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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ ITA 14/2019 & CM APPL. 1268/2019

HIMALAYA FOOD INTERNATIONAL LTD.

..... Appellant

Through: Ms Shreya Jain and Mr Gaurav
Tanwar, Advs.

versus

PR. COMMISSIONER OF INCOME TAX -04

..... Respondent

Through: Mr Vipul Agarwal, Senior
Standing Counsel with Mr
Gibran Naushad and Ms Sakshi
Shairwar, Advocates.

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+ ITA 218/2019

PR. COMMISSIONER OF INCOME TAX-04, DELHI

..... Appellant

Through: Ms Shreya Jain and Mr Gaurav
Tanwar, Advs.

versus

HIMALAYA FOOD INTERNATIONAL LTD. (FORMERLY
KNOWN AS HIMALAYA INTERNATIONAL LTD.)

..... Respondent

Through: Mr Vipul Agarwal, Senior
Standing Counsel with Mr
Gibran Naushad and Ms Sakshi
Shairwar, Advocates.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

HON'BLE MR. JUSTICE PURUSHAINdra KUMAR

KAURAV

ORDER

28.02.2024

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1. These two appeals by the assessee and the Revenue question the judgment and order dated 26 July 2018 passed by the **Income Tax Appellate Tribunal**¹. The ITAT has in essence taken note of the legal position as enunciated by the Special Bench of the ITAT in **Inventaa Industries Private Limited vs. Deputy Commissioner of Income Tax**² and which had held that the revisional authority had clearly erred in assuming revisional powers and interfering with the order of assessment which had been made in favour of the appellant in ITA 14/2019. The issue which fell for consideration of the Special Bench was whether mushroom farming would fall within the meaning of agricultural operations.

2. The ITAT now and while proceeding to set aside the view taken by the revisional authority has remitted the matter to the **Assessing Officer**³ for undertaking the exercise of requisite verification of the income generated from agricultural operations.

3. The assessee is aggrieved by the following part of impugned order as framed by the ITAT:

“As regards the second aspect, being the verification of quantum of income from growing of mushroom, it is found that the assessment order totally silent on the same. The Id. CIT has discussed certain aspects regarding quantification of income from mushroom which are germane to the computation, but were not considered by the Assessing Officer. Such aspects have been enumerated in para 3 of the impugned order. Thereafter, the Id. CIT recorded in para 6.2 of the impugned order that though the Assessing Officer called for information regarding other points, : 'but at no point of time details pertaining to claimed agricultural income and its related expenses were called for by the Assessing Officer'. In the next para, he noted that : 'the AO had even failed to ask for details of the land claimed to have been utilized for growing mushrooms, which were given during proceedings u/s 263 only, vide letter dated 28.02.2018'. This shows that the AO did not examine the quantification of the extent

¹ ITAT

² 2018 SCC OnLine ITAT 23613

³ AO



of income claimed as exempt. No material has been placed before us to demonstrate that such findings recorded by the revisionary authority are not correct”

4. Insofar as the Revenue is concerned, it assails the view taken by the ITAT when it proceeded to set aside the order passed by the revisional authority. We note that insofar as the validity of the exercise undertaken and the assumption of jurisdiction by the revisional authority is concerned, the ITAT has taken note of the determinative view which came to be expressed by its Special Bench in *Inventaa Industries* to hold that the view taken to the contrary and thus interfering with the acceptance of the income being agricultural income by the AO, did not merit interference since it clearly amounted to a change of opinion. It has additionally on merits found that the views so taken would in any case not sustain or survive in light of the binding decision rendered in *Inventaa Industries*. These aspects are evident from the following observations as they appear in the impugned order:-

“4. In so far as the first aspect is concerned, the Hyderabad Special Bench of the Tribunal recently in DCIT vs. Inventta Industries Pvt. Ltd. has held vide its order dated 09.07.2018 that the income from production and sale of Mushroom can be termed as 'agricultural income' under the Act. It further laid down that anything which is produced by performing basic operations on the soil is an "agricultural product" and the income therefrom is "agricultural income" and the nature of the product is irrelevant. In holding so, the Special Bench noticed that there were two types of views prevalent on that point. The very fact that Special Bench had to be constituted due to divergence of opinion on the point makes it explicitly clear that the issue at the time of passing of the order by the Id. CIT, was debatable. The Hon'ble Supreme Court in CIT vs Max India Ltd (2007) 295 ITR 282 (SC) has held that where two views are possible and the ITO has taken one view, with which the CIT does not agree, it cannot be treated as an erroneous order prejudicial to the interest of the Revenue, unless the view taken by the ITO is unsustainable in law. It goes without saying that debatable issues are outside the ken of section 263. An assessment



order must be necessarily, inter alia, erroneous so as to be eligible for revision u/s 263. If a point is debatable and the two views are prevalent on a particular point and the Assessing Officer adopts one view, whereas the CIT considers the other view to be more plausible, it cannot be said that the assessment order is erroneous so as to clothe the CIT with the power to revise the assessment order. Since there was a cleavage of judicial opinion on the point as to whether or not income from growing of mushroom is agricultural, which issue has now been settled in favour of the assessee by virtue of the Hyderabad Special bench of the tribunal, we hold, in principle, that the Id. CIT was not justified in not approving the stand of the Assessing Officer that income from growing of mushroom was agricultural income. Impugned orders set aside pro tanto.”

5. We note that the question of whether farming of mushrooms would fall within the ambit of agricultural income was one which came to be directly raised for the consideration of the Special Bench. The Bench itself had come to be constituted pursuant to a reference made on 25 July 2017. In terms of that order of reference, the Bench was called upon to examine the following question:-

“Whether in the facts and circumstances of the case, the income from production and sale of Mushrooms can be termed as ‘agricultural income’ under the Income Tax Act, 1961?”

6. Ultimately and on a due consideration of the statutory position, it has held as follows:-

“12.8. Though the Ld. Assessing Officer has held that the compost used for production of mushroom by the assessee is not “soil”, the Ld. St. counsel, in reply to a specific query from the Bench, stated that this compost on which mushroom is grown is “soil”.

12.9. Hence, the undisputed facts are that, mushrooms are grown on “soil”. Certain basic operations are performed on such “soil” which require “expenditure of human skill and labour” on the soil resulting in raising a “product” called “Edible white button mushroom”. The product “Edible white button mushroom” has utility for consumption, trade and commerce.

12.10. The Ld. Standing Counsel referred to the decision of the Hon'ble Madras High Court in the case of *Union of India v. Krishna Murthy* (supra) wherein at para 14, *Mullah's commentary on Transfer of Property Act* has been extracted along



with definition of immovable property under “General clauses Act”, and argued that land is immovable property and once soil is detached from land, it ceases to be land.

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12.11. “Soil” is the thin skin that covers the land. “Soil” is material in the top layer of the surface of the earth on which plants can grow and is a non-renewable resource. It takes ages for rocks to wither into soil and rich organic matter to build up. Land is a part of the earth, while soil refers to one part of the land. Land, as commonly understood means, the surface of the earth not covered by a body of water. Thus, the term land includes soil. In the definition referred above, “land” is defined in an inclusive manner.

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12.14. The term ‘Land’ in our view has to be interpreted by using the principles of ‘Purposive Interpretation’.

The purposive approach (sometimes referred to as purposivism, purposive construction, purposive interpretation, or the modern principle in construction) is an approach to statutory and constitutional interpretation under which common law courts interpret an enactment (a statute, part of a statute, or a clause of a constitution) within the context of the law's purpose.

Purposive interpretation is a derivation of mischief rule set in Heydon's Case, and intended to replace the mischief rule, the plain meaning rule and the golden rule. Purposive interpretation is used when the courts use extraneous materials from the pre-enactment phase of legislation, including early drafts, Hansard's committee reports, and white papers. The purposive interpretation involves a rejection of the exclusionary rule.

Supreme Court in *Tirath Singh v. Bachittar Singh* approved and adopted the said approach. In *Shamrao V. Parulekar v. District Magistrate*, Thana, Bombay the Court reiterated the principle from *Maxwell*:

“If one construction will lead to an absurdity while another will give effect to what commonsense would show was obviously intended, the construction which would defeat the ends of the Act must be rejected even if the same words used in the same section, and even the same sentence, have to be construed differently. Indeed, the law goes so far as to require the Courts sometimes even to modify the grammatical and ordinary sense of the words if by doing so absurdity and inconsistency can be avoided.”

In *Molar Mal v. Kay Iron Works (P) Ltd.*, the Hon'ble Supreme Court while reiterating that courts will have to follow the rule of literal construction, which enjoins the court to take the words as used by the Legislature and to give it the meaning which naturally



implies, held that there is an exception to that rule. The Court observed:

“That exception comes into play when application of literal construction of the words in the statute leads to absurdity, inconsistency or when it is shown that the legal context in which the words are used or by reading the statute as a whole, it requires a different meaning.”

In *Mangin v. Inland Revenue Commission* the Privy Council held:

“The object of the construction of a statute, be it to ascertain the will of the legislature, it may be presumed that neither injustice nor absurdity was intended. If, therefore a literal interpretation would produce such a result, and the language admits of an interpretation which would avoid it, then such an interpretation may be adopted”.

12.15. ‘Soil’ is a part of the land. Land is also part of earth. The upper strata of the land is soil and this is cultured and made fit for production of crops, vegetables and fruits etc., by enriching the soil. When such soil is placed on trays, it does not cease to be land and when operations are carried out on this “soil”, it would be agricultural activity carried upon land itself.

12.16. If the strict interpretation, as argued by the Ld. Standing Counsel is accepted then, when ‘Soil’ attached to earth is cultivated, it is agricultural activity and when ‘Soil’ is cultivated after detaching the same from earth, it is not agricultural activity. Such an interpretation in our view, would be unintended and unfair. The only part of the land that is cultivable, and which is useful for agricultural activity is ‘Soil’ which is the top layer of land. Then whether such soil is attached to land or is placed in containers above the land should in our humble view, not make a difference. Though these strong arguments of the Ld. Standing Counsel appealed to us ab-initio on an analysis of the purpose for which the term is to be interpreted, we are unable to persuade ourselves to accept the same. If the term ‘Agri’ is ‘field’, then ‘field’ can be on land or on a ‘terrace’ or on a ‘pot’, ‘tray’ etc., In view of the above discussions, we hold that it is important to distinguish between the meaning of the term ‘soil’ from ‘land’, because the cultured top strata of the earth's surface, which is fit for arable cultivation, is actually what is required for agricultural purposes and this top layer (being ‘soil’) is one on which actual agricultural growth takes place. In contrast, the meaning attributed to land (primarily as an immovable object) is of a wide import. For the purpose of understanding the nexus between an agricultural operation and an agricultural land, what needs to be inferred from the term ‘land’ is that, the cultured top layer of the earth, which is fit for any sort of cultivation, is land for this purpose. Hence, in our opinion, the soil



which is placed on the vertical space above the land in trays, in one sense of the term, is also land.

13. We now consider the arguments on the explanation 3 to Section 2(1A) of the Act. The assessee relies on Explanation-3 to Section 2(1A) which reads as follows:

“3. For the purposes of this clause, any income derived from saplings or seedlings grown in a nursery shall be deemed to be agricultural income”

Thus, what is not otherwise agricultural income, is deemed under the explanation as agricultural income.

Shri P. Chidambaram, the then Hon'ble Finance Minister, while presenting Union Budget for 2008-09 at para 167 stated as follows:

“Agriculture income is exempt from income tax. However, courts have ruled the growing saplings or seedlings of land is agriculture. But growing them in pots is not agriculture. This does not seem to be fair. Hence, I propose to exempt from tax income arising from saplings or seedlings grown in a nursery.”

(Emphasis on)

While introducing explanation 3 to Section 2(1A) of the Act, in the explanatory note at para 4.2. It is stated as follows:—

“With a view to giving finality to the issue, and Explanation in Section 2 of the Income-tax Act, has been inserted providing that any income derived from saplings or seedlings grown in a nursery shall be deemed to be agricultural income. Accordingly, irrespective of whether the basic operations have been carried out on land, such income will be treated as agricultural income, thus qualifying for exemption under sub-section(1) of Section 10 of the Act.”

(Emphasis ours)

13.1. It is true that this Explanation 3 to Section 2(1A) of the Act, is a deeming provisions in the Act. It is also true that deeming fiction cannot be extended and should be strictly restricted to the fiction created. The impression that this amendment was brought into the statute to nullify certain judicial pronouncements is factually incorrect. The courts have decided that income from nursery is agricultural income.

13.2. The Hon'ble High Court of Madras in *Commissioner of Income-tax v. Soundarya Nursery*, (2000) 241 ITR 530 (Madras), in which the court observed as under:

“8. All the products of the land, which have some utility either for consumption or for trade or commerce, if they are based on land, would be agricultural products. Here, it is not the case of the revenue that without performing



the basic operations, only the subsequent operations, as described in the decision of the Apex Court have been performed by the assessee. If the plants sold by the assessee in pots were the result of the basic operations on the land on expending human skill and labour thereon and it was only after the performance of the basic operations on the land, the resultant product grown or such part thereof as was suitable for being nurtured in a pot, was separated and placed in a pot and nurtured with water and by placing them in the greenhouse or in shade and after performing several operations, such as weeding, watering, manuring, etc., they were made ready for sale as plants all these operations would be agricultural operations and all this involves human skill and effort. Thus, the plants sold by the assessee in pots were the result of primary as well as subsequent operations comprehended within the term 'agriculture' and they are clearly the products of agriculture."

13.3. Thus, the Hon'ble High Court gave breadth to a more expansive definition of the term 'agricultural products' by including within its meaning all products of land, having some utility either for consumption or for trade or commerce and also, inferred that plants sold by the assessee in pots to be comprehended within the term 'agriculture'. This judgment was delivered in the year 1998, August 5th, much before the introduction of explanation 3 to Section 2(1A) of the Act in the year 2008. Similar is the judgment in the case of *CIT, Chennai v. K. N. Pannerselvam*, (2016) 75 taxmann.com 98 (Madras). The judgment of the Hon'ble Allahabad High Court in *H. H. Maharaja Vibhuti Narayan Singh v. State of U.P.*, (1967) 65 ITR 364, was considered by the Hon'ble Madras High Court in the case of *Soundarya Nursery* (supra) at para 6 of the judgment. The Court held that the observation of the Hon'ble Allahabad High Court was clearly an obiter.

This judgment in the case of *Soundarya Nursery* (supra) required basic objections to be performed on land for the income to be exempt as agricultural income. Before the introduction of Explanation 3 to Section 2(1A) of the Act, growing plants in pots was interpreted as agricultural activity by the courts. What this explanation does is to expand this interpretation further. It lays down that the basic operations are not necessary in nurseries, as required by the judgment in the case of *Soundarya Nursery* (see explanation note). Hence, even without this explanation, the income from plants grown in pots was held as agricultural income by the courts. As this explanation is a deeming provisions, we cannot apply the same to the assessee. But as the assessee performs basic operations on soil, the ratio of the judgment in the case of *Soundarya Nursery* (supra) applies to the facts of this case.



13.4. The Ahmedabad Bench of the ITAT in the case of *DCIT v. Best Roses Biotech Ltd.*, (2012) 17 taxmann.com 56 (Ahd.) has held as follows:—

“6.1 Activity in question : The company had developed a greenhouse for the establishment of a floriculture project. The company had grown good quality of rose flowers and also exported them abroad. It was explained that for the plantation of roses a very well treated soil is required. The quality of the soil is therefore tested. Manures are mixed for preparing a base for growing the rose plants. The company has installed a proper drainage system. Certain operations such as mixing of soil and watering of plants through drainage are explained. Then the activity of pruning and bending of growing plants carried out to get best size of rose buds. It has also been explained that pest control is also required. Insecticides are sprinkled to save the plants from any disease. From the facts as emerged from the compilation filed we have gathered that within greenhouse the floriculture activity comprises of growing of rose by deploying hydroponics technique for the farming of best quality roses. It is stated that the assessee has deployed a budding technical plant. Further it was explained that root stocks were brought from the market and placed in the green house. The plantation and the generation of sapling was nothing but agricultural activity. The mother plant is otherwise reared on earth. For rearing of mother plant human labour is involved. The tilling of soil, watering and other primary agricultural activity is the basic requirement for the growing of the rose plants. Subsequently the saplings are planted on plastic trays, which were kept at the height 2-3 ft. placed on MS stand. It was explained that the purpose of growing the rose plants at a height is primarily to avoid the pest and to develop in a controlled atmosphere. By this method, the rose plant is protected from climate, pest, as well as other disease, to minimize the possibility of damage. The drainage system for watering the plants with the help of dipper is required. The watering of rose plants are also a technical method to avoid excessive watering so that the roots of the rose plants should not get damaged. The commercial greenhouse i.e. “bent canopy” is used for various benefits so that the sun-light and the humidity level both can be maintained. For meeting the international demand, it is explained, that the assessee-company adopted best measure to ensure best quality of rose.

6.2 Conditions of Agriculture operation-From the side of the respondent-assessee there was detailed discussion



about the growing of rose plants and other connected agricultural operation carried out by the assessee. However, the objection of the Revenue was that the rose plants were not grown on the land, therefore the generation of income was not directly connected with the operation of land. Somehow we are not agreeing with the said proposition of the Revenue-department because on due consideration of the activity as explained to us, it is not justifiable to say that the growing of rose plants at all is not connected with the utilization of land. It is not in dispute that the agricultural land was acquired by the assessee from agriculturists. It is also not in disputed that mother plants are always been grown on the agricultural land.

As far as ingredients of basic operation is concerned the assessee's case is that the technology deployed is (i) use of soil and operation on soil (ii) use of particular soil type contents i.e. coco peat, manure, etc. present in the soil, (iii) drainage system as over watering harms the roots as well as quality (iv) bending shoots for maximizing the quality of roses, and (v) pest and diseases control for providing protection to roses. Therefore we hold that the activity which is connected with the land cultivation, such as ploughing of field, leveling of field, sowing of seed in the ploughed and leveled field, growing of plants, as case the may be, plantation, manuring, watering, weeding-out of weeds, so and so forth. These agriculture operations are said to be 'basic cultivation activity' and thereafter an agriculturist has to perform 'subsequent agriculture operation', namely tending of grown plants, pruning, cutting or shaping and finally harvesting of crop. We have to clarify, as held by few honourable courts as well, that the subsequent operations ought to be a continuation of basic Agriculture operation. The fundamental requirement is that it should remain connected with the basic agriculture operation."

13.5. We agree with this view of the Tribunal. The process followed in the case of *Best Roses Biotech (P.) Ltd.*, (supra) in similar to the process followed by the assessee.

13.6. Hence, the view of the courts was that the income in question was agricultural income and the explanation only acknowledges this fact. We should not take a 'pedantic' view on this issue. The view of the legislature is more expansive and purposive than the view of the courts.

13.7. In view of the above discussion, we conclude that "soil", even when separated from land and placed in trays, pots, containers, terraces, compound walls etc., continues to be a specie



of land and hence “land” for the sole purpose of determining whether activity performed on such land is for production of an agricultural product.”

7. While Mr. Agarwal, learned counsel appearing for the Revenue sought to contend that the judgment in *Inventaa Industries* came to be pronounced subsequent to the rendering of the final order by the revisional authority and thus could not have constituted a ground which would have warranted interference, we find ourselves unable to sustain that submission for the following reasons. As the ITAT has rightly observed, the right which stands conferred upon the revisional authority is not really one which is liable to be exercised to examine a matter on merits. It would only be liable to be invoked where the revisional authority finds that if the order of assessment was to stand, it would clearly be prejudicial to the interest of the revenue. This was also not a case where the Commissioner would have been unaware of the reference made. Undisputedly, the reference, as noticed hereinabove, had already been made in July 2017 while the order of the revisional authority came to be passed on 28 March 2018. The revisional authority would have thus been well advised to stay its hands before taking any view which would have impacted the stand as taken by the assessee. Consequently, we find no merit in the challenge which stands raised at the behest of the Department to the order of the ITAT insofar as it has proceeded to set aside the order passed in revision.

8. That only leaves us to examine the grievance of the assessee and who has contended that since the AO had accepted the entire income to be agricultural income and thus had not questioned the declarations as made, the remit to the AO for the purposes of



quantification were wholly unmerited.

9. We note from a reading of the order passed by the AO that there appears to be no discussion or inquiry undertaken so as to render a definitive finding whether the assessee was engaged in agricultural operations and the Return of Income pertained to agricultural income alone. In that view of the matter, we find no justification to interfere with the directions framed as by the ITAT.

10. The appeals shall consequently stand dismissed with liberty reserved to the AO to undertake the exercise of verification in terms of the directions ultimately framed by the ITAT.

YASHWANT VARMA, J.

PURUSHAINDRA KUMAR KAURAV, J.

FEBRUARY 28, 2024

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