

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

Before Shri Sanjay Arora, Accountant Member and  
Ms. Kavitha Rajagopal, Judicial Member

**ITA No. 428/Coch/2023  
& SA No. 78/Coch/2023**  
(Assessment Year: 2018-19)

Pallathukadavil Ibrahimkutty Abdul Kabeer 71, Pallathukadavil Kanjoor P.O., Ernakulam 682575 [PAN: AAOPI0584P]	vs.	Principal CIT – 1 C.R. Building, I.S. Press Road Kochi 682018
(Appellant)		(Respondent)

Appellant by:	Shri Padmanathan K.V., Advocate
Respondent by:	Shri Sanjit Kumar Das, CIT-DR

Date of Hearing:	09.02.2024
Date of Pronouncement:	30.04.2024

**ORDER**

Per: Sanjay Arora, AM

This is an appeal by the assessee in respect of revision of his assessment under section 143(3) read with sections 143(3A) and 143(3B) of the Income Tax Act, 1961 (the Act) dated 15.03.2021 for Assessment Year (AY) 2018-19 by the Principal Commissioner of Income Tax (Appeals) (Pr.CIT) vide his order u/s. 263 of the Act dated 29.03.2023. The assessee has also filed a Stay Petition *qua* his appeal.

2. The brief facts of the case are that the assessee returned his income for the relevant year on 31.03.2019 at Rs.7,77,378 (other than agricultural income of Rs.6.78 lacs). The return was selected for being subject to the verification procedure under the Act *qua* it's following aspects:

(a) investment in immovable property;

(b) claim of deduction on capital gains.

The assessment was completed at the returned income accepting the explanations and evidences furnished by the assessee on several dates, the last of which is dated 22.02.2021. The operative part of the assessment order reads as under: -

4. In response to the notice issued the assessee stated that

“I have sold an agricultural land for Rs. 9,00,00,000/- and capital gain on the above transaction comes to Rs.8,14,19,048/-. I have invested Rs. 8,21,50,000/-. I am eligible to get exemption on capital gain u/s. 54B as I have invested the capital gain for purchase of new asset.”

5. *Relying on the explanation and documentary evidences submitted*, the assessee's clarification has been accepted. The data pertaining to the assessee has been collated and re-examined. After *due diligence*, the assessment is completed accepting the returned income that was shown by the assessee. *(emphasis, ours)*

3. Subsequently, the Id. Pr.CIT called for and examined the assessment records. The following two aspects had been omitted to be verified by the Assessing Officer (AO), integral to the claim of deduction u/s. 54B of the Act:

(a) Whether the land sold by the assessee was used for agriculture for 2 years immediately preceding the date of transfer;

(b) Whether the properties purchased by the assessee for availing exemption u/s. 54B are agricultural and used exclusively for agriculture.

The genuineness of the transaction was also enquired into by the Id. Pr.CIT, causing physical inspection of the land/s purchased and sold by the assessee, through his Inspector, whose report is extracted at para 6.4 (pgs. 9-11) of his order. The same points to several infirmities in the assessee's claim, viz.:

(a) The land purchased for Rs.1.18 crore was not fit for agricultural use;

(b) The agreement dated 06.08.2018 for purchase of the second land for Rs.6.91 crores was not per registered Deed but on a stamp paper of Rs.100; non-compliance of the provision of s. 54B(2) for the Act *qua* utilization of capital gains in relation to the second purchase of Rs.6.91 crores.

(c) Non-completion of the said purchase; the agreement dated 06.08.2018 expired on 05.07.2018, followed by another agreement dated 30.06.2020, and which again expired on 30.06.2021. The transaction is doubtful also considering the fact that Mrs. Fatima, the seller of the land, also claims exemption u/s. 54B of the Act; and

(d) The said land is also not fit for agricultural use.

The assessment was accordingly set aside for a *de novo* consideration, to be decided per a speaking order in accordance with law after hearing the assessee.

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

4.1 The Id. Pr. CIT having invoked section 263 of the Act, it may be relevant to visit the law in the matter, i.e., insofar as it relates to an absence or lack of inquiry in the matter, which at heart is the charge by the revisionary authority in the instant case. Non-application of mind, as explained by the Apex Court in *Malabar Industrial Co. Ltd. v. CIT* [2000] 243 ITR 83 (SC), is one of the ingredients that renders an order as prejudicial and erroneous to the interest of the Revenue. As explained therein, where the AO accepts the assessee's version in the absence of any supporting material and without making any enquiry, his order would be erroneous and exercise of jurisdiction u/s. 263(1) justified. As an example, it, citing its earlier decisions in *Rampyari Devi Saraogi v. CIT* [1968] 67 ITR 84 (SC) and *Tara Devi Aggarwal v. CIT* [1973] 88 ITR 323 (SC), held that where a sum not earned by a person is assessed as income in his hands on his so offering, the order passed by the AO accepting the same would be subject to sec. 263. The decision by the Hon'ble jurisdictional High Court, reported at [1992] 198 ITR 611 (Ker), holding the assessment as without application of mind, was, accordingly, affirmed. Absence or lack of enquiry is an attribute, a manifestation, of this non-application, so that an order imbued therewith would be liable to revision. This represents trite law, since co-opted on the Statute itself vide *Explanation 2(a)* to s. 263(1). In *Gee Vee Enterprises v. Addl. CIT* [1975] 99 ITR 375 (Del), again with reference to judicial precedents, it stands explained that the order of the AO becomes erroneous on a failure to make enquiry where the

circumstances call for it. This is not because there is anything wrong in the order if all the facts stated therein are assumed to be correct. However, the AO is not only an adjudicator but also an investigator and, therefore, cannot remain passive in the face of a return which is apparently in order but calls for further enquiry. It is his duty to ascertain the truth of the facts stated in the return when the circumstances of the case are such as to provoke an enquiry. In *Toyota Motor Corporation v. CIT* [2008] 306 ITR 52 (SC), confirming the decision by the Hon'ble High Court reported at [2008] 306 ITR 49 (Del), it was explained that the Tribunal could not have substituted its own reasons which were required to be recorded by the AO, and ought to have remanded the matter to the latter. Sure, there must thus be circumstances which would make the enquiry prudent, and not *de hors* the same, even as explained in *CIT v. Gabriel India Ltd.* [1993] 203 ITR 108 (Bom), the same being an objective fact which must be satisfied on the basis of the material on record. This in fact is captured by the words: 'which should have been made' occurring in *Explanation 2(a)* to s. 263(1) with reference to any inquiry or verification by the AO.

4.2 Section 54B of the Act, claim for deduction under which has been directed for verification and examination in the set aside proceedings, 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 utilized 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.

4.3 The assessee's case before us was that the relevant enquiry had been made by the AO, who though did not write an elaborate order, and which should not therefore prejudice the assessee. The argument is valid in principle. As afore-noted, lack of inquiry is an indicator of non-application of mind, vitiating the order. We may further clarify that inquiry is in fact only the beginning of the verification process, and is to be followed by due examination and issue of finding/s based on materials and explanations furnished, i.e., subject the return to due process. The matter is principally factual, and no hard and fast rule/s, by the very nature of the process, laid down, even as we observe the assessment order as *sub silentio* qua each of the aspects, germane to the assessee's claim, emphasized by the Id. Pr. CIT.

4.4 The issue before us, thus, is if, as claimed, it is indeed so, i.e., there has been due examination, i.e., on facts; there being no doubt, nor indeed disputed before us, that each of the issues raised by the Id. Pr. CIT in his order is valid and germane to the deduction u/s. 54B of the Act. The emphasis of Shri Padmanathan, the learned counsel for the assessee, was therefore to show that the relevant enquiry had indeed been made by the AO. However, he could not show us any enquiry with regard to the first two aspects, nor, consequently, any reply by the assessee thereto, much less any finding by the AO in its respect, only which would exhibit his application of mind in the matter. In view thereof, we may not travel further in the matter inasmuch as the impugned order gets validated on this basis alone. So, however, for the sake of completeness of our order; the matter having been heard at length, we may proceed further.

4.5 Perusal of the revision order reveals the following aspects of assessment:

(a) True, the payment of Rs.52 lakhs comprising a part of the purchase consideration of Rs.691.50 lakhs, stands made on 17/10/2018. The question, however, would be, the satisfaction of the condition of s. 54B(2), to which exemption of capital gain u/s. 54B(1) is subject, and *qua* which there is no finding by the AO. In fact, the issue of satisfaction of the condition of s. 54B(2) would extend to the entire sale consideration of rs. 9 cr.

(b) There is then the question of the purchase of this land being complete, in view of it being per an agreement to sell, which has to translate into an agreement of sale/sale deed. This becomes relevant in view of the changed position of law by the enactment of Registration and Other Related Laws (Amendment) Act, 2001, with simultaneous and consequential amendments in Transfer of Property Act (s. 53A); Indian Registration Act, 1908 (ss. 17 & 49), even as clarified in *CIT vs. Balbir Singh Maini* [2017] 398 ITR 531 (SC). That apart, there is nothing, other than a bald claim, of the assessee being in possession and enjoyment of the property within the prescribed period.

(c) The lands purchased being not fit for agricultural purpose, *qua* which there has been no enquiry nor, consequently, any finding of the same being used for agricultural purposes.

[Here, we may though hasten to add that the law provides for the land purchased for being used for agricultural purposes, and it could well be that due to certain accentuating factors, it becomes not feasible, even as explained by the assessee per its statement of facts before us. The same, if anything, again confirms absence of enquiry inasmuch as this explanation ought to have been, on being subject to verification and consequent enquiry, before the AO, *and not the revisionary authority or the appellate authority in appeal against his order.*]

5.1 Apart from a clear absence of pertinent enquiry into the several specific aspects of the matter, the assessment is not per a speaking order, a *sine qua non* for a judicial order. We, accordingly, find the impugned order as valid in principle. We are, though, not in agreement with the Id. Pr. CIT, where he expresses an apprehension as to the fitness of the land sold for agricultural purposes. The only aspect relevant, even as pointed out by him, is if it was indeed put to use for agricultural purposes in the two-year period prior to sale (s. 54B(1)). The requirement being stricter than of the subject land being agricultural, and which would require being positively satisfied, subsumes the requirement of the land being fit for agriculture. The other infirmity we observe in the impugned order is that it is not proper for the Id. Pr. CIT to have ‘held’ that the assessee is not eligible for a claim u/s. 54B of the Act, followed by direction for a *de novo* examination and adjudication in accordance with law per a speaking order. This is dichotomous. Accordingly, the first sentence in para 7 of his order the words ‘is not eligible’ be read as ‘may not be eligible’. The material gathered by the Revenue may though; rather, ought to be, put across to the assessee, who is to establish his claims, leading evidence (*Asha George v. ITO* [2013] 351 ITR 123 (Ker)). The ensuing assessment would accordingly be sustainable only on the basis of finding/s of fact, i.e., as to whether the facts admit of, or not, a claim u/s. 54B. We may also clarify that we may not be construed as having expressed any opinion in the matter, except that the AO’s enquiry is seriously wanting, and there had thus been no proper verification and examination of the assessee’s claim by him, finding each of the several objections as highlighting the

various aspects of the matter which ought to have been, but were not, examined by the AO, who shall though make an assessment afresh, uninfluenced by any finding/s by the Id. Pr. CIT, inasmuch as it is a *de novo* assessment.

5.2 As regards the stay application, the same is invalid inasmuch as the impugned order does not by itself result in any demand against the assessee. The same is accordingly dismissed as not maintainable.

5.3 We decide accordingly

6. In the result, the assessee's appeal is partly allowed on the above terms, and his SA dismissed.

*Order pronounced on April 30, 2024 under Rule 34 of The Income Tax (Appellate Tribunal) Rules, 1963*

Sd/-  
(Kavitha Rajagopal)  
Judicial Member

Sd/-  
(Sanjay Arora)  
Accountant Member

Cochin, Dated: April 30, 2024  
n.p.

Copy to:

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

By Order

Assistant Registrar  
ITAT, Cochin