

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

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

**ITA No. 252/Coch/2023
& SA No. 144/Coch/2023**
(Assessment Year: 2017-18)

Sini Noushad Poovathumkiadavil House Kara Post, Peethamaballur Kathiyalam, Thrissur 608671 [PAN: EMRPS6227J]	vs.	The Income Tax Officer Ward - 1(3), Thrissur
(Appellant)		(Respondent)

Appellant by:	Shri Padmanathan K.V., Advocate
Respondent by:	Smt. J.M. Jamuna Devi, Sr. D.R.

Date of Hearing:	06.03.2024
Date of Pronouncement:	28.05.2024

ORDER

Per: Sanjay Arora, AM

This is an Appeal by the Assessee directed against the dismissal of her appeal contesting her assessment under section 144 of the Income Tax Act, 1961 (the Act) dated 27.12.2019 for Assessment Year (AY) 2017-18 by the Commissioner of Income Tax (Appeals), Income Tax Department [CIT(A)], vide his order dated 15.02.2023. The assessee has *qua* the instant appeal also filed a stay application.

2. The brief facts of the case are that the assessee, who did not return any income for the relevant year, did not comply with the notice u/s. 142(1) of the Act dated 23.03.2018, calling for the said return. The assessment was accordingly completed by the Assessing Officer (AO) computing the Long Term Capital Gain (LTCG) on sale of her residential property by the assessee during the year for Rs.42 lakhs, at Rs. 39.11 lakhs. The assessee, in first appeal, submitted that she had in fact manually

filed the return on 24.12.2019, declaring LTCG on sale of the said property at (-) Rs. 32,795, which was not taken cognizance of by the AO in finalizing her impugned assessment. This did not find favour with the Id. CIT(A) as the return filed on 24.12.2019 was not a valid return. No evidence toward construction of a residential house, subsequent to the purchase of land in 2008, deduction for which stood allowed by the AO in computing the LTCG, was furnished either before him or before the assessing authority toward cost of improvement being claimed. Aggrieved, the assessee is in second appeal before us.

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

3.1 The facts of the case, as narrated above, are not in dispute. The assessee's only claim before us, through her learned counsel, was for a set aside of the assessment, restoring it back to the AO for factoring in the cost of improvement inasmuch as the assessee had built a super superstructure on the said land during f.y. 2014-15 at a cost of Rs. 38 lakhs, and which, on indexation, at Rs.41.75 lakhs, comprises the bulk of the total cost of Rs. 42.33 lakhs, The Revenue has restricted the same on the ground that no evidence toward construction stands adduced by the assessee at any stage.

3.2 We find dereliction writ large in the assessee's conduct. Failing to file a return either u/s. 139(1) or belatedly u/s. 139(4), she did not file one even in response to the notice u/s. 142(1) of the Act, constraining the AO to take recourse to a best judgment assessment u/s. 144 of the Act. The filing of the return on 24.12.2019, i.e., at the fag end of the proceedings, and after the hearing had been closed, and which could not be validly filed in law, is both misleading and mischievous. Shri Padmanathan, the learned counsel for the assessee, on being enquired by the Bench, could not explain as to if the AO had been, on filing the return on 24.12.2019 at the receipt counter, been informed thereof. This is as there is no reference thereto in his order. That is, neither was it brought to the notice of the AO nor accompanied by any evidence. *What value, then, one may ask, the said filing, except to mislead?* The AO had in fact

by then already proceeded as per the directions dated 18.12.2019 from the Addl. Commissioner u/s. 144A of the Act, issuing notice on 19.12.2019. That is, he could, given the time available, neither verify nor act on it, with a view to enable an assessment with reference to the obtaining facts, upon determining the same. The status of the return in law, is, clearly, a *non est* return.

3.3 Continuing further, no evidence was also filed before the first appellate authority, making out a case of admission thereof at the first appellate stage, resulting in dismissal of her appeal by the Id. CIT(A). *How, pray, could that be faulted with?* Before us, again, the assessee has not made out any case for remission by seeking admission of additional evidences. That is, commits the same ‘mistake’ that she has before the Revenue authorities. The burden to prove one’s return, and the claims preferred thereby, or even otherwise, is on the assessee, who only is in the intimate know of its affairs and in a position to substantiate the same. The assessee’s plea is without merit, and her conduct one of clear disregard of her statutory obligations.

3.4 Be that as it may, we yet consider it fit and proper that the assessment is restored back to the file of the AO for consideration of the aspect of LTCG afresh. The AO was well aware that what had been purchased by the assessee in 2008 was land, and what has been sold during the relevant previous year, resulting in capital gain (loss) for the relevant year, is a house property. This is apparent from a reading of para 2 of his order, which also bears reference to the sale deed dated 16.08.2016. It was therefore incumbent on the AO to have estimated the cost of construction, as he did of the cost of land at Rs. 1.50 lakhs (as against the actual cost of Rs.0.30 lakhs), and allow deduction in its respect in computing the capital gain. Once the assessee is non-cooperative, as in the instant case, the law enjoins, for an assessment u/s. 144 of the Act, the AO to gather evidences and base the assessment thereon, which the AO has failed to. His assessment is thus manifestly unjust and, accordingly, cannot be approved of. This patent flaw in the assessment has not been addressed at the first

appellate stage and, in fact, allowed to obtain. It was incumbent on the ld. CIT(A) to seek to remove the deficiency in the assessment order (*Kapurchand Shrimal v. CIT* [1981] 131 ITR 451 (SC)). His order is, thus, again seriously wanting from the standpoint of s. 250(6) of the Act and, further, as elucidated by the Hon'ble Courts.

3.5 Under the circumstances, despite the assessee's poor and depreciable conduct, the proceedings, setting aside the impugned order, are restored to the file of the AO to recompute the capital gain, if any, arising on the sale of the assessee's subject property during the relevant year. Needless to add, the assessee shall be allowed a reasonable opportunity to substantiate and prove her claims. The AO may seek any further evidence deemed fit and proper, and cause any verification in the matter as he deems fit and proper toward the cost of land and construction, including as to the time of investment, as he deems fit and proper for a proper assessment. Non-cooperation by the assessee shall entitle him to draw adverse inference/s as permissible under law. He shall decide in accordance with law per a speaking order, issuing definite findings of fact. There is no order as to cost. As we have decided the appeal, the assessee's corresponding stay application is rendered infructuous.

3.6 We decide accordingly.

4. In the result, the assessee's appeal is allowed for statistical purposes.

Order pronounced on May 28, 2024 under Rule 34 of The Income Tax (Appellate Tribunal) Rules, 1963

Sd/-
(Kavitha Rajagopal)
Judicial Member

Sd/-
(Sanjay Arora)
Accountant Member

Cochin, Dated: May 28, 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