आयकर अपीलीय अधिकरण,चण्डीगढ़ न्यायपीठ, "ए ", चण्डीगढ़

IN THE INCOME TAX APPELLATE TRIBUNAL
DIVISION BENCH, 'A', CHANDIGARH

श्री एन. के. सैनी, उपाध्यक्ष एवं श्री संजय गर्ग, न्यायिक सदस्य

BEFORE SHRI N.K. SAINI, VICE PRESIDENT &
SHRI SANJAY GARG, JUDICIAL MEMBER

आयकरअपीलसं./**ITA No. 652/CHD/2017**

निर्धारणवर्ष / Assessment Year : 2008-09

M/s Blue Coast Infrastructure Development P. Ltd., 7, Shopping complex, Sector-1, Parwanoo, Distt. Solan, H.P.	Vs. बनाम	Dy. Commissioner of Income Tax, Circle, Parwanoo
स्थायीलेखासं./PAN NO: AABMC4010E		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारितीकीओरसे/Assessee by : Shri Sudhir Sehgal, Advocate

राजस्वकीओरसे/ Revenue by : Shri Chandrajit Singh, CIT-DR

सुनवाईकीतारीख/Date of Hearing : 11.11.2019

उदघोषणाकीतारीख/Date of Pronouncement : 11 .12.2019

आदेश/Order

Per Sanjay Garg, Judicial Member:

The present appeal has been preferred by the assessee against the order dated 13.02.2017 of the Commissioner of Income Tax (Appeals), Shimla, H. P. [hereinafter referred to as 'CIT(A)'].

2. The brief facts relevant to the issue are that the assessee company filed its return of income on 30.09.2008 declaring its income for the year under consideration at Rs. 57,000/-. The Assessing Officer (in short 'AO'), subsequently gathered information that the assessee had purchased a land in Goa in the F.Y. 2001-02, which was sold during the

F.Y. 2007-08 relevant assessment year 2008-09, but the assessee had not offered any capital gains on the above said transaction. The A.O., therefore, reopened the assessment for the year under consideration AY 2008-09.

3. During the reopened assessment proceedings, the A.O. noted that the assessee company had purchased land measuring 131425 Sq. Mtrs in survey No. 87/1A at Varem, Reis Magos, Goa from M/s Reis Magos Estates Pvt. Ltd. on 26.07.2001 vide Regd. Sale deed for a consideration of Rs. 9,76,00,000/- . The assessee company kept this land with it for a period of six years. The company further sold the said land for a consideration of Rs.60 crores to M/s Delanco Home & Resorts Pvt. Ltd. on 09.04.2007. On being asked to explain by the AO as to why no capital gains were returned in the Income-tax return in respect of the above said transaction, the assessee company explained that the land in question was an agricultural land situated at a distance of more than 8 K.M. from the Municipal limits of Panaji and falls in the revenue jurisdiction of village Reis Magos, having population of less than ten thousands. It was, therefore, contended that the said land did not fall in the definition of capital asset, hence, was exempt from capital gains tax as per the provisions of section 2(14) of the Income Tax Act, 1961 (in short 'the Act').

4. The Assessing Officer, however, did not agree with the above contention of the assessee. He observed that the land in question was

classified as residential land by the District Administration/Land Revenue Authorities in the year 1994. That the village Panchayat of Reis Magos had issued permission for construction of residential complex on the aforesaid land in the year 1995-96 i.e. prior to the purchase of land by the assessee and that even the said permission was renewed from time to time up to year 2009. The AO further observed that the intention of the assessee company was never to use the land for agricultural purposes. That the assessee company was in the business of real estate and the land was purchased by the assessee company for development of hotel project / housing project. The A.O. in this respect relied upon the clauses of agreement to sale. The AO further observed that even the assessee company could not prove with convincing evidence that agricultural operations were carried out on the said land. The AO further observed that even the said land was within 8 K.M. of the Municipal limits of Panaji and that the population of Panaji was more than ten thousand persons as per census of 2001. He, therefore, observed that the land in question was not exempt from taxation as per the provisions of section 2(14) of the Income Tax Act. He further observed that though the population of village Reis Magos was less than ten thousands but since the land fell within 8 K.M. of Municipal limits of Panaji , hence, the contention of the assessee that the land did not fall within the definition of the capital asset as per section 2(14)(iii) of the Act was not factually correct. He further observed that the contention of the assessee company that the distance was to be measured by road was

erroneous. He held that the distance can be measured either by mettled (pucca) road or by an unmettled road (kuchcha road). He further observed that even neither the assessee nor the buyer of the land were agriculturist. That mere purchasing of agricultural land would not make the assessee an agriculturist. He, therefore, concluded that the assessee could not establish that the land in question was not chargeable capital gains tax. He, accordingly computed the capital gains and made the impugned addition to the income of the assessee.

5. Being aggrieved by the above order of the Assessing Officer, the assessee filed the appeal before the CIT(A) but remained unsuccessful. Hence, the assessee has come in appeal before this Tribunal raising the followings concise grounds of appeal:

> *"1. That the Worthy Commissioner of Income Tax (Appeals) has erred in confirming the action of the Assessing Officer with regard to reopening of the case u/s 148.*
>
> *2. a). That there was no reason to believe that the income of the assessee had escaped assessment and further, there was no cogent material with the Assessing Officer for forming the belief for the purpose of reopening of the case u/s 148.*
>
> *b). That the reasons in itself as recorded by the Assessing Officer are vague and without any substance for the purpose of taking recourse to section 148 of the Income Tax Act, 1961*
>
> *3. Notwithstanding above said ground of appeal, the Ld. CIT (A) has erred in confirming the action of the Assessing Officer that the land in question, as sold by the assessee cannot be classified as agricultural land since as per revenue records, it is an*

agricultural land and agricultural operations have been carried out and further no construction activity had been carried out on the said land by the assessee, till its sale after six years of purchase to the other party.

4. *That the reliance by the Assessing Officer and CIT (A) on the statement of Sh. Suresh Parulekar recorded at the back of the assessee, is totally unjust and against the principles of natural justice and also against the principles laid down by the Hon'ble Supreme Court in the case of Kishinchand Chellaram as reported in 125 ITR 713 and in the case of Tek Ram as reported in 357 ITR 133 (SC).*

5. *That the numerous details and documentary evidences in the form of various certificates from Village Panchayat and office of the Mamlatdar, affidavit of Registered Land Valuer and numerous other evidences had been furnished, which confirms that the land in question was more than 10 Kilometers away from the limits of the 'Panaji' and, as such, the CIT (A) having considered and examined all such documentary evidence should have given categorical finding that the land in question was more than 10 Kilometers away from Municipal Committee, rather than holding that the issue is only an academic as nothing adverse has been pointed out by the CIT(A) against such documentary evidences.*

6. *That all such evidences confirm that the land in question was agricultural land and is more than 10 Kilometers away from Municipal Committee and, as such, the CIT (A) has erred in holding that the land was capital asset, which is against the facts and circumstances of the case.*

7. *That the Appellant craves leave to add or amend the grounds of appeal before the appeal is finally heard or disposed off."*

6. We have heard the rival contention and have also gone through the record. Our finding in respect of the issues raised in this appeal is as under. Firstly, we take up the legal issue raised vide Grounds No. 1 & 2.

Ground no. 1 & 2

7. The assessee through above grounds of appeal has contested the validity of the reopening of the assessment u/s 147 read with section 148 of the Income Tax Act. The Ld. Counsel for the assessee in this respect has invited our attention to the reasons recorded by the Assessing Officer for reopening of the assessment, which read as under:

"M/s Blue Coast Infrastructure Development Ltd.,
7, Shopping Complex, Sector-1, Parwanoo

Asst Year 2008-09

Reasons: *Dated : 08.05.2012*

*In this case, information was received from the Dy. Commissioner of Income Tax, Central Circle, Panaji that a search was carried out at the residence of Sh. Suresh V. Parulekar on 17.11.2009, wherein a copy of sale deed between M/s Blue Coast Infrastructure Development Ltd. and M/s Delanco Home & Resorts Pvt. Ltd. was found. During search operation, it was stated by Sh. Parulekar that his company M/s Reis Magos Estates Pvt Ltd., had sold land of 131425 Sq. Mtrs. in survey No.87/1-**A,** Verem, Reis Magos, Gao to M/s Morepen Holiday Resorts Ltd. (now M/s. Blue Coast infrastructure Development Ltd.) on 26.07.2001 for a consideration of Rs. 9,76,00,000/-. which was subsequently sold to M/s. Delanco Home.& Resorts Pvt. Ltd. on 09.04.2007 for a consideration of Rs.60,00,00 000/-.*

According to article 4.1(1) of the sale deed, the above said land falls under S2 Zone as per the Master Development Plan of Goa which is approved for residential purposes. On enquiring the status of the land, it was gathered that no agricultural operations had been carried on the said land for the last 20-30 years and the land is situated within four kilometers of the Panaji Municipality. Further, it has been noticed that the assessee company is in the business-of infrastructure development for the hospitality sector and carrying out agricultural operation is not its objective. Further, the company had also not disclosed any agriculture income from the said land in its returns of income filed after purchase of the land.

The assessee company had filed its returns for the A.Y 2008-09 (relevant to the period during which the said land was sold) on 30.09.2008, however, the income of Rs.60,00,00,000/- has not been reflected.

In the given facts & circumstances of the case, 1 have reasons to believe that due to failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment of its total income for the A.Y. 2008-09, income to the extent of Rs.60 crores has escaped assessment for which proceedings u/s 147 are being initiated.

Issue notice u/s 148 for the A.Y. 2008-09.

Sd/-
(Anshuman Sharma)
Dy. Commissioner of Income Tax
Circle, Parwanoo"

8. A perusal of the above reasons recorded by the Assessing Officer for reopening of the assessment reveals that the Assessing Officer had received information from the Dy. C.I.T., Central Circle, Panaji that during the search action carried out at his residence of Sh. Suresh V. Parulekar, a copy of sale deed of land between M/s Delanco Home & Resorts Pvt. Ltd. and the assessee was found. In his statement Sh. Parulekar stated that his company M/s Reis Magos Estate Pvt. Ltd. had sold the aforesaid land to the assessee company for Rs.9,76,0,000/- which was subsequently sold to M/s Delanco Home & Resorts Pvt. Ltd. on 09.04.2007 for a consideration of Rs.60 crores. The Assessing Officer, however, has reproduced the relevant part of the statement of Sh. S. V. Parulekar in the assessment order which is further reproduced as under:

"Relevant portion of the statement of Mr. Suresh Parulekar recorded on 26.02.2010 is extracted as under:

"Q No. 3 Please furnish details of transaction with Ms Morepen Holiday Resorts Ltd., which is now renamed as M/s Blue Coast Infrastructure Ltd.

Ans: M/s Reis Magos Estates Pvt. Ltd has sold land of approximately 1,30,000 sq. mtrs in survey No. 87 IA at Reis Magos, Bardez Taluka, Goa to the above Company.

The sale deed was registered in 2002 or there about in their name. This company belongs to the group of M/s Park Hyatt Hotels.

Q. No. 4 Please furnish details of the acquisition of the above land by M/s Reis Magos Estates Pvt. Ltd.

Ans. M/s Reis Magos Estates Pvt. Ltd has purchased this land in the year 1994. The land in Survey No. 87/1A was about 1,30,000 sq. mtrs was sold to M/s Morepen Holiday Resorts Ltd., which is now renamed as M/s Blue Coast Infrastructure Ltd.

Q. No. 5 Please furnish the details of all the agricultural operations curried on by the M/s Reis Magos Estates Pvt. Ltd., prior to its sale to M/s Morepen Holiday Resorts Ltd., which is now renamed as M/s Blue Coast Infrastructure Ltd.

Ans. The above land which is sold is sloppy and terrain is hilly. Approximately in the year 1995-96, this land was converted into settlement Zone for the residential purpose. Have not carried out any agricultural operation at any lime on the above land which is sold to M/s Morepen Holiday Resorts Ltd., which is now renamed as M/s Blue Coast Infrastructure Ltd.. We have sold the converted land along with all the conversion approvals to M/s Morepen group.

Q. No. 6 Have you claimed any exemption on the profit from sale of land to M/s Morepen Group.

Ans. Now we have declared the profit on the sale of above land at Reis Magos as business Income and paid tax.

Q. No. 7 Please furnish the details of the present status of the land.

Ans. This land is adjacent to INS Manadovi. I heard that it was subsequently sold to M/s DLF Group."

9. A perusal of the above statement recorded of Mr. Suresh Perulekar, Director of M/s Reis Magos Estates Pvt. Ltd. reveals that during the search

action at their premises what was found was the copy of the sale deed executed between M/s Reis Magos Estates Pvt. Ltd. and the assessee. However, the assessing officer in the reasons recorded for reopening of the assessment has mentioned that during the search action executed between assessee and M/s Delanco Home and Resorts private limited was found. This fact mentioned by the assessing officer is contrary to the effect coming out of the statement of Mr. Perulekar. In his reply to question No. 7, Mr. Perulekar has stated that he has heard that the land has been subsequently sold by the assessee to M/s. DLF group. Mr.Perulekar did not show any direct or specific knowledge about the fact the sale of land or as to the terms of the sale deed of sale consideration settled. From the above facts, it is apparent that the assessing officer has wrongly mentioned that during research action a copy of the sale deed between the assessee and M/s. Delanco Home and Resorts Private limited was found or that Mr. Perulekar in his statement had stated that the assessee had sold the land at a sale consideration of Rs. 60 crores to M/s. Delanco Home and resorts Pvt. Ltd. Hence, the very basis of information leading the assessing officer to form belief that the income of the assessee had escaped assessment is wrongly and falsely mentioned by the assessing officer.

Now the question that arises as to if the assessing officer did not form his belief from the information, if any received from the DCIT, Panaji, as alleged in the reasons recorded, then what was the source of information to the Assessing officer of the sale deed entered into by the assessee with M/s Delanco Home and Resorts Pvt. Ltd. The Ld. counsel

for the assessee in this respect has invited our attention to the earlier correspondence of the assessee with the other income tax authorities. At page 25 of the paper book, there is a copy of the letter dated 04/03/2010 issued by DCIT, Circle Parwanoo, (Assseessing Officer) wherein, it has been mentioned that a survey action under section 133A of the Income-tax act was carried out at the premises of the assessee during the course of which some documents regarding the sale of land by the assessee M/s. Delanco Home Resorts Private limited have been found. The assessing officer, accordingly, through this letter called for information regarding the above aforesaid sale deed asking the assessee to furnish the date of purchase and the name of party from whom the land was purchased, the area of the land, the copy of the sale deed, amount of sale consideration received, whether any capital gains tax has been paid in respect of the aforesaid sale transaction and further the relevant documents like income tax return, P&L account, balance sheet etc. along with other related details and information. The assessee vide letter dated 04/03/2010 replied to the queries raised by Assessing Officer, whereby, it was explained that the land in question being rural agricultural land not falling in the definition of capital asset as defined u/s 2(14) of the Act, and hence, the income earned from the sale of said land was not exigible to capital gains tax. Hence, no capital gains tax had been paid. A certificate from the office of Talathi of Reis Magos was also enclosed to the effect that the land was beyond 8 kms of the limits of nearest Municipal council of Panaji. No further correspondence

in continuation of the aforesaid correspondence between the assessee and the DCIT, Parwanoo (Assessing Officer) has been brought on record by either of the parties. The Ld. counsel for the assessee has further invited our attention to page 30 of the paper book, which is a copy of letter dated 17/05/2010 issued by the office of Deputy Director of Income tax (Inv.), H.P., Shimla, whereby, the assessee has been asked to attend to the proceedings before him and produce the necessary documents and details as asked for. A copy of letter dated 03/09/2010 has been placed on the file whereby Deputy Director of Income Tax (Inv.), H.P., Shimla, has asked the assessee to furnish the required details relating to the purchase and sale of land in question. The assessee has also been asked to explain as to why not any capital gains tax has been paid on the sale of the land in question. The perusal of the above aforesaid letter dated 30/09/2010 reveals that the Ld. Deputy Director of Income tax (Inv.), H.P., Shimla, has raised all the queries and doubts that have been mentioned by the Assessing officer in the reasons recorded for reopening of the assessment and has asked the assessee to give his explanation about the same . The contents of the letter dated 03/09/2010 of the Deputy Director of income tax (Inv.), H.P., Shimla, for the sake of ready reference, are reproduced as under:-

"Sub:- Enquiry Proceedings - regarding

Please refer to your letter dated June 15, 2010.

In your above letter it was mentioned that a Survey u/s 133A of the Act was conducted by AO Parwanoo and during the survey proceedings

the AO had called for information on various points including details of your ,bank statements which were furnished to him.

This Office has obtained copies of the records pertaining to survey action conducted u/s 133 A of the Income Tax Act 1961 from the office of DCIT Parwanoo. It has been gathered that you had purchased the land measuring 1,31,425 sq. mtrs out of 1,48,150 sq. mtrs in survey no. 87/1-A, Verem, Reis Magos, Goa from M/s Reis Magos Estates Pvt. Ltd on 26.07.2001 by way of registered sale deed for a sale consideration of Rs. 9,7600,000/- and land was subsequently sold by you to M/s Delanco Home & Resorts Pvt. Ltd. on 9.4.2007 by way of registered sale deed for a consideration of Rs. 60,00,00,000. As it is gathered, that you have not paid the tax on capital gain on the sale of the said land.

It was claimed by you that it was an agricultural land and the profit on the sale of the above land are exempt. However, you have not been able to substantiate your claim of the sale deed the above land falls. under S2 development zone as per the Master development plan of Goa and the above land is approved for residential purposes. The land is situated with in four kilometres of the Panaji municipality and is in a developed area. The provisions of Section 45 of the Income Tax Act 1961 are attracted in your case since the sale of this land amounts to transfer of capital assets. As per section 2(14) of the Income Tax Act 1961, capital asset has been defined as "Capital asset means property of any kind held by an assessee whether or not connected with his business or profession, but does not include- ....(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 committee or by any other name) or a cantonment board and which has a population of not less than ten thousand according to the last preceding census of which the relevant figures have been published before the first day of the previous year, or

(b) in any area within such distance, not being more than eight kilometres, from the local limits of any municipality or cantonment board referred to in item (a), as the Central Government may, having regard to the extent of, and scope for,

urbanisation of that area and other relevant considerations, specify in this behalf by notification in the Official Gazette....

The following points are also brought into your kind notice: -

a) The land of 1, ,31,425 sq. mtrs in survey no 87/ 1-A at Verem Reis Magos is classified as residential land by the district revenue administration in 1994.

b) The village panchayat Reis Magos issued permission for constructing residential complexes on the above land in 1995-96 and renewed the same from time to time unto the year 2009.

c) The earlier owner of the above land M/s Reis Magos estates Pvt. Ltd (which held the land for 7 Years) has claimed that the land is non-agricultural and has not claimed and exemption on the profit on sale of the above land.

d) You have not actually carried out agricultural operations on the above land and there is no documentary evidence to prove that actual agricultural operations were carried out.

e) You have not declared any agricultural income in your returns of income filed before the department for any assessment year. Even the consideration received and profit on sale of the land were not disclosed in the profit & loss account for the year ending 31.03.2008. They were routed through the balance sheet only.

f) The purchase consideration of Rs. 9,76, 00,000/- is not paid for the purchase of the agricultural land but was actually paid for the residential land. You have not purchased the above land for agricultural purposes.

g) The sale consideration of Rs. 60 Crores cannot be paid for an agricultural land. The buyer M/s Delanco Home & Resorts Pvt. Ltd. has not purchased the above land for agricultural purposes.

h) The land is situated within 4 Kilometres of the Panaji municipality and is in a developed area.

i) Neither you nor M/s Delanco Home & Resorts Pvt. Ltd. i.e. neither the seller nor the buyer of the above land are agriculturalists.

In view of the above discussion, you are hereby required to show-cause why the claim of exemption be not rejected and the capital gains be computed as under for the A.Y. 2008-09.

Sale consideration	*60,00,0,000*
Less indexed cost of the land	*13,88,62,347*
*10,73,60,000*551/426*	
Long Term Capital Gains	*476,11,37,653*

Your case is fixed for hearing on 18.10.2010.

Sd/-
(SHASHI SAKLANI)
Dy. Director of Income-tax (Inv.)
Shimla"

10. The assessee vide its letter dated 13/10/2010 replied to the enquiries and doubts raised by Deputy Director of Income tax (Inv.), H.P., Shimla. The assessee in support of its claim also furnished copies of the official land revenue records. No document has been brought on the file to show that if any further action was taken in respect of the matter by Deputy Director of Icome Tax (Inv.), H.P., Shimla.

However, thereafter the Assessing officer on 08/05/2012 recorded the reasons for reopening of the assessment mentioning the same grounds that have been mentioned in detail in the letter dated

30/09/2010 of the Deputy Director of Income tax (Inv.), H.P., Shimla. From the above facts coming out of the documents mentioned above, it appears that after considering the reply of the assessee Deputy Director of income Tax (Inv.), H.P., Shimla dropped further proceedings in respect of the matter. Even if it is assumed that Deputy Director of income Tax (Inv.), H.P., Shimla, further referred the matter to the assessing officer of the assessee, it is not clear as to what prevented the assessing officer for not mentioning about the report or reference received by him in this respect from the office of Deputy Director of Income Tax (Inv.), H.P., Shimla. Though, the assessing officer in the reasons recorded has mentioned all the facts, circumstances, reasons and doubts as have been raised by Deputy Director of Income Tax (Inv.), H.P., Shimla, however, the assessing officer has mentioned the basis of information as information received from the DCIT, Central Circle, Panaji, without any reference to the survey action carried out at the premises of the assessee and further correspondence made by his predecessor about the sale deed in question vide his letter dated 4.3.2010(supra) and the reply of the assessee there to vide letter dated 4.4.2010. The facts on the file reveal that after the receipt of information from DCIT, Panaji, a survey action was carried out at the premises of the assessee from where the sale deed in question was found. Thereafter, not only the assessing officer, as discussed above, but also the Deputy Director of Income tax (Inv.), H.P., Shimla, carried out investigation in respect of the matter. However, the assessing officer

has conveniently overlooked or to say skipped the above facts and events in the reasons recorded. Had the assessing officer mentioned about the aforesaid fact and events of investigation by his office as well by the office of Deputy Director of income Tax (Inv.), H.P., Shimla, he should have been required to meet or to say deal with the reply and explanations furnished by the assessee to his predecessor assessing officer as well as with the result / report on the investigation carried out by Deputy Director of income tax (Inv.), H.P., Shimla, and had to point out as to why he was not satisfied with the reply and explanations furnished by the assessee and the report thereof , if any, of his predecessor (assessing officer) and also with the report of the Deputy Director (supra), if any, on the investigation carried out by him in respect of the matter. However, the assessing officer in the reasons recorded simply picked up the contents of the letter dated 30/09/2010 even without making any reference of the said letter. Under the circumstances, it cannot be said that the assessing officer had reasons to believe that the income of the assessee has escaped assessment. Without meeting with the reply and explanation of the assessee in respect of the matter as well as with the report/opinion of his predecessor as well that of the Deputy Director of Income Tax (Inv.), H.P., Shimla, the assessing officer simply reopened the assessment, which action in our view, neither can be held to be legally valid nor justified. As per the provisions of section 147 of the Act, the AO is authorized to reopen the assessment proceedings, if he has reason to believe that any income

chargeable to tax has escaped assessment. The Courts of law have time and again held that such a reason to believe that the income of the assessee has escaped assessment should be based on some tangible material which comes to the knowledge of the AO. An assessment cannot be reopened under section 147 of the Act on the basis of mere suspicion. It is a well settled proposition that reason to believe must have a material bearing on the question of escapement of income. It does not mean a purely subjective satisfaction of the assessing authority, such reason should be held in good faith and cannot merely be a pretense. Furthermore, the reasons to believe must have a rational connection with or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the Assessing Officer and the formation of belief regarding escapement of income. The powers of Assessing Officer to reopen an assessment, though wide, are not plenary. The words of the statute are "reason to believe" and not "reason to suspect". There can be no manner of doubt that the words "reason to believe" suggest that the belief must be that of an honest and reasonable person based upon reasonable grounds and that the Income-tax Officer may act on direct or circumstantial evidence but not on mere suspicion, gossip or rumour. The Income Tax Officer would be acting without jurisdiction if the reason for his belief that the conditions are satisfied does not exist or is not material or relevant to the belief required by the section. The Court can always examine this aspect,

though the declaration or sufficiency of the reasons for the belief cannot be investigated by the court. The entire law as to what would constitute "reason to believe" had summed up by Supreme Court in Income Tax Officer v Lakhmani Mewaldas (1976) 103 ITR 437.

In the case in hand, although, the assessing officer had information coming into his possession that the assessee had sold the property in question but had not returned / paid the capital gains tax, however, he was also aware that the necessary enquiries were made in this respect not only by his office but also by the Investigation Wing that too not only during the survey action at the premises of the assessee carried out u/s 133A of the Act but also thereafter. The assessee duly explained about the transaction and explained that the land being agricultural and not falling within the definition of capital asset under section 2(14) of the Act, hence, was not exigible to capital gains Tax. The Assessing Officer, without having met with the reply and explanations given by the assessee and even not mentioning a word about reports thereof of the concerned officers, proceeded to reopen the assessment on the same premise. The Assessing Officer, fully knowing that if he will rely upon those proceedings, he will have to meet and discard the reply and explanations of the assessee and also the reports, if any, given by his predecessor and by the concerned investigation authorities and under the circumstances his action of reopening might not pass the test of ‘reasons to believe’, hence, he skipped the entire

episode of earlier proceedings, based his reasons for reopening of the assessment on the alleged information received from DCIT, central circle, Panaji, which even , as discussed above, does not support the reasoning given by the AO. When the very reasons on the basis of which the reopening, allegedly , could not form the basis of forming the belief by the AO that the income of the assessee had escaped assessment, the consequential reassessment order formed by the AO u/s 147 of the Act is illegal and the same is accordingly quashed.

Grounds No.3 to 7:-

11. Though, we have quashed the reassessment order as per our adjudication on the issue of validity of reopening of the assessment, however, as both the parties have argued the case on facts also, hence, we deem it appropriate to adjudicate the matter on factual matrix of the case also.

The assessing officer has based his findings on the following Points:-

i) The land falls under development zone as per the master plan and has been approved for residential purposes by way of grant change of land User Certificate (CLU).

ii) The assessee company had purchased the land not with the intention to carry out agricultural activities, rather, for construction purposes. That even the purchase and sale consideration was very excessive as compared to the price value of the agricultural land.

iii) The earlier owner has not claimed the said land as agricultural, rather, has returned the income from the sale of land as its business income. That even the subsequent purchaser has also not purchased the land for agriculture purposes, but for residential project. Neither the assessee nor the buyer is agriculturist.

iv) Assessee had not carried out any agricultural activities on the land and that the natural growth on land does not tantamount to agriculture operations. Assessee had failed to establish that any agricultural operations were carried out by the assessee. Even the assessee has not shown any agricultural income in the return of income.

V) The land is situated with in 8 Kms (about 4 kms) from the Panjim Municipal Committee.

12. The Ld. CIT(A) has also relied upon the above points while confirming the order of the AO. Apart from that, the Ld. CIT(A) has also observed that the evidences furnished by the assessee of the sale of fruit/agricultural crop do not inspire confidence as the payments and receipts have been shown in cash and the vouchers are self-made vouchers. Neither the receipts nor the payments were through cheque. That the assessee neither purchased the land with any intention to carry out any agricultural activity on the said land nor ever carried out the same. There has to be a series of operations like tilling of land, irrigation, management etc. which all together constitute agriculture

activity, but the assessee has failed to prove the carrying of such activity.

13. We have heard the rival contentions of the parties in respect of each of the point and have also minutely gone through the record. Though the contention of the revenue that the assessee company is a construction /development company and that the land in question was not purchased with an intention to carry out agricultural activities seems to be true, however, this fact in itself, in our view, is not sufficient to hold that the land was not an agricultural land. The assessee has proved on the file with sufficient documents in the shape of revenue records that the land till date has been classified as Orchard Zone. Even when the earlier owner in the year 1994 had applied for change of user of land from agriculture to residential, an actual survey at site was carried out by the 'Land Revenue Authorities' who reported that the land in question was a mixed garden. Not an iota of evidence has been pointed out to show that the nature of land in question has ever been changed either by the earlier purchaser or by the assessee. Merely because permission for change of user was granted by the village Panchayat or the Land Revenue Authorities, that itself is not sufficient to classify the land as residential land until and unless the nature and user of the land is actually changed by an overt activity. Though the permission for change of user was granted and renewed from time to time but the nature of the land was never changed. The assessing officer has mentioned that

permission for constructing the land were renewed from time to time up to year 2009 and thereafter also. The fact that the CLU was applied and renewed till the sale of the land by the assessee proves that the user or to say the nature of the land was not changed and that is why the renewal of the permission was sought from time to time. Had the nature of the land ever changed to residential by any of the occupier of the land, there was no question of seeking and granting of renewal of the permission for change of land user. Even the fact that the land is an orchard has not been denied or refuted by the revenue authorities. The assessee had also given the explanation that since the land is situated within 200 meters of river Mandova, with in which no construction could be carried out and due to the said reason neither the previous owner could carry out construction nor the assessee was able to do so. The previous owner that is M/s Reis Magos Pvt. Ltd. had retained the portion of the land which was 200 metres away from river Mandova. Though, initially the intention of the assessee might have been to develop some construction project, however due to the practical problems in implementing the same, the assessee decided not to change the user of the land and, therefore, continued to maintain it in its original and actual form, that is, as an orchard. The assessee furnished the evidence before the lower authorities that it had employed two employees and further developed the orchard by putting efforts i.e. by weeding undesired growth of wild plants, by clearing bushes grown between the food bearing trees, pruning the food bearing trees and to

further develop and enhance the yield of fruit crops such as cashew, mangoes, jackfruit and coconut. The assessing officer has denied relief on the ground that the assessee could not produce the evidence of tilling and ploughing of the fields and harvesting of crop etc. The Assessing officer, in our view, could not differentiate between traditional agriculture and horticulture. The case of the assessee specifically is that it has been developing and maintaining an orchard.

14. The next issue raised by the lower authorities is that the assessee had not shown any positive income from the of aforesaid agricultural / horticulture activity. The assessee duly explained to the lower authorities that the total expenditure incurred by the assessee on the aforesaid activity was almost equal to the income earned from the agricultural activity. The assessee also produced the relevant bills and vouchers to show that it had sold the fruit crops in the local market. In our view, merely because the assessee did not show positive income from the agricultural activity that itself is not enough to hold that the assessee did not carry out any agricultural activity. The assessee has produced evidence on the file that it did not change the nature of the land, continued and developed the orchard, employed two employees for the development and maintenance of the orchard and also produced the evidence of expenditure and income on the said activity. Merely because the payments received were in cash, that itself, in our view, can not be a reason to discard that evidence. As it is generally known that in

horticulture sector where the crops are generally sold to private parties in the market, the payments and receipts on the sale of crops by the farmers is normally done in cash. The fact that agricultural operation did not result in surplus and no agricultural income was declared in the return, cannot be a ground to treat the land as non-agricultural land. The fact on the file is that though the assessee had purchased the property in question with an intention to develop a residential or hotel project, however, the assessee did not rather to say could not proceed with its such intentions, rather, maintained and developed the original form of the land i.e. of an orchard. The assessee continued with the horticulture activity which is a branch of the agriculture, hence, it cannot be said that the land was not an agricultural land at the time of its sale by the assessee. Even the assessee has further claimed that the nature of the land even has not been changed till date. The assessee in this respect has relied upon the report of Sh. Vineet Raut Desai, Engineer cum Land Valuer, who along with Sh. VK Jain, Sh. Rajeev Jain and Sh. Gaurav Jain (counsels for the assessee) who visited the land in question, measured the distance from the outer skirts of the Municipal limits and also noted and photographed the actual vegetation on the land. Some of the photographs have been placed on the file to show that the land on the date of visit on 10/07/2016 was a neglected orchard. He has further deposed in his affidavit that the distance from the municipal limits to the land in question by shortest route was 10 km, whereas, via most common and convenient road it was 19 km. He also obtained a

certificate from the office of 'Mamlatdar' (the authorized officer to collect land revenue in respect of agricultural land) who certified that the land in question under the survey No.87/1-A situated at Reis Magos village was at a distance of 10.5 km from outer Panaji municipal limits. Apart from that, the assessee has also furnished the certificate from village panchayat that the land in question has been situated at a distance of more than 10 km from Panaji Municipal Council. A certificate from Directorate of Census Operations, Goa has been furnished to the effect that the population of the village Reis Magos is less than 10,000. It is pertinent to mention here that during the appellate proceedings, the assessing officer claimed that he himself had visited the spot. However, it has not been mentioned that what route was followed by him?; whether the road was a motorable road?; whether any notice was issued to the assessee?; whether he has taken along any official of the Income tax department at Goa?; whether he had met any government official or other respectable person to prove the veracity and truthfulness of his claim? Even the assessing officer has not denied the claim of the assessee that the land in question till date was an orchard and its nature has not been changed. The assessee has proved beyond doubt not only the nature and classification of the land being an orchard and filing within the definition and scope of an agricultural land and further that it has been situated at a distance of more than 10 km from the Municipal limits of Panaji. The assessing officer in the assessment order has himself mentioned that he has not taken into

consideration the motorable or pucca road to measure the distance of the land in question from municipal limits of Panaji. He has mentioned that the approach by road would be an erroneous way to compute such distance. However, the law has been settled in this respect. Although, an amendment has been brought to the relevant provisions of section 2(14) of the Income tax Act with effect from 01/04/2014, whereby, it has been provided that the aerial distance from the Municipal limits to the property has to be taken into consideration, however, the said amendment has been made with prospective effect as clarified vide CBDT circular No.17/2015 dated 6.10.2015, pursuant the order of the Hon'ble Bombay High Court (Nagpur Bench) dated 30.03.2015 passed in ITA No. 151 of 2013 in the case of Smt. Maltibai R Kadu. Prior to the said amendment of 2014, the law was settled through various case laws that the distance between the municipal limits and assessed property is to be measured as per approach road/motorable road. The Ld. AR in this respect has relied upon the decision of the Chennai Bench of the Tribunal in "ITO Vs. Shri Chagan Lal Lalji Aswin" order dated 18.10.2011 in ITA No. 857/Mds/2011 and ITAT, Amritsar Bench in the case of "ITO Vs. M/s Ranjit Rattan Mehra (HUF)" order dated 18.7.2012 in ITA No. 442(Asr.)/2011 and ITAT Mumbai Bench in the case of "ACIT vs Sh. Sunil G. Mathreja" order dated 7.3.2014 in ITA No. 6562/Mumbai/2011 & another and of the Hon'ble Punjab & Haryana High Court in the case of in the case of 'CIT v Satinder Pal Singh' 188 Taxman 54 (P&H)(2010). The assessee in this case has placed

certificates from Gram Panchayat and Land Revenue officials, apart from the report and affidavit of Regd. Land Valuer cum Engineer to the effect that the land in question is situated at a distance of about 10.5 Km from the Panaji Municipal limits, whereas, the Department has relied upon the vague and uncertain statements of Income tax inspector and that of assessing Officer, which as discussed above can not be relied upon. Moreover, the certificate procured by the assessing officer during appellate proceedings from the office of Municipal Council, Mapusa – Goa states the distance of village Reis Magos from Municipal Corporation Goa and not of the land of the assessee. Even the Ld. CIT(A) has also not given any finding that the evidence furnished or relied upon by the AO inspires any confidence. Rather, he has opined from the appraisal of the evidence on the file that it is a disputed issue and has chosen to base his findings on the first issue holding that the land in question is not an agricultural land. However, in the light of reliable evidences furnished by the assessee, it can be safely concluded that the land is situated beyond 8 KMs from the Municipal Limits of Panaji.

15. So far as the observation of the lower authorities that the earlier purchaser has not claimed the said land as agricultural land not falling in the definition of capital asset is concerned, it is to be noted that Reis Magos Estate Pvt. Ltd. has not paid any capital gains tax on the sale of the said land to the assessee. The said seller has returned the income

from the above sale of land as business income, which means that the said company has treated the land as stock in trade and not as an investment or a capital asset. The question of exemption from capital gains tax would have arisen, if the previous owner would have treated the said land as an investment asset and not as stock in trade. Further, even though the said company did not continue to maintain and develop the land as orchard for the purpose of earning agricultural income, yet, the fact on the file is that it even did not alter its character. If the previous owner did not carry out agricultural activity on an agricultural land, however did not alter or change its nature and character, but the subsequent owner of land starts the agricultural activity on the said land, under the circumstances, it can be safely held that the land remains the agricultural land and has not lost its original characteristic. In view of the above discussion of the matter, the issue on factual matrix is also decided in favour of the assessee.

In the result the appeal of the assessee is, hereby allowed and consequently the additions made / confirmed by the lower authorities stand deleted.

Order pronounced in the Open Court on 11.12.2019.

Sd/-	Sd/-
(एन. के. सैनी / N.K. SAINI)	**(संजय गर्ग / SANJAY GARG)**
उपाध्यक्ष /Vice President	**न्यायिकसदस्य/ Judicial Member**

Dated : 11 .12.2019
'G.P./rkk/Sr. PS '

आदेशकीप्रतिलिपिअग्रेषित/ Copy of the order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त/ CIT
4. आयकरआयुक्त (अपील)/ The CIT(A)
5. विभागीयप्रतिनिधि, आयकरअपीलीयआधिकरण, चण्डीगढ़/ DR, ITAT, CHANDIGARH
6. गार्डफाईल/ Guard File

आदेशानुसार/ By order,
सहायकपंजीकार/ Assistant Registrar