

आयकर अपीलीय अधिकरण, इन्दौर न्यायपीठ, इन्दौर

**IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE "SMC" BENCH, INDORE**

BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER

**ITA No.423/Ind/2018
Assessment Year: 2011-12**

Ghaynshyam Songara 29, Ganesh Nagar Indore (Appellant)	बनाम/ Vs.	ITO-2(S) Indore (Revenue)
P.A. No.AVKPS1995A		

Appellant by	Shri Pankaj Shah, A.R.
Respondent by	Shri R.P. Maurya, D.R.
Date of Hearing:	27.06.2019
Date of Pronouncement:	29.07.2019

आदेश / O R D E R

PER KUL BHARAT, J.M:

This appeal by the assessee is directed against order of the CIT(A)-2, Indore dated 5.3.2018 pertaining to the assessment year 2011-12. The assessee has raised following grounds of appeal:

GROUND-I : AGAINST REASSESSMENT UNDER SECTION 147

1. On the facts and in the circumstances of the case and in law, the Commissioner of Income tax (Appeals)-II ("CIT(A)") erred in confirming the action of AO in reopening the assessment under Section 148 of the Act failing to appreciate that the same was based on merely change of opinion.
2. He further failed to appreciate that the reopening is based on audit objection of Revenue party to which the AO himself did not agree and has objected to the said objection in view of which there is no reason to believe of the AO.
3. The Appellant prays that the said reopening under Section 148 being illegal and unjustified be directed to be quashed.

GROUND-II : AGAINST CONSIDERING RURAL AGRICULTURAL LAND AS URBAN

1. On the facts and circumstances of the case and in law, the CIT(A) erred in confirming the addition on account of alleged long term capital gains by treating rural agricultural land as urban agricultural land.
2. The Appellant prays that the addition be directed to be deleted.

GROUND-III

The Appellant craves leave to add, to amend, to alter and/or to delete all or any of the above grounds of appeal

→ G. S. Songara

2. Ground No.1 is against legality of the opening of assessment. The facts in brief are that the assessment u/s 143(3) of the Income Tax Act, 1961 (hereinafter called as 'the Act') was framed on 7.3.2014 by the A.O. pertaining to the assessment year 2011-12. However, subsequently, the A.O. reopened the assessment on the ground that he was in possession of information that assessee had sold immovable property for a consideration of Rs.19,65,000/- at patwari Halka No.12, survey Nos.155/79, 155/80 at village Machla, Tehsil and Dist. Indore on 10.12.2010 to Smt. Sunita W/o Shri Kamal Singh R/o vill. Morod Tehsil. It was noticed that the agricultural land fall within the 8 kms. of the Municipal limit, therefore, transfer of the same attracted capital gain tax. Thereafter, the assessing officer after considering the objections proceeded to make addition of Rs.19,55,966/- in respect of the long term capital gain arose out of the transaction.

3. Aggrieved by this order, the assessee preferred an appeal before Ld. CIT(A) where the assessee had taken a ground of validity of reopening and other grounds of merit. The Ld. CIT(A) dismissed the grounds raised by the assessee. Ld. Counsel for the assessee reiterated the

submissions as made in the synopsis. The submissions of the assessee are reproduced as under:

SYNOPSIS

1. The Appellant is an individual engaged in agricultural activities. During the year under consideration the Appellant had sold a rural agricultural land which was beyond 8 km from Municipal limits of city. The distance aspect was examined in the original assessment and after due enquiry and inspection report from Income tax Inspector the AO was satisfied and accepted the submissions.
2. Later on Revenue Audit party vide their letter raised audit objection in respect of sale of such rural agricultural land. Details of such audit objection based on inspection of Assessment records are as follows:
 - a. Letter no. CRA-I/D-699 dated 23.05.2015
 - b. Letter no. CRA-I/CIT-I/Indore/2015-16/D-1708 dated 21.09.2015
 - c. Letter dated 11.05.17 Letter no. CRA-1/लेखा परीक्षा /निराकरण/२०१७-१८/D-408
3. The learned AO did not accept the Audit objection and stated to the Audit party vide his letter ITO2(5)/Ind/Audit Reply/2015-16/186 dated 15.07.2015 that the audit objection is based on assumption that as per present limits the distance is less than 8 km which is not tenable as the said area is included now i.e. after 4 years from date of sale of rural agricultural land. The Id AO also stated to the audit party that he had examined the distance and the same was found as follows from 3 routes:
 - a. Shortest route Limbodi via NH3 – 12.6 kms
 - b. A.B. Road – 12.9 kms
 - c. Rau Railway Station – 17kms

He also stated that there was report of inspector to verify the distance and therefore the audit objection was not acceptable

4. However since the audit party did not accept the reply of AO the case was reopened based on audit objection and change of opinion.
5. This is a clear case of change of opinion as the aspect was already examined in detail in original assessment. See:
 - a. Point no.9 – 11 in questionnaire on page 6 of Paper book
 - b. Copy of reply to AO dated 26.02.14 on page 7 of PB
 - c. Report of Income tax Inspector on page 9 of PB
 - d. Order sheet noting dated 07.03.14 on page 11 of PB
6. In view of above the Appellant prays that the said reopening be quashed.

Legal Propositions

7. In this regard following jurisdictional High Court decisions also support the stand of Appellant that audit objection is not "information" and reopening cannot be made on its basis:
 - **Yeshwant Talkies v. CIT (157 ITR 103)(MP)**
 - CIT v. Digvijay Singh (292 ITR 314)(MP)
 - Sharmisthabai Holkar vs CWT (169 ITR 496)(MP)
 - Vishwanath v. Assistant Controller of Estate Duty (139 ITR 610)(MP)
 - H.H. Maharaja Shri Lokendra Singhji v. CIT (166 ITR 407)(MP)
8. No reopening under section 148 of the act based on a mere change of opinion
 - a. CIT vs. Pithampur Steels (P) Ltd. (2008) 11 ITJ 696 (MP)
 - b. CIT vs. S.R.Construction, Bhopal 2002 (2) MPLJ 81
9. For Section 148 there should be reason to believe that income has escaped assessment however the AO himself doesnot believe that any income has escaped Assessment. In case of **Raajratna Metal Industries vs. ACIT [2014] 49 taxmann.com 15 (Gujarat)** it is held that If AO contests the audit objection but still reopens to comply with the audit objection, it means he has not applied his mind independently and the reopening is void

4. I have heard the rival submissions, perused the materials available on record and gone through the orders of the authorities below. I find that Ld. CIT(A) dismissed the ground of validity of reopening without adverting to the submissions of the assessee by observing as under:

“4.0 This ground of appeal is with regard to dissatisfaction with the reasons for reopening the case by the A.O. u/s 148 of the I.T. Act, 1961. I have carefully gone through the assessment order as well as submission of the appellant in this regard.

*4.1 After carefully examined the facts of the assessment order, I found that the A.O. had mentioned specific reason for reopening the case u/s 148 of the I.T Act, 1961. Hence, the view of the A.O. is found to be correct and these grounds of appeal are accordingly **dismissed.**”*

5. From the above finding of the Ld. CIT(A), it is clear that he has not adverted to the submissions/objections of the assessee. Regarding treating the land as a capital asset being situated within the municipal limit as prescribed under the law and also whether reopening on the basis of change of opinion, when the A.O. had categorically in original assessment after making enquiries, treated the land being situated beyond municipal limit as prescribed under the law, I therefore hereby set aside the finding of the Ld. CIT(A) and restore the issue of validity of reopening u/s 148 of the Act and also the issue, whether the land in question is within the prescribed limit? Needless to say the

Ld. CIT(A) would pass a speaking order on both these issues. Ground of the assessee's appeal is allowed for statistical purposes.

6. Ground No.2 is on merit of the addition. Since I have set aside the order on the validity of the reopening to the file of the Ld. CIT(A) for decision afresh, this ground is also restored to the A.O. to decide this issue as well after the issue of validity and the factum of the location of the land is examined. This ground of the assessee's appeal is allowed for statistical purposes.

7. Ground No.3 is general in nature and needs no separate adjudication.

8. Appeal of the assessee in ITA No.423/Ind/2018 for the A.Y. 2011-12 is allowed for statistical purposes.

Order was pronounced in the open court on 29.07.2019.

Sd/-
(KUL BHARAT)
JUDICIALMEMBER

Indore; दिनांक Dated : 29/07/2019

VG/SPS

Copy to: Assessee/AO/Pr. CIT/ CIT (A)/ITAT (DR)/Guard file.

By order

Assistant Registrar, Indore