IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN

Before Shri Sanjay Arora, Accountant Member and
Shri Sandeep Gosain, Judicial Member

ITA No. 81/Coch/2018
(Assessment Year: 2001-02)

Shri John Mathew N. Neroth House No. 1, Jubilee Road Alappuzha [PAN: ACUPM8885D]	vs.	The Income Tax Officer Ward - 2, Alleppey
Appellant		**Respondent**

Appellant by:	Shri Anil D. Nair & Shri P.K. Biju, Advocates
Respondent by:	Smt. J.M. Jamuna Devi, Sr. D.R.

Date of Hearing:	03.02.2023
Date of Pronouncement:	24.02.2023

O R D E R

Per Bench

This Appeal by the assessee challenges the validity of the reassessment under section 147 read with section 143(3) of the Income Tax Act, 1961 ('the Act' hereinafter) dated 20.11.2007 for assessment year (AY) 2001-02, since upheld in first appeal vide Order dated 24.01.2018 by the Commissioner of Income Tax (Appeals), Kottayam ('CIT(A)' for short).

2.1 At the outset, Shri Anil D. Nair, the ld. counsel for the assessee-appellant, would submit that the basis of the assessee's challenge is two-fold:

(a) non-supply of the reasons recorded; and

(b) true and full disclosure of all material facts relating to the income escaping assessment by the assessee per his return of income.

A copy of the reasons recorded was, despite being sought (PB pg. 35), not supplied to the assessee, as mandated by the decision in *GKN Driveshafts (I) Ltd. vs. ITO* [2003] 259 ITR 19 (SC). Two, there had been true and full disclosure of all material facts in relation to the escaped income by the assessee per his statement of total income (PB pgs. 30-32) forming part of the return of income for the relevant year. Reassessment was, under the circumstances, not sustainable.

2.2 The ld. Sr. D.R., Smt. J.M. Jamuna Devi, would, on the other hand, submit that the impugned order is a very comprehensive order covering every aspect of the case as contested by the assessee before the ld. CIT(A), viz.

(a) delay beyond 4 years;

(b) change of opinion;

(c) reasons for reopening;

(d) land being agricultural land (and, thus, a capital asset or not);

(e) computation of capital gain; and

(f) interest u/s. 234B of the Act.

2.3 Shri Nair would, in response, concede, explaining that being the reason for his limiting his challenge to the two areas afore-stated (see para 2.1). The appeal in fact involves, he would continue, another legal issue in view of the decisions in the case of *Sagar Enterprises vs. Asst. CIT* [2002] 257 ITR 335 (Guj) and *DHFL Venture Capital Fund vs. ITO* [2013] 358 ITR 471 (Bom). In both these decisions it stands clarified that reassessment under the Act cannot be contingent on the happening of a future event, or a hypothesis. It only relates to the income that has already escaped assessment, i.e., an event that has already taken place, which cannot thus depend on the happening or otherwise of a future event, or to cover up a probability. Inasmuch as therefore the reassessment in the instant case was made in the assessee's hands on a protective basis, it is bad in law, being contingent on the subsequent confirmation or otherwise of the

assessment made on substantive basis. Smt. Devi, would, in response, state that the decisions relied upon are, though valid in principle, distinguishable on facts. She did not, however, elaborate further in the matter.

2.4 The hearing was closed at this stage.

3. We have considered the rival contentions and perused the material on record. We shall take up each of the issues raised before us in seriatim.

3.1 The assessee did not ask for the reasons recorded u/s. 148(2) of the Act from the Assessing Officer (AO), and in that view of the matter, his claiming to have been not supplied a copy thereof, is misplaced, even as stated by the ld. CIT(A), who also observes, without being rebutted, of the assessee having been admittedly furnished a copy thereof by the AO as soon as he unambiguously conveyed his desire for the same (refer para 4.3.3 of the impugned order). The same, it may be appreciated, is a rule of natural justice, informing the assessee of the case he has to meet. In the instant case, on the contrary, the assessee has himself narrated the entire facts in relation to the capital gain under reference per the statement of taxable income for the relevant year, along with the reason/s as to why the same was being not returned, i.e., *the subject land sold by him being not, in his opinion, an agricultural land*. That apart, vide his letter dated 27.6.2007 (PB pgs. 37-38), in response to the notice u/s. 143(2) dated 14.6.2007, it stands clarified that inasmuch as there has been full disclosure per his return, as well as indeed while applying for clearance certificate u/s. 230A of the Act on 22.9.2000, there is no failure on his part to disclose fully and truly all material facts necessary for assessment, precluding reassessment. So much so, he claims that in view of the said disclosure, the claim ought to be deemed to have been accepted, failing the reassessment proceedings. *How we wonder, it then lies in the assessee's mouth to contend that he was not aware of the reasons recorded*. The two reasons on which the assessee seeks to assail the reassessment proceedings are in fact contradictory.

3.2 The second reason, i.e., as to true and full disclosure, is, again, not valid inasmuch as the time limitation of four years (from the end of the relevant assessment year) for the issue of notice u/s.148(1) is applicable only where the return has been subject to an assessment u/s. 143(3) of the Act. For a return processed u/s.143(1), as in the instant case, the extended time limit of six years would apply. The notice u/s.148(1) of the Act dated 28.03.2007 is, accordingly, not barred by limitation which attends a true and full disclosure.

3.3 We may next discuss the assessee's legal plea as to the reassessment being not valid as the assessment made is a protective assessment, which could not be a subject matter of reassessment proceedings. The same being a legal ground is, firstly, not liable to be admitted unless the relevant facts are not in dispute or otherwise borne out of record. A copy of the reasons recorded is not on record. If there is no mention therein of the reopening being for making a protective assessment, how could the said decisions be pressed into service? *There is in fact even no claim by the assessee in this regard*. The assessee ought to have placed a copy of the reasons recorded on record, and canvass his case on that basis, in the absence of which his plea is in fact not liable to be admitted. It is trite law that a failure to adduce evidence; rather, the best evidence that a party can furnish, being that which is supposed to be in it's possession, would raise the presumption as to adverse inference (*Union of India v. Rai Deb Singh Bist* [1973] 88 ITR 200 (SC)). On the facts available on record, the assessment of capital gains in the instant case has been in view of the assessee's claim of the AOP (consisting of assessee and his wife), which had returned the lease income on the subject land, had not been conveyed the ownership of the land and, which, therefore continued to vest with the assessee and his wife. Unless a case of sub-lease, of which there is no whisper, it is the owner who would be entitled to lease income. Lease is a transfer of property under the Transfer of Property Act, 1882, which (transfer) can in law only be by an owner. Further, lease income on agricultural land would only be agricultural in nature, exempt

from tax u/s. 10 of the Act, while the same was returned as business income. Further, the primary facts of the case are undisputed; the assessee, as afore-noted, having himself clarified per the return of income that the subject land (144.726 cents), though sold at a profit, no capital gain was being returned in view of it being agricultural, which would in any case be exigible only on the land appurtenant to the building (16.05 cents), also sold along with. *How could, one wonders, the assessee then contend that it was not open for the Revenue to entertain a reason/s to believe escapement of income arising to him on the sale of land in such a case*? To hold, under the circumstances, of the Revenue being not entitled to take recourse to a protective assessment, the very premise of which is to protect it's interest, would be destructive of the concept and purpose of a protective assessment, a travesty of justice and, in fact, against the law thereon (*Lalji Haridas v. ITO* [1961] 43 ITR 387 (SC); *Banyan & Berry v. CIT* [1996] 222 ITR 831 (Guj); *CIT v. Durgawati Singh* [1998] 234 ITR 249 (All)).

That the assessment was substantively made in the hands of the AOP is another matter and of little consequence. Why, in the facts of the case, the status, individual or AOP, in which the assessed income may finally survive, shall stand to be determined in the appellate proceedings in the assessee's own case, and not in another; the assessment in the hands of the AOP having attained finality without the status of the owner being determined. The same, thus, becomes one of the grounds, as, for example, the status of the land – agricultural or otherwise, on which the assessment is being contested. Rather, the income having arisen, so that only question that remains is the person in whose hands it is to be assessed, perhaps in view of conflicting claims, the assessee stands on a weaker footing than while contesting an assessment on merits *per se*. It is for these reasons that the Hon'ble Apex Court has time and again exhorted for the two to be heard together. As a corollary to the said injunction, an issue of fact or law, subject to which an assessment stands made protectively, would always stand to be determined in the assessee's own case. In fact, the protective assessment in

Lalji Haridas (supra), in case of *Chhotalal Haridas*, was again in consequence of reassessment proceedings (pgs. 391-392), put paying the assessee's case.

We may though clarify that the assessee's success on any of it's grounds on merits, where so, would be a matter different and subsequent, and not operate to oust the assumption of jurisdiction for reassessment, which only requires a genuine, valid and honest reason/s to believe, held in good faith, of which what better proof in the instant case than the assesseee himself narrating the facts resulting in accrual of capital gains in his hands, which he though believes as not liable to tax in view of the status of the subject land as not a capital asset.

The argument, seemingly attractive, given the law & facts, fails on all fours.

3.4 As afore-stated, the order by the first appellate authority is a very comprehensive adjudication, covering all aspects of the case, and which have in fact, as admitted before us, attained finality in view of the decision by the Tribunal, as noted by the Hon'ble High Court in the case of the AOP. The same were thus fairly not challenged by the assessee before us.

3.5 We, for the reasons stated, decline interference. We decide accordingly.

4. In the result, the appeal by the assessee is dismissed.

Order pronounced under Rule 34(4) of the Income Tax (Appellate Tribunal) Rules, 1963

Sd/-	Sd/-
(Sandeep Gosain)	(Sanjay Arora)
Judicial Member	Accountant Member

Cochin, Dated: February 24, 2023

Copy to:

1. The Appellant
2. The Respondent
3. The Pr. CIT - Kottayam
4. The DR, ITAT, Cochin
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