IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH 'B' MUMBAI

BEFORE SHRI R.S. SYAL (AM) AND SMT. ASHA VIJAYARAGHAVAN (JM)

ITA No.55/Mum/2009
Assessment year-2004-05

M/s. Bachhraj Factories Pvt. Ltd., Bajaj Bhavan, 226-Nariman Point, Mumbai-400 021 PAN-AAACB4654N	Vs.	The ITO, 3(1)(1), Aayakar Bhavan, Mumbai-400 020
(Appellant)		(Respondent)

Appellant by: Shri Arvind V. Sonde &
Shri Kirit R. Kamdar
Respondent by: Shri S.T. Bidari

O R D E R

PER ASHA VIJAYARAGHAVAN (JM)

This appeal filed by the assessee is directed against the order dated 25.9.2008 passed by the ld. CIT(A)-XXVII, Mumbai for the Assessment Year 2004-05.

2. The brief fact of the case is that during the course of assessment proceedings, the Assessing Officer found that the assessee had shown ITCG on sale of land at Ujjain amounting to Rs 11,05,556/- The assessee was asked to furnish details of capital gain on sale of land alongwith cost of the land and also to explain as to whether the sale value has been taken as per the provisions of sec. 50C of the IT Act. In response, the assessee filed details of the sale of land alongwith the copies of the MOU. As regards the valuation as per provisions of sec

50C, it was submitted that the property has neither been conveyed nor the document whereby the assessee has transferred its rights has been executed for the purpose of payment of stamp duty and therefore the provisions of sec 50C cannot be applied. It is also submitted that it was not possible to convey the said land in view of the status quo direction of the Courts and the transfer has not been registered. The Assessee has merely entered into a MOU and the capital gains have been offered in the year under consideration in view of the provision of sec 2(47) by which a part performance of a contract contemplated in sec 53A of the transfer of property act is deemed to amount to a transfer. Therefore the Assessee submitted that sec 50C is not applicable as the stamp valuation authority has not adopted or assessed any value of the property for the purpose of payment of stamp duty. The AO observed that the property has not been conveyed and the Assessee has merely entered into a MOU. Hence, the Assessee was asked to explain the treatment of capital gains given to the receipt of moneys alleged to be in consideration of the Ujjain Property and to show cause why the same should not be taxed under the head Income from other sources. The Assessee in response stated that it has sold the property alongwith with their rights title and interest in the said property and the same constitutes a capital asset. The AO noted that as admitted by the Assessee there has been litigation as regards the right to the property that has been pending for last 35 years and it has been in possession of the property and as such the same constitute a capital asset.

3. Regarding the litigation about the said property, the assessee submitted that the S.C. vide order dated 7.9.1989 had observed that since the civil suits have already been filed before the Civil Court, the Civil Court shall investigate the matter and decide the issue of title to

the land. The Civil Court in one suit in respect of plot of land of 14 bighas has decided in favour of the Assessee and the Ujjain Municipal Corpn. has preferred an appeal before the High Court of M.P. against the said order. The other suit in respect of plot of 27 bighas has been decided against the assessee and the assessee has preferred an appeal before the high court of MP. The Court has passed an interim order directing the parties to maintain status quo and both the appeals are pending for disposal till date. The Assessee further submitted that the purchasers have purchased the property on as is where is basis and no person would pay an amount of Rs 2,28,00,000/- without getting any benefit. The purchasers have paid the price for acquiring whatever rights title and interest the Assessee had in the Ujjain property. The Assessee has stated that possession of the said property was given to the purchasers vide letter dated 16.12.2003 during the previous year relevant to the AY under consideration and therefore the sale proceeds received on transfer of the Ujjain property is to be taxed under the head capital gains and not under the head 'Income from other sources'.

4. The assessee stated that in case of the sale proceeds received as per MOU in connection with the transfer of right title and interest in the Ujjain property does not constitute a transfer of any capital assets then the amount received cannot automatically be treated as a casual or non recurring receipt taxable under the head Income from other sources and the amount received would have to be treated as capital receipt not exigible to tax.

5. The AO examined the assessee's submission and noted that the facts of the case are that the assessee had purchased the land somewhere in 1962 from Seth Nazar Ali. The land was a leasehold land given to Seth Nazar Ali by the Govt. of M.P. for establishing a factory

and the condition of the lease was that if for any reason it was not possible to run a ginning or cloth factory the property shall revert back to the government. This property was taken over by the Addl. Collector, Ujjain as the terms of the grant of the said property were violated and no compensation was paid to the Assessee. The property comprised of 2 plots of land of 27 Bighas and 14 Bighas respectively. The acquisition of the plot of 27 bighas was made as the land was given for running a cloth factory and there was a stipulation in the agreement that in the eventuality of the cloth factory being stopped, the land shall be reverted to the government. The plot of 14 bighas was acquired on the ground that the assessee company was a more trespasser. The Assessee company has disputed the acquisition of the said land and as stated by the Assessee himself the appeals filed by the Assessee and the Ujjain Municipal Corporation are pending in the High Court of MP The question therefore arises as to whether the Assessee at all had any saleable right in the property. The title of Seth Nazar Ali, the above facts would reveal also was not absolute as he had only a limited right in the said property which was subject to certain encumbrances and therefore he could not be said to have any absolute ownership under the general law or even under sec 27(iii) of the IT Act not to mention that he had no right to transfer any valid title even by executing a registered deed. As regards the 14 bighas of land it has been acquired treating the Assessee as a trespasser and the law does not recognize the rights of a trespasser . Though the Assessee claimed to be the possessor of the land and buildings for some time, it cannot be concluded that the possessory rights bear any legal recognition. The rights are legally protected interests and to associate the word right with the said type of possession will be a misnomer.

6. The AO quoted certain relevant paragraphs from the MOU signed by the Assessee with the alleged purchaser.

> This memorandum of understanding (MOU) mainly records in principle the basic terms which have been agreed between the parties hereto regarding sale by BFPL of the said property more particularly described in the 2nd schedule hereunder written on as Is where is basis and by itself is not to be or should not be constructed as an agreement for sale of the said property.
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> It is also expressly agreed and declared that the purchaser shall not be entitled to the possession of the said property or any part thereof until such time as the transaction is completed and proper conveyance Is executed in favour of the purchaser by BFPL.
>
> It shall be the responsibility of the purchaser to proceed with or prosecute the said litigation in such manner as it may deem fit and proper or to settle the same with the Chief Secretary, State of Madhya Pradesh and Ujjain Municipal Corpn. Before the High Court of MP at Indore and Ujjain District Court respectively or any other appropriate court or forum where such litigations are being fought out entirely at its own costs charges and expenses.

7. From the above the AO observed that the MOU is not to be constructed as an agreement for sale and that the purchaser is not entitled to possession of the said property till such time conveyance is executed in his favour. The Assessee has himself stated that it is not possible to convey the said land in view of the status quo direction of the Courts. Sec 53A of Transfer of property Act 1882 defines part performance as where any person contracts to transfer for

consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty and the transferee has in part performance of the contract taken possession of the property or any part thereof or the transferee being already in possession continues in possession in part performance of the contract and has done some act in furtherance of the contract and the transferee has performed or is willing to perform his part of the contract. In the instant case the Assessee has received the money but as found above cannot give clear possession of the property The letters giving possession filed by the Assessee are only self serving as when the Assessee does not have a clear title to the said property no possession valid in law can be given. There is therefore no part performance as stated by the Assessee. The assessee's argument that no prudent person will pay an amount as Rs. 2,28,00,000/- without getting any benefit does not hold good as that is the fact in this case. It is clear from para 2.3 of the MOU that the purchaser will proceed with the litigations in the Court or settle the same with the MP government and in the event of the purchaser being successful he will enjoy the benefit arising from the transaction.

8. Section 45 of the I.T. Act defines capital gains to be profits or gains arising from the transfer of a capital asset and sec 2(47) defines transfer in relation to a capital asset to include the sale exchange or relinquishment of the asset or the extinguishment of any rights therein. The capital gain will only arise if there is transfer of an asset and as such existence of the asset is a must. In the instant case as discussed above the clear right title of the assessee over the property at Ujjain has not been proved. It is clearly born out of the assessee's records that the covenants contained in the original lease executed between the said Shri Nazar Ali and the Government of M.P have been

flouted leading to the re possession of the impugned property by the government. The fact that there is litigation regarding the trespass to the property by the assessee, whether with an understanding with the said Nazar Ali or not, cannot judicially be said to have been decided to confer any right to the property in favour of the assessee. What sec 2(47) or sec 2(14) of the I.T Act contemplates is only a legal right to the asset in the first place. Then and only then can one look to the deeming effect of 'transfer, sale, exchange or extinguishment' of such right. As regards the transfer of the right subject to the condition that the purchaser would prosecute the pending litigation again cannot be said to be an answer to the question whether there is a transfer of any asset much less whether there is any asset at all in possession of the Assessee. This is so because the accused is the assessee and that status cannot be shifted to any other person except by moving any interlocutory petition by such other person. The Assessee has not brought out any such fact in this case.

9. The AO also observed that the above position would reveal that there is no asset in the possession of the assessee as of date and there is also no factual or legal transfer of any asset as alleged by it.

10. As regards the argument that the amount involved is in any case a capital receipt not exigible to tax is not tenable because for the consideration being termed as a capital receipt there must be either a tangible or intangible asset which in both the cases should exist. The assessee has not traced the receipt to any tangible asset except by merely stating so. Even in the case of any intangible asset the essential indicia is that the assessee holds a right therein. In this case the assessee has failed to indicate any such right to any such asset.

11. The I.T Act does not stipulate anywhere that the income or receipt sought to be brought to tax should be legal or genuinely sourced. All what the Act envisages is that if a person earns taxable income the same should be taxed as per the charging provisions of the act. If the assessee should resist such a levy it I the duty of the Assessee to prove that the amount did not fall within the charging provisions of the act. Having offered under a fictitious head as capital gain the Assessee has admitted that the amount in question is exigible to income tax. The only factual position us that the assessee has physically received ₹. 2,28,00,000/- and now to say that the same is a capital receipt not exigible to income tax amounts to a volte face which does not fit in any alternative situation under the law. To exempt this receipt from any charging provision of this act there must be a specific section available under the act to which also the assessee has not pointed out. Sec 14 specifies specific heads of income and that the last thereof is other sources which is residuary in nature. Since the assessee's receipt does not fit in any other heads it has to essentially fall in the category of other sources. In these circumstances, the amount of ₹. 2,28,00,000/- is neither a capital receipt nor a casual income but is indeed exigible to income tax as income from other sources. Accordingly, the AO taxed the amount of ₹.2,28,00,000/- under the head " Income from other sources."

12. On appeal before the Ld.CIT(A), the assessee reiterated its submission made before the AO which is as under:

> *Briefly the Assessee submitted that the company had purchased land at Ujjain during the year 1962. The said land was acquired by the Govt. of MP in the year 1979-80. The Company filed two separate suits before the District Court of Ujjain of which one was decided in favour of the company. Ujjain Municipal Corporation has filed an appeal against the order of the District Court which is still pending. The company's other Suit*

against the said acquisition was dismissed by the District Court of Ujjain. The Company has filed an appeal against the order of the District Court and has obtained status quo order from the Madhya Pradesh High Court, Indore bench, which is pending for final disposal. This property was written off in the books of account in the same year 1979-80 since no compensation was received there against. The Company in terms of Memorandum of Understanding (MOUs) executed on 23rd October 2003 agreed to transfer the said land on as is where is basis to Mahakal Infrastructure Pvt. Ltd and Mahakal Projects P. Ltd. The parties to the MOUs have further agreed by way of execution and acceptance of a binding irrevocable Power of Attorney that under no circumstances and on no account whatsoever will either party have a right to terminate this deal which effectively concludes the sale transaction between the two parties. In view of what is stated above and since the Company has handed over possession of the land it has accounted for the income aggregating to Rs 22,800,00,000/- of which Rs 22,500,000/- has already been received.

More than 30% of the front side of the said property has been encroached by the State Government Ujjain Municipal Corporation and a Fire Brigade Station has also been established by the State Government on the said land. The said property is under litigation since more than 35 years and the company does not have a clear title to the said property on the date of execution of the MOUs. Therefore it cannot convey the said property in favour of the transferees and consequently the MOUs are on as is where is basis. In view of the fact that the High Court has issued a status quo on the said property, the said property cannot be adjudicated nor conveyed and accordingly section 50C is not applicable.

While explaining the transaction as a transaction leading to capital gains the Assessee relied on the following decisions.

1. *CIT Mumbai ciy-1 vs Tata Services Ltd 22 ITR 594(Mumbai)*
2. *A.R. Krishnamurthi vs CIT 176 ITR 417 (SC)*
3. *CIT vs Ashoka Marketing Ltd 164 ITR 664 (Cal)*

Relying on these decisions the Assessee submitted that this property was originally purchased from Shri Nazar Ali sometime in the year 1962 and since then the Assessee has acquired this property till litigation started in 1976. It is a fact that this property was given in Nazar Ali by the Madhya Pradesh State Government for the purpose of establishing a factory and it is

also a fact that if on by event such factory could not be established the property shall revert back to the government. In view of non fulfillment of the conditions the MP Government had taken over the property in the year 1979 leading to the litigation in Civil Court. The Assessee has disputed the acquisition of the said land and the court cases are pending before the High Court of P in any event the Assessee claimed to be the possessor of the land and buildings thereon for sometime enjoying the property and same has subsequently been transferred to Mahakal Infrastructure P. Ltd and Mahakal Projects Pvt. Ltd., in terms of MOU executed on 23.10.2003. Since the Assessee has handed over the possession of the land and since the sale proceeds have been received by the Assessee the same is offered for taxation under the head Capital Gains. In view of the provisions of sec 2(47) and provisions contemplated under sec 53A of the Transfer of property Act. The Assessee however admitted that as the said properties were under litigation since many years and the Assessee does not have a clear title to the said property on the date of exclusion of MOUs it cannot convey the said property in favour of transfers and consequently the MOU as is where is basis. In view of the above facts the Assessee urged that it has rightly offered the amount of sale proceeds for taxation under the head capital gains."

13. The Ld. CIT(A) rejected the contentions of the assessee observing as under:

"I have gone through the facts of the case and also the assessment order. I have also perused the submission made by the appellant. I have noted that during the year under consideration the appellant in its return of income had shown LTCG on sale of land at Ujjain amounting to Rs 11,05,556/- This land was claimed to have been purchased by the appellant from Shri Nazar Ali sometime in the year 1962. This land was originally government land and the same was given to Shri Nazar Ali by the government of MP for establishing a factory with the condition that if for any reason it was not possible to run a ginning or cloth factory, the property shall revert back to the government. As Shri Nazar Ali failed to set up and run a factory as aforesaid the land was taken over by the Additional Collector, Ujjain as the term of the grant of the said property were violated. From the facts of the case and materials on record, I have noted that the property comprises of two plots of land of 27 bighas and 14 bighas respectively.

The plot of 27 bighas was originally given to Nazar Ali for running the factory. The other plot containing 14 bighas have been acquired by encroachment. In the event of acquisition of the said plots by the State Government the appellant filed appeals before the High Court of MP and the matter is still subjudice. In view of litigation in the Court of law and in view of the facts brought on record both by the appellant and the AO it is to be decided whether the appellant has the absolute right or clear title of the land in question, The AO while examining the facts of the case has given his finding that while taking over the possession of the land from Shri Nazar Ali by the appellant the appellant could not be said to have acquired title as the vendor i.e. Shri Nazar Ali did not have absolute ownership of the land given to him by the State Government of MP. The AO has also examined the issue leading to the aforesaid fact as to whether the appellant at all only any saleable right in the property. The title of Shri Nazar Ali on this plot of land was not absolute as he had only a limited right in the said property which was subject to certain encumbrances and therefore Nazar Ali would not be said to have any absolute ownership under the general law or even u/s 27(3) of the IT Act. Thus Shri Nazar Ali did not have any right to transfer any valid title even executing a registered deed. As has already been stated the land in dispute contains two plots, one plot has been given by the State Government to Nazar Ali and another plot obtained by the appellant through encroachment, The AO found that in both the cases the appellant cannot be said to be the legal owner of the plots as there is no legal recognition to such possession of land. From the findings of the AO and facts on record I therefore find that the land in question though in possession of the appellant does not belong to the appellant as there was no clear title. In the case of CIT vs Podar Cement P. Ltd 226 ITR 625 (SC) the Hon'ble Apex Court had held that one of the most important rights of an owner is the right to exclude others. The property right is essentially a guarantee of the exclusion of other persons from the use or handling of the thing. To acquire possession of a thing it is necessary to exercise such physical control over the thing as the thing is capable of and to evince the intention to exclude others. It would thus be seen that where the possession of a property is acquired with a right to exercise such necessary control over the property acquired which it is capable of, it is the intention to exclude others which evinces an element of ownership.

In view of the above position I am inclined to accept the finding of the AO which has been broadly discussed hereinabove. I also agree with the AO that the facts and the position of the

cases would reveal that there is no asset in the possession of the appellant as of date and there is no factual or legal transfer of any asset as claimed by the appellant. Significantly in this regard, the appellant itself admitted that the property in question was written off in the books of accounts in the year 1979-80 thereby confirming the non existence of assets in the hands of the appellant. On this fact itself the appellant's case is distinguishable from the cases relied on by the appellant. Even coming to the argument that the amount involved is in any case a capital receipt not exigible to tax is also not tenable because for the consideration being termed as a capital receipt there must be either a tangible or intangible asset which in both the cases should exist. It is also a fact that the IT Act does not stipulate anywhere that the income or receipt sought to be brought to tax should be legal or genuinely sourced. The AO has rightly stated that all what the Act envisages is that if the person earns taxable income the same should be taxed as per the charging provisions of the Act. The only factual position as pointed out is that the assessee has physically received Rs 2,28,00,000/- and as the same is not a capital receipt against any asset belonging to the appellant, is to be taxed in the hands of the appellant. Sec. 14 specifies different heads of income and the last thereof is income from other sources which is residuary in nature. Since the appellant's receipt does not fit in any other heads the AO has rightly taxed the same under the head "Income from other sources". Accordingly, addition and taxation of Rs 2,28,00,000/- made by the AO is upheld. This ground is dismissed."

14. Aggrieved the assessee is on appeal before us and raised the following grounds:

"1. On the facts and in the circumstances of the case and in law, the CIT(A) erred in upholding the action of the ITO in taking an amount of ₹. 2,28,00,000/- received by the appellant on sale of property at Ujjain.

2. The Ld. CIT(A) erred in holding that there is no transfer of a capital asset in the case of the appellant.

3 The Ld. CIT(A) erred in holding that there is no part performance of the contract u/s. 53A of the Transfer of Property Act, 1882.

4. *The Ld. CIT(A) erred in observing that the land in question though in possession of the appellant does not belong to the appellant as there was no clear title and that there is no asset in the possession of the appellant as of date and there is no factual or legal transfer of any asset as claimed by the appellant.*

5. *The Ld. CIT(A) erred in holding that since the appellant's receipt does not fall under a specific head, it has to essentially be brought to tax under the residuary head 'Income from Other sources'.*

6. *The Ld. CIT(A) erred in rejecting the alternative contention that the receipt was not of income nature and was a capital receipt on the ground that there must be either a tangible or intangible asset for a receipt to be termed as a capital receipt.*

7. *On the facts and in the circumstances of the case and in law, the CIT(A) erred in upholding the action of the ITO in disallowing an amount of ₹. 10,46,836/- u/s. 14A.*

8. *Without prejudice to the above grounds of appeal, and in the alternative, the CIT(A) erred in not giving any findings in respect of following grounds of appeal.*

   Without prejudice to the above grounds of appeal, and in the alternative, the appellant prays that if at all any expenses are attributable to earning dividend income, then.

   (a) Mumbai office expenses attributable towards the ginning and pressing activities ought not to be attributed towards earning dividend income.

   (b) Out of the Mumbai office expenses of ₹. 38,11,820/- expenses aggregating to ₹. 1,10,561/- as shown in para 1.5 of the Statement of facts which have already been disallowed while computing the business income ought not to be considered for apportionment towards dividend income.

9. *On the facts and in the circumstances of the case and in law, the CIT(A) erred in upholding the action of the ITO in disallowing an amount of ₹. 9,045/- in respect of Employees' contribution to Provident Fund u/s. 2(24)(x) r.w.s. 36(1)(va)."*

15. The assessee had purchased the land in 1962 from Seth Nazar Ali. This land was lease hold land given to Seth Nazar Ali by government of Madhya Pradesh for establishing a factory. As he did not establish a factory the property was taken over by Additional Collector, Ujjain and no compensation was paid to the assessee. The property comprised of 2 plots of land of 27 Bighas and 14 Bighas respectively. The plot of land of 27 Bighas was acquired on the ground that the assessee not put to use as stipulated by the Government. The other plot of 14 Bighas was acquired on the ground that the assessee was merely a trespasser. The assessee had disputed the acquisition of said land and the same was pending in the Civil Court. The Civil Court in the suit for 14 Bighas had decided the issue in favour of the assessee and the other suit in respect of 27 Bighas has been decided against the assessee. Both government and the assessee preferred an appeal before the High Court of Madhya Pradesh. The Court has passed an interim order directing the parties to maintain status quo and even till date it would appear that the two suits are pending before the High Court. In the meanwhile, the assessee had entered into an agreement assigning his rights to third party for a consideration of Rs. 2,28,00,000/-. The issue is whether the amount received by the Assessee constitutes capital receipt.

16. We find that a similar issue had come up before the co-ordinate Bench in ITA No. 905/M/86 for A.Y. 1981-82 vide order dt. 28.12.1993. In that case, when the property was acquired by the Additional Collector, Ujjain, the assessee had claimed capital loss. In this connection the Tribunal held as under:

> *"We have heard the rival submissions in the light of material placed before us and precedents relied upon. The assessee purchased the property from the heirs of late Seth Nazarali in terms of a registered conveyance executed on 10th Sept., 1962. The property comprised of two plots of land of 27 bighas and 14 bighas respectively and the building is constructed thereon.*

The plot admeasuring 27 bighas was acquired by the M.P.Govt under the Land Revenue code vide the order of the Additional Collector dated 30th Jan., 1980. The acquisition was made as because originally the land was given by the Gwalior State to Seth Nazarali for running a cloth factory and there was a stipulation that in the eventuality the cloth factory being stopped, the land shall be reverted to the Government.

The land admeasuring 14 bighas and building thereon was acquired under the Land Revenue Code vide the order of the Thasildar (Nazul) dated 22nd March, 1980 on the ground that the company was a mere trespasser.

The possession of the land was taken over before 31st March, 1980 and no compensation was awarded to the assessee. The assessee preferred an appeal to the District Court against the order of the Additional Collector and filed a petition in the High Court against the order of the Thasildar. It made a prayer for re-acquiring the land and building or for grant of compensation.

While computing the total income, the assessee computed long term capital loss in respect of the aforesaid Ujjain property at Rs.5,42,098/-. Subsequently, vide letter dated 16th Jan, 1984 it substituted the fair market value of the said property as on 1st Jan1964 for the original cost and the capital loss in respect of the aforesaid property was re-computed at Rs.15,60,000/- and after setting off the long term capital gain on sale of other assets amounting to Rs.2,04,156/- and an amount of Rs.13,55,844/- was carried forward under Sec.74(1)(ii) of the Act.

The Assessing Officer disallowed the long term capital loss in respect of the aforesaid property on the ground that the assessee did not accept the order of the District collector/Tahsildar in respect of the acquisition of the said property and has filed an appeal there against. The ld. C.I.T.(Appeals) disallowed the capital loss in respect of the aforesaid property on the ground that title of late Seth Nazarali was not absolute and he could not confer a valid title even by executing a registered deed. Further, it has been stated by the Ld. CIT (A) that the question of computing capital gain or capital loss would depend on the outcome of the legal proceedings, pending before the Court.

In the case of Dollar Company (supra), the Hon'ble Madras High court has held that the right to compensation arose in the year in which the transaction of acquisition took place and what happened subsequently is only a quantification thereof. In the case of Topandas Kundanmal (supra) the Hon'ble Gujarat High court has held that if the nature of the receipt of the compensation amount is found to be in the nature of capital gains, the right to such income would accrue in the year in which the transfer is effected as laid down in Sec.45 of the Act. In the case of Ismallia Co-operative Housing Society Ltd. (supra), the Hon'ble Bombay High court has held that having regard to the consent terms, it

must be held that the assessee had a right or interest in the plot of land. That right or interest ceased when the said plot was acquired in 1954 long before the commencement of the previous year relevant to the assessment year 1971-72. The assessee obtained the right to get compensation and the amount of the compensation was determined when the consent decree was entered into in 1970. The transfer of the capital asset took place long before the previous year in question. Hence, the compensation amount was not liable to capital gains tax for the assessment year 1971-72.

We have noticed that in the cases cited by Shri Dastur, government acquired the property for public purpose and the question was in relation to the exact year of the accrual of income but the facts of the present case are different. The very title of the assessee is in dispute. In relation to plot admeasuring 27 bighas, the land was acquired on the ground that the property in question was granted to Seth Nazarali with specific condition that the property will be used for running of ginning or cloth mill and in the eventuality of violation of conditions laid down in the lease deed, the property shall be reverted to the government. Regarding plot of land admeasuring 14 bighas the property was acquired as the assessee was treated as a mere trespasser.

On these premises, the question arises whether the assessee had any right in such land and whether the extinguishment of such rights give rise to capital loss. We are reminded the famous dictum of law; 'nemo debet qua non habet'. The idea inculcated in the dictum is nobody can confer better right than he himself has. We find that the land was granted on lease with a specific condition. The ownership of Seth Nazarali was not absolute. It was subject to certain encumbrances. Ownership is a right over a determinate thing, in-definite in point of user, unrestricted in point of disposition and unlimited in point of duration. The right of Seth Nazarali was restricted in point of disposition. The grant was for a specific purpose. It is abundantly clear from the records that the government found that purpose for which the grant was made got frustrated. Consequently, the land was acquired. Similarly, in regard to 14 bighas, the assessee was found to be a trespasser. The law does not recognize the rights of a trespasser. Ordinarily, it is said that the possession is the nine point of ownership. The possessor has got right over the property and his right cannot be challenged by any one except the true owner. Undoubtedly, for some time, the assessee was the possessor of the land and building. But from the facts culled out from the records, it cannot be concluded that the possessory rights of the assessee bear any legal recognition. Unless such rights are protected by law to associate the word 'right' with the said type of possession will be a misnomer, since right is a legally protected interest.

Coming to the context of 'right', we find that it is laid down in a well known dictum; 'vbi jus ibi remedium'. This means wherever there is right, there is remedy and by resorting to the court of appropriate jurisdiction grievance can be redressed. A trespasser has got no remedy before any court of law.

Sec.45 of the Act provides for the computation of capital gains, it uses the word "transfer" of a capital asset in order to result in capital gains. Further, in Sec.2(47), it has defined "transfer", in relation to a capital asset, to include "the sale, exchange or relinquishment of the asset or the extinguishment of any rights therein or the compulsory acquisition thereof under any law". Firstly, it has specifically included "extinguishment of any rights" or "compulsory acquisition" of the asset within the definition of transfer for the purposes of Sec.45 to 55; and secondly, it has made the definition an "inclusive" definition. This definition gives an artificially extended meaning to the term by including within its scope and ambit two kinds of transactions which would not ordinarily constitute "transfer" in the accepted connotation of that word, namely, relinquishment of the capital asset and extinguishment of any right in it. The net is thus cast very wide and not only any profits or gains arising from every act by which property may pass from one person to another but also that arising specially from the sale, exchange or relinquishment of a capital asset or the extinguishment of any rights therein or the compulsory acquisition thereof was subjected to tax under Sec.45. The capital gains tax is attracted u/s.45 by "transfer" and nor merely by extinguishment of rights however brought about. Whatever the mode by which the transfer was brought about, the existence of the asset during the process of transfer is, sine……. Unless the asset existed, in fact, there could not be a transfer of it. The extinguishment of a right or rights should in any case be on account of its or their transfer in order to attract the provisions of Section 45.

When we examine the facts from this angle, we find it difficult to say that any transfer as alleged took place giving rise to capital gain or capital loss. We, however, do not express any opinion on this aspect, since the matter is sub-judice. In our opinion, the approach of the Ld. CIT(A) was most pragmatic. The question of computing capital gain or capital loss would depend on the outcome of the legal proceedings. In view of this, we are unable to accept the prayer made by Shri Dastur. We uphold the order of the Ld. CIT (Appeals).

In the result, appeal of the assessee stands dismissed"

Respectfully following the decision of the co ordinate Bench on the same issue, it is not possible for us to decide on the issue whether the assessee has assigned any interest in immovable property, because we are not certain whether he has any right in the immovable property. Further if there is a capital loss arising from acquisition of the property by the Government in an earlier year, there cannot be a

capital gains on transfer of the same property in a subsequent year. The character of the compensation received can be determined only when the assessee's rights in the immovable property are determined.

17. In the circumstances, respectfully following the decision of the co ordinate Bench, we set aside the issue to the files of the AO, to redo the assessment afresh, on the basis of the outcome of the litigation regarding the ownership of the property. This ground raised by the assessee is allowed for statistical purposes.

18. Ground No. 2 raised in this appeal is against the confirmation of disallowance u/s. 14A at ₹. 10,46,836/-.

19, The facts are that the assessee had not incurred any expenditure for earning exempt income. In the return of income, the assessee had not disallowed any expenditure u/s. 14A. During the course of assessment proceedings, the assessee was asked to furnish details of expenses incurred for earning exempt income and why the same should not be disallowed u/s. 14A.

20. The assessee vide letter dt. 13.10.2006 gave detailed submissions explaining that no expenses were incurred to earn the dividend income and no notional expenses ought to be attributed to earning dividend income. The assessee also submitted a statement showing breakup of expenses for the Mumbai office and the Wardha factor.

21. In para 4 of the assessment order passed u/s. 143(3), the disallowance under Sec. 14A has been computed at ₹. 10.46,836/- being proportionate expenditure on earning dividend income, estimated as follows:

Expenses of Mumbai Office - Dividend income

Total income

38,11,820 1,27,91,876

4,65,78,773

= ₹. 10,46,836/-

22. Further in the assessment order, out of the Mumbai office expenses of ₹. 38,11,820/-, the following amounts have already been disallowed while computing the business income.

	Particulars	Amount ₹.
(a)	Investment written off	5,186
(b)	Loss on sale of Units	538
(c)	Disallowance u/s. 43B Leave encashment	1,01,229
	Municipal tax	3,608
		1,10,561

The above addition of ₹. 10,46,836 has also been made while computing book profit u/s. 115JB.

23. The Ld. CIT(A) held as follows:

"I have gone through the facts of the case, submission made and also the assessment order. It is a fact that in the A.Y. 2001-02, in appellant's case the Tribunal has deleted the additions made by the AO u/s. 14A of the I.T. Act. However, I cannot agree with the appellant that the facts and circumstances and the method of addition is the same this year also. In the .A.Y. 2001-02, the AO made an adhoc disallowance of 5% of the total expenditures. However, in this year the AO has given a finding that the appellant derived income from different sources, but common books of accounts are maintained and therefore the expenses have to be apportioned between the different heads of income. This principle has been upheld by the S.C. in the case of Waterfall Estates Ltd. (219 ITR 563). While proceeding to

disallow part of the e4xpenditure u/s. 14A of the I.T. Act, the AO has also relied on the decision reported in 89 ITD 14 (Cal) and also in the case of Southern Petrochemical Industries (3 SOT 157) Chennai. As the AO has given a finding that the appellant has derived income from different sources, but common books of accounts are maintained thereof, not furnishing details of such expenditure pertaining to tax free dividend income. I find this year AO is justified in disallowing an amount of ₹. 10,46,836/- u/s. 14A on a proportionate basis. This ground is dismissed."

24. Aggrieved, assessee is in appeal before us.

25. We have heard the rival submissions and perused the relevant material on record. It is noted that the question of making disallowance u/s. 14A is no more *res integra* in view of the judgment of the Hon'ble Bombay High Court in Godrej & Boyce Ltd. Mfg. Co. Vs DCIT (2010) 238 ITR 81 (Bom) holding that the provisions of Sec. 14A are applicable in circumstances as are prevailing presently and the disallowance has to be worked out by the AO on some 'reasonable basis' and not Rule 8D. Under such circumstances, we set aside the impugned order and restore the matter to the file of the AO for deciding the quantum of disallowance, as per the afore-noted judgment, after allowing a reasonable opportunity of being heard to the assessee.

26. Ground No. 3 raised in this appeal is against the disallowance of Rs. 9,045/- being employees' contribution to Provident Fund u/s. 2(24)(x) r.w.s. 36(1)(va).

27. Before the Ld. CIT(A) the assessee submitted that the AO did not appreciate the fact that as mentioned in Annexure 3 of the Tax Audit report the amount of ₹. 9,045/- had been tendered by the assessee and cleared by the bank on 13.1.2004 i.e. well before the due date but was returned by the bank on 21.1.2004 because of a totaling error

pursuant to which the assessee paid the amount on 24.1.2004 within 3 days and accordingly the said amount should not have been disallowed by the AO. The assessee also stated in the alternative that the said amount ought to have been allowed as a deduction since it has been paid during the relevant previous year.

28. The Ld. CIT(A) held as follows:

> *"I have gone through the facts of the case and submission made and I have noted that there was a delay of depositing the P.F. contribution by the appellant. The provision of Sec. 36(1)(va) r.w.s. 2(24)(x) is very specific and if any assessee fails to deposit employee's contribution to P.F. within the due date,no deduction is allowable. In view of the above provision, I find the AO is justified in disallowing ₹. 9,045/- u/s. 36(1)(va) r.w.s. 2(24)(x) of the I.T. Act. This ground is dismissed."*

29. The Supreme Court in the case of CIT Vs Alom Extrusions Ltd (319 ITR 306) and the decision of the Delhi High Court in the case of CIT v AIMIL Ltd (229 CTR 418) wherein it has been held that payment of employees' contribution made before the due date for filing of the return cannot be disallowed u/s 43B. Therefore, we remit the issue to the file of the AO to decide in the light of the Supreme Court decision (supra).

28. In the result, the appeal filed by the assessee is allowed for statistical purposes.

Order pronounced on this 20th day of May, 2011

Sd/-	Sd/-
(R.S. SYAL)	(ASHA VIJAYARAGHAVAN)
Accountant Member	Judicial Member

Mumbai, Dated 20th May , 2011
Rj

Copy to :
1. *The Appellant*
2. *The Respondent*
3. *The CIT-concerned*
4. *The CIT(A)-concerned*
5. *The DR 'B ' Bench*

True Copy

By Order

Asstt. Registrar, I.T.A.T, Mumbai

		Date	Initials	
1	Draft dictated on:	5.05.2011		Sr. PS/PS
2.	Draft placed before author:	10.05.2011	_____	Sr. PS/PS
3.	Draft proposed & placed before the second member:	_____	_____	JM/AM
4.	Draft discussed/approved by Second Member:	_____	_____	JM/AM
5.	Approved Draft comes to the Sr. PS/PS:	_____	_____	Sr. PS/PS
6.	Kept for pronouncement on:	_____	_____	Sr. PS/PS
7.	File sent to the Bench Clerk:	_____	_____	Sr. PS/PS
8.	Date on which file goes to the Head Clerk:	_____	_____	
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10.	Date of dispatch of Order:	_____	_____	