

**IN THE INCOME TAX APPELLATE TRIBUNAL
JABALPUR BENCH, JABALPUR**

BEFORE SHRI SANJAY ARORA, HON'BLE ACCOUNTANT MEMBER &
SHRI MANOMOHAN DAS, HON'BLE JUDICIAL MEMBER

I.T.A. No. 92/JAB/2019
(Asst. Year: 2014-15)

Income Tax Officer, Ward-1(1), Jabalpur	vs.	Deepak Singh Banafer, H.No. 2001, Badi Ukhari Road, Jabalpur, (MP) [PAN: ALYPB0867H]
(Appellant)		(Respondent)

Revenue by : Sh. Shiv Kumar, Sr. DR
Assessee by : Sh. L.L. Sharma, Advocate

Date of hearing : 14/10/2022
Date of pronouncement : 11/01/2023

ORDER

Per Sanjay Arora, AM:

This is an Appeal by the Revenue agitating the Order dated 30/09/2019 by the Commissioner of Income Tax (Appeals)-1, Jabalpur ('CIT(A)' for short), allowing the assessee's appeal contesting his assessment under section 143(3) read with section 147 of the Income Tax Act, 1961 ('the Act', hereinafter) for Assessment Year (AY) 2014-15 vide order dated 18/12/2018.

2.1 The facts of the case, insofar as are relevant, are that the assessee sold during the relevant year 1.61 acres of his inherited land at Swami Vivekanand Ward 21 (near Vijay Nagar), Jabalpur for Rs. 260 lacs to one M/s. RM Infra vide sale deed dated 06/01/2014. As no return of income had been filed for the relevant year, notice u/s. 148(1) was issued on 31/01/2018, to which the assessee responded by filing a return on 02/7/2018 declaring income at Rs. 33,420, which was other than by way of capital gain. The non-returning of capital gain on the said sale was

on the basis of the subject land, though a capital asset under the Act, being an agricultural land, gain arising on the transfer of which is exempt u/s. 54B on the investment of the sale proceeds arising thus on the purchase of another agricultural land. The subject land was confirmed by the Assessing Officer (AO) with the Jabalpur Municipal Corporation (JMC) to be falling within the municipal limits of JMC. The land had been described in sale deed (copy on record) as follows:

“.....जमीन असिंचित एक फसली कृषि उपयोग की है। इस भूमि पर वृक्ष, कुआँ आदि नहीं है। विक्रेता क्रेता आदिवासी गौड़ नहीं है। यह भूमि अविकसित कम उपजाऊ है, भूमि के आस पास बस्ती रोड नाली बिजली आदि की सुविधायें नहीं है।”

In other words, the subject land was a non-irrigated land, on which there were no standing trees, well, etc.; was not fertile, and on which only one crop could be grown. The land is not serviced by any service road, drainage, well, electricity, etc. Further, enquiries with the Tehsildar revealed the description of the subject land in the Revenue record as ‘पड़ती का क्षेत्रफल’ (Padtikakshetrafal), i.e., *land on which no agricultural activities are being done*. Certified copies of Form P-II (Panchshala Khasra Nakal) for the relevant year and two preceding years, i.e., fy 2011-12 to 2013-14, were furnished by him on 27/9/2018. The assessee, in response, furnished (on 28/9/2018) a certificate dated 11/9/2018 from the Patwari to the effect that on the basis of spot enquiries, it had been found by him that agricultural activity was being conducted on the subject land in the past, though at present construction was being undertaken thereon. The AO summoned the Tehsildar, Shri Ashok Kumar Deharia, on 04/12/2018, and recorded his statement u/s. 131(1A) on 17/12/2018. It was, on being questioned in the matter by the AO, clarified that the assessee had applied his Office for making correction in the revenue record – *which reported no crop being grown thereon*, in respect of the subject land, by making entries to the effect that crop/s were being grown thereon, i.e., from fy 2011-12 to fy 2013-14, and which application had been rejected by him on 27/9/2018 (PB pg. 7). No change in P-II in respect of the subject land had

therefore been made. The rejection order dated 27/9/2018, which has also been made a part of the assessment order, was furnished by him. The same in its relevant part reads as under:-

‘पटवारी द्वारा प्रतिवेदन पेश किया गया जो कि, प्रकरण में संलग्न है। प्रकरण का अवलोकन किया गया। जिसमें पाया गया कि, रजिस्ट्री में जमीन असिंचित एक फसली कृषि उपयोग का उल्लेख किया है, जो गन्ने की फसल बोने एवं होने का प्रमाण पत्र दिया जाना सम्भव नहीं है।’

The same clarifies the subject land to be a non-irrigated land and, therefore, it was not possible to certify that sugarcane crop was being cultivated thereon. It was also, in response to Question No.4, clarified by him that the entries in the revenue record are made by the area Patwari on spot inspection of the land/s, i.e., at the relevant time, and which thus forms the basis of the entries in the revenue record. It was, on the basis of the foregoing findings, concluded by the AO that the subject land was not subject to any agricultural operations, and was, accordingly, not an agricultural land. No exemption u/s. 54B, which is only in respect of investment of the transfer proceeds of a land which had been used for agricultural purposes, is thus exigible. The entire capital gain, computed by him at Rs. 2,48,71,420, was accordingly brought by him to tax. The returned agricultural income (unspecified) was also on that basis treated by him as nil (refer paras 4 – 8 / pgs. 3-17 of the assessment order).

2.2 In appeal, it was submitted before the Id. CIT(A) that the assessee had applied for rectification of the Khasra (land record) in the Court of Sub-Divisional Magistrate (SDM), Kotwali, Jabalpur. The said authority had vide order dated 21/12/2018 (PB pgs.13-15), not only quashed the rejection order dated 27/9/2018 by the Tehsildar, but also directed making correction entries in the revenue record in respect of the subject land. That is, the very basis on which the AO had not accepted the assessee’s claim, stands since removed. The assessee had in fact also produced bills and vouchers in respect of the agricultural income and expenses, viz. mandi receipts, kisan credit card statements, etc., to justify the claim/s *qua*

agricultural activity. The Id. CIT(A) accepted the assessee's stand on that basis, further noting that agriculture was the assessee's only source of income.

2.3 Aggrieved, the Revenue is in appeal, raising the following grounds:

‘1. Whether on the facts and circumstances of the case, Id. CIT(A) erred in deleting the addition made on account of Long Term Capital Gain of Rs. 2,48,17,420.

2. Any other ground as may be adduced at the time of hearing.’

3. Before us, the matter was argued at length. Like submissions, i.e., as before the Revenue authorities, were made before us. While Sh. Kumar, the Id. Sr. DR, relied on the assessment order, the assessee would on the impugned order. The assessee was in the course of hearing required to produce P-II (Khasara Nakals) of the subject land fy 2011-12 onwards, which accordingly were, i.e., from fy 2011-12 to 2022-23, which are placed on record. The same exhibit a *status quo*, i.e., of no crop/s recorded as cultivated therein for the said 12 years.

4. We have heard the parties, and perused the material on record, giving our careful consideration to the matter.

4.1 Section 54B of the Act, exemption under which is under dispute in the instant case, reads as under:

Capital gain on transfer of land used for agricultural purposes not to be charged in certain cases.

54B. (1) Subject to the provisions of sub-section (2), where the capital gain arises from the transfer of a capital asset being land which, in the two years immediately preceding the date on which the transfer took place, was being used by the assessee being an individual or his parent, or a Hindu undivided family for agricultural purposes (hereinafter referred to as the original asset), and the assessee has, within a period of two years after that date, purchased any other land for being used for agricultural purposes, then, instead of the capital gain being charged to income-tax as income of the previous year in which the transfer took place, it shall be dealt with in accordance with the following provisions of this section, that is to say,—

- (i) if the amount of the capital gain is greater than the cost of the land so purchased (hereinafter referred to as the new asset), the difference between the amount of the capital gain and the cost of the new asset shall be charged under section 45 as the income of the previous year; and for the purpose of computing in respect of the new asset any capital gain arising from its

transfer within a period of three years of its purchase, the cost shall be *nil*;
or

- (ii) if the amount of the capital gain is equal to or less than the cost of the new asset, the capital gain shall not be charged under section 45; and for the purpose of computing in respect of the new asset any capital gain arising from its transfer within a period of three years of its purchase, the cost shall be reduced, by the amount of the capital gain.

(2) The amount of the capital gain which is not utilised by the assessee for the purchase of the new asset before the date of furnishing the return of income under section 139, shall be deposited by him before furnishing such return [such deposit being made in any case not later than the due date applicable in the case of the assessee for furnishing the return of income under sub-section (1) of section 139] in an account in any such bank or institution as may be specified in, and utilised in accordance with, any scheme which the Central Government may, by notification in the Official Gazette, frame in this behalf and such return shall be accompanied by proof of such deposit; and, for the purposes of sub-section (1), the amount, if any, already utilised by the assessee for the purchase of the new asset together with the amount so deposited shall be deemed to be the cost of the new asset :

Provided that if the amount deposited under this sub-section is not utilised wholly or partly for the purchase of the new asset within the period specified in sub-section (1), then,—

- (i) the amount not so utilised shall be charged under section 45 as the income of the previous year in which the period of two years from the date of the transfer of the original asset expires; and
- (ii) the assessee shall be entitled to withdraw such amount in accordance with the scheme aforesaid.

4.2 We may begin by delineating the case of either side before us. The Revenue's case was based principally on the revenue record *qua* the subject land inasmuch as the same, based on spot inspections by the area Patwari, i.e., at the relevant time, is a contemporaneous record, which cannot be regarded lightly, much less altered. This is particularly so in the instant case where the subject land is classified as 'Padti' (barren land). In fact, the charge of it being false and not representing the correct state of affairs, is a very serious charge against the concerned person, the area Patwari, a public servant, which would warrant enquiry and, besides, attract action against the concerned person/s. No change/s in the revenue record followed the order by the SDM, so that legal effect thereto had not been given, and was thus to no avail.

The assessee's case, on the other hand, was that the rejection order dated 27/9/2018, which forms the basis of the AO's finding of the subject land being not an agricultural land, obtains no longer, removing the very basis of his order. It is this that appealed to the Id. CIT(A), whose finding/s thus cannot be faulted with. That the revenue authorities did not give effect to the order of SDM, binding on them, would not detract from its status as a valid legal order, which could only be challenged before a higher appellate forum, though had not been, attaining finality. The same, in any case, cannot operate to prejudice the assessee. The same is in fact binding on the AO, i.e., the authorities under the Act, and therefore rightly taken cognizance of by the Id. CIT(A).

4.3 The matter arising for adjudication before us is principally one of fact; there being no ambiguity, much less dispute, *qua* what is an 'agricultural land', a term not defined under the Act. As such, any land subject to agricultural activity is an agricultural land by definition. The only exception is where the same is located within the local limits of a Municipality, or is notified by the Central Government (for years prior to fy 2013-14, the current year), which, thus, though an agricultural land, is yet a capital asset, on the transfer of which income by way of capital gain u/s. 2(24)(vi) r/w s. 45 of the Act, liable to tax, arises. This aspect is again not in dispute as the subject land admittedly falls within the jurisdiction of JMC, even as clarified by Dy. CIT (Revenue), JMC vide his letter to the AO dated 30/8/2018. In fact, it is only on account of this that capital gain arises on its sale and *qua* which deduction u/s. 54B, though denied in assessment, stands claimed. The bone of contention between the parties, as apparent, is if agricultural activity was indeed carried out by the assessee on the subject land prior to its sale on 06/01/2014 as, in its absence, deduction u/s. 54B is not exigible.

4.4 We may at this stage draw a distinction between an 'agricultural land' and that which had been subject to agricultural activity, or used for agricultural purposes, in the recent past, specified in s. 54B as two years immediately

preceding the date of transfer. It is the latter, representing a more restrictive condition, which is to be satisfied for the purposes of s. 54B. We say so as it could be that an agricultural land has been, for some reason, not been put to any agricultural use in the recent past, which would oust the claim u/s. 54B. It may, however, having not been subject to conversion, continue to be reflected in the revenue records as an 'agricultural land'. In our clear view, much less the rigor of sec. 54B, the subject land does not satisfy even the broader condition of being an agricultural land. Reference, even as law in the matter is well-settled and, besides, uniform across different Hon'ble High Courts, with in fact case law legion, be made to the decision in *Sarifabibi Mohmed Ibrahim & Ors. vs. CIT* [1993] 204 ITR 631 (SC), also adverted to by the SDM in his order. *We extract the relevant part of the said judgment, deemed relevant both from the standpoint of the law laid down as well as the manner in which the facts of a case are to be regarded, as follows, for a careful consideration:*

The law

Whether a piece of land is agricultural land or not is essentially a question of fact. Several tests have been evolved in decisions of the Supreme Court and the High Courts, but all of them are more in the nature of guidelines. The question has to be answered in each case, having regard to the facts and circumstance of that case. There may be factors both for or against a particular point of view. The court has to answer the question on a consideration of all of them – a process of evaluation. The inference has to be drawn on a cumulative consideration of all the relevant facts (see p. 637, c).

The facts

The appellants were co-owners of a plot of land inherited from an ancestor through their father. On March 15, 1967, they agreed to sell the land to a housing co-operative society and, to enable them to complete the transaction, they applied in June, 1968, and March 1969, for permission to transfer the land for a non-agricultural purpose and the permission was granted in April, 1969. A number of sale deeds were executed in May 1969, and the purchasing society applied for conversion of the land to non-agricultural

purposes, viz., construction of buildings. The question was whether the profit from the sale of the land was assessable to capital gains tax. The facts in favour of the appellants were: the land was registered as agricultural land in the revenue records and land revenue had been paid in respect thereof till the year 1968-69; there was no evidence that the land was put to non-agricultural use and the land was actually cultivated till and including the agricultural year 1964-65; there were agricultural lands abutting the land; and the appellants had no other source of income except the income from those lands. The facts against the appellant were : the land was situated within the municipal limits of the Surat municipality and at a distance of one kilometre from the Surat railway station; the land was not cultivated from 1965-66 until it was sold in 1969; the appellants had entered into an agreement with a housing co-operative society to sell the land for construction of houses, they had applied in June, 1968, and March, 1969, for permission to sell the land for non-agricultural purposes and soon after obtaining permission they executed the sale deeds in May, 1969; and the land was sold at a rate of Rs. 23 per sq. yard and the purchasing society commenced construction operations within three days of purchase. On a consideration of the contending factors the High Court held that the land was non-agricultural land and tax was leviable on the capital gains arising from the transfer. On appeal to the Supreme Court:

The decision

The Hon'ble Apex Court, affirming the decision of the High Court, held that the entering into the agreement to sell the land for housing purposes, the applying for and obtaining permission to sell the land for non-agricultural purposes, and its sale soon thereafter and the fact that the land was not cultivated for a period of four years prior to its sale, coupled with its location and the price at which it was sold outweighed the circumstances appearing in favour of the appellants' case and established that the land was not agricultural land when it was sold. The appellants had no intention to bring it under cultivation at any time after 1965-66 and certainly not after they entered into the agreement to sell the land to the housing co-operative society. The High Court was right in holding that the land was not agricultural land at the time of its sale and the profit arising from its sale was liable to capital gains tax (see p. 643 – F).

Now, sure, a land hitherto subject to agricultural operations, may, to exploit its commercial potential, be sold to a builder or a housing society. A contract of sale, as any other, presupposes and arises only on the meeting of minds, so that both the seller and buyer are clear and in agreement *qua* the nature of the land sold, which may in view of the vast price difference between a land being bought for agricultural purposes vis-a-vis for real estate purposes, also be clear from the price and other terms of sale. The matter, as explained by the Hon'ble Court, is accordingly to be decided in the conspectus of the case. Reference thereto serves one more purpose: As shall be presently seen, applying the law as clarified therein, the subject land is not an agricultural land at the time of its sale. *What value, then, one may ask, the reliance thereon by the SDM?*

4.5 Having thus set out the law impinging on the matter as well as the respective cases of the parties, we proceed to determine the matter with reference to the material on record and the law as clarified.

a). It may, to begin with, be noted, even as observed by the Bench during hearing, that there is nothing in law to suggest that the orders by the land revenue authorities or their findings are binding on the Revenue authorities under the Act, much less, the appellate authorities thereunder, even as the matter at hand is essentially one of fact. Why, *in Sarifabibi Mohmed Ibrahim & Ors.* (supra), *the land, despite being an agricultural land as per the revenue records, was yet regarded as non-agricultural.* Our first observation in the matter is that the subject land is located well within the city limits of Jabalpur, and has been sold at the stamp valuation rate, which would even otherwise, unless objected to, apply u/s. 50C for computing the capital gain chargeable u/s. 45, i.e., at the rate applicable to urban land, irrespective of the nature of user of the land prior to its sale, making it largely inconsequential in the scheme of things. This also agrees with the fact that the land is sold to a Builder, in pursuance of a sale agreement dated 08/6/2012, i.e., over 1 ½ years prior to the transfer, for real estate development.

b). Our second observation in the matter is that we find nothing on record to show that any agricultural activity was carried out during the three years ending the current year, as indeed prior thereto, on the subject land, classified as Padti (barren land) in the revenue record, as indeed in the sale deed itself. That is, in the two prime documents which have immense evidentiary value. Besides, there is nothing to show of land revenue being paid in it's respect. Why, as afore-noted, the land had been agreed to be sold a good 19 months prior to it's sale. No doubt, the assessee has furnished bills and vouchers of expenses and receipt (of sale of agricultural produce) before the Id. CIT(A) and, as claimed, before the AO as well. There is, firstly, no material toward the same brought on record of the Tribunal, even as the assessee was specifically, vide order-sheet entry dated 29/9/2022, called upon to place on record any material he wishes to place reliance on. That apart, equally importantly, the assessee, stated to be an agriculturist, admittedly owns 43.35 acres (17.54 hectares) of agricultural land (refer para 3(1) of the impugned order), of which only 1.61 acres (0.65 hectare) stands sold by him. How could it be then said, on the basis of production of vouchers of expense and receipt, as to which land (part of the total land) was subject to agricultural activity? There is no finding by the Id. CIT(A) of the mandi receipts being in respect of sale of sugarcane, which was the crop sought to be entered into by the assessee in it's revenue record *qua* the subject land vide his application to the Tehsildar (Nazool Kotwali), Jabalpur (PB pg.6)). Further, there is also no mention the names of the crops cultivated on the subject land in the Patwari's report dated 11/9/2018. *What value, then, the reliance on the said vouchers by the Id. CIT(A), as indeed his finding of agricultural income being the assessee's only source of income?* So much so, he has not even reversed the AO's finding as to nil agricultural income, so that his order, while holding agriculture to be the assessee's only source of income, yet, does not disturb the AO's finding of agricultural income being at nil. Why, the sale deed itself, which has not been disputed, and of which the assessee himself is a signatory, clearly states the subject land being un-irrigated and not

serviced by any well, drainage system, electricity, etc. and, accordingly, described as a Padti land in the revenue record. In fact this, coupled with an exorbitant price of Rs. 161.50 lacs per acre, or Rs. 3337 per sq. yard (1 acre = 4840 sq. yards), that is, in relation to or in comparison with the land rate for an agricultural land, and it is clear that the land sold was neither an agricultural land, i.e., subject to agricultural operations prior to its sale, nor sold as such. *Why, the subject land being padti, unirrigated and uncultivable, it would not even fetch the rate applicable to an agricultural land.* There is in fact no denial of the subject land being sold to a builder for real estate development purposes. It is therefore not surprising that construction activity was being carried on thereat at the time of visit of the area Patwari at the site in September, 2018. The status thereof, i.e., state of its completion, is not known, so that it is not clear whether the same followed soon after the purchase or was after a hiatus, with the agreement for sale having been entered into as far back as on 08/6/2012 (para 3(2) of the impugned order). A time lag, i.e., even assuming so, which could be for several reasons, cannot, therefore, be given much weight, particularly considering it being a unequivocal & admitted position that the land was sold to a Builder for real estate development purposes, charging it the same rate as the stamp valuation (u/s. 50C), which itself is a indicative of the property, falling within the local limits of JMC, valued at price applicable to a non-agricultural, urban land. The land conversion could be a reason for the delay, i.e., where it actually obtains, which is an administrative act, albeit time consuming and, further, considering the fact that the land actually falls within the local limits of JMC, a mere formality.

c). We next consider the assessee's main plank of the Patwari's report dated 11/9/2018, since upheld by the SDM, Jabalpur, 'quashing' the order of the Tehsildar dated 27/9/2018, so that the same obtains no longer. We may though clarify that the matter being principally factual, with the revenue record being one of the evidences, the same cannot be regarded as conclusive and shall have to be necessarily considered along with and in conjunction with the surrounding and

other obtaining facts and circumstances (also refer para 4.4). As afore-noted, *the land, despite being an agricultural land as per the revenue records, was yet regarded as non-agricultural in Sarifabibi Mohmed Ibrahim & Ors.* (supra). The Patwari's report is admittedly based on an inspection made by him on 11/9/2018, i.e., years after the sale and, further, based on enquiries with the Chohaddi farmers. *There is however no evidence thereof.* Neither their names nor land numbers are specified, so that there is no identification whatsoever, much less confirmation. The only name that surfaces, *though not in the said report*, but the assessee's submissions, is of one, Prahad Singh Banafer, the assessee's uncle, who is stated to be a big farmer, with large tracts of land. His statement (not on record), assuming so, is for that reason suspect. The principal objection thereto, even as stated by the AO, is as to the credence that could be placed on the Patwari's report in view of it being based on a survey, even assuming so, inasmuch as the same is unevicenced; and carried years after the period (2011-12 to 2013-14) over which the subject land is stated to have been subject to agricultural activity, i.e., years after the period to which it relates. There is, as afore-noted, no mention of the crops being cultivated. How could therefore any reliance be placed on such unsubstantiated report, admittedly based on memory, more so where it contradicts the official record, particularly considering that the basis thereof, as is well-known, and as explained by the Tehsildar in his statement u/s. 131(1A), is the regular visits by the concerned official to the site/s concerned, so that the same is a contemporaneous record, which has its genesis in the inspection of the site over the years. The assessee in its application before the Tehsildar for correction of the revenue record claimed sugarcane crop, which, rather, as is common knowledge, consumes a high proportion of water, which is again a contradiction considering that the land is un-irrigated, without access to water; the sale deed itself stating of there being no well and electricity. As against this, the land record, as deposed by the Tehsildar before the AO, is a record based on regular visits by the assigned official to the lands, noting the crops being cultivated thereat. That is, is a contemporaneous record and,

as argued vehemently before us by Shri Kumar, the Id. Sr. DR, cannot be lightly, if at all, changed, much less on the basis of hearsay report as being pressed into service in the instant case. The statutory presumption, it needs to be appreciated, is of the official acts being regularly performed (s. 114(e) of the Act), so that the onus that it is not so, and the land record not a true and correct record, or not properly kept, is squarely on the assessee, and heavy. No other instance of such incorrect record keeping, which would in that case obtain for other lands in the area as well, has been brought to notice. We say so as it cannot be that the assigned official was not doing his work or not performing his duty only in relation to the assessee's land, while performing his duty *qua* other lands; it being not a case of a mistaken identity, as where the entry/s of one land number is by mistake posted in another, in which case, as also afore-stated, a corresponding mistake for some other land, would obtain. Further still, even assuming so, again, as afore-noted, there would be a prescribed manner to be adopted for correction. Who, for instance, was the person charged with the duty of making the said inspection and causing entries in the revenue record, and who, as a first step, would require being examined and questioned in the matter? His name, as indeed of the persons in the hierarchy i.e., supervising his work, are conspicuous by their absence. That is, there is nothing to exhibit this fact on record. For all we know, the same person who reports on 11/9/2018, was on duty for the relevant period, again putting a question mark on the report. All this makes the said report no more than a humbug. No wonder, the same did not find favour with the Tehsildar, who therefore found no reason to cause the correction, as sought by the assessee, in the official record. His order no doubt has been set aside by the SDM, but, again, i.e., it is without any material, much less credible. No wonder the same has not been given effect to even to date. The application by the assessee to the Tehsildar, it is to be appreciated, was for making correction in the revenue record, and which record remains unchanged to date. Even as claimed before us by Shri Kumar, the same is for the reason that the official record cannot be changed on that basis. The same is

not without merit. That is, for the reasons afore-stated and, besides, without a corresponding finding as to where and how the error sought to be corrected, crept in the maintenance of the land record. For example, an entry in respect of one land being made in another. In fact, ground rent is payable on the basis of, and duly noted in the revenue record, none of which obtains in the instant case. There is, equally surprisingly, no whisper of any enquiry in the matter, or issue of any process, or accountability being fixed. Does that therefore mean that all it needs to change the land revenue record is an unsubstantiated and un-evidenced report, admittedly based on enquiries with some unnamed persons, even if years after the period to which it relates, i.e., memory based, and which may, as we observe, sourced from interested parties? It is this that led us to state of it being no more than a humbug. Be that as it may, the fact of the matter is that the revenue record, which we have stated as not conclusive of the matter, remains unchanged, so that the subject land is a padti (fallow land) on which no agricultural activity for at least 3-4 years prior to the sale was being carried out.

d). The assessee next states of having lodged a criminal complaint against another Builder in the past who sought to encroach the said land. What better proof, in our view, albeit indirect, of it being, quite clearly, a vacant urban piece of land with good commercial potential? Nobody, much less a Builder, would possibly encroach a land unless it is lying unused and unattended for quite a while, if not years. Rather, it could also be a tactic on his part to impel the assessee to part with his land, or to secure a 'better' price therefor by it getting tainted as a disputed land. *This also explains absence of any entry in the revenue record qua agricultural produce or crops cultivated.* All this unmistakably point to the land being an urban land, being in fact transacted at the price of an urban, vacant, non-agricultural land; in fact, for years prior to its sale, itself fructifying 1½ years after being agreed to. The complaint, rather than assisting, defeats the assessee's case.

4.6 Whichever way one may therefore look at it, the subject land, a capital asset, had never been used for agricultural purposes, except, perhaps, sometime in the distant past, of which, again, there is nothing on record to suggest, even as it is not relevant inasmuch as the time of such user prior to the transfer stands clearly defined by law. It would, given its nature, not even fetch the price applicable to an agricultural land. And, further, stands sold as an, urban, vacant piece of land, with, rather, no agriculture potential, which normally a piece of land, unless the soil quality is very poor, has. That is, was not an agricultural land in the recent past nor sold as such. The matter, as continually emphasized herein, is essentially factual and, accordingly, stands decided on the basis of the material on record, taking the entirety of the facts and circumstances thereof into account, as indeed the Tribunal is obliged to, and toward which we may refer to some case law, viz. *CIT v. Radha Kishan Nandlal* [1975] 99 ITR 143 (SC); *CIT v. Daulat Ram Rawatmull* [1973] 87 ITR 349 (SC); *Omar Salay Mohamed Sait v. CIT* [1959] 37 ITR 151 (SC); *Dhiraj Lal Girdharilal v. CIT* [1954] 26 ITR 736 (SC).

4.7 In view of the foregoing, we, setting aside the impugned order, uphold the assessment of capital gains at rs. 248.17 lacs, disallowing the benefit u/s. 54B.

4.8 The agriculture income returned by the assessee, quantum of which is not available on record, could be, as afore-stated, in respect of his balance agricultural land of 41.74 acres. There is thus no reason to disallow the same, as done by the AO, treating it as nil, even if, as found by him – and with which we wholly agree, no agricultural activity has been carried out by the assessee on the land sold during the relevant year. This disallowance has not been disturbed by the Id. CIT(A) even as he finds to the contrary. In fact, the AO's order is also inchoate inasmuch as the income being admitted, if not agricultural income, as returned, the same is liable to be assessed under any other, including the residuary head, i.e., as income from other sources, or even as income from an unexplained source/s. It is incumbent on an appellate authority to, as explained in *Kapurchand Shrimal v. CIT* [1981] 131

ITR 451 (SC), unless forbidden from doing so by the statute, correct all errors in the proceedings under appeal, and to issue, if necessary, appropriate directions to the authority against whose decision the appeal is preferred to (even) dispose of the whole or any part of the matter afresh. Even otherwise, the Tribunal is, as explained in *CIT v. Walchand & Co. (P.) Ltd.* [1967] 65 ITR 381 (SC), bound to, in deciding a matter before it, deal with and determine the questions that arise *out of the subject-matter of the appeal in the light of the evidence, and consistently with the justice of the case.* This aspect, it would be noted, is related to the agricultural income being the assessee's only source of income, a 'fact' that found favour with the Id. CIT(A) in deciding the issue under appeal and, thus, related.

We, accordingly, restore the aspect of assessment of agricultural income back to the file of the AO, to decide the same in accordance with law, after hearing the assessee in the matter, by issuing definite finding/s of fact. This is as this only would enable 'correction' of an admitted income being neither held as exempt nor subject to tax, or partly as one and partly as another. And, besides, cause to remove the aberration in the impugned order *qua* a related aspect of assessment.

4.9 We decide accordingly.

5. In the result, the Revenue's appeal is allowed on the aforesaid terms.

Order pronounced in open Court on January 11, 2023

Sd/-
(Manomohan Das)
Judicial Member

Sd/-
(Sanjay Arora)
Accountant Member

Dated: 11/01/2023

vr/-

Copy to:

1. The Assessee: Shri Deepak Singh Banafer, H.No. 2001, Badi Ukhari Road, Jabalpur (MP) - 482002
2. The Revenue: Income Tax officer, Ward-1(1), Jabalpur
3. The Principal CIT-1, Jabalpur (MP)
4. The CIT(Appeals)-1, Jabalpur.
5. The Sr.D.R., ITAT, Jabalpur.
6. Guard File.

By order

(VUKKEM RAMBABU)
Sr. Private Secretary,
ITAT, Jabalpur.