आयकर अपीलीय अधिकरण, 'बी' न्यायपीठ,चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH, CHENNAI

श्री महावीर सिंह, उपाध्यक्ष एवं श्री एस.आर. रघुनाथा, लेखा सदस्य के समक्ष

BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENTAND SHRI S.R. RAGHUNATHA, ACCOUNTANT MEMBER

आयकर अपील सं./**ITA No.: 582/CHNY/2024**
निर्धारण वर्ष/Assessment Year: 2007-08

Dr. P. Ravichandran, No.3, Second Link Street, Raghava Reddy Colony, Jaffarkhanpet, Chennai – 600 083. **PAN: AAHPR 0455M**	Vs.	**The Deputy Commissioner of Income Tax,** Central Circle – 1(3), Chennai.
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellant by	:	Shri G. Baskar, Advocate Shri I. Dinesh, Advocate
प्रत्यर्थी की ओर से/Respondent by	:	Shri N. Sanjay Gandhi, JCIT

सुनवाई की तारीख/Date of Hearing	:	11.06.2024
घोषणा की तारीख/Date of Pronouncement	:	14.06.2024

आदेश /**O R D E R**

PER MAHAVIR SINGH, VICE PRESIDENT:

This appeal by the assessee is arising out of the order of the Commissioner of Income-Tax (Appeals)-18, Chennai, in ITA No.106/2011-12/CIT(A)-18 dated 12.02.2024. The assessment was framed by the Joint Commissioner of Income Tax [OSD], Central Circle IV(3), Chennai for the assessment year 2007-08 u/s.143(3)

r.w.s.148 of the Income Tax Act, 1961 (hereinafter the 'Act') vide order dated 26.12.2011.

2. The first issue in this appeal of assessee is as regards to the order of assumption of jurisdiction by the AO for reopening of assessment u/s.147 of the Act and confirmed by the CIT(A). For this, assessee has raised the following grounds:-

> *1.2 The CIT (Appeals) erred in not following the directions of the Hon'ble Income Tax Appellate Tribunal and failed to verify if the AO had valid material to reopen assessment.*
> *1.3 The CIT (Appeals) erred in stating that there was no requirement for any fresh material to reopen an assessment if notice was issued within 4 years of assessment, without noticing that AO cannot review his own decision.*
> *1.4 The CIT (Appeals) failed to note that the surplus arising out of sale of land were already disclosed in the original return of income.*
> *1.5 The CIT (Appeals) failed to note that the issue relating to reopening was subject matter of another appeal and hence could not be raised in this appeal.*
> *1.6 The CIT (Appeals) erred in stating that the Appellant did not furnish the required particulars, when the same were produced before the AO itself.*

3. Briefly stated facts are that the assessee is a doctor by profession. A search u/s.132 of the Act was conducted on the business and residential premises of the assessee on 12.10.2007. Consequent to the search, assessment u/s.153A r.w.s. 143(3) of the Act was passed on 24.12.2009. The assessment was completed by determining total income at Rs.4,93,60,000/-. The assessee

preferred appeal against this assessment and CIT(A) vide order dated 23.09.2011, based on remand report of the AO partly-allowed the appeal of assessee. In the mean time, the assessment was reopened u/s.147 r.w.s. 148 of the Act by issuing notice u/s.148 of the Act dated 13.10.2010 on the reason that the assessee failed to disclose short term capital gain arising out of sale of property admeasuring 10.5 acres at Janakipuram, Maduranthakam. The reassessment order was passed vide order dated 26.12.2011 by making addition on sale of agricultural land by assessee treating the same as business transaction, adding a sum of Rs.2,23,90,000/-. Aggrieved against this assessment order, assessee preferred appeal before CIT(A). The assessee before CIT(A) challenged the reopening of assessment and CIT(A) in ITA No.106/11-12 dated 10.08.2012 quashed the reopening by observing in paras 7 to 9 as under:-

> *"7. I have considered the arguments advanced and the facts of the case. The assessment for A.Y 2007-08 was completed u/s 153A on 24-12-2009 determining the total income at 4,93,60,000/-. The case was re-opened on 13-10-2010 by issue of notice u/s 148. A return of income was filed on 5-9-2011 admitting an income of 14,90,055/-. The Assessing Officer had re-opened the assessment for the appellant's failure to disclose the capital gains in respect of property at Janakipuram,Madurapthakam. The appellant had objected to this stating that the amount received on sale of the land concerned was utilized for purchase of agricultural lands and exemption u/s 54B had been claimed The land was sold only because it was not fit for bio research, and because of the presence of endosulfan and such pesticides.*

> *8. The explanation offered was not accepted by the Assessing Officer as according to her, the properties were purchased on power of attorney, were sold within a short period and profits were earned. She also relied upon the current account of the appellant wherein the appellant in the land account had treated the land as stock. Land can be considered as stock only when the business is in real estate. Therefore, she proceeded to add 2,23,90,000/- as business income, to the income assessed as per order dated 5-12-201 1.*
>
> *9. An assessment can be re-opened when there is concealment of income. When an income has been offered, and a particular view has been taken by the Assessing Officer, on the same transaction/ income offered based on change of view the assessment cannot be reopened, which happens to be the situation in this case. In this case, after a remand report was called for, the Assessing Officer had arrived at an income of 24, 15,247/- which she refers to in her order as assessed income as per order dated 5-12-2011. Based on this remand report, the appeal was disposed off holding the income determined by the Assessing Officer for each year as the income for that particular year. The appellant had not filed further appeal. Therefore the issue had come to a finality. Under the circumstances, re-examining the same material available, arriving at a different view and determining a different income is not Correct, when during appellate proceedings based on the remand report incomes have been determined. The important fact here is that there is no new material on record to justify re-opening."*

3.1 Aggrieved, Revenue took the matter to Tribunal and Tribunal in ITA No.1850/Mds/2012 order dated 18.04.2013 remanded the matter back to the file of CIT(A) to decide the issue afresh as regards to assumption of jurisdiction by the AO u/s.147 of the Act as well as on merits by observing as under:-

> *"It is clear from the above that the methodology and procedure for a search assessment is much graver and serious, than in a regular assessment. The duty of care i.e. to be exercised by the Assessing Officer when completing an assessment under section 153A is substantially higher than in the case of a regular assessment. Application of mind has to be vivid and clear in a search assessment. Probability of missing out a transaction and result*

thereof, if it was already available on record, would generally be negligible in a search assessment. Therefore, the 10 ITA. 1850 /Mds/12 only question that is to be answered is whether information regarding purchase and sale of property was available with the Assessing Officer at the time of original assessment or not. No doubt break-up of the investment in property made by the assessee has been narrated by the Assessing Officer in the original assessment order. But he failed to probe further or find out whether any surplus arose to the assessee on sale of the properties. Assessment order does not show that the sale of the properties had come to his attention. As pointed out by the Ld. D.R, remand report called for by the CIT(A), in assessee's appeal against the assessment under section 153A was not at all there at the point of time, when proceedings under section 148 were initiated. CIT(A) had failed to consider whether the reasons given by the Assessing Officer for reopening the assessment was on account of any new or tangible material coming to the possession of the Assessing Officer after the completion of the original assessment proceedings. CIT(A) has also not verified whether any queries in this regard was made by the Assessing Officer during the course of original assessment proceedings and how the assessee had shown surplus arising out of the sale in its original return. CIT(A) had invalidated the reassessment without considering these crucial aspects. We are therefore, of the opinion that the matter requires fresh visit by the CIT(A). We set aside the order of the CIT(A) and remit the appeal back to his file for consideration afresh in accordance with law."

3.2 In consequence to the Tribunal's order, the CIT(A) confirmed the action of the AO and uphold the reopening vide para 3.13 as under:-

3.13 In the light of the above, I hold that the reopening of assessment in this case is valid for the following reasons:
i. The assessee did not furnish the details of purchase/ sale of properties related to the impugned transactions fully and truly.
ii. The assessing officer with the available details has only estimated the professional receipts and determined the total income.
iii. In the absence of full details during the assessment u/s 153A stage, there was no occasion for the AO to consider the issue related to gainsf sale of land. Therefore, there is no question of any change of opinion as no opinion was formed during the l53A assessment on the impugned issue.

iv. The notice u/s 148 was issued within 4 years of assessment year and therefore, there was no requirement for any fresh material to reopen the assessment.
v. The issue of assessment of gains from sale of land was neither considered in the assessment made u/s 153A and was not part of the appeal proceeding before CIT(A). Therefore, there is no question of any change of opinion or a case of subject matter of appeal.
vi. In the remand proceeding, the AO did not raise the issue and the CIT(A) in the earlier proceeding did not suo motu taken up the issue. Hence, it is not the case of matter decided in appeal.
vii. The reopening is covered under Explanation 2(c) to section 147 of the Income-tax Act, 1961.
viii. The decision in the Delhi High Court (affirmed by the Hon'ble Supreme Court) in the case of Kelvinator India Ltd (320 1TR 561) is not applicable to the facts of the case, as it is not a case where all the materials were already on record. It is clear from the submissions of the assessee that he had not fully furnished all the details, rather he furnished few details only and therefore, it is not the case of non-application of mind by the AO.
ix. Though some more details were furnished by the Assessee to the AO during remand proceedings, they were only for the purpose of remand report called for by the CIT(A) with specific directions and the AO could not travel beyond the directions of the CIT(A). Moreover, the reopening was done prior to calling for the remand report by the CIT(A) which fact has been admitted by the assessee himself.

Aggrieved, now assessee is in appeal before the Tribunal.

4. First of all, the ld.counsel for the assessee took us through the assessment order and stated the facts that the assessee has purchased property admeasuring 10.5 acres situated at S.No.56/1 and 58/1, located at Janakipuram, Maduranthakam which was purchased for a sum of Rs.52,00,000/- on 23.12.2005. This property was sold in 2006 for a sum of Rs.2,05,00,000/-. The

ld.counsel stated that the above land was sold and sale amount was utilized for purchase of another agricultural land and therefore claimed that the gain is exempt from tax u/s.54B of the Act and alternatively, the assessee claimed exemption u/s.2(14) of the Act, the land being agricultural land. The ld.counsel for the assessee stated that the original assessment was completed by the AO wherein the AO vide questionnaire dated 05.08.2009 has raised the following question No.2:-

> *"2. Furnish the details of investments in Immovable properties such as, date of purchase, docu.No., Sellers name and address, in whose name purchased, cost of purchase and sources thereof."*

4.1 The ld.counsel for the assessee also drew our attention to the remand report asked by the CIT(A) and the remand report submitted by the AO dated 21.02.2011 has already considered the details of property purchased and computed the income including the property. The relevant computation reads as under:-

Property Purchase details:

1.	*House at 29 and 30, Suba Shree Nagar Extn., Mugalivakkam, Chennai. Used for residence ALV taken @*		*Nil*
Business			
Net income filed as per Revised return			*Rs.4,95,516*
Add:	*Agricultural income*	*Rs.932000*	
	Jewellery purchased	*Rs.500000*	
	Property purchased	*Rs.1,96,83,659**	*Rs.2,11,15,659*
			Rs.2,16,11,175

Less:	*Amount received on sale of property used for above investment*	*(-)*	*Rs.2,23,90,000*
			Rs.7,78,825
Add:	*Cash in hand*		*Rs.2,01,010*
	Cash at Bank		*Rs.7,99,646*
	Advance for machine		*Rs.5,00,000*
	Handi craft materials		*Rs.1,42,081*
	Gold coin		*Rs.22,68,880*
			Rs.31,32,792
Less:	*Liabilities*		
	Ind Vysya Bank	*Rs.2,00,860*	
	Karur Vysaya Bank	*Rs.56,749*	
	Std. Chartered Bank	*Rs.4,59,936*	*Rs.7,17,545*
	Total income :		***Rs.24,15,247***

There are other unsecured liabilities claimed by the assessee during this year, the same has not been proved by assessee and hence the same is not allowable.

** No. of properties as per list enclosed (14 properties)*

4.2 The ld.counsel for the assessee in view of the above stated that the amount received on sale of above land of Rs.2,23,90,000/- was invested in purchase of agricultural land for a sum of Rs.1,96,83,659/- as is evident from the computation submitted by the AO before CIT(A) during remand proceedings. The ld.counsel for the assessee stated that the CIT(A) has accepted this remand report and even the AO has submitted the same remand report except the fact that the assessee has disclosed all material facts relating to this transaction before the AO and CIT(A) during original assessment proceedings. The ld.counsel for the assessee also stated that even in the return of income, assessee has disclosed this transaction in

the assessee's current account filed along with the return of income. The ld.counsel for the assessee drew our attention to page 7 of assessee's paper-book wherein complete details were filed before the AO in the return of income, which can be verified by the Revenue. In view of the above, the ld.counsel for the assessee took us through the reasons recorded for reopening of assessment which reads as under:-

> *"The assessee has failed to disclose the capital gains (short term) in respect of property at S.No.56/1 and 58/1, Janakipuram, Maduranthakam – 10.5 acres. Purchased on 23.12.2005 for Rs.52,00,000. Sold on April 2006 for Rs.2,05,00,000. There is Gain of Rs.1,53,00,000."*

4.3 The ld.counsel also stated that once the AO has formed an opinion and that also from the search material, as search was conducted on the professional as well as residential premises of the assessee on 12.10.2007 u/s.132 of the Act and consequently assessment was framed u/s.153A r.w.s. 143(3) of the Act vide order dated 24.12.2009 after considering seized material including the transactions of sale and purchase of land relating to sale of property of 10.5 acres of land at Janakipuram, Maduranthakam. The ld.counsel argued that there is no fresh or tangible material for reopening of assessment and this issue is squarely covered by the decision of Hon'ble Supreme Court in the case of CIT Vs Kelvinator of India Ltd., reported in (2010) 320 ITR 561 (SC).

5. On the other hand, the ld.Senior DR argued that the assessee has shown the land as a part of current account and once the assessee itself treated the transaction as part of stock-in-trade, it will not come under the distinction of capital asset. He also stated that the information furnished by assessee during remand proceedings and AO in remand proceedings remanded by CIT(A) has shown the gain from land both as short term capital gain and profit from sale of land but now, was taken diametrically opposite stand during this proceeding. The ld.counsel for the assessee stated that the land was purchased for the purpose of profession of the assessee and for that purpose, he has treated the purchase of land as part of stock-in-trade and therefore it cannot be claimed as capital asset but only stated to have stock-in-trade and assessee cannot compute the gain under the head 'capital gains' and claim exemption/deduction u/s.54B of the Act. The ld.Senior DR also pointed out to the finding of CIT(A) at page 37, which reads as under:-

> *" The purchase and sale clearly indicate the property purchased for around Rs.4 lakhs had appreciated by nearly 10 times within a period of about a year. This kind of appreciation is incomprehensible especially when it is claimed as agricultural land. As mentioned earlier, the assessee has aggregated and facilitated the transfer to Shri D Arulanand, MD of Rich Marketing P Ltd. One set of property sold by the assessee to one Shri Ranganathan is again shown transferred to Shri D Arulanand. Hence, it is clearly established that the purchase and sale of land was carried out by the assessee as part of business/profession."*

In view of the above finding of CIT(A), the ld. Senior DR stated that once the above land was part of 'stock-in-trade' of the assessee and by nature of activities of the assessee, the purchase and sale of land was carried out by assessee as part of business and hence, the same is to be treated as gain arising out of real estate business and he, relied on the assessment order and the order of CIT(A).

6. We have heard rival contentions and gone through the facts and circumstances of the assessee. We noted that the assessee subjected to search u/s.132 of the Act and consequent to search, assessment was framed u/s.153A r.w.s. 143(3) of the Act. This matter was carried before CIT(A) on various additions and CIT(A) vide order dated 23.09.2011 partly allowed the appeal of assessee based on the remand report of the AO. Admittedly, the assessee in its return of income had disclosed this transaction of purchase and sale of land filed in response to notice u/s.153A of the Act. Even during remand proceedings of the AO dated 21.12.2011, the assessee has given complete details and AO in his remand report has mentioned the details of property purchased and sold as agricultural land, which is evident from the above details referred in above para 4.1. We, after going through the facts of the case are of the view that the assessee had disclosed this transaction in the

return of income filed originally in response to notice u/s.153A of the Act and also disclosed this transaction before the AO during the course of assessment framed u/s.153A r.w.s. 143(3) of the Act, in response to query raised by AO and the relevant query raised vide letter dated 05.08.2009 is reproduced in above para 4. We noted that the Hon'ble Supreme Court on the issue of reopening of assessment in the case of Kelvinator of India Ltd., *supra,* observed as under:-

> *"On going through the changes, quoted above, made to Section 147 of the Act, we find that, prior to Direct Tax Laws (Amendment) Act, 1987, re-opening could be done under above two conditions and fulfillment of the said conditions alone conferred jurisdiction on the Assessing Officer to make a back assessment, but in section 147 of the Act [with effect from 1st April, 1989], they are given a go-by and only one condition has remained, viz., that where the Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to re- open the assessment. Therefore, post-1st April, 1989, power to re-open is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, Section 147 would give arbitrary powers to the Assessing Officer to re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to re-open. We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to re-assess. But re-assessment has to be based on fulfillment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, Assessing Officer has power to re-open, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to Section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in Section 147 of the Act. However, on receipt of representations from the Companies against omission of the words "reason to believe", Parliament re-introduced*

the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the Assessing Officer. We quote hereinbelow the relevant portion of Circular No.549 dated 31st October, 1989, which reads as follows:

> "7.2 Amendment made by the Amending Act, 1989, to reintroduce the expression `reason to believe' in Section 147.--A number of representations were received against the omission of the words `reason to believe' from Section 147 and their substitution by the `opinion' of the Assessing Officer. It was pointed out that the meaning of the expression, `reason to believe' had been explained in a number of court rulings in the past and was well settled and its omission from section 147 would give arbitrary powers to the Assessing Officer to reopen past assessments on mere change of opinion. To allay these fears, the Amending Act, 1989, has again amended section 147 to reintroduce the expression `has reason to believe' in place of the words `for reasons to be recorded by him in writing, is of the opinion'. Other provisions of the new section 147, however, remain the same."

For the afore-stated reasons, we see no merit in these civil appeals filed by the Department, hence, dismissed with no order as to costs."

We noted that the Hon'ble Supreme Court in the case of Kelvinator of India Ltd., *supra,* has categorically considered that unless and until there is fresh or tangible material comes to the notice of the AO after assessment, reopening is not valid. In the present case before us also, the assessee in his return of income and subsequently query raised by AO and thereafter remand report during original proceedings of CIT(A) has given complete details and even in reasons recorded by AO, the AO has nowhere stated that there is escapement of income or land sold is not agricultural land. In the absence of these factual aspects, we are of the view that reopening is bad in law and hence, quashed.

7. As regards to merits of the case, since we have adjudicated the jurisdictional issue in favour of assessee and quashed the reopening, we need not go into the merits of the case, which has become academic.

8. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 14th June, 2024 at Chennai.

Sd/-
(एस. आर. रघुनाथा)
(S.R. RAGHUNATHA)
लेखा सदस्य/ACCOUNTANT MEMBER

Sd/-
(महावीर सिंह)
(MAHAVIR SINGH)
उपाध्यक्ष /VICE PRESIDENT

चेन्नई/Chennai,
दिनांक/Dated, the 14th June, 2024

RSR

आदेश की प्रतिलिपि अग्रेषित/Copy to:
1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त /CIT, Chennai
4. विभागीय प्रतिनिधि/DR
5. गार्ड फाईल/GF.