SMT.HALIMA ZUBAIR vs. ASSISTANT COMMISSIONER OF INCOME TAX

COCHIN TRIBUNAL

CHANDRA POOJARI, AM. & GEORGE GEORGE K, JM.

ITA No.116/Coch/2016

Apr 1, 2019

(2019) 55 CCH 0552 CochinTrib

Legislation Referred to

Section 2(14), 54F, 143(3) and Section 9(3) of the Land Acquisition Act, 1894

Case pertains to

Asst. Year 2011-2012

Cases Referred to

Goetze (India) Ltd. v. CIT [(2006) 284 ITR 323 (SC)]
Kalpetta Estate Ltd. V. CIT (61 taxman 54)(Ker.)
Pr.CIT v. Western India Shipyard Ltd. [(2015) 379 ITR 289 (Del.)]
Shahnaz Shukkoor v. Chelannur Grama Panchayat [(2009) 3 KLT 899 (Ker.)
Smt. Asha George v. ITO (351 ITR 123)(Ker.)

Counsel appeared:

Surendranatha Rao for the Petitioner.: A.S.Bindhu, Sr.DR for the Respondent.

GEORGE GEORGE K, JM.:

This appeal at the instance of the assessee is directed against CIT(A)'s order dated 08.12.2015. The relevant assessment year is 2011-2012.

2. The grounds raised reads as follow:-

> *1. The order of the Commissioner of Income Tax (Appeals) is against law and facts.*
>
> *2. The learned Commissioner of Income Tax (Appeals) should have appreciated that the actual user of the land for agricultural operation for two years immediately prior to the date of sale is not a pre-condition for treating a plot of land as agricultural property. This condition is specified in section 54F as well as section 10(37) but cannot be read into section 2(14) which defines capital asset. For*

determining whether the particular plot of land is agricultural what is really required is connection of such land with an agricultural purpose. The appellants have used the land for agricultural purposes in which crops were raised for own use and the mere fact that no agricultural income was included in the Income Tax returns filed, by itself would not decide the character of the land. The learned Commissioner (Appeals) should have appreciated that the entries in revenue records are prima facie evidence to indicate that the land in question is agricultural land. The mere fact that area around this land was fast developing, would by itself not make this particular plot a non-agricultural one.

3. Without prejudice to what is stated above, the learned Commissioner of Income Tax (Appeals) should have allowed the deduction U/S 54F if he was of the opinion that the land transferred was a capital asset and the amount received on transfer of this land was chargeable capital gains. He should have appreciated that the decision of the Honourable Supreme Court in Goetze (India) Limited v. CIT (284 ITR 322)(SC) has only held that the Assessing Officer cannot consider a fresh claim during assessments if such claim is not raised such claim at the time of adjudication of an appeal filed. The facts of the decision of the apex court related to a claim before the tribunal and based on the fact of that case, the Commissioner (Appeals) is not justified in concluding that the fresh claim can be raised only before the tribunal and not before Commissioner (Appeals). Even otherwse, as per Circular No.14 (XI- 35) of 1955, dated April 11, 1955, the CBDT has provided that the Assessing officer shall grant all deductions and exemptions to which an assessee is entitled even though the assessee would have omitted to raise a claim in the return. The Assessing officer having included the notional income from the new residential property in the income of the appellant, he should have also granted the deduction under section 54F for the amount invested in this property. "

3. The brief facts of the case are as follows:

The assessee is an individual, who is a dealer in tiles and sanitary items. She is also commission agent of seafood. For the assessment year 2011-2012, the return of income was filed on 30.09.2011 declaring total income at Rs.26,73,010. The assessee had received a sum of Rs.90,83,968 on account of compulsory acquisition of 1.06 acres of land from Kerala Government. The assessee claimed the land acquired as exempt from taxation as per letter dated 12.03.2014 written to the Assessing Officer. The contentions of the assessee for claiming exemption from taxation are as follows:-

(i) The land acquired is basically agricultural land. It was acquired by Government of Kerala for KNFRA (Kerala Industrial Infrastructure) project for development of industrial infrastructure.

(ii) The revenue records show the property as Nilam (wet land) and the land tax has been paid on the said property.

(iii) The property was regularly used for agriculture and paddy was cultivated and later on banana plantation was done. The yield from the cultivation was used for own consumption. The land continued to be used for agricultural purposes only and no industrial activity was carried out.

(iv) The land was not situated in a developed area. The entire surrounding area was agricultural land only and under compulsory acquisition by the Government of Kerala for the Info Park expansion 2nd stage. The land forms part of 21 acres of property acquired for the II phase of Info Park. Almost all the acquired land is wet land only and some portion had coconut trees on the buds having an approximate age of 20 to 25 years.

(v) No development was done by plotting or providing roads and other facilities.

(vi) There was no sale of property on earlier occasion of any small portion for non-agricultural purposes. The land was sold on acreage basis.

(vii) The sale was due to compulsory acquisition by the Government of Kerala and a large portion of 21 acres was acquired in full with no room for negotiation of price. The price offered was below the then market value of the property.

(viii) The land is located outside the limits of Municipality and notified area as defined for the purposes of agricultural land.

4. The Assessing Officer, however, denied the claim of exemption from capital gains on compensation received on transfer of land giving following reasons:-

(i) The land in question is basically a residential plot with access to all amenities like electricity, water, cable T.V. connections, drainage connections and road access.

(ii) The nearby locality was of the land are highly developed near to Infopark developed roads, etc.

(iii) Land was transferred for non-agricultural purposes for a price of Rs.90 lakhs per acre which is comparatively high for agricultural land.

(iv) The intention of the assessee in acquiring this land cannot be said to be for genuine agricultural purposes and the motive was only for to earn gains by fetching higher value.

(v) There is no evidence to prove that organized agricultural activity was carried out on the land.

(vi) Physical characteristics, use of lands adjoining lands, etc do not indicate that the land was agricultural.

(vii) Whether or not compulsory acquisition was done, the appellant would not have cultivated the land.

5. Aggrieved by the denial of exemption, the assessee preferred an appeal to the first appellate authority. The assessee before the first appellate authority contended that the land acquired was an agricultural land and would not come within the term capital asset u/s 2(14) of the I.T.Act and hence would not be liable for capital gain tax. Further, the learned Counsel had claimed exemption u/s 54F of the I.T.Act in respect of a new residential house purchased in Bangalore. The CIT(A), however, rejected the contention of the assessee. The CIT(A) reiterated the views of the Assessing Officer and upheld the order of the Assessing Officer denying the claim of exemption from capital gains. The CIT(A) also relied on the finding of the Assessing Officer that no agricultural income was returned by the assessee for the year under consideration and also for the earlier years. The CIT(A) relied on the following judicial pronouncements, which the Assessing Officer also relied on.

(i) M.K.Abdul Rehman v. DCIT (16 taxman.com 406)(Coch)

(ii) Smt.Asha George v. ITO (351 ITR 123)(Ker.)

(iii) Kalpetta Estate Ltd. V. CIT (61 taxman 54)(Ker.)

(iv) Shahnaz Shukkoor v. Chelannur Grama Panchayat [(2009) 3 KLT 899 (Ker.)

6. The CIT(A) also rejected the claim of exemption u/s 54F of the I.T.Act for the reason that the claim was not made in the return of income filed by the assessee.

7. Aggrieved by the CIT(A) is order, the assessee filed the present appeal before the Tribunal. The assessee has filed a paper book containing 137 pages inter alia enclosing certificate from the Village Office, Form No.9(B) of the Land Acquisition Act, 1894, signed by the Special Tahasildhar, Land Acquisition, Cochin, Form No.12 dated 18.05.2010, Notification No.9447 dated 6th June, 1994 and copies of judicial pronouncements relied on by the assessee. The assessee has also filed additional evidence namely Form No.9(B) under the Land Acquisition Act, 1894, in which the official notice of compulsory acquisition and the nature of the land is specified. In support of the additional evidence sought to be admitted, the assessee has also filed an affidavit which reads as follows:-

> "Halima Zubair, aged 54 years wife of Zubair Naina residing at 28/2115-B, Zuleka House, Thottungathara Road, Kadavanthra Post, Emakulam do hereby solemnly affirm as follows :-
>
>> I am assessed to Income Tax by the Assistant Commissioner of Income Tax, Circle 2(1), Kochi having PAN No. AACPZ2882R. For Assessment Year 2011-12, my Income Tax assessment was completed U/S 143(3) on 26.03.2014. While completing the assessment, the assessing officer treated consideration received by me on compulsory acquisition of 1.06 acres of agricultural land in Kunnathunadu village as consideration received on transfer of capital asset and levied capital gain tax on this amount. This land was not sold by me but was compulsorily acquired. The consideration for acquisition was fixed by the Land Acquisition Thahasildar, Thripunithura as NILAM which means agricultural land. Even though the amount received was relating to compulsory acquisition and not voluntary sale the assessing officer treated the land acquired as capital asset. The CIT (Appeals) also did not grant any relief even though the village officer's certificate and other evidences were produced before him. The appellant now has obtained copy of Form no.9B under the Land Acquisition Act 1894, in which the official notice of compulsory acquisition and the nature of the land is specified. This Form no 9B clearly specified that the land acquired was nilam meaning agricultural land. Form no.9B was not be produced before the assessing officer and the Commissioner (Appeals) because the appellant honestly believed that the land acquired would be treated as exempt on the basis of Village Officer's certificate and other evidences. However, as the appeal filed has been dismissed by the Commissioner (Appeals), the Form no 9B would be crucial to decide the nature of land compulsory acquired. The non filing of Form no 9B before the Assessing Officer or the Commissioner (Appeals) was not willful and was due to a bonafide belief that the compulsorily acquired land would be treated as agricultural land based on documents already filed and also precedents established in other cases. The filing of this document is now very important to prove the actual nature of the land at the time of acquisition. Under these circumstances I pray the Honorable Tribunal to take on record this additional evidence and kindly issue appropriate directions for the disposal of the appeal."

8. The learned Departmental Representative strongly supported the orders of the Income-tax Authorities.

9. We have heard the rival submissions and perused the material on record. The solitary issue for our consideration is regarding taxability of the amount received on compulsory acquisition of 1.06 acres of land claimed to be agricultural land. Admittedly, the above said land is outside the Ernakulam Municipality. The assessee had also claimed exemption u/s 54F of the I.T.Act.

9.1 As regards the claim that the impugned land is an agricultural land, the assessee has produced Form No.9(B) i.e. Notification u/s 9(3) of the Land Acquisition Act, 1894, issued by the Special Tahasildhar, Land Acquisition Office, wherein it is clearly stated that the property acquires as 'Nilam'. Form No.9(B) now produced goes to the root of the issue and for substantial cause and justice, we admit the same on record. Since we have admitted the additional evidence on record, the matter needs to be restored to the Assessing Officer for examination of the issue afresh in the light of the additional evidence now produced by the assessee.

9.2 Before concluding, it is to be mentioned that the claim of deduction u/s 54F of the I.T.Act was dismissed at the threshold by the CIT(A) on the ground that the claim was not raised through the return of income, hence, it cannot be considered by the A.O. The CIT(A) failed to note that the judgment of the Hon'ble Supreme Court in the case of *Goetze (India) Ltd. v. CIT [(2006) 284 ITR 323 (SC)]* wherein the Hon'ble Supreme Court had put an embargo on Assessing Officers entertaining a fresh claim other than through a revised return but the same decision has held that there is no such bar on appellate authorities entertaining a claim on any issue not raised in the return. The Hon'ble Delhi High Court in the case of *Pr.CIT v. Western India Shipyard Ltd. [(2015) 379 ITR 289 (Del.)]*, had held that : "the Tribunal was right in holding that while there was a bar on the Assessing Officer entertaining such claim without a revised return being filed by the assessee, there was no such restraint on the Commissioner (Appeals) during the appellate proceedings.........". Moreover, as per Circular No.14(XI-35) of 1955, dated 11th April, 1955, the Assessing Officer having included the notional income from new residential property in the income of the assessee, he can also consider the claim of deduction u/s 54F of the I.T.Act provided the conditions are satisfied for claiming such deduction. It is ordered accordingly.

10. In the result, the appeal filed by the assessee is allowed for statistical purposes.

Order pronounced on this 01st day of April, 2019.

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DILPREET SINGH vs. INCOME TAX OFFICER

CHANDIGARH TRIBUNAL

DIVA SINGH, JM.

ITA No. 301/CHD/2017

Apr 1, 2019

(2019) 55 CCH 0361 ChdTrib

Legislation Referred to

Section 250(5), 2(14), 148

Case pertains to

Asst. Year 2009-10

Decision in favour of:

Matter Remanded

Capital gains—Fair market value—Assessee filed return of income—AO found that assessee had sold land during relevant AY alongwith others—Based on such information, capital gains on sale of those lands had escaped assessment, accordingly, AO initiated re-assessment proceedings by issue of notice u/s 148—AO noticed that assessee had declared capital gains at 'nil' after claiming deduction u/s 54F—AO observed that land sold was a capital asset u/s 2(14) for purpose of s.45—Further, AO noted that assessee had computed capital gains by adopting indexed cost of land—AO rejected valuation report of valuer as it was found to have been based merely on opinion of valuer and not substantiated with any documentary evidence—AO computed LTCG after allowing benefit u/s 54F to assessee which resulted in addition—CIT(A) confirmed FMV adopted by AO—Held, if evidence relied upon by an assessee was vague, not relevant, sufficient or complete, CIT(A) ought to have exercised his powers u/s 250(4) to call for necessary evidences exercising powers vested in his authority vide Rule 46A(4) of Income Tax Rules, 1962 in order to enable himself to adjudicate upon issue—FAA under Act and Rules had ample powers to call for Report from Land Revenue Authorities and also direct AO to place a Remand Report on record after obtaining DVO's Report—If version of assessee relying on Approved Valuer's Report was to be discarded, then tax authorities necessarily need to refer matter to DVO—Similarly, even on issue of location of specific property, it was word of Land Revenue Authorities which was last word—On reading of CBDT Circular No. 14 (XL-35), Executive intent evident by Board's Circular, unambiguously made it clear that tax authorities were not expected to encash for State Exchequer ignorance of assessee—Circulars were binding on tax authorities—There could be in no doubt that assessee could not be made to pay more tax than was legitimately due from him—It was directed that in case evidence filed was not reliable, sufficient or complete, AO should call for DVO's Report and necessary evidences from Land Revenue Authorities, confront report to assessee and pass an order after hearing assessee in accordance with law—Impugned order was remanded to AO with a direction to pass a speaking order—Matter Remanded.

Held

If evidence relied upon by an assessee was vague, not relevant, sufficient or complete, CIT(A) ought to have exercised his powers u/s 250(4) to call for necessary evidences exercising powers vested in his authority vide Rule 46A(4) of Income Tax Rules, 1962 in order to enable himself to adjudicate upon issue. FAA under Act and Rules had ample powers to call for Report from Land Revenue Authorities and also direct AO to place a Remand Report on record after obtaining DVO's Report. If version of assessee relying on Approved Valuer's Report was to be discarded, then tax authorities necessarily need to refer matter to DVO. Similarly, even on issue of location of specific property, it was word of Land Revenue Authorities which was last word.

(Para 10)

On reading of CBDT Circular No. 14 (XL-35), Executive intent evident by Board's Circular, unambiguously made it clear that tax authorities were not expected to encash for State Exchequer ignorance of assessee. Circulars were binding on tax authorities. There could be in no doubt that assessee could not be made to pay more tax than was legitimately due from him.

(Paras 10.2&10.4)

It was directed that in case evidence filed was not reliable, sufficient or complete, AO should call for DVO's Report and necessary evidences from Land Revenue Authorities, confront report to assessee and pass an order after hearing assessee in accordance with law. Impugned order was remanded to AO with a direction to pass a speaking order.

(Para 11)

Conclusion

If version of assessee relying on Approved Valuer's Report was to be discarded, then tax authorities necessarily need to refer matter to DVO.

In favour of

Matter Remanded

Cases Referred to

ACIT vs. Rajesh Jhaveri Stock Brokers Pvt. Ltd. (291 ITR 500)
CIT Vs Mahindra Mills 243 ITR 56 (S.C)
Commissioner of Income tax vs Mahindra Mills, ((2008) 296 ITR 85 (Mad))

Counsel appeared:

Chanderkanta, Sr.DR for the Revenue

ORDER

1. The present appeal has been filed by the assessee assailing the correctness of the order dated 05.12.2016 of CIT(A)-2, Chandigarh pertaining to 2009-10 assessment year on the following grounds :

> *1. That the order of the Ld. Commissioner of Income Tax (Appeals) - 2, Chandigarh is defective both in law and facts of the case.*

2. That the Ld. CIT (A) - 2, Chandigarh is unjustified in upholding the re-assessment framed u/s 147 r.w.s. 148 of the I.T. Act, 1961 by the Ld. Assessing Officer which is bad in law as the reasons recorded were on the basis of incomplete version of notification without any proof and proper satisfaction.

3. That the Ld. CIT (A) - 2, Chandigarh is unjustified in upholding the order of the Ld. Assessing Officer regarding addition of Rs.24,64,857/- under the head Long Term Capital Gains as the agricultural land sold by the appellant is not a capital asset u/s 2(14) of the I.T. Act, 1961 being beyond the notified limits. This addition is uncalled for and deserves to be deleted.

4. That the Ld. CIT (A) - 2, Chandigarh is unjustified in upholding the order of the Ld. Assessing Officer regarding addition of Rs.24,64,857/- under the head Long Term Capital Gains as the Ld. Assessing Officer has applied his own fair market value of the land as on 01-04-1981 instead of the value taken by the appellant on the basis of valuation report certified by a Government Approved Qualified Valuer. This addition is uncalled for and deserves to be deleted.

5. That any other ground may kindly be allowed to be taken at the time of appeal with due permission.

2. At the time of hearing, no one was present on behalf of the assessee. The appeal was passed over. In the second round also, no one was present. Accordingly, considering the peculiar facts and circumstances on record after hearing the ld. Sr.DR it was deemed appropriate to proceed with the present appeal ex-parte qua the assessee appellant on merits.

3. The record shows that the appeal of the assessee was dismissed earlier in limine on 28.03.2017 by order dated 05.04.2017. The assessee, thereafter filed M.A./78/CHD/2017 wherein the assessee pleaded ld. AR's medical reasons as an inability to be present on the specific date. Considering the facts, the order was recalled by an order dated 25.10.2017. Thereafter, though the appeal come up for hearing on various dates, however on the requests for time moved by the assessee, it was adjourned. In the circumstances it was deemed appropriate to proceed with the present appeal ex-parte qua the assessee on merits as grant of any further time considering the facts of the case may not serve any purpose. Accordingly, in the interests of substantial justice, it is deemed appropriate to address the issues raised in the present appeal after hearing the ld. Sr.DR.

4. Ground No. 1 raised by the assessee in the present appeal is general in nature in as much as the issues raised therein are elaborated vide ground Nos. 2 to 4 and thus, the first ground requires no specific adjudication.

5. Addressing the issues raised in the second ground, it is seen that the assessee challenged the re-opening of the assessment before the CIT(A). The challenge was rejected on the following reasons :

5.1 As the omission of this ground from the form of appeal *was not willful, this ground of appeal is admitted for adjudication as per the provisions of section 250(5) of the Act. The assessing Officer formed his reasons to believe that some income had escaped assessment and so issued* notice *u/s 148 of the Act. It has been held by Hon'ble Supreme* Court *in the case of ACIT vs. Rajesh Jhaveri Stock Brokers Pvt. Ltd. (291 ITR 500) that at the stage of issue of* notice *u/s 148, the only question to be seen is whether there* was *relevant material, on the basis of which a reasonable person could have formed the requisite belief. Whether material would conclusively prove escapement of income is not the concern at the stage of issue of notice u/s 148. It is so because the formation of belief is within the realm of the*

> *subjective satisfaction of the Assessing Officer. In view of the judgment of Hon'ble Supreme Court (supra) and by respectfully owi ng the same, the* action of *the Assessing* Officer of re-opening *the assessment is held. This additional ground of appeal taken by the appellant is dismissed.*

6. Aggrieved the assessee is in appeal. However, in the absence of any material on record by way of submissions etc. or for that matter any representation on behalf of the assessee despite opportunity the challenge fails. As noticed, considering the submissions of the Revenue, and on a consideration of the material available on record, I find no good reason available on record which would justify an interference in the conclusion arrived at. Being satisfied with the same on the facts as they stand Ground No. 2 raised by the assessee is dismissed.

7. On a perusal of the facts relatable to the issues raised in ground No. 3 and 4 by the assessee, it is seen that the assessee is found to have sold land at village Ballomajra, Mohali during the relevant assessment year alongwith others. Based on the information made available to the Assessing Officer (AO) that capital gains on the sale of these lands has escaped assessment, the A.O initiated re-assessment proceedings by issue of notice u/s 148 of the Act. Considering the computation of income filed on behalf of the assessee during the assessment proceedings, the AO noticed that the assessee has declared capital gains at 'nil' after claiming deduction u/s 54F. The A.O. required the assessee to justify its claim by requiring the assessee to provide the details of computation of capital gains.

7.1 The details filed were considered to be not acceptable. The A.O observed that the land sold was situated within one kilometer of Mohali Kharar road and it was a capital asset within the meaning of section 2(14) of the Act for the purpose of Section 45. Further considering the Valuation Report relied upon by the assessee, he noted that the assessee had computed capital gains by adopting the indexed cost of land. The AO observed that the valuer had taken the fair market value of the land as on 01.04.1981 with the remarks that *"pursuant to the request from Mr. Gulzar Singh and Sh Dilpreet Singh, resident of vill. Ballomajra Tehsil and Distt. Mohali inspect the site on 26.03.2010. Based on the physical inspection and the particular provided by, detailed valuation report to assess the value on 01.04.1981, the report is furnished below."* Assessing Officer rejected the valuation report of the valuer as the same was held to be not reliable because it was found to have been based merely on the opinion of the valuer and not substantiated with any documentary/ evidence. It was further observed by the A.O. that the assessee has not filed even a single case of sale effected through Registry to support his claim. The AO, accordingly, obtained copies of sale deeds of five cases from the office of Registrar, Ropar and taking the average @ Rs. 279.43 per marla computed the long term capital gain and after allowing benefit u/s 54F to the assessee which resulted in the addition of Rs. 24,64,857/- as long term capital gains.

8. In appeal before the First Appellate Authority, the assessee assailed the action stating that the ancestral land had been acquired before 1981 and the cost of acquisition had been computed on the basis of Fair Market Value as on 01.04.1981 as assessed by the Government approved valuer. The action of the AO in relying upon the sale instances were assailed on the reasoning that the value of every property varies and is dependent on various factors. Reliance was placed upon report of the valuer which so as to argue that the assessee's land was not situated on a prime location on the national highway. The AO's arbitrary estimation was assailed on various other grounds including the ground that the AO was not a technical person.

8.1 These submissions did not find favour with the CIT(A) who held that; *"the cases relied upon by the appellant are distinguishable from the facts in the case of the assessee as in this case assessing officer has not substituted the valuation report by his own subjective estimation but based on factual information obtained from revenue authority. Therefore,* *fair market value adopted by the assessing officer is upheld. Ground of appeal No. 2 is dismissed."*

8.2. The assessee's submission that the land being situated in a rural area beyond the municipal limits was not a capital area, also did not find favour with the CIT(A). The assessee supported its case by relying upon Report of a Patwari. The evidence filed was considered to be vague and infact discarded relying upon the valuer's report filed by the assessee at the assessment stage. The AO had rejected the very same Report as being based on personal opinions instead of evidences.

9. The ld. Sr.DR relied on the consistent orders of the tax authority. However, she was unable to address on query why the matter was not referred to the DVO if the Registered Valuer's Report was to be discarded by the AO and relied upon by the CIT(A) to discard the further supporting evidences of the assessee namely Report of a Patwari.

10. I have heard the submissions. On a consideration of the facts on record and the submissions on behalf of the Revenue I find that the decision making process followed by the ld. CIT(A) is patently incorrect. The ld. CIT(A) holding that the Report of the Patwari relied upon was vague should have then called forth for a Specific Report from the Land Revenue Authorities confronted the same to the assessee and decided the issue. The decision to reject the Patwari's Report relying on the Valuer's Report which any way stood discarded by the AO on the grounds that it was based on mere opinions instead of evidences makes the decision making procedure questionable and unfair. The approach of 'heads' you loose and 'tails' you loose cannot be given a legal sanction. If the evidence relied upon by an assessee was vague, not relevant, sufficient or complete, the ld. CIT(A) ought to have exercised his powers under sub-section (4) of Section 250 of the Income Tax Act, 1961 to call for necessary evidences exercising the powers vested in his authority vide Sub-Rule (4) of Rule 46A of the Income Tax Rules, 1962 in order to enable himself to adjudicate upon the issue. The first Appellate Authority under the Act and the Rules had ample powers to call for the Report from the Land Revenue Authorities and also direct the AO to place a Remand Report on record after obtaining the DVO's Report. It is well settled that if the version of the assessee relying on the Approved Valuer's Report was to be discarded, then the tax authorities necessarily need to refer the matter to the DVO. Similarly even on the issue of location of the specific property, the law is well settled that it is the word of the Land Revenue Authorities which is the last word. As noted in order dated 19.03.2019 in ITA No. 340/CHD/2017 - Shri Iqbal Singh It, *"The State expects the tax administrators to act fairly and competently in the performance of their fundamental and onerous duty to collect taxes on its behalf. However, it is well settled and non negotiable that the taxes so to be collected need to satisfy the touchstones of "just" and "due" taxes. The word "just" presupposes "fairness" in the actions of the tax administrators who are acting for and on behalf of the Government of India.* ***The mind set needs to be re-oriented to consciously acknowledge that the duty and power to collect taxes is not being exercised on behalf of an alien foreign power in a colonial state who may have needed to fill its coffers by subjecting its colonies to the arbitrary actions. The power is exercised on behalf of the State and pre-supposes that it is exercised responsibly and fairly."*** Similarly it has also been observed in the aforesaid decision that; *"In today's digital world, tax compliances necessarily have increased, with Banks, Land Revenue Authorities being integrated with tax authorities. However, the benefit of actual and complete knowledge of financial nuances and Taxing Statutes coupled with computer literacy has remained restricted to a large extent only to a few experts. The tax authorities constitute some of these few elites who have been equipped by the State by providing training and courses in order to hone the skill and competence with the use of cutting edge technology.* ***I am of the view that the rash attitude of adopting the dangerous policy and philosophy of "us against them" in a free nation is to be strongly repelled and crushed. The ignorance and helplessness of the masses who are required to address the values of their***

inherited property, sales etc. of agricultural lands etc. before the tax authorities glaringly stand out as every day examples of some failure and malaise. The tax administration is not expected to collect taxes based on the ignorances of the assessee but is expected to ensure that in the discharge of their duties and responsibilities, the citizens on behalf of whom the tax administration Junctions are advised, counseled and guided towards tax compliances.

10.1 At this stage, it would not be out of context to refer to the CBDT Circular No. 14 (XL-35) dated 11.04.1955 which set out the road map addressing the role of the officers of the Department. The following extract is reproduced from the said Circular hereunder for the sake of completeness :

> ***"CBDT Circular No. 14 (XL-35) dated 11/04/1955-Department must not take advantage of ignorance of assessee to collect more tax than what is legitimately due***
>
> *1 x x x x*
>
> *2 x x x x*
>
> *3. Officers of the Department must not take advantage of ignorance of an assessee as to his rights. It is one of their duties to assist a taxpayer in every reasonable way, particularly in the matter of claiming and securing reliefs and in this regard the Officers should take the initiative in guiding a taxpayer where proceedings or other particulars before them indicate that some refund or relief is due to him. This attitude would, in the long run, benefit the Department for it would inspire confidence in him that he may be sure of getting a square deal from the Department. Although, therefore, the responsibility for claiming refunds and reliefs rests with assessees on whom it is imposed by law, officers should :—*
>
> *(a) draw their attention to any refunds or reliefs to which they appear to be clearly entitled but which they have omitted to claim for some reason or other;*
>
> *(b) freely advise them when approached by them as to their rights and liabilities and as to the procedure to be adopted for claiming refunds and reliefs. "*

10.2 On a reading of the above, the Executive intent evident by the Board's Circular, unambiguously makes it clear that the tax authorities are not expected to encash for the State Exchequer the ignorance of the assessee. The Circulars are binding on the tax authorities is well settled. This aspect has very recently been noticed by the Hon'ble Madras High Court in W.P.No. 3849 of 2019 and W.M.P. No. 4278 of 2019 Mrs. Kannammal Vs ITO dated 13.02.2019. The Court noticing that the assessee while moving a Stay Application relying on the said Circulars as noticed by the Hon'ble Apex Court in the case of CIT Vs Mahindra Mills 243 ITR 56 (S.C) observes that in the Stay Application the assessee *may not have specifically invoked the three parameters for the grant of stay,* ***it is incumbent upon the assessing officer to examine*** *the existence of a prima facie case as well as call upon the assessee to demonstrate financial stringency, if any and arrive at the balance of convenience in the matter.* The relevant extract from the decision is extracted hereunder for the sake of completeness :

> *"Of course the petition seeking stay filed by the petitioner is itself cryptic. However, as noted / by the Supreme Court in the case of Commissioner of Income tax vs Mahindra Mills, ((2008) 296 ITR 85 (Mad)) in the context of grant of depreciation, the Circular of the Central Board of Revenue (No. 14 (SL- 35) of 1955 dated April 11, 1955) requires the officers of the department 'to assist a taxpayer in every reasonable way, particularly in the matter of claiming and securing reliefs Although,*

therefore, the responsibility for claiming refunds and reliefs rests with the assessees on whom it is imposed by law, officers should draw their attention to any refunds or reliefs to which they appear to be clearly entitled but which they have omitted to claim for some reason or other ' Thus, notwithstanding that the assessee may not have specifically invoked the three parameters for the grant of stay, it is incumbent upon the assessing officer to examine the existence of a prima facie case as well as call upon the assessee to demonstrate financial stringency, if any and arrive at the balance of convenience in the matter."

10.3 The Court further goes on to hold in the batch of appeal Nos. W.P.Nos. 30094, 30098, 30104 & 30110 of 2018 and WMP Nos. 35104, 35110, 35114, 35120, 35121, 35126 and 35128 of 2018 in Jayanthi Seeman Vs (i) Pr. CIT, Chennai (ii) the ITO Non Corp. Ward 1(2), Chennai observed considering the mandate of Circular of the Central Board of Revenue (No. 14 (SL-35) of 1955 dated April 11, 1955 that it is expected that *the **officers of the department 'to assist a taxpayer in every reasonable way,** particularly in the matter of claiming and securing reliefs.*

.... Although, therefore, the responsibility for claiming refunds and reliefs rests with the assessees on whom it is imposed.

10.4 Considering the decisions and the Circular as recently considered by the Hon'ble Madras High Court there can be in no doubt that the assessee cannot be made to pay more tax than is legitimately due from him. The Hon'ble Apex Court in CIT Vs Mahendra Mills had taken note of the relevant provisions then applicable to the claim of depreciation and held *that the officer is required to do no more then to advise the assessee.* The relevant extract is reproduced hereunder for the sake of completeness:

"Income-tax Officer in such a case is required to compute the income without allowing depreciation allowance. Circular of the Board dated April 11, 1955 is of no help to the Revenue. It imposes merely a duty on the officers of the department to assist the tax-payers in every reasonable way, particularly, in the matter of claiming and securing relief. The Officer is required to do no more than to advise the assessee.

It does not place any mandatory duty on the officer to allow depreciation if the assessee does not want to claim that. Provision for claim of depreciation is certainly for the benefit of the assessee. If it does not wish to avail that benefit for some reason, benefit cannot be forced upon him. It is for the assessee to see if the claim of depreciation is to his advantage. Rather Income-tax Officer should advise him not to claim depreciation if that course is beneficial- to the assessee. That would be in our view the spirit of the circular dated April 11, 1955."

10.5. Though certain extracts from order dated 15.03.2019 in ITA 340/CHD/2017 in the case of Shri Iqbal Singh Vs ITO, Mohali have already been quoted, however it would be appropriate to also extract the following paras from the order:

"8.1 It would also be appropriate to refer to some relevant facts noticed in the exercise of decision making powers exercised by the Ld. CIT(A). It is seen that admittedly fresh evidence by way of a Valuation Report was filed before the CIT(A) without a proper application. I do not find any reason on record as to why the said authority failed to responsibly advise the tax payer to come by way of a proper application. All assessees do not necessarily have the benefit of expert legal advice but all tax administrators, it is presumed, have been sufficiently equipped by the State to ensure that the powers exercised on its behalf are responsibly exercised. The State expects the tax administrators to act fairly and competently in the performance of their fundamental and onerous duty to collect taxes on its behalf.

However, it is well settled and non negotiable that the taxes so to be collected need to satisfy the touchstones of "just" and "due"taxes. The word "just" presupposes "fairness" in the actions of the tax administrators who are acting for and on behalf of the Government of India. The mind set needs to be re-oriented to consciously acknowledge that the duty and power to collect taxes is not being exercised on behalf of an alien foreign power in a colonial state who may have needed to fill its coffers by subjecting its colonies to the arbitrary actions. The power is exercised on behalf of the State and pre-supposes that it is exercised responsibly and fairly.

8.2 In today's digital world, tax compliances necessarily have increased, with Banks, Land Revenue Authorities being integrated with tax authorities. However, the benefit of actual and complete knowledge of financial nuances and Taxing Statutes coupled with computer literacy has remained restricted to a large extent only to a few experts. The tax authorities constitute some of these few elites who have been equipped by the State by providing training and courses in order to hone the skill and competence with the use of cutting edge technology. I am of the view that the rash attitude of adopting the dangerous policy and philosophy of "us against them" in a free nation is to be strongly repelled and crushed. The ignorance and helplessness of the masses who are required to address the values of their inherited property, sales etc. of agricultural lands etc. before the tax authorities glaringly stand out as every day examples of some failure and malaise. The tax administration is not expected to collect taxes based on the ignorances of the assessee but is expected to ensure that in the discharge of their duties and responsibilities, the citizens on behalf of whom the tax administration functions are advised, counseled and guided towards tax compliances.

8.3 In the facts of the present case, the evidence of exact location of the land and the value thereof based on a Valuation Report admittedly was relevant and crucial for deciding the issue and knowing its relevance, the assessee ideally should have been advised to come by way of a proper application. The fact that the assessee was a farmer agriculturist and thus, may not have had the benefit of a proper legal advice at the assessment stage cannot be ruled out. In a fair exercise of power, the said opportunity should have been given by the ld. CIT(A). In the eventuality the value based on the Valuation Report was to be upset, the matter should have been referred to the DVO and not arbitrarily decided.

8.4 Accordingly, in view of the detailed reasons given hereinabove, the evidence is directed to be admitted and in case it is found to be insufficient or incomplete, the ld. CIT(A), it is directed shall call for further evidences if so deemed necessary and confront these to the assessee before passing an order in accordance with law.. "

11. Accordingly, considering the circumstances and not commenting either on the correctness or the completeness of the evidences relied upon on behalf of the assessee before the CIT(A), it is directed that in case the evidence filed is not reliable, sufficient or complete, the AO shall call for the DVO's Report and necessary evidences from the Land Revenue Authorities, confront the report to the assessee and pass an order after hearing the assessee in accordance with law. In view thereof, the impugned order is set aside back to the file of the AO with a direction to pass a speaking order in accordance with law. The assessee in its own interests is directed to participate fully and fairly before the AO. Said order was pronounced in the Open Court at the time of hearing itself.

12. In the result, appeal of the assessee is allowed for statistical purposes.

Order pronounced in the Open Court on 01.04. 2019.

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KAMLESHBHAI NARANBHAI PATEL vs. INCOME TAX OFFICER

AHMEDABAD TRIBUNAL

RAJPAL YADAV, JM & RIFAUR RAHMAN, AM.

ITA No. 2395/Ahd/2018

Jun 20, 2019

(2019) 56 CCH 0163 AhdTrib

<u>Legislation Referred to</u>

Section 2(14)

<u>Case pertains to</u>

Asst. Year 2013-14

<u>Decision in favour of:</u>

Assessee(Partly)

Capital Gains—Transfer of land—Capital asset—Taxability—Assessee filed return of income which was assessed by AO—Thereafter, AO received an information from Information Wing claiming that assessee had purchased agriculture land with 14 co-owners—Subsequently, 12 co-owners sold their shares to assessee and other two co-owners thus, all three land owners thereafter sold this land—Assessee had 1/3rd share—For charging stamp duty, sub-Registrar had valued property for payment of stamp duty on transfer of land—Accordingly, AO issued a notice u/s 148—AO rejected assessee's contentions on ground that since he himself had recognized capital gain assessable in his hand, therefore no exemption for assessee for levy of capital gain tax—AO determined taxable income—CIT(A) dismissed assessee's appeal—Held, both Revenue authorities had not disputed that land sold by assessee was not agriculture land—Dispute was about its geographical situation and applicability of amendment carried out in definition of "agriculture land" vide Finance Act, 2013—CBDT in circular no.17 of 2015 had opined that said amendment would be applicable only from AY 2014-15—Similarly, Board had explained that distance between municipal limit and agriculture land had to be measured having regard to shortest road distance and not by way of crow's flight—Even if assessee had included gain on transfer of this land in his return of income, he had every right to plead that gain was not taxable and it be excluded from his taxable income—Duty of AO was to determine right tax liability in assessee's hands, and not based on erroneous admission—Therefore, even if assessee had admitted initially about taxability, and later on realize his right then his right had to be given effect and adjudicated upon—Assessee was relying upon certificate issued by Talati—Talati was Revenue official appointed by State Government—His duty was to maintain accounts and record all rights in a particular village—"Illegible" written on notes signature i.e.,

Talati- cum-mantry, Bhuvaladi Gram Panchayat, which means, he was a Revenue official-cum-accountant for this gram panchayat—He was not an elected person rather he was competent person to give certified copy of land record and other certificates—Talati was akin to Patwari in other parts of India—He was a village accountant and as contemplated in Ss 16 and 17 of Gujarat Land Revenue Code 1879—Thus, cognizance could be taken based on his certificate—CIT(A) just made a bald reference to Google-map etc., but had not pin-pointed what was distance given in Google-map in 1994 when Central Government had issued notification for purpose of s. 2(14) of Income Tax Act—His observation that this was evident from Google-map also was just an observation without any scientific look to data recorded as on 6.1.1994—Therefore, land transferred by assessee was not a "capital asset" within meaning of s. 2(14) and gain arising from such transfer was not taxable in his hand—Assessee's appeal partly allowed.

Held

Both the Revenue authorities have not disputed that the land sold by the assessee was not agriculture land. Dispute is about its geographical situation and applicability of amendment carried out in the definition of "agriculture land" by way of Finance Act, 2013. As far as applicability of amendment carried out in the definition of agriculture land way of Finance Act, 2013 is concerned, Board has already considered this aspect in the circular no.17 of 2015 and opined that it will be applicable only from the assessment year 2014-15. Similarly, Board has explained that distance between municipal limit and agriculture land is to be measured having regard to the shortest road distance and not by way of crow's flight.

(Para 10)

Even if the assessee has included gain on transfer of this land in his return of income, he has every right to plead that gain is not taxable and it be excluded from his taxable income. Duty of the AO is to determine right tax liability in the hands of the assessee, and not on the basis of erroneous admission. Therefore, even if the assessee has admitted initially about the taxability, and later on realize his right then his right has to be given effect and adjudicated upon. The assessee is relying upon the certificate issued by Talati. The Talati is Revenue official appointed by the State Government. His duty is to maintain accounts and record all rights in a particular village. The "illegible" written on notes signature i.e., Talati- cum-mantry, Bhuvaladi Gram Panchayat, which means, he is a Revenue official-cum-accountant for this gram panchayat. He is not an elected person rather he is competent person to give certified copy of land record and other certificates. Talati is akin to Patwari in other parts of India. He is a village accountant and as contemplated in sections 16 and 17 of the Gujarat Land Revenue Code 1879. Thus, cognizance could be taken on the basis of his certificate. The CIT(A) has just made a bald reference to Google-map etc., but has not pin-pointed what was the distance given in the Google-map in 1994 when the Central Government has issued notification for the purpose of section 2(14) of the Income Tax Act. His observation that this is evident from Google-map also is just an observation without any scientific look to the data recorded as on 6.1.1994. Therefore, land transferred by the assessee was not a "capital asset" within the meaning of section 2(14) and gain arising from such transfer is not taxable in his hand.

(Para 11)

Conclusion

Even if the assessee has included gain on transfer of this land in his return of income, he has every right to plead that gain is not taxable and it be excluded from his taxable income and his right has to be given effect and adjudicated upon.

In favour of

Assessee(Partly)

Cases Referred to

CIT Vs. Satinder Pal Singh, 229 CTR 82

Counsel appeared:

P.F. Jain, AR for the Assessee.: Vinod Tanwani, Sr.DR for the Revenue

RAJPAL YADAV, JM.

1. Assessee is in appeal before the Tribunal against order of the ld.CIT(A)-2, Ahmedabad dated 2.11.2018 passed for the Asstt.Year 2013-14.

2. The assessee has taken ten grounds of appeal, which are argumentative and descriptive in nature. In brief his grievance revolves around two fold viz. (a) no capital gain deserves to be assessed in the hands of the assessee on transfer of land comprised in Block No.516, Survey No.330/1-334/4/2, Bhuvaldi, Ahmedabad, and (b) if gain is taxable, then not the sum as computed by the AO.

3. Brief facts of the case are that the assessee had purchased alleged agriculture land on 29.3.2007 along with 14 co-owners for a consideration of Rs.1,23,00,000/-. Subsequently on 15.10.2010, 12 co-owners sold their shares to the assessee and other two co-owners. Thus, all three land owners thereafter sold this land on 26.3.2013 for a consideration of Rs.1,71,00,000/-. The assessee has 1/3rd share. For the purpose of charging stamp duty, the sub-Registrar has valued the property for payment of stamp duty on transfer of this land at Rs.4,72,71,900/-. The AO got information about this through annual information wing. He issued a notice under section 148 of the Act on 6.5.2016. In response to this notice, the assessee wrote a letter to the AO that return filed on 31.3.2016 be treated as filed in response to the notice under section 148. During the assessment proceedings the assessee filed a reply to the AO vide letter dated 28.8.2017. It is pertinent to take note of this letter, which reads as under:

> *1) "I have sold Agriculture land situated At: village Bhiwaldi, which was purchase by me on 29/03/2007 and 15/10/2010 and same was sold on 26/03/2013. On receipt of the notice I have filed my return of income on 31/03/2016 declaring total income from capital gain Rs.1378330/- and tax on total income Rs.469980/- paid wide challan no.00001, BSR code: 0292036 dated 31/03/2016.*
>
> *2) I have sold agriculture land situated At: village Bhuvaldi, TA Dascroi having population is less than ten thousand and distance from local limit of municipality is more than eight km hence not liable for capital gain tax but under wrong impression I have paid capital gain tax and filed my return stated as above. In the circumstances request your honour to refund of tax paid by me.*

3) Provisions of section 50C is applicable for sale of capital assets but I have sold agriculture land hence provision of section 50C not applicable. I hope this will suffice your requirement."

4. But the AO has rejected the contentions of the assessee on the ground that since he himself has recognized capital gain assessable in his hand while filing the return on 31.3.2016, therefore no exemption for the assessee for levy of capital gain tax. The ld.AO did not accept contention of the assessee that he has wrongly filed return recognizing the capital gain taxable in his hand. Basically, this gain is exempt from tax. He determined taxable income vide assessment order dated 22.12.2017. Dissatisfied with the finding of the AO, the assessee carried the matter in appeal before the ld.CIT(A). The ld.CIT(A) concurred with the AO and rejected the contentions of the assessee. The relevant finding of the ld.CIT(A) on this issue reads as under:

"2.4. I do not agree with the submission of the appellant that the land is a agriculture land, and therefore, not amenable to capital gain on its sale as appellant himself has filed return of income on 31/03/2016 and declared the gain on sale of land under the head capital gain. It is seen that the land at Block No.516, S. No.330/1-334/4/2, Bhuvaldi, Ahmedabad, the capital gain of which is under dispute has been inspected by Junior Engineer Shri Nikhil Roy on 14/11/2007 for the purpose of valuation of the property. The engineer has reported that the land is within 8 Km from municipal limit which is evident from the google map also. Therefore, the appellant's contention that the land is beyond 8 Km from the municipal limit is not tenable. Appellant has filed return of income on 31/03/2016 and shown the land as a capital asset. The definition of agriculture land has also been redefined by Finance Act, 2013 which has come into effect from 01/04/2013 as under:-

"(iii) agricultural land in India, not being land situate:

(a) in any area which is comprised within the jurisdiction of a municipality (whether known as a municipality, municipal corporation, notified area committee, town area 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 kilometres, 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 kilometres, 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 kilometres, 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 purposes 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."

In view of the above, the contention of the appellant that the above land was agriculture land is not acceptable. The above fact is also reinforced as the jantri value of the above property has been reported by the Sub-Registrar is at Rs.4,72,71,900/- and the DVO has also revalued the property at Rs.4,30,04,000/- taking the comparable instances in the same locality.

2.5. The appellant has contended that it has been owner of the property from 29/03/2007 and only certain right has been added on 15/10/2010 after 12 co-owners have relinquished their rights. Therefore, even if capital gain is to be computed, the date of acquisition has to be taken as 29/03/2007, I do not agree with the contention of the appellant, as appellant-was owner of only 1/15th of land on 29/03/2007. He has purchased 4/15th of land on 15/10/2010 which amounts to buying a new property. In view of-the above, the appellant's contention is rejected and the stand taken by AO is upheld. The related grounds of appeals are accordingly dismissed."

5. Before us while impugning order of the ld.Revenue authorities, the ld.cousnel for the assessee took us through the definition of "capital asset" provided in section 2(14)(iii) of the Income Tax Act, 1962. According to him, as per this definition if an agriculture land is situated beyond 8 km. of municipal limit then it will not fall within the ambit of "capital asset" on whose transfer capital gain is leviable in the hands of the assessee. While taking us through the finding of the ld.CIT(A) recorded in para 2.4 extracted (supra), he contended that the ld.CIT(A) has rejected the contentions of the assessee by assigning two reasons; (a) in his first reason, the ld.CIT(A) has observed that definition of "agriculture land" has been redefined by the Finance Act, 2013. He took cognizance of this definition by ignoring the fact that it is applicable from 1.4.2013 whereas the assessee has transferred the land on 26.3.2013. The transaction of the assessee falls within the assessment year 2013-14 and not 2014-15. The Board has issued a circular bearing no.17 of 2015 explaining that this changed definition will be applicable from the assessment year 2014-15. In the second reasoning, the ld.CIT(A) has observed that Engineer Shri Nikhil Roy has inspected the property on 14.11.2007 for the purpose of valuation. He has reported that the land is situated within 8 kms. from municipal limit which is evident from Google map also. This finding of the ld.CIT(A) is factually incorrect. Firstly, Junior Engieer Shri Nikhil Roy is not a competent person to give any certificate determining geographical situation of the assessee's property form the municipal limit. Revenue official under the Gujarat Land Revenue Code 1879 is the competent officer for issuing such certificate. The assessee has annexed such certificate from Talati-cummantry of this village and certificate is available on page no.20 of the paper book. He took us through this certificate, which reads as under:

"Running English Version of Certificate in Gujarati from Gram Panchyat dtd. 22/11/2017 certifying the distance of agricultural land of above 10 kms. from the Municipal limit.

BHUVALADI GRAM PANCHYAT Village-Bhuvaladi,

Tal. Daskroi, Ahmedabad-382430

Javak No. *Date:-22/12/2017*

CERTIFICATE

The Certificate is given hereto that

The Population of Village- Bhuvaladi is 7829 as per Population Census 201, Moje-Bhuvaladi Ta.Daskroi From the limit of Ahmedabad Municipality Corporation, it is away about 10 K.M.

The land of Moje-Bhuvaladi Revenue Block No.516-G New No. 614 is in the limit of Bhuvaladi which is hereby Certified by issuing this Certificate and the impugned land is Agricultural Land.

Sd/-illegible

Stamp of

Talati-cum-Mantry

Bhuvaladi Gram Panchayat

Tal.Daskroi, Dist.Ahmedabad

6. Apart from the above, distance for determination of geographical location of assessee's land from municipal limit is required to be taken from limit notified by the Central Government in its gazette under Income Tax Act. Copy of such notification issued on 6.1.1994 is available in the paper book on page no.29 onwards. In other words, municipal limit of Ahmedabad city existed as on 6.1.1994 is to be taken as a point for measuring distance upto the boundary of this village. The order of the CIT(A) is totally silent about this aspect. He just made a general reference about Google-map and observation of the Junior Engineer while valuing the value of the property, whereas it is a critical factor which determines what is the right of the assessee and whether capital gain taxable in the hands of the assessee or not.

7. Next fold of contentions, he submitted that distance is to be measured by road not by crow-flights. He has placed on record copy of Board circular which was taken into consideration the judgment of Hon'ble Bombay High Court. This circular has been considered by the ITAT in IIA No.3337/Ahd/2015. He has placed on record copy of the Tribunal's order. He also pointed out that this circular has been considered by the Division Bench of ITAT in the case of in ITA No.2138/Ahd/2012 where one us was author (Judicial Member). On the strength of these documents, he contended that the assessee has sold agriculture land. In order to prove status of the land, the assessee has produced copy of the Form No.7/12 i.e. documents maintained by the State Revenue Officials exhibiting record of rights of the landholders under Gujarat Land Revenue Code, 1879. This fact, according the ld.counsel for the assessee has not been disputed by the AO. Thus, he emphasized that the assessee sold agriculture land which was situated beyond 8 kms. from municipal limit, and on sale of this land, if any profit arose to the assessee, then it is not taxable.

8. On the other hand, the ld.DR contended that certificate of Junior Engineer is available on record who observed that situation of this land is within 8 kms. Contrary to this, the assessee has annexed certificate of *Talati-cum-mantry* on page no.20, but he gave his opinion on estimate basis. In his opinion, this land is situated about 10 kms. away from the municipal limit. He further contended that *talati-cum-mantry* is an elected officer and not revenue official and therefore this certificate should not be considered.

9. We have considered rival contentions and gone through the record carefully. An identical situation came up before the Tribunal in the case Akashdeep Farms P.Ltd. in ITA No.2138/Ahd/2012 wherein the Tribunal took note of the notification issued by the Central Government under section 2(14) on 6.1.1994. This aspect was noted by the Tribunal while

taking cognizance of the finding recorded by the CIT(A). In order appreciate the controversy in present case, we deem it appropriate to take note of this notification as well as discussion made by the Tribunal on an identical issue in the case Akashdeep (supra) reads as under:

"INCOME-TAX ACT, 1961 : NOTIFICATION UNDER SECTION 2(IA)(C), PROVISO. CLAUSE (II)(B) AND SECTION 2(14)(III)(B): URBANISATION OF AREAS

Notification No. [SO 9447] (File No. 164/3/87-ITA.I), dated. 6-1-1994

> *Whereas a draft notification was published by the Central Government in exercise of the powers conferred by item (B) of clause (ii) of the proviso to sub-clause (c) of clause (1A), and item (b) of sub-clause (iii) of clause (4), of section 2 of the Income-tax Act, 1961 (43 of 1961), in the Gazette of India, Extraordinary, Part II, section 3, subsection (ii), dated February 13, 1991, under the notification of the Government of India in the Ministry of Finance (Department of Revenue] No. S.O. 91 (E), dated February 8, 1991, for specifying certain areas for the purposes of the said clauses and objections and suggestions were invited from the public within a period of 45 days from the date the copies of the Gazette of India containing such notification became available to the public;*
>
> *And whereas copies of the said Gazette were made available to the public on February 13, 1991;*
>
> *And whereas the objections and suggestions received from the public on the said draft notification have been considered by the Central Government;*
>
> *Now, therefore, in exercise of the powers conferred by item (B) of clause (ii) of the proviso to sub-clause (c) of clause (1A) and item (b) of sub-clause (iii) of clause (14) of section 2 of the Income-tax Act, 1961 (43 of 1961), and in supersession of the notification of the Government of India in the erstwhile Ministry of Finance (Department of Revenue and Insurance] No. S.O. 77(E), dated February 6, 1973, the Central Government having regard to the extent of, and scope for urbanisation of the areas concerned and other relevant considerations, hereby specifies the areas shown in column (4) of the schedule hereto annexed and falling outside the local limits of municipality or cantonment board, as the case may be, shown in the corresponding entry in column (3) thereof and against the State or Union Territory shown in column (2) thereof for the purposes of the above mentioned provision of the Income-tax Act, 1961 (43 of 1961).*

Gujarat	*1. Ahmedabad*	*Area upto a distance of 8 kms. From the municipal limits in all directions*

> *Expln1(2) - the reference to municipal limits or the limit of cantonment board in the schedule to this notification is to the limits as existing on the date on which the notification is published in the official Gazette."*
>
> *From the above, it is clear that the land situated within 8 kilometers from Ahmedabad municipal corporation limit is urban land and to be treated as capital asset. However land situated outside 8 km limit will be agricultural land not to be treated as capital asset. For computing the distance of 8 km, the municipal limit is also defined. Since municipal limit is dynamic and changing over a period of time, an explanation is given at the end of the*

aforesaid notification that municipal limit is the limit as existing on the date of publication of the notification and not the limit on the date of transaction or as on date. The notification is published on 6-1-1994 and therefore the municipal limits as on 6-1-1994 Is to be taken for computing 8 km road distance to decide whether agricultural land is a capital asset or not. The municipal limit on the date of transaction is not relevant as far as application of this notification is concerned. Appellant submitted that prior to 2006, the municipal limit of Ahmedabad Municipal Corporation was very restricted and form that limit, both the villages in which agricultural lands were situated are much beyond 8 km distance. Since notifications with regard to Ahmedabad municipal Corporation limits are available from which assessing officer can work out the distance of these agricultural lands. In view of the clear provisions in the notification referred earlier, it is held that the municipal limits relevant for computing distance is the municipal limit existing on the date of issue of this notification i.e. 6-1-1994. Assessing officer is therefore directed to compute the road distance of the agricultural lands from the municipal limits of AMC as on 6-1 -1994. If the distance is within 8 km, appellant is liable for capital gains and if the distance is beyond 8 km, the agricultural lands sold will be outside the purview of capital asset and hence no capital gains can be charged on the same. This ground is accordingly disposed off."

6. Before us, limited dispute is whether the distance for identifying the geographical location of the agriculture land is to be taken by road or by aerial. Second fold of dispute is whether the municipal limit enhanced by the State Government is to be considered as starting point or it is to be taken from notification issued by the Central Government dated 6.1.1994. The ld.CIT(A) has held that notification issued on 6.1.1994 by the Central Government is to be considered.

7. Ld.DR relied upon the order of the AO. On the other hand, the ld.counsel for the assessee contended that Hon'ble Punjab & Haryana High Court in the decision referred by the ld.CIT(A) in the case of CIT Vs. Satinder Pal Singh, 229 CTR 82 has held that distance requires to be computed for identifying the geographical location of the agriculture land from the municipal limit is concerned, it is to be measured by road, and if the distance is beyond 8 KMs, then that land would not fall within the definition of capital asset. He further pointed that Hon'ble Bombay High Court has also concurred with this view in the decision of CIT Vs. Nitish Rameschandra Chordia, 57 taxmann.com 394. He placed on record copy of this decision. In this decision, the Hon'ble Bombay High Court has specifically laid down that the distance is to be measured by road and not as per crow's flight. The ld.counsel for the assessee pointed out after this decision of the Hon'ble Bombay High Court, the Board has issued circular bearing nos.17/2015 and accepted the decision. He placed on record copy of the circular.

8. We have duly considered rival contentions and gone through the record carefully. The definition of "capital asset" has been provided in section 2(14) of the Act. Sub-clause (a) and (b) of Section 2(14)(iii) contemplates that if an agriculture land is in India, and it is situated at a distance of more than 8 KMs. from the local limit of any municipality cantonment board, then, that land would not fall within the ambit of definition "capital asset". In other words, if the land which is not forming part of capital asset sold by an assessee, then, no gain as such would be considered, as accrued to the assessee. In the present case, the ld.AO has observed that if the distance of geographical situation of the assessee's land is being measured from municipality limit, by way of crow's flight, then, it is within the municipal limit. In various authoritative pronouncements, as discussed by the ld.CIT(A), it has been held that the distance is to be measured by road and not by aerial route. At this *stage, it is important to take note of the Board Circular bearing No.17/2015. It reads as under:*

"CBDT CIRCULAR NO -17/2015, Dated: October 06, 2015

Subject:- Measurement of the distance for the purpose of section 2(14)(iii)(b) of the Income-tax Act for the period prior to Assessment year 2014-15

"Agricultural Land" is excluded from the definition of capital asset as per section 2(14)(iii) of the Income-tax Act based, inter-alia, on its proximity to a municipality or cantonment board. The method of measuring the distance of the said land from the municipality, has given rise to considerable litigation. Although, the amendment by the Finance Act, 2013 w.e.f. 1.04.2014 prescribes the measurement of the distance to be taken aerially, ambiguity persists in respect of earlier periods.

2. The matter has been examined in light of judicial decisions on the subject. The Nagpur Bench of the Hon. Bombay High Court Vide order dated 30.03.2015 in ITA 151 of 2013 in the case of Smt. Maltibai R Kadu has held that the amendment prescribing distance to be measured aerially, applies prospectively i.e. in relation to assessment year 2014-15 and subsequent assessment year. For the period prior to assessment year 2014-15, the High Court held that the distance between the municipal limit and the agricultural land is to be measured having regard to the shortest road distance. The said decision of the High Court has been accepted and the aforesaid disputed issue has not been further contested.

3. Being a settled issue, no appeals may henceforth be filed on this ground by the officers of the Department and appeals already filed, if any, on this issue before various Courts/Tribunals may be withdrawn/ not pressed upon. This may be brought to the notice of all concerned.

[F. No. 279/Misc./140/2015-ITJ]

(D S Chaudhry) CIT (A&J), CBDT"

9. Thus, if the finding of the ld.CIT(A) is being examined in the light of the circular, then one thing is clear that the distance is to be measured by roads in this accounting year. The land sold by the assessee is situated beyond 8 KMs. of the municipal limit.

10. Next objection of the AO was that the State Government has enhanced the municipal limit in 2006 and the distance is to be measured from new boundary of the Ahmedabad Municipal Corporation Limit. AMC limit was extended upto Sarkhej since 2006. The ld.CIT(A) has examined this aspect, and has observed that perusal of sub-clause (b) of section 2(14)(iii) would indicate that the municipal limit is to be taken from the area which has been notified by the Central Government in its gazette notification. Central Government has notified the area on 6.1.1994, and from that notification, the agriculture land of the assessee was situated beyond a distance of 8KMs."

10. In the light of the above, let us examine the facts of the present case. Both the Revenue authorities have not disputed that the land sold by the assessee was not agriculture land. Dispute is about its geographical situation and applicability of amendment carried out in the definition of "agriculture land" by way of Finance Act, 2013. As far as applicability of amendment carried out in the definition of agriculture land way of Finance Act, 2013 is concerned, Board has already considered this aspect in the circular no.17 of

2015 and opined that it will be applicable only from the assessment year 2014-15. We have extracted this circular while taking cognizance of the finding recorded by the Tribunal in Akashdeep (supra). Similarly, Board has explained that distance between municipal limit and agriculture land is to be measured having regard to the shortest road distance and not by way of crow's flight.

11. Third aspect is that even if the assessee has included gain on transfer of this land in his return of income, he has every right to plead that gain is not taxable and it be excluded from his taxable income. Duty of the AO is to determine right tax liability in the hands of the assessee, and not on the basis of erroneous admission. Therefore, even if the assessee has admitted initially about the taxability, and later on realize his right then his right has to be given effect and adjudicated upon. The only circumstance, which has left for consideration is, whether the land situates beyond 8 kms. from the municipal limit or not. The assessee is relying upon the certificate issued by Talati. The Talati is Revenue official appointed by the State Government. His duty is to maintain accounts and record all rights in a particular village. The "illegible" written on page no.20 notes signature i.e. Talati-cum-mantry, Bhuvaladi Gram Panchayat, which means, he is a revenue official-cum-accountant for this gram panchayat. He is not an elected person rather he is competent person to give certified copy of land record and other certificates. We do not find any merit in the contention of the ld.DR that he is not a revenue official rather an elected person in the gram panchayat. Talati is akin to Patwari in other parts of India. He is a village accountant and as contemplated in sections 16 and 17 of the Gujarat Land Revenue Code 1879. Thus, cognizance could be taken on the basis of his certificate. The ld.CIT(A) has just made a bald reference to Google-map etc., but has not pin-pointed what was the distance given in the Google-map in 1994 when the Central Government has issued notification for the purpose of section 2(14) of the Income Tax Act. His observation that this is evident from Google-map also is just an observation without any scientific look to the data recorded as on 6.1.1994. Therefore, we are of the view that the land transferred by the assessee was not a "capital asset" within the meaning of section 2(14) and gain arising from such transfer is not taxable in his hand.

12. As far other alternative contention is concerned, we do not deem it necessary to adjudicate them because we have held that on transfer of this agriculture land, long term capital gain is not leviable in the hands of the assessee.

13. So far as charging of interest under section 234A/B/C is concerned, it is consequential in nature.

14. In the result, appeal of the assessee is partly allowed.

Order pronounced in the Court on 20th June, 2019.

DEPUTY COMMISSIONER OF INCOME TAX & ANR. vs. ACCELERATED FREEZE DRYING CO. LTD. & ANR.

COCHIN TRIBUNAL

CHANDRA POOJARI, AM & GEORGE GEORGE K., JM.

ITA No. 714/Coch/2008, 1286/Coch/2005

Jun 28, 2019

(2019) 56 CCH 0195 CochinTrib

Legislation Referred to

Section 50B, 2(14), 147

Case pertains to

Asst. Year 2002-03

Cases Referred to

Alappattu Venkitaraman vs. CIT (57 ITR 185)
Sutlej Cotton Mills Ltd. Vs. CIT reported in [1979] 116 ITR 1
CIT Vs. Woodward Governor India Pvt. Ltd. reported in [2009] 312 ITR 254 (SC)

Counsel appeared:

A.S. Bindhu, Sr. DR for the Revenue.: R. Srinivasan, FCA for the Assessee

CHANDRA POOJARI, AM.

1. These appeals filed by the assessee and the Revenue are directed against the different orders of the CIT(A)-IV, Kochi for the assessment year 2002-03. These appeals were originally disposed of by the Tribunal vide order dated 13th November, 2009. Against this, the Revenue went in appeal before the High Court in ITA No. 201 & 281/2010 wherein the High Court vide judgment dated 02-08-2018 remitted the issue to the file of the Tribunal with the following observation:

> *"Especially noticing the long pendency, we request the Tribunal to dispose of the appeals within a period of six months from the date of receipt of a certified copy of this judgment."*

Hence, these appeals came up for hearing today for fresh consideration.

2. The Revenue has raised the following grounds of appeal:

> 1) The CIT(A) has wrongly held that the effective date of transfer of the Taloja property took place when the assessee took possession of the assets and made entries in the books of account on 31/03/1997 and hence, the holding period was more than 36 months when the assets finally sold on 10/05/2001 and therefore, the assessee is liable only to long term capital gains.
>
> 2) The CIT(A) ought to have seen that the deed of assignment by which the assessee took over the Taloja property was registered only on 05/08/1999 and the assessee sold the property on 10/05/2001 and therefore, the holding period was less than 36 months for which the assessee is liable to short term capital gains.
>
> 3) The CIT(A) ought to have seen that as per the decision of the Supreme Court in Alappattu Venkitaraman vs. CIT (57 ITR 185), entries in the books are not relevant for the purpose of determining the date of transfer. The effective date of transfer is the date on which the transfer deed is registered.

4. Having held that the capital gains on the transfer of he said property should be assessed u/s. 50B, the CIT(A) ought to have see that according to proviso to section 50B(1), capital assets "owned and held" by an assessee for less than 36 months shall be deemed as short term capital assets. The CIT(A) went wrong in applying the definition of capital assets in section 2(14) and ignoring the mere specific provisions contained in the proviso to section 50B(1).

3. The facts of the case are that by order dated 28.12.2006, the Assessing Officer completed the assessment u/s. 143(3) r.w.s. 147 determining a total income of Rs. Rs.4,85,37,340/- against Nil income. During the relevant assessment year the assessee had sold two of its units at Taloja in the State of Maharashtra and Veraval in the State of Gujarat. The assessee was engaged in the processing of frozen foods either as Block or as IQF. According to the Assessing Officer, the sale of these two units would partake the nature of slump sales and income arising out of these should be computed as profit u/s.50B of the I.T Act. A Report in Form 3CEA indicating the computation of the net profit of these units was also asked to be filed The assessee submitted that what was sold were the depreciable assets and provisions of section 50B were not applicable and the value was clearly bifurcated as attributable to immovable and movable property.

3.1 It was found that the unit at Taloja Industrial Area was transferred in favour of Allana Investments and Trading Co., Mumbai for a consideration of Rs.1.25 Crores which was bifurcated towards land and building at Rs.5 Crores and towards value of movable plant and machinery and other installation at Rs.7.5 crores. As regards the Veraval Unit, this was sold to Allana Frozen Foods Ltd., Mumbai, being lease hold rights for a consideration of Rs.1.75 crores, being Rs.1.00 crore for land and Rs.0.75 lakhs towards movable plant and machinery installation which was treated as slump sales.

3.2 The Assessing Officer referred to various decisions to bring the transactions within the definition of section 2 of section 42(C) r.w.s. 50B to treat the same as slump sales.

3.3 It was contended that the Taloja unit initially leased out from innovative Marine Foods Ltd., an associate concern of the assessee was taken possession by the assesseeon 31/03/1997, being the leasehold right for factory building and office building and plant and machinery and on these dates the assessee had passed an entry for consideration of purchase to the tune of Rs.23.65 cores. The Department had granted depreciation from the subsequent year. Therefore, it was submitted that all these assets had been included as early as 31/03/1997 so much so it cannot be held to be a short term capital gain. Therefore, the assessee had rightly deducted the sale proceeds from the block of assets..

4. On appeal, the CIT(A) decided the issue in favour of the assessee.

5. Against this, the Revenue is in appeal before us.

6. We have heard the rival submissions and perused the record. Admittedly, a similar issue was considered by the Jurisdictional High Court in assessee's own case in ITA Nos. 640 & 1470 of 2009 dated 06/10/2010 wherein it was held as under:

"3. The admitted facts that lead to the controversy are the following. The assessee which was engaged in seafood processing and export with their own factories transferred one of their industrial units as a going concern during the previous year relevant for the assessment year 2003-04 to Hindustan Lever Limited for a total consideration of22.20 crores. The consideration agreed is the aggregate value for land, building, machinery and all equipments with liabilities specifically mentioned in the agreement entered into between parties. The sale is in two parts, one sale deed executed and registered covers, land, and building and for the purpose of payment of Stamp duty and registration fee a valuation was separately made based

on which stamp duty and registration fee were are paid. Besides the valuation of land and building which is specifically stated in the conveyance deed as fair market value adopted only for the purpose of payment of stamp duty and registration charges, sale consideration was not separable between value for land and building and for other items sold. In other words the assessee sold the industrial unit as a going concern and as an operating unit for a total agreed consideration whereby the assessee received the net sale price after retaining liabilities to be borne by the purchaser. In Clause 3.2 *of the sale deed executed between the assessee and the purchaser it is clearly stated that the undertaking is transferred as a going concern on "slump sale basis". The assessee also initially treated the sale of industrial unit as "slump sale" and when income tax return was filed assessee submitted auditor's report in form 3 (EA) prescribed under Rule 6(H) of the Income Tax Rules which is the requirement for the purpose of assessment of capital gains on "slump sale" under Section 50B(3) of the Act. In spite of the declaration in the sale deed and treatment of the transfer of the industrial undertaking as a going concern to another company as a "slump sale" by obtaining and producing chartered accounts certification in the prescribed form in. terms of Section 50B(3) of the Act, in the return filed, the assessee returned the transaction for assessment for capital gains as sale of depreciable items under Section 50 of the Act. Before the Assessing Officer assessee contended that Form 3EA is furnished as a precaution and assessee's contention is that the sale of industrial undertaking should be assessed for capital gains as sale of depreciable assets under Section 50.of the Income Tax Act. The Assessing Officer noticed that the sale is a "slump sale" falling within the definition of Section 2(42C) of the Act and he made the assessment for capital gain as provided under Section 50B of the Income Tax Act. The assessment was made by invoking powers under Section 147 of the Act which was also challenged by the assessee in appeal. In this case, the first appellate authority allowed the appeal on both the grounds that is by cancelling the income escaping assessment as passed without jurisdiction and on merits by holding that the sale of the industrial undertaking is not slump sale but is to be assessed as sale of depreciable asset under Section 50 of the Act. In the connected case, the CT(Appeals) took an entirely different view by upholding the assessment of sale of Industry as a "slump sale". In the second appeal filed by the revenue before the Tribunal in this case, the Tribunal upheld the CIT (Appeals) order on merits but did not consider the validity of reopening raised by the revenue as the said ground had become academic by virtue of the Tribunal's decision on merit in favour of the assesses. It is against this order of the Tribunal revenue has filed the appeal.*

4. Based on the facts stated above, the only question to be considered is under what provision of the Income Tax Act capital gain is to be assessed on the profit received by the assessee on the sale of the industrial undertaking.

5. Slump sale is defined under Section 2(42C) as follows:-

> *"Slump sale" means the transfer of one or more undertakings as a result of the sale for a lump sum consideration without values being assigned to the individual assets and liabilities in such sales.*
>
> *Explanation 1—For the purposes of this clause, "undertaking" shall have the meaning assigned to it in Explanation 1 to clause (19AA).*
>
> *Explanation 2 —For the removal of doubts, it is hereby declared that determination of the value of an asset or liability for the sole purpose of payment of stamp duty, registration fees or other similar taxes or fees shall not be regarded as assignment of values to individual assets or liabilities."*

We have already noticed that the unit transferred by the assessee is an industrial undertaking which is a fish processing factory with land, building, machinery, plant and all equipments as a going concern with all the assets and liabilities. The consideration agreed between assessee and the buyer is admittedly a lump sum amount of 22.20 crores. Since the industrial unit sold is as a whole and as a continuing business concern with land, building, plant, machinery and all equipments as a going business with assets and liabilities for a consolidated sum, the same squarely attracts definition of the undertaking covered by explanation 1 of the definition clause. Further, it has to be noted that the assessee was well aware of explanation 2 of Section 2(42C) because except the value adopted for land and building which is specifically stated as for the purpose of payment of stamp duty and registration fee the sale price agreed and paid was a lump sum amount of Rs.22.20 crores. Further the assessee and the purchaser have specifically stated in Clause 3.2 of the sale deed that the sale is on "slump sale basis" which is nothing but adoption of the said terms as contained in the above provision of the Income Tax Act. ft is also to be taken note that the assessee knowing well the chance of transaction being treated as a "slump sale" for the purpose of assessment of capital gain furnished along with the return filed the chartered accountant's certificate in form 3EA prescribed under Rule 6H in terms of Section 50B(3) of the Income Tax Act. Even after annexing the Chartered Accountant's Certificate issued in the prescribed form for assessment under Section 50B of the Act, assessee claimed that capital gain is assessable on sale of the undertaking as sale of depreciable assets under Section 50 of the Act, The question now to be considered is whether the claim of the assessee is tenable or not. In this regard we have to consider the scope of Section 50 and Section 50B of the Act. In our view assessee's claim for assessment of capital gainn under Section 50 of the Act is not tenable because the said Section provides for assessment of capital gains in the case of sale of depreciable assets. This Section provides for assessment for capital gain of assets forming part of block of assets in respect of which depreciation is allowed under the Act. What the assessee has sold is not any asset in a block, if at all the assets sold form part of a block of asset on which depreciation was being allowed. On the other hand sale is of an industrial undertaking as a whole which includes land, building, machinery, equipments etc. as a going concern with all the assets and liabilities. *We have already found that the sale is of business undertaking as a going concern and the same squarely falls within the definition of "slump sale" as defined under Section 2(42C) of the Act. Section 50B which provides for computation of capital gain in the case of slump sale is as follows:-*

> *"(1) Any profits or gains arising from the slump sale effected in the previous year shall be chargeable to income-tax as capital gains arising from the transfer of long-term capital assets and shall be deemed to be the income of the previous year in which the transfer took place:*
>
> *Provided that any profits or gains arising from the transfer under the slump sale of any capital asset being one or more undertakings owned and held by an assessee for not more than thirty-six months immediately preceding the date of its transfer shall be deemed to be the capital gains arising from the transfer of short-term capital assets.*
>
> *(2) In relation to capital assets being an undertaking or division transferred by way of such sale, the "net worth" of the undertaking or the division, as the case may be, shall be deemed to be the cost of acquisition and the cost of improvement for the purposes of Sections 48 and 49 and no regard shall be given to the provisions contained in the second proviso to Section 48.*

(3) Every assesses in the case of slump sale, shall furnish in the prescribed form along with the return of income, a report of an accountant as defined in The Explanation below sub-section (2) of Section 288, indicating the computation of the net worth of the undertaking or division, as the case may be and certifying that the net worth of the undertaking or division, as the case may be, has been correctly arrived at in accordance with the provisions of this Section.

Explanation 1:- For the purposes of this Section, "net worth" shall be the aggregate value of total assets of the undertaking or division as reduced by the value of liabilities of such undertaking or division as appearing in its books of account."

What is clear from the above is that Section 50B is the only provision which provides for computation of capital gains in the case of slump sale, even though sale of business undertaking as a going concern will involve sale of assets forming block of assets on which depreciation was being allowed. Assessee's counsel contended that when depreciable assets are sold, provision to be applied for assessment of capital gain is Section 50. However we are of the view that Section 50 applies only when an independent asset or a block of asset are sold on which depreciation was allowed and not when the industrial undertaking with depreciable assets are sold as a whole. In fact, when Section 50B provides for computation of capital gain on the sale of the undertaking it covers capital gain payable on depreciable assets forming part of the industrial undertaking also. In other words the distinction between Section 50 and 50B is that while Section 50 provides for computation of capital gain on the sale of only depreciable assets Section 50B provides for computation of capital gain on the sale of an undertaking as a whole which includes depreciable assets as well. In fact there is also difference in the mode of computation of capital gains under Section 50 for depreciable assets and for "slump sale" under Section 50B. Section 50 is a full code for computation of capital gains on depreciable assets. On the other hand under Section 50B the asset has to be first classified between long term or short term capital asset and then for the purpose of Sections 48 and 49 net worth has to be computed in terms of explanation 1 of the said Section. The capital gain under Section 50B is the sale proceeds as reduced by the net worth.

6. From the above findings, we hold that the sale of the undertaking is a stump sale within the meaning of Section 2(42C) assessable under Section 50B of the Act and assessee also rightly styled the transaction as such as "slump sale" in the sale documents and even got the Auditor's report prepared and filed along with return in terms of Section 50B(3) of the Act. We therefore allow the appeal by reversing the order of the Tribunal and that of the first appellate authority and hold that assessment was rightly made by the Officer under Section 50B treating the transaction as "slump sale". Since the Tribunal has not considered the question raised on the validity of re-opening and completion of assessment under Section 147, we remand the matter to the Tribunal for decision on this issue after hearing both sides.

7. As already stated the issue raised in I.T.Appeal 640/2009 filed by the revenue is the same as in the case decided above and both the companies are stated to be related companies of the same group. Tribunal allowed assessee's appeal by reversing the order of the CIT (Appeal) following their decision in ITA 1470/2009 which we have reversed vide above judgment. Since the facts are the same following our above judgment we allow this appeal also by reversing the order of the Tribunal and by restoring the order of the CIT (Appeal) confirming the assessment.

8. Counsel appearing for the assessee in I.T.A.1470/2009 contended that the computation of capital gains under Section 50B by the Assessing Officer itself is not correct and there was no occasion to consider the correctness of computation by any of the appellate authorities because issue happened to be decided in their favour by the first appellate authority and the Tribunal. We give one more opportunity to the assessee to raise this issue before the A.O. If the Tribunal upholds the income escaping assessments and remands the matter for revision of assessment in terms of our judgment."

6.1 Since the similar issue has already been decided against the assessee in assessee's own case by the above judgment of the Jurisdictional High Court, we allow the appeal of the Revenue. Thus, the appeal of the Revenue in ITA No. 714/Coch/2008 is allowed.

<u>ITA No. 1286/Coch/2005 : 2002-03</u>

7. The assessee has raised the following grounds of appeal:

> 1. The Officers below are not justified in confirming the addition of Rs.2,07,99,000/- u/s.43B being interest accrued on loans from Banks/Financial Institutions for the reason that this has not been paid before the due date of filing the return.
>
> 2) The Officers failed to appreciate the fact that such interest has been waived by the Bank/Financial Institutions shown as income in the assessment year 2004-05 so much so this would amount to double taxation.
>
> 3) The Officers below are not justified in confirming the disallowance of interest claimed for the reason that funds have been diverted to sister concern.
>
> 4) The Officers failed to appreciate the fact that interest claimed as paid to banks and financial institutions have been for specific advances like term loans, export packing credit which are not otherwise available for diversion.
>
> 5) The Officers below were not justified in disallowing the loss which has occurred on the re-instatement of foreign exchange loans procured for working capital requirements more so when the appellant has been consistently following the system of accounting year after year and booking into account the loss or gain arising on re-instatement of foreign exchange loans.
>
> 6) The Commissioner of Income-tax[Appeals] did not consider the opinion given by the Institute of Chartered Accountants of India in regard to the treatment of similar losses.

8. The facts of the case are that the assessee is an exporter of marine products. For the A.Y. 2002-03, the assessee filed return of income showing net loss of Rs.1,88,41,046/-. The assessment was completed on a total income of Rs.10.17,840/-.

8.1 The first ground relates to disallowance u/s 43B of Rs,2,07,99,000/-. The AO found that the assessee had claimed interest accrued on loans from banks/financial institutions of Rs.2,07,99,000/-which were not paid before the due date of filing of the return of income for the A.Y.2002-03. The assessee's contention was that this interest was waived by the financial institutions and the above sum was offered as income for the A.Y.2004-05. The AO considered this argument as irrelevant since only the interest paid to financial institutions before the specified date of filing of the return could be allowed as deduction u/s 43B.

8.2 On appeal, the CIT(A) observed that the provisions of sec. 43B are very clear. As per sec. 43B, the interest to financial institutions/banks could be allowed as deduction only on payment basis, that too before the specified date. In this case, the CIT(A) observed that the assessee had not paid the amount till date and held that waiver of interest cannot be a valid ground not to apply provisions of sec. 43B. Accordingly, the CIT(A) sustained the disallowance made by the Assessing Officer

8.3 Against this, the assessee is in appeal before us.

8.4 We have heard the rival submissions and perused the record. As per the provisions of section 43B(d) and (e) of the Act, the assessee has to pay the interest on any loan or borrowings in accordance with the terms and conditions of agreement governing such loan or borrowings when it was borrowed from the public financial institution or a State financial corporation or a State industrial investment corporation or a scheduled bank. However, in the present case, the Ld. AR has fairly conceded that the assessee has not paid interest on loan or borrowings made from such institutions and shown as income in the subsequent year on its waiver. According to the Ld. AR, it cannot be added in the assessment year under consideration. In our opinion, offering of income on waiver in the subsequent assessment year cannot be a reason to allow non-payment of interest as deduction when it was not paid in accordance with the provisions of section 43B of the Act. Hence, we are in full agreement with the finding of the CIT(A) and the same is confirmed. Thus, this ground of appeal of the assessee is dismissed.

9. The next ground is relating to disallowance of part of interest claimed. The AO in para 4 of the assessment order has stated that the assessee had given interest free loans to sister concerns amounting to Rs.804.71 lakhs. The assessee had paid interest of Rs.826,26 lakhs on secured loans 6f Rs.6,424.10 lakhs. The AO held that proportionate interest on money advanced without charging interest should be disallowed. He worked out the proportionate disallowance at Rs.1,03,50,000/-. He also relied on the decision of the Kerala High Court in the case of VI Baby & Co. (254 ITR 248). The contention of the assessee is that the interest was paid for specific advance like term loan, export packing credit and export bill discounting charges. It is the contention of the assessee that interest bearing funds were not diverted to the sister concerns as the assessee had sufficient resources.

9.1 On appeal, the CIT(A) observed that the AO had made similar disallowance for the A.Y.1997-98 and he had sustained the disallowance by relying on the decision of the Kerala High Court in the case of V I Baby & Co. The Court wherein it was held as under:

> *"We are inclined to accept the argument raised by counsel for the Revenue, because the advances to the partners, their relatives and the sister concerns are not for business purposes and the assessee has not derived any benefit out of the same. Admittedly, no interest was charged on these advances. The Tribunal appears to have placed reliance on the fact that the partners and their relatives have utilised the amounts for business purposes, such as construction of a shop building, etc. So long as the assessee-firm is not the beneficiary of such investments, the nature of investment or the utilisation of such advances has no relevance. So far as the assessee is concerned, it is only an interest free advance. The claim of the assessee's counsel that cash balances were available with the firm for advances to the partners, their relatives and the sister concerns does not advance the assessee's case. If cash balances are available, the borrowing itself is not for the purpose of the business. An assessee with liquidity cannot claim that it can give interest free advances to the partners and others and then borrow funds from the bank on interest for business purposes. Such borrowings will not be for business purposes, but for supplementing the cash diverted by the assessee without any benefit to it, 'Therefore, so long as the assessee is not the beneficiary of the*

investments made by the partners, their relatives and the sister concerns, and so long as the advances are interest free, the Assessing Officer is perfectly justified in disallowing the interest in proportion to the advances made. There is no dispute with regard to working out of the proportionate disallowance of interest. The decision relied on by the Tribunal and referred to above does not appear to be applicable to the facts of this case, becauSe-that was an individual-assessee advancing interest free loan to a firm engaged in a related business as the assessee and in which he is also a partner along with his wife and minor children. Whatever benefit accrued to that firm will also be treated as income of the assessee assessable in his individual capacity. Therefore such an advance also should be taken as for business purposes of the assessee, and we do not see how that decision will apply to the facts of this case. We are of the view that the Tribunal went wrong in relying on the said decision and allowing the appeals."

9.2 The High Court had held that an assessee with liquidity cannot claim that it can give interest free advances and then borrow funds on interest for business purposes. In the light of the decision of the Kerala High Court cited supra, the CIT(A) confirmed the disallowance of interest.

9.3 Against this, the assessee is in appeal before us.

9.4 We have heard the rival submissions and perused the record. In view of the judgment of the Jurisdictional High Court in the case of V.I. Baby & Co., cited supra, the CIT(A) had confirmed the disallowance of the interest made by the Assessing Officer. However, we make it clear that Assessing Officer has to compute interest on diversion of funds to sister concerns on outstanding balances on day to day basis. With this observation, we remit this issue to the file of the Assessing Officer for re-computation of interest. This ground of appeal of the assessee is partly allowed for statistical purposes.

10. The last ground is with regard to disallowance of loss which had occurred on the re-instatement of foreign exchange loans procured for working capital requirements.

10.1 The brief fact of the case are that the assessee had taken foreign exchange loans for purchase of assets as well as for working capital requirements. The practice adopted by the assessee was to revalue the loan amount payable on the basis of exchange rate as on 31st March every year. The loan amount payable was restated on the basis of the exchange rate prevailing on that date. The difference between the amount in the books and the restated amount was debited or credited to the P&L account. If the exchange rate was at a lesser rate than that adopted in the books of account, the ''profit" arising on "restatement" was credited to the P&L account. On the other hand, if the restatement results in a loss, then that loss is debited to P&L account. For the A.Y.2002-03, the assessee had debited to the P&L account a sum of Rs.84,06,770/- as foreign exchange loss on restatement of foreign exchange loans. The AO issued a notice requiring the assessee to explain why this amount should not be disallowed. The assessee has stated as under: -

"The foreign exchange loss of Rs.84,06,770/- debited to the Profit and Loss account is on account of the reinstatement of the External commercial Borrowing availed by the company from Sumitomo Mitsui Banking Corporation for working capital purposes. Accordingly, loss on reinstatement of the loan as per the exchange rate prevailing as on 31.3.2002 has been debited to the Profit and Loss account. In fact for the assessment years 2003-04 & 2004-05 the Company has earned profit on reinstatement of the External Commercial Borrowing which has been taken as revenue income. That apart, there is a difference in the fluctuation of the External Commercial Borrowing as between one borrowed for working capital and one borrowed for acquisition of fixed assets. The working capital loan is mainly availed

to acquire stock in trade and for meeting other expenditure whereas term loan was availed for acquisition of fixed assets. Therefore, any fluctuation in the reinstatement of External commercial Borrowings as far as working capital is concerned could only be taken as revenue expenditure whereas in other case it is capitalized to the assets."

10.1 The AO held that the entire claim was in the capital field as the loan received is a capital receipt. The fluctuation loss was mostly on account of periodical reinstatement of the External Commercial Borrowings. The Assessing Officer relied on the decisions of the Delhi High Court reported in 272 ITR 355 and 254 1TR 570.

10.2 Before the CIT(A), the assessee had given a break-up of the total amount of Rs.84,06,770/-as follows:-

> "Rs.26,04,139/-: This amount represents the loss on restatement of the loan utilized to purchase the assets situated at the Taloja factory. We have been consistently following the accounting policy of charging the loss or gain on account of the restatement of the foreign currency loans, to the fixed .assets that have been purchased with the loan. However, during the relevant financial year ie 2001-02, the Taloja factory was disposed off and the proceeds therefrom was used to repay the loans which was used to finance the acquisition of the Taloja factory. A portion of these loans continued to remain outstanding as on 31st March 2002 since the sales proceeds were inadequate to repay the loans in full. Hence the loss/gain arising on restatement of these loans were debited/credited to the Profit & Loss account.
>
> The above explanation would hold good for the following amounts debited/credited to the Profit & Loss account. ,
>
> a. Rs. 69,158.83
>
> b. Rs. 1.70
>
> c. Rs. 22,934.99
>
> d. Rs. 4,243,12 (Cr)
>
> Rs.57,14,725.60 : This amount represents the loss on restatement of the ECB availed by the company from Sumitomo Bank for its working capital requirements."

10.3 Before the CIT(A), it was argued that the claim was to be allowed as the assessee had consistently followed the above method of accounting. It was claimed that for the A.Ys.2003-04 and 2004-05, the company had earned profit on restatement and these were offered for assessment.

10.4 According to the CIT(A), depending on the foreign exchange rate as on the last date of the accounting year, the assessee quantified the amount payable to the borrower as on 31sl March of every year. The CIT(A) was of the view that the amount of loan repayable undergoes a change on the basis of foreign exchange rate at the end of each year. Thus, the CIT(A) observed that restatement resulted in the assessee requiring a higher or lower amount to clear the loan liability. According to the CIT(A), the amount debited for Rs.84.06 lakhs actually represented the excess amount of liability to clear the loan account as on 31.3.2002. The CIT(A) noted that the assessee had not made any payment on 31.3.2002 and the actual amount to be paid depended upon the exchange rate at the time of repayment. The CIT(A) observed that the source was the loan obtained from foreign banks/financial institutions and undoubtedly, the loan received was a capital receipt. Therefore, according to the CIT(A), the increase or decrease in the liability should also fall in the capital field. Therefore, the amount debited represented capital expenditure only. According to the CIT(A), even if it is to be held that the amount can be claimed u/s 37, still it is to be disallowed because the claim is purely contingent in nature. The additional liability, if any, would crystallize only on the date(s) of repayment of loan. Accordingly, the CIT(A) upheld the disallowance of interest made by the Assessing Officer.

10.5 Against this, the assessee is in appeal before us.

10.6 We have heard the rival submissions and perused the record. The issue involved in the appeal is whether the difference amount arising out of restatement of foreign currency transactions taking into account the prevailing exchange rate as on the end of accounting year is liable to tax or not. The Supreme Court in the case of Sutlej Cotton Mills Ltd. Vs. CIT reported in [1979] 116 ITR 1 has held as under:-

> *"The law may, therefore, now be taken to be well settled that where profit or loss arises to an assessee on account of appreciation or depreciation in the value of foreign currency held by it, on conversion into another currency, such profit or loss would ordinarily be a trading profit or loss if the foreign currency is held by the assessee on revenue account or as a trading asset or as a part of circulating capital embarked in the business. But, if on the other hand, the foreign currency is held as a capital asset or as fixed capital, such profit or loss would be of capital nature."*

10.7 The ratio of the above decision is whether the gain or loss should be brought to tax or allowed as deduction depends upon whether the foreign currency transactions were carried on account of capital or revenue items. If the foreign currency transactions are undertaken on capital account, the gain made out of such transaction is outside ambit of taxation, of course subject to the application of provisions of Section 43A of the Act. If the transactions undertaken are on account of revenue items, the gain is clearly taxable and so the loss also is clearly allowable. The assessee except making bald assertion that the transactions were undertaken on account of capital items no evidence was brought on record to establish that the foreign currency transactions were undertaken on capital items. The Assessing Officer also had failed to undertake this exercise. The Hon'ble Supreme Court in the case of CIT Vs. Woodward Governor India Pvt. Ltd. reported in [2009] 312 ITR 254 (SC) had clearly held that the actual payment was not a condition precedent for making adjustment in respect of foreign currency transactions as the end of the closing year. We are therefore, unable to concur or agree with the view of the CIT(A), that liability could arise only when the contract would have matured, as such a stand is totally divorced from the accounting principles and is in variance with the principle upheld by the Apex Court in the case Woodward Governor India (P.) Ltd. (supra). It can also be seen that the decision in the case of Woodward Governor India (P.) Ltd. (supra) has been rendered with regard to items in the revenue account and capital account.

10.8 In the light of our above findings, we restore the matter to the file of AO with the direction that to re-do the assessment keeping in view the principles enunciated above after affording a reasonable opportunity of being heard to the assessee. Accordingly, the appeal of the assessee is partly allowed for statistical purposes. Thus, the appeal of the assessee is partly allowed for statistical purposes.

11. In the result, the appeal of the Revenue is allowed and the appeal of the assessee is partly allowed for statistical purposes.

Order pronounced in the open Court on this 28th June, 2019