

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'E', NEW DELHI
(Through Video Conferencing)**

**BEFORE, SHRI G.S. PANNU, VICE PRESIDENT
AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER**

**ITA No.5255/Del/2016
(ASSESSMENT YEAR-2008-09)**

Om Parkash Gulati, Prop. Gulati Proprieties, Faridabad Head Office Jhanj Gate, Jind. PAN:AHVPG 8460A	Vs.	Asst. CIT, Hisar.
(Appellant)		(Respondent)

Appellant By	Sh. Shantanu Jain, Adv.
Respondent by	Ms. Rakhi Vimal, Sr. Dr
Date of Hearing	18.08.2020
Date of Pronouncement	30.09.2020

ORDER

PER SUDHANSHU SRIVASTAVA, JM:

This appeal has been preferred by the assessee against order dated 09.08.2016 passed by the Learned Commissioner of Income Tax (Appeals)-Hissar {CIT (A)} for Assessment Year 2008-09.

2.0 The brief facts of the case are that the assessee derives income from purchase and sale of properties. The return of

income was filed declaring an income of Rs.42,19,312/-. The assessment was completed after making an addition of Rs.1,25,000/-. Subsequently, notice u/s 154 of the Income Tax Act, 1961 (hereinafter called 'the Act') was issued to examine whether the agricultural land sold by the assessee was capital asset or not. The 154 proceedings were closed without making any addition. Thereafter, a report on a major audit objection on the issue whether agricultural land sold by the assessee is capital asset or not was prepared. In this report also, the Assessing Officer observed that the objection raised by the internal audit party were not maintainable. Subsequently, the assessee's case was reopened and notice u/s 148 was issued for the purpose of ascertaining as to whether the agricultural land sold was capital asset or not. The assessment u/s 147 of the Act was completed after making an addition of Rs.42,27,046/- and the assessment was completed at an income of Rs.85,71,360/-.

2.1 The assessee's appeal before the Ld. First Appellate Authority was partly allowed wherein the assessee had challenged the reopening and had also challenged the addition on merits. The

Ld. CIT (A) upheld the reopening but given part relief to the assessee on merits.

2.2 Now, the assessee has approached this Tribunal and has challenged the order of the Ld. CIT (A) by raising the following grounds of appeal:

“1. The order passed by the Ld. ACIT Bhiwani dated 30.01.2014 is against facts, bad in the eyes of law and based on change of opinion. The case has been re-opened firstly, by issuing notice under section 154 and thereafter, issuing notice under section 147/148 on the objection raised by the IAP is not the independent opinion of the ld. ACIT to reopen the case under section 148.

2. The Ld. C.I.T. (appeal) erred in law by holding that the A.O. applied his mind independently to the information received from the audit party to initiate proceedings under section 148 ignoring the fact that the A.O. has himself sent the annotated report dt. 05-10-2012 to the higher authorities proposing that the objection raised by the I.A.P. is not maintainable and the para may please be treated as settled.

3. The Ld. C.I.T. (appeal) erred in law by treating the agriculture land as stock in trade inspite of the fact that the land is not covered in definition of section 2 (14) of the Income tax act as capital assets. The agriculture land in question is more than 8 KM away from the Municipal limit of Palwal Nagar Parishad. The notification under section 2 (1A)/2(14) of the I.T. Act 1961 No. 9447 dt. 06th January, 1994 covers the areas up to a distance of 5 KM from Municipal limits in all directions, where the land in question is away more than 8 KM from Municipal limit of Palwal.

4. The Ld. C.I.T. (appeal) has also not considered the judgment of Hon'ble Punjab & Haryana Court in the case of

C.I.T. vs. Satender Pal Singh (2010) 2 SET 16 vide saral tax addition 2010 in which the Hon'ble High Court has held that distance of the agriculture land to be measured by road and not by straight line distance on horizontal plane or as per crows flight.

5. *The Ld. C.I.T. (appeal) has also not considered the certificate of Tahasildar Palwal regarding the distance of land from the Municipal limit Palwal as well as Khasra Girdwari of agriculture land of village Bhagolla Teh. Palwal for the F.Y. 2005 to 2007. Showing that the land was under cultivation on the date of transfer.*

6. *The appellant craves, leave to add amend or rescind any of the grounds arising from the order under appeal:*

3.0 The Ld. Authorized Representative (AR) submitted that the assessee was challenging the reopening on the ground that the reopening was done for the very same reason which had earlier been considered under the original assessment proceedings. It was also submitted that 154 proceedings initiated for the same reason were also dropped and that further the objection of the audit party on the same issue had also been discarded by the Assessing Officer. It was submitted that the reassessment was bad in law in as much as the issue had been the subject matter of proceedings in the original assessment proceedings as also the proceedings u/s 154 of the Act. To buttress this contention, the Ld. Authorized Representative drew our attention to paragraph-4 of the original

assessment order passed u/s 143(3) of the Act (dated 12.11.2010) wherein the Assessing Officer has stated that proof regarding agricultural land has been furnished which is away by 8 K.M. from the Municipal Committee Limit and that no capital gain attracts as per *patwari's* report. The Assessing Officer has further stated that after verification and examination of requisite information, nothing adverse has been noticed. The Ld. Authorized Representative pointed out that a lump sum addition of Rs.1.25 lacs was made to cover any possible revenue leakage.

3.1 The Ld. Authorized Representative also drew our attention to the show-cause notice issued u/s 154 of the Act wherein the assessee was asked to demonstrate how agricultural land was not a capital asset. The Ld. Authorized Representative also drew our attention to the notice issued u/s 148 of the Act and pointed out that the reasons in this notice and the show cause notice issued u/s 154 were identical. It was also brought to the notice of the Bench that the proceedings u/s 154 of the Act were dropped without making any addition. Our attention was also drawn to a similarly worded objection of the internal audit party

wherein in the comments the Assessing Officer has mentioned the objection as “settled”.

3.2 The Ld. Authorised Representative argued that it was apparent that the Department had no tangible fresh material to its possession to justify the reopening and that it was only a case of change of opinion. The Ld. Authorized Representative placed reliance on numerous judicial precedents to support his contention that the reopening was bad in law.

4.0 In response, the Ld. Sr. Departmental Representative submitted that the report of the Assessing Officer with respect to the audit objection is an internal procedure and it does not invalidate the impugned notice u/s 148. It was also argued that audit objection constitutes information and, therefore, a reopening on that basis is perfectly valid. It was also submitted that the dropping of proceedings u/s 154 does not mean that the Department is satisfied with the explanation of the assessee. The Ld. Sr. DR also submitted that there is a settled judicial precedent by the Hon'ble Apex Court in the case of *R.K. Malhotra, ITO vs. Kasturbhai Lalbhai reported in 109 ITR 537 (SC) and CIT vs. P.V.S*

Beedies Pvt. Ltd. reported in 237 ITR 13 (SC) that reopening of case on the basis of factual information given by internal audit party is valid in law. The Ld. Sr. DR submitted that the reopening deserve to be upheld.

5.0 We have heard the rival submissions and have also perused the material on record. A perusal of the assessment order passed u/s 143(3) of the Act vide dated 12.11.2010 shows that the issue as to whether the agricultural land sold by the assessee was capital asset or not has been considered by the Assessing Officer wherein he has stated that proof regarding agricultural land has been furnished which is away by 8 K.M. from the Municipal Committee Limit and that no capital gain attracts as per *patwari's* report. The Assessing Officer has further stated that after verification and examination of requisite information, nothing adverse has been noticed. Thus, it is established beyond doubt that the matter had received due to consideration of the Assessing Officer while finalising the original assessment proceedings u/s 143(3) of the Act. Moving further on, it seen that notice u/s 154 of the Act was issued in which the assessee was required to establish

how the agricultural land sold by him did not fall under 'capital asset'. We also note that the proceedings initiated u/s 154 of the Act were dropped vide order dated 04.02.2013 without making any addition. The Ld. Sr. DR had argued that dropping of 154 proceedings does not mean that the assessee's explanation has been accepted. However, we cannot agree with this proposition of the Ld. Sr. DR. If the Assessing Officer has initiated proceedings under specific provision of the Act and has, thereafter, closed the proceedings after obtaining an explanation from the assessee, by no stretch of imagination can it be assumed that the Assessing Officer had not accepted or was not satisfied with the explanation given by the assessee. Therefore, it is our considered opinion that the issue as to whether the agricultural land sold by the assessee was a capital asset or not was again given due consideration by the Assessing Officer during the 154 proceedings and by dropping of these proceedings, it is apparent to that he had accepted the explanation of the assessee.

5.1 Now coming to the notice issued u/s 148 of the Act, a perusal of the reasons recorded shows that they are recorded on

almost identical lines as the show cause notice issued u/s 154 of the Act. There is no mention by the Assessing Officer in the reasons recorded as to whether the Department had come in possession of any tangible fresh material justifying the reopening. Reference has been made by the Ld. Dr. DR to the audit objection raised by the internal audit party and to two judgments of the Hon'ble Apex Court in the cases of *R.K. Malhotra, ITO vs. Kasturbhai Lalbhai reported in 109 ITR 537 (SC)* and *CIT vs. P.V.S Beedies Pvt. Ltd. reported in 237 ITR 13 (SC)* for the proposition that information received from audit party on factual issues constitutes information and that reopening on that basis is valid. However, it is our considered opinion that the information received from audit party might be considered fresh information only in those cases where the Assessing Officer would not have examined the issue being brought to the notice of the Assessing Officer in the original assessment proceedings. However, in the present case, this is not so as the reason for which the reopening had been done had been the subject matter both under the 143(3) proceedings as well as 154 proceedings. We also note that the judgment relied upon by the Ld.

Sr. DR as aforesaid are of 1977 & 1999 respectively whereas in 2019 the Hon'ble Apex Court in the case of *ACIT vs. FIS Global Solutions India Pvt. Ltd. reported in 263 Taxmann 369 (SC)* dismissed the Department's SLP against the order of the Hon'ble Delhi High Court wherein the Hon'ble Delhi High Court had held that audit object being only an information, reassessment notice based on such objection is not sustainable. Therefore, in view of the factual matrix and the judicial precedents, we are of the considered opinion that objection of the audit party in the present case cannot be considered as information for the purpose of reopening of the assessee's case.

5.2 We also note that in the present factual matrix it is apparently a case of change of opinion of the Assessing Officer as he has on two earlier occasions accepted the assessee's explanations and has made no additions. We would like to make reference to the judgment of the Hon'ble Delhi High Court in the case of *CIT vs. Usha International Ltd. reported in 348 ITR 485 (Delhi)* wherein it was held by the majority view that assessment proceedings cannot be validly reopened u/s 147 of the Act even within 4 years if an

assessee has furnished full and true particulars at the time of original assessment with reference to the income alleged to have escaped assessment, if the original assessment was made u/s 143(3). In this present appeal there is no allegation in the reasons recorded that the assessee has not furnished full and true particulars. It is also evident from the assessment order that the issue had been duly considered by the Assessing Officer.

5.3 The Hon'ble Apex Court in the case of *CIT vs. Kelvinator India Ltd. reported in 320 ITR 561 (SC)* held that there has to be some new tangible material in possession of the Assessing Officer to come to the conclusion of escapement of income and mere change of opinion cannot be the reason to re-open the assessment. As we have already observed, there is no new tangible material which had come into the possession of the Assessing Officer in the present case. Accordingly, the reopening on the same material amounts to a mere change of opinion which cannot be upheld.

5.4 Therefore, in view of the judicial precedents relied upon by us in the preceding paragraphs, coupled with the factual matrix of the case, we are of the view that the reopening in the

present case is not sustainable. We set aside the order of the Ld. CIT (A) and quash the reassessment proceedings.

6.0 In the final result, the appeal of the assessee stands allowed.

Order pronounced on 30/09/2020.

Sd/-

(G.S.PANNU)
VICE PRESIDENT

Dated: 30/09/2020

PK/Ps

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-

(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

ASSISTANT REGISTRAR
ITAT NEW DELHI