

आयकर अपीलीय अधिकरण, इन्दौर न्यायपीठ, इन्दौर
IN THE INCOME TAX APPELLATE TRIBUNAL,
INDORE BENCH, INDORE

BEFORE SHRI C.M. GARG, JUDICIAL MEMBER
AND SHRI O.P. MEENA, ACCOUNTANT MEMBER

आ.अ.सं./I.T.A. No. 519/Ind/2013

निर्धारण वर्ष /Assessment Year: 2009-10

Madhu Ajmera

Indore

PAN – ABWPA – 1601 N

:: अपीलार्थी /Appellant

Vs

Addl. Commissioner of Income Tax

Range 2, Indore

:: प्रत्यर्थी /Respondent

अ.सं./I.T.A. No. 518/Ind/2013

निर्धारण वर्ष /Assessment Year: 2009-10

Late Pradeep Ajmera

Through L/H Smt. Madhu Ajmera

Indore

PAN – ABWPA – 1601 N

:: अपीलार्थी /Appellant

Vs

Asstt. Commissioner of Income Tax

1(2), Indore

:: प्रत्यर्थी /Respondent

निर्धारिती की ओर से/Assessee by	Shri Prakash Jain
राजस्व की ओर से/Revenue by	Shri Mohd. Javed – DR
सुनवाई की तारीख Date of hearing	28.3.2017
उद्घोषणा की तारीख Date of pronouncement	29.3.2017

आदेश / O R D E R

PER BENCH

The above-captioned appeals have been filed by the assessee-appellants against different orders of the learned CIT(A)-I, Indore, both dated 25.3.2013 in First Appeal Nos. IT-768/11-12/38 and IT-768/11-12/39 for the assessment year 2009-10.

2. In both these appeals, the common grounds of appeal are as under :-

- “1. *That impugned order passed by the ld. Learned CIT(A) is bad in law as well as on the facts. It is based on incorrect interpretation of law and the facts have also been incorrectly construed.*
2. *That on the facts and in the circumstances of the case and in law, the ld. CIT(A) erred in confirming the action of the ld. A.O. in assessing the long term capital gain of Rs. 48,60,503/- on sale of agriculture land situated in rural area and specified in section 2(14)(iii) of the Income Tax Act without appreciating the facts of the case and submission made before him.*

3. *That on the facts and in the circumstances of the case and in law, the ld. A.O. and CIT(A) erred in not relying on the certificate of Gram Panchayat and Patwari filed during the course of assessment proceedings inter alia stating that land sold by the appellant is more than 8 kolometers from the Municipal Limited.*
 4. *That on the facts and in the circumstances of the case and in law, the ld. CIT(A) erred in not accepting the arguments of the appellant that the SDO was examined by the ld. A.O. behind the back of the appellant without allowing a reasonable opportunity to rebut his statement.*
 5. *That on the facts and in the circumstances of the case and in law, the ld. A.O. erred in not putting required question before the SDO which are necessary for deciding the issue viz. how the distance is measured i.e. by motor/pagdandi or airly and how at first occasion he measured the distance at 3 kilometers and later on it became 6.8 kilometers etc.”*
3. Briefly stated, the facts of the case are that the assessee is 50% shareholder of land bearing survey no. 906/13 and 906/17 in

village Kailod Karta which was sold for a sum of Rs.1 crore during the year under consideration. The assessee claimed 50% share of the sale consideration of the said land as exempt being agricultural land. However, the Assessing Officer did not allow the exemption and assessed the income under the head 'long term capital gain' after allowing indexed cost of acquisition at Rs.1,29,966/-. The Assessing Officer held that the land under consideration was not agricultural land within the meaning of section 2(14)(iii) of the Act. In this connection, the Assessing Officer required the SDO, Rural, Indore, to submit his report as regards the distance between the land, in question, and the municipal limits of Indore. The SDO vide letter dated 17.10.2011 informed that the land under consideration was within 3 kms of municipal limits of Indore. However, the assessee produced copies of certificate given by Patwari, Halka No. 12, village Kailod Kartal stating that the said land was located at more than 8 kms away from municipal limits of Indore. The assessee also produced a letter from Village Sarpanch of village Kailod Kartal to the effect that the land fell 8 kms away from municipal limits. The Assessing Officer treated the certificate of the SDO as correct. Accordingly, the surplus arising on sale of the land

was brought to tax as capital gains by the Assessing Officer. On appeal, the learned CIT(A) confirmed the action of the Assessing Officer against which the assessee-appellants are in appeal before the Tribunal.

4. At the very outset of the hearing, the learned assessee's representative (AR) as well as the learned Senior Departmental Representative (DR) placed their concurrence that ground nos. 4 and 5 of the assessee's appeals may kindly be heard firstly.

5. Before us, the learned AR submitted that the learned CIT(A) has grossly erred in not accepting the contention of the appellant that the SDO was examined by the Assessing Officer at the back of the appellant without allowing the assessee a reasonable opportunity to rebut his statement by way of cross-examination and by producing other supportive documentary evidence in favour of the assessee. The learned AR further contended that the Assessing Officer was not correct in not putting the required question before the SDO which was relevant and necessary for deciding the issue viz. how the distance of the land sold was measured from the boundary of Nagar Nigam, Indore. The learned AR vehemently submitted that the authorities below ignored this fact that on the

first occasion the SDO issued letter stating that the land is 3 kms away from the boundary of Nagar Nigam, Indore, and secondly during the statements recorded by the Assessing Officer, he stated that the distance is 6.8 kms. Therefore, his statement cannot be relied upon for making the disallowance. The learned AR further pointed out that during the assessment proceedings when the assessee was informed about the statement of the SDO then immediately the assessee placed his objection to the statements which were not properly adjudicated by the Assessing Officer and the opportunity of cross-examining the SDO was also not given to the appellant.

6. Replying to the above, the learned DR supporting the action of the authorities below submitted that the assessee never asked for cross-examination of the SDO and his written objections to the statement and the evidence filed by the SDO were dismissed by the Assessing Officer after due consideration of total facts and circumstances of the case. Therefore, there is no violation of principles of natural justice by the Assessing Officer. The learned DR strenuously contended that the assessee never asked for cross-

examination of the SDO neither before the Assessing Officer nor before the learned CIT(A). Therefore, this plea cannot be agitated at this belated stage before the Tribunal.

7. Placing rejoinder to the above submissions of the revenue, the learned AR submitted that the assessee by way of written letter dated 14.11.2011 (assessee's paper book pages 38-39) the assessee placed his detailed objections to the statement and evidence filed by the SDO and also requested the Assessing Officer to kindly confirm the fact in the light of the certificates issued by Tehsildar, Sarpanch and Patwari filed by the assessee on the assessment record but the Assessing Officer did not properly consider the objections of the assessee. The learned AR further submitted that by way of written objections to the statement of the SDO, the assessee placed his contrary stand and the Assessing Officer was duty bound to allow the assessee an opportunity of cross-examining the SDO and thus there was clear violation of principles of natural justice and, hence, the statement of the SDO along with the evidence filed by him during the statement cannot be relied upon being self-contradictory.

8. On careful consideration of the rival submissions, we are of the view that when the Assessing Officer wants to make the addition or disallowance on the basis of any evidence or statement then he is duty bound to confront the material to the assessee and after allowing due opportunity of hearing, such evidence or statement can be relied upon for making any disallowance or addition. Be that as it may, in the present case, undisputedly the Assessing Officer recorded the statement of the SDO and he also placed documentary evidence in support of his statement and the assessee also placed his objections to the admissibility and reliability of the statement of the SDO as well as the statement filed by him, but the Assessing Officer without allowing opportunity to rebut the same to the assessee, proceeded to make disallowance and consequent addition which is not a proper and justified approach. At this juncture, we may point out that during the arguments before us, the learned DR fairly submitted that the department has no objection if the assessee is allowed an opportunity to cross-examine the SDO if it is found necessary in the interest of justice. In view of the above situation, we are of the view

that the revenue authorities are empowered to inquire and verify the facts placed before them by the assessee by way of calling any evidence or recording statement of any relevant person or authority but such material cannot be used against the assessee without confronting the same to him. We are, therefore, of the considered opinion that in the present case, despite written objections dated 14.11.2011 of the assessee, the Assessing Officer, without allowing the assessee to rebut or to cross-examine the SDO, proceeded to make disallowance and consequent addition which is not a proper and justified approach and in this situation we may safely presume that the assessment order has been framed by violating the principles of natural justice and thus the same cannot be held as sustainable in law.

9. On the basis of the foregoing discussion, we reach to the conclusion that the assessee should be given an opportunity to cross-examine the SDO. Therefore, the case is restored to the file of the Assessing Officer with the direction that he shall allow the assessee to crss-examine the SDO concerned and thereafter shall adjudicate the issue afresh without being prejudiced from the

earlier assessment and the first appellate order. Needless to say that the assessee shall be given an opportunity of being heard on the issue. Accordingly, ground nos. 4 and 5 are allowed and the matter is restored to the file of the Assessing Officer with the directions as noted above.

10. Since we have restored the entire issue to the file of the Assessing Officer for fresh adjudication, therefore, ground nos. 1 to 3 have become infructuous and the same are not being adjudicated upon.

11. So far as ITA No. 518/Ind/2013 is concerned, both the parties agreed that the facts and circumstances in this case are exactly similar and identical with the facts and circumstances obtaining in the case of Smt. Madhu Ajmera (supra). Therefore, our conclusion arrived at in the case of Smt. Madhu Ajmera (supra) shall apply to this appeal also and, therefore, we restore this appeal to the Assessing Officer for fresh adjudication along with the case of Smt. Madhu Ajmera with similar directions.

12. In the result, both the appeals are allowed for statistical purposes.

The order has been pronounced in open Court on 29th March,
2017.

Sd/-
लेखा सदस्य
(O.P.Meena)
Accountant Member

sd/-
न्यायिक सदस्य
(C.M. Garg)
Judicial Member

March 29th , 2017

Dn/