* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
\+ **ITA No. 198/2001**

Reserved on: 24th July, 2014
% **Date of Decision: 28th August, 2014**

Commissioner of Income Tax - VIII, New Delhi **....Appellant**
Through Mr. Sanjay Kumar, Jr. Standing Counsel for Mr. Kamal Sawhney, Sr. Standing Counsel.

Versus

Gulab Sundri Bapna **…Respondent**
Through None

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

SANJIV KHANNA, J.

1. This appeal by the Revenue which relates to assessment year 1988-89, was admitted for hearing vide order dated 18th May, 2004 on the following substantial questions of law:-

> "1. Whether the ITAT is justified in law in deleting the addition of Rs.59,63,410/- being the amount of enhanced compensation received by the assessee during the year?
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> 2. Whether the amount of Rs.59,63,410/- 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?
>
> 3. Whether the ITAT is correct in law that no capital gains arose to the assessee on receipt of

compensation because of the acquisition of land in which the assesse had tenancy rights only?"

2. The facts, as noticed by the Income Tax Appellate Tribunal (Tribunal, for short), are that land admeasuring 24.1 acres in village Arkpur, owned by the Government and managed by the Land Development Officer was given on lease in favour of M/s Delhi Pottery Works (P) Ltd., vide registered lease deed dated 19th March, 1924. Late Kesar Singh and his sons took on sub-lease 19.1 acres of land and constructed factory premises and installed machinery thereon under the sub-lease dated 20th March, 1942. The sub-lease was for a period of 17 years and rent fixed was Rs.500 per month. Respondent assessee Late Gulab Sundri Bapna, now represented by her legal heirs, was wife of Late Kesar Singh. M/s Delhi Pottery Works (P) Ltd., went into liquidation and the leasehold rights were transferred in favour of Harnam Kaur, widow of Ram Singh Kabli, in March, 1949 and thereafter rent payable under the sub-lease was paid to her. Notification under Section 4 of the Land Acquisition Act dated 15th September, 1962, was issued in respect of land in Village Arkpur including the land under sub-tenancy and occupation of the respondent assessee. This was followed by a notification under Section 6 of the Act dated 5th December, 1968. In January, 1975, two awards were made by the Land Acquisition Officer fixing compensation for the acquired land. The respondent assessee handed over vacant possession of land under sub-lease on 30th March, 1976 and of the factory building on 17th September, 1976. In the meanwhile, in 1964, Harnam Kaur had executed a Trust Deed whereby Sardarni Harnam Kaur Trust was assigned rights in the land.

Thus, there were three claimants and the District Judge, in l decision dated 20th April, 1983, held that the compensation for acquisition of land and building should be distributed inter se in the following manner:-

A.	Union of India	25% of the award money.
B.	Smt. Harnam Kaur Trust	Rs.1,20,000/- being 20 years capitalization of monthly rent of Rs.500/-.
C.	Smt. G.S. Bapna(Respondent assessee)	The Balance amount.

3. Aggrieved by the quantum awarded, respondent assessee filed a reference under Section 18 of the Land Acquisition Act, which was decided by the Additional District Judge on 20th February, 1987. Award for enhanced compensation was challenged by the Union of India before the Delhi High Court, in an appeal which was admitted but the respondent assessee was allowed to withdraw Rs.94,89,304/- on furnishing security for restitution. The aforesaid amount was withdrawn on 30th July, 1987, by the respondent assessee by furnishing security/guarantee.

4. The Assessing Officer brought to tax Rs.59,63,410/- after excluding 50% of the compensation so awarded in terms of Section 48(2) of the Act. The respondent assessee, however, succeeded before the Commissioner of Income tax (Appeals) who observed that she was only a sub-lessee of the land and her interest was only that of a tenant. As there was no cost of acquisition of the tenancy right, capital gain was not chargeable/computable. Further, the

compensation paid was not taxable till the dispute was finally decid by the High Court.

5. Appeal filed by the Revenue before the Tribunal relying upon Section 45(5) of the Act was rejected observing that the word 'received' would not include or mean compensation received, if the assessee was liable to refund the amount received. Further, the compensation paid was for acquisition of tenancy right and not for acquisition of ownership rights. Section 55(2)(a) was substituted by Finance Act, 1994 w.e.f. 1st April, 1995, stipulating that the cost of acquisition of tenancy rights could be taken as NIL in cases where there was no purchase price and the said amendment was applicable only with effect from the assessment year 1994-95.

6. The Supreme Court in ***CIT vs. B.C. Srinivasa Setty*** [1981] 128 ITR 294 (SC) had held that if cost of acquisition of a capital asset was not determinable, then the sale consideration received would be a capital receipt but not taxable, because cost of acquisition was incapable of being ascertained and computation as envisaged under Section 48 was not possible. The effect thereof was that in such cases the assessee would not be liable to pay capital gains tax on the sale consideration received. The aforesaid decision was in relation to consideration received for transfer of goodwill. The said principle was extended to tenancy rights, by the Delhi High Court in ***Bawa Shiv Charan Singh vs. CIT, Delhi,*** [1984] 149 ITR 29, observing that the tenancy right had no cost of acquisition and, therefore, capital gains cannot be computed. Faced with the aforesaid decisions, Section 55(2) was inserted and amendments were made stipulating

that in transactions specified including payment received f surrender or relinquishing tenancy rights, where it was not possible to ascertain cost of acquisition, the cost of acquisition would be taken to be NIL for computing capital gains. However, where it was possible to ascertain the cost of acquisition, such cost would be taken into consideration for computing taxable gains under Sections 48 and 49 of the Act. The said insertion, as noticed above is applicable with effect from assessment year 1994-95. Therefore, it would not be applicable to the case in hand.

7. Decision of the Delhi High Court in ***Bawa Shiv Charan (supra)*** was not accepted as a correct legal ratio and was overruled by the Supreme Court in ***CIT vs. D.P. Sandu Bros. Chembur (P) Ltd.*** [2005] 273 ITR 1 (SC). This was a case relating to Assessment Year 1987-88 and, therefore, Section 55(2) as amended by Finance Act, 1994 w.e.f. 1st April, 1995 was not applicable. It was held that tenancy right gets acquired with effect from a particular date and it would be possible that it was acquired at a cost and this was a question of fact. Reference was made to the decision of the Supreme Court in ***A.R. Krishnamurthy & Anr. Vs. CIT*** [1989] 176 ITR 417 (SC), wherein it has been held that it cannot be said conceptually that there would be no cost of acquisition for grant of lease and cost of acquisition of lease hold rights could be determined. Thus, the Supreme Court in categorical terms has held that the judgment in the case of ***B.C. Srinivasa Setty's case (supra)*** would not be applicable to capital gains earned on surrender of tenancy rights. In the case of ***D.P. Sandu Bros. (supra),*** the Supreme Court did not interfere with

the final outcome/decision as the Revenue's stand before the Hi Court was that the cost of acquisition of the tenancy was incapable of being ascertained. The ratio of the said decision is binding on us and has to be applied. In other words, we have to proceed on the basis that cost of acquisition of leasehold rights could be determined and was capable of being ascertained and this was the position even before Section 55(2) was amended by Finance Act, 1994 with effect from 1st April, 1995. Thus, the decision of the Supreme Court in ***B.C. Srinivasa Setty's case (supra)*** would not be applicable to cases of surrender of tenancy rights.

8. Read in this manner and applying the ratio of the decision of the Supreme Court in ***D.P. Sandu Bros.'s case (supra)***, it has to be held that the tenancy right had computable cost of acquisition and, therefore, the consideration received on surrender or acquisition was taxable as capital gains even prior to 1st April, 1995. In the present case, as noticed, the sub-lease was for 17 years and even construction had been raised by the predecessors of the respondent assessee.

9. This brings us to Section 45(5) of the Act and whether the same would be applicable to the facts of the present case. The aforesaid Section reads as under:-

> "Section 45. …
>
> (5) Notwithstanding anything contained in sub-section (1), where the capital gain arises from the transfer of a capital asset, being a transfer by way of compulsory acquisition under any law, or a transfer the consideration for which was determined or approved by the Central Government or the Reserve Bank of India, and the compensation or the consideration for such transfer is enhanced or further enhanced by any court, tribunal or other authority, the

capital gain shall be dealt with in the following manner, namely :—

(*a*) the capital gain computed with reference to the compensation awarded in the first instance or, as the case may be, the consideration determined or approved in the first instance by the Central Government or the Reserve Bank of India shall be chargeable as income under the head 'Capital gains' of the previous year in which such compensation or part thereof, or such consideration or part thereof, was first received; and

(*b*) the amount by which the compensation or consideration is enhanced or further enhanced by the court, tribunal or other authority shall be deemed to be income chargeable under the head 'Capital gains' of the previous year in which such amount is received by the assessee;

(*c*) 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*) or, as the case may be, enhanced compensation or consideration referred to in clause (*b*), and subsequently such compensation or consideration is reduced by any court, Tribunal or other authority, such assessed capital gain of that year shall be recomputed by taking the compensation or consideration as so reduced by such court, Tribunal or other authority to be the full value of the consideration.

Explanation.—For the purpose of this sub-section,—

(*i*) in relation to the amount referred to in clause (*b*), the cost of acquisition and the cost of improvement shall be taken to be *nil*;

(*ii*) the provisions of this sub-section shall apply also in a case where the transfer took place prior to the 1st day of April, 1988;

(*iii*) where by reason of the death of the person who made the transfer, or for any other reason, the enhanced compensation or consideration is received by any other person, the amount referred to in clause (*b*) shall be deemed to be the income, chargeable to tax under the head 'Capital gains' of such other person."

10. The aforesaid Section was interpreted by the Supreme Court in ***CIT vs. Ghanshyam (HUF)*** [2009] 315 ITR 1 (SC), and it was held

that the profits and gains from transfer of a capital asset by compulsory acquisition was chargeable under the head 'capital gains'. Section 45(5) was enacted as it was noticed that in case of compulsory acquisition, additional compensation was/is awarded at several stages by different authorities. This had necessitated multiple rectifications in the original assessment order causing great administrative difficulty and problem in collection of the additional demand. With a view to remove these difficulties, by Finance Act, 1987, Section 45(5) was enacted to provide for taxation of additional compensation as deemed income in the year of receipt in the hands of the recipient. The Section also stipulated that the cost of acquisition in the hands of the receiver of the additional compensation would be deemed to be NIL and this would not affect the compensation already taxed at the first instance in the earlier previous year when the transfer of capital asset took place. Thus, in case of compulsory acquisition of assets, capital gain was/is charged on the compensation originally awarded in the year of transfer, and the additional compensation was/is deemed to be taxable income and was/is taxed in the year in which it was/is received and, it was/is not taxed in the year of transfer of the capital asset. Earlier decision of the Supreme Court in ***CIT vs. Hindustan Housing and Land Development Trust Ltd.*** [1986] 161 ITR 524 (SC), was held to be inapplicable after enactment of Section 45(5) of the Act. In light of the aforesaid decision, it has to be held that the additional compensation received would be taxable in the present assessment year, i.e. 1988-89. Therefore, decision of the tribunal to the contrary cannot be sustained and has to be set aside.

11. The aforesaid reasoning deals with and answers the contenti of the respondent assessee that the acquisition of tenancy rights being indeterminate, capital gain tax was not payable on enhanced compensation under Section 45(5) of the Act.

12. The respondent assessee, however, submits that the Assessing Officer and the Appellate Authorities including the Tribunal have not given a finding that the cost of acquisition of tenancy right was determinable and thus, Section 45(5) cannot be invoked as the said Section is not applicable. It is further submitted that Section 45(5) stipulates how capital gains has to be charged and is not the computation provision. Reliance is placed on decision of the Punjab & Haryana High Court in ***Commissioner of Income Tax vs. Leader Engg. Works,***[2004] 269 ITR 542.

13. The aforesaid contentions are without merit and are fallacious. In ***D.P. Sandu's case (supra),*** Supreme Court in categorical terms has held that the cost of acquisition could be computed in case of acquisition of tenancy rights. Moreover, in the present case, sub-lease in question was for a period of 17 years and the respondent assessee also had constructed a super-structure, a factory, which was constructed by the predecessor of the respondent assessee. The respondent assessee had in the land acquisition proceedings, claimed that they were entitled to compensation on acquisition of their land under the sub-lease. Their rights had been acquired. Value of the sub-lease rights of the respondent assessee was ascertained and accordingly, the compensation was assessed and paid. Thus, the tenancy right had value and, therefore, compensation was paid. Once

it was held that it was possible to ascertain the cost of acquisition tenancy rights then it follows that capital gains could be computed and shall be payable. Further, Section 45(5) is both the charging Section as well as the computation Section. It specifically provides for how and in what manner capital gain on compulsory acquisition of land is to be computed and taxed. For the purpose of taxation of enhanced compensation received, cost of acquisition has to be taken as NIL as per the statutory mandate of Section 45(5) of the Act. Logically, therefore, it follows that the compensation received in this year by the respondent assessee has to be taxed. For the purpose of taxation of enhanced compensation received, cost of acquisition is to be taken as NIL as per the statutory mandate of Section 45(5). The stand that the compensation received in any year pertains to only one transfer and gain, has been undone and negated by enactment of Section 45(5). Each assessment year is separate and distinct and enhanced compensation received is to be taxed in the year of receipt i.e. the year in question. Thus, the argument of the respondent assessee is untenable and is contrary to the dictum of the Supreme Court in the case of ***Ghanshyam (HUF)*** **(supra).** Similarly, the contention that capital gains on enhanced compensation received is taxable only when the original or earlier compensation itself was taxed in the facts of the present case has to be rejected for several reasons. Firstly, there is no evidence that original compensation received by the respondent assesse was not taxed and there is no such factual finding to that effect by any authority. Secondly, each assessment year/order is separate and distinct. The assessee or Revenue cannot take advantage of a wrong computation or failure to

tax or erroneous taxation in an earlier year. The argument also fa to take notice of the fact that the courts declare the law as it exists and when the Supreme Court pronounced the judgment in ***Ghanshyam (HUF)'s case*** (supra), it declared the legal position as it was. As per the ratio of ***D.P. Sandu's case (supra),*** it is possible to compute and calculate cost of acquisition of tenancy rights and, therefore, gain on transfer of tenancy rights is taxable as capital gains. Another contention of the respondent assessee that they would have availed benefit of Section 54/54F of the Act is equally fallacious. It is not the case of the respondent assessee that they had taken benefit under Section 54/54F of the Act. The respondent assessee wanted to take and sought advantage of legal opinion to claim that the gain was not taxable. The risk was inherent in the said stance and stand and had its consequences. The legal position as it unfolded and evolved, is against the respondent assesse. Tax, therefore, has to be paid. Income has been certainly earned is not exempt from tax.

14. In view of the aforesaid discussion, the questions of law mentioned above are answered in favour of the appellant Revenue and against the respondent assessee. Appeal is disposed of. In the facts of the present case, there will be no order as to costs.

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(SANJIV KHANNA)
JUDGE

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(V. KAMESWAR RAO)
JUDGE

August 28, 2014
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