



\$~R-26

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **INCOME TAX APPEAL No. 171/2001**

Date of decision: 18th July, 2014

COMMISSIONER OF INCOME TAX Petitioner
Through Mr. Balbir Singh, Sr. Standing
Counsel with Mr. Abhishek Singh Baghel,
Advocates.

versus

SHARDA KOCHHAR Respondents
Through

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE V. KAMESWAR RAO

SANJIV KHANNA, J. (ORAL):

This appeal by the Revenue under Section 260A of the Income Tax Act, 1961, (Act, for short) pertains to assessment year 1988-99. By order dated 9th January, 2002, the following substantial questions of law were admitted for adjudication:-

“(A) Whether the amount of Rs.72,80,752/- received by the assessee during the previous year relevant to assessment year 1988-89 is taxable in view of the provisions of Section 45(5) (b) of the I.T. Act?

(B) Whether the Ld. ITAT is correct in law in holding that the decision of the Hon'ble Supreme Court in the case of C.I.T. Vs. Hindustan Housing and Land Development



Trust Ltd., (161 ITR 524) has not been overruled or superceded by the provision of Sec. 45(5) of the Act?”

2. The respondent-assessee is legal representative of one B.K. Kochhar. The said B.K. Kochhar had filed original return on 27th July, 1988 declaring business income of Rs.17,693.60. Subsequently, two notices, under Section 148 dated 8th March, 1991 and 20th March, 1991, were issued and served on 17th March, 1991 and 27th March, 1991, respectively. These notices were, however, challenged on the ground of legality. The Assessing Officer thereafter issued another notice dated 26th March, 1993, under Section 148, after recording reasons in the order sheet dated 15th December, 1992. The assessee filed a return revising/enhancing his income to Rs.23,750/-. The return mentioned that the assessee had received compensation of Rs.72,80,752/- against a bank guarantee and Rs.1,20,466/- as initial compensation with interest. It was claimed that these amounts were not taxable as the question of enhancement was pending challenge before the Supreme Court. The Assessing Officer rejected the said submission and brought to tax Rs.72,80,752/- and Rs.1,20,466/- observing that the assessee's father late H.R. Kochhar had *Bhumidari* rights in agricultural land at village Masudpur, Delhi, which was acquired by the Government under Section 4 of the Land Acquisition Act, 1894. Not satisfied with the compensation granted, proceedings for enhancement of compensation were initiated and enhanced compensation



was awarded by the Additional District Judge, Delhi on 7th July, 1987. (

further appeal, by an interim order dated 9th March, 1988, the Delhi High Court directed Union of India to pay enhanced compensation awarded on 7th July, 1987, upon furnishing a bank guarantee. Against the said direction, Union of India had preferred appeal before the Supreme Court, which was pending at the time when the assessment order was passed. The Assessing Officer held that the decision in the case of *Commissioner of Income Tax Vs. Hindustan Housing and Land Development Trust*, (1986) 161 ITR 524 (SC) cannot apply in view of the provisions of newly enacted Section 45(5) inserted with effect from 1st April, 1988. He accordingly computed the total taxable income as Rs.67,71,560/-.

3. The respondent-assessee did not succeed in the first appeal, but the Tribunal by the impugned order dated 25th September, 2000 accepted the assessee's contention that Rs.72,80,752/- was not taxable in the year in question, *inter alia*, relying upon an earlier order dated 23rd July, 1998, passed in the case of K.K. Kochhar. Copy of this order dated 23rd July, 1998 has been placed on record. The said order takes note of the decision of the Delhi High Court in the case of *Harish Chander*, 154 ITR 473 and *CIT Vs. Devki Nand*, 138 ITR 225 and it was held that Section 45(5) would not be applicable as the money had been paid on furnishing of bank guarantee etc.

4. The issue in question is in fact covered by the decision of the



Supreme Court in *Commissioner of Income Tax Vs. Ghanshyam (HUI* , ,

[2009] 315 ITR 1. In the said decision, the Supreme Court noticed the object, purpose and why Section 45(5) was enacted with effect from 1st April, 1988, in the following words:-

“Section 45(1) of the 1961 Act speaks about capital gains arising out of “transfer” of a capital asset. The definition of the expression “transfer” is contained in Section 2(47) of the 1961 Act. It has very wide meaning. What is taxable under Section 45(1) of the 1961 Act is “profits and gains arising from a transfer of a capital asset” and the charge of income tax on the capital gains is a charge on the income of the previous year in which the transfer took place. Capital gain(s) is an artificial income. It is created by the 1961 Act. Profit(s) arising from transfer of capital asset is made chargeable to income tax under Section 45(1) of the 1961 Act. From the scheme of Section 45, it is clear that capital gains is not an income which accrues from day-to-day during a specific period but it arises at a fixed point of time, namely, on the date of the transfer. In short, Section 45 defines “capital gains”, it makes them chargeable to tax and it allots the appropriate year for such charge. It also enacts a deeming provision. Section 48 lays down the mode of computation of capital gains and deductions therefrom.

The question which arises for determination is—why was Section 45(5) inserted by the Finance Act, 1987, w.e.f. 1-4-1988? Under Section 45(1), profits or gains arising from the transfer of a capital asset effected in the previous year is taken to be the income of the previous year in which the transfer took place and such profits are chargeable to tax under the head “capital gains”. However, it was noticed that in cases where capital gains accrued or arose by way of compulsory acquisition, the additional compensation stood awarded in several stages by different appellate authorities which necessitated rectification of the original assessment at each stage. To provide for rectification of the assessment of the year in which capital gains was originally assessed, Section 155(7-A) was also introduced. However, as stated above, since additional compensation under the Land Acquisition Act, 1894 was awarded in several stages



multiple rectifications had to be made to the original assessment which cause great difficulty in carrying out the required rectification and in effecting the recovery of additional demand. It was also noticed that repeated rectifications of assessment on account of enhancement of compensation by different courts often resulted in mistakes in computation of tax. Therefore, with a view to remove these difficulties, the Finance Act, 1987 inserted Section 45(5) to provide for taxation of additional compensation in the year of receipt instead of in the year of transfer of the capital asset. Accordingly, additional compensation is treated as “deemed income” in the hands of the recipient even if the actual recipient happens to be a person different from the original transferor by reason of death, etc. For this purpose, the cost of acquisition in the hands of the receiver of the additional compensation is deemed to be *nil*. However, the compensation awarded in the first instance would continue to be chargeable as income under the head “capital gains”, in the previous year in which the transfer took place. At this stage, it may be noted, that, Section 45(1) stood further amended (w.e.f. 1-4-1991) so as to include reference to Section 54-H and Section 45(5)(a) which, as stated above, stood amended (w.e.f. 1-4-1988). The scope and effect of the above amendments made in Section 45, as also insertion of Section 54-H, by the Finance Act, 1991, has been elaborated in the following portion of Departmental Circular No. 621 dated 19-12-1991:

“Streamlining the provisions relating to exemption for roll over of capital gains—

Capital gains are deemed to be the income of the previous year in which the transfer giving rise to the gains takes place except where otherwise provided. Accordingly in the case of compulsory acquisition of assets, the capital gains included in the compensation, as originally awarded, is charged to tax in the year in which the transfer by way of compulsory acquisition takes place, but additional compensation is brought to tax only in the year in which it is received.

It has been brought to the notice of the Government that in case of compulsory acquisition of assets, at times there is a considerable gap between the dates of acquisition and payment of compensation. The result is that the existing provisions of capital gains' taxation operate harshly inasmuch as the affected persons are unable to avail of the exemption for roll over of capital gains, within the



specified time period through investment in specified assets.

Section 45 of the Income Tax Act has, therefore, been amended to provide that capital gains arising from the transfer of the capital asset by way of compulsory acquisition under any law shall be charged to tax in the previous year in which the compensation is first received.”

5. Reference was made to Section 54H, which was enacted retrospectively with effect from 1st April, 1988 to provide relief to assesseees in cases where they had utilised the compensation for purchase of another specified asset to save capital gains tax. Provisions of the Land Acquisition Act, 1894 were explained and the earlier decision of the Supreme Court in the case of *Hindustan Housing and Land Development Trust* (supra) was elucidated and held to be no longer applicable in the following words:-

“In the case of *Hindustan Housing** certain lands belonging to the assessee company, which was in the business of dealing in land and which maintained its account on mercantile system, were first requisitioned and then compulsorily acquired by the State Government. The Land Acquisition Officer awarded Rs 24,97,249 as compensation. On appeal the arbitrator made an award at Rs 30,10,873 with interest at 5% from the date of acquisition. Thereupon, the State preferred an appeal to the High Court. Pending the appeal, the State Government deposited in the Court Rs 7,36,691 being the additional amount payable under the award and the assessee was permitted to withdraw that additional amount on furnishing a security bond for refunding the amount in the event of the said appeal being allowed. On receiving the amount, the assessee credited it in its suspense account on the same date. The question was: whether the additional amount of Rs 7,24,914 could be taxed as income on the ground that it became payable pursuant to the award of the arbitrator. The Tribunal held that the



amount did not accrue to the assessee as its income and was, therefore, not taxable in Assessment Year 1956-1957. The financial year in which the additional amount came to be withdrawn ended on 31-3-1956. It was held by this Court that although the award was made on 29-7-1955, enhancing the amount of compensation payable to the assessee, the entire amount was in dispute in the appeal filed by the State. Therefore, there was no absolute right to receive the amount at that stage. It was held that if the appeal was to be allowed in its entirety, the right to payment of enhanced compensation would have fallen altogether. Therefore, according to this Court, the extra amount of compensation of Rs 7,24,914 was not income arising or accruing to the assessee during the previous year relevant to Assessment Year 1956-1957. Therefore, in our view, the judgment of this Court in *Hindustan Housing** is not applicable to the present case.”

6. Thereafter, interpreting to Section 45(5), which was inserted by the Finance Act, 1987 with effect from 1st April, 1988 and subsequently amended retrospectively with effect from 1st April, 1988 by the Finance Act, 1991, it was observed Section 45(5) was an overriding provision and took care of the situation where the capital gains arose from transfer of a capital asset being a transfer by way of compulsory acquisition and the compensation for such transfer was enhanced in stages by a court, tribunal or authority. In such situation, the capital gains so arising with effect from assessment year 1988-89 has to be dealt with as under:-

“(i) the capital gains computed with respect to the compensation awarded in the first instance would be chargeable as income under the head “capital gains” of the previous year in which such compensation or part thereof was first received; and

(ii) amount by which *compensation or consideration is*



enhanced or further enhanced by the court, tribunal or authority is to be deemed income chargeable under the head “capital gains” of the previous year in which such amount is received by the assessee.

For the said purpose, the cost of acquisition is to be taken as *nil* [see Explanation (i)]. Also, where the enhanced compensation is received by any person, other than the transferor by reason of the death of the transferor or for any reason, the amount of such additional compensation or additional consideration is to be deemed to be the income of the recipient of the previous year in which such amount is received by him.”

7. The Supreme Court clarified that Section 45(5) deals with transfers by way of compulsory acquisition and not by way of sales etc.
8. Computation of the addition made by Assessing Officer on account of enhanced compensation is as under:-

“Taxable income is computed below:		
Income as declared:		23,750
Capital gain on acquisition of land:	10,55,893	
Less: deduction u/s 48	<u>10,000</u>	
	10,45,893	
Less 50% of the balance	<u>5,22,946</u>	
		<u>5,22,947</u>
		5,46,697
Value of solatium (30%)		3,16,768
Additional amount @ 12%		5,52,902
Interest u/s 28		<u>53,55,190</u>
	Taxable income	67,71,557
	Rounded off	<u>Rs 67,71,560”</u>

9. Whether or not the solatium, addition in the amount at rate of 12 p.a and interest u/s 28 of Land Acquisition Act, 1894 was/is compensation, has been also answered. Referring to section 45(5) of the act, in Ghanshyam (supra) it has been observed:-



“33. It is to answer the above questions that we have analysed the provisions of sections 23, 23(1A), 23(2), 28 and 34 of the 1894 Act. As discussed hereinabove, section 23(1A) provides for additional amount. It takes care of increase in the value at the rate of 12 per cent. per annum. Similarly, under section 23(2) of the 1894 Act, there is a provision for solatium which also represents part of enhanced compensation. Similarly, section 28 empowers the court in its discretion to award interest on the excess amount of compensation over and above what is awarded by the Collector. It includes additional amount under section 23(1A) and solatium under section 23(2) of the said Act. Section 28 of the 1894 Act applies only in respect of the excess amount determined by the court after reference under section 18 of the 1894 Act. It depends upon the claim, unlike interest under section 34 which depends on undue delay in making the award. It is true that "interest" is not compensation. It is equally true that section 45(5) of the 1961 Act refers to compensation. But, as discussed hereinabove, we have to go by the provisions of the 1894 Act which awards "interest" both as an accretion in the value of the lands acquired and interest for undue delay. Interest under section 28 unlike interest under section 34 is an accretion to the value, hence it is a part of enhanced compensation or consideration which is not the case with interest under section 34 of the 1894 Act. So also additional amount under section 23(1A) and solatium under section 23(2) of the 1894 Act forms part of enhanced compensation under section 45(5)(b) of the 1961 Act. In fact, what we have stated hereinabove is reinforced by the newly inserted clause (c) in section 45(5) by the Finance Act, 2003, with effect from April 1, 2004. This newly added clause envisages a situation where in the assessment for any year, -the capital gain arising from the transfer of a capital asset is computed by taking the -compensation or consideration referred to in clause (a) of section 45(5) or, as the case may be, enhanced compensation or consideration referred to in clause (b) of section 45(5), and subsequently such compensation or consideration is reduced by any court, tribunal or other authority.”

10. In view of the aforesaid legal position, question no (A) above is answered in affirmative and in favour of revenue and against the assessee.

Addition made by assessing officer was in accordance with law i.e. Section



45(5) of the Act. Question (B) is answered in favour of revenue and again the assessee. Decision in *Hindustan Housing and Land Development Trust Ltd.* (supra) was/is no longer applicable in view of the statutory amendment with effect from 1st April, 1988. The appeal is disposed of, with no orders as to cost.

SANJIV KHANNA, J.

V. KAMESWAR RAO, J.

JULY 18, 2014
NA