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

% *Date of Decision: 29.03.2023*

\+ **ITA 194/2023 & CM APPL. 15570-15571/2023**

PR. COMMISSIONER OF INCOME TAX-1 ..... Appellant
Through: Mr Sanjay Kumar, Sr. Standing Counsel with Ms Easha Kadian, Adv.

versus

M/S ANSAL PROPERTIES AND INFRASTRUCTURE LIMITED ..... Respondent
Through:

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER
HON'BLE MS. JUSTICE TARA VITASTA GANJU

[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J. (Oral):

CM APPL. 15570/2023

1. Allowed, subject to just exceptions.

CM APPL. 15571/2023 ***[Application filed on behalf of the appellant/revenue seeking condonation of delay of 200 days in filing the appeal]***

2. This is an application filed on behalf of the appellant/revenue seeking condonation of delay in filing the appeal.

3. According to the appellant/revenue, there is a delay of 200 days.

4. For the reasons given in the application, the delay is condoned.

5. The application is, accordingly, disposed of.

ITA 194/2023

6. This appeal concerns Assessment Year (AY) 2012-13.

7. The appellant/revenue seeks to assail *via* the instant appeal the order of the Income Tax Appellate Tribunal [in short "Tribunal"] dated 16.07.2021.

8. The issue which arose for consideration before the Tribunal was whether the claim made by the respondent/assessee seeking exemption of income amounting to Rs.70,05,71,000/- arising on account of transfer of "Trunk Infrastructure Asset" to its 100% subsidiary should be sustained.

8.1 This exemption was claimed by the respondent/assessee by alluding to Section 47(iv) of the Income Tax Act, 1961 [in short, the "Act"]. For the sake of convenience, the said provision is extracted hereafter:-

> *"**Transactions not regarded as transfer**.*
> *47. Nothing contained in section 45 shall apply to the following transfers:—*
> *xxx xxx xxx*
> *(iv) any transfer of a capital asset by a company to its subsidiary company, if—*
> *(a) the parent company or its nominees hold the whole of the share capital of the subsidiary company, and*
> *(b) the subsidiary company is an Indian company;..."*

9. It goes without saying that any profits or gains arising from transfer of capital asset which is effected in the previous year, save and except those excluded under the provisions of the Act are chargeable to income tax under the head "capital gains" [See Section 45[1] of the Act].

9.1 The important feature of Section 45 of the Act is that the assessee should have earned profits and gains arising from the transfer of a capital

[1] "**45.** (1) Any profits or gains arising from the transfer of a capital asset effected in the previous year shall, save as otherwise provided in sections 54, 54B, 54D, 54E, 54EA, 54EB, 54F, 54G and 54H, be chargeable to income-tax under the head "Capital gains", and shall be deemed to be the income of the previous year in which the transfer took place…."

asset.

9.2 It is in this context that reference was made by the respondent/assessee to Section 47 of the Act. Section 47 of the Act sets out those transactions to which Section 45 of the Act does not apply. One of the transactions to which Section 45 does not apply is set forth in clause (iv) of Section 47 of the Act.

10. A bare perusal of the aforesaid provision would show that transfer of a capital asset by a company to its subsidiary will not fall within the provisions of Section 45 of the Act i.e., be exigible to capital gains, if the following prerequisites stand fulfilled:

(i) First, the parent company or its nominees hold the whole of the share capital of the subsidiary company.

(ii) Second, the subsidiary company is an Indian company.

11. In the instant case, the "Trunk Infrastructure", which includes roads etcetera, were, admittedly, transferred by the respondent/assessee to its 100% subsidiary Ansal API Infrastructure Ltd. [hereafter referred to as, "AAIL"].

11.1 The transfer of "Trunk Infrastructure", concededly, led to generation of surplus amounting to Rs.70,05,71,000/-. The record shows that the respondent/assessee had included this surplus in its return of income *albeit,* with a note which explained as to how the surplus arose.

12. In an appeal preferred by the respondent/assessee, the Commissioner of Income Tax (Appeals) [CIT(A)] ruled against the respondent/assessee. The reasoning provided by the CIT(A) in its order dated 27.11.2014 was brief. For convenience, the relevant part is extracted hereafter:

> *"4.7.2 I have considered the submission of the AR and the assessment order. No sufficient material is there to take a view that the surplus arising out of the said transfer was capital in nature or that it would not be income at all*

and not assessable to tax. The transfer of infrastructure assets related to the business carried on by the assessee as real estate developer. Since the receipt is on account of assets employed in the business, the claim of the appellant is untenable and without any merit. Therefore, the ground is dismissed."

12.1 As would be evident, CIT(A) concluded that the surplus generated by the respondent/assessee on transfer of what was, essentially, capital work-in-progress would be chargeable to tax, as it was an asset employed in the business.

13. The Tribunal, however, in reversing the view of the CIT(A), has, in our view, rightly, concluded that an assessee employees both capital assets and trading assets in his business; the fact that a capital asset (i.e., Trunk Infrastructure), which was, as noted above, a capital work-in-progress, on transfer, generated surplus, could not be treated as income, in view of the provisions of Section 47(iv) of the Act.

14. There is no dispute raised before us that the prerequisites provided in Section 47(iv) of the Act stand fulfilled i.e., the transfer of the Trunk Infrastructure/capital work-in-progress was made by the respondent/assessee to its 100% subsidiary and the subsidiary was an Indian company.

15. The other argument made by Mr Sanjay Kumar, learned senior standing counsel, who appears on behalf of the appellant/revenue, is that the Tribunal could not have gone beyond the assessment order, given the fact that the respondent/assessee itself had included the surplus as income chargeable to tax in its return of income.

15.1 To our minds, this argument misses the point (something which the Tribunal has noted) which is that the assessee had entered a caveat in the return of income. It is not disputed that a note was incorporated in the return

wherein it was explained as to how the surplus arose in the instant case on transfer of Trunk Infrastructure/capital work-in-progress.

16. Besides this, in our view, it is more than well-established that merely because the assessee inadvertently offers a receipt for levy of tax, tax cannot be levied by the revenue if it is not otherwise constitute income of the assessee. Every receipt is not an income chargeable to tax under the provisions of the Act.

17. Accordingly, we find no good reason to interfere with the impugned order passed by the Tribunal. In our opinion, no substantial question of law arises for our consideration.

18. The appeal is, accordingly, closed.

(RAJIV SHAKDHER)
JUDGE

(TARA VITASTA GANJU)
JUDGE

MARCH 29, 2023/*ha*

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