

**IN THE INCOME TAX APPELLATE TRIBUNAL  
COCHIN BENCH, COCHIN**

**Before Shri Chandra Poojari, AM & Shri George George K, JM**

ITA No.116/Coch/2016 : Asst.Year 2011-2012

Smt.Halima Zubair 688/1, Kunjalu's Place P.T.Usha Road Kochi - 682 011. <b>PAN : AACPZ2882R.</b>	Vs.	The Asst.Commissioner of Income-tax, Circle 2(1) Kochi.
(Appellant)		(Respondent)

Appellant by : Sri.Surendranatha Rao  
Respondent by : Smt.A.S.Bindhu, Sr.DR

<b>Date of Hearing : 21.03.2018</b>	<b>Date of Pronouncement : 01.04.2019</b>
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**ORDER**

**Per George George K, JM**

This appeal at the instance of the assessee is directed against CIT(A)'s order dated 08.12.2015. The relevant assessment year is 2011-2012.

2. The grounds raised reads as follow:-

*1. The order of the Commissioner of Income Tax (Appeals) is against law and facts.*

*2. The learned Commissioner of Income Tax (Appeals) should have appreciated that the actual user of the land for agricultural operation for two years immediately prior to the date of sale is not a pre-condition for treating a plot of land as agricultural property. This condition is specified in section 54F as well as section 10(37) but cannot be*

*read into section 2(14) which defines capital asset. For determining whether the particular plot of land is agricultural what is really required is connection of such land with an agricultural purpose. The appellants have used the land for agricultural purposes in which crops were raised for own use and the mere fact that no agricultural income was included in the Income Tax returns filed, by itself would not decide the character of the land. The learned Commissioner (Appeals) should have appreciated that the entries in revenue records are prima facie evidence to indicate that the land in question is agricultural land. The mere fact that area around this land was fast developing, would by itself not make this particular plot a non-agricultural one.*

*3. Without prejudice to what is stated above, the learned Commissioner of Income Tax (Appeals) should have allowed the deduction U/S 54F if he was of the opinion that the land transferred was a capital asset and the amount received on transfer of this land was chargeable capital gains. He should have appreciated that the decision of the Honourable Supreme Court in Goetze (India) Limited v. CIT (284 ITR 322) (SC) has only held that the Assessing Officer cannot consider a fresh claim during assessments if such claim is not raised such claim at the time of adjudication of an appeal filed. The facts of the decision of the apex court related to a claim before the tribunal and based on the fact of that case, the Commissioner (Appeals) is not justified in concluding that the fresh claim can be raised only before the tribunal and not before Commissioner (Appeals). Even otherwise, as per Circular No.14 (XI-35) of 1955, dated April 11, 1955, the CBDT has provided that the Assessing officer shall grant all deductions and exemptions to which an assessee is entitled even though the assessee would have omitted to raise a claim in the return. The Assessing officer having included the notional income from the new residential property in the income of the*

*appellant, he should have also granted the deduction under section 54F for the amount invested in this property."*

3. The brief facts of the case are as follows:

The assessee is an individual, who is a dealer in tiles and sanitary items. She is also commission agent of seafood. For the assessment year 2011-2012, the return of income was filed on 30.09.2011 declaring total income at Rs.26,73,010. The assessee had received a sum of Rs.90,83,968 on account of compulsory acquisition of 1.06 acres of land from Kerala Government. The assessee claimed the land acquired as exempt from taxation as per letter dated 12.03.2014 written to the Assessing Officer. The contentions of the assessee for claiming exemption from taxation are as follows:-

(i) The land acquired is basically agricultural land. It was acquired by Government of Kerala for KNFRA (Kerala Industrial Infrastructure) project for development of industrial infrastructure.

(ii) The revenue records show the property as Nilam (wet land) and the land tax has been paid on the said property.

(iii) The property was regularly used for agriculture and paddy was cultivated and later on banana plantation was done. The yield from the cultivation was used for own consumption. The land continued to be used for

agricultural purposes only and no industrial activity was carried out.

(iv) The land was not situated in a developed area. The entire surrounding area was agricultural land only and under compulsory acquisition by the Government of Kerala for the Info Park expansion 2<sup>nd</sup> stage. The land forms part of 21 acres of property acquired for the II phase of Info Park. Almost all the acquired land is wet land only and some portion had coconut trees on the buds having an approximate age of 20 to 25 years.

(v) No development was done by plotting or providing roads and other facilities.

(vi) There was no sale of property on earlier occasion of any small portion for non-agricultural purposes. The land was sold on acreage basis.

(vii) The sale was due to compulsory acquisition by the Government of Kerala and a large portion of 21 acres was acquired in full with no room for negotiation of price. The price offered was below the then market value of the property.

(viii) The land is located outside the limits of Municipality and notified area as defined for the purposes of agricultural land.

4. The Assessing Officer, however, denied the claim of exemption from capital gains on compensation received on transfer of land giving following reasons:-

(i) The land in question is basically a residential plot with access to all amenities like electricity, water, cable T.V. connections, drainage connections and road access.

(ii) The nearby locality was of the land are highly developed near to Infopark developed roads, etc.

(iii) Land was transferred for non-agricultural purposes for a price of Rs.90 lakhs per acre which is comparatively high for agricultural land.

(iv) The intention of the assessee in acquiring this land cannot be said to be for genuine agricultural purposes and the motive was only for to earn gains by fetching higher value.

(v) There is no evidence to prove that organized agricultural activity was carried out on the land.

(vi) Physical characteristics, use of lands adjoining lands, etc do not indicate that the land was agricultural.

(vii) Whether or not compulsory acquisition was done, the appellant would not have cultivated the land.

5. Aggrieved by the denial of exemption, the assessee preferred an appeal to the first appellate authority. The assessee before the first appellate authority contended that the land acquired was an agricultural land and would not come within the term capital asset u/s 2(14) of the I.T.Act and hence would not be liable for capital gain tax. Further, the learned Counsel had claimed exemption u/s 54F of the I.T.Act in respect of a new residential house purchased in Bangalore. The CIT(A), however, rejected the contention of the assessee. The CIT(A) reiterated the views of the Assessing Officer and upheld the order of the Assessing Officer denying the claim of exemption from capital gains. The CIT(A) also relied on the finding of the Assessing Officer that no agricultural income was returned by the assessee for the year under consideration and also for the earlier years. The CIT(A) relied on the following judicial pronouncements, which the Assessing Officer also relied on.

- (i) M.K.Abdul Rehman v. DCIT (16 taxman.com 406) (Coch)
- (ii) Smt.Asha George v. ITO (351 ITR 123) (Ker.)
- (iii) Kalpetta Estate Ltd. V. CIT (61 taxman 54) (Ker.)
- (iv) Shahnaz Shukkoor v. Chelannur Grama Panchayat [(2009) 3 KLT 899 (Ker.)

6. The CIT(A) also rejected the claim of exemption u/s 54F of the I.T.Act for the reason that the claim was not made in the return of income filed by the assessee.

7. Aggrieved by the CIT(A) is order, the assessee filed the present appeal before the Tribunal. The assessee has filed a paper book containing 137 pages *inter alia* enclosing certificate from the Village Office, Form No.9(B) of the Land Acquisition Act, 1894, signed by the Special Tahasildhar, Land Acquisition, Cochin, Form No.12 dated 18.05.2010, Notification No.9447 dated 6<sup>th</sup> June, 1994 and copies of judicial pronouncements relied on by the assessee. The assessee has also filed additional evidence namely Form No.9(B) under the Land Acquisition Act, 1894, in which the official notice of compulsory acquisition and the nature of the land is specified. In support of the additional evidence sought to be admitted, the assessee has also filed an affidavit which reads as follows:-

“Halima Zubair, aged 54 years wife of Zubair Naina residing at 28/2115-B,Zuleka House,Thottungathara Road,Kadavanthra Post, Emakulam do hereby solemnly affirm as follows :-

I am assessed to Income Tax by the Assistant Commissioner of Income Tax, Circle 2(1), Kochi having PAN No. AACPZ2882R. For Assessment Year 2011-12, my Income Tax assessment was completed U/S 143(3) on 26.03.2014. While completing the assessment, the assessing officer treated consideration received by me on compulsory acquisition of 1.06 acres of agricultural land in Kunnathunadu village as consideration received on transfer of capital asset and levied capital gain tax on this amount. This land was not sold by me but was compulsorily acquired. The consideration for acquisition was fixed by the Land Acquisition Thahasildar, Thripunithura as NILAM which means agricultural land.

Even though the amount received was relating to compulsory acquisition and not voluntary sale the assessing officer treated the land acquired as capital asset. The CIT (Appeals) also did not grant any relief even though the village officer's certificate and other evidences were produced before him. The appellant now has obtained copy of Form no.9B under the Land Acquisition Act 1894, in which the official notice of compulsory acquisition and the nature of the land is specified. This Form no 9B clearly specified that the land acquired was nilam meaning agricultural land. Form no.9B was not be produced before the assessing officer and the Commissioner (Appeals) because the appellant honestly believed that the land acquired would be treated as exempt on the basis of Village Officer's certificate and other evidences. However, as the appeal filed has been dismissed by the Commissioner (Appeals), the Form no 9B would be crucial to decide the nature of land compulsory acquired. The non filing of Form no 9B before the Assessing Officer or the Commissioner (Appeals) was not willful and was due to a bonafide belief that the compulsorily acquired land would be treated as agricultural land based on documents already filed and also precedents established in other cases. The filing of this document is now very important to prove the actual nature of the land at the time of acquisition. Under these circumstances I pray the Honorable Tribunal to take on record this additional evidence and kindly issue appropriate directions for the disposal of the appeal."

8. The learned Departmental Representative strongly supported the orders of the Income-tax Authorities.

9. We have heard the rival submissions and perused the material on record. The solitary issue for our consideration is regarding taxability of the amount received on compulsory acquisition of 1.06 acres of land claimed to be agricultural



land. Admittedly, the above said land is outside the Ernakulam Municipality. The assessee had also claimed exemption u/s 54F of the I.T.Act.

9.1 As regards the claim that the impugned land is an agricultural land, the assessee has produced Form No.9(B) i.e. Notification u/s 9(3) of the Land Acquisition Act, 1894, issued by the Special Tahasildhar, Land Acquisition Office, wherein it is clearly stated that the property acquires as `Nilam'. Form No.9(B) now produced goes to the root of the issue and for substantial cause and justice, we admit the same on record. Since we have admitted the additional evidence on record, the matter needs to be restored to the Assessing Officer for examination of the issue afresh in the light of the additional evidence now produced by the assessee.

9.2 Before concluding, it is to be mentioned that the claim of deduction u/s 54F of the I.T.Act was dismissed at the threshold by the CIT(A) on the ground that the claim was not raised through the return of income, hence, it cannot be considered by the A.O. The CIT(A) failed to note that the judgment of the Hon'ble Supreme Court in the case of *Goetze (India) Ltd. v. CIT [(2006) 284 ITR 323 (SC)]* wherein the Hon'ble Supreme Court had put an embargo on Assessing Officers entertaining a fresh claim other than through a revised return but the same decision has held that there is no such bar on appellate authorities entertaining a claim on any issue not raised in the return. The Hon'ble Delhi High Court

in the case of *Pr.CIT v. Western India Shipyard Ltd. [(2015) 379 ITR 289 (Del.)]*, had held that : "*the Tribunal was right in holding that while there was a bar on the Assessing Officer entertaining such claim without a revised return being filed by the assessee, there was no such restraint on the Commissioner (Appeals) during the appellate proceedings.....*". Moreover, as per Circular No.14(XI-35) of 1955, dated 11<sup>th</sup> April, 1955, the Assessing Officer having included the notional income from new residential property in the income of the assessee, he can also consider the claim of deduction u/s 54F of the I.T.Act provided the conditions are satisfied for claiming such deduction. It is ordered accordingly.

10. In the result, the appeal filed by the assessee is allowed for statistical purposes.

Order pronounced on this 01<sup>st</sup> day of April, 2019.

Sd/-  
**(Chandra Poojari)**  
**ACCOUNTANT MEMBER**

Sd/-  
**(George George K)**  
**JUDICIAL MEMBER**

Cochin ; Dated : 01<sup>st</sup> April, 2019.  
Devdas\*

Copy to :

1. The Appellant.
2. The Respondent.
3. The Pr.CIT, Kochi
4. The CIT(A)-II, Kochi
5. The DR, ITAT, Cochin
6. Guard File

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