Pure Drinks (P) Ltd. vs Deputy Commissioner Of Income Tax. ... on 3 June, 1993

Equivalent citations: (1994)49TTJ(DEL)225

ORDER

A. KALYANASUNDHARAM, A.M. :

These are cross-appeals by the assessed and the Revenue involving common issues of, whether the land that is situated at Worli, Bombay, that is owned by the appellant-company, has been transferred, attracting the provisions of capital gains tax. The other related issue is, whether there was any transfer of the said land in the asst. yr. 1982-83, because the agreement between the assessed and the developer was entered during the previous year relevant to that assessment year. It is in this context that the Department had reopened the assessment for the asst. yr. 1982-83, which is being challenged by the appellant, both on validity of the reopening as well as on merits. We shall deal with the aspect of reopening, coupled with merits, as these are inseparable and deal with rest of the issues as had been raised by the parties before us.

Asst. yr. 1982-83-Appeal by the assessed

2. The facts in brief are that, the assessed-company, had a plot of land No. 9, Scheme 58 of Worli Estate, Bombay measuring 17,907. 6 sq. mts. In part of this plot, it had its factory, where soft drinks were manufactured and on the other part, it had residential flats for its employees. The assessed-company approached the authorities for allowing its to re-develop the land measuring 13,049.45 sq. mts. and allow it to construct residential flats on it and submitted plans. The concerned authority agreed subject to the demolition of the existing structure and finally on 10th June, 1981 issued the commencement certificate. By this certificate, the assessed was permitted to re-develop the land and construct a total FSI of 1,82,473 sq. ft. During the pendancy of the approval of the plans with the authorities, the appellant-company, had negotiations with M/s P.S.B. Constructions Co. Ltd. (hereinafter referred to as PSBCCL) and Mr. Yusuf Patel of M/s Mohiuddin of Patel Construction Company, for construction, for which, it had received some advance. Consequent to the authorities granting permission to construct the multi-storied flats, the appellant-company drew up contracts of 12th Aug., 1981, with PSBCCL, for allowing it to develop the land and to construct the flats thereon. According to this contract or agreement, PSBCCL was allowed to construct on FSI of 1,00,000 sq. ft. and was also allowed to deal with the constructed area, i.e., sell to any one he pleases at any rate he pleased, subject to the condition that, PSBCCL pays the assessed, a total of Rs. 3 crores, as the consideration amount. It was also agreed that, PSBCCL shall also construct the basement exclusively for the appellant-company, for which, it was agreed that the cost of construction shall be taken at Rs. 125 per sq. ft. Identical agreement was entered with M/s Yusuf Patel (hereinafter called YP) on 20th Aug., 1981, by which YP was allowed to

construct on FSI 29,000 sq. ft. and was also to construct the basement of 16,000 sq. ft. at a cost of Rs. 125 per sq. ft., and YP was to pay Rs. 87 lakhs. The agreement of 20th Aug., 1981, was modified by another agreement dt. 10th Sept., 1981, with PSBCCL for development of 41,494 sq. mts. and 53,473 sq. ft., for which PSBCCL was to pay Rs. 1,60,41,900. Thus by means of these agreements, the appellant had allowed the developers to develop the land and raise the multi-storeyed residential flats, for which consideration, the developers had agreed to pay the assessed a total of Rs. 5,47,41,900. Consequent to PSBCCL failing to keep up to the Schedule of payment, there was modification in the agreement, with surrender of FSI 55,066 sq. ft., and it was also relieved from the construction of the basement. Yusuf Patel, had surrendered its agreement in favor of PSBCCL, vide an agreement it had entered with PSBCCL on 1st Sept., 1981. Consequent to the modification in the agreement with PSBCCL and the company, and the company obtaining FSI of 55,066 sq. ft., it again allowed YP to construct that part and the basement, and the amount payable by YP was to be adjusted against the cost of basement to be constructed by YP. During the previous year relevant to the asst. yr. 1982-83, PSBCCL had paid Rs. 1.65 crores and Rs. 67 lakhs from Mr. Yusuf Patel of M/s Mohd. Mohiuddin (Patel Construction Corporation), giving an aggregate of Rs. 2.32 crores. During the previous year relevant to the asst. yr.

1985-86, an additional amount of Rs. 80 lakhs was received and thus, the cumulative figure of collection stood at Rs. 3.12 crores. The appellant-company, in the asst.yr. 1985-86, had offered the amount of Rs. 3.12 crores as income from capital gains. The assessed-company, for the asst. yr. 1982-83, had included the receipt of Rs. 2.32 crores under Other liabilities and showed it in the balance sheet. The Revenue, on Realizing that, the agreements were effected during the previous year relevant to the asst. yr. 1982-83, commenced reassessment proceedings, for bringing into tax the capital gains arising on account of the above transactions on the land.

3. Shri C. S. Agarwal, the learned counsel for the appellant-company, to begin with addressed us on the reopening of the assessment. He submitted that, the adequacy of disclosure of primary information, has to be examined with reference to the original return and the details as were placed on the record of the Assessing Officer. He submitted that, the return of income required indication of various sources of income and not all of its receipts. He submitted that, the assessed could not be compelled to indicate receipts of money, which at a later point of income would get converted into income. He submitted that, the return of income as was filed by the appellant-company on 3rd June, 1983, had several enclosures, viz., the annual accounts (copy placed at pages 6 to 27 of the paper book) and other details, relevant for the assessment of income. He submitted that, the details were placed, contained summary of other liabilities, together with the statement of each of those items, figuring in the summary of other liabilities. He carried us through to Schedule 9 to the annual accounts, that contained details of other liabilities for an aggregate amount of Rs. 2,42,58,172. He then carried us through the details, that are placed at pages 48 to 53, giving further breakup of the figures, that have been grouped in the above schedule. He also carried us through the submissions as were made before the Assessing Officer, that explained the nature of the items under other liabilities.

He pointed out that, the details indicate that, in the previous year relevant to the assessment year under appeal, the appellant-company had received from three parties, an aggregate of Rs.2.32

crores and these have been clearly marked as advance and the purpose for which these were received, had also been indicated in the margin. The details show that, the appellant-company had received Rs. 67 lakhs, Rs. 20 lakhs and Rs. 145 lakhs from M/s Patel Construction Corpn. (hereinafter referred to as PCC), M/s Mohd. Yusuf Mohiuddin (hereinafter referred to as MYM) and PSBCCL respectively. The statement of account with PSBCCL, showing receipt of Rs. 145 lakhs, placed at page 53, margin note read as-"the above amount and Rs. 20 lakhs received from PCC by way of earnest money under an agreement to sell dt. 12th Aug., 1981. Agreement to sell entered between the assessed and PSBCCL for a total sum of Rs. 2 crores and 45 lakhs, out of which 1 crore and 45 lakhs have been received from PSBCCL, Bombay. Further a sum of Rs. 20 lakhs received from PCC, on behalf of PSBCCL". This is confirmed by a letter dt. 14th Jan., 1982 from PCC, which has been placed at page 5 of the paper book. The copy of account of MYM, placed at page 54, the margin note read - "against an agreement to sell dt. 10th Sept., 1981 in respect of property No. 9, Worli Estate Bombay for a consideration of Rs. 67 lakhs, no sale deed is executed as yet, hence, not a sale price".

4. Shri Agarwal, contended that, it is too well known that, an immovable property, can be transferred and sold only by means of a registered document and that, mere handing over possession of the land, would not result in any transfer. He pleaded that, s. 2(47) of the IT Act, which defines the term transfer, has been amended w.e.f. 1st April, 1988 to include part performance related to s. 53A of the Transfer of Property Act. He contended that the amendment as stated above, is not effective for the asst. yrs. 1982-83 and 1985-86 and, therefore, it cannot be applied.

5. He made reference to the agreement with PSBCCL (the developer), that is placed at pages 50 to 60 of paper book II and submitted that, the party is allowed to develop the land, carry out construction of multi-storeyed residential flats on an area of 1,00,000 sq. ft. and for this consideration was agreed at Rs. 300 per sq. ft., i.e., an aggregate of Rs.3 crores. The developer was allowed to sell the 1,00,000 sq. ft. of constructed area of different flats to any one he pleases at the price that he may deem it proper. The developer was to construct the basement at an agreed rate of Rs. 125 per sq. ft., which would be exclusive property of the appellant-company. The other two parties were to pay Rs. 2,4741 crores, for the developmental work, on similar lines. He submitted that, the other party entered into separate agreements with PSBCCL, on their own and surrendered its share in favor of PSBCCL and thus, the total contract value of Rs. 5,4741 crores became that of PSBCCL. He pleaded that the agreement only permits development of the land, construction of multistoreyed flats thereon, sell them, but it did not give them any right or title to the land, till such time it was agreed to be transferred. He pleaded that, till the time the hearing of the present appeal, there had been no transfer effected, by means of any registered document.

6. He submitted that, for an immovable property to be transferred and recognised as transferred for the purpose of the IT Act, clearance as prescribed under s. 230A of that Act is mandatory in nature, and this has not been sought for by the appellant, and therefore, the question of Department granting it does not arise. He pleaded that, when none of the precondition for effecting a transfer are satisfied, the basis of reopening of the assessment on an escapement of income, falls to the ground. He contended that, the agreement as has been entered into by the appellant company with PSBCCL,

is usually called a collaboration agreement and it does not confer any right on the other party, except to carry out construction and sell the constructed area. He contended that, in the circumstances of the case, there having been no sale or transfer as defined in s. 2(47) of the IT Act, and not also recognised according to s. 230A of the Act, there does not arise any income at all. Shri Agarwal pointed that, the very basis of reopening is wrong, because, the Department had stated that, capital gains of Rs. 3.12 crores had escaped assessment, while, the fact remains that, the appellant had received an advance of Rs. 2.32 crores only. He contended that, the position of transfer remaining to be effected, is a feature that continued right from asst. yr. 1982-83, and is yet to be effected and, therefore, the folly of the assessed returning the capital gains in the asst. yr. 1985-86, should not be held against the assessed, and must be deleted as income for that assessment year. He placed reliance on the Delhi High Court in CIT vs. Bharat General Re-insurance Co. Ltd. (1971) 81 ITR 303 (Del), for the proposition that, even where the assessed had returned some item as income, if it is truly not its income for that assessment year, then, it is the duty of the authorities, to exclude it from the assessment of the income.

7. He contended that the identical question of any transfer arising on collaborations, such as the one in the instant case, had come up before the Tribunal and the conclusion was that, there was no transfer and there did not arise any capital gain. He supported his contention by referring to the orders of the Tribunal in ITA No. 3703/Del/1987, for asst. yr. 1983-84, in, Smt. Radha Bai vs. ITO, Distt. V(9), New Delhi dt. 7th Dec., 1987 and two, common order in ITA No. 2559/Del/1986 for asst. yr. 1983-84 in M/S Atam Prakash & Sons Vs. ITO D-IIID(7), New Delhi and ITA No. 2557/Del/1986 for asst. yr. 1982-83 in Om Prakash Vs. ITO, Distt. IIID(3), New Delhi dt. 22nd Sept., 1987, copies of which orders have been provided and placed on our record.

8. He pleaded that the disclosure that is required of the assessed is of those items, which have the character of income, whether they are taxable. He contended that the details as furnished by the assessed was complete, from which it could be easily derived that there was an agreement for development of land, which might ultimately get transferred at a future point of time. He submitted that, since there was no transfer of ownership by a registered document, there did not arise any gain, much less a capital gain. He accordingly contended that the reopening of the assessment, on the plea of non-disclosure of primary facts, truly and completely is clearly falsified. He contended that his instructions are that the agreement under cover of which the advances were received, were filed in the original assessment proceedings. Mr. Rai Khan, took a strong objection on the plea of the agreements having been filed in the original assessment proceedings and intervened during the arguments of the counsel for the assessed. He contended that the records are available with him and he had checked up the records of the original assessment and the reopened proceedings, which indicates that the agreements are on the record of the reopened proceedings only. He produced the records for verification by the Bench and the same was also shown to the counsels, Shri. Agarwal and Shri Bahl.

9. Shri Agarwal contended that the details as had been furnished explaining the other liabilities, itself was sufficient information, indicating the nature of the receipt. He contended that the duty of the assessed stops with the providing of the information and not to lead the Assessing Officer through all the details. In support of this contention, he placed reliance on the Allahabad High Court

decision in Modi Spg. & Wvg. Mills Vs. ITO (1975) 101 ITR 637 (All). He pleaded that, primary facts having been furnished, the duty that was cast upon the assessed had ended and, therefore, it would be wrong on facts to hold that there was non-disclosure of primary facts merely because, the Assessing Officer had failed to take notice of or did not appreciate the nature of the transaction.

10. Shri Agarwal took us through the reasons recorded for reopening of the assessment, copy of which was provided by the Departmental Representative, Rai Khan, during the hearing. Shri Agarwal submitted that, the claim of the Assessing Officer is that, an income of Rs. 3.12 crores had escaped assessment. He pleaded that the assessed had received an advance of Rs. 2.32 crores only and it was only by the assessment year that, the total of all the advances had become Rs. 3.12 crores. He contended that, the reopening is clearly based on the assessed offering the capital gain in the asst. yr. 1985-86, which is nothing but an indication of change of opinion. He contended that, the very basis of reopening had been taken on facts and it must, therefore, be held as irregular and improper and quashed.

11. Mr. Home Rai Khan, the learned Departmental Representative submitted by referring to the reasons recorded that, the belief of income escaping assessment, had been formed as a consequence of the agreement for transfer of the land, resulting in capital gain. He submitted that, the filing of the annual accounts, that gave the details of the other liabilities, could not give any indication to any one, much less to the Assessing Officer, that, it included items of receipt, which may have some bearing as income. He contended that, disclosure of the primary facts, fully and truly, implies that, the assessed discloses all the receipt, as in the instant case, the agreements entered into, the amounts received against the agreement, explaining the nature of the agreement, giving reasons that, they are in the nature of advance only. He pleaded that, the assessed is having exclusive knowledge of all its transaction, be it business or any other and it becomes its primary duty to confront the Assessing Officer with all the facts. The examination and applying the mind on such facts then lies with the Assessing Assessing Officer. It is only under such circumstances that, the assessed could be stated to have furnished fully and truly all primary facts.

He contended that, the Assessing Officer, in case of assessment of limited companies, proceeds by placing reliance on the audited accounts. The annual accounts, that are placed at pages 6 to 27, are summary of the transactions of the year, grouped under convenient heads. He referred to the details of other liabilities as contained in Schedule 9 and submitted that, the Assessing Officer could not have known the contents of the amounts shown to the credit under that head, because, it does not contain any narration, excepting that it is other liabilities. The explanation that is offered by the assessed, is only related to the items appearing in the P&L account and there is hardly and reference to the items figuring in the balance sheet. The new feature of the year is never brought out in the shape of a note, for being appreciated by the Assessing Officer. The Assessing Officer who is heavily burdened with the assessments, has hardly any time to read through the accounts and usually limits his examination of the items that he feels result in the income, that are taxable.

He contended that, the plea of the appellant that the reopening is based on the findings for the asst. yr. 1985-86, are clearly falsified because, the reasons recorded shows that, the agreements that have been effected in August and September, 1981, the income arising thereupon, not having been

disclosed, the belief was derived of escapement of income. The assessed not having provided the agreements, the primary facts were not disclosed. He had relied on the ruling of the Supreme Court in Indo-Aden Salt Mfg. & Trading Co. Pvt. Ltd. vs. CIT (1986) 159 ITR 624 (SC), for the proposition that, it is for the assessed to disclose the primary facts, fully and truly and should not be left to the Assessing Officer to probe into the matter to find out its true nature. He accordingly supported the reopening.

He contended that the party was given possession of the land in the previous year relevant to the asst. yr. 1982-83, which had the effect of assessed being deprived of the asset, thus there was a transfer. In support of this contention, he relied on the Supreme Court ruling in Bist & Sons vs. CIT (1979) 116 ITR 131 (SC).

He raised and alternative submission that the receipt could also be treated as income from other sources, as of casual and non recurring nature. He pleaded that the transfer though may not be of the land, it is a transfer of some rights on the land, such as carrying on construction thereon, which may not require any registration. He contended that the assessed, by means of this kind of agreements, may not transfer the land at all and thus the amounts received, may never get taxed. He accordingly contended that, the proper view in the matter is that, there did arise income from transfer of capital asset, resulting in capital gain.

12. Shri Agarwal took a strong objection to the alternative submission raised by the Departmental Representative because, it was never the case of the Assessing Officer. He submitted that, at this late stage of second appeal, the Department could not be allowed to make totally new case and he supported his objection by placing reliance on the ratio laid down by the Delhi High Court in CIT vs. Anand Prakash & Ors. (1981) 128 ITR 388 (Del).

13. The contentions of both the parties on the reopening and on the merits have been very carefully considered along with the various documents as have been placed on our record, to which our attention was drawn by the parties and to the reasons recorded for the reopening of the assessment. The reasons that are recorded on 12th May, 1988 for the reopening of the assessment, is reproduced for the sake of facility.

1. On 12th Aug., 1981 and 20th Aug. 1981, the assessed-company sold capital land to :

(a) P.S.B. Construction Co. Ltd., 5G, Vandhana Building, Tolstoy Marg, New Delhi.

(b) M/S Mohd. Yusuf A/C Abdullah, R/O 53-57, Narayan Dhurd Street, Bombay.

Mohiuddin S/O Tayab Sony, Shiv Tirath Bldg., 4 Warden Road, Bombay - 25.

The beneficial ownership of the land was also transferred during the period relevant to the asst. yr. 1982-83 and therefore, the assessed-company should have disclosed the sale proceeds during the asst. yr. 1982-83 which the assessed has failed to do. I have, therefore, reasons to believe that income chargeable to tax amounting to Rs. 3,12,00,000 has escaped assessment.

2. The assessed has shown closing stock of bottles and shells at Rs. 9,61,139 whereas it should have been shown at Rs. 76,96,886 as under :

Rs.

Opening Stock 61,15,459 Purchases 28,75,047 96,90,506 Less : Breakage as shown 19,93,620 Balance 76,96,886 From the above, it is seen that the assessed has shown closing stock short to the extent of Rs. 67,35,747. Out of this, a sum of Rs. 51,40,880 related to the asst. yrs. 1979-80 to 1981-82 for which separate proposals are being sent under s. 147(a). Thus net suppression for the year under consideration comes to Rs. 15,94,867.

3. On the facts, therefore, I have reasons to believe that reason of omission or failure on the part of the assessed to disclose fully and truly all material facts necessary for its assessment for asst. yr. 1982-83, income chargeable to tax has escaped assessment to the extent of Rs. 3,27,94,867. Sanction to issue notice under s. 148 may kindly be accorded.

The perusal of the reasons recorded indicates that the Assessing Officer was of the belief that, (a) the assessed, for giving over of the beneficial ownership of land, had either received Rs. 3,12,00,000 or had agreed to receive that amount and (b) stocks of bottles and shells had been less shown in the closing stock and these two combined factors, had resulted in the escapement of income of Rs. 3,27,94,867.

It is in this connection, the details of other liabilities as are stated to have been furnished, during the original assessment proceedings, need to be examined, for answering the following questions. One, whether they are sufficient disclosure, from which it could be gathered, as to the nature of the transaction, and two, whether, any opinion was possible as to the resultant feature of there arising any income that would get attracted to taxation. The Departmental Representative Mr. Rai Khan had not objected to the claim of the appellant company, that it had placed the details of other liabilities, giving the narration as had been brought out in the earlier paragraphs. Accordingly, we proceed on the basis that these were on record and limit our findings to, whether they are sufficient for drawing up of a conclusion as to the nature of the transaction.

The transaction or remark as is contained in the detail of other liabilities, are reproduced hereunder once again for facility : "the above amount and Rs. 20 lakhs received from PCC by way of earnest money under an agreement to sell dt. 12th Aug., 1981. Agreement to sell entered between the assessed and PSBCCL for a total sum of Rs. 2 crores 45 lakhs, out of which Rs. 1 crore 45 lakhs have been received from PSBCCL, Bombay. Further a sum of Rs. 20 lakhs received from PCC on behalf of PSBCCL". This narration indicates that the assessed had agreed to sell some land for a consideration of Rs. 2.45 crores, against which agreement, the buyer had paid the assessed, a total of Rs. 1.65 crores. It does not give any description of the land, the location of the land. The Departmental Representative Mr. Rai Khan, had pointed out that the original records did not contain the copies of

the agreement to sell, which alone, according to him would have assisted the Assessing Officer to frame an opinion on the transactions.

14. The requirement of disclosure of information is of material facts, fully and truly, that are necessary for framing of an assessment. According to the assessed, the transaction was such that did not involve any transfer of any sort, resulting in attraction of capital gains tax, and, hence, the disclosure, it had made giving narration is full disclosure. In the case of Modi Spg., & Wvg. Mills (supra), the Court had laid down three stages. The first stage is for the assessed to file the return, duly filling in the columns in the return. The second stage, is the assessing authority, after examination of the return of income, calling for further information, though, the information as provided was complete. The third stage, is where the assessing authority, after examination of the return, comes to a conclusion that, the information as contained in the return is not sufficient of incomplete, for framing of an assessment. The Court ruled that, till the third stage is reached, the assessed could not be blamed for not disclosing some information, which, till then, he was not called upon to furnish in the prescribed form, but that ultimately is found to be relevant in connection with the assessment.

15. In the instant case, the records indicate that there has been no enquiry of any sort of the amounts appearing under the head, other liabilities. The Assessing Officer, did not examine the items figuring under the head other liabilities, because he had not read through the accounts and the other statements, details as had been filed by the appellant-company. Applying the principle propounded by the Allahabad High Court in Modi Spg. & Wvg. Mills (supra), it is clearly a case of the third stage not having been reached at all. The prescribed form of return of income, does not contain any column for making disclosure of transactions, that do not result in any income, whether taxable or exempt or that would become taxable at a future point of time. The Supreme Court in Indo-Aden Salt Mfg. & Trading Co. Pvt. Ltd. (supra), was concerned with the situation of disclosure from the point of view of works, where the assessed, did not either file the detailed break up of the cost of construction on earth work, masonry work or filed the valuation report. In the instant case, the assessed had provided the break up of the other liabilities, giving narration against each item, which gives information to the effect that, consequent upon an agreement to sell land, the assessed had received as advance from the parties, together with the information that registration has not been yet effected. Therefore, the ratio of the Supreme Court in Indo-Aden Salt Mfg. & Trading Co. Pvt. Ltd. (supra) relied by the Department would not be applicable to the facts of the present case before us. The non-filing of the agreement to sell, would not deter the present facts, because, the narration provides clearly that, on the agreement to sell, advance had been received, which character of receipt would not get modified by the filing of the agreement to sell.

16. In our view, therefore, on legality of the reopening of the assessment, we have to hold, in the facts and circumstances of the case that, the assessed had made fully and truly all the material facts, as are necessary for framing of the assessment of income, and we have no other alternative, but to quash the reassessment proceedings. On the second part of the reasons recorded, not much of an argument was advanced, because, the bottles and shells have all along been treated as plant and further, since their individual cost being less that the limit prescribed, thus entitling to hundred per cent depreciation, non-inclusion of bottles and shells, is a mere change of opinion and, therefore,

this reason does not entitle the reopening of the assessment.

17. On merits, the decision requires deliberation on the facts. The appellant-company had an industrial land at Worli, Bombay, which was allowed to be converted to residential land, for construction of residential flats. The appellant company instead of constructing on its own and selling them, resulting in attraction of income from business or capital income, designed the novel method of inviting a builder to carry out the construction. Since, the builder requires a land, and the assessed had the land, they come together allowing the builder to construct on the land owned by the assessed, for which consideration, the builder had agreed to pay the assessed Rs. 3.12 crores, which subsequently swelled up to Rs. 5.47 crores. The agreement entitles the builder to construct an area of 1 lakh sq. ft. and sell them as flats, at whatever price he desires, and to whomsoever he pleases. The assessed only desired that the basement should be allowed to be retained by it and it shall pay the cost of construction to the builder.

By this arrangement, no land gets transferred to the builder, but, the builder gets the right to develop the land, right to construct there on, and sell the super structure at the price that he feels proper and to those, whom he likes. In return, the appellant-company receives sizable amount, which in the assessment year was Rs. 2.32 crores, piled up to Rs. 3.12 crores by asst. yr. 1985-86 and still went up to a colossal figure of Rs. 5.43 crores in a later year. It is this receipt, which is in question, as to whether it results in any capital gains and thus attracting capital gains tax or not.

18. It is well known that, the provisions of capital gains tax are directly related to the satisfaction of the provisions contained in s. 2(47) of the Act, which had defined the meaning of the term transfer, with reference to capital assets. Sec. 2 (47) of the IT Act provides -"transfer, in relation to the capital asset, includes sale, exchange or relinquishment of the asset or the extinguishment of any rights therein or the compulsory acquisition thereof under any law".

The land in question, is a capital asset and this fact is not in dispute. There is no sale, exchange, or relinquishment of the asset because, for all these, there must be a contract between the two parties, for sale, exchange or relinquishment of the asset, which in the instant case is absent. In so far as the extinguishment of any rights therein, this is as a consequence of an external act of law, or natural calamity, or other factors, without any action on the part of the owner. The ownership rights of the land is a bundle of rights, such as title, right of entry, right to sell, construct though according to the State Laws, allow it to remain idle, use it in any manner as it pleases. Of there rights, the assessed, after the agreement has been acted upon by it, retains the title indicating the ownership rights only, as the other rights, such as power to sell, power to construct, power of keeping it idle, using it in any manner are all fettered.

To this extent, it could be said that, there is reduction in the bundle of rights on the land. The rights in the immovable property are normally governed by the Transfer of Property Act. The contention of the appellant that, under no provisions of the Act, the present agreement could be stated as resulting in any giving over of rights in favor of the builder, went unrequited by the Departmental Representative. The argument of the assessed, by referring to s. 230A of the Act, that the transfer shall be effective, in so far as the IT Act is concerned, only if the clearance according to that section

had been allowed, has been allowed, had also gone unrequited, because, the assessed never applied for permission to transfer the land. This according to the appellant-company, was not required now, because, the developer had merely obtained the development rights under a power of attorney and was carrying on the construction of the building on that basis, and that, there was no transfer of land or any rights therein.

19. It is in this context that the counsel for the appellant-company made reference to the two decisions of the Delhi Bench of the Tribunal, Copies of which were supplied. One, ITA No. 3703/Del/1987 for asst. yr. 1983-84, in Smt. Radha Bai vs. ITO, Dist. V(9), New Delhi dt. 7th Dec. 1987 and two, common order in ITA No. 2559/Del/1986 for asst. yr. 1983-84 in M/S Atam Prakash & Sons vs. ITO D-IIID (7), New Delhi and ITA No. 2557/Del/1986 for asst. yr. 1982-83 in Om Prakash vs. ITO, Dist. IIID(3), New Delhi, dt. 22nd Sept., 1987.

Smt. Radha Bai, had a land in Model Town, New Delhi. on which she obtained to construct residential flats under a group housing scheme. For this purpose, she entered into an agreement with a builder for preparation of the plan, construct the flats, etc., and sell them at his price and to those whom he pleased, and agreed to pay Rs. 20 lakhs for allowing the builder to construct on the land. In that case, the question related to the nature of receipt of Rs. 20 Lakhs. In this case, the assessed went on declaring the land as her wealth. The Tribunal had held that, no capital gains tax was leviable, because, there was no transfer on the land. The Tribunal had observed that "the assessed had no role whatsoever to play in the development of the land or the construction of the flats. The agreement in question represented an agreement to sell, executed in respect of the plot in question, the gain wherefrom could be liable to capital gains tax only in the year in which a transfer or transfers within the meaning of s.2(47) of the Act took place".

In the second case, the co-owners of a landed property in a prime location, initially made an agreement to sell the land, but, subsequently converted it into a collaboration agreement with a builder and promoter. The builder were to provide co-owners 6,000 sq. ft. & 4,000 sq. ft. of constructed area and three garages in the multi-storeyed building, to be constructed at its own cost and another sum of Rs. 7.50 lakhs as security. The question that was raised in this case was whether, there was any barter of receipt of constructed area for permission to construct on the land and allowing the remaining constructed portion to be sold by the builder, in consideration of surrendering of the rights therein. In this case too, the Tribunal found it difficult to accept the proposition advanced by the Department that there was a transfer, because there was no conveyance effected by means of a registered document, and placed reliance on the ratio of Supreme Court in Nawab Sir Mir Osman Ali Khan vs. CWT (1986) 162 ITR 888 (SC). In the decision, the Tribunal had made reference to the provisions of ss. 52 and 60 of the Indian Easement Act, for the definition to the term license. The Tribunal also considered the meaning of the term transfer extinguishment of any rights therein, with the argument of the appellant that the term refers to rights in their entirety. The Departmental Representative made reference to the decision of Gujarat High Court in Vania Silk Mills Ltd. vs. CIT (1977) 107 ITR 300 (Guj) especially to the observations contained at page 312. The observation was on the meaning of the term extinguishment of any rights therein, which is reproduced for the sake of facility. "It is destruction, annihilation, extinction, termination, or cancellation, by satisfaction or otherwise, if all or any of the bundle of rights-qualitative or

quantitative-which the assessed has in a capital has in a capital asset, whether such asset is corporeal or incorporeal". The Tribunal had accepted in this decision that, there is in reality reduction in the bundle of the rights on the capital asset, but such a reduction in the rights would not result in a transfer of the asset. It was also observed that, the agreement only granted the builder a license to construct a building on the land, becomes effective with the completion of the construction and ceases with the non-existence of the building. It was accordingly concluded that, there was no transfer, resulting in any capital gains. It was also observed that, the Revenue had not proceeded on the basis that the transaction was one of a trade.

20. In the instant case before us, the facts are identical to those of the above mentioned Tribunal decisions. In the absence of any new material being brought in by the Department, we do not see any reason to take a different view and, therefore, respectfully following the above decision of the Tribunal, we hold that, there being no transfer of any sort of the land, the receipt of Rs. 2.32 corers, in the asst. yr. 1982-83, could not be brought to tax as income from capital gains. The addition is accordingly quashed.

Asst. yr. 1982-83- Appeal by the Department

21. The Revenue has challenged the allowing of depreciation at hundred per cent on bottles, wooden shells, treating them as plants. This issue has been cropping up year after year, and the Tribunal had consistently taken the view in the case of the assessed that, bottles and shells are plants and since each bottle, shell are plants themselves, and their individual value being meagre, they were allowed depreciation at hundred per cent of their cost. Respectfully following the earlier decisions, we uphold the order of CIT(A).

22. The Revenue also has challenged the allowing of deduction of payment of commission to wholesalers by excluding it from the connotation of sales promotion expenditure. The finding of the CIT(A) was that the wholesalers were allowed discount on their purchase price, based on the quantity lifted by them and, therefore, not in the nature of sales promotion. Since the bulk discount is allowed, only when a particular quantity is lifted and is based on the actual quantity lifted, is clearly for services rendered and not a sales promotion. We uphold the order of CIT(A).

23. The addition of Rs. 11,65,105 made on account of suppression of sales was made by the Assessing Officer, by comparing the total number of bottles of 2,43,89,836 with the consumption of crown corks of 257,00,832 pieces. From the difference of 13,10,996, he had allowed rebate for broken bottles of 3,78,912 and arrived at the excess consumption of crown corks of 9,32,084 and had concluded that the assessed must have sold soft drinks in 9,32,084 bottles without accounting them in the books. He accordingly, evaluated the suppressed production at Rs. 1.25 per bottle and made the addition. The CIT(A), deleted the addition as baseless because, there was no evidence indicating more number of bottles were purchased, than what was recorded. The Revenue could not controvert this finding of the CIT(A) that there was no evidence indicating the assessed purchasing more bottles than what was recorded in the books and, therefore, the possible sale of soft drinks was a mere surmise and, hence, the suppression of production too, is a mere conjecture.

Asst. yr. 1985-86 - Appeal by the assessed

24. The issue as raised relates to the taxability of the income from capital gains on the land, as discussed in the asst. yr. 1982-83, with the only difference of the assessed, offering it for taxation, now challenged in this appeal, as not taxable. The plea of the assessed, was by placing reliance on the Delhi High Court decision in CIT vs. Bharat General Re-insurance Co. Ltd. (supra), that, the assessment of an assessment year, could be made, only if it has accrued or has arisen to the assessed, not by the mere fact of the assessed showing it as income. He had contended that, in the case before the Delhi High Court, the assessed had shown income from dividend for the assessment year, which was in actuality income of an earlier year and the assessed, had pleaded that, it could not have been taxed in the assessment year shown, but in an earlier year. The Court had ruled, that, the wrong action of the assessed, showing the dividend as the income of the year, could not be used against him, especially, when it is clear on fact that, it was the income of an earlier year. The Court had also observed that, merely because, the assessed, had shown it as income, when it was not taxable as income of that assessment year, it could not be taxed. The concept of income, clearly implies that, unless, the item in question bears the character of income and that too for a particular assessment year, it could not be brought to tax, because, it travels right to the root of the matter, i.e., the statutory sanction for taxation. The Supreme Court had held in CIT vs. India Discount Co. Ltd. (1970) 75 ITR 191 (SC), that, a receipt which in law cannot be regarded as income cannot become so merely because the assessed erroneously credited it to the profit and loss account. Therefore, the Department cannot capitalise on the wrong committed by the assessed, since the amount received does not bear the character of income, because, to get the colour of income, the land in question must have undergone a transaction, which could be classified as a transfer within the meaning of s. 2(47) of the Act. We accordingly quash the inclusion of the income from capital gain of Rs. 3.12 crores.

25. The disallowance of unpaid sales-tax by applying the provisions of s. 43B of the Act, has been challenged by the assessed, by the contention that, jurisdiction of the appellant falls within the Punjab & Haryana High Court, and since there are contrary views of various High Courts of Calcutta, Orissa, Andhra Pradesh and Delhi, in view of the Supreme Court ruling in CIT vs. Vegetable Products Ltd. (1972) 88 ITR 192 (SC), the view that is favorable to the assessed should be taken. The Departmental Representative, only relied on the orders. In our view, this issue does not require much of the deliberation, because, the various High Courts have taken different views on the sales-tax amounts remaining unpaid on the closing date of the accounting period, but paid on the due date as mentioned in the Act, we respectfully following the ratio in CIT vs. Vegetable Products Ltd., we follow the decisions of Andhra Pradesh, Orissa and Calcutta High Courts and delete the disallowance.

6. The other issue relates to the disallowance of Rs. 75,000 under the head vehicle maintenance, under s. 37(3A) of the Act, on which the contention raised was, it was excessive. In our view, this is pure question estimate and, therefore, we do not interfere.

Asst. yr. 1985-86- Appeal by the Department

27. The Revenue has challenged the direction of CIT(A), to allow deduction of the gratuity at Rs. 3,05,234, on which the counsel conceded that, the correct figure of allowable deduction is far less, i.e., Rs. 2,11,711, which was the amount deposited with LIC under the Group Gratuity Scheme. The Departmental Representative only relied on the orders. The Assessing Officer is directed to verify the amount that has been paid into the Group Gratuity Scheme with LIC and allow deduction to the extent of the actual amount of deposit.

28. The Revenue has again raised the issue of allowing of depreciation at hundred per cent of the cost of bottles and shells, treating them as plants; for the detailed discussion in Para 5 above, which would equally hold good, we do not see any merit in this ground.

29. In the result, the appeal by the assessed for the asst. yr. 1982-83, is allowed, and for the asst. yr. 1985-86 is allowed in part and the Departmental appeals are allowed in part.

In view of earlier decisions of Tribunal referred, I agree.