(In Civil Writ Jurisdiction Case No. 6041 of 2020)
For the Petitioner/s : Mr.D.V.Pathy, Advocate
For the Respondent/s : Dr. K.N.Singh, A.S.G.
Mrs.Archana Sinha @ Archana Shahi, Advocate
Mr. Rishi Raj Sinha, Advocate

(In Civil Writ Jurisdiction Case No. 15459 of 2021)
For the Petitioner/s : Mr.Chiranjiva Ranjan, Advocate
Mr. Amar Kumar Singh, Advocate
Mr. Sanjay Singh, Advocate
For the Respondent/s : Dr. K.N.Singh, A.S.G.
Mr. Kumar Priya Ranjan, Advocate
Mrs.Archana Sinha @ Archana Shahi, Advocate
Mr. Rishi Raj Sinha, Advocate

(In Civil Writ Jurisdiction Case No. 15554 of 2021)
For the Petitioner/s : Mr.Chiranjiva Ranjan, Advocate
Mr. Amar Kumar Singh, Advocate
Mr. Sanjay Singh, Advocate
For the Respondent/s : Dr. K.N.Singh, A.S.G.
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Mr. Shyam Bihari Singh, Advocate

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CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE MADHURESH PRASAD
ORAL JUDGMENT
(Per: HONOURABLE THE CHIEF JUSTICE)

Date : 12-05-2023

The batch of writ petitions challenge notices issued under Section 148 of the Income Tax Act, 1961 (hereinafter referred to as the 'Act') and some of them also challenge the order issued under Section 144 read with Section 147 of the Act and the notice of demand issued pursuant to the assessment orders.

2. The question of law raised in the writ petitions, filed under Article 226 of the Constitution of India, is as to whether sub-section (5A) of Section 45 of the Act; inserted by

the Finance Act, 2017, with effect from 01.04.2018, apply retrospectively. The petitioners also contend that if it is held to be prospective, as is the consequence of the express words employed in the Finance Act, then it would violate Article 14 of the Constitution of India on the ground of invidious discrimination between the same class of persons. It is also argued that sub-section (5A) has been brought into the Income Tax Act to remove unintended consequences of the earlier provision for computation of capital gains on a conjoint reading of Sections 2(47)(v), 45 & 48. In such circumstances, the same should be considered as retrospective, despite the recitals in the Finance Act indicating it to be prospective. Insofar as the orders passed, which were also challenged in some of the writ petitions, the challenge made is to the very jurisdiction exercised by the Assessing Officer; relying on the judgment of the Hon'ble Supreme Court in **Commissioner of Income Tax vs. Balbir Singh Maini; (2018) 12 SCC 354.**

3. We heard Shri D.V.Pathy, learned counsel for the writ petitioners and Dr. K.N.Singh, learned Additional Solicitor General, instructed by Smt. Archana Sinha, learned senior standing counsel for the Income Tax Department.

4. In the case of **Balbir Singh Maini** (supra) at

paragraph-3 the following questions of law were framed, which are extracted hereinbelow:

> "i) Whether the transactions in hand envisage a "transfer" exigible to tax by reference to Section 2(47)(v) of the Income Tax Act, 1961 read with Section 53-A of the Transfer of Property Act, 1882?
> ii) Whether the Income Tax Appellate Tribunal, has ignored rights emanating from the JDA, legal effect of non-registration of JDA, its alleged repudiation, etc.?
> iii) Whether "possession" as envisaged by Section 2(47)(v) and Section 53-A of the Transfer of Property Act, 1982 was delivered, and if so, its nature and legal effect?
> iv) Whether there was any default on the part of the developers, and if so, its effect on the transactions and on exigibility of tax?
> v) Whether amount yet to be received can be taxed on a hypothetical assumption arising from the amount to be received?"

5. The Hon'ble Supreme Court in paragraph 30 and 31, answered the aspect relevant to this case as follows :-

> "30. In the facts of the present case, it is clear that the income from capital gain on a transaction which never materialised is, at

> best, a hypothetical income. It is admitted that for want of permissions, the entire transaction of development envisaged in the JDA fell through. In point of fact, income did not result at all for the aforesaid reason. This being the case, it is clear that there is no profit or gain which arises from the transfer of a capital asset, which could be brought to tax under Section 45 read with Section 48 of the Income Tax Act.
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> 31. In the present case, the assessee did not acquire any right to receive income, inasmuch as such alleged right was dependent upon the necessary permissions being obtained. This being the case, in the circumstances, there was no debt owed to the assessees by the developers and therefore, the assessees have not acquired any right to receive income under the JDA. This being so, no profits or gains "arose" from the transfer of a capital asset so as to attract Sections 45 and 48 of the Income Tax Act."

6. The binding declaration of the above decision is insofar as, unless the income from capital gains of a transaction has actually materialized; there is no question of any assessment in the year in which a transfer occurred. This did not happen in the captioned case, wherein the Joint Development Agreement

(JDA) fell through and for that reason income did not materialize. It is to be noticed that this issue turns purely on the facts of the case, which it may not be proper for us to dwell into, especially in a proceeding under Article 226 of the Constitution of India. Insofar as the challenge against the notices, the assessee can place the facts before the Assessing Officer and if it is identical or similar to the one decided in **Balbir Singh Maini** (supra), the Assessing Officer would necessarily have to follow the said decision under Article 141 of the Constitution of India. Insofar as the orders passed under Section 144 read with Section 147 of the Act, there is an appeal provided, to which remedy the petitioners would have to be relegated.

7. Be that as it may, we are called upon to answer the question regarding the retrospectivity claimed of an amendment brought into the Income Tax Act by the Finance Act, 2017 which inserted sub-section (5A) under Section 45 after sub-section (5) and the explanation thereto; which was specifically stated to be inserted with effect from 1st day of April, 2018, making the amendment prospective in operation.

8. In support of the challenge raised, the petitioners have relied on a decision of the Bombay High Court in **Godrej & Boyce MFG Co. Ltd v. Deputy Commissioner of Income**

Tax; (2010) 43DTR 177(Bombay), the principle in which stood affirmed by the Hon'ble Supreme Court in **Allied Motors(P) Ltd. Etc v. Commissioner of Income Tax; (1997) 224 ITR 0677. Commissioner of Income Tax v. M/s Alom Extrusions Limited; 2009 319 ITR 306 (SC) and Commissioner of Income Tax v. Essar Teleholdings Ltd.; (2018) 401 ITR 445(SC)** were also relied on.

9. In **Godrej & Boyce MFG Co. Ltd** (supra), the High Court of Bombay upheld both Section 14A and Rule 8B brought into the Act and the Rules respectively, but held the Rule to apply only prospectively while Section 14A was introduced by an amendment to the Finance Act, 2001 with restrospective effect from 1st April, 1962 and sub-sections (2) and (3) were effective from 01.04.2007. Rule 8D, which was the machinery provision for determining the expenditure incurred in relation to income which does not form part of the total income, was notified in the Official Gazette only from 24th March, 2008. The introduction of Section 14A was by reason of the Supreme Court having held that the Assessing Officer cannot embark upon an enquiry, whether an expenditure produced or will produce taxable income and thus disallow the expenditure. Section 14A, brought in with a validation clause, took away the

basis of the judgments of the Hon'ble Supreme Court and postulated that in computing the total income, no deduction shall be allowed in respect of expenditure incurred by an assessee in relation to income which does not form part of total income under the Act. While upholding the constitutional validity of Section 14A, it was held that the machinery provisions would apply only from the date it was brought into the rules. However, it was found that even before Rule 8D was brought in, the Assessing Officer was obliged to enforce the provision of sub-section (1) of Section 14A; which has to be done on a reasonable basis through a method consistent with all the relevant facts and circumstances, after furnishing a reasonable opportunity to the assessee; though not necessarily by way of the machinery provision brought under Rule 8D.

10. Learned Counsel placed specific emphasis on paragraph-65 of the judgment of the Bombay High Court in **Godrej & Boyce MFG Co. Ltd (supra)** which is extracted herein below:-

> "65 The following principles guide in determining as to whether an amendment is prospective or retrospective:
> (i) In determining as to whether an amendment is to take effect prospectively or with retrospective effect, the date from

which the amendment is made operative does not conclusively decide the question. The Court has to examine the scheme of the statute prior to the amendment and subsequent to the amendment to determine whether an amendment is clarificatory or substantive;

(ii) An amendment which is clarificatory is regarded as being retrospective in nature and would date back to the original statutory provision which it seeks to amend. A clarificatory amendment is an expression of intent which the legislature has always intended to hold the field. A clarificatory amendment may be introduced in certain cases to set at rest divergent views expressed in decided cases on the true effect of a statutory provision wherein legislature clarifies its intent, it is regarded as being declaratory of the law as it always stood and is therefore, construed to be retrospective;

(iii) Where on the other hand, an amendment seeks to bring about a substantive change in legal rights and obligations, the Court would not readily accept an interpretation of the amendment that would render it retrospective in character. Clear words will be necessary in order to enable the Court to reach to such a conclusion;

(iv) Where the amendment is curative or

> where it is intended to remedy unintended consequences or to render a statutory provision workable, the amendment may be construed to relate back to the provision in respect of which it supplies a remedial effect;
> (v) Where an amendment essentially provides a rule of evidence such as a method for the valuation of the property by adopting one among a set of well-known and well accepted methods of valuation with a view to achieve uniformity in valuation and avoiding disparate valuations resulting from the application of different methods in respect of properties of a similar nature and character, the Court would place a construction on the statutory provision, giving the retrospective effect."

11. **Allied Motors(P) Ltd. Etc.** (supra) was a case in which proviso to Section 43B inserted by the Finance Act, 1987, with effect from 01.04.1987, was held to be retrospective. The intention of bringing Section 43B and the reason for finding it to be retrospective is found in the succinct declaration of the Hon'ble Supreme Court in Paragraph-5 of the aforesaid judgment, which is extracted herein below :-

> "Sec. 43B was, therefore, clearly aimed at curbing the activities of those taxpayers who did not discharge their statutory liability of

payment of excise duty, employer's contribution to provident fund etc. for long periods of time but claimed deductions in that regard from their income on the ground that the liability to pay these amounts had been incurred by them in the relevant previous year. It was to stop this mischief that S.43B was inserted. It was clearly not realized that the language in which S. 43B was worded would cause hardship to those taxpayers who had paid sales-tax within the statutory period prescribed for this payment, although the amount so made by them did not fall in the relevant previous year. This was because the sale-tax collected pertained to the last quarter of the relevant accounting year. It could be paid only in the next quarter which fell in the next accounting year. Therefore, even when the sales-tax had in fact been paid by the assessee within the statutory period prescribed for its payment and prior to the filing of the income-tax return, these assessees were unwittingly prevented from claiming a legitimate deduction in respect of the tax paid by them. This was not intended by S.43B. Hence the first proviso was inserted in S.43B. The amendment which was made by the Finance Act of 1987 in S.43B by inserting, inter alia, the first proviso, was remedial in nature,

designed to eliminate unintended consequences which may cause undue hardship to the assessee and which made the provision unworkable or unjust in a specific situation.

Looking to the curative nature of the amendment made by the Finance Act of 1987 it had been submitted before us that the proviso which is inserted by the amending Finance Act of 1987 should be given retrospective effect and be read as forming a part of S. 43B from its inception. This submission had taken support from decisions of a number of High Courts before whom this question came up for consideration. The High Courts of Calcutta, Gujarat, Karnataka, Orissa, Gauhati, Rajasthan, Andhra Pradesh, Patna and Kerala appear to have taken the view that the proviso must be given retrospective effect. Some of these High Courts have held that 'sum payable under S. 43B(a) refers only to the sum payable in the same accounting year, thus excluding sales-tax payable in the next accounting year from the ambit of S.43B(a) The Delhi High Court has taken a contrary view holding that the first proviso to S. 43B operates only prospectively. We will refer only to some of these judgments".

12. The purport of the above declarations is that, in examining the question whether an amendment is prospective or retrospective, the Court should determine whether it is clarificatory or substantive. If it is clarificatory, it is an expression of intent which the legislature always intended to hold the field and if there is substantive change in legal rights and obligations, it would not be curative and hence not retrospective.

13. We are concerned with the specific question as to whether by bringing sub-section (5A) under Section 45(5), the legislature was trying to eliminate an unintended consequence, visiting the assessee with a hardship, which was sought to be removed; thus making it curative and hence retrospective? Before the amendment, according to the department, as per Section 2(47)(v) any transaction involving transfer of possession of immovable property in part performance of a contract, is a transfer of a capital asset and any profits or gains arising from such transfer effected in the previous year are chargeable to income tax under the head 'capital gains', deemed to be the income of the previous year, the computation of which is to be made under section 48.

14. We extract sub-section (5A) of Section 45, here

under :

> (5A) Notwithstanding anything contained in sub-section (1), where the capital gain arises to an assessee, being an individual or a Hindu undivided family, from the transfer of a capital asset, being land or building or both, under a specified agreement, the capital gains shall be chargeable to income-tax as income of the previous year in which the certificate of completion for the whole or part of the project is issued by the competent authority; and for the purposes of section 48, the stamp duty value, on the date of issue of the said certificate, of his share, being land or building or both in the project, as increased by the consideration received in cash, if any, shall be deemed to be the full value of the consideration received or accruing as a result of the transfer of the capital asset:
>
> Provided that the provisions of this sub-section shall not apply where the assessee transfers his share in the project on or before the date of issue of the said certificate of completion, and the capital gains shall be deemed to be the income of the previous year in which such transfer takes place and the provisions of this Act, other than the provisions of this sub-section, shall apply for the purpose of determination of full value of consideration received or accruing as a result of such transfer.
>
> *Explanation*.- For the purposes of this sub-section, the expression-
>
> (i) "competent authority" means the authority empowered to approve the building plan by or under any law for the time being in force;
>
> (ii) "specified agreement" means a registered agreement in which a person owning land or building or both, agrees to allow another person to develop a real estate project on such land or building or both, in consideration of a share,

being land or building or both in such project, whether with or without payment of part of the consideration in cash;

(iii) "stamp duty value" means the value adopted or assessed or assessable by any authority of the Government for the purpose of payment of stamp duty in respect of an immovable property being land or building or both.”

15. The petitioners’ contention essentially is that Section 45(1) read with Section 2(47)(v) of the Income Tax Act enables inclusion of the capital gains in the total income of the assessee, in the previous year in which possession of an immovable property has been handed over, by the owners to the developer as envisaged under Section 53A of the Transfer of Property Act, under a JDA. Then, such income accruing from the JDA is deemed to be an income of the owner of the property accrued in the previous year in which the transfer is effected.

16. In **Balbir Singh Maini**(supra), it was held that by reason of the amendment to the Registration Act, 1908 by the Amendment Act of 2001, any JDA not registered in accordance with the Registration Act, will have no effect in law for the purposes of Section 53A of the Transfer of Property Act. It was also held that the object of Section 2(47)(v) was to bring within the taxable limit any *de facto* transfer of any immovable

property even though the title may not be transferred in law; but there should be, in fact, a transfer of title in substance. Relying on **E.D.Sasson & Co. Ltd. V. Commissioner of Income Tax; (1955) 1 SCR 313**, it was held that income would accrue to an asessee only on the actual receipt of the same or when the assessee acquires a right to receive the income, despite the actual receipt being later. Unless there is acquired, a right to receive the income or that income has accrued to the assessee, it cannot be included in the total income. Hence, when the JDA had not taken effect, there cannot necessarily be an inclusion of the entire consideration, as envisaged under Section 48 in the total income of the assessee, was the binding declaration.

17. By the Finance Act, 2017, sub-section (5A) was inserted under sub-section (5) of Section 45 and the explanation thereto. As per sub-section (5A) with respect to capital gains arising to an assesse who is an individual or a Hindu undivided family from the transfer of capital asset, being land or building or both, under a specified agreement shall be chargeable to Income Tax as income of the previous year in which certificate of completion for the whole or part of the project is issued by the competent authority. The discrimination alleged by the petitioners in the batch of writ petitions is that, assessees

entering into a JDA are discriminated only by reason their legal status; i.e. individuals and joint Hindu families are given a benefit which is denied to others; like companies. The date of amendment does not offer an intelligible differentia to discriminate between similarly situated assessees, who have entered into a JDA prior to and after the amendment, thus creating two classes of persons among equally situated, seems to be the argument.

18. The argument that in the computation of total income, there cannot be a distinction between a company and an individual, at the outset has to be rejected. The claim also is only insofar as the amendment being retrospective and it is not the contention that the amendment should be made applicable to every entity entering into a JDA and not confined to an individual or a joint Hindu family. The amendment, it is urged, was brought in, to mitigate unintended consequences of an assessee being obliged to compute in his total income, the capital gains on the basis of its accrual, merely for reason of a transfer having been effected as available under Section 53A of the Transfer of Property Act.

19. We are unable to countenance the said argument especially since the amendment to Section 45 by insertion of a

sub-section was expressly stated to be, with effect from the 1st day of April, 2018. There is no question of any discrimination between persons who entered into a JDA before and after the amendment, insofar as the JDA entered into by an individual or a Hindu undivided family, prior to 01.04.2018 being governed by the law on the subject as it existed at that point of time, i.e. on a conjoint reading of Section 2(47)(v) read with Sections 45 & 48. There is no discrimination among equals since the differentiation is made on the basis of date on which the JDA has been entered into, which is a natural consequence of an amendment brought into the Act by way of an insertion expressly stated to be prospective from a specific date i.e., 01.04.2018. Further, though there are different class of assessees under the Income Tax Act, they cannot be considered to be equal, merely for reason of their being assessed under that Act.

20. We refer to paragraph 65 of ***Godrej and Boyce Manufacturing Company Ltd.*** *(supra),* wherein the principles of retrospectivity were succinctly stated; which we also have extracted herein above. The date from which the amendment is made operative, though does not conclusively decide the question, the issue of retrospectivity has to be considered by examining the scheme of the statute prior to the amendment and

subsequent to the amendment, to determine whether the amendment is clarificatory or substantive. In addition to the fact that the amendment is expressly stated to be effective only from 01.04.2018, the benefit of including the consideration by way of a transfer as capital gains in the previous year in which the certificate of completion for the whole or part of the project is issued by the competent authority, was confined to individuals and Hindu undivided families. This very clearly indicates that the benefit was intended to be conferred only on two classes of assessees and this fact especially works against the contention of the amendment being clarificatory. The amendment also cannot be stated to have intended to remedy unintended consequences or to render a statutory provision workable. It cannot be related back to the date of enactment of the original provisions, as an amendment supplying a remedial effect.

21. Section 2(47)(v) read with Sections 45 & 48 remains as such, applicable to all assesses who transferred a capital asset coming within the definition of Section 53A of the Transfer of Property Act, except those individuals and Hindu undivided families, who by virtue of a JDA transferred the capital assets after 01.04.2018.

22. The power of the legislature to make an

amendment, with retrospective effect is undisputed but the requirement is that unless the same is expressed in clear language or implied, without any scope for doubt, then the amendment would only be prospective. An amendment can be taken as impliedly retrospective only when it is intended at removing an obvious anomaly or correcting a blatant error or obliterating an absurdity or bringing it in consonance with any other law or the Constitution. In fact, in such cases the legislature brings in the amendment by way of a substitution and even when a provision is substituted, it would be retrospective only if it is so expressed or follows from necessary intendment, as is implicit from the language implied. In the present case, the amendment made effective from 01.04.2018 is expressly stated to be prospective from that date and there can be no intendment ferreted out since the above noted deficiencies are totally absent. We find no discrimination having been visited on individuals or Hindu undivided families, for whom there was a change made in the manner, or the previous year in which the computation of total income is made, which was effective only insofar as the agreements entered into after 01.04.2018.

23. Insofar as unintended consequences, it would be fruitful to refer to the Hon'ble Supreme Court's decision in the

case of ***Zile Singh v. State of Harayana & Others,*** reported in ***(2004) 8 SCC 1,*** wherein an interpretation of an amendment providing an exception to a disqualification was considered. On April 5, 1994, an amendment was made to the Municipal Act in Haryana, bringing in a disqualification for being elected or continued as a member of the Municipality, to any person having more than two children. An exception was provided to those who had more than two living children 'on or after' the expiry of one year of the commencement of the Act. This resulted in anomalous consequences verging on absurdity, since a person who has a third child on the commencement of the Act would be disqualified but the said disqualification would be removed on the expiry of a full year. A substitution was made changing 'after' to 'upto'. Zile Singh who had a fourth child in August when sought to be disqualified claimed that the substitution made is retrospective. The Hon'ble Supreme Court found that the substitution was intended to remove the anomaly and by necessary implication, it had retrospective effect from the date on which the disqualification was brought into the statute book. It was so held in paragraph 22 :-

> "22**.** The State Legislature of Haryana intended to impose a disqualification with effect from 5-4-1995 and that was done. Any person having

> more than two living children was disqualified on and from that day for being a member of a municipality. However, while enacting a proviso by way of an exception carving out a fact situation from the operation of the newly introduced disqualification the draftsman's folly caused the creation of trouble. A simplistic reading of the text of the proviso spelled out a consequence which the legislature had never intended and could not have intended. It is true that the Second Amendment does not expressly give the amendment a retrospective operation. The absence of a provision expressly giving a retrospective operation to the legislation is not determinative of its prospectivity or retrospectivity. Intrinsic evidence may be available to show that the amendment was necessarily intended to have retrospective effect and if the Court can unhesitatingly conclude in favour of retrospectivity, the Court would not hesitate in giving the Act that operation unless prevented from doing so by any mandate contained in law or an established principle of interpretation of statutes."

24. We also garner support from ***Shyam Sundar & Others v. Ram Kumar & Another,*** reported in ***(2001) 8 SCC 24,*** wherein it was held that '... there is a presumption against the retrospective operation of a statute and further a statute is not to be construed to have a greater retrospective operation than its

language renders necessary, but an amending Act which affects the procedure is presumed to be retrospective, unless amending Act provides otherwise' (sic). Going by the above precedents, we are of the opinion that sub-section (5A) inserted by way of an amendment in the Finance Act, 2017, expressly stated to be effective from 01.04.2018 cannot be treated as retrospective, for reason of the express words employed and there can be no intendment ferreted out, so as to deem it impliedly retrospective. The consequences as per Section 45, for a person who transfers a capital asset as contemplated under Section 2(47)(v) insofar as having to compute the total income by including the capital gains accrued in the previous year in which a transfer was affected, when the JDA was entered into prior to 01.04.2018 was not an unintended consequence. This was substantially changed insofar as an individual and a Hindu undivided family, thus, making the liability to include the capital gains only in the total income of the previous year in which completion certificate was issued by the competent authority was a substantive change brought in prospectively. We find no reason to accept the contention raised of it's retrospectivity and reject the argument of discrimination and the amendment having intended mitigation of hardship and removal of unintended

consequences. The consequence that flow from the provisions in the absence of sub-section (5A) of Section 45 prior to 01.04.2018 cannot be obliterated by the subsequent amendment, which was expressly stated to be prospective. We reject the writ petitions making it clear that we have answered only the question of retrospectivity urged before us. We have not gone into the facts and the various contentions of the petitoners, regarding the JDA having not materialized, no consideration having been passed, the JDA itself having become unworkable and even some of the petitioners, companies and like legal entities having become defunct. These contentions would have to be considered on the anvil of the principles enunciated in **Balbir Singh Maini** (supra). The appellants are left to their statutory remedies and since, the above writ petitions were pending before this Court for long, we grant them two months time, in the case of notices, to file objections before the Assessing Officer. Insofar as the assessment orders are concerned, we grant the assessee's who are the petitioners herein, a further period of three months from the date of receipt of certified copy of this judgment, within which a statutory appeal can be filed before the first Appellate Authority. All contentions on individual facts will be considered either by the

Assessing Officer or the Appellate Authority, depending upon the stage of the assessment.

25. The writ petitions are dismissed with the above observations.

(K. Vinod Chandran, CJ)

(Madhuresh Prasad, J)

Sujit/-

AFR/NAFR	AFR
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