

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

Before Shri Sanjay Arora, AM & Shri Manomohan Das, JM

ITA No.587/Coch/2022: Asst. Year: 2014-2015

George Stanley Grace Villa Near Head Post Office Thiruvalla – 689 101. [PAN: AKMPS0862N]	vs.	The Deputy Commissioner of Income-tax, International Taxation Circle, Trivandrum
(Appellant)		(Respondent)

Appellant by: Ms. Telma Raju, Advocate  
Respondent by: Sri. Sajit Kumar Das, CIT-DR

Date of Hearing : 09.08.2023	Date of Pronouncement: 31.10.2023
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**ORDER**

Per Sanjay Arora, AM:

This is an Appeal by the Assessee agitating the dismissal of his appeal contesting his assessment under section 143(3) of the Income-tax Act, 1961 ('the Act') dated 28.12.2016 for assessment year (AY) 2014-2015, by the Commissioner of Income-tax (Appeals)-12, Bengaluru [CIT(A)], vide his order dated 20.12.2021.

2. The appeal, filed on 11.05.2022, after accounting for the blanket saving on account of Covid by the Hon'ble Apex Court per its *suo motu* Writ Petition WP (C) 03/2020, dated 10/01/2022, is late by 22 days, which stands reasonably explained per a sworn affidavit dated 05.05.2022 by the assessee. The appeal was accordingly admitted, and the hearing in the matter proceeded with.

3. The only issue arising in the appeal is if the land and the residential house sold by the assessee during the relevant year is agricultural land and, thus, not a capital asset, gain on which stands to be taxed under the Act. The secondary issue is the

claim of deduction u/s.54F and/or s.54EC on the said capital gain, where so, also denied.

4. The brief facts of the case are that the assessee, a non-resident Indian, returned his income for the year on 29.7.2014 at Rs.8,47,598 as income from other sources. The several deposits in his bank account and transfer of funds abroad (at Rs.300 lakh) during the year were explained in the assessment proceedings as out of the sale proceeds of 94 cents (38.04 ares) of land, on a part of which a residential house (built-up area: 2500 sq.ft.) at Pathanamthitta village falling under the Pathanapuram panchayat, for an aggregate consideration of Rs.620.40 lakh, submitting along with copy of the sale agreement and sale deed (dated 03.6.2013). The land was contended as agricultural, explaining thus the non-return of any gain. That is, no capital gain had accrued for the relevant year for it to have been returned even for rate purposes. The status of the land as agricultural or otherwise is a bone of contention between the parties; the Revenue holding it as non-agricultural.

5. The assessee's principal contention before us was that 100 rubber trees, besides some coconut trees, were standing on the land at the time of its sale, and which were being regularly tapped, save for the relevant year, yielding agricultural income. Further, the same were cut down by the buyer in July, 2013, subsequent to transfer. This stands clarified by the Village Agricultural Officer (VAO), whose statement stands reproduced at para 2.3 (page 3) of the assessment order. The subject land cannot thus but be regarded as agricultural. On an inquiry by the Bench of over Rs.6 crore having been realized for less than 1 acre of land, clearly indicating that what was sold was a residential land, even as stated by the buyer, Ms. Raju, the learned counsel for the assessee, would submit that the same cannot by itself be determinative of the matter.

6. We have heard the parties, and perused the material on record.

6.1 The matter, we may at the outset clarify, is essentially factual, to be decided in the conspectus of the case, taking the entirety of the facts and circumstances into account. The several tests devised by the Hon'ble Courts for the purpose, as their reading shows, being in the nature of guidelines, by way of factual indicators toward ascertaining the purpose and intendment of transfer from the conduct of the parties and the surrounding facts & circumstances. No hard and fast rule could, accordingly, be laid down, and each case decided on its facts, viewing the matter in a realistic sense, *i.e., as the contracting parties understood it as*. The onus to prove its claims, needless to add, is on the assessee. This represents well-settled law, for which we refer to some judicially binding precedents, viz.

*CIT vs. Gemini Pictures Circuit P. Ltd.* [1996] 220 ITR 43 (SC);

*Sarifabibi Mohamed Ibrahim vs. CIT* [1993] 204 ITR 631 (SC);

*G.M. Omer Khan vs. CIT* [1992] 196 ITR 269 (SC);

*CWT vs. Officer-in-Charge (CW), Paigah* [1976] 105 ITR 133 (SC);

*Kalpetta Estates Ltd. vs. CIT* [1990] 185 ITR 318 (Ker),

quoting, for authority, from the last:

‘Whether a piece of land is agricultural in character or a capital asset is largely a *question of fact which should be determined by the cumulative effect of fall facts and circumstances* in a given case. The *onus is on the assessee* to show that the character of the lands changed after the acquisition of the capital asset by the assessee and that the lands were agricultural lands at the time of transfer of the asset. The *material date* with reference to which the question whether the particular asset (land) which has been sold is agricultural land or not is to be decided is *the date of sale*. In other words, in order to entitle the assessee to earn the exemption, it is not enough to allege or show that the land was once agricultural land at the time of acquisition. *The assessee should further prove that it was agricultural land at the time of transfer.*’  
(emphasis, ours)

The tests afore-referred, culled out in *Mahaveer Enterprises vs. UoI* [2000] 244 ITR 798 (Raj) after a review of judicial precedents, are as under:

‘The question whether a piece of land is agricultural land or not, is essentially a question of fact. The facts that raise a presumption that the land is non-agricultural are—

- (i) situation of the land, for example, land situated in an urban area within the municipal limits in the proximity of buildings and building sites,

- (ii) sale of land to a non-agriculturist for non-agricultural purposes,
- (iii) sale of land on a square yard basis at a price comparable to prices fetched by building sites,
- (iv) sale of land on a square yard basis at a price comparable to prices fetched by building sites,
- (v) sale at a price at which no *bona fide* agriculturist would *purchase* for genuine agricultural operations, and
- (vi) when the price is such that no prudent owner would sell it at a price worked out on the capitalisation method taking into account its optimum agricultural yield in the most favourable circumstances.

When the question arises as to the real nature of land in the context of land situated in urban areas, the crucial two-fold test would be to find out, *if any prudent agriculturist would purchase the land in order to carry on agricultural operations having regard to the price he would have to pay and whether the owner of such land would sell it by valuing it as property yielding agricultural produce on the capitalisation method, even on the basis of optimum yield and maximum sale price. The effect of the totality of the circumstances must be considered.* (emphasis, ours)

This, then, explains the law in the matter, which is to be applied in the facts of a ~~the~~ case, variances in which would explain the differences in the decisions.

6.2 Both the Revenue authorities have examined the matter in sufficient detail. We, therefore, proceed by reproducing the relevant part of the impugned order:

‘8. The submissions of the assessee are considered. The assessee has also given various other evidences including pictures from google map to show that the land in question was agricultural in nature. The submissions of the assessee are considered and are deliberated as under:

i. The lands in question *had been accounted as residential lands* forming part of Pattanapuram town by means of a gazette notification dated 14.12.2009 issued by revenue divisional commissioner of Kollam district. To this extent the land sold had lost its agricultural nature on account of government notification. The said notification had also fixed fair price per `are` of land.

ii. The land sold was situated well *within a residential area* and was situated between a hospital and a church. There were *residential and commercial buildings all around the lands sold*. To this extent, the land sold was part of developed land within Pattanapuram town of Kollam district.

iii. The assessee had claimed that he was cultivating the lands till the date of its sale. However, it is notified that the assessee was a non-resident living in USA and could not have cultivated the land by himself. *His mother of 94 years, being the sole family member in India*, could not have been expected to conduct any agricultural operations. To this

extent, any claim of the assessee that the lands were subject to the cultivation by assessee or his close family members is also not correct.

iv. The assessee has also claimed that there were a few rubber, coconut, cashew and mango trees in the said land yielding regular income to the assessee. This may be true. However, the mere existence of these trees on the land sold cannot enable the land to be categorized as agricultural in nature. *These trees which have remained on the land for the past many years do not make the land a cultivatable agricultural land.*

v. The assessee has received *a very substantive consideration of Rs.6.20 crores on sale of less than one acre of land.* The assessee also had a residential building in the said land and the land sold were essentially used for residential purposes with a backyard of fruit trees and rubber trees.

vi. The assessee could not have sold any agricultural land to a non-resident. The lands in question have indeed been purchased by another non-resident. *The said non-resident purchaser has also confirmed before the department that the lands purchased by him were residential in nature.*

vi. The sale deed by which consideration is received by the assessee does not mention the lands in question as any agricultural lands. The lands are only mentioned as land and building. In fact, the lands in question had a large residential building at the time of sale.

9. On account of cumulative reasons as above, the action of Assessing Officer in bringing the LTCG for taxation is approved. It is held that the receipts from sale of the lands in question are liable for LTCG taxation. The grounds of appeal on this issue are rejected.(emphasis, supplied)

None of these findings and observations, even as he challenges the order, has been disputed by the assessee? *What, then, we wonder is the controversy about?*

6.3 Our examination of the matter, based on the material on record and the explanations furnished, lead us to state of the assessee's case as much ado about nothing. The subject land is covered by a Gazetted Notification dated 14.12.2009, so that it forms part of the Pathanapuram town. The same would, thus, fall u/s.2(14)(iii)(a), which reads as under; the provision itself clarifying the term 'municipality' to be construed and understood in a very wide sense, including a notified area committee, a town area committee, or a town committee, or by any other name:

“2. In this Act, unless the context otherwise requires,—

(14) "capital asset" means—

(a) property of any kind held by an assessee, whether or not connected with his business or profession;

(b).....,

but does not include—

(i) ..(ii)

(iii) agricultural land in India, not being land situate—

(a) in any area which is comprised within the jurisdiction of a municipality (whether known as a municipality, municipal corporation, *notified area committee, town area committee, town committee, or by any other name*) or a cantonment board and which has a population of not less than ten thousand; or

(b) in any area within such distance, not being more than eight kilometres, from the local limits of any municipality or cantonment board referred to in item (a), as the Central Government may, having regard to the *extent of, and scope for, urbanisation of that area and other relevant considerations*, specify in this behalf by notification in the Official Gazette.” (emphasis, supplied)

In fact, a gazette notification, being an official pronouncement, should quell any doubt as regards the status, agricultural or otherwise, in the matter.

6.4 Even as the foregoing should conclude the matter, we may, without prejudice, also examine the matter factually. The subject land falls under the residential area of the town, the land price of which stands fixed by the Government, ostensibly for the purpose of registration and levy of stamp duty. This stands also confirmed by the Assessing Officer (AO) from the Office of the Sub-Registrar, Pathanapuram, stating, in its words: “that the said property belongs to residential plot”. Form 1B attached to and forming part of the sale deed (No.1026/2013, dated 03.06.2013) states the category of land as “commercial”. This is consistent with the sale deed, which refers to the subject property as ‘land and building’ as opposed to ‘agricultural land’ (refer paras 2.3 & 2.6 of the assessment order). Rather, *agricultural land could not be sold to a non-resident, which the buyer, as resident of Dubai, is.*

The assessee, who is living in USA since 2008, claims carrying on of agricultural activity on the subject land till up to the date of sale. How, pray, these were carried out, of which there is no iota of evidence. Even if some agricultural activity stood carried out in the past, what is relevant is it’s status at time of it’s sale.

It was not sold as an agricultural land, but only as non-agricultural, for residential purposes, even as confirmed by the buyer. *A contract is result of meeting of minds.* Both the agreement to sell as well as the sale deed have not been made part of the Tribunal's record, so that we have necessarily to go by the material on record and, in any case, non-furnishing the same would invite adverse inference (*UoI v. Rai Deb Singh Bist* [1973] 88 ITR 200 (SC)). It is nobody's case that while the buyer bought a residential property, the assessee, contrary to Form 1B, bargained for & sold an agricultural land. The onus to prove that the apparent is not real is on the person alleging so. The only manner, given the clear evidence toward the land being residential, on which in fact a huge building stood, by which the assessee could show, or at least make an attempt to show, that the land sold was, nevertheless, agricultural, is the parity of the land rates for agricultural and non-agricultural land, which is, again, nobody's case. In fact, given the huge price differential that obtains between the two, the same disproves the assessee's – who has fetched land rate consistent with the residential area, case. There is, accordingly, no difference in the perception of the buyer and seller *qua* the intended user of the land, defining its character as the object matter of sale.

The assessee's reliance on the statement of Village Agricultural Officer (VAO) is also misplaced. Even as that would not by itself make the land agricultural, it speaks of standing trees in fy 2011-12, making it irrelevant. Where, one wonders, have they disappeared over the period since. The statement being without basis in any record, cannot be relied upon, even as explained in *Asha George v. ITO* [2013] 351 ITR 123 (Ker). In fact, as it appears from a conjoint reading of the sale deed (Form 1B); statement of the buyer and the VAO, the trees were standing in the backyard of the residential property, even as stated by the Id. CIT(A). No agricultural activity in fact at any point of time has been exhibited by the assessee, including returning it under the Act, which though by itself cannot be regarded as final, or as concluding the matter.

7. In view of the foregoing, we, upholding the findings of the Revenue Authorities, hold the subject land as non-agricultural (35.21 ares), with the balance land (2.83 ares) and building (280 sq.mtrs.), purchased during FY 2004-2005, as a residential house with land appurtenant thereto. Both, accordingly, qualify to be a capital asset u/s.2(14)(a) of the Act. We decide accordingly.

8. Next, we may consider the assessee's alternative claim, i.e., the deduction u/s.54F and 54EC. As regards the claim u/s.54F, there is nothing on record to exhibit the satisfaction of the relevant provision; the assessee, through his counsel, conceding before the Id.CIT(A) to be not in possession of the full details of the transaction (para 10 of the impugned order). The legal claim could be entertained only where the facts relevant for deciding the same are not disputed or otherwise admitted. The claim, thus, has no basis in law or on facts, and is dismissed.

9. *Qua* the deduction u/s.54EC, the Id.CIT(A) has vide para 11 of his order confirmed the investment in the relevant bonds for Rs.10 lakh on 30.06.2016. The claim, being legal, is thus admitted. The matter would thus travel to the file of the Assessing Authority to examine the assessee's claim, and decide thereupon in accordance with law after affording him an opportunity of being heard, by issuing definite findings. We decide accordingly.

10. In the result, the assessee's appeal is partly allowed.

*Order pronounced on October 31, 2023 under Rule 34 of The Income Tax (Appellate Tribunal) Rules, 1963*

Sd/-  
(Manomohan Das)  
Judicial Member

Sd/-  
(Sanjay Arora)  
Accountant Member

Cochin; Dated: October 31, 2023  
Devadas G\*

**NB:** This is the copy of the order dated 31/10/2023, duly corrected for the errors listed in corrigendum order dated 30/11/2023.

Copy to:

1. The Appellant.
2. The Respondent.
3. The Pr. CIT concerned.
4. The CIT-DR, ITAT, Cochin.
5. Guard File.

By Order

Assistant Registrar  
ITAT, Cochin

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COCHIN BENCH, COCHIN**

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(Appellant)		(Respondent)

**CORRIGENDUM**

Order under section 254(1) of the Income Tax Act, 1961 ('the Act') in the captioned appeal was passed on 31.10.2023. It is, however, found that there have occurred certain typing errors and omissions in the said order, which are, therefore, sought to be rectified through this corrigendum order. The same being only correction of those errors, do not therefore *per se* cause any prejudice to either party. The details are as under:

1. Para 2 (page 1): A coma (,) be read after the word 'admitted' in the last of the para.
2. Para 5 (page 2): A coma (,) be read after the words 'relevant year' (at line 3 of the para)
3. Para 6.3 (page 5): The word 'sense' be read instead of the word 'clause' (at line 6 of the para)
4. Para 6.4 (page 7):
  - a). The word 'A' shall be read instead of the word 'The' in the sentence "*The contract is result of.....*" in the second sub-para.
  - (b) The words 'final or concluding' in the last sentence of the sub-para 3 of the para, be read as 'final, or as concluding'.
5. Para 7 (page 8): A coma (,) be read after the words "(35.21 ares)".

6. Para 9 (page 8): Comas (,) be read both before and after the words 'being legal' at line 3 of the para.

Sd/-

(Manomohan Das)  
Judicial Member

Cochin; Dated: November 30, 2023  
Devadas G\*

Sd/-

(Sanjay Arora)  
Accountant Member

Copy to:

1. The Appellant.
2. The Respondent.
3. The Pr. CIT concerned.
4. The CIT-DR, ITAT, Cochin.
5. Guard File.

By Order

Assistant Registrar  
ITAT, Cochin

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COCHIN BENCH, COCHIN**

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2. The appeal, filed on 11.05.2022, after accounting for the blanket saving on account of Covid by the Hon'ble Apex Court per its *suo motu* Writ Petition WP (C) 03/2020, dated 10/01/2022, is late by 22 days, which stands reasonably explained per a sworn affidavit dated 05.05.2022 by the assessee. The appeal was accordingly admitted and the hearing in the matter proceeded with.

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claim of deduction u/s.54F and/or s.54EC on the said capital gain, where so, also denied.

4. The brief facts of the case are that the assessee, a non-resident Indian, returned his income for the year on 29.7.2014 at Rs.8,47,598 as income from other sources. The several deposits in his bank account and transfer of funds abroad (at Rs.300 lakh) during the year were explained in the assessment proceedings as out of the sale proceeds of 94 cents (38.04 ares) of land, on a part of which a residential house (built-up area: 2500 sq.ft.) at Pathanamthitta village falling under the Pathanapuram panchayat, for an aggregate consideration of Rs.620.40 lakh, submitting along with copy of the sale agreement and sale deed (dated 03.6.2013). The land was contended as agricultural, explaining thus the non-return of any gain. That is, no capital gain had accrued for the relevant year for it to have been returned even for rate purposes. The status of the land as agricultural or otherwise is a bone of contention between the parties; the Revenue holding it as non-agricultural.

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The tests afore-referred, culled out in *Mahaveer Enterprises vs. UoI* [2000] 244 ITR 798 (Raj) after a review of judicial precedents, are as under:

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This, then, explains the law in the matter, which is to be applied in the facts of the case, variances in which would explain the differences in the decisions.

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We, therefore, proceed by reproducing the relevant part of the impugned order:

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extent, any claim of the assessee that the lands were subject to the cultivation by assessee or his close family members is also not correct.

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9. On account of cumulative reasons as above, the action of Assessing Officer in bringing the LTCG for taxation is approved. It is held that the receipts from sale of the lands in question are liable for LTCG taxation. The grounds of appeal on this issue are rejected.(emphasis, supplied)

None of these findings and observations, even as he challenges the order, has been disputed by the assessee? *What, then, we wonder is the controversy about?*

6.3 Our examination of the matter, based on the material on record and the explanations furnished, lead us to state of the assessee's case as much ado about nothing. The subject land is covered by a Gazetted Notification dated 14.12.2009, so that it forms part of the Pathanapuram town. The same would, thus, fall u/s.2(14)(iii)(a), which reads as under; the provision itself clarifying the term 'municipality' to be construed and understood in a very wide clause, including a notified area committee, a town area committee, or a town committee, or by any other name:

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In fact, a gazette notification, being an official pronouncement, should quell any doubt as regards the status, agricultural or otherwise, in the matter.

6.4 Even as the foregoing should conclude the matter, we may, without prejudice, also examine the matter factually. The subject land falls under the residential area of the town, the land price of which stands fixed by the Government, ostensibly for the purpose of registration and levy of stamp duty. This stands also confirmed by the Assessing Officer (AO) from the Office of the Sub-Registrar, Pathanapuram, stating, in its words: “that the said property belongs to residential plot”. Form 1B attached to and forming part of the sale deed (No.1026/2013, dated 03.06.2013) states the category of land as “commercial”. This is consistent with the sale deed, which refers to the subject property as ‘land and building’ as opposed to ‘agricultural land’ (refer paras 2.3 & 2.6 of the assessment order). Rather, *agricultural land could not be sold to a non-resident, which the buyer, as resident of Dubai, is.*

The assessee, who is living in USA since 2008, claims carrying on of agricultural activity on the subject land till up to the date of sale. How, pray, these were carried out, of which there is no iota of evidence. Even if some agricultural activity stood carried out in the past, what is relevant is it’s status at time of it’s sale.

It was not sold as an agricultural land, but only as non-agricultural, for residential purposes, even as confirmed by the buyer. *The contract is result of meeting of minds.* Both the agreement to sell as well as the sale deed have not been made part of the Tribunal's record, so that we have necessarily to go by the material on record and, in any case, non-furnishing the same would invite adverse inference (*UoI v. Rai Deb Singh Bist* [1973] 88 ITR 200 (SC)). It is nobody's case that while the buyer bought a residential property, the assessee, contrary to Form 1B, bargained for & sold an agricultural land. The onus to prove that the apparent is not real is on the person alleging so. The only manner, given the clear evidence toward the land being residential, on which in fact a huge building stood, by which the assessee could show, or at least make an attempt to show, that the land sold was, nevertheless, agricultural, is the parity of the land rates for agricultural and non-agricultural land, which is, again, nobody's case. In fact, given the huge price differential that obtains between the two, the same disproves the assessee's – who has fetched land rate consistent with the residential area, case. There is, accordingly, no difference in the perception of the buyer and seller *qua* the intended user of the land, defining its character as the object matter of sale.

The assessee's reliance on the statement of Village Agricultural Officer (VAO) is also misplaced. Even as that would not by itself make the land agricultural, it speaks of standing trees in fy 2011-12, making it irrelevant. Where, one wonders, have they disappeared over the period since. The statement being without basis in any record, cannot be relied upon, even as explained in *Asha George v. ITO* [2013] 351 ITR 123 (Ker). In fact, as it appears from a conjoint reading of the sale deed (Form 1B); statement of the buyer and the VAO, the trees were standing in the backward of the residential property, even as stated by the Id. CIT(A). No agricultural activity in fact at any point of time has been exhibited by the assessee, including returning it under the Act, which though by itself cannot be regarded as final or concluding the matter.

7. In view of the foregoing, we, upholding the findings of the Revenue Authorities, hold the subject land as non-agricultural (35.21 ares) with the balance land (2.83 ares) and building (280 sq. mtrs.), purchased during FY 2004-2005, as a residential house with land appurtenant thereto. Both, accordingly, qualify to be a capital asset u/s.2(14)(a) of the Act. We decide accordingly.

8. Next, we may consider the assessee's alternative claim, i.e., the deduction u/s.54F and 54EC. As regards the claim u/s.54F, there is nothing on record to exhibit the satisfaction of the relevant provision; the assessee, through his counsel, conceding before the Id.CIT(A) to be not in possession of the full details of the transaction (para 10 of the impugned order). The legal claim could be entertained only where the facts relevant for deciding the same are not disputed or otherwise admitted. The claim, thus, has no basis in law or on facts, and is dismissed.

9. *Qua* the deduction u/s.54EC, the Id.CIT(A) has vide para 11 of his order confirmed the investment in the relevant bonds for Rs.10 lakh on 30.06.2016. The claim being legal is thus admitted. The matter would thus travel to the file of the Assessing Authority to examine the assessee's claim, and decide thereupon in accordance with law after affording him an opportunity of being heard, by issuing definite findings. We decide accordingly.

10. In the result, the assessee's appeal is partly allowed.

*Order pronounced on October 31, 2023 under Rule 34 of The Income Tax (Appellate Tribunal) Rules, 1963*

Sd/-  
(Manomohan Das)  
Judicial Member

Sd/-  
(Sanjay Arora)  
Accountant Member

Cochin; Dated: October 31, 2023  
Devadas G\*

Copy to:

1. The Appellant.
2. The Respondent.
3. The Pr. CIT concerned.

4. The CIT-DR, ITAT, Cochin.
5. Guard File.

By Order

Assistant Registrar  
ITAT, Cochin