

**IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN**

**BEFORE SHRI P. K. BANSAL, VICE PRESIDENT AND
SHRI GEORGE GEORGE K., JUDICIAL MEMBER**

ITA No 500/Coch/2016
Assessment Year: 2013-14

M/s. Kaduna Hospitality Pvt. Ltd., 39/4602, Cheramel Building, Sreekandath Road, Ernakulam, Kochi-682 016.	Vs	The Income Tax Officer, Corporate Ward 1(4), Kochi.
(Appellant)		(Respondent)

Appellant by	Shri K.M. Jose, CA
Respondent by	Shri A. Dhanaraj, Sr. DR
Date of hearing	03/10/2017
Date of pronouncement	23/10/2017

ORDER

Per George George K, JM

This appeal at the instance of the assessee is directed against the order of the CIT(A)-I, Kochi dated 25/10/2016. The relevant assessment year is 2013-14.

2. The grounds raised read as follows:

On the facts and in the circumstances of the case, the Learned Commissioner of Income Tax (Appeals) -I has:-

1. *failed to appreciate that the Notification dated 10th January 2008 issued by the Government of Kerala and the subsequent possession of the land acquired by the Land Acquisition Officer on 24th November 2008 relevant to AY 2009-10, was challenged by the appellant as illegal and void ab initio before the Hon'ble High Court of Kerala and therefore the said date could not be taken as the date of transfer, on account of acquisition of the plot and therefore no capital gain/loss can be said to have accrued in the AY 2009-10;*

2. *failed to appreciate that the appellant had challenged the government decision to acquire the land in the Hon'ble High Court of Kerala vide Write Petition number 7608 of 2008. Therefore, there was no question of the transaction of acquisition being chargeable to income tax in AY 2009-10. Hence, the appellant was justified in holding that the taxability of the entire transaction i.e. the original acquisition and the enhanced compensation should be considered in the AY 2013-14 only after the Writ Petition before the Hon'ble High Court of Kerala was withdrawn and the compensation which was finally determined by the court was received only in the AY 2013-14;*
3. *should have appreciated that the award of compensation by the Addl. Sub Judge, Ernakulam in the AY 2013-14 was not really only the 'additional compensation' in so far as it relates to land value but it was really also "correct determination of compensation in the first instance" and therefore capital gain computation on account of acquisition was correctly done by the appellant in the AY 2013-14, taking into account the cost of acquisition, etc.*
4. *should have appreciated that only when the Court of the Addl. Sub Judge, Ernakulam decided on the compensation payable by correcting the illegal order of the Land Acquisition Officer in the AY 2013-14 by determining the correct balance amount payable at Rs.3,00,94,463/- (including interest of Rs. 1,09,03,339/- and solatium of Rs. 41,31,979/-) over and above the original compensation of Rs. 25,35,526/-, followed by making payment available, it could be treated as the year of transfer i.e. AY 2013-14 and accordingly short term capital gain accrued only in that year and therefore Assessing Officer and Commissioner of Income Tax (Appeals)-I were not justified in holding that the enhanced compensation has accrued in the AY 2013-14 and that has to be taxed without taking into account the cost of acquisition and compensation originally decided by the Acquisition Officer in the AY 2009-10;*
5. *should have appreciated that the award of compensation determining the compensation to be paid to the appellant of Rs. 1,55,68,157/- was different from that of solatium of Rs. 41,31,979/- and interest of Rs. 1,09,03,339/- (aggregating to Rs. 1,50,35,318/-) and therefore only the solatium and interest could be taxed as per the provisions of section 45(5)(b) read with section 145A(b) in the AY 2013-14 and compensation for acquisition of land should be taxed as per section 45 r.w. section 48 in the AY 2013-14;*
6. *should have appreciated that the learned Assessing Officer cannot make a one-side assessment of taxing the enhanced compensation in AY 2013-14, without combining or considering the tax implication arising from acquisition of land in AY 2009-10 and not allowing the cost of acquisition as required under section 48, etc;*
7. *without prejudice to the above, since the order of land acquisition itself was subjudice till the pendency of the Writ Petition filed by the*

appellant before the Hon'ble High Court of Kerala, which was withdrawn only on 2nd June 2011 i.e. in AY 2012-13, at best, the acquisition can be said to be effective from AY 2012-13 and accordingly the compensation may be held to be taxable in AY 2012-13, after allowing the deduction for cost of acquisition against the same;

8. without prejudice to the above, should have appreciated that even if the learned Assessing Officer was of the opinion that the tax consequences in respect of original acquisition, relates back to the year of acquisition, after withdrawal/disposal of Writ Petition by the appellant, post determination of compensation by the Court, the learned Assessing Officer should have worked out the tax consequence i.e. gain or loss on account of original acquisition for AY 2009-10 along with the assessment for AY 2013-14 and should have allowed short term capital loss of AY 2009-10 to be carried forward and set off against the gain assessable for AY 2013-14 (on account of grant of solatium and interest);

9. the learned Commissioner of Income Tax (Appeals)-I was not justified, in not directing the Assessing Officer to grant set off of unabsorbed depreciation of earlier years under section 32(2), amounting to Rs.5,67,2047-, against the short term capital gain for AY 2013-14;.

The appellant craves, to consider each of the above grounds of appeal without prejudice to each other and craves to leave or add, alter, delete or modify all or any of the above grounds of appeal.

3. The assessee has also filed additional grounds. In the additional grounds the assessee has raised the issue that only the amount of enhanced compensation received during the relevant AY can be brought to tax u/s. 45(5)(b) of the Act. According to the learned AR only Rs.97,56,627/- is received in the assessment year 2013-14. It is contended that the Assessing Officer also brought to tax the sum of Rs.2,03,33,836/- received during the previous year relevant to the assessment year 2014-15, in the **the**current assessment year, namely 2013-14.

4. Briefly stated the facts of the case are as follows:

The assessee is a private limited company. It is engaged in hospitality business. For the assessment year 2013-14, the return of income was filed on 21/09/2013 declaring loss of Rs.35,58,854/-. The assessment was taken up for scrutiny by issuance of notice u/s. 143(2) of the Act. In the course of scrutiny assessment, the Assessing Officer noticed that the assessee-company had declared net gains on land acquisition amounting to Rs.38,48,650/- and interest income amounting to Rs.1,09,03,339/-. The short term capital gains (STCG) and the interest income declared by the assessee are as follows:

(i)	Short Term Capital Gains	
	Compensation received on land acquisition	Rs.1,91,87,124.00
	Add: Advances received	Rs. 25,35,526.00
	Total	Rs.2,17,22,650.00
	Less: Purchase cost	<u>Rs.1,78,74,000.00</u>
	Net Short Term Capital Gains	<u>Rs. 38,48,660.00</u>
(ii)	Interest Income	Rs.1,09,03,339.00

4.1 It was noticed by the Assessing Officer that the assessee had received enhanced compensation of land value including solatium and interest as detailed below during the relevant AY, namely AY 2013-14:

LAR 27/09	Rs. 8,35,885.92
LAR 24/09	Rs.1,08,40,697.00
LAR 25/09	<u>Rs.1,84,13,879.89</u>
Total receipts	<u>Rs.3,00,90,462.80</u>

4.2 The Assessing Officer also noticed that the impugned land was taken possession by Land Acquisition Officer in the AY 2009-10 and compensation was paid amounting to Rs.25,35,526/-. The Assessing Officer was of the view

that when the amount of Rs.25,35,526/- was received as initial compensation in the assessment year 2009-10, the assessee ought to have calculated STCG for the assessment year 2009-10 and set off the loss, if any, against the additional/enhanced compensation that was to be received in the subsequent years. Therefore, the Assessing Officer was of the view that the total amount received in the assessment year 2013-14 ought to have been brought to tax in the same year.

4.3 To the above proposal, the assessee filed objections. It was contended by the assessee that short term capital gains has arisen only in the current assessment year, namely AY 2013-14 and no capital gains had accrued in the assessment year 2009-10. It was argued that under the Land Acquisition Act, 1894, no compensation can be fixed below the market value of the property. It was stated that compensation paid initially amounting to Rs.25,35,526/- is far below the purchase cost and therefore, no capital gain/loss could arise in the AY 2009-10. It was submitted by the assessee that for the financial year relevant to the assessment year 2009-10, in the accounts of the assessee, the value of the land compulsorily acquired was transferred to the current assets with Rs.25,35,526/- received shown as "*advance received*" and the balance of Rs.1,53,38,474/- shown as "*amount receivable*". According to the assessee the assessment of capital gains/losses on the basis of compensation that is void in law renders such assessment as null and void. It was further submitted that the land acquisition proceedings were challenged in writ petition before the Hon'ble Kerala High Court and the issue was sub-judice in the AY 2009-10.

4.4 The Assessing Officer, after duly considering the assessee's objections held that though the assessee had challenged the land acquisition proceedings before the Hon'ble High Court in writ petition, the Single Judge of the Hon'ble High Court had dismissed the writ petition. It was further observed by the Assessing Officer that the appeal filed before the Division Bench of the Hon'ble High Court was withdrawn by the assessee in the year 2011. The Assessing Officer was of the view that when the assessee had received initial compensation of Rs.25,35,526/- in the assessment year 2009-10 and possession was taken over, the STCG has arisen in the AY 2009-10. Thereafter, the Assessing Officer held that out of the total enhanced compensation received during AY 2013-14, a sum of Rs.1,09,03,339/- received for solatium and interest should be taxed under the head 'income from other sources' and the balance of Rs.1,91,87,132/- should be taxed as STCG. Since the assessee had offered short term capital gains of Rs.38,48,650/- for the assessment year 2013-14, the same was given credit and the balance amount of Rs.1,53,38,482/- (Rs.1,91,87,132 - Rs.38,48,650) was assessed by the Assessing Officer as net short term capital gains that arose in the hands of the assessee for the relevant assessment year 2013-14.

5. Aggrieved by the order of the assessment, the assessee preferred appeal before the first appellate authority. The CIT(A) rejected the contentions of the assessee and confirmed the computation of short term capital gains made by the Assessing Officer.

6. The assessee being aggrieved has preferred the present appeal before the Tribunal. As regards the issue raised in the main grounds, the Ld. AR reiterated

the submissions made before the income tax authorities. As regards the additional grounds, the contentions raised by the Ld. AR read as follows:

- 1 *“3 cents of land belonging to your Appellant was acquired for the Kalamassery - Vallarpadam National Highway by a Notification w/s 4(1) of the Land Acquisition Act, 1894 dated 10-01-2008*
- 2 *The total compensation awarded and payments received are as under,*

LAR No.	Original Advance Compensation – received on 12/12/2008	Additional compensation received on 09/02/2013, 07/06/2013 and 19/06/2013 vide Sub-Court Order	Interest Received along with additional compensation vide Sub-Court Order	Total Compensation received for land including interest
	Rs.	Rs.	Rs.	Rs.
LA 27/09	70,431	533,109	302,739	906,279
LA 24/09	921,713	6,962,936	3,961,551	11,846,200
LA 25/09	1,543,381	11,691,079	6,639,049	19,873,510
Total	2,535,526	19,187,124	10,903,339	32,625,989

3 The additional compensation has been received/credited on the following dates,

Date	Particulars	Rs.	Sub total	Previous Year ended
12-12-2008	Bank	2,266,269		
	TDS	<u>269,257</u>	2,535,526	31-03-2009
09-02-2013	Bank	<u>9,756,627</u>	9,756,627	31-03-2013
07-06-2013	Bank	752,298		
19-06-2013	Bank	16,572,491		
09-06-2013	TDS	3,009,047	20,333,836	31-03-2014
	Total	<u>32,625,989</u>	<u>32,625,989</u>	

Copy of the Bank Statement and Form 26AS are enclosed as Annexure A and B.

5. Section 45(5) of the Income Tax Act, 1961 dealing with the charge to Capital Gains is as under, 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 :

Provided that any amount of compensation received in pursuance of an interim order of a court, Tribunal or other authority shall be deemed to be income chargeable under the head "Capital gains" of the previous year in which the final order of such court, Tribunal or other authority is made;

- (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 purposes 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.

5- In view of the charging section 45(5) (b), only a sum of Rs.9,756,627/- of the enhanced compensation is assessable in the Assessment Year 2013-14. However, the Assessing Officer has been brought to tax the sum of Rs.20,333,836/- received during the previous year relevant to assessment year 2014-15 also to tax in the assessment year 2013-14, which is contrary to and in violation of the express provisions contained in section 45(5)(b) of the Income Tax Act, 1961 rendering such assessment null and void.

6. In view of the above provision with regard to section 45(5)(b) and considering the Grounds of Appeal originally filed before the Hon'ble Income Tax Appellate Tribunal it is prayed that the Assessment Order for the AY 2013-14 be rectified for the purpose of;

a. Limiting the quantum of Short Term Capital Gain assessable for the AY 2013-14 in accordance with law and facts to only Rs.9,756,627/- and

b. By virtue of the express provisions contained in section 48(ii) of the Income tax Act to allow a sum of Rs.9,756,627/- to deducted from the above Short Term Capital Gain by way of Cost of Acquisition and suitable rectification be made in the Assessment Order for the AY 2013-14 and refund and interest due to the assessee be computed and paid representing the excess tax paid/deducted at source and interest due on refund in respect of the AY 2013-14.

7. The Ld. D. R. on the other hand supported the orders of the Income Tax authorities.

8. We have heard the rival submissions and perused the material on record.

TheThe acquisition of the impugned property which has given rise to short term capital gains was purchased by the assessee company vide Sale Deed No. 694/07 dated 26/09/2007. The purchase price for the said property mentioned in deed is Rs. 1,78,74,000/-. The notification for acquisition of the said property was issued u/s. 4(1) of the Land Acquisition Act, 1894 on 10/01/2008. The

possession of the land was taken by the Land Acquisition Officer on 24/11/2008. In view of the land acquisition, the assessee was paid a compensation of Rs.25,35,526/- which was received in the AY 2009-10. The assessee challenged the land acquisition proceedings by filing writ petition before the Hon'ble High Court of Kerala. In the writ petition it is stated that land acquisition proceedings is not for public purpose and the acquisition was not under the correct Act. Therefore, the acquisition is void. However the writ petition was dismissed vide Single Bench judgment dated 06/10/2008 in W.P.(C) No. 7608 of 2008. The assessee had filed appeal against the dismissal of the writ petition before the Division Bench of the Hon'ble High Court of Kerala. However, the same was withdrawn by the assessee on 02/06/2011 (judgment dated 02/06/2011 in W.P.(C) No. 2395/2008). As mentioned earlier, undisputedly the possession of the said land **was** taken over by the Land Acquisition Officer on 24/11/2008, i.e. **is** in the **AA.Y.** 2009-10. In pursuant to the possession of land taken over by the Land Acquisition Officer, the assessee was paid compensation of Rs.25,35,526/-. When possession of the land is taken by the Land Acquisition Officer and compensation is paid, however, inadequate it may be, there is transfer within the terms of section 2(47) of the I.T. Act and the assessee ought to have filed the return of income disclosing capital gains/losses. The assessee was very much aware of the receipt of initial compensation. The judgment dated 09/03/2010 of III Addl. Sub Judge, Ernakulam also mentioned that as per Award No. 97/2008, following amounts were given as compensation to the assessee-company:

Rs. 9,37,871/-	for LAR 24/09
Rs.15,27,932/-	for LAR 25/09
<u>Rs. 67,723/-</u>	for LAR 27/09
Rs.25,35,526/-	

8.1 When the impugned land belonging to the assessee was acquired by issuing land acquisition notification u/s. 4(1) and the possession was taken over during the assessment year, 2009-10, the liability to capital gains/losses has definitely arisen only in the assessment year 2009-10, as per the terms of sec. 2(47) of the I.T. Act. The failure of the assessee to compute the capital gains/losses and carry forward the same to be set off against the enhanced compensation that is to be received in the subsequent year is an error on the part of the assessee. Therefore, we hold that the assessee is liable for short term capital gains in the assessment year 2009-10.

8.2 Having held that the assessee is liable for short term capital gains in the assessment year 2009-10, let us now examine whether the assessee is entitled to deduct the cost of acquisition against the enhanced compensation that was received in the relevant assessment year, namely AY 2013-14. It is clear on the facts of the instant case that the assessee has received compensation for the sales of the lands acquired as under:

- (i) Rs. 25,35,526/- being the initial compensation (received in the first instance) in the A.Y. 2009-10.
- (ii) Rs. 3,00,90,462.80/- as the additional compensation ordered by the Hon'ble Sub-Court in the impugned A.Y. 2013-14.

From literal reading of Section 45(5)(a) of the Act, it is clear that the assessee ought to have declared the compensation of Rs.25,35,526/- awarded in the first instance in its Return of Income for the AY 2009-10 as its taxable income chargeable under the head 'Capital gains' of the previous year (being A.Y. 2009-10) in which such amount is received. The above position would apply irrespective of whether the consideration received was full or in part. Likewise, the additional compensation of Rs.3,00,90,462.80/- received by the assessee in A.Y.2013-14 consequence to the Hon'ble Sub Court's order would be deemed to be the income chargeable under the head 'Capital gains' of the said AY as per Section 45(5)(b). Explanation 1 to Section 45(5)(b) states that the cost of acquisition needed to be taken to be nil, which strengthens the position of the **revenue** revenue that any cost of acquisition would be deemed to have been considered and adjusted in the computation of Capital Gains in such earlier assessment years in which the compensation (or part thereof) was received in the first instance. Hence, the cost of acquisition to be considered and adjusted against the amount of Rs.3,00,90,462.80/- being the additional compensation received in the impugned AY 2013-14 would need to be taken as Rs. 'nil'. Therefore, in view of Explanation 1 to Section 45(5)(b), the cost of acquisition cannot be allowed as deduction against the enhanced compensation received in the current assessment year, namely AY 2013-14, since it is deemed to have been allowed in year of receipt of initial compensation by the assessee.

8.3 In Ground No. 9, the assessee has stated that the CIT(A) ought to have directed the Assessing Officer to grant set off of unabsorbed depreciation u/s.

32(2) of the Act amounting to Rs.5,67,204/- against the short term capital gains for the assessment year 2013-14. We notice that the issue raised in this ground does not arise out of the order of the CIT(A), as there is no adjudication of the issue by the first appellate authority. Before the Tribunal also the assessee's Counsel has not raised any arguments on this ground, hence this ground is not adjudicated.

8.4 As regards, additional grounds, it is claimed by the assessee that only a sum of Rs.97,56,627/- alone is received during the previous year relevant to the assessment year 2013-14. According to the learned AR, the initial compensation and the additional/enhanced compensation that are received for the year ending 31/03/2009, 31/03/2013 and 31/03/2014, are as follows:

Date	Particulars	Rs.	Sub total	Previous Year ended
12-12-2008	Bank	2,266,269		
	TDS	<u>269,257</u>	2,535,526	31-03-2009
09-02-2013	Bank	<u>9,7,56,627</u>	9,7,56,627	31-03-2013
07-06-2013	Bank	752,298		
19-06-2013	Bank	16,572,491		
09-06-2013	TDS	3,009,047	20,3,33,836	31-03-2014
	Total	<u>32,625,989</u>	<u>32,625,989</u>	

8.5 Section 45(5)(b) clearly states that enhanced compensation shall deemed to be the income chargeable to "capital gains" of the previous year in which the said amount is received by the assessee. The assessee has filed bank

statement and Form 26AS as Annexure A and B along with additional grounds of appeal. On perusal of the same, it is quite discernable that the amount of Rs.2,03,33,836/- was received by the assessee only during the previous year ending 31/03/2014. Hence the same cannot be brought to tax in view of the express provision u/s. 45(5)(b) of the Act. However, we notice that in the assessment order as well as the appellate order, it is stated that the assessee has received the enhanced compensation on 26/12/2012, 14/02/2013 and 28/01/2013 (i.e. in AY 2013-14). Since there is conflict in the facts, in the interest of justice and equity, we are of the view that the matter needs to be restored to the file of the Assessing Officer. Accordingly, the additional grounds and the evidence furnished alongwith the same are restored to the file of the Assessing Officer. The Assessing Officer, on examination of the evidence shall only bring to tax the enhanced/additional compensation that is received by the assessee during the assessment year 2013-14. The Assessing Officer shall dispose off the matter after affording reasonable opportunity of hearing to the assessee. It is ordered accordingly. Hence the additional ground raised is allowed for statistical purposes.

9. In the result, the appeal filed by the assessee is partly allowed for statistical purposes as indicated above.

sd sd/-
(P.K. BANSAL)
VICE PRESIDENT
Dated:...23/10/2017
GJ
Copy to:

sd/-
(AbbGEORGE GEORGE K.)
JUDICIAL MEMBER

1. M/s.Kaduna Hospitality Pvt. Ltd., 39/4602, Cheramel Building, Sreekandath Road, Ernakulam, Kochi-682 016.
2. The Income Tax Officer, Corporate Ward 1(4), Kochi.
3. The Commissioner of Income-tax(Appeals)-I, Kochi.
4. The Pr. Commisisoner of Income-tax, Kochi.
5. D. R., ITAT, Cochin.
6. Guard File

By order

(ASSISTANT REGISTRAR)
ITAT, COCHIN BENCH