2024:DHC:8650-DB

IN THE HIGH COURT OF DELHI AT DELHI

% Judgment delivered on: 08.11.2024

\+ **ITA 1092/2018**

PR. COMMISSIONER OF INCOME TAX
DELHI -11 .....Appellant

Through: Mr. Aseem Chawla, SSC with Ms. Pratishtha Chaudhary, Advocate.

versus

MS. SANGEETA JAIN .....Respondent

Through: Ms. Rashmi Chopra, Advocate.

CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU
HON'BLE MS JUSTICE SWARANA KANTA SHARMA

JUDGMENT

SWARANA KANTA SHARMA, J.

1. The Revenue has preferred the present appeal under Section 260A of the Income Tax Act, 1961 [hereafter '***the Act***'] impugning the order dated 15.02.2018 [hereafter '***the impugned order***'] passed by the learned Income Tax Appellate Tribunal [hereafter '***the learned ITAT***'] in ITA No. 3888/Del/2017, in respect of the assessment year (AY) 2013-14.

FACTUAL BACKGROUND

2. For the adjudication of the case, it is essential to provide a concise overview of the background facts that culminated in the

passing of the impugned order and the subsequent filing of the present appeal.

3. The assessee, Ms. Sangeeta Jain, who carries her business through a proprietary concern under the name and style 'M/s Fashion Club Global', had filed her return of income on 30.09.2013, declaring total income of ₹2,64,51,220/-. The return was processed under Section 143(1) of the Act and was selected for scrutiny under Computer Assisted Scrutiny Selection (CASS). A notice under Section 143(2) of the Act was issued on 10.09.2014 and was duly served on the assessee. On 19.08.2015, a notice under Section 142(1) of the Act was issued with a questionnaire forming part of it.

4. In response to the aforesaid notices, the assessee informed the learned Assessing Officer [hereafter '***the AO***'], *inter alia*, that she had earned long term capital gain of ₹10,72,76,180/- on sale of agricultural land, which was situated beyond the prescribed limits of Sohna District in Haryana. To support the same, she had enclosed a certificate issued by Tehsilar, Sohna, which, as claimed by her, was to the effect that the land was situated beyond 8 kms of the municipal limits. The prescribed limit for Sohna District was 5 kms. Thus, the assessee claimed that the land did not qualify as a capital asset defined under Section 2(14) of the Act, and was thus exempt from capital gains.

5. An order dated 07.12.2015 was passed by the AO under Section 143(3) of the Act. The AO held that the assessee had debited expenses of ₹4,244/- under the head 'Challan and Penalty' and the amount,

being non-business in nature, was to be disallowed under Section 37 of the Act. The AO also held that the assessee was not able to establish that certain expenditure claimed by her was incurred exclusively for the purpose of business activity, and thus, considering the nature of transactions and volumes of expenses, it was reasonable to disallow 15% of such expenses, i.e. ₹2,93,276/-, under Section 37 of the Act. The income of the assessee was thus assessed at ₹2,67,48,740/-.

6. The Principal Commissioner of Income Tax-11 [hereafter '***the PCIT***'], on examination of the assessment record of the assessee pertaining to the AY 2013-14, issued a show cause notice on 25.09.2016 under Section 263 of the Act, since the PCIT, upon perusing the records, was of the opinion that the order dated 07.12.2015 passed by the AO was erroneous in so far as it was prejudicial to the interests of revenue.

7. In the show cause notice, the PCIT noted that the AO had framed the assessment on the same day the assessee had submitted the documents, and the AO had accepted the assessee's version of long-term capital gains *viz*. the land in question, without verifying the records. The PCIT mentioned that the AO should not have relied solely on the certificate issued by the Tehsildar, which was issued in a routine manner and without any corroborative evidence. It was also noted that the assessee did not show any agricultural income in her return for AY 2013-14, and that she had purchased the land for ₹7,74,80,250/- on 03.05.2011 and sold it on 20.04.2012, i.e. within a

period of nine months, indicating that there was no intention to use the land for agricultural purposes. Therefore, the gains from the sale could not be treated as long-term capital gains, but short-term capital gains. The PCIT also observed that the assessee had wrongly claimed the said income as exempt income on the ground that the land was situated beyond 8 kms of the municipal limits, in respect of which too, no verification was conducted by the AO. Even the AO had not taken into account the distance from any other municipality limit, other than Sohna District. Thus, the assessee was given an opportunity of being heard and to show cause as to why the order passed by the AO be not modified or set aside under Section 263 of the Act by the PCIT.

8. During the course of proceedings, the PCIT found that necessary details regarding the land were not sought by the AO from the District Town Planner (Planning), Gurugram [hereafter '***DTP, Gurugram***']. The PCIT noted that the report of DTP, Gurugram confirmed that the land was within both the old and extended municipal limits of Gurugram, contradicting the assessee's claim of land being agricultural land. When confronted with this evidence, the assessee could not provide any satisfactory explanation. The PCIT also highlighted that the land was sold to one M/s Vallabham Buildcon Pvt. Ltd. [hereafter '***Vallabham Buildcon***'] for ₹17,96,15,625/-, and the same was being aggregated for township development. Additionally, the sale deed executed between the assessee and Vallabham Buildcon mentioned that the land was not fit for agricultural purposes. The PCIT concluded that the evidence provided by the assessee had no evidentiary value compared to the

substantial evidence possessed by the department, which proved that no agricultural operations had been conducted by either the assessee or the buyer on the land.

9. Thus, the PCIT, by an order dated 21.04.2017 passed under Section 263 of the Act, held that the assessee was liable for short term capital gain of ₹10,72,76,180/- and the AO was directed to modify the order passed by it under Section 143(3) of the Act.

10. Consequently, an order under Section 263 read with 143(3) of the Act was passed on 26.04.2017, and addition was made to the income of the assessee by the AO, on account of short-term capital gain to the tune of ₹10,72,76,180/-, and the total income of the assessee was assessed at ₹13,40,24,920/-.

The Impugned Order

11. Aggrieved by the order of the PCIT, the assessee preferred an appeal, i.e., ITA No. 3888/Del/2017, before the learned ITAT. By way of the impugned order, the learned ITAT allowed the said appeal and quashed the order dated 21.04.2017 passed by the PCIT.

12. As revealed from the impugned order, the learned ITAT was of the opinion that the issue regarding the taxability of capital gain was considered while carrying out the assessment and the view taken by the AO, as to the non-taxability of such gains, was found evident. The learned ITAT further held that there was no finding recorded by the PCIT, after the receipt of the replies from the assessee, that the assessment order was erroneous and prejudicial to the interest of the Revenue. Further, the learned ITAT held that in view of the decision

of the Hon'ble Supreme Court in the case of ***Malabar Industrial Co. Ltd v. CIT:*** *(2000) 243 ITR 83*, the action of the PCIT in passing the order under Section 263 of the Act was not in accordance with law. It was also held by the learned ITAT that the certificate issued by the Tehsildar in this case could not have been disbelieved by the AO, *inter alia*, for the reason that the Tehsildar is also a public officer and certificates issued by public officers are generally believed by the other officers. The relevant extracts from the decision of learned ITAT are reproduced hereunder:

> "6. We have considered the rival arguments made by both the sides, perused the orders of the A.O. and the ld. CIT(A) and the paper-book filed on behalf of the assessee. We have also considered the various decisions relied upon by both the sides. Assessment order in this case was passed u/s 143(3) of the Act on 07.12.2015, which mentions that the ld. counsel for the assessee appeared on behalf of the assessee and explained the case and submitted all the details as called for during the proceedings. It is evident from the assessment order that the assessee was provided ample opportunities and the ld. counsel for the assessee appeared over various dates of hearing i.e. 21.07.2015, 19.10.2015, 05.11.2015 and on other dates as per the order sheet. The Assessing Officer further mentioned in the' assessment order that details were provided on behalf of the assessee which were checked and verified on test check basis and were placed on record. It is further noticed that a letter was filed by the assessee in the assessment proceedings giving explanation about the non taxability of the capital gain of Rs. 2,10,72,76,180/- arising on the sale of subject land. It was explained in the letter placed at page 54 and 55 of the paper books that the subject agricultural land was situated beyond prescribed limits of Sohna and that it was not a capital asset as the land was situated beyond the prescribed limit of concerned municipal limit and thus capital gain arising on the sale of such agricultural land is exempt. It is also noticed that assessee filed purchase deed of this land which is at pages 56 to 62 of the paper book and at page 56 it is specifically mentioned 'Kisan - Chahi [Krishi Bhoomi]. Assessee also filed copy of sale deed which is at page 78 to 87 which also mentions the type of land

as agricultural land and 'Chahi'. Copy of certificate from Tehsildar was also placed certifying the distance from the municipality. Paper book page 108 to 110 also copy of Jamabandi which show the subject land as Chahi [irrigated]. Thus, it is evident that during the course of assessment proceedings issue about the taxability of capital gain was considered in assessment and a view was taken by the Assessing Officer as to the non taxability of such gain. Therefore, when the claim of the assessee was accepted in assessment order after due consideration of the facts, it cannot be said that the assessment order was erroneous as assessment was passed after application of mind. It has been held in the case of CIT Vs. Nirav Modi 390 ITR 292 [Born] that the Assessing Officer having raised queries and perused evidences and having been satisfied with the claim a revision by the CIT was not justified. Hon'ble Delhi High Court in the case of Oracle Systems Corporation Vs. ADIT 380 ITR 232 have held that when assessment order is passed u/s 143(3) of the Act, there is presumption that assessment order has been passed after application of mind. Reliance is also placed on CIT Vs. LIC Housing Finance Ltd 367 ITR 458 [Born]; CIT Vs. Kelvinator of India Ltd 332 ITR 231 [Del]; CIT Vs. DLF Power Ltd 329 ITR 289 [Del] which hold that an order cannot be said to be erroneous and prejudicial if Assessing Officer takes a possible view and Assessing Officer taking one of the two possible views, assessment order cannot be treated as erroneous. In this case, as mentioned above, Assessing Officer after considering the submissions of the assessee and considering the evidence reached to the conclusion that capital gain was exempt. Therefore, in view of the above decisions, and in view of the Hon'ble Supreme Court decision in the case of Malabar Industrial Co. Ltd vs CIT reported in 243 ITR 83, the action of the ld. CIT in passing the order u/s 263 of the Act cannot be said to be in accordance with law and the order passed u/s 263, thus is bad. Moreover, it is seen that the ld. CIT in first 15 pages of the order has mentioned about the show cause notices, replies given on behalf of the assessee and then in paras 18 to 20 of the order u/s 263, CIT held that the objections raised by the assessee as regards the invocation of section 263 of the Act are not tenable. There is no finding recorded by the ld. CIT(A) after the receipt of the replies from the assessee that the assessment order was erroneous and prejudicial to the interest of the revenue. Therefore, absence of such finding is also fatal to the validity of the order u/s 263 and we are fortified by Guwahati High Court decision in the case of

Smt. Lila Chaudhary Vs. CIT 289 ITR 226, Hon'ble Bombay High Court in the case of Jewel of India Vs. CIT 325 ITR 92, Hon'ble Delhi High Court in CIT Vs. International Travel House Ltd reported in 344 ITR 554, Hon'ble Delhi High Court in CIT Vs. Bharat Aluminum Co. Ltd 303m ITR 256, therefore, from this stand point also, order passed u/s 263 is not sustainable and is therefore, quashed.

7. Appellant's counsel Dr. Rakesh Gupta raised one more issue that CIT could not have taken upon himself to deny the exemption and best power of CIT could have to set aside the order. The decisions relied upon were ACIT Vs Manas Salt lodization Industries Pvt. Ltd 169 TTJ 172 [Guwahati] and Bharat petroleum 350 ITR 44 [Mumbai]. Since we have quashed the order u/s 263, we do not think to deal with this contention raised.

8. The ld. CIT [DR] relied upon the Hon'ble Supreme Court decision reported in 243 ITR 83 and ITAT Delhi decision in the case of Surya Jyoti Software which were distinguished by the ld. counsel for the assessee on facts. Explanation 2 to section 263 inserted by Finance Act 2015 cannot be interpreted in a manner which would make the enquiries unending. If Explanation 2 to section 263 is invoked by the Commissioner in such a manner as applied in the present case, in our considered opinion, the process of enquiry would be unending and no assessment order can be said to be final as all the assessment order can be found fault on the ground that enquiries should have been made more elaborate. Certificate issued by Tehsildar in the instant could not be disbelieved by the Assessing Officer inter alia for the reason that the Tehsildar is also a public officer. Certificates issued by the public officers are generally believed by the other officers as public duty unless there is some material, which suggest that such certificate has been obtained under fraud etc. Therefore, we do not agree with the contention of the ld. CIT in the order u/s 263 of the Act that Tehsildar's certificate should have been corroborated with other evidence. Accordingly, the order passed by the ld. CIT u/s 263 of the Act for the above stated reasons is hereby set aside and quashed. Since we have quashed the order u/s 263 of the Act, we do not deal with the merit of the claim of the assessee.

9. In the result, the appeal of the assessee in ITA No. 3888/DEL/2017 is allowed."

13. The aforesaid findings of the learned ITAT have been assailed by the Revenue in the present appeal.

14. On 07.10.2024, this Court framed the following question of law for consideration:

> 'Whether the ITAT was justified in setting aside the order passed by the PCIT under Section 263 of the Act, on the ground that the assessment order is erroneous, inasmuch as it is prejudicial to the interest of the Revenue?'

SUBMISSIONS ON BEHALF OF THE PARTIES

Submissions on Behalf of the Revenue

15. Sh. Aseem Chawla, the learned counsel appearing for the Revenue assailed the impugned order on the ground that the learned ITAT has committed an error by not considering clause (a) of Explanation 2 to Section 263 of the Act, which provides that jurisdiction can be exercised by the PCIT in case the AO has passed the order without making inquiries or verification which should have been made. It is argued that a perusal of the order passed by the AO would reveal that it did not conduct inquiries with regard to the claims of the assessee, and did not obtain information from concerned authorities for verification of distance of the land in question from the municipal limits, which is essential for determining whether it is a capital asset.

16. He states that the certificate issued by Tehsildar, relied upon by the assessee, was not a certificate, which was issued after conducting

any inquiry by Tehsildar in respect of the land in question, and the AO ought not to have relied upon the said certificate which, in effect, contained no information, and thus, the reliance placed by the AO on the Tehsildar's certificate, which lacked essential information regarding the land's distance from the municipal area, was misplaced. Therefore, Sh. Chawla contended that the AO did not conduct the inquiry as he was required to conduct, and rather, there is a total absence of inquiry before declaring the land in question as agricultural land, and therefore, the PCIT had rightly exercised jurisdiction under Section 263 of the Act as the order passed by the AO was erroneous. In support of his contentions, he also relies on the decision of this Court in ***Gee Vee Enterprise v. Additional Commissioner of Income Tax:*** *(1975) 99 ITR 375*.

17. It is also contended that the learned ITAT has committed error in substituting its own findings to justify the order passed by the AO, without recording any findings on the issues pointed out by the PCIT while passing the order under Section 263 of the Act. Sh. Chawla also submits that decision of the Hon'ble Supreme Court in ***Sarifabibi Mohmed Ibrahim & Ors. v. CIT:*** *(1993) 204 ITR 631* is fully applicable in the present case.

18. He argues that the learned ITAT has erred in ignoring the findings returned by the PCIT, that the land was 'non-agricultural land' falling within the purview of definition of 'capital assets' as per the Act and, therefore, gains from sale of the land was chargeable to capital gains tax. In addition, it is the case of the Revenue that ITAT

had committed an error in law and facts by holding that a certificate issued by any authority, such as Tehsildar in the present case, is to be relied upon by the AO without making any enquiry or verification. It is also stated that the certificate issued by the Tehsildar was contrary to the report of the DTP, Gurugram as received by the PCIT during the proceedings under Section 263 of the Act.

19. On these grounds, the Revenue prays that the impugned order passed by the learned ITAT be set aside.

Submissions on Behalf of the Assessee

20. Ms. Rashmi Chopra, the learned counsel appearing for the assessee argues that there is no infirmity in the impugned order passed by the learned ITAT. She states that the jurisdiction assumed by the PCIT under Section 263 of the Act was bad in law since the order passed by the AO could not be said to be erroneous and prejudicial to the interests of the Revenue since a proper inquiry was conducted by the AO and the issue of exemption from capital gain was considered while framing the assessment. It is stated that the AO had taken a particular view in this regard on the basis of facts and documents presented before it, which revealed that the land in question was agricultural land situated beyond prescribed distance from Sohna District in Haryana. It is also contended that though the PCIT had issued notice under Section 263 of the Act and sought a response from the assessee, once the replies were filed, the PCIT did not specifically hold that the order passed by the AO was erroneous and prejudicial to the interests of the Revenue. She argues that unless such twin findings

are recorded by the PCIT, after the receipt of response from the assessee, a valid order under Section 263 of the Act could not be passed.

21. Ms. Chopra also contends that the certificate issued by the Tehsildar is unequivocal and unambiguous, and once it is issued by the said authority, there was no need for the AO for seeking any further corroboration by way of any other evidence or documentary proof. It is stated that the certificate clearly mentions that the land in question is agricultural land and, therefore, it was rightly held by the learned ITAT that in absence of any proof that the land was non-agricultural land, the same could not have been assessed or brought to tax under capital gains.

22. It is also contended that Explanation 2 to Section 263 of the Act was inserted in the year 2015 and since the present case pertains to AY 2013-14, the said Explanation, which explains the scope of order being 'erroneous insofar as it is prejudicial to the interests of the Revenue', could not be invoked in the present case. Therefore, it is argued on behalf of the assessee that the PCIT had wrongly assumed jurisdiction under Section 263 of the Act, since the AO had conducted sufficient enquiries and verification and its order could not be held as erroneous. Thus, the order passed by the PCIT under Section 263 of the Act was bad in law, and the same was rightly quashed by the learned ITAT.

ANALYSIS & FINDINGS

23. The Revenue has challenged the impugned order by way of which the learned ITAT has set aside the order passed by the PCIT under Section 263 of the Act. In a nutshell, the Revenue contends that the order passed by the AO under Section 143(3) of the Act was erroneous insofar as it was prejudicial to the interests of the Revenue, since the AO had failed to conduct enquiries into certain critical aspects and verify the claim of the assessee that the land in question was indeed agricultural land and thus exempt from capital gains tax.

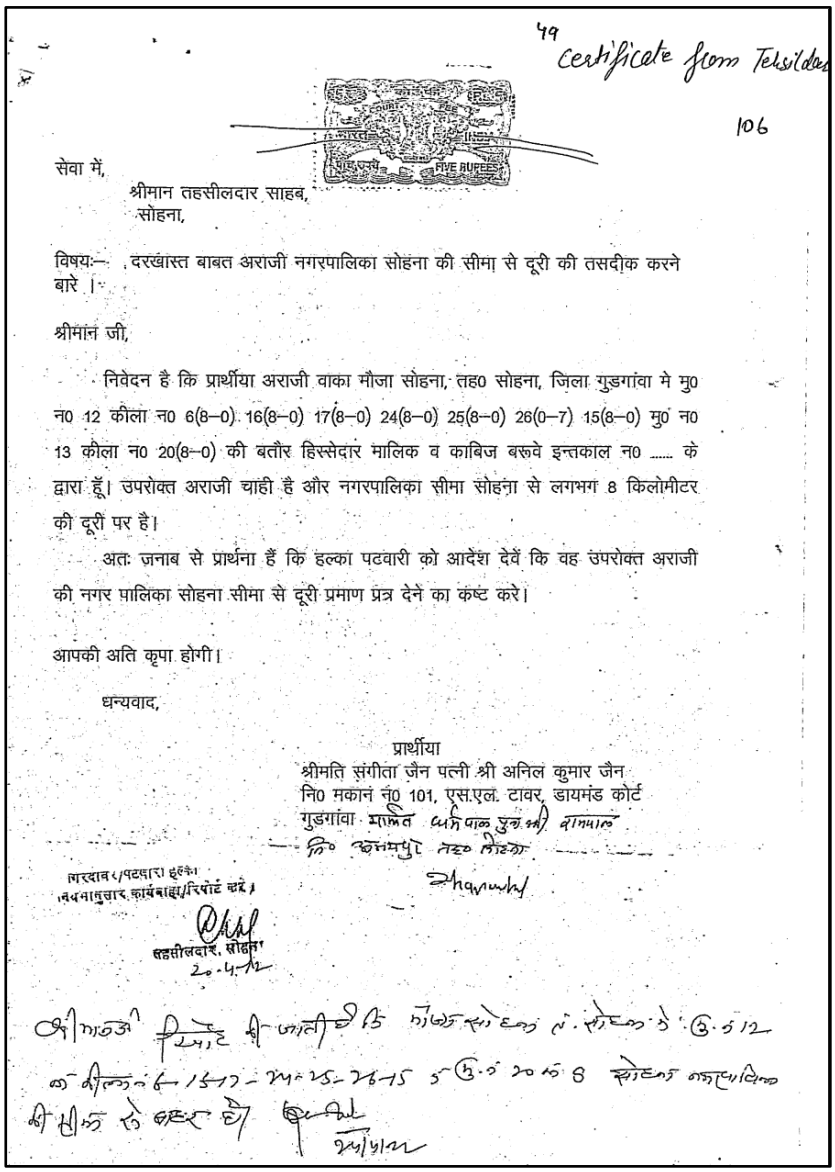
24. In the present case, the taxability of capital gains hinges upon whether or not the land in question qualifies as an agricultural land.

25. A 'capital asset' is defined under Section 2(14) of the Act. Short-term capital gains tax applies to gains arising from transfer of short-term capital assets; whereas long-term capital gains tax applies to gains arising from transfer of long-term capital assets. Section 2(14) also provides as to what assets would not fall within the meaning of 'capital assets' which includes agricultural land. The sale of agricultural land does not make an assessee liable to pay capital gains tax, either short-term or long-term.

26. However, to qualify as an agricultural land, the land must meet specific criteria, including its distance from the municipal areas, as stipulated under Section 2(14)(iii)(b) of the Act. As per the said provision *(as it stood prior to its amendment i.e. at the time of AY 2013-14)*, if a land is situated within the distance of 8 kms from the local limits of any municipality, it would be treated as a capital asset

and the assessee would be liable to pay the capital gains tax; otherwise, the land would be treated as agricultural land, which does not fall within the meaning of 'capital assets'.

27. The assessee had claimed that the land in question was agricultural land, and thus not a capital asset, and she had earned long-term capital gain from its sale, which was exempt from tax. In support of this claim, the assessee had placed reliance on the certificate issued by the Tehsildar in the year 2012. Notably, a perusal of the said certificate reveals that the same is a letter written by the assessee to the Tehsildar in which she had herself mentioned that she resided at Araji Waka Mauza Sohna, Tehsil Sohna, District Gurugram, and was requesting the Tehsildar to order the Patwari to give "certificate of distance from Sohna border of the above municipality of Araji". Under normal circumstances, upon receiving such a letter, it would be the duty of the Tehsildar to undertake an inquiry and then to tender information or certify as to what is the distance of the land from the municipal limit. However, in the present case, the Tehsildar's certificate, which is only in the form of two liner endorsement beneath the application made by the assessee requesting for issuance of such certificate, would reveal that he has not even mentioned the distance of the land from the municipal limit, which is a fundamental criterion under Section 2(14)(iii) of the Act to determine whether the land qualifies as agricultural land or not, for seeking exemption from capital gains tax, but has merely mentioned that the land is out of the boundary of Sohna Municipal Corporation. The said letter and the Tehsildar's endorsement is reproduced below:



49 certificate from Tehsildar

106

सेवा में,

श्रीमान तहसीलदार साहब,
सोहना,

विषय:— दरखास्त बाबत अराजी नगरपालिका सोहना की सीमा से दूरी की तसदीक करने बारे।

श्रीमान जी,

निवेदन है कि प्रार्थीया अराजी वाका मौजा सोहना, तह0 सोहना, जिला गुडगांवा मे मु0 न0 12 कीला न0 6(8–0) 16(8–0) 17(8–0) 24(8–0) 25(8–0) 26(0–7) 15(8–0) मु0 न0 13 कीला न0 20(8–0) की बतौर हिस्सेदार मालिक व काबिज बरूवे इन्तकाल न0 ..... के द्वारा हूँ। उपरोक्त अराजी चाही है और नगरपालिका सीमा सोहना से लगभग 8 किलोमीटर की दूरी पर है।

अतः जनाब से प्रार्थना हैं कि हल्का पटवारी को आदेश देवें कि वह उपरोक्त अराजी की नगर पालिका सोहना सीमा से दूरी प्रमाण पत्र देने का कष्ट करे।

आपकी अति कृपा होगी।

धन्यवाद,

प्रार्थीया
श्रीमति संगीता जैन पत्नी श्री अनिल कुमार जैन
नि0 मकान नं0 101, एस.एल. टावर, डायमंड कोर्ट
गुडगांवा माफित ...

गिरदावर/पटवारी हल्का।
नवनामुसार कार्यवाही/रिपोर्ट करें।

तहसीलदार, सोहना
20.4.12

28. Before the PCIT, the assessee had also placed reliance on another certificate, which was issued by the Tehsildar in the year 2016. However, the said certificate would reveal that it has been issued on the basis of the prior certificate issued in 2012, which has been discussed in the preceding paragraph. The certificate issued in 2016, which was sought to be relied upon by the assessee before the PCIT, only mentioned that the Tehsildar had already given his

findings regarding the distance of the land from the municipal limits in 2012, and it reiterates the same. Notably, the certificate issued by Tehsildar in 2016 draws upon the assessment made in 2012; however, since the 2012 certificate did not mention the distance of the land from the municipal limits, the 2016 certificate would suffer from the same deficiency inasmuch as it merely reiterates the earlier assessment without addressing the fundamental requirement of Section 2(14)(iii) of the Act. In other words, since no findings were given in the year 2012 itself, the finding given in the certificate issued in 2016, which was issued on the basis of certificate of 2012, is of no relevance. In any view, the said certificate was issued after the AO had passed the assessment order.

29. We also note that the PCIT had issued summons under Section 131 of the Act to Tehsildar, Sohna, requesting him to bring the relevant documents on the basis of which the certificate had been issued and to also produce the documents on the basis of which the land had been reported as fit for agricultural use. However, the Tehsildar never joined the proceedings before the PCIT.

30. The assessee had also relied upon the sale deeds pertaining to the land in question. It is to be noted that a sale deed is not a document issued by the revenue authorities or any government authority which would certify the agricultural nature of the land. A sale deed primarily reflects the transaction between the parties and the terms of sale, but it does not, in itself, verify the land's classification as agricultural for the taxation purposes. Therefore, heavy reliance on the sale deed to

establish the agricultural character of the land would be misplaced. However, even if we consider the contents of the sale deed, it shall be important to note that though the sale deed dated 20.04.2012 executed between the assessee and Vallabham Buildcon mentioned the land as 'agricultural land', it was specified in the contents of the sale deed itself that the land was not beneficial for the purposes of sowing and cultivation. This fact was also taken note of by the PCIT, alongwith the fact that the Vallabham Buildcon, in its reply, had informed the PCIT that it was in process of aggregating the land for the development of integrated township and group housing projects at Sohna.

31. Further, the assessee had purchased the land on 03.05.2011 and sold the same on 20.04.2012 i.e. within nine months from the date of purchase. Undisputedly, the assessee did not show any agricultural income for the AY 2013-14 in her return. The PCIT observed that these facts were not taken into account by the AO.

32. Moreover, the DTP, Gurugram had also informed the PCIT that the land in question was within 2.6 km from the old municipal limit and within 1.8 km of the extended municipal limit of Gurugram. The assessee, however, failed to give any reply in this regard. The DTP, Gurugram had also informed that the land in question was shown on the sectoral plan of Sector 2, 35 and 36 of Sohna, meaning thereby that the land had been developed into sectors, and thus, no agricultural operations could be carried out on the land.

33. In this background, it shall also be apposite to consider the guidelines/criteria laid down by the Hon'ble Supreme Court, regarding the land being defined as agricultural land, in the case of ***Sarifabibi Mohmed Ibrahim*** *(supra)*. The relevant portion of the decision is extracted hereunder:

> "Whether a land is an agricultural land or not is essentially a question of fact. Several tests have been evolved in the decisions of this Court and the High Courts, but all of them are more in the nature of guidelines. The question has to be answered in each case having regard to the facts and circumstances of that case. There may be factors both for and against a particular point of view. The Court has to answer the question on a consideration of all of them - a process of evaluation. The inference has to be drawn on a cumulative consideration of all the relevant facts.
>
> The first decision of this Court which considered the meaning of the expression "agricultural land" is in Commissioner of Income Tax v. Raja Benoy Kumar Sahas Roy 32 I.T.R. 466. But the question there was whether the income from forest land derived from sal and piyasal trees, 'not grown by human skill and labour' constitutes agricultural income? The decision that directly considered the issue, though under the Wealth Tax Act, is in C.W.T., Andhra Pradesh v. Officer-in-charge (Court of Wards),Paigah (hereinafter referred to as to 'Begumpet Palace case') reported in (105 I.T.R. 133). It was an appeal from a Full Bench decision of the Andhra Pradesh High Court. The High Court had taken the view, following a decision of the Madras High Court in Sarojini Devi v. Sri Krishna that the expression "agricultural land " should be given the widest meaning. It held that the fact that the land is assessed to land revenue as agricultural land under the State Revenue Law is a strong piece of evidence of its character as an agricultural land. On Appeal, a Constitution Bench of this Court held that; (a) inasmuch as agricultural land is exempted from the purview of the definition of the expression "assets", it is "impossible to adopt so wide a test as would obviously defeat the purpose of the exemption given". The idea behind exempting the agricultural land is to encourage cultivation of land and the agricultural operations. "In other words this exemption had to be necessarily given a more restricted meaning than the very

wide ambit given to it by the Full Bench of the Andhra Pradesh High Court", (b) What is really required to be shown is the connection with an agricultural purpose and user and not the mere possibility of user of land by some possible further owner or possessor, for an agricultural purpose. It is not the mere potentiality but its actual condition and intended user which has to be seen for purposes of exemption, (emphasis added), (c) "The person claiming an exemption of any property of his from the scope of his assets must satisfy the conditions of the exemption." (d) "The determination of the character of land, according to the purpose for which it is meant or set apart and can he used, is a matter which ought to be determined on the facts of each particular case." (e) The fact that the land is assessed to the Land Revenue as agricultural land under the State Revenue Law is certainly a relevant fact but if is not conclusive.

That was a case where the question arose with respect to a large extent of 105 acres situated in the city of Hyderabad. The land was enclosed by a boundary wall, wherein there were two wells. The land was abutting Hussain Sagar Tank. The Full Bench of the Andhra Pradesh High Court evolved the following eight indicators to determine whether a land is in agricultural land, viz.,:

(1) The words 'agricultural land' occurring in Section 2(e)(i) of the Wealth-tax Act should be given the same meaning as the said expression bears in entry 86 of List I and given the widest meaning;

(2) the said expression not having been defined in the Constitution, it must be given the meaning which it ordinarily bears in the English language and as understood in ordinary parlance;

(3) the actual user of the land for agriculture is one of the indicia for determining the character of the land as agricultural land;

(4) land which is left barren but which is capable of being cultivated can also be 'agricultural land' unless the said land is actually put to some other non-agricultural purpose, like construction of buildings or an aerodrome, runway, etc., thereon, which alters the physical character of the land rendering it unfit for immediate cultivation;

(5) if land is assessed to land revenue as agricultural land under the State revenue law, it is a strong piece of evidence

of its character as agricultural land;

(6) mere enclosure of the land does not by itself render it a non-agricultural land;

(7) the character of the land is not determined by the nature of the products raised, so long as the land is used or can be sued for raising valuable plants or crops or trees or for any other purpose of husbandry;

(8) the situation of the land in a village or in an urban area is not by itself determinative of its character.

The court characterised the indicator Nos. 6,7 and 8 as merely negative in character. It disagreed with (1) and (4) and observed that only the 5th indicator was a relevant one though not conclusive. There was no controversy regarding indicator No. 3. Inasmuch as the matter was not examined from the correct point of view, it was remitted to the High Court for a fresh decision.

The decision of Gujarat High court in Commissioner of Income Tax, Gujarat-II v. Siddharth J.Desai 139 I.T.R. 628, relied upon strongly by the learned Counsel for the appellant, reviewed the several earlier decisions of the Gujarat High Court as well as the decision of this Court in Begumpet Palace and has evolved the following 13 factors/indicators applying which the question has to be answered. The 13 factors are the following :

(1) Whether the land was classified in the revenue records as agricultural and whether it was subject to the payment of land revenue?

(2) Whether the land was actually or ordinarily used for agricultural purposes at or about the relevant time?

(3) Whether such user of the land was for a long period or whether it was of a temporary character or by way of a stop-gap arrangement?

(4) Whether the income derived from the agricultural operations carried on in the land bore any rational proportion to the investment made in purchasing the land?

(5) Whether, the permission under Section 65 of the Bombay Land Revenue Code was obtained for the non-agricultural use of the land? If so, when and, by whom (the vendor or the vendee)?

Whether such permission was in respect of the whole or a portion of the land? If the permission was in respect of a

portion of the land and if it was obtained in the past, what was the nature of the user of the said portion of the land on the material date?

(6) Whether the land, on the relevant date, had ceased to be put to agricultural use? If so, whether it was put to an alternative use? Whether such cesser and/or alternative user was of a permanent, or temporary nature?

(7) Whether the land, though entered, in revenue records, had never been actually used for agriculture, that is, it had never been ploughed or tilled? Whether the owner meant or intended to use it for agricultural purposes?

(8) Whether the land was situate in a developed area? Whether its physical characteristics, surrounding situation and use of the lands in the adjoining area were such as would indicate that the land was agricultural?

(9) Whether the land itself was developed by plotting and providing roads and other facilities?

(10) Whether there were any previous sales of portions of the land for non-agricultural use?

(11) Whether permission under Section 63 of the Bombay Tenancy and Agricultural Lands Act, 1948, was obtained because the sale or intended sale was in favour of a non-agriculturist? If so, whether the sale or intended sale to such no-agriculturist was for non-agricultural or agricultural user?

(12) Whether the land was sold on yardage or on acreage basis?

(13) Whether an agriculturist would purchase the land for agricultural purposes at the price at which the land was sold and whether the owner would have ever sold the land valuing it as a property yielding agricultural produce on the basis of its yield?

At the risk of repetition, we may mention that not all of these factors would be present or absent in any case and that in each case one or more of those factors may make appearance and that the ultimate decision will have to be reached on a balanced consideration of the totality of circumstances.

In Commissioner of Income-Tax v. V.A. Trivedi [1988] 172 I.T.R. 95 a Division Bench of the Bombay High Court, of which one of us (S.P. Bharucha, J.) was a member, considered this question again. In this case the assessee had purchased the

land of an extent of seven acres in February 1966. The land was covered by the Nagpur Improvement Trust Scheme. In August 1966 he obtained permission to convert the said land to non-agricultural use. In June 1968 he entered into an agreement with a Housing Cooperative Society to sell three acres out of it. The sale-deed was executed in October 1968. In this assessment proceedings the assessee claimed that the surplus income arising from the sale of land was exempt from tax inasmuch as it was agricultural land at the time of its sale. The matter reached the High Court. The Division Bench referred to several facts established from the record. Some of them supported the assessee's stand while some others militated against his contention. The facts found in favour of the assessee were: (1) at the time of its purchase by the assessee, the Ajni land was agricultural land; (2) it had been under cultivation by the assessee till the date of its sale, (3) it continued to be assessed to land revenue as agricultural land until it was sold, (4) the intention of the assessee, when he purchased it, was to acquire agricultural land for agricultural purposes, (5) the assessee's use of it was the normal use by an agriculturist, (6) it was nor within any Town Planning Scheme, and (7) no materials has been produced to show any development or building activity surrounding it. The facts which militated against the assessee's stand were three in number - namely: (1) the location or the Ajni land within the Corporation and the improvement trust limits; (2) the action of the assessee in obtaining on August 8, 1966, permission to convert the user of the Ajni land to non-agricultural purposes, and (3) the agreement to sell and the sale of the Ajni land for non-agricultural, i.e., building purposes.

The Bench observed that to ascertain the true character and the nature of the land, it must be seen whether it has been put to use for agricultural purposes for a reasonable span of time prior to the relevant date and further whether on the relevant date the land was intended to be put to use for agricultural purposes for a reasonable span of time the future. Examining the facts of the case from the said point of view, the Bench held that the agreement entered into by the assessee with the Housing Society is the crucial circumstance since it showed that the asses-see agreed to sell the land to Housing Society admittedly for utilisation for non-agricultural purposes. The sale-deeds were executed four months after the agreement of sale and even if any agricultural operations were carried on within the said span of four months, - the Bench held - it was evidently in

> the nature of a stop-gap arrangement. On the date the land was sold, the Bench held, the land was no longer agricultural land which is evident from the fact that the assessee had obtained permission even in August 1966 to convert the said land to non-agricultural purposes."

34. Thus, the Hon'ble Supreme Court in ***Sarifabibi Mohmed Ibrahim*** *(supra)* had discussed various factors and precedents to clarify the criteria for identifying agricultural land. It was held that the classification of land as agricultural depends on multiple factors, not just one. It was emphasized that each case must be evaluated based on its specific facts. A wide range of indicators would include the actual use of the land, whether the land is classified as agricultural in revenue records, and whether it is used for agriculture over a long period of time. Factors such as the land being under cultivation, being assessed as agricultural in revenue records, and the owner's intent to use it for agriculture plays a crucial role. However, conversion of the land to non-agricultural use, selling it for housing development, and the absence of agricultural activities for several years weigh against it being classified as agricultural land.

35. In the backdrop of the above-noted principles discussed by the Hon'ble Supreme Court, we note that following facts were brought to light during the proceedings before the PCIT:

(i) The Tehsildar who had issued the certificates in favour of the assessee did not appear before PCIT to provide any documents in support of the certificate issued by him.

(ii) The land in question, which had been sold by the assessee to Vallabham Buildcon, was being aggregated for development projects by Vallabham Buildcon.

(iii) The DTP, Gurugram confirmed that the land was within the extended municipal limits of Gurugram and was marked on the sectoral plan of Sohna, indicating that no agricultural operations were possible.

36. We are also of the view that the following facts, apparent from the record, were completely overlooked by the AO while passing assessment order under Section 143(3) of the Act:

(i) The Tehsildar's certificate of 2012, heavily relied upon by the assessee, did not mention the distance of the land from the nearest municipal limits, which is a critical requirement under Section 2(14)(iii) of the Act. Further, the certificate did not contain even the name or seal of the Tehsildar concerned.

(ii) The sale deed dated 20.04.2012 executed between the assessee and Vallabham Buildcon, though mentioning the land as agricultural, stated that the land was not beneficial for cultivation and agricultural purposes.

(iii) The assessee had not declared any agricultural income from the said land during the relevant year.

37. The above-mentioned facts make it clear that no inquiry, *in fact*, was conducted by the AO before passing the assessment order under Section 143(3) of the Act.

38. During the course of arguments, the learned counsel for the assessee contended that even if this Court arrives at an opinion that the AO did not conduct a proper inquiry, it can at best be a case of insufficient inquiry, but it cannot be termed as a case of absence or lack of inquiry, so as to empower the PCIT to exercise jurisdiction under Section 263 of the Act. It was also contended that the PCIT could not have exercised jurisdiction in the manner as exercised since the AY in the present case is 2013-14 and the amendment to Section 263 of the Act, by which Explanation 2 was inserted in the provision, was brought in the year 2015. Therefore, since the said Explanation came to be incorporated after the AY in question, the earlier provisions of Section 263 of the Act will govern the adjudication of the present case.

39. Prior to dealing with the above contentions, the relevant portion of Section 263 of the Act is set out hereunder for reference:

> "**263. Revision of orders prejudicial to revenue**.
>
> (1) The Principal Commissioner or Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that **any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the revenue**, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment…"

40. Section 263 of the Act, as it reads on date, including Explanation 2 inserted by virtue of Finance Act, 2015, is extracted hereunder:

"**263. Revision of orders prejudicial to revenue**.

(1) The Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that **any order passed therein by the Assessing Officer** or the Transfer Pricing Officer, as the case may be, **is erroneous in so far as it is prejudicial to the interests of the revenue**, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including,—

(i) an order enhancing or modifying the assessment or cancelling the assessment and directing a fresh assessment; or

(ii) an order modifying the order under section 92CA; or

(iii) an order cancelling the order under section 92CA and directing a fresh order under the said section.

***

Explanation 2.— For the purposes of this section, it is hereby declared that **an order passed by the Assessing Officer** [or the Transfer Pricing Officer, as the case may be, **shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if,** in the opinion of the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner,—

(a) the order is passed without making inquiries or verification which should have been made;

(b) the order is passed allowing any relief without inquiring into the claim;

(c) the order has not been made in accordance with any order, direction or instruction issued by the Board under section 119; or

(d) the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person."

(Emphasis added)

41. As far as the above-noted contention of the assessee is concerned, the same appears merited. The AY *qua* which the notice

was issued by the AO is 2013-14. The said notice was issued under Section 143(2) on 10.09.2014. However, the Explanation 2 to Section 263 of the Act was inserted by virtue of Finance Act, 2015 with effect from 01.06.2015. The proceedings in this case were initiated in the year 2014, i.e. prior to insertion of Explanation 2 in Section 263 of the Act.

42. Therefore, while deciding the question as to whether or not the jurisdiction was rightly exercised by the PCIT under Section 263 of the Act, we would have to take into consideration the provisions of Section 263 of the Act as they stood prior to the amendment in the year 2015 i.e. *sans* Explanation 2 which has elucidated the cases where the order can be held as erroneous and prejudicial to the interests of the Revenue.

43. However, undisputedly, Section 263 of the Act, even prior to the said amendment, stipulated the mandatory requirement of the order being 'erroneous' as well as 'prejudicial to the interests of the Revenue'. Therefore, what manifests from the above is the fact that the twin conditions have to be met for assuming jurisdiction under Section 263 of the Act, and the PCIT has to form an opinion that the order passed by the AO is 'erroneous' and 'prejudicial to the interests of the Revenue'.

44. Further, even prior to the amendment, though it was not explicitly explained in the Act as to how the PCIT will reach a conclusion that the AO had passed an 'erroneous' order which was also 'prejudicial to interests of the Revenue', the scope of these words

was explained by the Hon'ble Supreme Court and the Coordinate Benches of this Court in various decisions. It will be useful to refer to a few decisions, without burdening the present judgment with all the authorities on the said issue.

45. The Hon'ble Supreme Court, in case of ***Malabar Industrial Co. Ltd.*** *(supra)* has ruled that an order passed by an assessing officer can be deemed erroneous if it is based on incorrect assumption of facts or an incorrect application of law, and also if it is passed without applying the principles of natural justice or without application of mind. In the case of ***Malabar Industrial Co. Ltd.*** *(supra)*, a resolution passed by the board of the appellant-company was not placed before the assessing officer and it was held that there was no material to support the claim of the appellant therein, and the assessing officer had accepted the entry in the statement of the account filed by the appellant in the absence of any supporting material and without making any inquiry.

46. This Court, in ***Gee Vee Enterprise*** *(supra)*, held that the Commissioner can regard the order as erroneous on the ground that in the circumstances of the case the officer should have made further inquiries before accepting the statements made by the assessee in the return. The relevant portion of the decision is reproduced hereunder:

> "....These two decisions show that it is not necessary for the Commissioner to make further inquiries before cancelling the assessment order of the Income-tax Officer. **The Commissioner can regard the order as erroneous on the ground that in the circumstances of the case the Income-tax Officer should have made further inquiries before**

> **accepting the statements made by the assessee in his return**.
>
> The reason is obvious. The position and function of the Income-tax Officer is very different from that of a civil court. The statements made in a pleading proved by the minimum amount of evidence may be accepted by a civil court in the absence of any rebuttal. The civil court is neutral. It simply gives decision on the basis of the pleading and evidence which comes before it. **The Income-tax Officer is not only an adjudicator but also an investigator. He cannot remain passive in the face of a return which is apparently in order but calls for further inquiry. 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 inquiry.** The meaning to be given to the word "erroneous" in section 263 emerges out of this context. It is because it is incumbent on the Income-tax Officer to further investigate the facts stated in the return when circumstances would make such an inquiry prudent that the word "erroneous" in section 263 includes the failure to make such an inquiry. The order becomes erroneous because such an inquiry has not been made and not because there is anything wrong with the order if all the facts stated therein are assumed to be correct."
>
> (Emphasis added)

47. In case of ***Commissioner of Income-tax v. Toyota Motor Corporation:*** *(2008) 306 ITR 49*, the assessing officer had passed an order dropping the penalty proceedings initiated in the assessee's case. The Commissioner had exercised powers under Section 263 of the Act and concluded that the assessing officer had not verified several issues and facts as mentioned in the order passed by him, nor had he carried out necessary investigations to come to a conclusion that penalty was not leviable. Consequently, he had found that the order was erroneous and prejudicial to the interest of the revenue. However, on appeal, the Tribunal had held that the penalty proceedings were not dropped casually by the assessing officer but after verification of full facts

disclosed by the assessee in the reply. This Court, in judgment dated 02.04.2008 held that the order passed by the assessing officer was cryptic and non-reasoned. The relevant observations are extracted below:

> "10. We are unable to appreciate this reasoning given by the Tribunal simply because that the Assessing Officer himself did not say any such thing in his order. There is no doubt that the proceedings before the Assessing Officer are quasi-judicial proceedings and a decision taken by the Assessing Officer in this regard must be supported by reasons. Otherwise every order such as the one passed by the Assessing Officer, could result in a theoretical possibility that it may be revised by the CIT under section 263 of the Act. Such a situation is clearly impermissible.
>
> 11. It is also necessary for the parties to know the reasons that have weighed with the Adjudicating Authority in coming to a conclusion. The order passed by the Assessing Officer should be a self-contained order giving the relevant facts and reasons for coming to the conclusion based on those facts and law.
>
> 12. We find that the order passed by the Assessing Officer is cryptic to say the least, and it cannot be sustained. The Tribunal cannot substitute its own reasoning to justify the order passed by the Assessing Officer when the Assessing Officer himself did not give any reason in the order passed by him."

48. The aforesaid decision was affirmed by the Hon'ble Supreme Court in ***Toyota Motor Corporation v. Commissioner of Income-tax:*** *(2008) 306 ITR 52.*

49. Therefore, it is clear that the Hon'ble Supreme Court and the Coordinate Benches of this Court had also dealt with the scope of 'erroneous orders' for the purpose of Section 263 of the Act, even when Explanation 2 had not been inserted in the said provision, and had held that an erroneous order would include an order which is

passed without conducting sufficient inquiries or without application of mind.

50. In the present case, while invoking the provisions of Section 263 of the Act against the order passed by the AO under Section 143(3) of the Act, the PCIT emphasized that the AO did not scrutinize the critical documents, particularly those concerned with the claim of the assessee with respect to the land being agricultural in nature and its sale being exempt from capital gains tax. Specifically, the PCIT noted that the AO relied on a certificate issued by the Tehsildar, but failed to obtain corroborative evidence from other important and necessary authorities like the DTP, Gurugram. The AO, according to the PCIT, accepted the assessee's claim without proper verification, which amounted to no-inquiry. Ultimately, the PCIT took a view that the land sold by the assessee was not agricultural land, and thus, the assessee was not entitled for long-term capital gains tax exemption. However, the learned ITAT in the impugned order opined in the present case that the AO had considered the issue of capital gains taxability and had accepted the submissions of the assessee.

51. However, the critical issue remains whether the inquiry made by the AO in this case can be actually considered as an inquiry required to be conducted by the AO. The fact that the AO neither read the contents of the certificate issued by the Tehsildar, which is discernible from the fact that the certificate did not even mention the distance of the land from the municipal limits which is a criteria for determining the agricultural status of land under the Act, nor sought

any additional evidence or document from the relevant authorities like the DTP, Gurugram, undoubtedly, suggests that the AO failed to undertake any inquiry or even apply his mind to the documents submitted by the assessee to arrive at the conclusion regarding the long-term capital gains exemption.

52. There is no cavil that the PCIT would not have jurisdiction to pass an order under Section 263 of the Act solely for the reason that he held a different opinion with the AO. If the AO has applied his mind and had arrived at a plausible view, the same would not be amenable to a revision under Section 263 of the Act.

53. However, if the AO has not applied his mind and had come to an erroneous conclusion without making any enquiries, the CIT may be well within his jurisdiction to pass an order under Section 263 if he finds that the assessment order is erroneous and prejudicial to the interest of the revenue. In ***Rampyari Devi Saraogi v. Commissioner of Income-Tax, West Bengal & Ors:*** *(1968) 67 ITR 84*, the Commissioner found that the assessee had given an incorrect residential address and had also given her name in reverse order so as to fall within the jurisdiction of a particular Income Tax Officer (ITO). Accordingly, the CIT concluded that the ITO did not have the jurisdiction to pass the assessment order. The CIT held that it was apparent that the assessee had given a fictitious address and revered the order of her name, as a camouflage to fall within the jurisdiction of a particular ITO. Accordingly, the CIT passed an order under Section 263 of the Act. The High Court upheld the said decision. In the appeal

preferred by the assessee, the Hon'ble Supreme Court observed that "there was ample material to show that the Income Tax Officer has made the assessments in undue hurry". The assessment was made without any enquiry or evidence whatsoever and the order of assessment was erroneous and prejudicial to the interest of the revenue.

54. Similarly in the case of ***Tara Devi Aggarwal v. Commissioner of Income-Tax, West Bengal, Calcutta:*** *(1973) 88 ITR 323,* the Hon'ble Supreme Court upheld the finding of the CIT that the assessments made by the ITO "were made in post haste without making any enquiry or investigation into the antecedents of the assessee".

55. A Coordinate Bench of this Court in ***Commissioner of Income Tax v. Sunbeam Auto Ltd.:*** *(2011) 332 ITR 167* had highlighted the necessity to bear in mind the distinction between "lack of inquiry" and "inadequate enquiry". We consider it apposite to refer to the following passage from the said decision:

> "17. We have considered the rival submissions of the counsel on the other side and have gone through the records. The first issue that arises for our consideration is about the exercise of power by the Commissioner of Income-tax under section 263 of the Income-tax Act. As noted above, the submission of learned counsel for the Revenue was that while passing the assessment order, the Assessing Officer did not consider this aspect specifically whether the expenditure in question was revenue or capital expenditure. This argument predicates on the assessment order, which apparently does not give any reasons while allowing the entire expenditure as revenue expenditure. However, that by itself would not be indicative of the fact that the Assessing Officer had not applied his mind on the issue. There are judgments galore laying down the principle that the

> Assessing Officer in the assessment order is not required to give detailed reason in respect of each and every item of deduction, etc. Therefore, one has to see from the record as to whether there was application of mind before allowing the expenditure in question as revenue expenditure. Learned counsel for the assessee is right in his submission that **one has to keep in mind the distinction between "lack of inquiry" and "inadequate inquiry"**. If there was any inquiry, even inadequate that would not by itself give occasion to the Commissioner to pass orders under section 263 of the Act, merely because he has a different opinion in the matter. It is only in cases of "lack of inquiry" that such a course of action would be open……"
>
> (Emphasis added)

56. In the present case, the AO had issued a questionnaire to the assessee on 19.08.2015. The assessee responded to the said questionnaire by claiming that she had earned long term capital gains of ₹10,72,76,180/-, which was not chargeable to tax as the agricultural land was beyond the prescribed distance from the municipal limits of Sohna district. She also enclosed therewith a document described as a certificate issued by Tehsildar, Sohna to the aforesaid effect. However, a plain reading of the said document indicates that it did not certify that the land in question was beyond the prescribed distance from the municipal limits as claimed by the assessee. Notwithstanding the same, the AO passed the assessment order on the same date. It is thus apparent that the AO had not applied his mind to the relevant point whether the asset sold by the assessee was the agricultural land situated 5 kms / 8 kms beyond the boundary limits of the municipal corporation. The noting made by the Tehsildar on 24.04.2012, which the assessee claims to be a certificate, merely stated that the land in question was "outside the border of Sohna Municipal Corporation".

The question is not whether the land in question was outside the municipal limits but whether it was an agricultural land that was located 5 kms. / 8 kms. beyond the municipal limits. The Tehsildar's noting is clearly not to the aforesaid effect. It is thus clear that this is not a case where the enquiries conducted by the AO were inadequate; this is a case of lack of enquiry as the AO had not conducted any enquiry to verify whether the land sold by the assessee was beyond the prescribed distance from the boundary of Sohna Municipal Corporation. It is apparent that no enquiry to the said effect was conducted by the AO and there is no material before the AO, other than the self serving statement of the assessee, to corroborate the same.

57. The assessment order passed by the AO under Section 143(3) of the Act even records no reasons for accepting the version of the assessee that the land was agricultural land, and not capital asset, and thus exempt from capital gain. In fact, there is no mention of this aspect at all in the order passed by the AO under Section 143(3) of the Act. Thus, it is not clear as to what had weighed in the mind of the AO since the order passed by the AO is totally silent on this aspect.

58. Therefore, the present case would be one where the absence of any effective inquiry and a total non-application of mind by the AO is evident, and thus, the order passed by the AO would clearly fall within the meaning of an 'erroneous order'. The order is also, undisputedly, prejudicial to the interests of the Revenue inasmuch as it results in loss of the Revenue in the form of tax.

59. We are thus of the view that the PCIT had exercised the jurisdiction under Section 263 of the Act correctly and legally, in view of the fact that the order passed by the AO was erroneous and prejudicial to the interest of the Revenue since the same was passed without conducting any enquiries and applying mind to the claims of the assessee. We are also of the view that the learned ITAT erred in setting aside the order passed by the PCIT under Section 263 of the Act on the ground that the PCIT had wrongly exercised jurisdiction under Section 263 of the Act.

60. In view of the above, we set aside the impugned order dated 15.02.2018 passed by the learned ITAT in ITA No. 3888/Del/2017 in as much as for the reasons mentioned in the preceding paragraphs, it is writ large that the order passed by the AO was prejudicial to the interest of the Revenue which is the foundational requirement of exercising jurisdiction under Section 263 of the Act. Consequently, the jurisdiction exercised by the PCIT cannot be found fault with.

61. Accordingly, the appeal is disposed of in the above terms.

SWARANA KANTA SHARMA, J

VIBHU BAKHRU, J

NOVEMBER 08, 2024/*A*