

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "SMC" NEW DELHI  
SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER**

आ.अ.सं./I.T.A No.2017/Del/2023  
निर्धारणवर्ष/Assessment Year: 2011-12

Bijender Singh Thakran VPO Khor, Patodi, Gurgaon, Haryana.	बनाम Vs.	ITO Ward 1(3) New Delhi.
PAN No. AMHPT4885H		
अपीलार्थी Appellant		प्रत्यर्थी/Respondent

निर्धारितकीओरसे /Assessee by	Shri Rakesh Jain, Adv. & Shri Gurjeet Singh, CA
राजस्वकीओरसे /Revenue by	Shri Om Prakash, Sr. DR

सुनवाईकीतारीख/ Date of hearing:	29.08.2023
उद्घोषणाकीतारीख/ Pronouncement on	18.10.2023

**आदेश /O R D E R**

This appeal has been filed by the assessee against the order of Ld. Commissioner of Income Tax (Appeals)-NFAC dated 22.05.2023 for AY 2011-12. The grounds raised by the assessee are as follows:

1. *"Because the action for concluding the re-assessment proceedings u/s 143(3)/147 is being challenged on facts & law.*
2. (a) *Because the action of treating the whole turnover of Rs.8,25,000/- of the 'eligible assessee engaged in an eligible business' as unexplained income u/s 69A is in violation to due process of law and against*

*intent/rationale behind section 44Ad r.w.s. 4 & 5 of the Income Tax Act, 1961.*

*(b) Because the charge u/s 4, 5 of the I.T. Act, 1961 is on the income (Rs.66,000/-) not hypothetical income/declared turnover and the real income of the assessee is to be taxed not the turnover.*

*(c) Alternatively & without prejudice to the above, the quantum of addition is disputed.*

3. *Because the action for treating the amount of exempt sale consideration (section 2(14) as chargeable long term capital gain amounting to Rs.16,33,200/- (7/16<sup>th</sup> share) is being challenged on facts & law.*

4. *Because praying for any addition, deletion, modification and/or any consequential relief arising out of grounds of appeal before the disposal of the appeal.”*

Ground No. 1 & 2:

2. Apropos said grounds the Ld. Counsel submitted that the Ld.CIT(A) has erred in approving the action of the AO treating the whole turnover of Rs.8,25,000/- of the eligible business of assessee as unexplained income u/s 69A of the Income Tax Act, 1961 (for short ‘the Act’) in violation of due process of law and against the intention of legislation behind section 44AD read with section 4 & 5 of the Act. The Ld. Counsel vehemently pointed out that the charge u/s 4 & 5 of the Income Tax Act is on the income of Rs.66,000/- which was earned on the declared turnover and real income earned there from amounting to Rs.66,000/- has been offered to tax by the assessee in his return of income for AY 2011-

12. Therefore, no further addition is required to be made on account of turnover deposited to the bank account of assessee.

3. Replying to the above, the Ld. Sr. DR supported the orders of the authorities below and submitted that the assessee could not establish that he was doing some business of fodder and agricultural products, therefore, the AO was right in making addition u/s 69A of the Act treating the entire amount as unexplained income of assessee. Placing rejoinder to the above, the Ld. Counsel drew our attention towards copy of the return of income and submitted that the assessee has already declared income of total turnover of Rs.8,25,000/- amounting to Rs.66,000/- in his return of income, therefore, any further addition would amount to double addition which is not permissible. Therefore, addition may kindly be deleted.

4. On careful consideration of above rival submissions, we note that the AO made addition u/s 69A of the Act by observing that the assessee remained failed to prove with any substantial documentary evidence that any business activity has been carried out by him during the relevant period and thus, the amount of Rs.8,25,000/- deposited by the assessee to his bank account remains unexplained and hereby added to the return of income of the assessee u/s 69A

of the Act. From the first appellate order, we note that the Ld.CIT(A) upheld the addition by observing that no reply was filed before the AO. However, the Ld.CIT(A) noted the contention of the assessee that the appellant has declared business income as per section 44AD of the Act on the said turnover and he further alleged that no document/details/evidences have been filed before him explaining the source of cash worth Rs.8,25,000/-.

5. Therefore, I am inclined to hold that the Ld.CIT(A) upheld the addition by making contradictory observations as in first part of para 6.1.2 he noted that the appellant has declared income as per section 44AD of the Act and in subsequent sentence he alleged that no document/details/evidences have been filed before him explaining the source of cash (source of cash of Rs.8,25,000/-) which was in fact sale proceed/amount of turnover accrued to the assessee. Therefore, when the assessee has declared income u/s 44AD of the Act in his return of income and offered the same for taxation then the assessee, who is running a small business of fodder and agricultural products, cannot be expected to submit more details to support his claim. Neither from the assessment order nor from the order of the Ld.CIT(A) it is discernable that what details or documentary evidence was called to be filed by the

assessee in support of business income declared u/s 44AD of the Act. Therefore, I am inclined to hold that the AO as well as Ld.CIT(A) was not correct and justified in making and upholding the addition on account of deposits of turnover proceeds and amount to the bank account of assessee. Therefore, ground no. 1 & 2 of assessee are allowed.

Ground No. 3 of assessee:

6. Apropos ground no. 3 the Ld. Counsel submitted that the AO by way of passing rectification order u/s 154 of the Act dated 07.02.2019 had reduced the addition on account of long term capital gain to Rs.16,33,200/- but the same is baseless as the land sold by the assessee was beyond limit of 8 kms from the Municipal Corporation Ltd., therefore, no long term capital gain is required to be charged from the assessee on sale of land which was not a capital asset.

7. Replying to the above, the Ld. Sr. DR supported the action of the AO as well as the order of Ld.CIT(A) and submitted that after evaluation and examination of the entire facts and circumstances of the case and factual situation of the land sold by the assessee along with his co-owners, the Ld.CIT(A) rightly uphold the action of the

AO by observing that from the submissions of appellant and certificate Tehsildar population criteria is not clear and the appellant has failed to produce any document before him that the land was used for the purpose of agriculture prior to sale. The Ld. Sr. DR also contended that no submissions have been made by the assessee to controvert the finding of the AO how section 2(14)(b) of the Act is not applicable to the case of the assessee.

8. On careful consideration of submissions, we note that the AO by passing rectification order u/s 154 of the Act reduced the amount of long term capital gain from Rs.74,66,000/- to Rs.16,33,200/- pertaining to the share of assessee in the land sold. The Ld.CIT(A) upheld the addition with following observations and findings:

*“6.2.1 The appellant has sold a land at Rs.74,66,000/- during the year under consideration. The appellant did not pay capital gain on this amount. The appellant during the course of assessment proceedings stated that since it is an agricultural land and hence no capital gains have been paid. The AO held that as per Section 2(14), the capital asset falls within 8 kms. from the Municipal Corporation and hence LTCG is chargeable on the sale of the property. No documentary evidence was filed before the AO how this land was agricultural land and also regarding distance of property from the Municipal limit. Hence, the AO made the addition of LTCG worth Rs.16,33,200/-/.*

6.2.2 Now before me in the appellate proceedings, the written submission has been filed. No documentary evidence has been filed that this land was used for the agricultural purposes. No details have been filed regarding any agricultural income shown by the appellant. Even return of income, stating agricultural income has not been filed. Hence, by any logic, it can't be held that this is an agricultural land. The appellant in the submission has mentioned that distance 2 kms is only required to be seen while levying LTCG on the sale of land. As per section 2(14)(b), three sub-clauses are there, Clause (1) deals with 2 kms criteria where population is more than 10,000 but not exceeding 1 lakh. Clause (II) deals with 6 kms criteria where population is more than 1 lakh but not exceeding 10 lakhs. Clause (III) deals with 8 kms criteria where the population is more than 10 lakhs. The appellant has relied upon the notification of Central Govt. dated 06/01/1994, which only deals with agricultural land criteria. This circular cannot be applied here. I have gone through the notification, filed by the appellant before me. This circular deals with the issue of urbanization. This cannot be applied here because section 2(14)(iii)(b) has been substituted w.e.f. 13/12/1962. The circular cited by the appellant is dated 06/01/1994. Hence, after retrospective amendment of the section w.e.f. 13/12/1962, no reliance can be made here. Circular and notification are part of delegated legislation. Since law has been amended, hence the circular loses its force and it is no longer applicable. The appellant has filed one letter from Tehsildar at Pataudi, Gurgaon. The Tehsildar has written that it is within 8-9 kms. Hence, from the letter of Tehsildar, it is not clear that it is situated beyond 8 kms. Hence, 8 kms criteria of section 2(14) is clearly applicable here. From the submissions of the appellant and certificate of Tehsildar, population criteria is also not clear. Further, the appellant has failed to produce any documents before me that land was used for the purposes of agriculture. No submission has been made to controvert the finding of the AO how section 2(14)(b) is not applicable in the

*case of the appellant. Hence, the addition made by the AO is confirmed and ground of appeal No.3 raised by the appellant is dismissed.”*

9. On careful consideration of rival submissions, basis taken by the AO in the rectification order and observations of Ld.CIT(A) while upholding the addition, we note that the onus was on the assessee to prove that the 8 km criteria of section 2(14)(b) of the Act is not applicable to the transaction of sale of land by the assessee. On order to discharge said onus as per mandate of law the assessee filed a Report/Certificate issued by Tehsildar Patodi dated 04.11.2019 wherein it was certified that the land in question was 8 to 9 kms away from office of the Tehsildar which also gets support from distance map attached thereto. From copy of the notification of Department issued u/s 2(1A)(c) of the Act dated 06.01.1994 entry 46 states that the areas upto a distance of 2 kms from the municipal limits in all directions, which again supports the contention of assessee that the land sold was not a capital asset and it was agriculture land situated 8-9 kms away from Tehsildar Patodi office/municipal limits of Patodi. Said conclusion also gets support from the order of Hon'ble Jurisdiction High Court of Punjab & Haryana in the case of CIT Vs. Shri Lal Singh & Others dated 20.11.2009 in ITA No.06 of 2009 as relied by the Ld. Counsel of assessee.

10. Further, in copy of sale deed executed by the assessee as co-owner with others dated 04.02.2011 the land sold has been shown as agriculture land (PB Page 45-49). The assessee has also submitted copies of certified Revenue records showing that prior for sale the land was used for agriculture purposes which negates the allegation and basis taken by the AO for denying claim of assessee. Accordingly, ground no.3 of assessee is allowed and AO is directed to delete the addition on account of long term capital gain (LTCCG).

11. In the result, appeal of assessee is partly allowed.

Order pronounced in the open court on 18/10/2023

Sd/-  
(C.M. GARG)  
JUDICIAL MEMBER

Dated: 18.10.2023

*\*Kavita Arora, Sr. P.S.*

Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT  
(DR)/Guard file of ITAT.

By order

Assistant Registrar, ITAT: Delhi Benches-Delhi