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

\+ **INCOME TAX APPEAL NO. 341/2003**

Date of order: 9th November, 2011

COMMISSIONER OF INCOME TAX ..... Appellant
Through Mr. Kamal Sawhney, Sr. Standing Counsel.

Versus

MEERA CHATTERJEE ..... 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 13th April, 2004, the following substantial question of law was framed:

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

2. The present appeal under section 260A of the Income Tax

Act, 1961 (the Act, for short) relates to assessment year 1994-95 and the respondent is an individual. She had received Rs.1 crore on account of surrender of tenancy rights in property No. 15, Motilal Nehru Marg from M/s Bennet Coleman and Company Limited. The said amount was claimed as a capital receipt but not taxable in view of the judgment of the Delhi High Court in ***Bawa Shiv Charan Singh versus CIT***, (1984) 149 ITR 29.

3. The Assessing Officer treated Rs.1 crore as income taxable under Section 10(3) following the decision of Allahabad High Court in ***CIT versus Gulab Chand***, (1991) 192 ITR 495 for the following reasons:-

(i) The respondent assessee was not a tenant.

(ii) The amount received was not a capital receipt but a casual and non-recurring income under Section 10(3) of the Act.

4. On appeal filed by the respondent assessee, CIT(Appeals) deleted the said addition holding that the amount received was towards surrender of tenancy rights and in view of the judgment of the Delhi High Court in ***Bawa Shiv Charan Singh*** (supra) the said amount was not taxable as capital gains. It was also held that Section 10(3) is not applicable as an amount received on surrender of tenancy rights is not a casual and non-recurring

receipt, but a capital receipt.

5. The Revenue preferred an appeal before the Income Tax Appellate Tribunal (tribunal, for short), which has been dismissed by the impugned order dated 19th February, 2003.

6. We have heard Mr. Kamal Sawhney, Sr. Standing Counsel for the appellant and examined the findings recorded by the authorities and the tribunal.

7. Ram Krishan Dalmia and his family earlier had controlling interest in M/s Bennet Coleman and Company Limited (BCCL, for short). By a lease deed dated 17th March, 1959, the aforesaid company leased out the property in question to Ram Krishan Dalmia for a period of three years on a monthly rent of Rs.1,000/-. The property in fact was in occupation of Ram Krishan Dalmia since January, 1953. Even after the term of the lease expired on 31st December, 1964, Ram Krishan Dalmia continued to remain in occupation of the property. Ram Krishan Dalmia expired on 26th September, 1978 and had left behind a Will dated 15th April, 1977. However, the said Will was contested by one of his daughters, Asha Dalmia and her children. Subsequently, there was settlement between Asha Dalmia, Meera Chatterji, Alakha Dalmia and Dhruv Dalmia, three daughters and one son of Ram Krishan Dalmia, who entered

into an agreement dated 17th November, 1992 with BCCL and was agreed that they would surrender the tenancy for Rs.4 crores and Rs.1 crore each was paid to the four children of Ram Krishan Dalmia.

8. We fail to understand on what basis and on what ground the Assessing Officer had held that the respondent assessee was not a tenant in the property. In the assessment order it was mentioned that as per the agreement dated 17th November, 1992 between the four children and BCCL, the rent payable at that time was Rs.5,000/- per month, thus, the Delhi Rent Control Act, 1958 was not applicable. It may be noted that as per the Assessing Officer himself, BCCL was not, by then, a family company or under the control of the assessee, when the agreement dated 17th November, 1992 was executed and the payment was made. The Assessing Officer has relied upon the original lease deed dated 17th March, 1959 and the clauses thereof that the tenant, Ram Krishan Dalmia, cannot create sub-tenancy. This, to our mind, is completely insignificant and is not relevant because the respondent-assessee had claimed inheritance of tenancy rights after the death of Ram Krishan Dalmia and their mother. Tenancy rights are inherited unless prohibited under a statute or if there is a contract to the contrary.

9. In ***Gian Devi Anand*** (supra), Bhagwati J. on the questio of inheritance of tenancy, whether contractual or statutory in nature, has elucidated the same, observing:

> "2. The distinction between contractual tenancy and statutory tenancy is thus completely obliterated by the rent control legislation. Though genetically the parentage of these two legal concepts is different, one owing its origin to contract and the other to rent control legislation, they are equated with each other and their incidents are the same. If a contractual tenant has an estate or interest in the premises which is heritable, it is difficult to understand why a statutory tenant should be held not to have such heritable estate or interest. In one case, the estate or interest is the result of contract while in the other, it is the result of statute. But the quality of the estate or interest is the same in both cases."

10. Amarendra Nath Sen J. ***in Gian Devi Anand*** (supra) has also dealt with the above issue. He observed as under:

> "18. ...We find it difficult to appreciate how in this country we can proceed on the basis that a tenant whose contractual tenancy has been determined but who is protected against eviction by the statute, has no right of property but only a personal right to remain in occupation, without ascertaining what his rights are under the statute. The concept of a statutory tenant having no estate or property in the premises, which he occupies is derived from the provisions of the English Rent Acts. But it is not clear how it can be assumed that the position is the same in this country without any

reference to the provisions of the relevant statute. Tenancy has its origin in contract. There is no dispute that a contractual tenant has an estate or property in the subject-matter of the tenancy, and heritability is an incident of the tenancy. It cannot be assumed, however, that with the determination of the tenancy the estate must necessarily disappear and the statute can only preserve his status of irremovability and not the estate he had in the premises in his occupation. It is not possible to claim that the 'sanctity' of contract cannot be touched by legislation...

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23. ...It is not in dispute that so long as the contractual tenancy remains subsisting, the contractual tenancy creates heritable rights; and, on the death of a contractual tenant, the heirs and legal representatives step into the position of the contractual tenant; and, in the same way on the death of landlord the heirs and legal representatives of a landlord become entitled to all the rights and privileges of the contractual tenancy and also come under all the obligations under the contractual tenancy. A valid termination of the contractual tenancy puts an end to the contractual relationship. On the determination of the contractual tenancy, the landlord becomes entitled under the law of the land to recover possession of the premises from the tenant in due process of law and the tenant under the general law of the land is hardly in a position to resist eviction, once the contractual tenancy has been duly determined..."

11. There is no evidence/material to show that the tenancy of

Ram Krishan Dalmia, which continued from month to mont , was terminated. The agreement dated 17th November, 1992 indicates that the month to month tenancy was not terminated by issuance of notice under Section 106 the Transfer of Property Act, 1882. The month to month tenancy is recognised and permitted by law. The doctrine of "tenant hold over" is well recognised. The CIT(A) has held that the respondent assessee was a tenant. No eviction or ejectment proceedings were initiated. On the question of difference amongst the terms a tenant by sufferance, tenant holding over and a trespasser, it has been observed in ***Badrilal v. Municipal Corporation of Indore***, (1973) 2 SCC 380, as under:-

> "8. It was then urged by Mr Gupte that the appellant having deposited the rent up to March 31, 1954 and the Municipal Commissioner having accepted it he should be deemed to be a tenant holding over. Leaving aside for the moment the contention put forward on behalf of the Corporation that this payment was made behind its back, it has to be noted that the payment was at the rate prevailing before September 30, 1949 and on that date the Corporation having passed a resolution specifying a new rate of rent of Rs 9 per Chasma the payment at the old rate by the appellant and its acceptance by the Municipal Commissioner was not an acceptance of rent as such and in clear recognition of the tenancy right of the appellant. It cannot amount to the Corporation consenting to the appellant continuing as a tenant by paying the old

rates of rent. There is thus no question of the appellant being a tenant holding over. But a person who was lawfully in occupation does not become a trespasser, even if he does not become a tenant holding over but is a tenant by sufferance. The position at law was explained in *Kai Khushroo Bezonjee Capadia* v. *Bai Jerbai Hirjibhoy Warden* as follows:

"On the determination of a lease, it is the duty of the lessee to deliver up possession of the demised premises to the lessor. If the lessee or a sub-lessee under him continues in possession even after the determination of the lease, the landlord undoubtedly has the right to eject him forthwith; but if he does not, and there is neither assent nor dissent on his part to the continuance of occupation of such person, the latter becomes in the language of English law a tenant on sufferance who has no lawful title to the land but holds it merely through the laches of the landlord. If now the landlord accepts rent from such person or otherwise expresses assent to the continuance of his possession, a new tenancy comes into existence as is contemplated by Section 116, Transfer of Property Act, and unless there is an agreement to the contrary, such tenancy would be regarded as one from year to year or from month to month in accordance with the provisions of Section 116 of the Act."

At p. 272 it was pointed out:

"It can scarcely be disputed that the assent of the landlord which is founded on acceptance of rent must be acceptance of rent as such and in clear

recognition of the tenancy right asserted by the person who pays it."

9. The same position was explained in a recent decision of this Court to which one of us was a party in *Bhawanji Lakhamashi* v. *Himatlal Jamnadas Dani*. At p. 391 it was observed:

"The act of holding over after the expiration of the term does not create a tenancy of any kind. If a tenant remains in possession after the determination of the lease, the common law rule is that he is a tenant on sufferance. A distinction should be drawn between a tenant continuing in possession after the determination of the term with the consent of the landlord and a tenant doing so without his consent. The former is a tenant at sufferance is English Law and the latter a tenant holding over or a tenant at will. In view of the concluding words of Section 116 of the Transfer of Property Act, a lessee holding over is in a better position than a tenant at will. The assent of the landlord to the continuance of possession after the determination of the tenancy will create a new tenancy. What the section contemplates is that on one side there should be an offer of taking a new lease evidenced by the lessee or sub-lessee remaining in possession of the property after his term was over and on the other side there must be a definite consent to the continuance of possession by the landlord expressed by acceptance of rent or otherwise. In *Kai Khushroo Bezonjee Capadia* v. *Bai Jerbai Hirjibhoy Warden case* the Federal Court had occasion to consider the question of the nature of the tenancy created under Section 116 of the Transfer of Property Act and Mukherjea,

> J., speaking for the majority said that the tenancy which is created by the "holding over" of a lessee or under-lessee is a newtenancy in law even though many of the terms of the old lease might be continued in it, by implication; and that to bring a new tenancy into existence, there must be a bilateral act. It was further held that the assent of the landlord which is founded on acceptance of rent must be acceptance of rent as such and in clear recognition of the tenancy right asserted by the person who pays it."

12. In view of the aforesaid position, we do not find any reason to hold that what was surrendered by the respondent assessee was not tenancy rights but some other "rights". It may be noted here that the Assessing Officer in the assessment order has not specified or stated what was the nature and character of the right, which was surrendered.

13. The next question, which arises for consideration is whether the Assessing Officer was right in invoking and taxing Rs.1 crore, received by the assessee from BCCL for surrender of tenancy rights, under Section 10(3) of the Act. The Assessing Officer had held that the judgment of the Delhi High Court in the case of ***Bawa Shiv Charan Singh*** (supra) was not applicable as the said decision deals with capital gains and the decision of the Allahabad High Court in ***Gulab Chand*** (supra) should be

followed, to tax the said income under Section 10(3) of the Act.

14. As noticed above, the CIT(A) and the tribunal did not agree with the said contention and reasoning of the Assessing Officer. The aforesaid aspect is no longer res integra and is covered by the decision of the Supreme Court in ***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:-

> "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.
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> 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 and Ors, vs. Commissioner of Income Tax, Madras 1989 (176) ITR 417 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.
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> 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."

15. In the said decision it has been held that tenancy rights are a capital asset and consideration received for surrender of the tenancy right is capital in nature. Further, once it is held that the income received was of capital nature, it cannot be brought in tax under Section 10(3) as casual income of non-recurring nature.

16. In the present case, the Assessing Officer has not held that it is possible to compute and calculate the cost of acquisition of the tenancy rights in the hands of the original tenant Ram Krishan Dalmia. The said exercise was not undertaken by him in the assessment order. In view of the aforesaid position, we are not required to determine, decide and compute income from capital gains under Section 45. A similar situation had had arisen in the case of ***D.P. Sandu Bros. Chembur (P) Ltd.*** (supra) and the Supreme Court had refused to examine and go into the said question, in view of the stand taken by the Revenue that it was not possible to compute the cost of acquisition of the tenancy rights when they were acquired.

17. In view of the aforesaid, the question of law is answered against the appellant 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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