IN THE INCOME TAX APPELLATE TRIBUNAL
"RAIPUR" BENCH, RAIPUR

BEFORE SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER
& SHRI N. K. CHOUDHRY, JUDICIAL MEMBER

आयकर अपील सं./I.T.A. No. 19/RPR/2021
(**निर्धारण वर्ष /** Assessment Year : 2016-17)

Ramdev Mandhani HUF, C-295, Shailendra Nagar, Raipur, Chhattisgarh - 492001	**बनाम**/ Vs.	Income Tax Officer-3(2), Raipur
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAGHR 5208 F		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

अपीलार्थी ओर से /**Appellant by :**	Shri R.B. Doshi, AR
प्रत्यर्थी की ओर से/**Respondent by :**	Shri P.K. Mishra, CIT-DR

सुनवाई की तारीख **/ Date of Hearing**	29.07.2021
घोषणा की तारीख /**Date of Pronouncement**	21.10.2021

आदेश/O R D E R

PER PRADIP KUMAR KEDIA - AM:

The captioned appeal has been filed at the instance of the assessee against the revisional order of the Principal Commissioner of Income Tax ("PCIT" in short), Raipur-1 communicated to the assessee on 26.03.2021 passed under Section 263 of the Income Tax Act, 1961 ("the Act" in short) whereby the assessment order passed by the Assessing Officer ("AO" in short) dated 05.12.2018 under section 143(3) of the Act concerning Assessment Year ("AY" in short) 2016-17 was sought to be set aside for reframing the assessment in terms of supervisory jurisdiction.

2. As per its grounds of appeal, the assessee has challenged the revisional action of the PCIT whereby the Assessing Officer was directed to pass the assessment order *de novo* after making enquiries on the points set out in the notice which has already examined and considered during the original assessment proceedings concerning AY

2016-17. The assessee has challenged the assumption of jurisdiction by the PCIT under Section 263 of the Act on the ground that the Assessment Order under revision is neither erroneous nor prejudicial to the interest of the revenue.

3. Briefly stated, the assessee filed return of income for AY 2016-17 declaring total income at Rs.14,35,500/-. The case was selected for scrutiny on the reasons for verification of large deductions claimed under Section 54-B, 54-C, 54-D, 54-G of the Act and whether deductions from capital gains have been claimed correctly. The assessment was completed under Section 143(3) of the Act allowing the deductions claimed. Thereafter, the PCIT called for the assessment records and opined that the assessment order so passed is erroneous insofar as prejudicial to the interest of the Revenue. A show cause notice was issued to assessee seeking his response. It will be pertinent to reproduce the show-cause notice issued by the PCIT for appreciation of controversy.

"To,

RAMDEV MANDHANI
C-295, SHAILENDRA NAGAR
492001 , Chhattisgarh India

PAN/TAN: AAGHR5208F *AY: 2016-17*

DIN & Notice No:ITBA/REV/F/REV1/2020-21/1031386740(1) *Dated: 10/03/2021*

NOTICE FOR THE HEARING

Subject: Notice for Hearing in respect of Revision proceedings u/s 263 of the THE INCOME TAX ACT, 1961 – Assessment Year 2016-17.

In this regard, a hearing in the matter is fixed on 15/03/2021 at 11:00 AM. You are requested to attend in person or through an authorized representative to submit your representation, if any alongwith supporting documents/information in support of the issues involved (as mentioned below). If you wish that the Revision proceeding be concluded on the basis of your written

submissions/representations filed in this office, on or before the said due date, then your personal attendance is not required. You also have the option to file your submission from the e-filing portal using the link: incometaxindiaefiling.gov.in

On examination of your Income Tax records for the above assessment year, I find that the order passed u/s 143(3) on 05.12.2018of the Income tax Act, 1961 is erroneous in so far as it is prejudicial to the interest of revenue in the following manner: -

The order in the aforesaid case is erroneous so far as prejudicial to the interest of revenue on the following grounds:

In this case, the assessee company filed its return of income for A.Y. 2016-17 on 31.03.2017 declaring total income at Rs. 14,35,500/-. The case was selected for scrutiny through CASS on the reason "Large deduction claimed u/s 54-B, 54-C, 54-D, 54-G whether deduction from capital gain has been claimed correctly." The assessment was completed u/s 143(3) of the I.T. Act, 1961 on 05.12.2018 at Rs. 14,35,500/-.

Later on the RAP has raised two objections vide audit objection memo dated 23.07.2019 which is reproduced as under:-

"The deduction under Section 54 B is available in respect of capital gain arising from transfer of Agriculture Land, if following conditions are satisfied:

(1) The Agricultural Land has been transferred by an individual.
(2) The Agricultural Land has been used by the Individual or his parents for agricultural purpose during the 2 years immediately preceding the date of transfer

(3) The assessee had purchased another agricultural Land (rural or urban) within a period of 2 years after the day of transfer of the original agricultural land to be used for agricultural purposes.

Further, as per Section 2(14) (iii) of the Income Tax Act, 1961, unless the context otherwise requires, the term, "capital asset" does not include agricultural land in India, not being land situated:

(a) in any area which is comprised within the jurisdiction of a municipality (whether knows as a municipality, municipal corporation, notified area committee, town are committee, town committee, or by any other name) or a cantonment board and

which has a population of not less than ten thousand; or (b) in any area within the distance, measured aerially:

(I) not being more than two kilometers, from the local limits of any municipality or cantonment board referred to in item (a) and which has a population of more than ten thousand but not exceeding one lakh; or

(II) not being more than six kilometers, from the local limits of any municipality or cantonment board referred to in item (a) and which has a population of more than one lakh but not exceeding ten lakh; or

(III) not being more than eight kilometers, from the local limits of any municipality or cantonment board referred to in item (a) and which has a population of more than ten lakh.

Explanation: For the purpose of this sub-clause, "population" means the population according to the last preceding census of which the relevant figures have been published before the first day of the previous year.

Further, as per Section 45 of Income Tax Act, provides that, any profit or gains arising from the transfer of a capital asset effected in the previous year shall, save as otherwise provided in sections be chargeable to income-tax under the head "Capital gain", and shall be deemed to be the income of the previous year in which the transfer took place. Audit scrutiny of case file revealed that assessee had sold agricultural land situated at Daldal Seoni, Raipur for sales consideration amounting to 2,56,72,500/- dated 01/12/15 and earned Long Term Capital Gain of 2,13,70,207/- and claimed deduction u/s 54 B by investing in 3 agricultural Lands situated at Sejbahar, Raipur having purchase value i.e. 84,00,000/- and 60,00,000/- and 1,07,40,000/- totaling to 2,51,40,000/-.

But scrutiny of case file, revealed that land sold and purchased by assessee in not agricultural land it comes under Definition of capital asset as per section 2(14) of IT Act, because it is itself mentioned in sale deed that above sold land is in Daldal Seoni Locality which falls under Limits of Raipur Municipal Corporation. Further, there is no Certificate from land Record Authorities attached in case file, that above mentioned sold and purchased Agricultural lands are situated at more than specific distance from limits of Municipal bodies are described above in Section 2(14)(iii) of IT Act, 1961. Further, land at Daldal Seoni, Raipur is sold to Abhinav Builders. That corroborates that above land would be used for non-agricultural purposes i.e. commercial

operations. Therefore deduction taken by assessee u/s 54 B i.e. 2,13,70,207/- is irregular and is liable for taxation on Long Term capital gain amounting to 2,13,70,207/-

4. Hence, there is no application of mind on the part of the AO to correctly tax the income of the assessee in the return of income and therefore, the assessment order passed u/s 143(3) of the Act is erroneous in so far as it is prejudicial to the interest of revenue.

Therefore, in exercise of the powers conferred on me by section 263 of the I.T.Act, 1961, I propose to suitable revise the order u/s 263, which may include setting aside the order as such. Accordingly, an opportunity is being extended to explain your case along with details, documents and necessary evidences. An absence of any submission or reply shall lead to the conclusion that you have no objection for the proposed action and the proceedings shall be finalized accordingly.

Your submission / reply may kindly be sent through the e-mail on or before 15/03/2021.

If you wish to appear personally or through your authorized representative, personal hearing may kindly be availed on 15/03/2021 at 11:00 am in the office of PCIT-1, Central Revenue Building, Civil Lines, Raipur."

It was alleged by the PCIT that deductions claimed under Section 54-B by the assessee on transfer of agricultural land has been wrongly allowed by the AO and without application of mind. A revision order was passed by which the PCIT accordingly set aside the assessment so completed and remanded the issue back to the file of the AO for fresh adjudication thereof.

4. Aggrieved, the assessee preferred appeal before the Tribunal.

5. When the matter was called for hearing, two fold contentions were raised on behalf of the assessee.

5.1 Firstly, it was contended that the assessee has not received the show-cause notice under Section 263 at all and, therefore, no appearance could be made before the PCIT in the absence of any

opportunity provided to the assessee. It was pointed out that the show-cause notice bears the date 10.03.2021 calling for hearing on 15.03.2021 at 11:00 am. However, the notice itself bears the signature on 15.03.2021 at 1.49pm. Apparently, as per show-cause notice, the time fixed for hearing is prior to the time of issue of notice itself. Besides, the show-cause notice has been purportedly sent on email ID ssdlab7@hotmail.com which was not received on the said ID at any time. The PCIT did not verify the fact of service of notice especially when there was no response from the assessee in the matter. It was thus contended that firstly the notice has not been issued and secondly even if it is momentarily assumed that the notice has been served, it carries no legal effect for the reason that issue of notice is subsequent to date and time fixed for attendance. It was further submitted that the burden is on the Department to prove service of notice and giving of opportunity as held in Venkat Naicken Trust Vs. ITO (2000) 242 ITR 141 (Mad.). It was also submitted that except the impugned show cause notice, no other notice/intimation of the revisional proceedings were given to the assessee. The revisional order was passed based on such solitary show cause notice which remained unserved. In these background, it was strongly contended that the revisional order passed, without any opportunity of hearing, is null and *void ab initio* and such revisional order passed without opportunity is *non est* and is unsustainable in law. A reference was made to the decision of Co-ordinate Bench in the case of Smt. Shardaben B. Patel Vs. PCIT (2020) 180 ITD 328 (Ahd.) for this purpose.

5.2 On merit, learned Counsel for the assessee submitted that the PCIT in the revisional order passed *ex-parte* has observed that deduction claimed by the assessee on sale of agricultural land under s.54B of the Act has been wrongly allowed without adequate enquiry

and the order of the AO passed under Section 143(3) of the Act is vitiated by non-application of mind. In its defense, the learned AR for the assessee pointed out that the whole premise for coming to such conclusion by the PCIT is *prima facie* incorrect. The learned Counsel referred to the reasoning provided by the PCIT in page 3 of its order and submitted that PCIT referred to the definition of Section 2(14) of the Act and observed that the agricultural land is situated within the Raipur Municipal Corporation and is thus a capital asset. In defense, the learned Counsel submitted, at the outset, that the controversy is on account of deductibility under Section54B of the Act and has no connection with parameters of Section 2(14) of the Act. The learned Counsel submitted that if the agricultural land is outside specified distance of 8 kilometers of the Raipur Municipal Corporation, the asset will not be a 'capital asset' at the first place and gains arising would be totally exempt from taxation. In such a situation, the question of deductibility under s.54B of the Act would not arise at all. The learned Counsel pointed out that the land in question is agricultural land as can be seen from the sale deed placed at page no.16 of the paper book. It was further contended that all the conditions stipulated under s.54B of the Act are fully satisfied in the instant case and the deductibility under Section 54B of the Act as claimed by the assessee was rightly allowed by the AO after taking cognizance of relevant facts placed on record. It was pointed out that land was used for agricultural purposes in two years prior to sale as can be seen from Revenue records (P-22) maintained by Patwari. Further, the new land purchased is agricultural land which fact is again supported by Form P-2 placed at page nos. 92, 93, 95 & 96 of the paper book. The produce shown in the Form P-2 would demonstrate that the new land purchased was also put to use for agricultural purposes. The learned Counsel pointed out that no

evidence has been brought to the contrary by the PCIT for coming to an adverse opinion. It was thus pointed out that once Section 54B of the Act were duly complied with, there was no reason for the AO to deny the deduction. The learned Counsel for the assessee submitted that the PCIT without giving any opportunity has proceeded on an irrelevant consideration, such as, land sold was a capital asset under Section 2(14) of the Act, whereas, the assessee has never claimed that it was not a capital asset. The deduction under s.54B of the Act is admissible only in respect of urban agricultural land and rural agricultural land are otherwise also exempt from taxation. Hence, the PCIT has wrongly alleged inadequacy to enquiries on the face of tell-tale evidences and wrongly invoked the revisional power bestowed upon it under s.263 of the Act without showing as to how the action of the AO is erroneous per se. The learned AR accordingly urged for cancellation of the revisional order passed in wrongful exercise of jurisdiction.

5.3 In conclusion, the learned Counsel submitted that the revisional order is neither sustainable in law in the absence of mandatory requirement of opportunity enshrined in Section 263 itself nor on merits as the PCIT has totally misconstrued the facts of the case and grossly misapplied the law. He accordingly urged for cancellation of the revisional order and restoration of assessment order.

6. The learned CIT-DR, on the other hand, relied upon the contents of the revisional order.

7. We have heard the rival submissions and perused the material placed before us by way of paper-book. Firstly, we consider it expedient to address ourselves on justification of the issuance of the

show-cause notice under Section 263 of the Act and consequently the direction for verification of deduction under Section 54-B on merits.

8. On perusal of the show-cause notice and the revisional order along with factual matrix, we find that the principal allegation of the PCIT is that the land sold and then purchased by the assessee is not an agricultural land. The land sold giving rise to capital gains on which deduction under Section 54-B has been alleged to fall under the limits of municipality, i.e. Raipur Municipal Corporation. It is further observed that there is no certificate from the Land Revenue Authorities that the land sold and purchased are situated at more than specific distance from the limits of municipality bodies as described in Section 2(14)(iii) of the Act. It is further alleged that the land was sold to a builder which would mean that the land would be used for non-agricultural purposes and for commercial operation after sale. In this backdrop, it is alleged that the deduction taken by the assessee under Section 54-B of the Act is irregular and the gains arising on the sale of land is liable for taxation as LTCG without any deduction claimed under Section 543 of the Act..

8.1 We find the observations of the PCIT neither here nor there. It is manifest that the PCIT has proceeded on a total misconception of law in the given set of facts. Where the agricultural sold land situated is outside the municipal limits, it will not be deemed as capital asset under Section 2(14)(iii) of the Act at the first place and consequently there would be no liability of capital gain on the assessee at the threshold. Hence, we do not understand the need for certificate of land record authorities in this regard. The assessee has not claimed at all that the agricultural land is situated outside the specified distance of municipality. The assessee has, in fact, calculated the LTCG and claimed deduction thereon on the ground that the capital gain accrued

on sale of land has been towards purchase of other land parcels which is also used for agricultural purposes. The PCIT has made out a totally different case which has no relation with application of Section 54-B of the Act. The use of agricultural land, after its transfer to a builder, is of no consequence for the purposes of Section 54-B of the Act. The PCIT himself has admitted that the land in sale to be agricultural land and also not disputed the purchase of agricultural land by utilization of capital gain for agricultural purposes. The PCIT has proceeded to disturb the assessment on totally irrelevant consideration and without showing any error in the claim.

8.2 On appreciation of facts available before us showing the use of land for agricultural purposes having regard to the agreement with farmers and other supporting papers, we are unable to discern even any remote error in the action of the AO in admitting the claim of deduction under Section 54-B of the Act. On the other hand, we find that the action of the PCIT suffers from vice of arbitrariness and total lack of application of mind. The palpably wrong revisional order is accordingly set aside and quashed.

9. We now also advert to the vehement opposition on behalf of the assessee on the ground of non-issuance of notice and on total lack of opportunity while concluding the proceedings under Section 263 of the Act. It has been demonstrated on facts that only show cause notice issued to the assessee was for attendance on 15.03.2021 calling the assessee at earlier point of time i.e. 11.00 AM on the same date, whereas the notice itself was issued at 1.49 PM. We are constraint to observe that such casual approach of a very senior functionary of the Department does not augur well in the eyes of the public. As stated in the bar, no such notice was served at all on the email ID as

claimed. No other notice was served. Palpably, it is a case of total lack of opportunity to the assessee to defend its case. A question would arise as to whether a failure to give a reasonable opportunity to the assessee of being heard was only a procedural irregularity in such gross circumstances and thus curable and did not render the order passed by the PCIT *ab initio void* and *non est* in law per se.

10. In the case of Tata Chemicals Limited vs. DCIT, ITA No.3127/Mum/2010, order dated 30.06.2011, the co-ordinate bench after making reference to the decision in the judgment in Maneka Gandhi vs. Union of India, AIR 1978 SC 597, and other judgments observed that the order which infringes the fundamental principle, passed in violation of *audi alteram partem* rule, is a nullity. When a competent Court or authority holds such an order as invalid or sets it aside, the impugned order becomes null and void. Once it is concluded that the order in question is null and void, it is not for the adjudicating authority to advise the Commissioner as to what should he do. He is always at liberty to do whatever action he can take in accordance with the law, but a life to null and void order by remitting it back to the Commissioner for giving a fresh opportunity of passing the order after giving the assessee an opportunity of hearing cannot be given. In a case where it is possible for the Commissioner to pass a fresh order at this stage in accordance with the scheme of the Act, he can very well do so but in case the time limit for passing such order has already expired, such time limit cannot be extended by directing him to pass the order after giving an opportunity of hearing to the assessee. Otherwise, this would tantamount to give premium to the person committing default. The finality of the assessment cannot be disturbed for the failure of the PCIT to obdurately adhere to the explicitly prescribed requirement of opportunity to assessee. Hence,

in the absence of any opportunity to the assessee for which the fault is attributable squarely to the PCIT, is fatal and such defect being incurable, the revisionary order passed under Section 263 of the Act is also required to be quashed independently on this ground also.

11. Hence, looking from any angle, the impugned revisional order passed under Section 263 of the Act is set aside and quashed.

12. In the result, the appeal of the assessee is allowed.

Pronounced on 21.10.2021 as per Rule 34(4) of the Income Tax Appellate Tribunal Rules, 1963.

Sd/-	Sd/-
(N. K. CHOUDHRY) JUDICIAL MEMBER	(PRADIP KUMAR KEDIA) ACCOUNTANT MEMBER

BT

True Copy

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. राजस्व / Revenue
2. आवेदक / Assessee
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त– अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, रायपुर / DR, ITAT, RAIPUR
6. गार्ड फाइल / Guard file.

By order

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Assistant Registrar
Income Tax Appellate Tribunal
Raipur Bench, Raipur