

Alpha Associates Vs. Deputy Commissioner of Income Tax

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Court : Mumbai

Decided On : Oct-29-1999

Reported in : (2000)66TTJ(Mumbai)758

Appeal No. : ITA No. 4792/Bom/1995 29 October 1999 Asst. Yrs.: 1990-91

Appellant : Alpha Associates

Respondent : Deputy Commissioner of Income Tax

Advocate for Pet/Ap. : Shoba Jagtiani & Prakash Jotwani, *for the Assessee*
Waseem Arshad, *for the Revenue*

Judgement :

ORDER

R. P. Tolani, JM

This is assessee's appeal challenging levy of penalty under section 271(1)(c) at Rs. 1.30 crores imposed by Commissioner (Appeals) at twice the amount of tax sought to be evaded. The penalty was levied on the assessee consequent to the enhancement notice given to the assessee during the course of hearing of first appeal on the quantum of assessment. Briefly stated facts are as under :

2. The assessee is a partnership firm. For the relevant assessment year, the assessee has shown a loss computed under the head 'business income' amounting to Rs. 91,12,980 and a profit under the head 'capital gains' on the sale

of land to Mahanagar Telephone Nigam Ltd. (hereinafter called 'MTNL') amounting to Rs. 1,18,66,907. This amount was arrived at after claiming deduction under section 48(2) of the Income Tax Act, 1991 (hereinafter called the 'Act'), Thus the income disclosed for the year was under two heads, viz. business loss and the profit under the head capital gains. The net taxable income worked out by the assessee-firm. was at Rs. 26,16,299.

3. Before the assessing officer, two questions were raised for his consideration :

(i) 'Whether the assessee's claim that the land in question disposed of by the assessee is a capital asset and not a business asset i.e. stock in trade?

(ii) If the answer to Issue No. 1 is in the affirmative (it is the capital asset), then whether the assessee could bifurcate this sale consideration in respect of the capital asset into two parts-one in the nature of a capital receipt and the other in the nature of business receipts, thereby claiming deduction under section 48(2) and also business loss.'

4. The assessing officer treated the entire receipt as a one composite receipt in respect of transfer of capital asset. Being aggrieved, the assessee preferred appeal before the Commissioner (Appeals). The Commissioner (Appeals) examined the nature of right in property by applying the various legal tenets and found that the receipt in question cannot be construed to be a 'capital receipt', since it is not emanating out of the transfer of a capital asset. The entire income was treated by the Commissioner (Appeals) as the business income of the assessee.

5. The assessee received a sum of Rs. 4,66,56,233 from MTNL. This amount was bifurcated by the assessee into two parts, viz. Rs. 3,23,00,469 was treated as 'capital receipt' resulting from the transfer of land and the balance was treated as trading receipt. In doing so, the assessee had adopted the land valuation as done by the Director of Town Planning, who estimated the value at Rs. 900 per sq. mtr. In respect of land in undeveloped condition and Rs. 1,300 per sq. mtr. In developed condition.

6. The assessee paid a sum of Rs. 85,56,655 under agreement dated 28-1-1984 to Shri C. B. Sharma, in respect of the land admeasuring 52,925.27 sq. mts (equivalent to 44,261.09 sq. mtr.), at Powai, abutting Adi Sankaracharya Road.

7. Vide an agreement dt. 6th March, 1989, between the assessee, Shri Sharma, Bombay Metropolitan Regional Development Authority (hereinafter called 'BMRDA') and MTNL the rights in the said property were transferred to MTNL for a total consideration of Rs. 1,300 per sq. mtr., as fixed by the Director of Town Planning, Government of Maharashtra. The total area transferred to MTNL was 35,889.41 sq. mtr. Taking the clue from the valuation report as done by the Director of Town Planning that the land in undeveloped condition will cost Rs. 900 per sq. mtr., the assessee worked out the sale consideration of the land at Rs. 900 x 35,889.41 - 3,23,00,469. Besides receipts were calculated at the rate of Rs. 400 per sq. mtr. This amount of Rs. 400 is worked out on the basis of difference in the value of the land in undeveloped condition and developed condition. The assessing officer treated the entire receipt as a composite capital receipt and after allowing deduction under section 48(2), he assessed the capital gains at Rs. 73,89,169. The Commissioner (Appeals), on the other hand treated the entire receipt as- a composite business receipt and computed the income as under :

Rs.

Rs.

Total receipts

4,66,56,233

Less : Expenses incurred

Amount due to Shri C. B. Sharma as per letter dt. 28th Jan, 1984

85,56,655

Cost of development of land calculated by the assessing officer

2,33,11,240

3,18,67,895

1,47,88,338

8. The Commissioner (Appeals) thus enhanced the assessment by issuing a notice for enhancement of assessment during the appellants proceedings and after hearing the assessee. The assessment as enhanced by the Commissioner (Appeals) has been finally upheld by the Tribunal in Appeal No. 3653/Bom/1994. The reference application of the assessee under section 256(2) is pending before the Honourable Bombay High Court on this order of the Tribunal.

9. Commissioner (Appeals) initiated penalty proceedings under section 271(1)(c) and after giving the assessee an opportunity of being heard the above penalty has been imposed. It shall be pertinent to mention here that the assessee-firm is a group of firms and the other sister concerns are M/s Omega Associates and M/s Crescendo Associates etc. In these cases also the assessments were enhanced and penalty under section 271(l)(c) was also imposed similar terms and circumstances. At the time of hearing the learned counsel for the assessee took us through chronology of events and facts of the case which are summarised as under :

10. On 28-1-1984, the assessee-firm entered into an agreement with Shri C. B. Sharma, who was having rights in certain parcels of lands or ground situate laying and being at village Tirandaz admeasuring 52,925,27 sq. yds. equivalent to 44261.09 sq. mtrs. in the registration District and Sub-District of Bombay city and Bombay suburban and abutting Adi Shankaracharya. Road, Powai. By this agreement Shri C.B. Sharma agreed to allow and permit the appellant to developed the property and ultimately sale the said property to the assessee or the assessee's nominee on the terms and conditions mentioned therein. The impugned land in fact was acquired by the Maharashtra Government by proper notification dated 24-6-1977 under the Bombay Metropolitan Region- I Development Act, 1974. Intimation thereof was given by said Shri C. B. Sharma to the assessee. The agreement entered into between Shri C.B. Sharma and the assessee was subject-matter of proceedings under section 269 UL 3 of the Income Tax Act, 1961 whereby the appropriate authority under the Income Tax

Act, issued its no-objection for the sale of the said property by an order dated 21-1-1987. The learned counsel for the assessee submitted that by this duly executed written agreement, the vendor Shri C. B. Sharma executed irrevocable power of attorney in favour of the assessee to do various activities including representing before all the concerned authorities appointed under various Acts, to submit representation or proposal for development of the above property and to obtain sanction thereof, engage architects, surveyors, RC Specialists, etc. besides undertaking to convey the said property in favour of appellant or nominees in one lot or in number of lots or by portion as desired by the assessee. By this agreement, the assessee secured a bundle of rights including right to obtain conveyance subject to proceedings under various laws. The dominant object of the agreement was to secure a right of getting the conveyance executed.

11. Thereafter, an agreement dated 19-11-1986, was executed between Government of Maharashtra, Bombay Metropolitan Region Development Authority (hereinafter referred as BMRDA) and the said Shri Sharma by which the various land owners including Shri C.B. Sharma agreed to make available their land to the BMRDA as per the Government's notification and rules and regulation in this behalf.

12. Thereafter an agreement dated 6-3-1989, was executed between the Alpha Associates (first party), Shri C.B. Sharma & Ors. (second party), BMRDA (confirming party) and Mahanagar Telephone Nigam Ltd. (MTNL) (assignees). The relevant clauses of the agreement are as under :

'(i) Shri C. B. Sharma, party of the second part was possessed and seized of the land prior to 12-5-1983, (p. 4). This averment was made without considering the notification/order issued under section 10 of the ULCR Act, 1976 because under section 10 of the ULCR Act right in land might have vested in State Government earlier.

(ii) The Government of Maharashtra published a Notification No. BMRDA/2076/1100/CR 84/Part H/UD-4 dt. 12th May, 1983, in Government Gazette to acquire such land in pursuance of sub-section (1) to section 32 of BMRDA Act and accordingly various lands including the land Shri C. B. Sharma

vested in the State Government upon the publication of the said notification (p. 5). Under this agreement, Shri C. B. Sharma offered to the MTNL (assignees) to assign and transfer the benefits of the said agreement to lease dated 19-11-1986 in respect of the land in favour of MTNL (assignee) (p. 9),

(iii) BMRDA (confirming party) approved the terms and conditions of agreement and undertook to execute a final lease in favour of MTNL (assignees) upon the full payment of the consideration at the rate Rs. 1,300 per sq. mtr. to the appellant firm (party of first part) as authorised by Shri Sharma (party of the second part) (p. 12).

(iv) It was agreed between the parties that M/s Alpha Associates (appellant) and/or Shri C. B. Sharma shall forthwith hand over to the assignees (MTNL) quiet, vacant and peaceful possession of the said land on behalf of the confirming party, they being merely the licencees in respect of the said plot of land and on their doing so, all their claims and benefits and right in respect of the said land shall stand assigned transferred without any further act to be performed on their part and that they will have no right, title or interest whatsoever in the land thereafter.

(v) It was also agreed by the parties as mentioned para 11 (pp. 19 & 20) that notwithstanding the agreement dated 6-3-1989, the liability of the party of the First part and party of the second part the said tripartite agreement and the said agreement to lease both dated 19-11-1986 to provide the necessary infrastructure for the said land shall remain and continue and the part of the second part shall be liable and responsible for the same. As regards the liability and responsibility of the first and second part (M/s Alpha Associates and Shri C. B. Sharma) it was laid down that they will be responsible for providing the net work of infrastructure on the said land by providing, laying or installing water mains, sewers, storm water drains, street lights, roads in accordance with the norms and standards laid down by Municipal Corporation of Greater Bombay.

It was also laid down in para 14 (p. 21) of the agreement dated 6-3-1989, that the parties confirm that this transaction between the parties is in pursuance of the said tripartite agreement and the agreement to lease (both dated 19-11-1986). It was agreed by the party of the first part M/s Alpha Associates and the party of the second part Shri C.B. Sharma in para 17 of the agreement that in no event shall

be relieved of their obligation and/or liability under said tripartite agreement and the appellant and Shri C.B. Sharma have undertaken to fulfil all their obligations under the said tripartite agreement by providing requisite infrastructure under the said scheme in accordance with the standard laid down by the Municipal Corporation of Greater Bombay.'

The learned counsel for the assessee vehemently contended that all the above documents are in writing and are spread over a long period of time and constitute a series of events one leading to other. The conduct of the assessee clearly shows that what was contemplated to have purchased a bundle of rights including a right to get the conveyance of immovable property executed in favour of the assessee-firm. The agreements are valid agreements as per the canons of the law and no illegality can be attributed to them. The fact that the same was treated as transfer by the assessee is evident from the fact that it applied to the appropriate authority under section 269UL of the Income Tax Act which is a cumbersome procedure and applicable only to transfers of immovable property, Had the assessee carried an impression that transactions entered into it with Shri C. B. Sharma is not transfer of immovable property it would not have applied for such proceedings which were applicable only to transfer of immovable property. Further, the Appropriate Authority after considering the contents of the agreements and other relevant facts came to a firm conclusion that the documents represent transfer of immovable property and they gave a no-objection certificate working under a statutory provision which contemplates exercise of quasi judicial discretion. This goes to show the bona fides of the assessee that it considered in detail transactions as transfer of immovable property, The same was endorsed by the statutory authority i.e. Appropriate Authority constituted under statute to deal with transfer of immovable properties. The learned counsel further asserted that the very fact that by an agreement dt. 6th March, 1989, and lease deed dt. 27th April, 1989, the assessee company was made a party to the agreement signed by the BMRDA. The BMRDA is a statutory authority empowered to administer the law under BMRDA Act and Urban Land Ceiling Act. If there was any illegality about the relationship of the assessee and the vendor Shri C.B. Sharma, the authority would not have inducted the assessee as a party to the agreement. The agreements are finalised by the BMRDA after following due procedure of law and consulting its

legal advisors. BMRDA is not supposed to make any person a party of agreement without proper legal standi. Further as per this agreement BMRDA gave the payments also to the assessee. According to the learned counsel for the assessee word property under section 2(14) of Income Tax Act has the /vide amplitude. An emphasis was given on the word 'any kind'. The right of conveyance of immovable property is clearly held as a right in property. The learned counsel for the assessee took us further to the accounting entries made by the -assessee in this behalf. At the time of alleged acquisition/purchase of the land the assessee showed the amount as land account in the asset side. The assessee incurred expenditure from year to year for improvement of the said land from 1986-86, this expenditure has been capitalised to land account. On the date of transfer to MTNL the total of land account as mentioned above stood at Rs. 1,05,48,600 which comprises of original cost of Rs. 58,28,170 and cost of improvement Rs, 47,26,850.

13. The learned counsel for the assessee contended that the assessee bifurcated the above receipts into two parts i.e. the portion of sale of land worked out on the basis of schedule of MTNL as given under the head 'Capital gains' and the balance towards the development of land as per the above schedule as taxable under the head 'Profits from business and profession'. The assessee was under bona fide belief that as far as the amount of contract with MTNL to the extent of land is concerned it has to be covered under the chapter I capital gains' and as the assessee is doing the developmental work as per the specifications of MTNL the same is an adventure in the nature of trade and the same is to be treated under the head 'Profits from business and profession'. The return was accordingly prepared and valid return duly accompanied with audited accounts statement and all other necessary particulars complete in all respects were filed with the assessing officer. Assessment proceedings were lengthy wherein all the aspects of the assessment were properly looked into by the assessing officer. The assessing officer in framing the assessment made certain findings and observations which shall be pertinent to mention in this behalf :

'(4.5) The above judicial pronouncements have been gone through and the same found to be applicable to the facts and circumstances pertaining to the case of the

assessee-firm and moreover, on the basis of the facts discussed in the preceding para regarding the nature of property, length of ownership and holding, conduct and subsequent dealings, as also absence of frequency, multiplicity of transactions, the assessee's claim that the said land has all along been a capital asset for the assessee-firm and not a stock-in-trade is found to be in order.

(5.) Having determined the nature of the land in question, the next issue to be decided is whether the part of the sale consideration can be said to be a capital receipt and part of the same a business receipt. The assessee's claim in nutshell is that the sale consideration in respect of 35,960 sq. mtrs. of land to the extent of Rs. 900 per sq. mtrs. represents the capital receipt, whereas the balance consideration received at the rate of Rs. 400 per sq. mtrs. represents a business receipt for the land development activities. In order to determine the justification for such break-up of Rs. 1,300 per sq. mtrs. (which is the rate of sale consideration decided by the MTNL as per the agreement dated 6-3-1989), the assessee was given an opportunity to explain the position in this regard. In response to this, a detailed reply is placed on record.'

'From the above it is abundantly clear that the premium was fixed by the MTNL at the rate of Rs. 1,300 per sq. mtr. and the total amount of premium payable is also mentioned clearly at Rs. 4,67,48,000. This clearly goes to show beyond any shadow of doubt that the land was acquired by the MTNL at the composite rate of Rs. 1,300 per sq. mtr., and there is no sanctity in the bifurcation of the said premium into two parts i.e. Rs. 900 and Rs. 400 per sq. mtr. by the assessee, and subsequent ' bifurcation of the total sum of sale consideration of Rs. 4,67,48,000 also. Thus, the agreement clearly lays down the premium for which the land was to be acquired by the MTNL at Rs. 1,300 per sq. mtr. and does not mention anything about the break-up of the same into two parts.

(ii) As regards the assessee's claim that the MTNL acquired the land in the undeveloped condition, reference is hereby made to the MTNL's letter No. PLL-I-241, dated 30-5-1988, addressed to the assessee-firm by the Dy. General Manager (P) of MTNL. The relevant part reads as under :

'It has been approved- by the MTNL, Bombay for acquisition of 8 hectares of development land as against the offer of 34.9 hectares of land for construction of trading centre and staff quarters. Hence you are requested to offer only 8 hectares of land in developed condition....

From the above letter of MTNL, it is clear that it was the developed land which was always intended and was actually acquired by the MTNL from the assessee-firm. In the reply filed by the assessee it is claimed that the above letter dated 13-5-1988, shows that the land was acquired in the undeveloped land which is found to be factually incorrect. The other correspondence between the MTNL and the land officer of BMRDA vide letter dated 2-9-1986, and further letter dated 20-3-1987, is of little consequence in deciding whether it was the developed land which was sought to be acquired by the MTNL or otherwise. Although the above letter has also been relied upon by the assessee, the same are found to be not applicable to the issues in question, which happens to be the condition in which the land was proposed to be acquired.

(iii) Coming to the bifurcation of the total premium of Rs. 1,300 per sq. mtr. into two parts i.e. Rs. 900 and Rs. 400 per sq. Mtr. It is found that the entire controversy in this regard has been created by the assessee-firm, taking clue from the valuation reports of the Powai lands by the Dy. Director of Town Planning, Greater Bombay, Vide their letter dt. 18-12-1985. The said letter is addressed to the Metropolitan Commissioner, BMRDA, which mention the approximate valuation of Powai lands as follows : I

Rs.

'Plot-A

Undeveloped condition

900 per sq. mtr.

Plot-A

Developed condition

1,300 per sq. mtr.'

It is on the basis of this valuation that the assessee has bifurcated the premium rate of Rs. 1,300 per sq. mtr. to claim that Rs. 900 per sq. mtr. is towards the acquisition of a capital asset in the form of un-developed land and balance Rs. 400 per sq. mtr. is towards the development of the said land. However, it should be appreciated that on the basis of the said valuation, the assessee could not bifurcate the premium of Rs. 1,300 per sq. mtr. as the entire premium on which such bifurcation has been made is the claim that it was the undeveloped land which was sought to be acquired by the MTNL which as discussed above has been found to be factually incorrect. Therefore, the question of bifurcation of the said premium of Rs. 1,300 per sq. mtr. does not arise as it was the capital asset in the form of developed land, which was sought to be always acquired by the MTNL. Therefore, the capital asset in question which is sought to be undergoing a transfer is the developed land and not the undeveloped land as claimed by the assessee.

(5.4) On the basis of the main points brought out in the preceding para, it is clear that it was the developed land which was acquired by the MTNL, and it is therefore, this capital asset, i.e. the developed land, which is undergoing a transfer to the MTNL. Furthermore, the claim that a separate commercial job of carrying out the development of the said land was assigned to the assessee firm by the MTNL after acquisition in the state of undeveloped condition is also incorrect. This is so because the entire terms and conditions regarding the acquisition and subsequent development to be carried out by the assessee-firm are listed in the agreement dt. 6th March, 1989. In this agreement all conditions are stated, including that the MTNL is paying the price of Rs. 1,300 per sq. mtr. for the developed land and the assessee will complete the development activities subsequent to the handing over of possession in June, 1989. If it was a separate commercial job, the MTNL would have floated a tender and agreement for the selection of the developer would have been made in this regard. This has not so been done. This is because at the very outset it was the developed land, which was sought to be purchased by the MTNL. It may be mentioned that it was because of such facts that the entire premium of Rs. 4,67,56,233 has been paid by

27-4-1989. The meaning thereof is that the transaction of sale of the development of the capital asset is taken as complete and it is only an improvement in the complete and it is only an improvement in the condition of the land which is to be carried out by the assessee-firm subsequently.

15. 'In view of the foregoing discussion regarding the facts of the case (para 5 to 5.4 and regarding the legal positions in para 6.5 and 5.6), the assessee's claim of the said bifurcation of the premium price on the transfer of land is found to be untenable and is accordingly rejected. As a result, the total sale consideration will be taken as one composite receipt in respect of the transfer of the capital asset (developed land), and the various expenses which have been shown in the so-called P&L; a/c for the rejected business activity, have to be treated as cost of improvement to the said capital asset. Therefore, in nutshell, the entire sale consideration is treated as a capital receipt chargeable to tax under the head 'Capital gains' and the expenses as mentioned above will be considered as cost of improvement of the capital asset in the scheme of computation of the said capital gains.'

14. Thus the assessing officer accepted the stand of the assessee that the portion of capital gains offered by the assessee is to be treated under that head but however held that the assessee's claim to the extent of bifurcation and treatment of part of the consideration as profit from business and profession to be treated as capital gain. The assessment was accordingly framed. This shows that the assessing officer after perusing all the relevant agreements, materials, provisions of relevant laws, conduct of the parties and various legal propositions and after elaborate observations came to a firm conclusion that the entire consideration was capital gain. The assessment order establishes that the assessing officer acting under statutory function came to the conclusion that there was right of the assessee in the immovable property which could be transferred and the consideration of transfer was liable under the head 'Capital gains' even beyond what has been offered by the assessee under the 'Capital gains'. The assessing officer after such elaborate exercise was under the impression that the rights of the assessee in the said land and the consideration thereof tantamounts to right in property and the profits therefrom liable to be the income from capital gains. The

past conduct of the assessee in maintaining the account books, treating the value of the land as asset, execution of several agreements terming the same to be transactions of immovable property and it- is offered by way of return of income shows that the view adopted by the assessee though ultimately may have been found to be technically not full proof but the bona fide of impression about the nature of the head under which the same is to be offered for taxation is clearly established in favour of the assessee. The counsel further pointed out that assessee has not withheld any paper from the scrutiny of the department. In fact there is no observation whatsoever in the orders of the lower authorities holding that assessee has produced any wrong paper, withheld any information or concealed any paper. All the agreements are on record. All the receipts are on record, the same are duly reflected in the account books from time to time over a length of time.

15. The counsel of the assessee now came to the enhancement order of the Commissioner (Appeals). It was however contended that the bona fides of the assessee is further proved by the fact that it was aggrieved by the orders of the assessing officer to the extent of part of the consideration disclosed under the head 'Profits and gains from business'- Had the assessee an impression that the profits are chargeable under the head 'Profits from business and profession' it had got everything from the assessing officer by treating the entire amount under the head 'Capital gains' even beyond the claim of the assessee in the return of income. The Commissioner (Appeals) issued an enhancement notice and by a series of arguments/observations and technical interpretation came to the conclusion that the entire receipt is taxable under the head 'Income from profits & gains of business or profession'. The Tribunal also has upheld the view again on technical interpretation of the various terms and a very strict legal work out has been made. The assessee is in reference petition in the honourable Bombay High Court under section 256(2) on the Tribunal order. The penalty proceedings are independent and separate proceedings from assessment proceedings. The assessment proceedings do not constitute any conclusive evidence to prove that the income has been concealed or inaccurate particulars have been made. The learned Commissioner (Appeals) framed three aspects of the - matter to proceed with the penalty proceedings which are as under :

' Now the following issues arise for consideration :

(i) Whether the fact about sale of land stated by the appellant in the documents and statement of income enclosed with the return of income is correct? If this act is not correct then the appellant has furnished inaccurate particulars of income.

(ii) Whether the appellant has received amount of Rs. 3,23,00,469 from MTNL account of sale of land as shown in P&L; a/c and statement of computation of income If not, then the appellant has furnished inaccurate particulars of income.

(iii) Whether the appellant has received land development expenses of Rs. 43,55,764 from MTNL? If not, the appellant has furnished inaccurate particulars of income.'

16. On the basis of above factual observations the Commissioner (Appeals) further held that the assessee-firm. has furnished inaccurate particulars because of the following reasons :

'(i) The assessee-firm declared profit on sale of land in the return of income and other documents accompanying the return of income, whereas in fact neither the land was purchased by the assessee-firm nor sold by the assessee-firm. When the land was not purchased by the assessee-firm, it is not understood how the receipt on account of sale of land has been shown in the return of income and documents accompanying the return of income.

(ii) The appellant has received composite amount of Rs. 4,66,56,233 from MTNL on behalf of Shri C. B. Sharma. Bifurcation of this receipt of Rs. 4,66,66,233 into two parts viz., receipt of Rs. 3,23,00,469 on account of sale of land and Rs. 1,43,55,764 as land development expenses is not justified in any manner. The assessee-firm. has not sold the land to MTNL and, therefore, there is no basis for showing receipt of Rs. 3,23,00,469 on account of sale of land, Assessee-firm has also not received any amount on account of land development expenses from MTNL. Therefore, there is no justification for showing receipt of Rs. 1,43,55,764 on account of land development expenses. The assessee-firm has received only the composite receipt of Rs. 4,66,56,233 from MTNL on behalf of Shri C.B. Sharma,

as compensation for acquisition of land of Shri C. B. Sharma.

The fixation of price of developed land at the rate of Rs. 1,300 and undeveloped land at the rate of Rs. 900 by the Director of Town Planning does not provide any justification for bifurcating the compensation of land in two parts. The compensation of Rs. 4,66,56,233 was obviously bifurcated by the appellant for the purpose of tax evasion and such bifurcation was without any foundation in the case of assessee-firm.'

17. After drawing above inference, the Commissioner (Appeals) further held that :

'The assessee has not declared the true nature of the receipt from MTNL. The assessee-firm bifurcated the receipt into two parts. The assessee-firm declared the receipt of Rs. 3,23,00,469 as receipt on account of sale of land and receipt of Rs.1,43,55,764 on account of land development expenses. The MTNL has not given these amounts separately to the assessee and, therefore, the assessee purposely furnished the receipts in two parts for the purpose of claiming deduction under section 48(2) and avoid tax. Since the assessee was never the owner of the land the assessee could not have shown the receipt of Rs. 3,23,00,469 on account of sale of land was on account of gross negligence and fraud on the Revenue. Fraud has been considered as deliberate attempt on the part of the assessee for avoidance of tax. In the case of the assessee, the assessee was fully aware that the land was not purchased. Therefore, the question of sale of land does not arise. Yet the assessee-firm declared the fact of sale of land and receipt of Rs. 3,23,00,469 on account of sale of land in the return of income and documents and statements filed with his return of income. Even in balance sheet as at 31-3-1990 the assessee-firm. has shown land as its asset whereas in fact the assessee was never the owner of land.'

18. The Commissioner (Appeals) finally levied penalty by observing as under :

'I am therefore, satisfied that the assessee-firm has furnished inaccurate particulars of income and there is intention to defraud the Revenue. There is gross and wilful negligence on the part of the assessee-firm and penalty under section 271(1)(c) is leviable.

(22) Now the question arises as to how the penalty is to be quantified. According to learned counsel of the assessee penalty is to be calculated with reference to the amount of tax sought to be evaded by reason of the concealment of particulars of income or the furnishing of inaccurate particulars of such income. It is stated that for the purpose of calculating the penalty the income declared by the assessee has to be considered because no tax is evaded by the assessee on the taxable income declared by him. This argument of the learned counsel seems to be reasonable. The penalty imposed under section 271(1)(c) is computed as under :

Rs.

Total business income

1,47,88,338

Less : Income declared by the assessee.

27,53,998

1,20,34,340

Tax sought to be evaded on income of Rs. 1,20,34,349 by treating the assessee firm as unregistered firm under section 271(2) of the Income Tax Act

Rs.

(i)

Tax on income of Rs. 1,20,34,340 sought to be evaded by treating the firm as URF

64,75,755

(ii)

Minimum penalty-100% of tax sought to be evaded

64,75,755

(iii)

Maximum penalty-300% of tax sought to be evaded

1,94,27,265

(22) After taking into consideration all the facts of the case and gross and wilful neglect of the assessee-firm in furnishing inaccurate particulars of income, I impose penalty of Rs. 1.30 crores on the assessee which is equal to twice the amount of tax sought to be evaded. The assessing officer is directed to issue demand notice and challan and collect the amount of penalty imposed. '

19. The learned counsel further submitted before us that all relevant documents, accounts, agreements, receipts etc. necessary to support the claim of the assessee were enclosed along with the return. During the course of assessment whatever further information, documents, etc, were required by the assessing officer, they were duly supplied. There is no observation by the assessing officer/CIT that the assessee did not furnish or partially furnished or wrongly furnished and details either along with the return of income or as demanded thereafter. The learned counsel vehemently contended that :

'It is argued by the learned counsel that the appellant has not concealed the particulars of income, or furnished inaccurate particulars of such income. It is stated that the assessee has disclosed the income in the following manner by he assessee .

Chart to show that the assessee has not concealed the particulars of his income or furnished in accurate particulars of such income.

Rs.

Rs.

(i)

Income disclosed by the assessee :

In the P&L; a/c on p. 3 of the paper book filed before Commissioner (Appeals)

By sale of land

3,23,00,469

Less : Cost of land

85,56,655

2,37,43,814

Receipts from MTNL

1,43,55,764

3,80,99,578

Less : Cost of development of land

2,33,41,240

1,47,58,338

(ii)

As per assessment order

Income under the head capital gains

Sale consideration @ Rs. 1,300 for 35960 sq, mts.

4,66,56,233

Less : Cost of land

85,56,655

Cost of improvement

2,33,41,240

3,18,67,895

1,47,88,338

(iii)

Income as per Commissioner (Appeals)

Income under the head business

Total receipts

4,66,56,233

Less : Expenses incurred

Amount due to Shri as per Lr. Dt. 28-1-84

85,56,655

Cost of development of land as calculated by the assessing officer

2,33,41,240

3,18,67,895

1,47,88,338

The only difference is that the appellant has declared its income under two heads, viz., partly under the head 'Profits and gains of the business or profession' and partly under the head 'Capital gain' with income was fully assessed by the assessing officer under the head 'Capital gain' and reversed by the Commissioner (Appeals) under the head 'Profits and gains or profession' which order of the Commissioner (Appeals) has been upheld by the Honourable Tribunal.

It is material to note that the income declared and assessed is the same and there is no change in the quantum of income as declared by the appellant. According to the learned counsel no inaccurate particulars of income were furnished and all the particulars of income were furnished and all the particulars of income furnished by

the assessee were accepted. If the assessee claimed expenses higher than that were generally incurred, that would be said to be a case of furnishing inaccurate particulars of income. If the assessing officer, or Commissioner (Appeals) had during the course of proceedings found that there were certain receipts not accounted for or that there were certain expenses which were not claimed. In the instant case no charge of furnishing of inaccurate particulars of income can be made against the assessee as both the assessing officer and the Commissioner (Appeals) have examined and accepted the figure of receipt and payment and expenses.'

20. The learned counsel for the assessee relied on catena of decisions, the copies of which have been placed on record and relied on the same. Some of the important case laws along with the proposition are as under :.

'(1) Gopal C. Sharma v. CIT : [1994]209ITR946(Bom)

Lands purchased by assessee from his father, C.B. Sharma which were subject matter of acquisition proceedings. departmental authorities held the view that the acquisition compensation to be taxed as Revenue profits. Bombay High Court held that transaction of compulsory acquisition of land did not constitute adventure in the nature of trade.

(2) CIT v. Vijay Flexible Containers : [1990]186ITR693(Bom)

Dalmia case (Delhi) has been dissented with has been relied upon by Commissioner (Appeals) in para 19.2 of penalty order.

(3) J. Gala Enterprises Estate & Investment (P) Ltd. & Anr. v. M. Hassan, CIT & Ors. : [1995]216ITR110(Bom)

Held by Bombay High Court that even though lands were subject to ULC Act however an agreement to transfer is not contrary to law or avoid.

(4) The Fruits & Vegetable Merchants Union v. The Delhi Improvement Trust : [1957]1SCR1

That the word vest is a word of variable impart. It does not have a fixed connotation. It may vest in title or it may vest in possession or it may vest in a limited sense.

(5) Tribunal's order dt. 28-5-1990 in -the case of Bombay Dyeing (P.B.I.pp. 289 to 304)

Sale proceeds were taxed partly as capital gains and partly as business receipts,
Cases relied upon for cancellation of penalty.

(6) CIT v. Mussadilal Ram Bharose : [1987]165ITR14(SC)

If the assessee maintained certain types of books of accounts and honestly believed the same to be sufficient for the true ascertainment of his profits. It could be considered as making an estimate of income on a proper basis and it could not be said that in filing the return of income as reflected in the books of account, the assessee was grossly or wilfully negligent, must less frau

(7) CIT v. Khoday Eswara & Sons : [1972]83ITR369(SC)

Proceedings under section 271(1)(c) being penal in character and penalty cannot be levied solely on the basis of reasons given in the original order of assessment.

(8) CIT v. N. A. Mohammed Haneef : [1972]83ITR215(SC)

It was established in the assessment proceedings that there was a discrepancy between the amount shown in the balance sheet and the information and figures obtained from the bank.

Held -. There was no basis for coming to a firm conclusion that the assessee deliberately supplied wrong particulars and therefore, penalty could not be imposed.

(9) CIT v. Devidayal Aluminium : [1988]171ITR683(All)

Penalty under section 271(1)(c) was cancelled on the ground that the assessee's claim for melting loss or wastage was rejected, so long as the claim was bona fide

it cannot be held to be false. If the assessee had furnished all details and did not conceal anything, it could not be said that he was not acting bona fide only because his explanation was not accepted.

(10) CIT v. P. M. Shah : [1993]203ITR792(Bom)

In penalty proceedings the provisions of the statute must be strictly construed. Penalty cannot be levied under the Expln. to section 271(1)(c) in the absence of any specific intention under that Explanation.

(11) CIT v. Dharamchand Shah : [1993]204ITR462(Bom)

In the absence of invoking the Explanation specifically the burden would remain on the Revenue to bring the assessee's case within the mischief of the main provisions.

(12) CIT v. Late G.D. Naidu & Anr. : [1987]165ITR63(Mad)

No question of any liability to penalty would arise when the assessee was merely contending for a particular position contrary to the view taken by the Income Tax Officer .

(13) Burmah Shell Oil Storage & Distributing Co. India Ltd. v. Income Tax Officer : [1978]112ITR592(Cal)

The rejection of the contentions raised by the petitioner cannot lead to the conclusion that there has been any concealment of the particulars of income by the petitioner or that the petitioner has furnished inaccurate particulars of income. The act of raising the legal contention which the petitioner raised before the Income Tax Officer and which according to the petitioner are sound and tenable are still being pursued by the petitioner in appropriate proceeding could not constitute fraud or willful neglect on its part.

(14) Income Tax Officer v. Burmah Shell Oil Storage & Distributing Co. : [1987]163ITR496(Cal)

Raising of legal pleas or urging question of law for getting relief to which a person might be entitled to or which a person might consider himself to be entitled could never constitute fraud or gross or willful neglect on the part of any such person.

(15) CIT v. Amar Nath (1997) 143 CTR (All) 148

Where two views are possible it is not a fit case for penalty.

(16) CIT v. Indian Metals & Ferro Alloys Ltd. (1994) 117 CTR (Ori) 378 : (1995) 11 ITR 35

There a claim was made with reference to several decisions of the High Court and a view of the Tribunal, it could not be said that the claim was bona fide.

(17) CIT v. Shri Pawan Kumar Dalmia : [1987]168ITR1(Ker) .

Even after the addition of the Expln. to s. 271(l)(c) conscious concealment is necessary. The presumption under the Expln. to section 271(1)(c) can be displaced by the assessee providing that the failure to return the correct income did not arise from any fraud or gross or willful neglect and the quantum of proof would be that required in a civil case namely preponderance of probabilities.

(18) Yasmin Properties (P) Ltd. v. Assistant Commissioner (1993) 46 ITD 331 (Bom)

When there is a bona fide claim made by the assessee and all the facts relating thereto and material to the computation had been disclosed by the assessee it was neither a case of concealment nor the case of deemed concealment within the provisions of Expln. 1 to section 271(1)(c)

(19) Geo Sea Foods v. Income Tax Officer (1991) 37 ITD 223 (Cochin T M. case)
The learned Third Member agreed with the Judicial Member in cancelling the penalty relying on Calcutta High Court in the case of Burmah Shell Oil Storage & Distributing Co. v. Income Tax Officer (1978) 112 ITR 592 (Cal).

(20) Dy. CIT v. Texmo Industries (1996) 54 TTJ (Mad) 571 : (1995) 53 TTD 370 (Mad)

The penalty was cancelled where the assessee had made a claim for depreciation and investment allowance which was not allowed. The Tribunal cancelled the penalty holding at p. 373 that simply because the legal claim has not been averted it cannot be said that assessee concealed any income.'

21. The learned counsel for the assessee summarised the arguments by saying that the transactions of immovable property have been entered into by valid contracts in which the transactions have been referred to as pertaining to immovable property. No illegalities have been found with the agreement. The assessee has accounted for the cost of land in the account books as an asset thereby treating the same to be the investment in an asset. These accounts have been submitted by the assessee from time to time along with the earlier turns of income which have been accepted by the department without any question. In the impugned year the assessee has divided the receipts from TNL, a portion into capital gains and portion into development activities based on the bona fide belief of the assessee and the interpretation as per the assessee which resulted from the transactions. The assessee's interpretations reinforced by the fact that the assessing officer not only accepted the version of the assessee out the capital gains as returned but however went further to hold after elaborate examination of documents and arguments that the portion attributed to income from profits and gains of business represents capital gain. This statutory order passed by statutory authority goes to show that the belief harboured by the assessee that its investment in immovable property and the income from other part of it falls under the head 'Capital gains'. This is reintroduced by order of Tribunal under section 269UL. The conduct of the assessee in challenging the order of the assessing officer further shows that the bona fides and belief reposed by the assessee in its judgment was strong and it was aggrieved by the portion of the order of the assessing officer holding the business income to the capital gain. Appeal was preferred. Commissioner (Appeals) reversed the findings of the assessing officer and held that the entire transactions represent business transactions. The assessee went to Tribunal which after elaborate examination and observation of the documents came to a technical finding that the receipts constitute income from business and profession. This series of litigation shows that the stand taken by the assessee about the capital gains was not false or totally unfounded or

unsubstantiated. Consequently it cannot be held at all that the assessee has concealed any particulars of income or furnished inaccurate particulars of income. The charge of Commissioner (Appeals) that the assessee has furnished inaccurate particulars is contained in two paragraphs in para 16 above. According to this the first charge is that the assessee-firm, neither purchased the land nor sold the same. Series of litigation and the fact that the appellate authority hold the same as transactions of immovable property, assessing officer in the first instance accepted that the same is capital gains. It clearly shows that there was a strong possibility that the assessee and the assessing officer were harbouring under the bona fide impression that the transactions entered into by the assessee was of purchase of land or rights therein. The second charge is that the assessee has bifurcated the receipts and since the assessee-firm has not sold the land to MTNL and the assessee has not received any amount on account of the land development expenses from MTNL, this allegation of the Commissioner (Appeals) again stands refuted by the document submitted that the assessee has furnished complete details of the expenditure incurred against the receipt shown from the MTNL against development charges.

Besides the MTNL Tariff clearly suggests that the contracts made with various parties constituted two parts-one was of purchase of rights in land and the other was towards the cost of development. The rates were given. All these details are of public knowledge in the form of tender clauses agreements etc. The assessee was diligent to file all the necessary documents to substantiate its claim. Therefore as far as charge of inaccurate particulars against the assessee is concerned, the same does not survive as the assessee submitted every piece of paper relevant to compute the income therefrom. On the basis of the material supplied by the assessee if there are two opinions possible and if the assessee computes the income on the one which is beneficial to do, it cannot be charged as an act of furnishing inaccurate particulars. There is no ban under the Income-tax law to say that the assessee should recourse to the interpretation which entails a higher levy of taxes. Having furnished all the relevant details and having furnished computation in accordance with the provisions of Income Tax Act assessee has to invoke some interpretation, its account books, the state of affairs as it believes to be and the expert guidance. After undertaking all these exercise if the assessee

on the basis of material furnished formulates the interpretation which is filed with the return and open to the scrutiny of the department and in fact the scrutiny of the first instance substantially accepted the stand of the assessee, by no stretch of imagination it can be presumed that the assessee has concealed the particulars or furnished inaccurate particulars merely because heads of taxability of income has been changed by the Commissioner (Appeals) thereby resulting in higher tax payable by the assessee. Based on the material supplied by the assessee it cannot be said that this state of affairs needs automatic levy of penalty. The Commissioner (Appeals) has not brought on record any new evidence, material, documents beyond what has been submitted by the assessee, Enhancement in assessed tax has been occasioned by change in heads of taxing the income. The assessee has furnished details of particulars of income chargeable to it and is clearly a matter of classification under which head it is to be taxed. As already mentioned, the assessee because of the presence of these materials established a strong interpretation that the receipts as returned by it are taxable under these heads only. The Commissioner (Appeals)'s findings that the heads are to be changed and the finally upholding of the same by the Tribunal does not lead to an irresistible/automatic conclusion that the penalty under s, 271(l)(c) is leviable. For imposition of penalty all the facts are to be reconsidered and on the basis of reconsideration an objective assessment of the entire material is to be made and after making such objective assessment and objective finding has to be given about the culpability of the assessee in concealing income by furnishing inaccurate particulars of income. Series of above facts clearly establishes that there was no culpability (sic) on the part of the assessee to conceal the income, furnish inaccurate particulars of income. As a matter of fact whatever findings have been attributed against the assessee have only resulted in changing of the heads of income under which the income declared by the assessee is to be assessed There is no change in the amount of income disclosed but because of the change in heads of taxability, the assessment has finally upheld by the Tribunal has resulted into increase in tax.

None of the authorities below has discovered new material, documents or any information beyond what the assessee had submitted. Therefore, the entirety of the situation clearly shows that the assessee has neither concealed income nor

furnished any inaccurate particulars of income and there was no intention to commit any of such defaults as have been contemplated in the penalty order.

22. The learned departmental Representative on the other hand, vehemently argued that after considering all the documents and agreements and aspects of the matter, the Commissioner (Appeals) has given an unmistakable finding which has been upheld by the Tribunal that the contracts entered into by the assessee ab initio transfers no right of immovable property in the hands of the assessee. The observations of the Commissioner (Appeals) in this behalf are as under

'(14.2) I have carefully considered the facts of the case and argument of the learned counsel as mentioned in the preceding paras the appellant has shown the amount of Rs. 3,23,00,469 on account of sale of land. No such amount was separately received by the assessee on account of sale of land. In fact the assessee was never the owner of the land. The land was never purchased by the assessee from Shri C. B. Sharma. The facts and circumstances and legal position were such that even Shri C. B. Sharma could never have sold the land to the assessee despite the agreement dated 28-1-1984, executed by the assessee with Shri C. B. Sharma. This fact has been confirmed by the Hon'ble Tribunal also. All the facts relevant to the acquisition of the land i.e. that the land was under acquisition and notice under section 10 of the ULCR Act was issued by the Competent Authority. It was also brought to the notice of the assessee by Shri C.B. Sharma that the State Government has issued a Notification No. BMRDA/2676/1100/CB-84/Part.II/UD-4, dated 12-5-1983, under section 32 of Bombay Metropolitan Regional department Act. Once such a notice is issued the land vested with the State Government from the date of notification. Therefore, the land had already been vested with the State Government on 12-5-1983, in consequence of notification issued under the BMRDA Act. In these circumstances the assessee could never have purchased the land from Shri C.B. Sharma. The assessee could never have acquired any right, title or interest in the land. Therefore, the sale of land shown by the assessee in the computation statement of income as well as P&L; a/c on credit side was totally false. When the land was never purchased by the assessee-firm, the declaration about sale of land in the return of income and documents enclosed with the return of income has to be

considered as false. Since the assessee had never purchased the land nor acquired any right, title or interest in land the question of sales of the land by the assessee can never arise. Therefore the amount of receipt shown by the assessee on account of sale of land amount to furnishing of inaccurate particulars of income because the income which was clearly business income has been shown as receipt on account of sale of land for the apparent purchase of evading income tax.

(14.3) The assessee worked out the sale consideration of the land at Rs. 900 X 35,88,941 = Rs. 3,23,00,469 by taking clue from the valuation report of the Director of Town Planning that the compensation for land in undeveloped condition comes to Rs. 900 per sq. mtr. The business receipts were furnished by the assessee at the rate of Rs. 400 per sq. mtr. This amount of Rs. 400 was worked out by the assessee on the basis of difference in the value of the land in undeveloped condition. There was no justification for bifurcating the amount received by the assessee in the two separate receipts because the appellant was never the owner of the land. For all practical purpose the assessee-firm has declared itself the owner of the land in the return of income as well as statement of income by declaring the receipt of Rs. 3,23,00,469 on account of sale of land and calculated capital gain thereon whereas the fact subsequently found clearly revealed that the assessee was never the owner of the land and the assessee had no right, title or interest in the land at any time. The assessee could never have acquired any right, title or interest in the land also because Shri C. B. Sharma was not the owner of the land on 28-1-1984. From the dated 28-1-1984 (date of execution of agreement by the assessee with Shri Sharma) to the date of filing the return of income the assessee never became the owner of the land or acquired any right, title or interest. But the assessee chose to declare the amount of Rs. 3,23,00,469 as receipt on account of sale of land which clearly shows the intention of assessee to evade income-tax by furnishing inaccurate particulars. In view of the various facts and circumstances discussed in my order dated 25-2-1994, and the order of the Hon'ble Tribunal (dated 27-2-1994) (para 25 to 29 on p. 14 to 18) it is clear that even Shri C. B. Sharma did not have any right, title or interest in land as claimed by the assessee because Shri C.B. Sharma has no power or right to transfer the land to any person, Therefore the description of sale of land and

receipt of Rs. 3,23,00,469 on account of sale of land was absolutely false and amounted to furnishing inaccurate particulars of income. Inaccurate particulars of income or concealment of particulars of income are more or less of the same nature. Because in the cases furnishing of inaccurate particulars means concealment of accurate particulars. The appellant declared receipt of Rs. 3,23,00,469 on account of the sale of land. This fact has been found false as appellant has never purchased any land and the question of sale does not arise. The appellant declared receipt of Rs. 1,43,764 on account of land development expenses. The fact remains that the appellant did not receive any amount from MTNL on land development expenses, The Hon'ble Tribunal vide order dated 27-10-1994, has confirmed in para 29 (p. 19) that the entire amount of consideration was business receipts. Under these circumstances, it cannot be stated that the assessee-firm has furnished accurate particulars of income. By bifurcating such particulars and facts which does not exist, the assessee-firm has even intentionally furnished inaccurate particulars of income.'

These observations of the Commissioner (Appeals) in the penalty order clearly establish that the assessee never purchased any land from Shri C. B. Sharma and the computation of statement of income and P&L; a/c as returned by the assessee were incorrect and false as the land was never purchased by the assessee and no such right was transferred in its favour. The amount of receipt shown by the assessee as capital gains and bifurcation thereof amounts furnishing inaccurate particulars of income and this bifurcation of particulars and facts which do not exist has been furnished by the assessee with clear intention. The plain and simple reading of the various agreements will go to show that the documents did not propose transfer in right in the immovable property as contemplated by the assessee and for this there can be no second opinion. The findings of the Tribunal in quantum assessment clearly show that no such right or interest in the immovable property could have acquired by the assessee by these agreements. The agreements have been conveniently drafted. The vendor had no property to transfer. Therefore, the assessee could not have purchased any interest in the immovable property from a vendor without title. The learned departmental Representative on the decision in the case of CIT v. P.M. Shah (supra) and in the case of CIT v. Dharamchand Shah (supra) regarding invoking of the proviso. The

learned departmental Representative was further justified for invoking of Expln. 1, It was further argued that onus of proof lies squarely on the assessee to prove that it has not concealed/furnished any inaccurate particulars of income. Reliance was placed on the decision of Supreme Court in the case of Jeevanlal Shah (1995) 214 TTR 244 (SC). The sum and substance of the learned counsel for the Revenue was that it is incumbent on the assessee not only to furnish proper accounts but the computation of income as well shall be furnished in such a way that it represents the correct nature of the transactions and their assessability under the correct head. The assessee had maintained the accounts in such a way by drawing such interpretation from the agreements which do not exist from plain reading of the agreement. Therefore, the accounts submitted by the assessee were intentionally made up to suit the interest of the assessee. Besides the assessability under the head 'Capital gains' and bifurcation of receipts by taking a part into income from business and profession has been deliberately done by the assessee to avoid payment of tax and thereby benefited itself from simply applicable provisions of law. The detail observations of the Commissioner (Appeals) were relied by the departmental Representative.

23. The learned counsel for the assessee in reply submitted that the accounts were prepared over a length of time. No defects with accounts have been found by the lower authorities. assessing officer in the original assessment not only upheld the view of the assessee that the sale of land is assessable under the head 'Capital gains' but also went further what the assessee has shown profits from business and profession under the head 'Capital gains'. Therefore, the inaccuracy or falsity attributed by learned departmental Representative or the Commissioner (Appeals) towards the accounts and computation of the assessee is without any basis. A plain reading of the agreement will indicate that there existed transfer of right in immovable property and it is only after a long drawn process to litigation and technical observation of facts and documents that a finding has been reached that the income of the assessee is taxable under the head 'Profits and gains from business and profession'. Further reliance was placed on the decision in the case of Gopal C. Sharma (supra) and on the decision of Calcutta High Court in the case of Burmah Shell Oil Storage & Distributing Co. (supra).

24. We have considered the rival submissions and perused the material available on record. The admitted facts are that whatever documents and information was necessary for filling the return of income or finalisation of the assessment or in the matter for finalisation of assessment in the wake of enhancement notices served by the Commissioner (Appeals), the assessee supplied all the required information. The penalty as finally imposed, assessment as finally framed and the basis of penalty is having the foundation of the material, which has been supplied by the assessee as referred to above. No new information or discovery has been made by the lower authorities, The assessee filed a return of income splitting the receipt from MTNL into two parts. A portion declared under the head 'Income from capital gains' and portion declared under the head 'income from business and profession'. The basis of working of receipts and bifurcation thereof was supplied by the assessee. All the necessary agreements, correspondence, etc. were duly furnished. The accounts of the assessee were prepared over a period of time wherein the land purchased from Shn C.B. Sharma has been shown as asset. The subsequent accounts and returns have been prepared accordingly and the department did not raise any objection thereon at the earlier occasion. The assessing officer while framing the assessment came to a conclusion that the portion of the receipts shown by the assessee as chargeable under the head 'Income from capital gains is correct. However, he converted part of receipts shown by the assessee as income from business and profession also into capital gains. Thereby clearly holding that an the receipts of the assessee in this behalf were to be taxed under the head 'Capital gains'. We shall mention here while framing the assessment the assessing officer is discharging a statutory function and proceeding of a quasi-judicial authority. As far as assessment is concerned, the mistakes committed by such authority may have bearing on the quantum assessment but we should not forget that while imposing penalty the objective finding given by quasi-judicial authority has some importance in penalty proceedings. We have seen the assessment orders and we see that no penalty proceedings have been initiated by the assessing officer under section 271(l)(c) while framing the original assessment and in any of the group cases of the assessee i.e. the assessee and sister concerns M/s Omega Associates and Crescendo Associates The position which emerges assessment is that a fault was

found by the assessing officer in the computation of the assessee which had the effect that not only the capital gains offered by the assessee were accepted but at the same time business income shown by the assessee was converted into income from capital gain which resulted into assessment at a higher tax. This assessment of the assessing officer also was made after elaborate observations and compliances and detailed findings which are contained in the elaborate order of the assessing officer. Here ultimately though the income tax levied on the assessee was at a substantially higher figure but the treatment of income from one head to other by the assessing officer was not considered fit to initiate penalty under section 271(1)(c). This gives an impression that though there was substantial increase in the assessed tax due to change of head of income but the assessing officer laboured under the impression that this has been occasioned by the interpreting the documents and particulars of the income of the assessee in a different manner on the basis of documents and material supplied by the assessee. So we have a side of the affairs where one statutory authority in the similar situation upholds the arguments of the assessee and strengthens it further by holding the business income of the assessee into income from capital gains. Thereby at this level the assessee's claim that the land in question was assessable under the head 'Capital gains' was accepted by the department, In fine, the transactions pertaining in these lands created a right in the immovable property was agreed in principle by the assessing officer although on part of income a different interpretation was applied.

25. Now we have another picture under the same circumstances and on the basis of same material. The Commissioner (Appeals) enhances the income in appellant proceedings after following the due procedure of law and comes to conclusion that the assessee would not have bought any right in the immovable property as it has claimed, by arriving at the finding based on perusal of the material supplied by the assessee and arriving at a different interpretation of the same material. The Tribunal upholds the order of the Commissioner (Appeals) in quantum assessment.

26. The Commissioner (Appeals) goes to support from the findings of the Tribunal that the assessee could not have purchased interest in the immovable property on

the basis of agreements which have been supplied by the assessee and goes further to say that as the agreements are not capable of transferring any right in immovable property thereby assessee's claim that it purchased the land from Shri B. S. Sharma is false. As far as further charge of furnishing inaccurate particulars is concerned, the same is concluded on the basis that by bifurcating the receipts from the MTNL the assessee has done the same without justification and the same was done for the purpose of tax evasion. Penalty has been levied mainly on these ingredients. We have considered the rival submissions and perused the materials available on record. As we have mentioned in the foregoing paragraph that on the same material the assessing officer in original assessment held that the income from 'Capital gains' shown by the assessee has to be taxed under the head and went further ahead that the business receipts shown by the assessee by splitting the consideration also pertains to such capital gains and the same was taxed under that head by holding that the entire receipts of the assessee were from transfer of right/interest in the immovable property detailed above, therefore the entire receipt -was taxable under the head capital gains. We have before us two divergent opinions of the two authorities. Finding of both the authorities have been arrived at from the material supplied by the assessee with the return of income and during the course of assessment in the form of agreements, submissions, account statement, books maintained and all other relevant materials supplied by the assessee. There is no charge on the assessee that the assessee has supplied wrong documents or failed to produce any information. The matter boils down to situation that the assessee furnished return of income together with relevant material, the materials based on past conduct of the assessee in the form of accounts maintained. The assessee furnished the return income by filing computation of income. The computation of income is otherwise proper and in consonance with the account books maintained by the assessee. The assessing officer in principle endorsed the computation part of the assessee that the lands purchased in question constitute a capital asset and the receipt thereof are taxable under the head 'Capital gains'. Further he goes to convert the business income of the assessee into capital gains and thereby levying more income-tax. No penalty under section 271(1)(c) however is initiated in these proceedings. Suffice to say that though there was a shift in the assessability of the assessee from one head of

income to other head still, it was not deemed to be fit for initiation of penalty proceedings for the reasons whatever may have existed in the minds of the assessing officer who was acting under the quasi-judicial authority. The Commissioner (Appeals) enhances the assessment on the same material which is upheld by the Tribunal. While levying penalty no further material or information has been brought by the Commissioner (Appeals) on record. He has based the imposition of penalty solely on the interpretation of the documents as finally upheld by the Tribunal and thereby presuming that the action of the assessee in filing the computation was intentionally false. We are of the view that looking into the state of affairs, the maintenance of accounts by the assessee over a period of time, proceeding under section 269UL filing of the return and the treatment of the assessing officer, the charge of falsity of the accounts cannot be attributed to the assessee. Besides the charges of the Commissioner (Appeals) that the assessee by bifurcating the receipts has furnished inaccurate particulars also cannot be sustained because what the assessee believed to be state of affairs that was duly returned and it was a of interpretation which can vary from an authority to authority as is in the present case, the assessing officer in the original assessment holding it to be capital gains and in enhancement of assessment the Commissioner (Appeals) held it not to be capital gains. The Commissioner (Appeals) has further held that when the land was never purchased by the assessee declaration of sale in the return of income and the documents enclosed in the return of income has to be considered as false. We are unable to subscribe to these findings of the Commissioner (Appeals) as we find merit in the counsel of the assessee that assessee believed and was acting under bona fides while harbouring under the belief that the transactions constituted purchase of land and purchase of interest in the land. On this belief, the accounts were prepared over a period, computation was prepared and return of income was filed. The basis of enhancement in this case is a change of interpretation based on the similar facts and material from business income to capital gains as done by the assessing officer and then from capital gains to business income as done by the Commissioner (Appeals). The assessee believed a portion of the receipts to be capital gains and portion to be business income. assessing officer interpreted the matter in such a way that he treated the entire income from capital gains. The Commissioner (Appeals) on the

same material and facts interpreted the matter in a different manner and held the entire income from business and profession. From the entire record we are unable to see that the assessee has not furnished any material or any material found by it has been considered to be false or wrong. Whatever can be attributed is the computation of income filed by the assessee. We are of the view that the assessee has a right to interpret the set of documents in a particular manner based on the as if the same pertaining to the particular income. Clarification of the heads of income should not be arbitrary, it should have a reasonable nexus with the material which is relevant for arriving at such conclusion. In order to During the assessee in the ambit of section 271(1)(c) in such case it is to be proved that the assessee's conduct is false or the material supplied by it is to mislead the Revenue authorities and lower them into a wrong selection of heads. In the present case though we agreed that on merits the assessee's interpretation has not been accepted by the Commissioner (Appeals) and the Honourable Member of the Tribunal but the same has been done after consideration of a series of divergent pleas and after meticulous interpretation of technical provisions of Transfer of Property Act, various clauses of the agreements and statutory requirements of Urban Ceiling Act and acquisition laws- But all the findings have been given based on the material and information supplied by the assessee. There is no allegation on the assessee that it did not provide a particular material or it provided false material. In the absence of such allegation and with the presence of fact that the enhancement of assessment was resulted a change in interpretation about assessability of the receipts under particular heads of income. The same is not free of any inherent disputes. Interpretation of assessing officer is just opposed to the findings of the Commissioner (Appeals) which has been upheld by the Tribunal. When the different interpretation exists in the hierarchy of the assessing machinery it will be unreasonable to hold that the assessee's interpretation and choice about taxability of income under particular head carry an element of falsehood or intention of deliberately furnishing inaccurate particulars.

27. In view of the above, we are of the view that the penalty imposed on the assessee is not justified. Consequently we delete the penalty under section 272(l)(c).

28.Theappealoftheassesseeisallowed.

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