Pvt. Ltd., observed that there was no agreement, no conveyance deed was executed between parties creating any right in the property in question. However, in the instant case MOU so entered was duly registered. Even Bombay High Court has also upheld the binding nature of said MOU and allotment letter after having detailed observation as mentioned above. In case of the assessee, documents are duly registered and refers to specific property being building no 1 and area in annexure forcing part of the registered document. Now coming to the claim of the assessee in respect of long term capital loss, we noted that the builder could not give the possession to the assessee of the said capital asset in terms of the MEMORANDUM OF UNDERSTANDING within the specified period. The time was the essence of the contract. The assessee therefore took legal action and ultimately matter was referred to the Sole Arbitrator to Retd Chief Justice of India J. S P Bharucha and ultimately a Cancellation Deed was executed on 27.10.2010 and registered under the Indian Registration Act, by which the assessee relinquished his right in the said capital asset i.e. area allotted to the assessee vide letter dt 3.4.2007 and the assessee received back the amount paid by him at the time of booking amounting to Rs 40 crores. Simultaneously, we noted separate Settlement Deed dt 27.10.10 was executed and the assessee received Rs 10 crores as 'Liquidated Damages' from the builder. The assessee, we noted, claimed long term capital loss by indexing the cost of acquisition i.e. Rs. 40 crores paid by the assessee to the builder on 3.4.2007 & reduced the same from Rs 40 crores which M/s. Bhansali Infotech Pvt. Ltd., was received back by the assessee on execution of registered Cancellation Deed dt 27.10.2010. Now the question arises whether such relinquishment of the right by the assessee in the capital asset can be regarded to be transfer of the capital asset so that long term capital loss be computed as per the provisions of computation of income from capital gains given under Chapter IV-E of the Income Tax Act. We may mention that on 27.10.2010, simultaneously a Settlement Deed was also executed and the assessee received liquidated damages amounting to Rs 10 crores which the assessee claimed to be capital receipt. This liquidated damages in our view is inextricably connected with the consideration received by the assessee for relinquishment of his right in the capital asset created by the allotment letter dt 3.4.2007. The nomenclature given by the party and entering into a separate agreement in our view will not treat this transaction or consideration received by the assessee to be a separate transaction. Receipt of Rs.10 Crores flows out of the same transaction, We have to look into the substance of the transaction not the nomenclature given by the parties. 'Liquidated damages' was received by the assessee due to the fact that the builder could not give the physical possession of the capital asset booked and allotted to assessee within the stipulated time in terms of registered MEMORANDUM OF UNDERSTANDING executed on 26.3.2007 alongwith the allotment letter dt 3.4.2007. The claim of the assessee that the said sum was for relinquishment of 'right to sue and for loss of source of income' cannot be M/s. Bhansali Infotech Pvt. Ltd., accepted. As per the Arbitration Award the assessee received back the consideration & Cancellation Deed was executed wherein right to sue gets relinquished. This right cannot separately survive once the Cancellation Deed was duly registered. The consideration of Rs 10 crores so received by the assessee mentioned as liquidated damages towards relinquishment of source of income in our view is part & parcel of the consideration received by the assessee towards the relinquishment of right by the assessee in the capital asset. Therefore in our view the said sum of Rs 10 crores should also be part of total consideration received by the assessee for transfer of capital asset i.e. relinquishment of right for allotted area in IT project of the builder. We have already held

that right as a capital asset created by MOU duly registered and the allotment letter, within the meaning of section 2(14) of the Income Tax Act, 1961, therefore when this right got relinquished the consideration received thereof will be consideration for transfer of capital asset as relinquishment falls within the definition of 'transfer' under section 2 (47) and is, therefore, chargeable to tax u/s 45 of Income Tax Act as capita! gain. The capital gain has to be computed in accordance with the provisions of section 48 of the Income Tax Act. The full value of consideration has to be taken to be Rs 50 crores received by the assessee for relinquishment of right in the capital asset. The cost of acquisition of right in the capital asset in this case is Rs 40 cr. We therefore set aside order of CIT(A) on both the issues and direct AO to recompute LTCG/Loss by reducing from total consideration of Rs 50 cr the M/s. Bhansali Infotech Pvt. Ltd., indexed cost of acquisition amounting to Rs 40 cr in accordance with the provisions of S. 48 of the Income Tax Act. Thus these grounds taken by the assessee are partly allowed.

25. Next issue relates to applicability of MAT on Rs 10 cr. We heard rival submission and carefully considered the same alongwith orders of tax authorities below. In our opinion, this issue is to be decided in favour of the assessee as sum of Rs 10 cr no more can be regarded to be part of book profit and represent the sale consideration of capital asset as has been held by us in the preceding paragraph. Otherwise also, the issue is duly covered by Mumbai High Court in case of CIT v Bisleri Sales Ltd 377 ITR 144 (Mumbai) in which Hon'ble High Court emphasized that for bringing amount under MAT, two conditions must be satisfied cumulatively i.e. (a) there must be credit to P & L a/c and (b) the amount so credited must be carried to Reserve. In the impugned case, we noted that the said sum of Rs.10 Crores has not been credited to P & L a/c and directly carried to Capital Reserve in the balance sheet. Hon'ble SC also in the case of Apollo Tyres 255 ITR 273 (SC) held that AO cannot vary the book profit other then the changes as permitted in S 115JB itself. In view of the dictum of law pronounced by Hon'ble Supreme Court, book profit disclosed by the assessee company in audited P & L a/c for impugned assessment year cannot be altered by adding back Capital Reserve. We have also gone through the decision of Mumbai High Court in the case of Veekayal Investments 249 ITR 597 (Mumbai) as relied upon by the Ld M/s. Bhansali Infotech Pvt. Ltd., DR. We noted that the said decision was rendered by Mumbai High Court prior to the decision of Apex Court in the case of Apollo Tyres Ltd. This decision therefore will not assist the Revenue. We therefore set aside the order of the CIT(A) on this issue and direct the AO not to take the sum of Rs 10 crores as part of the book profit by rewriting the audited P&L a/c of the assessee company. Thus the ground relating to this issue stands allowed.

26. The next issue relates to the claim of the assessee for a sum of Rs 5,87,400/- u/s 35D of the Income Tax Act. We heard the rival submission and carefully considered the same.

27. The undisputed facts relating to this issue are that the assessee has written off l/5th of the total expenses in respect of share issue expenses and preliminary expenses amounting to Rs 5,87,400/- which were incurred by the assessee in AY 2007-08. The assessee incurred preliminary expenses amounting to Rs 18,795/- during AY 2006-07 for the formation of the company which is apparent from details of such expenses at Exhibit L-l. Further, during AY 2007-08, the assessee company increased share capital from Rs 1 lakh to Rs 40,10,00,000/-. In this regard, the assessee company incurred Rs 21,27,000/- towards ROC fees and Rs 8,10,000/- towards stamp duty. These total

expenses of 29,37,000/- were debited to preliminary expenses. The share capital was increased for acquiring right in getting 213000 sq ft in upcoming IT project at Airoli to be constructed by B Raheja Builders Pvt Ltd. Thus the M/s. Bhansali Infotech Pvt. Ltd., assessee claims that these expenses were incurred after the commencement of the business in connection with the extension of its business of industrial undertaking. Since all these expenses are incurred in the formation of the company and extension of the business, the assessee claims l/5th of such expenditure every year and accordingly on the basis of the claims made in the earlier year, l/5th of said expenditure were claimed during the impugned assessment year. It is not denied that such claim was made in the earlier year. The Ld DR even though vehemently relied on the order of CIT(A), but did not bring on record any document or explanation to negate the submissions of the assessee, We have gone through the decisions as relied on before us specially the decision of this Tribunal in the case of Fine Jewellery Manufacturing Ltd v DCIT 2013 (11) TMI 897 (ITAT Mumbai). We noted that the case of the assessee is duly covered by the said decision. We, therefore, allow claim of the assessee made u/s 35D and delete the disallowance of Rs. 587,400/-

28. In the result, appeal of the assessee is allowed in part in terms indicated hereinabove.

Order pronounced in the open court on this 06/06/2018

Sd/-	Sd/-
(RAVISH SOOD)	(R.C.SHARMA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai; Dated 06/06/2018
Karuna Sr.PS

M/s. Bhansali Infotech Pvt. Ltd.,

Copy of the Order forwarded to :
1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
DR, ITAT, Mumbai
5.

BY ORDER,

6. Guard file.

//True Copy//

(Asstt. Registrar)
ITAT, Mumbai