

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:26.09.2018

Reserved on 18.09.2018
Delivered on 26.09.2018

C O R A M

THE HONOURABLE Mr.JUSTICE K.RAVICHANDRABAABU

W.P.No.1843 of 2018
and
WMP Nos.2292 and 2293 of 2018

Mr.Pallavarajha

...Petitioner

vs

1.Principal Commissioner of Income-Tax-VI,
121, Uthamar Gandhi Salai,
Nungambakkam,
Chennai 600 034.

2.Assistant Commissioner of Income-tax,
Non-Corporate Ward 15(1),
121, Uthamar Gandhi Salai,
Nungambakkam,
Chennai 600 034.

...Respondents

Prayer:Writ petition filed under Article 226 of the Constitution of India for issuance of a writ of certiorari to call for the records of the first respondent in respect of C.No.6120()/PCIT-6/2016-17 dated 20.03.2017 for the assessment year 2008-09 and quash the same.

For Petitioner : Mr.M.V.Swaroop

For Respondents : Mr.A.P.Srinivas

Senior Standing Counsel (I.T)

O R D E R

The petitioner is aggrieved against the order of the first respondent dated 20.03.2017, passed under Section 264 of the Income Tax Act, 1961, in respect of the assessment year 2008-09.

2. Through the impugned proceedings, the first respondent rejected the petition filed by the assessee under Section 264 with further direction to the Assessing Officer to treat the lands in question as non-agricultural in nature and therefore,

as capital assets, in the hands of the assessee, exigible to capital gain tax.

3.The following are the facts and circumstances, as projected by the petitioner, which have lead to filing of the present writ petition:

The petitioner is an individual engaged in the business of real estate. He owned various agricultural lands and was gaining agricultural income during the financial year preceding the relevant assessment year 2008-09. The petitioner and one Anoop Bora jointly purchased 13.91 acres of agricultural land from the Official Liquidator, Madras High Court on 11.05.2005 by public auction. They also purchased another extent of agricultural land measuring 13.14 acres during the same year. In 2006-07, they purchased further extent of 3.88 acres in the same village. Thus, the total extent of land held by them was 30.93 acres. Out of the said extent, they transferred 19.14 acres of land to two individuals on 21.08.2006. During the financial year relevant to assessment year 2008-09, they sold the remaining 11.29 acres to another individual on 30.05.2007. The lands in question are located in Sirunganallur, Unnamali Village and Kuzhipanthandalam village. The Encumbrance Certificate for all these lands evidences clearly that they are agricultural lands. The chitta, patta and the A-Register records for the relevant period would also show that there were crops during the year of sale and thus, they are only agricultural lands. Section 2(14) of the Income Tax Act, 1961, which defines capital asset, specifically excludes agricultural land. Therefore, the petitioner did not offer this income to tax in his return. His return was accepted and intimation under Section 143(1) was also sent. On 21.03.2014, a notice under Section 147 of the said Act was received by the petitioner for reopening the assessment on the ground that the lands in question were not agricultural lands. The petitioner participated in the assessment proceedings and submitted necessary documents. However, the second respondent passed an order of assessment dated 30.03.2015 that the lands in question are not agricultural lands and that the capital gains received by the said land is taxable as business income. Consequently, demand notice dated 30.03.2015 was issued demanding a sum of Rs.4,09,51,350/-. Thereafter, the petitioner preferred an appeal under Section 250(6) of the said Act before the Commissioner of Income Tax (Appeals). However, the said appeal was dismissed as withdrawn on 16.09.2016 at the instance of the petitioner for pursuing the revision before the Commissioner of Income Tax under Section 264 of the said Act. The petitioner filed the revision under Section 264 before the first respondent by contending that the lands are used for agricultural purposes; that the assessment had been reopened under Section 147 beyond four years without there being any averment that the petitioner

had not fully and truly disclosed material facts and that the order and the demand notice was served on the petitioner after 9 months, from the date on which it was passed. The petitioner also contended before the first respondent that the claim of the joint owner viz., Anoop Bora before his Assessing Officer that the subject matter lands are agricultural lands, was accepted and the Department had dropped proceedings. Therefore, the very same lands cannot be treated as non-agricultural lands, in the hands of the petitioner. However, the first respondent rejected the petition on 20.03.2017. A rectification petition filed under Section 154 also came to be rejected on 17.01.2018 on the reason that the grounds raised in the rectification petition are debatable. As no further appeal remedy is provided as against the order passed under Section 264, the present writ petition is filed before this Court.

4. The respondents filed a counter affidavit, wherein it is stated as follows:

The return of the income filed by the petitioner was processed under Section 143(1) of the Act. Subsequently, the case was reopened on account of materials gathered during a survey under section 133A in the case of one Meena Sakariya and Narendra Sakariya on 24.03.2010. It was gathered during the said survey that the petitioner was engaged in real estate activity through coordinated transactions of aggregating and selling the lands. Further perusal of the return revealed that the capital gain on the sale of the said lands was claimed as exempted amounting to Rs.5,37,19,960/-. Hence, it was concluded in the findings of the survey that the business income of the above said sum on account of sale of land be taxed as per the provisions of the Income Tax Act. Accordingly, after reopening the assessment under Section 147, the assessment order was passed. The petitioner is not entitled to question the reopening. The Assessing Officer had no chance to form an opinion at the initial stage and hence, the concept of change of opinion does not apply in the instant case. The assessment in the case of the said Anoop Bora was completed under Section 143 (3) on 23.12.2010. The facts, which came to the knowledge of the Department, after the survey under Section 133A in the case of Meena Sakhariya and Narendra Sakhariya on 24.03.2010, were not available to the Assessing Officer of Anoop Bora before passing the order of assessment on 23.12.2010 in his case. Even otherwise, the principles of res judicata does not apply to the income tax proceedings especially in a situation, where fresh incriminating facts have emerged consequently. The assessee was unable to discharge the primary onus by proving that agricultural operations were carried out in the land in question.

5. Mr. M. V. Swaroop, learned counsel for the petitioner made his oral submission. He also filed a written submission. The

sum and substance of the submissions made on behalf of the petitioner are as follows:

a) The writ petition is maintainable as against the order passed under Section 264 of the said Act, since there is no other alternative remedy available against the said order. Thus, the High Court can exercise its jurisdiction under Article 226 and examine the factual aspects of the case.

b) The Commissioner has the jurisdiction to hear a petition under Section 264, when the appeal before the CIT(A) was withdrawn, which amounts to waiver of right to appeal. Therefore, the bar in Section 264(4)(a) will not apply to this case. In this connection, (2018) 91 taxmann.com 196(Guj), Nitin Babubhai Patel vs. Dharmendra Vishnubhai Patel, 52 ITR 780 (All), Ajayapat Singhania vs. Gift Tax Officer & Others, 50 ITR 578 (Bom), Jagmohandas Gokaldas vs Commissioner of Wealth Tax, Bombay, are relied on.

c) The case of the co-owner of the subject matter land was not considered by the first respondent. When the very same land was held to be an agricultural land at the hands of the co-owner, the Revenue is not justified in treating the same as non agricultural land at the hands of the petitioner. The department cannot pick and choose between two different assesseees, who are identically placed. In this connection, 249 ITR 219 (SC), Union of India vs Kaumudini Narayan Dalal is relied on. When the department procured the alleged fresh materials on 24.03.2010 i.e., 9 months on completion of assessment of the co-owner viz., Anoop Bora, it cannot claim that the said materials were not in possession of the Assessing Officer of Anoop Bora, while passing the scrutiny assessment under Section 143(3). The assessment of the said Anoop Bora was never reopened. Hence, it should be construed that the Revenue has accepted the character of the land as agricultural.

d) Entries in Government records such as patta, chitta, A-register, Encumbrance Certificate reflect the land as an agricultural land, where agricultural activities were carried on in the said assessment year. The Government records ought to be taken as primary evidence of the character of the land.

e) The General Power of Attorney referred to by the respondents was entered into in subsequent assessment years and hence, it cannot be brought to tax in the assessment year 2008-09. The terms of the General Power of Attorney cannot be taken as proof of land, not being an agricultural land, since as on the date of transfer, the said land in the hands of the petitioner was an agricultural land. Intention of the purchaser of the property to use the land for non-agricultural purpose cannot be a determinative factor to treat the same as

agricultural land in the hands of the assessee. In this connection, (2018) 96 taxmann.com (164) (Guj), PCIT vs Heenaben Bhadresh Mehta, is relied on. If the lands are treated as agricultural land, the petitioner is entitled for exemption from capital gain tax.

6.Mr.A.P.Srinivas, learned Senior Standing Counsel for the respondents made his oral submission. He also filed a written submission. The sum and substance of the submissions made on behalf of the respondents are as follows:

a) The petitioner is not justified in questioning the reopening, since the second respondent had reason to believe that the petitioner had not disclosed truly and fully the fact by way of the claim of exempt income on account of sale of land in his return of income. Non disclosure of primary facts in the return of income does not attract the first proviso to Section 147 of the Income Tax Act. As the original assessment was framed under Section 143(1) and not in a regular assessment under Section 143(3), the Assessing Officer had no chance to form an opinion at the initial stage and hence, the concept of change of opinion does not apply to the present case. In this connection, reliance is placed in the case reported in (2007) 161 Taxmann 316 (SC), Assistant Commissioner of Income Tax vs Rajesh Jhaveri Stock Brokers (P) Ltd.

b) The Assessing Officer of Anoop Bora passed the assessment order in a routine summary manner without considering the findings of the survey along with impounded materials from the premises of Meena Sakhariya and Narendra Sakhariya. Thus, the Assessing Officer of Anoop Bora was not in possession of the information regarding Anoop Bora's activity in sale of non agricultural land, while concluding the assessment under Section 143(3). The principle of res judicata does not apply to the income tax proceedings. In this connection, (1963) 49 ITR 137 (SC), New Jehangirvakil Mills Co. Ltd vs Commissioner of Income Tax and (1961) 41 ITR 685 (SC), Raja Bahadur Visheshwara Singh vs Commissioner of Income Tax, are relied on. No discrimination is shown between the petitioner and the said Anoop Bora, more particularly, when the Assessing Officer of the petitioner and Anoop Bora are different.

c) The Principal Commissioner of Income Tax has no jurisdiction under Section 264 to revise the assessment, once the assessee availed the appeal remedy. Once such appeal is filed, no provision in the statute permitting for withdrawal of the same. Withdrawal of appeal would also amount to availing the appeal remedy, even though it was stated that the reason for withdrawal is to avail revision under Section 264.

d) The order passed under Section 264(1) is not prejudicial to the interest of the petitioner. Therefore, the writ petition is not maintainable. Non availability of further appeal remedy against the order made under Section 264(1) would not compel the High Court to issue the writs. Factual aspects cannot be interfered with under Article 226 of the Constitution of India. Assessee had failed to prove beyond the reasonable doubt whether agricultural operations were being carried out just before the date of sale. Confirmation receipts provided by the lessees do not contain their identity proof and addresses. Therefore, those documents are of no evidential value. As per the original assessment order, the petitioner sale proceeds are taxed as income from the business activity but the first respondent treated the lands in question as non agricultural in nature and therefore, the capital assets in the hands of the assessee liable to capital gains tax. The first respondent found that the subject matter lands are not agricultural lands and therefore, such factual finding cannot be interfered with under Article 226 of the Constitution of India. The petitioner, having availed the remedy of appeal, is not entitled to seek remedy under Section 264, since the Revisional Authority is barred from revising order of Assessing Authority by virtue of Section 264(4). In this connection, (2018) 91 taxmann.com 467 (Karnataka), Nataraju (HUF) vs Principal Commissioner of Income Tax, Mysuru, (2014) 44 taxmann.com 299 (Allahabad), Yogendra Prasad Santhosh Kumar vs Commissioner of Income Tax and (1967) 66 ITR 443 (SC), CIT vs Rai Bahadur Hardutroy Motilal Chamaria, are relied on.

7. Heard both sides, perused the materials placed before this Court and I have given careful consideration to the submissions made on behalf of the parties.

8. The petitioner is aggrieved against the order of the first respondent passed under Section 264 of the Income Tax Act, 1961. The facts warranting the filing of the present writ petition and the rival contentions of the parties before this Court for and against the impugned order have been stated in detail supra and therefore, they are not reiterated once again hereunder.

9. In respect of assessment year 2008-09, in pursuant to reopening of the assessment under Section 147 of the Income Tax Act, the Assessing Officer passed an order of assessment on 30.03.2015 under Section 143(3) read with Section 147 of the said Act, wherein and whereby, apart from the returned income of Rs.2,64,51,830/-, an addition of Rs.5,37,19,960/- was made, being the sale proceeds of the subject matter lands and consequently, assessed the income as Rs.8,01,71,790/-. The Assessing Officer, who originally treated the subject matter lands as agricultural lands, has however, subsequent to the

reopening of the assessment, treated the same as non agricultural lands and thus, made addition of the sale proceeds of such lands as stated above. It is the contention of the petitioner that the subject matter lands were only agricultural lands at the relevant point of time and therefore, the sale proceeds of those lands are not taxable.

10. It is seen that as against the said order of assessment dated 30.03.2015, the petitioner had filed an appeal before the Commissioner of Income Tax (Appeals) on 04.01.2016. However, the petitioner made a request in writing on 09.09.2016 before the said Appellate Authority to withdraw the said appeal to pursue the revision petition before the Commissioner of Income Tax under Section 264 of the said Act. The Appellate Authority, by his order dated 16.09.2016, dismissed the appeal as withdrawn in view of the request made by the petitioner through their letter dated 09.09.2016. The relevant paragraphs 3, 4 and 5 of the above said order dated 16.09.2016 of the Appellate Authority read as follows:

"3. The Income-tax Non-Statutory form-51 (in short, ITNS-51) was sent to the AO for confirmation. In the absence of a response from the AO, it is presumed that facts stated in Form 35 are borne on records and that the AO does not wish to be present at the hearing. The appeal was fixed for hearing by issuance of ITNS-37. In response to the notice, the appellant filed a letter on 09.09.2016 requesting to withdraw its appeal for the AY 2008-09 and submitted the reasons for withdrawal as under:

"I refer to the above mentioned subject and the appeal filed u/s 264A(1)(a) of the Income-tax Act, 1961. Your assessee has preferred to file a revision petition before the Commissioner of Income-tax u/s 264 of the Income-tax Act, 1961 based on the fact that the learned AO has not appreciated the fact of the case and the submission made by your assessee. Further the Commissioner of Income-tax has agreed to hear our case and take up the matter for revision. Based on the above background I kindly request your good self to accept my withdrawal of the appeal filed at your good office."

4. The matter is considered. In view of the request by the appellant vide letter dated 09.09.2016, this appeal is dismissed as withdrawn.

5. In the result, the appeal is dismissed. This order is passed under section 250 read with section 251 of the Act."

11. No doubt, it is true that after filing the above appeal before the First Appellate Authority on 04.01.2016, the petitioner filed the revision under Section 264 before the first respondent on 26.02.2016. Therefore, it is evident that the petitioner approached both the Appellate Authority and the Revisional Authority one after another and challenged the order of assessment. However, the petitioner has subsequently withdrawn the appeal before the Appellate Authority to pursue the revision before the Revisional Authority as found supra.

12. It is vehemently contended by the learned counsel for the respondents that the petitioner, having chosen to avail the appellate remedy and filed such appeal, is not entitled to maintain the revision before the first respondent under Section 264 even after withdrawal of the appeal. He thus contended that there is a specific bar under Section 264(4) in maintaining such revision, having availed such appellate remedy. It is his further contention that even though the said appeal was subsequently withdrawn, still the embargo made under Section 264 (4) will operate against the petitioner in maintaining the revision, as withdrawal of the appeal cannot be construed to mean that the writ petitioner did not avail the appellate remedy at all.

13. On the other hand, it is contended on behalf of the petitioner that once the appeal is withdrawn, that too, on the reasons stated in the said memo for pursuing the revision and once such memo was accepted and the appeal was dismissed as withdrawn based on such memo, it cannot be said that the petitioner has availed the appellate remedy so as to draw the bar stipulated under 264(4) against the petitioner.

14. Perusal of the order passed by the First Respondent/Revisional Authority, impugned in this writ petition, does not indicate anywhere that the revision was rejected on the ground of its maintainability. On the other hand, the Revisional Authority had proceeded to decide the revision on merits and ultimately, rejected the same by observing that the assessee had failed to prove beyond reasonable doubt whether the agricultural operations were being carried out just before the date of sale. Thus, the Revisional Authority, after rejecting the revision, directed the Assessing Officer to treat the subject matter lands in question as non agricultural in nature and therefore, capital assets in the hands of the assessee exigible to capital gain tax.

15. The said order of the first respondent, impugned in this writ petition, is not put to challenge by the Revenue questioning on its maintainability. On the other hand, the said order is being challenged in this writ petition only by the assessee. It is also to be noted at this juncture that the

Revenue has neither opposed the withdrawal of the appeal before the Commissioner of Income Tax (Appeals) nor challenged the said order of the Appellate Authority, dismissing the appeal as withdrawn, in view of the request made by the petitioner, before the next appellate forum. Likewise, the petitioner's letter dated 09.09.2016, was also not opposed by the Revenue. Therefore, much emphasis made by the learned counsel appearing for the respondents on Section 264(4) of the Income Tax Act, 1961, regarding the maintainability of the revision before the first respondent, cannot have any force. What the Revenue either accepted or failed to challenge further, cannot be objected to as the first time before this Court, that too in a proceedings at the instance of the Assessee.

16. (2018) 91 taxmann.com 467 (Karnataka), Nataraju vs Principal Commissioner of Income Tax, is relied on to contend that the revision before the first respondent is not maintainable. Perusal of the facts and circumstances of the said case would show that the assessee therein, instead of filing regular appeal before the First Appellate Authority to challenge the order of assessment, has chosen to file the revision petition under Section 264 just before the expiry of the prescribed time period and therefore, the Karnataka High Court has found that remedy by way of revision under Section 264 lies in a narrow compass and the said remedy cannot be treated as a regular remedy bypassing the regular remedy of appeal. The facts and circumstances of the present case are totally different, as discussed supra. Therefore, the above said decision is not applicable to the present case.

17. The learned counsel for the Revenue vehemently contended that even though the appeal was withdrawn, in effect, it has to be treated that the petitioner has exhausted the appellate remedy and thus the revision before the first respondent was not maintainable. I have already pointed out that the first respondent has not rejected the revision on the ground of its maintainability, but by considering the merits of the matter. Even otherwise, the question as to whether dismissal of the appeal as withdrawn can be treated as availing the appellate remedy, has already been considered by the Division Bench of the Bombay High Court in a case reported in 50 ITR 578 (Bombay), Jagmohandas Gokaldas vs Commissioner of Wealth Tax, wherein it is observed that unless the question as to the validity of the complaint looked into or scrutinized by the Authorities concerned viz., the Appellate Authority or the Revisional Authority, it cannot be said that the right conferred by the Act is fully exercised or exhausted. I am in full agreement with the view taken in the above case. For better understanding, the relevant portion of the order is extracted as hereunder:

" The question that arises is when can an order be said to be the subject of an appeal? According to Mr.Palkhivala, as already stated, the order becomes the subject of an appeal only when the merits of the order appealed against are dealt with by the appellate authority. While, on the other hand, according to Mr.Joshi, the order appealed against is the subject of an appeal when a competent appeal against that order is filed in which a decision could be given by the appellate authority.

We find it difficult to accept Mr.Joshi's contention. One of the shades of meaning of the word "subject" given is "that of which anything is said or of which the discourse treats". Understanding clause (b) in this sense it can only be said that where anything is said in the appellate order of the order appealed against, relating to the merits of the order, it can be said to be subject of an appeal, and this appears to be the intention of the legislature in enacting clause (b). Looking to the scheme of the Act, in our opinion, the right conferred on an assessee is two-fold: he can get the validity of the order of the Appellate Assistant Commissioner or the Wealth tax Officer tested either at the hands of the appellate authority, viz., the Tribunal or the Assistant Commissioner, or get the validity of either of the orders tested at the hands of the Commissioner and unless the question as to the validity of the order complained against is looked into or scrutinized by the authorities concerned, viz., the appellate authority or the revisional authority, it cannot be said that the right conferred by the Act is fully exercised or exhausted."

18. Perusal of the above observation of the Bombay High Court would show that the petitioner herein, after getting the appeal dismissed as withdrawn, was entitled to pursue his remedy under Section 264 before the first respondent. No doubt, it is true that the petitioner herein had in fact invoked both jurisdiction simultaneously. However, before passing any adverse order by any one of such authority on the maintainability of such proceedings, the petitioner had cleverly chosen to withdraw one of such proceedings viz., appeal. Thereafter, the Revisional Authority also proceeded to decide the revision on merits only. Therefore, I do not find any justification on the objection made by the learned counsel for the Revenue against the maintainability of the revision before the first respondent, before this Court as the first time.

19. (2014) 44 taxmann.com 299 (Allahabad), Yogendra Prasad Santosh Kumar vs Commissioner of Income-tax, is relied on by the learned counsel for the respondents again on the maintainability of revision before the first respondent. A careful perusal of the facts and circumstances of the said case would show that the assessee therein, after filing an appeal before the Commissioner (Appeals), had filed an application for withdrawal of such appeal and such application was rejected by the Appellate Authority, who in turn, thereafter proceeded to decide the appeal on merits. Therefore, the Allahabad High Court found that the revision before the Revisional Authority under Section 264, in that case, was barred by virtue of Sub Section (4) of Section 264. The facts and circumstances of the present case are totally different. In this case, the Appellate Authority had allowed the application for withdrawal and dismissed the appeal as withdrawn, in view of the reasons stated by the petitioner for withdrawal viz., for pursuing the revision before the first respondent. Therefore, I do not think that the above decision is helping the respondents in any manner.

20. (1967) 66 ITR 443 (SC), Commissioner of Income-tax vs. Rai Bahadur Hardutroy Motilal Chamaria, is relied on by the learned counsel for the respondents to contend that the Assessee, having once filed an appeal cannot withdraw it. But in this case, the Appellate Authority had permitted the writ petitioner/appellant to withdraw the appeal so as to pursue his remedy before the first respondent by way of revision under Section 264. Neither the said order of the Appellate Authority nor the order of the first respondent in entertaining and deciding the revision on merits was put to challenge by the Revenue. Therefore, the above contention of the Revenue cannot be sustained. Consequently, the above decision of the Apex Court is also factually distinguishable.

21. At this juncture, it is useful to note the observations made by the Division Bench of the Gujarat High Court reported in (2018) 91 taxmann.com 196, Nitin Babubhai Rohit vs Dharmendra Vishnubhai Patel, wherein at paragraph No.9, it is observed as follows:

"9. In terms of clause (a) of sub-section (4) of section 264, revisional powers would not be exercised, inter alia, in a case where the period of limitation for filing appeal has not expired and the assessee has not waived the right of appeal. This is essentially to ensure that at the hands of the same assessee a single issue does not receive consideration at the hands of two separate and independent authorities, one exercising appellate jurisdiction and the other revisional jurisdiction. Applying this principle to the facts on hands, we find that the assessee had

clearly made a choice to persuade the Commissioner of Income Tax to exercise his revisional powers under section 264 of the Act and not pursue his appeal before the Appellate Commissioner. The revisional authority therefore correctly proceeded to decide the revision petition of the assessee and on facts correctly allowed the same. This later observation needs no elaboration since the order of the Commissioner is self explanatory and eloquent. The assessee had made full disclosure of the capital gain tax and there was no failure on his part to give necessary details thereof."

22. Likewise, the Allahabad High Court in its decision reported in 52 ITR 780 (All), Ajayapat Snghani vs. GTO, has observed as follows:

" Apart from authority I would also have been inclined to hold that the assessee had a right either to have his grievance ventilated and determined on merits by the Tribunal on appeal or by the Commissioner by way of revision. The choice necessarily must be only that of the assessee and if he asks for permission to withdraw his appeal filed before the Tribunal and that permission is granted there is a clear indication that he does not want his grievance ventilated and determined by the Tribunal but by the Commissioner. That right or choice cannot be denied to him on any technical or theoretical grounds. So long as no decision has been given on the merits or even on the question of limitation by the Tribunal, the case cannot, in my judgment, be said to have formed the subject matter of an appeal to the Tribunal."

23. Therefore, the next question arises for consideration is as to whether the present writ is maintainable against the order of the first respondent and if the answer is in affirmative, whether the order of the first respondent is sustainable on merits.

24. It is contended by the learned counsel for the respondents that the order passed under Section 264, since not being an order prejudicial to the assessee, he is not entitled to challenge the same before this Court. He invited this Court's attention to Section 264(1) of the said Act, stipulating that the Principal Commissioner or Commissioner may pass such order, not being an order prejudicial to the assessee, as he thinks fit. I am not convinced on the above objection raised by the Revenue. No doubt, Explanation 1 to Sub Section (7) of Section 264 contemplates that an order by the Principal Commissioner or Commissioner declining to interfere shall, for the purpose of Section 264, be deemed not to be an order

prejudicial to the assessee. But that does not mean that even though the Authority under Section 264 rejected the revision, thereby declining to interfere with the order put to challenge in revision, the aggrieved assessee cannot have any further remedy at all against the said order made under Section 264. There is no dispute to the fact that against an order made under Section 264, no further statutory appellate remedy is available to the aggrieved party. Therefore, it leads to an irrebutable conclusion that, under such circumstances, a remedy under Article 226 of the Constitution of India is always available to the aggrieved party to challenge the order made under Section 264. Therefore, I reject the above objection made by the Revenue on the maintainability of the writ petition. It is further contended that the very revision itself was not maintainable before the first respondent and consequently, the order passed by the first respondent cannot be challenged by way of the present writ petition. I have already pointed out that the very issue against the maintainability of the revision before the first respondent, having not been raised by the Revenue before the first respondent, the same cannot be raised now before this Court as first time. Therefore, this Court is of the view that the writ petition is maintainable and hence, it has to be seen as to whether the order passed by the first respondent is sustainable on merits.

25. Now let me see on merits. I have given a careful consideration to the order passed by the first respondent, impugned in this writ petition. The question before the first respondent was whether the lands in question are agricultural or non agricultural lands. The first respondent, though pained to make 13 pages order, while most of the pages contained only extract of some case laws, has however, confined his findings only to one paragraph viz., paragraph No.4, which reads as follows:

"4. The following principles are merged from the case laws discussed as above:-

1. The assessee has to mandatorily provide evidence to prove beyond doubt that agricultural operations were being carried out before the sale of the lands in question.

2. Agricultural lands cease to be agricultural lands the time the assessee agrees to sell the same for use as house sites. This comes from the decision of the jurisdictional High Court in Meccane Industries Ltd. (supra) which is in the nature of binding precedent in the territory of Tamil Nadu and Pondicherry.

Coming to the first aspect, the evidence provided by the assessee cannot be accepted as the column in official records where the assessee has to state the name and survey number of the lessee who acquired the land for cultivation purposes is not filled in a proper manner. As per the official records no such name of the lessees have been provided. Thereafter, the confirmation receipts provided by these lessees do not contain their identity proofs and addresses. Such confirmatory certificates are of no evidential value as the persons who have signed are not verifiable. The assessee has simply furnished self serving certificates prepared at his convenience. Thus, the assessee has failed to prove beyond reasonable doubt whether the agricultural operations were being carried out just before the date of sale.

Coming to the second aspect, the common clause in the two agreements furnished by the assessee are reproduced as under:

1.WHEREAS my attorney is authorised by us by this deed of irrevocable General Power of Attorney to convey and sell and to alienate and to create charge on the entire property to be converted by the attorney herein as house sites mentioned in the schedule hereunder to the third persons as its discretion and decision. On this aspect, the case of the assessee is on all fours with respect to judgment of the jurisdictional High Court in Meccane Industries Ltd. (supra)."

26. No doubt the first respondent has extracted various decisions in his order. But there is no discussion of the facts and circumstances of the present case and finding as to how such facts and circumstances would fall under the purview of the facts and circumstances of the case laws extracted and the view expressed therein. Mere extraction of few case laws is not sufficient in the absence of any discussion on the same as stated supra.

27. The first respondent has chosen to reject the revenue records filed by the petitioner only on the reason that the entries in the said records were not made in a proper manner. The first respondent found that the names of the lessees have not been shown in the revenue records. Likewise, he found that the confirmation receipts provided by the lessees do not contain their identity proof and addresses. Therefore, the first respondent had come to the conclusion that the assessee had failed to prove beyond reasonable doubt with regard to the nature of the land in dispute.

28. First of all, it is to be noted that the first respondent has not doubted the genuineness of the official documents viz., the Encumbrance Certificate, Chitta, Patta and A-Register filed by the assessee. If a column to indicate the name of the lessee is not filled in those documents, it cannot be treated as fatal to the case of the petitioner, if other material entries made in those documents would lead to a reasonable conclusion that the lands in question are only agricultural lands or they were put to agricultural operations at the relevant point of time. In any event, if those revenue records maintained and issued by the concerned Department lack some details, it can always be ascertained from those authorities, so long as the very genuineness of those documents is not doubted. Equally, if the confirmation certificates provided by the lessees do not contain the identity and address of those persons, the first respondent could have very well called upon the petitioner to furnish those details and probed further. Without doing so, the first respondent has chosen to reject those confirmation certificates also, in a casual manner, which in my considered view, is not proper.

29. Apart from the above aspects, one more material factor has to be taken note of in this case, which the first respondent has totally failed to refer and consider. It is the case of the petitioner that the lands in question were purchased by the petitioner and another person by Anoop Bora as joint owners. There is no dispute to the fact that at the hands of the said joint owner viz., Anoop Bora, the subject matter lands were treated as agricultural lands by the very same income tax Department, while making the order of assessment for the relevant period. The petitioner has specifically raised that issue in his application filed under section 264. Even though such issue was raised by the petitioner, the first respondent has not at all traversed to the same and answered the said issue, while rejecting the application.

30. No doubt, it is true that the learned counsel for the respondents sought to contend that the Assessing Officer of Anoop Bora passed the assessment order without considering the findings of the survey report along with impounded material from the premises of two other individuals. However, the fact remains that the said order of assessment passed in respect of the said Anoop Bora, being the joint owner of the subject matter land, by treating the same land as agricultural land, has not been either reopened or revised. On the other hand, it is admitted that the said assessment order stands. Therefore, if the same land is treated by another Assessing Officer as agricultural land, the question as to how the Assessing Officer of the petitioner is justified in treating the same as non agricultural land, is certainly a question needs to be addressed and answered by the first respondent by considering the facts

and circumstances, especially when it was raised before him. The first respondent has not at all considered the said issue. At this juncture, the observation made by the Apex Court reported in 249 ITR 219 (SC), Union of India vs Kaumudini Narayan Dalal, is relevant to be noted wherein it is stated that it is not open to the Revenue to accept the case of the assessee in one case and challenge its correctness in the case of other assessee without just cause.

31. Likewise, the first respondent referred to the two agreements, presumably the Power of Attorneys, to reject the claim of the petitioner by taking note of a clause in the said agreement that the entire property to be converted by the attorney as house sites. It appears that in a power of attorney executed the power of attorney, in favour of a third party contained the above referred clause. It is contended on behalf of the petitioner that the General Power of Attorney referred to by the first respondent was entered into in the subsequent assessment year and hence, it cannot be taken as a proof of the land not being an agricultural land, since as on the date of transfer, the said land in the hands of the petitioner was an agricultural land. It is further contended that the intention of the property to use the land for non agricultural land, cannot be a determinative factor to treat the same as non-agricultural land at the hands of the assessee. In support of such contention, (2018) 96 taxmann.com 164, PCIT v Heenaben Bhadresh Mehta, was relied on.

32. A careful perusal of the impugned order would show that the first respondent, first of all, has not discussed the above aspect in detail except extracting the particular clause in his order and thereafter, to decide only by saying that the case of the assessee is rejected. As rightly pointed out by the learned counsel for the petitioner, the character of the property, at the relevant point of time, at the hands of the vendor, alone should be taken into consideration and that the intention of the purchaser as to how he is going to treat the property after such purchase, cannot be a determinative factor to decide such character. Even otherwise, the above clause in the Power of Attorney relied on by the first respondent clearly indicates that the Power of Attorney is going to convert the entire property as house sites. Therefore, it is evident that at the relevant point of time, the character of the lands at the hands of the assessee cannot be construed as house sites, since such conversion was intended to take place in future. Therefore, the first respondent ought to have gone by the other relevant revenue records and supportive confirmation certificates to arrive at a conclusion with regard to the nature of the land. At this juncture, the Division Bench decision of the Gujarat High Court reported in (2018) 96 Taxmann.com 164 (Gujarat), Principal Commissioner of Income Tax vs Heenaben

Bhadresh Mehta, is relevant to be quoted, wherein at paragraph No.9, it is observed as follows:

"9. As observed herein above, the land was sold as an agricultural land and in fact, what was sold was agricultural land. What was the intention of the purchaser cannot be the determinative factor to treat the profit earned by the assessee on sale of agriculture land as business income. Similarly, merely because for whatever reason, the assessee has earned sufficient huge amount of profit also cannot be a ground to treat the profit earned by the assessee on sale of agriculture land as business income."

33. It is vehemently contended by the learned counsel for the respondents that the principles of res judicata will not apply to the income tax proceedings and therefore, any order passed regarding the nature of the land in dispute by the other Assessing Officer in the case of Anoop Bora cannot be relied on by the petitioner to contend that in view of such order, the present proceedings cannot deal with the subject matter land as non agricultural land. In support of such contention, the learned counsel sought to rely on two decisions of the Hon'ble Supreme Court reported in (1963) 49 ITR 137 (SC), New Jehangir Vakil Mills Co. Ltd. vs Commissioner of Income Tax and (1961) 41 ITR 685 (SC), Raja Bahadur Visheshwara Singh vs Commissioner of Income Tax.

34. I do not think that the above objection raised with regard to the applicability of principles of res judicata need to be considered by this Court at this stage, in view of the fact that the very issue regarding character of the land at the hands of other assessee, being joint owner, at the relevant point of time, was not at all taken into consideration and decided by the first respondent, while passing the impugned order as discussed supra. I have already pointed out that the petitioner has specifically raised that issue by relying upon the assessment order made in the case of Anoop Bora dated 23.12.2010. However, the first respondent has not adverted to the said issue and answered the same in his order. Only when such issue was addressed by the first respondent and answered, then the question of considering the present objection on the principles of res judicata would arise. As this Court is inclined to remit the matter for fresh consideration of the first respondent, no view on the above said issue at this stage is expressed.

35. Though the petitioner in this writ petition has contended that the reopening of the assessment under Section 147 was beyond four years without there being any averment that the petitioner had not fully and truly disclosed the material facts,

perusal of the revision petition filed under Section 264 dated 25.02.2016 and a written submission filed in the said revision dated 12.09.2016 do not indicate that the petitioner has raised the above contention before the first respondent/revisional authority. The order passed by the first respondent, impugned in this writ petition, also does not deal with such issue. In any event, as this Court has chosen to remit the matter back to the first respondent, it is open to the petitioner to raise such contention as well before the first respondent by way of additional grounds and if any such ground is made, it is for the first respondent to consider the same and pass orders on such objection as well on merits and in accordance with law. Therefore, the case laws referred to by both parties in respect of the above said issue is not required to be considered as of now.

36. Considering the above stated facts and circumstances, the writ petition is allowed and the impugned order is set aside. Consequently, the matter is remitted back to the first respondent to reconsider the entire matter afresh, in the light of the findings and observation made in this order and pass a fresh order, after giving due opportunity of hearing to the petitioner. It is open to the petitioner to place further substantial materials including identity proof and address of the lessees at the relevant point of time. The first respondent shall pass such order within a period of four weeks from the date of receipt of a copy of this order. No costs. The connected miscellaneous petitions are closed.
Vri

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

To

- 1.The Principal Commissioner of Income-Tax-VI,
121, Uthamar Gandhi Salai, Nungambakkam,
Chennai 600 034.
- 2.The Assistant Commissioner of Income-tax,
Non-Corporate Ward 15(1), 121, Uthamar Gandhi Salai,
Nungambakkam, Chennai 600 034.

+1cc to Mr.M.V.Swaroop, Advocate S.R.No.67263
+1cc to Mr.A.P.Srinivas, Advocate S.R.No.66826

KR/13/11/18

W.P.NO.1843 OF 2018