

IN THE INCOME TAX APPELLATE TRIBUNAL "D" BENCH, MUMBAI

BEFORE SHRI ABY T. VARKEY, JM AND MS. PADMAVATHY S, AM

आयकर अपील सं/ I.T.A. No.308/Mum/2023

(निर्धारण वर्ष / Assessment Year: 2010-11)

Madanlal Mohanlal Sakhala Unit No. 301, 3 rd Floor, Maxheal House Bangur Nagar, Goregaon (W), Mumbai-400090.	बनाम / Vs.	Addl. CIT, Circle-24(1) Kautilya Bhavan, BKC, Bandra (E), Mumbai- 400051.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAPPS5474H		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by:	Shri Iswar Rathi
Revenue by:	Smt. Mahita Nair (Sr. AR)

सुनवाई की तारीख / Date of Hearing: 01/06/2023

घोषणा की तारीख /Date of Pronouncement: 28/06/2023

आदेश / ORDER

PER ABY T. VARKEY, JM:

This is an appeal preferred by the assessee against the order of the Ld. CIT(A)/NFAC, Delhi dated 07.12.2022 for AY. 2010-11.

2. The main grievance of the assessee is against the action of the Ld. CIT(A) in not admitting the assessee's plea before him that the assessee inadvertently offered capital gain in his return of income to the tune of Rs.34,16,728/- which is not taxable, since it was on sale of agricultural land which is exempt from tax as well as for not condoning the delay in filing the appeal of more than seven hundred ninety (790) days.

3. Brief facts are that the assessee is an individual who had filed his return of income for AY. 2010-11 on 21.01.2011 declaring total income of Rs.2,39,12,917/-; and during the year under consideration, he had sold agricultural land and the profit of such land was also offered (inadvertently) to tax as Long Term Capital Gain (LTCG) amounting to Rs.34,16,728/-. During the assessment proceedings, pursuant to the direction of AO, the assessee had submitted the copy of



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purchase and sale agreement of the agricultural land, details of capital gain and other relative details. The assessee also in the computation of income (along with return of income) filed before the AO had shown to have made Capital gain on sale of asset in the nature of agricultural land (refer page no. 4 of PB). And since the assessee has offered this income of Rs.34,16,728/- for taxation as LTCG, the AO accepted the return of income as such and accepted the total income of assess at Rs.2,39,12,917/- by order dated 28.12.2012 u/s 143(3) of the Income Tax Act, 1961 (hereinafter “the Act”). According to the assessee, he was under bonafide belief that the income from sale of the aforesaid agricultural land was taxable and accordingly did not claim any benefit/exemption for the gain. However, in the year of 2015, the Tax Consultant brought to his notice that the agricultural land which he sold was outside the purview of capital asset, (*if situated in the specified area as per the Act*). And hence in the facts and circumstances of the assessee’s case, according to the new Tax Consultant, the proceeds from sale of agricultural land will not attract tax. Realizing his mistake, he filed an appeal before the Ld. CIT(A) on 31.03.2015 along with request for condonation of delay of 790 days. However, the Ld. CIT(A) declined to condone the delay as well as was of the view that the ignorance of assessee about law is not an excuse. According to him, even otherwise, the grievance of the assessee is not emanating from the assessment order because assessee has not made any such claim to have sold his agricultural land and the gain from it was not taxable. Rather, according to Ld CIT(A), the AO accepted the return of income wherein assessee has himself considered the profit from sale of land as taxable as LTCG of Rs.34,16,728/-.



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Therefore, according to him, since AO has accepted the return of income filed by assessee, now the assessee cannot turn back and blame the AO for his failure as to whether he should have offered the LTCG on sale of land for taxation or not. And the Ld. CIT(A) in the impugned order acknowledges that the assessee has filed additional evidence in respect of his claim that the asset in question which was sold was agricultural land and profit from it was not taxable. However, the Ld. CIT(A) was of the opinion that since the AO has not given any adverse finding in the assessment order about this claim and has accepted the return of income as offered by assessee, the appeal was not arising from the assessment order. And therefore, he declined to entertain this issue after delay of 790 days. And therefore, he did not condone the delay and dismissed the appeal in-limine. Aggrieved, the assessee is before us.

4. We have heard both the parties and perused the records. It is not in dispute that the assessee has declared income of Rs.2,39,12,917/- which included capital gains of Rs.34,16,728/- which assessee has offered for taxation on sale of land. In the computation of income filed before the AO (*a copy of which has been filed before us*), it is discerned from perusal of page no. 4 of PB that the assessee had shown LTCG on sale of property [described therein as Agricultural Land] of land at Igatpuri dated 18.06.2009 which assessee has purchased on 09.11.2004 of Rs.28,05,017/- and net of sale at Rs.71,10,000/-. After indexation etc, the assessee has shown taxable @ 20% (LTCG) of Rs.34,16,728/-. And the AO after calling for the relevant documents in respect of sale of land has accepted the offer of tax from the assessee and accepted the return of income as returned by



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assessee. According to the assessee, he was on the bonafide belief that the sale of agricultural land would attract capital gain tax. However, only in year 2015 (on advice by Tax Consultant) that agricultural land if situated in the specified area as per Act are outside the purview of capital assets and so exempt from the levy of tax. In the light of the expert opinion, he had filed the appeal before the First Appellate Authority and due to which appeal couldn't be filed in time and thus delay happened for 790 days for filing of appeal. According to the Ld. AR, the Ld. CIT(A) erred in not admitting the appeal of the assessee because not filing of appeal was not intentional/deliberate. According to the Ld. AR, merely because the assessee has offered LTCG on sale of agricultural land, the AO after examination of documents ought not to have levied tax even if due to ignorance assessee has offered it for tax.

5. Drawing our attention to the Article 265 Constitution of India which reads as under: -

“No tax shall be levied or collected except by authority of law.”

6. Therefore, according to the Ld. AR, when the Constitution of India prohibit AO to impose the tax without authority of law and even if due to mis-conception of law if an assessee offers tax, then it should not have been brought to tax because Article 265 of the Constitution prohibits such an action. The Ld. AR also cited the CBDT Circular No. 14/XL-35) dated 11/04/1955 wherein it has been clarified that AO was duty bound to inform the assessee benefit available as per law and allow the same while computing the assessable income and the department should not take advantage of assessee's ignorance to collect more tax. And cited the decision of the Hon'ble Bombay High Court in the case of *Nirmala L. Mehta Vs. CIT (269 ITR 1)* wherein



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the Hon'ble High Court held that merely because income was inadvertently offered to tax, it no way take away the right of the assessee to contest the action of tax authority that the said income was not chargeable to tax. It would be gainful to reproduce the observation the Hon'ble High Court wherein it was held as under: -

“The problem arose because the petitioner in her return for the assessment year 1988-89 filed on June 30, 1988, offered the prize money of the lottery to tax rather a fundamental error of law on the part of the assessee, but that error of law once detected by the petitioner, it was urged before the Commissioner of Income-tax that the prize money earned by the petitioner could not be taxed under the Income-tax Act, 1961. It is true that it was at a later stage that such contention was raised by the petitioner, but the said contention was a pure question of law and the Commissioner of Income-tax ought to have considered the said contention on its merits and ought not to have declined to entertain it on the ground of delay. There cannot be any estoppel against the statute, Article 265 of the Constitution of India in unmistakable terms provides that no tax shall be levied or collected except by authority of law. Acquiescence cannot take away from a partly the relief that he is entitled to where the tax is levied or collected without authority of law.”

4.18 As per Article 265 of the Constitution of India, which reads as: -

“ no tax shall be levied or collected except by authority of law.”

7. In the light of the aforesaid facts and circumstances and in the light of judicial precedents cited (supra), he pleaded that the issue regarding tax/LTCG offered by assessee to the tune of Rs.34,16,728/- on account of sale of agricultural land may be examined denovo as to whether the same is taxable or not.



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8. Per contra, Ld. CIT-DR, submitted that no fault can be attributable to the Ld. CIT(A) in dismissing the appeal of the assessee. Since there was inordinate delay in filing of appeal (790 days) and the issue on which assessee claim relief is not emanating from the assessment order, according to him, the Ld. CIT(A) has rightly dismissed the appeal. So she does not want us to interfere with the order of the Ld. CIT(A).

9. In the light of the facts and circumstances taken note (supra), we note that the assessee has offered LTCG on sale of Agricultural land situated at Igatpuri LTCG of Rs.34,16,728/-. According to assessee, he was of the bonafide impression that the gain arising from such transaction was taxable; and after realizing mistake in year 2015, he has filed the appeal before Ld. CIT(A) and in that process couldn't file the appeal within the limitation time and delay occurred of 790 days for filing of appeal; and the Ld. CIT(A) has dismissed the appeal *in limine* without admitting the appeal as discussed (supra). Since Article 265 of the Constitution of India prohibit tax to be collected without authority of law, the assessee's ignorance cannot be a ground to refuse examination of the claim made by the assessee. Even though, inadvertently assessee offered the LTCG on sale of land, he ought to have been allowed to urge the claim before the Ld. CIT(A) because there is no estoppel against law; and the Article 265 of the Constitution prohibits tax authority to collect tax without authority of law. Therefore, in the interest of justice and fair play, we set aside the impugned order of the Ld. CIT(A) and admit this issue in respect of sale of land at Igatpuri on which assessee has offered LTCG to the tune of Rs.34,16,728/- which assessee is now claiming to be exempt



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from taxation being agricultural land. We note that the issue raised before us is a mixed question fact and law which need to be adjudicated on the basis of relevant material/documents as to whether the assessee's asset qualify to be agricultural land to claim the exemption or not. Since this issue has not been examined by the AO and Assessee didn't get an opportunity to make such a claim during assessment stage, , we rely on the decision of the Hon'ble Supreme Court in the case of Tin Box Company Vs. CIT (249 ITR 216) (SC) though in the context that if the assessee has not been granted proper opportunity before the AO, then it should be restored back to the AO for denovo assessment. However, the ratio can be applied in this case, and the Hon'ble Supreme Court held in the case of **Tin Box Company (supra)** has held as under: -

" It is unnecessary to go into great detail in these matters for there is a statement in the order of the Tribunal, the fact-finding authority, that reads thus :

"We will straightway agree with the assessee's submission that the ITO had not given to the assessee proper opportunity of being heard. " That the assessee could have placed evidence before the first appellate authority or before the Tribunal is really of no consequence for it is the assessment order that counts . That order must be made after the assessee has been given a reasonable opportunity of setting out his case . We, therefore, do not agree with the Tribunal and the High Court that it was not necessary to set aside the order of assessment and remand the matter to the assessing authority for fresh assessment after giving to the assessee a proper opportunity of being heard .

2 . Two questions were placed before the High Court, of which the second question is not pressed . The first question reads thus :

"1 . Whether, on the facts and in the



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circumstances of the case, the Tribunal was justified in not setting aside the assessment order in spite of a finding arrived at by it that the Income-tax Officer had not given a proper opportunity of hearing to the assessee ?"

In our opinion, there can only be one answer to this question which is inherent in the question itself: in the negative and in favour of the assessee .

3. The appeals are allowed . The order under challenge is set aside . The assessment orders, that of the Commissioner (Appeals) and of the Tribunal are also set aside . The matter shall now be remanded to the assessing authority for fresh consideration, as aforestated . No order as to costs ."

10. Since we have found in the present case AO didn't examine the issue since assessee himself offered tax (LTCG) on sale of land and the assessment need to be made by AO which matters, therefore this issue is admitted by us and the same is restored back to the AO for the limited purpose of examining the claim of assessee as discussed (supra). Therefore, we set aside the impugned order of the Ld. CIT(A) and remand the issue of sale of land at Igatpuri back to the file of the AO and direct the AO to examine this issue de-novo after hearing the assessee in accordance to law. The assessee is at liberty to file documents/material/written submission before the AO to substantiate its claim of agricultural land and exempt income on sale of it and AO to pass order in accordance to law.



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11. In the result, appeal filed by the assessee is allowed for statistical purposes.

Order pronounced in the open court on this 28/06/2023.

Sd/-
(PADMAVATHY S)
ACCOUNTANT MEMBER

Sd/-
(ABY T. VARKEY)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 28/06/2023.
Vijay Pal Singh, (Sr. PS)

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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