IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.06.2012

CORAM:

THE HONOURABLE MRS.JUSTICE CHITRA VENKATARAMAN

THE HONOURABLE MR.JUSTICE K.RAVICHANDRA BAABU

Tax Case (Appeal) No.1199 of 2005

Commissioner of Income Tax

Chennai. .. Appellant

versus

M/s .Amal Generators Ltd.

Chennai. .. Respondent

PRAYER: Tax Case Appeal filed under Section 260A of the Income Tax Act against the order of the Income Tax Appellate Tribunal, Madras "B" Bench dated 31.05.2002 in I.T.A.No.629/Mds/1999 relating to the Assessment Year 1994-95.

For appellant : Mr.T.Ravikumar

Standing Counsel for Income Tax

For respondent : Mr.C.V.Rajan

JUDGMENT

(Judgment of the Court was delivered by CHITRA VENKATARAMAN,J.)

The Revenue is on appeal as against the order of the Tribunal raising the following substantial questions of law:

1. Whether on the facts and in the circumstances of the case the Tribunal was right in holding the question of whether the receipt on account of surrender of tenancy rights could be taxed as capital gains cannot be looked at by them?

2. Whether on the facts and in the circumstances of the case the Tribunal was right in holding the question of whether the assessee was in fact a tenant at the relevant point in time was a ground extraneous to the proceedings under Section 263 of the Income Tax Act?

3. Whether on the facts and in the circumstances of the case the Tribunal was right in not considering the applicability of the amendment to Section 55(2) of the Income Tax Act whereby the cost of acquisition of tenancy rights is stated to be nil?

4. Whether on the facts and in the circumstances of the case the Tribunal was right in holding that the receipt on account of tenancy rights is a capital receipt, but refusing to look at the question of taxing the same as capital gains?

2. At the time of hearing, learned Standing Counsel placed before us further questions of law, which are stated to be substantial questions of law, as follows:

1. Whether in the facts and circumstances of the case the Appellate Tribunal being the highest facts finding authority, was right in not entertaining the fresh grounds raised by the department based on material evidences, which was not placed before the Commissioner in his proceedings under Section 263 of the Income Tax Act?

2. Whether in the facts and circumstances of the case the Appellate Tribunal being the highest facts finding authority, having satisfied through the lease deed dated 25.08.1978 that the assessee is not the lessee/tenant of the premises from 1978, can the same assessee claim surrender of tenancy right over the premises in 1994 with the new owners of the premises?

3. Whether in the facts and circumstances of the case the Appellate Tribunal was right in holding that the assessee had the tenancy rights over the premises, when the same was occupied by its sister concern Sri Rama Vilas Services Ltd.?

4. Whether in the facts and circumstances of the case the Appellate Tribunal was right in holding that the compensation received by the Assessee is not from surrender of tenancy rights and the same is assessable under "Income from other sources"?

3. The assessment herein relates to the assessment year 1994-95. The assessee herein is a company. The assessee was the lesee of the premises known as Dinrose Estate since 1950 on a monthly lease rent of Rs.2,150/-. It had however subleased it in 1950 itself to its 100% subsidiary company by name M/s.Sri Rama Vilas Service Limited at a lease rental of Rs.2,150/-. The owners were receiving the lease rent from the subsidiary company itself. Admittedly, after 1974, there was no renewal of the lease in favour of the assessee. In 1978, the assessee company and the owners of the property agreed for execution of the lease deed directly in favour of the 100% subsidiary company M/s.Sri Rama Vilas Service Ltd. and accordngly, the deed was entered into on 28.7.1978 between the owner of the property and M/s.Sri Rama Vilas Service Ltd. In 1979, the property in question was purchased by four persons viz., B.Radhamma, B.Papa Raju, Y.Rajyalakshmi and B.V.Raju from the original owner in 1979. On 25.2.1994, the four co-owners on the one hand and the assessee and M/s.Sri Rama Vilas Service Ltd. as second and third party, entered into a Memorandum of Understanding, as per which, the assessee and M/s.Sri Rama Vilas Service Ltd. were stated to have surrendered their tenancy rights in favour of the four co-owners and in lieu of

the surrender of the tenancy rights, the assessee was paid a sum of Rs.2.60 crores and M/s.Sri Rama Vilas Service Ltd., a sum of Rs.1.30 crores. It is stated that the four co-owners had sold the leased property to Madras Telephones. The tenancy was terminated on 25.2.1994. The receipt of Rs.2.60 crores as compensation on the surrender of tenancy rights was not offered as income by the assessee. In the assessment finalised, the Assessing Authority accepted the contention of the assessee that the tenancy rights being capital in nature, the receipt of Rs.2.60 crores as compensation for the surrender of the tenancy rights could not be assessed. In exercise of the jurisdiction under Section 263 of the Income Tax Act, the Commissioner of Income Tax (Appeals) sought to revise the order, placing reliance on the decision of the Income Tax Appellate Tribunal, Special Bench, Mumbai reported in [1996] 217 ITR ITAT Reports 51 (Cadell Weaving Mill Co. Pvt. Ltd. Vs. Assistant Commissioner of Income-tax) and the decision of the Allahabad High Court reported in [1991] 192 ITR 495 (CIT Vs. Gulab Chand). The assessee objected to the said notice on the ground that under the terms of the agreement dated 25.2.1994, the assessee was given compensation of Rs.2.60 crores for relinquishing its right on handing over vacant possession to the vendors, who agreed to pay the said sum to the assessee. Pursuant to the said agreement, the possession of the property was handed over to the vendors. Thus the said receipt could not be considered as income, nor could be included as a casual receipt. On scrutiny of the agreement, the Commissioner of Income Tax (Appeals) pointed out that in the agreement dated 25.2.1994 between the owners of the property, the assessee and its subsidiary Sri Rama Vilas Services Ltd. (in short, SRVS), it was noted that the assessee and its subsidiary were tenants of the property since 1950. The Commissioner viewed that a perusal of the agreement showed that there was nothing to speak on the specific right given to the assessee and to the subsidiary company of sub-lease or sub-tenancy of the tenanted premises. Thus there was nothing for the company to transfer by way of interest or asset; hence relinquishing or surrendering of the rights of such premises could not be treated as a capital asset to treat the compensation received as a capital receipt. On the other hand, the receipt in question arose out of an agreement between the assessee and the owners of the property, who had agreed to pay the assessee a sum of Rs.2.60 crores and a sum of Rs. and Rs.1.30 crores to Sri Rama Vilas Services Ltd., for agreeing to vacate the premises and hand over possession to the owners. Thus, adopting the reasoning of the Special Bench of the Tribunal, Mumbai, the Commissioner confirmed the proposal to revise the assessment; that the compensation received was liable to be assessed under Section 10(3) of the Income Tax Act. A direction was given to that effect to the Assessing Officer, to redo the assessment. The assessee went on appeal before the Income Tax Appellate Tribunal. In the course of the appeal proceedings, while objecting to the view of the Commissioner to keep the receipt as a casual receipt, the assessee pointed out to the document pertaining to the earlier lease that the assessee had with the original vendor under lease deed dated 06.12.1969 and subsequently, the original vendor and SRVS entering into lease deed dated 28.8.1978 and submitted that as per the document dated 06.12.1969, the right of the assessee to sub-lease was recognised by the then vendor. On the sale of the property, the assessee and SRVS entered into a memorandum of understanding with the purchasers. On the sale by the said landlord to Madras Telephones, it was agreed that the assessee shall be paid compensation for the surrender of lease rights.

4. The Revenue, however, submitted that as per the document dated 28.8.1978, SRVS was recognised as a tenant and they were paying the rent directly to the owner. Thus the assessee was not a lessee at all of the property in question after 28.8.1978 and it had no tenancy rights at all. The Revenue further pointed out that the assessee was never in possession of the leased property to

contend that it had leasehold interest to surrender and hence, was capital in nature; in the light of the above, the Revenue took the stand that the receipt was to be taxed as income under the head "income from other sources". Even assuming that the receipt was to be treated as capital receipt, going by Section 55(2)(a)(ii), which, according to the Revenue, was procedural in nature, the receipts were to be taxed to capital gains. Thus, even though the cost of acquisition was nil, the entire receipt was taxable. In considering the rival submissions, the Tribunal overruled the objection of the Revenue to the admissibility of fresh evidence, viz., the lease deed entered in 1969 and 1978 and took the view that in a revisional proceedings under Section 263, there was no question of the assessee having any opportunity to furnish a fresh document before the Assessing Authority and the lease deeds dated 06.12.1969 and 28.08.1978 were necessary to decide the issue on hand. Thus, on going through the lease deed dated 06.12.1969, the Tribunal came to the conclusion that the assessee, as a lessee, was given a right to assign, sub-lease and part with possession of the property or any part thereof. As far as the document dated 28.8.1978 with SRVS and the original owner was concerned, the Tribunal arrived at a factual finding that the deed did not refer to continuation of any lease right to the assessee herein and for all intended purposes, SRVS was the lessee to the exclusion of others and the lease rentals were paid directly to the owner of the property. In considering the contention of the Revenue that the document dated 25.02.1994 never recognised SRVS as a tenant and that they had also filed a suit against SRVS, the Tribunal pointed out that the filing of the suit was a matter which was not denied by the assessee and the owners had filed an eviction suit against SRVS.

5. As far as the initiation of proceedings under Section 263 of the Income Tax Act was concerned, the Tribunal pointed out that the entire order proceeded on the premise that the tenancy rights of the assessee was personal in nature, which could not be transferred to any other person, and hence not capital. On a reading of the agreement dated 25.02.1994 between the assessee, sister concern and the purchaser/owner, the Tribunal held that the two companies were recognised by the purchaser/owner as tenants. The Tribunal held that the Assessing Authority and the Commissioner of Income Tax proceeded on the admitted fact that the assessee had tenancy rights. In the background of the said fact and that the decision of the Special Bench relied on by the Commissioner of Income Tax was overruled by the decision of the Bombay High Court in the decision reported in [2001] 249 ITR 265 (Cadell Weaving Mill Co. P. Ltd. Vs. CIT), the order of the Commissioner of Income Tax under Section 263 was liable to be set aside and the assessee's appeal allowed, treating the right as a capital asset and the receipt as capital in nature. The said decision was confirmed in the decision reported in [2005] 273 ITR 1 (CIT Vs. D.P.Sandu Bros. Chembur P. Ltd. (SC)). Thus the reasoning of the Commissioner based on the Special Bench's view thus having been found overruled, the Tribunal rejected the contention of the Revenue holding that the assessment order was prejudicial to the interests of the Revenue. The Tribunal held that the said view could not be upheld, considering the admitted fact on the tenancy right of the assessee. The Tribunal held that the correctness or otherwise of the order of the Commissioner of Income Tax (Appeals) could be considered only on the grounds considered by the Commissioner for revision and nothing more. When the assessee was able to satisfy the Tribunal that the grounds for the decision given by the Commissioner were wrong on facts or not tenable in law, the Tribunal had every jurisdiction to set aside the order of the Commissioner. Thus the Tribunal viewed that when the assessee had satisfied the Tribunal that the grounds for the decision given by the Commissioner of Income Tax (Revision) could not be upheld, the appeal had to be allowed. The Tribunal pointed out that given the

admitted fact that the assessee was treated as a tenant and the entire proceedings before the Commissioner went on that premise, it was no longer open to the Revenue to take a different view. Following the decision of the Karnataka High Court reported in [1991] 192 ITR 547 (Commissioner of Income-tax v. D'Silva (L.F.), which, in turn, followed the decision reported in [1983] 140 ITR 490 (Commissioner of Income-tax vs. Jagadhri Electric Supply and Industrial Co.), the Tribunal rejected the Revenue's contention. Aggrieved by this, the present appeal has been filed by the Revenue before this Court.

6. Learned Standing Counsel appearing for the Revenue pleaded vehemently before this Court that the assessee had produced fresh documents before the Tribunal, particularly the document dated 28.8.1978, which was between the vendor and the subsidiary company of the assessee. The assessee could no longer claim the status as a tenant to contend that for the surrender of the tenancy rights, the compensation received had to be treated as capital in nature. In the absence of materials to show that the assessee was a tenant at the time of execution of the document dated 25.02.1994, the question of any receipt at the hands of the assessee being treated as capital, did not arise. Taking us through the order of the Tribunal, learned Standing Counsel appearing for the Revenue pointed out that the assessee produced fresh documents before the Tribunal. On going through the documents, the Revenue contended that the assessee could not be treated as tenant. He further contended that the assessee had not placed the document dated 28.8.1978 before the Commissioner and hence, in fairness to their plea, the order of the Tribunal has to be set aside.

7. Countering the said contention of the Revenue, learned counsel appearing for the assessee pointed out that in the face decision of the Apex Court reported in [2005] 273 ITR 1 (CIT Vs. D.P.Sandu Bros. Chembur P. Ltd. (SC)), confirming the Judgment of the Bombay High Court reported in [2001] 249 ITR 265 (Cadell Weaving Mill Co. P. Ltd. Vs. CIT), it is no longer open to the respondent to contend that the receipt was casual in nature; hence, assessable under Section 10(3) of the Act. Apart from that, learned counsel further pointed out that when once the Commissioner had assumed jurisdiction under Section 263 on certain stated facts, the basis of the order passed under Section 263 cannot be altered by the Revenue in the appeal preferred by the assessee. He submitted that on the very contention of the Revenue, the revisional proceedings merited to be held as bad in law, since the very basis of the assumption of jurisdiction is lost there. He further pointed out that the Commissioner had proceeded to treat the tenancy rights under document dated 25.02.1994 as personal in nature and following the Special Bench decision, held the receipt to be taxed as a casual receipt. Thus considering the decision of the Special Bench overruled by the Bombay High Court decision and the same confirmed by the Apex Court by dismissing the Special Leave Petition, it is no longer open to the Revenue to contend that the receipts are casual in nature; hence, assessable under law. He further pointed out that Section 55(2) was amended with effect from 1.4.1995, which has no relevance to the assessment year under consideration, namely, 1994-95. In the circumstances, the capital receipt at the hands of the assessee could not be assessed as capital gains, there being no cost of acquisition. He also made serious objection to the additional grounds now taken at the time of hearing, which are different from what was originally placed before this Court. In the circumstances, going by the well reasoned order of the Tribunal, the Tax Case needs no interference.

8. Heard learned counsel appearing for both sides.

9. The contention of the assessee is two fold, viz., given the fact that the Commissioner of Income Tax (Appeals) has jurisdiction to revise the orders which are prejudicial to the Revenue, and for this purpose, Section 263 requires the Commissioner to call for and examine the records available at the time of examination by the Commissioner. On a perusal of the notice of revision under Section 263, it is clear that the Commissioner intended to revise the order of the Assessing Authority on the admitted fact position that he was a tenant, based on the decision of the Special Bench. It is a matter of record that the only ground on which the Commissioner exercised his jurisdiction to interfere with the order was that the assessee was not having any right to transfer its interest in tenancy and hence, rights being personal, the compensation received has to be considered as income assessable at the hands of the assessee.

10. Thus following the decision of the Special Bench reported in [1996] 217 ITR ITAT Reports 51 (Cadell Weaving Mill Co. Pvt. Ltd. Vs. Assistant Commissioner of Income-tax), the Commissioner held that the income was assessable under Section 10(3) of the Income Tax Act. Thus a reading of the Commissioner's order shows the admitted fact that as per the document dated 25.02.1994, the assessee's status as a tenant was not disputed. It is also a matter of record herein to point out that the genuineness of the document dated 25.02.1994 remained unassailed by the Revenue. Hence, the admitted fact position is that the assessee was a tenant. The only ground on which the order of the Assessing Officer was sought to be revised was the character of the receipt alone and applying the decision of the Special Bench of the Tribunal, the Commissioner of Income Tax (Appeals) held that it was to be assessed as income under Section 10(3) of the Income Tax Act. Thus a reading of the order of the Commissioner shows that he had no doubt at all in his mind that the entire revision proceeded on the admitted fact that the assessee was a tenant. When the assessee went on appeal before the Tribunal, it is no doubt true that the Tribunal placed before the Tribunal, the first lease deed dated 06.12.1969 between the assessee and the owner and the second lease deed dated 28.08.1978 between SRVS, the subsidiary company of the assessee, and the owner. It is no doubt true that there was no mentioning of the name of the assessee in the said deed, but for some reasons best known to the assessee, when the memorandum of understanding was executed on 25.02.1994 between the assessee, its subsidiary company and the vendors, the assessee was recognised as a tenant under the said vendor. The Tribunal pointed out that admittedly, the documents were placed by the assessee on the premise that it being an appeal as against the revision order of the Commissioner, the assessee had no opportunity to furnish the documents before the Assessing Officer. Though the Revenue took serious objection to the reasoning of the Tribunal on this, we do not think that the acceptance of this document had, in any manner, improved the case of the assessee or had worsened the case of the Revenue, for the simple reason that the status of the assessee as on the date of memorandum of understanding dated 25.02.1994, under which compensation was paid to the assessee, was as a tenant under the vendor. As already pointed out, with the genuineness of the document dated 25.02.1994 remaining undisturbed, when the vendor had treated the assessee as a tenant, it is not for the Revenue to question it unless and until the genuineness of the document dated 25.02.1994 itself was questioned by the Revenue, a fact which admittedly is otherwise. Therefore, in the background of this fact, we do not appreciate the reasoning of the Revenue that by admission of the original lease deed and the subsequent lease deed, the Revenue had been put on a difficult platform to defend its case.

11. Leaving this aside, it is rather surprising to note that the Revenue went on a diametrically different factual plane to contend that the assessee could not be treated as a tenant, by reason of the document dated 28.08.1978 entered into between the assessee's subsidiary company and the vendor. Learned Standing Counsel pointed out that there is no reference at all in the said document as to the assessee being considered as a tenant under the owner. If the Revenue's contention on facts has to be accepted, we are afraid, the very basis of the Section 263 order fails, in which event, the entire order of the Commissioner has to be set aside. As already pointed out, whatever might have been the terms of understanding under the document dated 28.08.1978, as far as the present case is concerned, the right to receive compensation is traceable to the document dated 25.02.1994. Consequently, it is not open to the Revenue to contend that the order of the Commissioner could be sustained on a different fact situation, a position which is not open to the Revenue to contend so. In this connection, the decision of the Karnataka High Court reported in [1991] 192 ITR 547 (Commissioner of Income-tax Vs. D'Silva (L.F.) merits to be seen. The said case dealt with the scope of jurisdiction of the Tribunal in an appeal from the order passed by the Commissioner of Income Tax (Appeals). The facts therein are that the assessee therein was a co-owner of a property, along with two others and the assessee had equal share in the property. During the relevant accounting year, the firm called M/s.Curzon Project, consisted of six partners, which included the assessee and the co-owners. The firm was engaged in the business of developing property. Admittedly, the property was contributed towards the capital contribution of the three partners, with each co-owner's contribution being Rs.9 lakhs and the property was valued at Rs.27 lakhs. The other partners had not contributed anything towards the share capital. On the retirement of one of the Partners of the firm, he being one of the co-owners, the said partner was paid a sum of Rs.9,00,000/- from the capital of the partnership and the firm was re-constituted and the share of the assessee was declared as one-ninth instead of one-sixth. There was also a variation of the share of another partner. After four years, on the re-constitution on 30.4.1985, the assessee retired from the partnership. Along with him, the other co-owners also retired. In the circumstances, the assessee was assessed to income tax for the assessment year 1981-82, which was a subject matter of revision under Section 263. The notice stated that on the reduction of the assessee's share from 1/6th to 1/9th, the assessee was paid a sum of Rs.3 lakhs by the firm. The notice further stated that when the assessee contributed the property as towards his capital, there was extinguishment of the title and hence, the same constituted "transfer" within the meaning of Section 2(47). Consequently, any profits or gains arising from such transfer of capital asset was chargeable as capital gains. Thus in the process, whatever gain was earned was liable to be assessed under Section 45 to capital gains. As against the order of the Commissioner of Income Tax (Appeals) under Section 263, the assessee went on appeal before the Income Tax Appellate Authority. By that time, the decision of the Apex Court reported in [1985] 156 ITR 509 (Sunil Siddharthbhai v. Commissioner of Income-tax) had come, holding that even though the contribution of the property towards capital of the firm involved a transfer, there was no provision to apply the capital gains tax. Revenue contended that the transaction entered into by the assessee was a sham one and a device to overcome the levy of capital gains and sought for a remand to examine the genuineness of the transaction. Thus the Revenue sought for a remand of the case. The Tribunal rejected the said contention and held that the genuineness of the partnership was a different matter and that there were no materials to doubt the genuineness of the transaction. On appeal by the Revenue, rejecting the said contention, the High Court pointed out that while initiating proceedings, the Commissioner never doubted the genuineness of the transaction in question. It was not his case that the contribution towards the

share capital made by the assessee was only a ruse or device for converting the asset into money. He sought to revise the assessment order purely on the basis of the law as he understood it; he proceeded that there was an element of transfer in the transaction of contributing the personal asset as the share capital in the firm. Partially, the Commissioner was justified in this assumption. However, the inapplicability of Section 48 of the Act and the impracticability of evaluating the capital gain were not realised by the Commissioner. The notice issued by the Commissioner proceeded as if there was a valid transfer under a genuine situation. The basis of initiation of the proceedings by the Commissioner, hence, could not be altered before the Appellate Tribunal; the scope of the proceedings had to be the same as the one envisaged by the Commissioner, having regard to the peculiar nature of the revisional jurisdiction under Section 263.

12. Pointing out that the Tribunal had given a definite finding that the transaction could not be suspected to be a sham one, the High Court rejected the Revenue's case for a remand. In so holding, the Karnataka High Court also referred to the decision of the Punjab and Haryana High Court reported in [1983] 140 ITR 490 (Commissioner of Income-tax vs. Jagadhri Electric Supply and Industrial Co.). The High Court therein pointed out that the Tribunal cannot uphold the order of the Commissioner on any other ground, which, in its opinion, was available to the Commissioner as well. It observed that if the Tribunal is allowed to find out the ground available to the Commissioner to pass an order under Section 263(1) of the Act, then it will amount to a sharing of the exclusive jurisdiction vested in the Commissioner, which is not warranted under the Act. It is all the more so, because the Revenue has not been given any right of appeal under the Act against an order of the Commissioner under Section 263(1) of the Act. In case he proceeds thereunder after hearing the assessee in pursuance of the notice given to him, then the appeal filed by the assessee under Section 253(1)(c) of the Act cannot be treated on the same footing as an appeal against the order of the Appellate Assistant Commissioner passed in the assessment proceedings, where both the parties have been given the right of appeal. In this view of the matter, the argument raised on behalf of the Revenue that, in appeal, the Tribunal may uphold the order appealed against on grounds other than those taken by the Commissioner in his order, was held as not tenable.

13. The High Court further pointed out that under Section 263, it is only the Commissioner who has been authorised to proceed in the matter and therefore, it is his satisfaction, according to which, he may pass necessary orders thereunder in accordance with law. Thus the High Court held that while hearing the appeal of the assessee, the Tribunal cannot substitute the ground which the Commissioner himself did not think proper to form the basis of his notice, to pass the order. The said decision was again followed in [1994] 207 ITR 108 (Commissioner of Income Tax Vs. Chandrika Educational Trust), wherein, the Kerala High Court, on a similar situation as in [1991] 192 ITR 547 (Commissioner of Income-tax v. D'Silva (L.F.), held that in entertaining an appeal from the Commissioner's order, the Tribunal has to examine whether the order is sustainable in law and whether it is within the powers conferred under Section 263 of the Income Tax Act. When the Commissioner chooses to set aside the order of the Income Tax Officer on a particular ground, the Tribunal cannot go beyond that, to sustain the order on a different ground.

14. Again, in the decision reported in [1999] 236 ITR 156 Commissioner of Income-tax v. Howrah Flour Mills Ltd.), the Calcutta High Court held that the Tribunal cannot justify an order passed under Section 263 on grounds other than those mentioned by the Commissioner in the revised order itself. We are in entire agreement with the reasoning of the Punjab and Haryana High Court decision

reported in [1983] 140 ITR 490 (Commissioner of Income-tax vs. Jagadhri Electric Supply and Industrial Co.), the Kerala High Court decision reported in [1994] 207 ITR 108 (Commissioner of Income Tax Vs. Chandrika Educational Trust), Karnataka High Court decision reported in [1991] 192 ITR 547 (Commissioner of Income-tax v. D'Silva (L.F.) and the Calcutta High Court decision reported in [1999] 236 ITR 156 Commissioner of Income-tax v. Howrah Flour Mills Ltd.), that if an order had been made on a particular factual position, the Revenue cannot sustain the order by varying the vary basis of the order to contend that the facts are otherwise. In the circumstances, we reject the contention of the Revenue, thereby the Tribunal was not right in not entertaining fresh grounds taken by the Revenue.

15. As regards the relief to be considered under Section 55(2) of the Income Tax Act, the Supreme Court, in the decision reported in [2005] 273 ITR 1 (CIT Vs. D.P.Sandu Bros. Chembur P. Ltd. (SC)), confirmed the view of the Bombay High Court reported in [2001] 249 ITR 265 (Cadell Weaving Mill Co. P. Ltd. Vs. CIT). A reading of the judgment of the Apex Court shows that the amendment of Section 55(2) took effect from 1st April 1995. Till the amendment of law was there, if the cost of acquisition could not, in fact, be determined, the transfer of capital assets could not attract capital gains.

16. The Apex Court pointed out that tenancy right is a capital asset, the surrender of tenancy right is a transfer and the consideration received therefor is a capital receipt within the meaning of Section 45, had not been questioned before the Supreme Court and that in any event, the said proposition was taken to have been concluded by the decision of the Apex Court reported in [1991] 192 ITR 382 (A.Gasper Vs. CIT). Thus the consideration on tenancy rights, normally, would be subjected to capital gains under Section 45 of the Income Tax Act.

17. However, having regard to the unworkability of the provisions and that Section 55 itself was introduced relevant only to the subsequent assessment year, namely, 1995-96, the Apex Court held that till the amendment in 1995, the compensation received on surrendering the tenancy rights could not be assessed to capital gains. Thus, on the fact position as found by the Tribunal and which form the very basis of the order under Section 263 that the assessee was treated as tenants as per the document dated 25.02.1994, the genuineness of which was never questioned by the Revenue, we have no hesitation in confirming the order of the Tribunal. In the above circumstances, we reject the questions raised by the Revenue.

18. As far as the questions raised now before this Court are concerned, we do not think that they deserve any consideration, considering the fact position which was admitted by the Commissioner while passing the order under Section 263 of the Income Tax Act.

In the result, the Tax Case Appeal stands dismissed. No costs.

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To

1. The Income Tax Appellate Tribunal, Madras "B" Bench.

2. The Commissioner of Income Tax (Tamil Nadu I), Chennai-34.

3. The Deputy Commissioner of Income Tax, Special Range I, Madras