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

\+ **INCOME TAX APPEAL NO. 45/2000**

Date of order: 9th November, 2011

COMMR. OF INCOME TAX DELHI & ORS..... Appellants
Through Mr. Kamal Sawhney, Sr. Standing Counsel.

versus

B.K.BHAGAT ..... Respondent
Through Nemo.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V.EASWAR

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not ?
3. Whether the judgment should be reported in the Digest?

SANJIV KHANNA, J.:

By order dated 16th February, 2001, the following question of law was framed:

> "Whether the Tribunal was right in holding that Section 10(3) of Income Tax Act, 1961 was applicable and that the amount received for surrender of tenancy rights was not assessable to tax under Income Tax Act, 1961?"

2. The appeal relates to assessment year 1993-94 and the

substantial question of law mentioned above pertains to taxatio of Rs.65,51,000/-, which was received by the respondent-assessee on surrender of tenancy rights in property bearing No. 56, Jor Bagh, New Delhi on 7th May, 1992. The assessee had acquired tenancy rights in the property in 1979 from the owner Radha Krishan & Sons. The consideration for surrender of tenancy rights was paid pursuant to an agreement between the respondent-assessee, the owner-landlord Radha Krishan & Sons and M/s SCAL Investment Limited, Madras.

3. The Assessing Office in his order dated 12th March,1997 held that the aforesaid amount was actually compensation received by the assessee for vacating the premises in favour of the purchaser and was taxable under Section 10(3) of the Income Tax Act, 1961 (Act, for short) as receipt of casual and non recurring nature, exceeding Rs.5,000/-. He relied upon the judgment of the Allahabad High Court in ***CIT versus Gulab Chand***, (1991) 192 ITR 495. The assessee had specifically raised and submitted before the Assessing Officer that tenancy rights were capital in nature and could not be taxed as a casual receipt. The Assessing Officer rejected the said contention holding that surrender of tenancy rights was not taxable/chargeable under Section 45 of the Act and, therefore, has to be considered as

income assessable to tax under Section 10(3) of the Act. Th Assessing Officer distinguished the judgment of this Court in the case of ***Bawa Charan Singh versus CIT***, (1984) 149 ITR 29, on the ground that it relates to taxation under the head "capital gains" and not taxability under Section 10(3) of the Act. The Assessing Officer did state or hold that the receipts were also taxable under the head "capital gains".

4. On appeal filed by the assessee, the Commissioner of Income Tax (Appeals) (CIT(A), for short) held that Rs.5,000/- was exempt and not taxable under Section 10(3) but the balance amount of Rs.65,46,000/- was taxable as casual income under Section 10(3) of the Act.

5. The assessee succeeded before the tribunal, where it was held that Section 10(3) is not applicable and the judgment of the Special Bench in the case of ***J.C. Chandhiok versus Deputy CIT***, 69 ITD 75 was followed.

6. The question of law raised in the present appeal is no longer res integra and is covered by the judgment of the Supreme Court in the case of ***Commissioner of Income Tax versus D.P. Sandu Bros. Chembur (P) Ltd.***, (2005) 2 SCC 584 wherein dealing with the similar issue, it has been held as under:-

"7. That the tenancy right is a capital asset, the surrender of the tenancy right is a "transfer" and the consideration received therefor a capital receipt within the meaning of Section 45 has not been questioned before us and must in any event be taken to be concluded by the decision of this Court in *A. Gasper* v. *CIT*. Normally the consideration would therefore be subjected to capital gains under Section 45.

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11. ……It is contended that a tenancy right is not a capital asset of such a nature that the actual cost on acquisition could not be ascertained as a natural legal corollary.

12. We agree. A tenancy right is acquired with reference to a particular date. It is also possible that it may be acquired at a cost. It is ultimately a question of fact. In *A.R. Krishnamurthy* v. *CIT* this Court held that it cannot be said *conceptually* that there is no cost of acquisition of the grant of the lease. It held that the cost of acquisition of leasehold rights can be determined. In the present case, however, the Department's stand before the High Court was that the cost of acquisition of the tenancy was incapable of being ascertained. In view of the stand taken by the Department before the High Court, we uphold the decision of the High Court on this issue.

13. Were it not for the inability to compute the cost of acquisition under Section 48, there is, as we have said, no doubt that a monthly tenancy or leasehold right is a capital asset and that the amount received on its surrender was a capital receipt. But because we have held that Section 45

cannot be applied, it is not open to the Department to impose tax on such capital receipt by the assessee under any other section. This Court, as early as in 1957 had, in *United Commercial Bank Ltd.* v. *CIT* held that the heads of income provided for in the sections of the Income Tax Act, 1922 are mutually exclusive and where any item of income falls specifically under one head, it has to be charged under that head and no other. In other words, income derived from different sources falling under a specific head has to be computed for the purposes of taxation in the manner provided by the appropriate section and no other. It has been further held by this Court in *East India Housing and Land Development Trust Ltd.* v. *CIT* that if the income from a source falls within a specific head, the fact that it may indirectly be covered by another head will not make the income taxable under the latter head. (See also *CIT* v. *Chugandas and Co.*)

14. Section 14 of the Income Tax Act, 1961 as it stood at the relevant time similarly provided that "all income shall, for the purposes of charge of income tax and computation of total income, be classified under the following [six] heads of income", namely:

(*A*) Salaries;

(*B*) Interest on securities;

(*C*) Income from house property;

(*D*) Profits and gains of business or profession;

(*E*) Capital gains;

(*F*) Income from other sources unless otherwise provided in the Act.

15. Section 56 provides for the chargeability of income of every kind which has not to be excluded from the total income

under the Act, only if it is not chargeable to income tax under any of the heads specified in Section 14 Items (A) to (E). Therefore, if the income is included under any one of the heads, it cannot be brought to tax under the residuary provisions of Section 56.

16. There is no dispute that a tenancy right is a capital asset the surrender of which would attract Section 45 so that the value received would be a capital receipt and assessable if at all only under Item (E) of Section 14. That being so, it cannot be treated as a casual or non-recurring receipt under Section 10(3) and be subjected to tax under Section 56. The argument of the appellant that even if the income cannot be chargeable under Section 45, because of the inapplicability of the computation provided under Section 48, it could still impose tax under the residuary head is thus unacceptable. If the income cannot be taxed under Section 45, it cannot be taxed at all. [See *S.G. Mercantile Corpn. (P) Ltd.* v. *CIT*]

17. Furthermore, it would be illogical and against the language of Section 56 to hold that everything that is exempted from capital gains by statute could be taxed as a casual or non-recurring receipt under Section 10(3) read with Section 56. We are fortified in our view by a similar argument being rejected in *Nalinikant Ambalal Mody* v. *S.A.L. Narayan Row*, ITR at pp. 432, 435.

18. The appeal is accordingly dismissed without any order as to costs."

7. We may note here that in the present case the Revenue has not made out a case and it was not their contention that the

cost of acquisition of the tenancy was capable of ascertainmer This is not the case made out in the assessment order or in the order passed by the CIT(A) and this was also not the contention of the Revenue before the tribunal. Therefore, in an appeal under Section 260A of the Act, this question or issue does not arise for consideration and decision. In similar circumstances, in ***D.P. Sandu Bros. Chembur (P) Ltd.*** (supra), it has been held that the cost of acquisition of tenancy was capable of ascertainment but the Revenue had taken a contrary stand that the cost of acquisition was incapable of being ascertained. This is also the case of the Revenue in the present case.

8. In view of the aforesaid, the question of law is answered against the Revenue and in favour of the assessee.

The appeal is accordingly disposed of.

SANJIV KHANNA, J.

R.V. EASWAR, J.

NOVEMBER 09, 2011
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