आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री विजय पाल रॉव, न्यायिक सदस्य एवं श्री भागचन्दादव, लेखा सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JM & SHRI BHAGCHAND, AM

आयकर अपील सं./ITA No. 1064/JP/2016
निर्धारण वर्ष/Assessment Years : 2006-07.

Smt. Vidhya Poonia, 33, Suraj Nagar East, Civil Lines, Jaipur.	बनाम Vs.	The Income Tax Officer, Ward 2(3), Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No. AGAPP 0755 B		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/Assessee by : Shri Rajeev Sogani (C.A.)
राजस्व की ओर से/ Revenue by : Shri J.C. Kulheri (JCIT)

सुनवाई की तारीख/ Date of Hearing : 20.03.2018.
घोषणा की तारीख/ Date of Pronouncement : 21/05/2018.

आदेश/ ORDER

PER VIJAY PAL RAO, J.M.

This appeal by the assessee is directed against the order dated 28th September, 2016 of ld. CIT (A)-1, Jaipur for the assessment year 2006-07. The assessee has raised the following grounds of appeal :-

" 1(a) In the facts and circumstances of the case and in law the ld. CIT (A) has erred in confirming the validity of the action of the ld. AO in reopening the assessment u/s 147 of Income Tax Act, 1961. The action of ld. CIT (A) is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by quashing the reassessment proceedings being illegal and without any basis.

2(a) In the facts and circumstances of the case and in law the ld. CIT (A) has erred in confirming the action of the ld. AO in making the addition of Rs. 1,21,80,000/- as long term capital gain. The action of ld. CIT (A) is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by deleting the said addition of Rs. 1,21,80,000/-.

(b) In the facts and circumstances of the case and in law the ld. CIT (A) has erred in confirming the action of the ld. AO in treating the sold agriculture land as capital asset. The action of ld. CIT (A) is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by quashing the action of ld. CIT (A) in treating the non capital asset (agricultural land) as capital asset.

© In the facts and circumstances of the case and in law the ld. CIT (A) has erred in confirming the action of the ld. AO in treating the agriculture land as short term capital asset. The action of ld. CIT (A) is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by quashing the action of ld. CIT (A) in treating the agricultural land as short term capital asset.

(d) In the facts and circumstances of the case and in law the ld. CIT (A) has erred in confirming the action of the ld. AO in not allowing the exemption u/s 54B amounting to Rs. 1,11,45,700/-. The action of ld. CIT (A) is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by allowing the deduction of Rs. 1,11,45,700/- u/s 54B of the IT Act, 1961.

(e) In the facts and circumstances of the case and in law the ld. CIT (A) has erred in confirming the action of the ld. AO in not allowing the full deduction of Rs. 17,40,960/- of cost of acquisition of land. The action of ld. CIT (A) is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by allowing the deduction of Rs. 17,40,960/- of cost of acquisition of land.

(f) In the facts and circumstances of the case and in law the ld. CIT (A) has erred in rejecting the contention of the appellant that where no addition was made by the ld. AO on purchase of immovable property for which the proceedings u/s 147 of the Act were initiated no further addition can be made for other alleged escaped incomes. The action of ld. CIT (A) is illegal, unjustified, arbitrary and against the facts of the case. Relief

may please be granted by deleting the addition made by ld. AO and confirmed by CIT (A) which are illegal and contrary to established legal proposition.

3. The assessee craves her right to add, amend or alter any of the grounds on or before the hearing.

Ground No. 1 is regarding validity of reopening of the assessment under section 147 of the IT Act.

2. The assessee is an Individual and did not file her return of income for the year under consideration. The AO received AIR information regarding the investment of Rs.40,00,000/- made by the assessee in a property. Accordingly, the AO initiated the proceedings under section 148 of the Act vide notice dated 23rd March, 2013. During the course of reassessment proceedings, the assessee explained that the source of investment is the sale of existing immovable property and accordingly the AO made an addition of Rs. 1,21,80,000/- as Long Term Capital Gain. The assessee challenged the action of the AO before the ld. CIT (A) and also raised the objection against the reopening of the assessment. However, the ld. CIT (A) did not accept the contention of the assessee and upheld the validity of the reopening.

3. Before us, the ld. A/R of the assessee has submitted that the AO has reopened the assessment on the basis of AIR information regarding the purchase of immovable property by the assessee for a consideration of Rs. 40,00,000/-. Whereas the assessee has duly explained the source of said investment and further the assessee filed the return of income for the assessment year under consideration. Therefore, the reasons recorded by the AO do not explain the correct facts and the AO has proceeded to reopen the assessment without application of mind and

considering the correct facts regarding the return of income furnished by the assessee. The ld. A/R has further contended that even the approval/sanction obtained by the AO from the Additional CIT is not proper as the same was granted in a mechanical routine manner without application of mind. Thus the ld. A/R has contended that the AO has reopened the assessment with a view to verify the purchase of immovable property. Thus the AO misdirected himself in invoking the provisions of section 148 as the correct course of action would have been invoking the provisions of section 143(3) which talks about verification of the facts of return of income. Hence the ld. A/R has submitted that the reasons recorded by the AO are not sufficient to form the belief that the income assessable to tax has escaped assessment. In support of his contention he has relied upon the decision of Hon'ble Supreme Court in the case of CIT vs. S. Goyanka Lime & Chemical Ltd., 64 taxmann.com 313 (SC) as well as the decision of Hon'ble Madhya Pradesh High Court which was upheld by the Hon'ble Supreme Court in the said case of CIT vs. S. Goyanka Lime & Chemical Ltd. (supra). Thus the ld. A/R has submitted that the satisfaction of the approving authority which accorded the sanction for issuing notice under section 148 is without analyzing the facts and was given mechanically. Therefore, the same is not sustainable.

3.1. On the other hands, the ld. D/R has relied upon the order of the ld. CIT (A) and submitted that when the assessee did not file any return of income and also not disclosed either the sale transaction of the existing capital asset or the purchase transaction, therefore, when the AO has received the AIR information of purchase of

immovable property of Rs. 40,00,000/-, the same constitute a tangible material to form the belief that income assessable to tax has escaped assessment.

4. Having considered the rival submissions as well as the relevant material on record, we note that the AO reopened the assessment by recording the reasons as under :-

> *"As per the AIR information generated from the system, the assessee has purchased immovable property of Rs. 40,00,000/- during FY 2005-06 relevant for AY 2006-07.*
>
> *Since as per system no return of income has been filed for AY 2006-07, the above transaction is not verifiable. I have therefore reasons to believe that on account of not filing of return by the assessee, income chargeable to tax has escaped assessment.*
>
> *In view of above, I have reason to believe that the income to the extent of Rs. 40,00,000/- has escaped assessment within the meaning of section 147 of the I.T. Act, 1961. Therefore, notice u/s 148 is to be issued.*
>
> *Sd/-*
> *(Himanshu Tewari)*
> *Income tax Officer,*
> *Ward 2(3), Jaipur."*

Thus the AO has received the information that the assessee has purchased immovable property of Rs. 40,00,000/- during the year under consideration. Further, the AO noted that as per the system no return of income has been filed by the assessee and thus the AO proposed to reopen the assessment to assess the income of Rs. 40,00,000/- which has escaped assessment. Though the assessee has raised an issue before the ld. CIT (A) that the assessee filed return of income, however, we note that the said return of income was not filed with the AO Range-2 who is having

the jurisdiction over the assessee but the alleged return was, if any, filed with the jurisdiction of Range-5. Thus we find that the AO was having no material or information about the return of income filed by the assessee in wrong jurisdiction and, therefore, the assessee cannot take an excuse of such return of income filed in the jurisdiction of the AO other than the AO having the jurisdiction over the assessee. Further, the ld. CIT (A) has also verified this fact through the remand report called from the AO and thereafter decided this issue in para (iii) to (viii) of his order as under :-

> " (iii) I have duly considered the submission of the appellant, assessment order and the material placed on record. It appears from the copy of acknowledgement form filed by the appellant that apparently it filed its income tax return for the AY 2006-07 under consideration in the office of the Addl. CIT, Range-5, Jaipur whereas the correct jurisdiction was with the AO. In the case of B.M. Malani Vs. CIT (Supra), it was held by the Hon'ble Apex Court that a person cannot take advantage of his own wrong, may also have to be borne in mind. Therefore, the appellant cannot be allowed to take advantage of its own wrong for filing its return of income with an AO who is not having jurisdiction to assess the income of the appellant.
>
> (iv) Further, it would be appropriate to reproduce the provisions of section 124 of the Act which deals with the jurisdiction of AO as under:

"Jurisdiction of Assessing Officers.

124. (1) Where by virtue of any direction or order issued under sub-section (1) or sub-section (2) of section 120, the Assessing Officer has been vested with jurisdiction over any area, within the limits of such area, he shall have jurisdiction -

(a) in respect of any person carrying on a business or profession, if the place at which he carries on his business or profession is situate within the area, or where his business or profession is carried on in more places than one, if the principal place of his business or profession is situate within the area, and

(b) in respect of any other person residing within the area.

(2) Where a question arises under this section as to whether an Assessing Officer has jurisdiction to assess any person, the question shall be determined by the Director General or the Chief Commissioner or the Commissioner; or where the question is one relating to areas within the jurisdiction of different Directors General or Chief Commissioners or Commissioners, by the Directors General or Chief Commissioners or Commissioners concerned or, if they are not in agreement, by the Board or by such Director General or Chief Commissioner or Commissioner as the Board may, by notification in the Official Gazette, specify.

(3) No person shall be entitled to call in question the jurisdiction of an Assessing Officer—

(a) where he has made a return under sub-section (1) of section 115WD or under sub-section (1) of section 139, after the expiry of one month from the date on which he was served with a notice under sub-section (1) of section 142 or sub-section (2) of section 1 15WE or sub-

section (2) of section 143 or after the completion of the assessment, whichever is earlier.

(b) where he has made no such return, after the expiry of the time allowed by the notice under sub-section (2) of section 115WD or sub-section (1) of section 142 or under sub-section (1) of section 115WH or under section 148 for the making of the return or by the notice under the first proviso to section 115WF or under the first proviso to section 144 to show cause why the assessment should not be completed to the best of the judgment of the Assessing Officer, whichever is earlier.

(4) Subject to the provisions of sub-section (3), where an assessee calls in question the jurisdiction of an Assessing Officer, then the Assessing Officer shall, if not satisfied with the correctness of the claim, refer the matter for determination under sub-section (2) before the assessment is made.

(5) Notwithstanding anything contained in this section or in any direction or order issued under section 120, every Assessing Officer shall have all the powers conferred by or under this Act on an Assessing Officer in respect of the income accruing or arising or received within the area, if any, over which he has been vested with jurisdiction by virtue of the directions or orders issued under sub-section (1) or sub-section (2) of section 120."

(v) Thus, it is to be noted that as per the provisions of section 124(5) of the Act, the present AO had the territorial jurisdiction over the appellant. Further, as per provisions of section 124(3), the appellant can challenge the jurisdiction of the AO within one month of the earliest notice issued by the concerned AO, whereas in the instant case under consideration, the appellant, apparently, raised the jurisdiction issue for the first time on

20.02.2014 i.e. just 8 days before the passing of the assessment order under consideration and as per the provisions of section 124(3) of the Act, the appellant had lost its right to agitate the jurisdiction of the AO at that point of time.

(vi) It was the another contention of the appellant that the appellant filed its return of income for the A.Y 2005-06 in the same jurisdiction, which was duly accepted by the department. Therefore, the action of the appellant in filing the subsequent return in the same jurisdiction cannot be faulted with. **I have duly considered the acknowledgement form filed by the AR for the AY 2005-06 and it was observed that the previous year has been stated as from 01.04.2005 to 31.03.2006, AY as 2005-06 and the date for furnishing the return was stamped as 20 JUL 2005 which raises serious doubts about the genuineness of such acknowledgement form. Further, the said acknowledgement form, certainly, cannot be for the AY 2005-06 as claimed by the AR.**

(vii) It may be mentioned that in its reply dated 26.04.2013 in response to notice dated 23.03.2013 issued u/s 148 of the Act, it was stated by the AR that the return of income filed on 25.04.2006 may be treated as return filed in pursuance to notice issued u/s 148 of the Act. It is noted that in the acknowledgement form filed by the AR for the AY 2006-07, copy of sale agreement in 6 pages and copy of purchase agreement consisting of 16 pages were stated to be enclosed, however, it is pertinent to mention that the copies of the

purchase deeds and sale deeds were not furnished before the AO during the course of assessment proceedings and these were produced as additional evidence during the course of appellate proceedings. Further, the AR has not filed any processing order u/s 143(1)(a) of the Act or any other communication from the department in respect of alleged returns of income claimed to be filed in the office of Addl. Commissioner of Income Tax, Range-5, Jaipur.

(viii) Therefore, looking to the totality of facts and circumstances of the case as discussed above and since the AO had the territorial jurisdiction over the appellant, it is held that the AO has initiated proceedings u/s 147 of the Act in a valid and lawful manner. Hence, this ground of appeal is hereby rejected.

As these grounds of appeal are related to determination of Long Term Capital Gain relating to land sold by the appellant during the year under consideration, not allowing the cost of acquisition in respect of land sold and also not allowing the exemption u/s 54B of the Act on account of purchase of agriculture land as claimed to be purchased by the appellant. Hence, these are being adjudicated together."

When the return of income was not filed with the AO then the alleged return of income filed with the wrong jurisdiction cannot be considered for the purpose of deciding the validity of reopening as the AO at the time of initiation of proceedings

under section 148 has to form the belief on the basis of the material available with the AO which is sufficient for coming to the conclusion that prima facie the income assessable to tax has escaped assessment. As regards the objection against the approval of reasons for re-opening, we note that no such objection was raised before the authorities below. Further, the Addl. CIT granted the approval by considering the relevant facts as under :-

> *" Approval is granted for reopening of assessment, as the assesses mentioned above have made investments/expenditure of the amounts mentioned against their name & no return of income has been filed."*

Thus it is clear that the approval was granted by due application of mind. Hence we do not find any infirmity in the approval. Therefore, we do not find any merit or substance in the objection of the assessee against the reopening of the assessment.

Ground No. 2 is regarding the addition made by the AO under section 2(14) as Long Term Capital Gain of Rs. 1,21,80,000/-.

5. We have heard the ld. A/R as well as the ld. D/R and considered the relevant material on record. The ld. A/R of the assessee has raised the objection that the property in question is an agricultural land and, therefore, does not fall in the ambit of the term Capital asset as per the provisions of section 2(14) of the IT Act. He has submitted that the property is also situated beyond 8 KM from the Municipal limit of Jaipur and hence the sale consideration of agricultural land cannot be taxed as capital gain. In support of his contention, he has relied upon the decision of the Hon'ble Jurisdictional High Court in the case of Principal CIT vs. Shri Kheti Lal Sharma HUF dated 21st November, 2017 in DB IT Appeal No. 170/2016 and

165/2017. Thus the ld. A/R has submitted that the Hon'ble High Court has upheld the decision of this Tribunal in the case of Smt. (Dr.) Subha Tripathi vs. DCIT in ITA No. 1129/JP/2011, wherein the Tribunal has held that the distance of 8 KM from the Municipal limits has to be considered at the time of Notification dated 6th January, 1994 and not at the time of sale of the property. The ld. A/R has also filed a copy of Google map showing distance of the property in question. An alternative plea has also been taken by the ld. A/R regarding claim of deduction of Rs. 1,11,45,700/- under section 54B of the Act.

5.1. On the other hand, the ld. D/R has relied on the orders of the authorities below.

6. We have considered the rival submissions as well as the relevant material on record. The assessee raised this objection even before the AO as well as ld. CIT (A). However, the AO has obtained a report of the Tehsildar concern and held that the property in question is situated within 8 KM from the Jaipur Municipal Limits and accordingly is liable to Long Term Capital Gain. The ld. A/R of the assessee has now disputed the correctness of the said Certificate issued by the Tehsildar on the ground that the distance of the property has to be considered as on the date of Notification dated 6th January, 1994. So far as the issue of considering the distance from Municipal Limits as on the date of Notification dated 6th January, 1994, we find that this issue was considered by this Tribunal and now upheld by the Hon'ble Jurisdictional High Court in case of Principal CIT vs. Shri Kheti Lal Sharma HUF (supra). However, the question remains that whether on the date of Notification the distance of the property in question was situated within the distance of 8 KM from

the Jaipur Municipal Limits or beyond 8 KM. We further note that as per the language of section 2(14)(iii)(b) the distance has to be between the Municipal limits and the area in which the property is situated. Thus the distance is required to be considered from the Municipal limits and the area and not the particular property. Since the assessee has raised an issue which is factual in nature as to whether the area in which the property is situated within the distance of 8 KM from the Municipal limits of Jaipur or beyond it as on 6th January, 1994, therefore, the same is required to be verified at the level of the AO by conducting a proper enquiry. Accordingly having regard to the facts and circumstances, we set aside this issue to the record of the AO for consideration and deciding the same afresh in the light of above observations.

7. The other grounds raised by the assessee regarding deduction under section 54B as well as deduction of cost of acquisition are consequential in nature to the issue which has been remanded to the AO. Accordingly these issues are also stand remanded to the record of the AO to be considered and decided as per law and as per the outcome of the first issue.

8. In the result, appeal of the assessee is partly allowed for statistical purposes.

Order pronounced in the open court on 21/05/2018.

Sd/-	Sd/-
(भागचन्द)	(विजय पाल रॉव)
(BHAGCHAND)	(VIJAY PAL RAO)
लेखा सदस्य / Accountant Member	न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur
दिनांक / Dated:- 21/05/2018.
das/

आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:

1. अपीलार्थी/The Appellant- Smt. Vidhya Poonia, Jaiupr.
2. प्रत्यर्थी/ The Respondent-The ITO Ward 2(3), Jaipur
3. आयकर आयुक्त/ CIT
4. आयकर आयुक्त/ CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर/DR, ITAT, Jaipur
6. गार्ड फाईल/ Guard File {ITA No. 1064/JP/2016}

आदेशानुसार/ By order,

सहायक पंजीकार/Asst. Registrar