

**IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH "C", MUMBAI
BEFORE SHRI B.R.BASKARAN, ACCOUNTANT MEMBER AND
SHRI PAWAN SINGH, JUDICIAL MEMBER
ITA No.4122/Mum/2015 (Assessment Year- 2011-12)**

Prashant Jaipal Reddy C/o Dhanapat Kothari & Associates, Office No.50, Wadia Building, 9-B, Cawasji Patel Street, For, Mumbai-400001 PAN: AAYPR7037E	Vs.	I.T. O, Ward-9(1)-3, Room No. 224, Aayakar Bhavan, M.K. Road, Mumbai-400020.
(Appellant)		(Respondent)

Assessee by : Shri Subodh Ratnaparkhi
(AR)

Revenue by : Shri Rajat Mittal (Sr. DR)

Date of hearing : 29.08.2017

Date of Pronouncement : 22.09.2017

Order Under Section 254(1) of Income Tax Act

PER PAWAN SINGH, JUDICIAL MEMBER:

1. This appeal by assessee under section 253 of the Income-tax Act (the Act) is directed against the order of Commissioner of Income-tax (Appeals)-21 [Id. CIT (A)], Mumbai dated 02.03.2015 for the Assessment Year (AY) 2011-12.

The assessee has raised the following grounds of appeal:

1. On the facts & in law, the Hon. CIT (Appeals) erred in confirming the addition of Rs. 1,99,56,849/- by holding the surplus arising on sale of agricultural lands at villages Nane and Sange, Taluka Wad a, Dist. Thane to be in the nature of Long Term Capital Gains liable for tax, not appreciating that the lands sold were agricultural lands and therefore not "capital assets" as per section 2(14)(iii) of the LT. Act 1961 and accordingly the surplus arising on sale of such lands was not liable to any tax in the hands of the appellant.

2. Vide application dated 23.08.2017, the assessee has raised the following additional grounds of appeal:

2." Without prejudice to ground no.1, where it is held that the surplus of Rs. 1,99,56,849/- arising on sale of agricultural lands at village Sange/Nane, Taluka Wada, Dist. Thane is in the nature of long term capital gains, then the appellant be held eligible for

(i) Deduction of indexed cost of acquisition, as provided u/s 48 of the I. T. Act 1961, in the computation of long term capital gain and

(ii) Benefit of beneficial rate of tax as provided u/s 112 of the I. T. Act 1961."

3. Brief facts of the case are that the assessee filed return of income for relevant AY on 30.09.2011 declaring total income of Rs. 7,36,660/-. The assessment was completed on 28.02.2014 u/s 143(3) of the Act. The Assessing Officer (AO) during the assessment proceedings, noticed that the assessee has claimed Capital Gain of Rs. 1,99,56,849/- on sale of agricultural land and claimed exemption u/s 1(14(iii)) of the Act. The assessee was asked to furnish the details regarding the area of the land, location, nearby Municipal Corporation, Town and the evidence related with agricultural activities and the agricultural produced for last three years. The assessee in its reply dated 18.10.2014 contended that the land is situated at Village Sange & Nane in Taluka Wada, District Thane, Maharashtra. Both Villages falls within the Gram Panchayat. The nearby Town having Municipality Kalyan which is 72 Kilometer Meter (KM) away from the said Villages. The assessee further contended that the land was at the primary stage of development and no agricultural income was generated during the last three years. The contention of the assessee was not accepted by AO holding that any land which is open

or vacant and not used for any agricultural or other allied activities, land was under development could not be regarded as agricultural land. The open land/vacant land are mere use for commercial activities than the undertaking any agricultural activities or for extension of agriculture. The AO further observed that the multiple pieces of land in the Village Nane & Sange are under commercial development because of proximity to Kalyan, Bhiwandi, Thane and Mumbai. The assessee purchased the said land not with the intention of agricultural activities but to develop the land and sell the same for commercial gain. The assessee is not farmer, resides in Mumbai and purchases the land for after developing it and that assessee is more interested in commercial exploitation of land and has no intention of farming or carrying out any agricultural activities. Thus, the AO not treated the said land as agricultural land and the gain arising therefrom were brought to tax thereby denying exemption claimed u/s 2(14)(iii). On appeal before the Id. CIT(A), the action of AO was upheld. Thus, further aggrieved by the order of Id. CIT(A), the assessee has filed the present appeal before us.

4. We have heard the Id. Authorized Representative (AR) of the assessee and Id. Departmental Representative (DR) for the Revenue and perused the material available on record. In support of additional ground of appeal, the Id. AR of the assessee argued that he has raised additional ground of appeal in addition to the original ground of appeal in alternative to the Ground No.1, claiming deduction on account of index cost on acquisition of land and

improvement thereon as provided under section 48 for computation of Long Term Capital Gain (LTCG) and further benefit to beneficial rate of tax as provided u/s 112 of the Act. It was argued that all facts relating to the raising of additional ground of appeal are emanating from the record of the lower authorities no further for additional fact is required to be brought on record. The additional ground of appeal is necessary for effective and fair determination of tax against the assessee in any case the ground No. 1 of the appeal is decided against him. In support of his submission, the Id. AR of the assessee relied upon the decision of National Thermal Power Corporation Vs. CIT 229 ITR 383 (SC). On the other hand, the Id. DR for the Revenue argued that the assessee has not raised such ground of appeal before the First Appellate Authority (FAA).

5. We have considered the rival submission of the parties and found that the assessee has raised additional ground of appeal in alternative to the original ground of appeal *inter alia* that in the event of the land is not considered as agricultural asset, the assessee be allowed the benefit of LTCG and the deductions on account of index cost of acquisition and the benefit of beneficial rate of tax. We have noted that for consideration of additional ground of appeal, no fresh facts is required to be brought on record all the facts related to the additional ground of appeal are emanating from the facts available on record. Thus, the additional ground of appeal. Hence, the assessee is allowed to raise the additional ground of appeal.

6. Ground No.1 relates to the addition of Rs. 1,99,56,849/- on sale of agricultural land/asset. The ld. AR of the assessee argued that the assessee purchased several piece of agricultural land admeasuring more than 20 hectare situated at Village Sange & Nane, Wada Taluka, District-Thane through registered agreements dated 05.09.2006 for a total consideration of Rs. 1,02,20,245/-. At the time of purchase of said agricultural land the seller were using it for agriculture purposes for producing the fruits like Mango, Chick, Coconut as fruit Crops and producing rise and other Crops. After purchasing the land, the assessee spent substantial amount for further development of the land for making its boundary, labeling and installing the irrigation system, sprinklers, Borewell and power tillers. The assessee spend Rs. 48,22,906/-on such improvement and development. The assessee continued with the existing agricultural activities by nurturing to save the fruit bearing trees on the land. During the development process, the assessee's income from agricultural receipt was insufficient to meet the expenses of development. The assessee sold the agricultural land vide Conveyance dated 02.12.2010 to Shri Sohanlal Motiram Jain for a lump sum consideration of Rs.3.50 Crore. Thus, the assessee Net surplus of Rs. 1,99,56,849/- was claimed exempted from tax arising out from the sale of agricultural land. The exemption is provided under section 2(14(iii) of the Act. The Assessing Officer ('AO') disallowed the gain of assessee holding that the assessee has not utilized the land for agricultural operation. The AO

has not disputed the fact that the location of the land outside the notified area of Municipality. It was argued that the assessee provided all necessary information and evidence that the land was being used for agricultural purposes and the assessee also used the said land for the same agricultural purpose during the period it remains under the occupation/possession of assessee. In support of additional ground of appeal, the Id. AR of the assessee is entitled for exemption u/s 2(14)(iii), if in case the Hon'ble Tribunal is of opinion that the gain arising of the sale of the said land to be taxed under the Long Term Capital Gain(LTCG), the assessee be allowed cost of acquisition and the expenses made on its development, fencing labeling etc. The assessee further be allowed the benefit of beneficial rate of tax as provided u/s 112 of the Act. In support of his following submission, the Id. AR of the assessee relied on the following decisions:

- (i) Shankar Dalal v/s CIT, 150 DTR 197 (Bom)(2017)
- (ii) CIT v/s Smt. Debbie Alemao, 331 ITR 59 (Bom)(2011)
- (iii) CIT v/s Minguel C. Pais, 282 ITR 616 (Bom)(2006)
- (iv) CWT v/s H.V. Mungale, 145 ITR 208 (Bom)(1984)
- (v) ACIT v/s Harsh C. Rajani, ITA No.911/M/2015-'H' Bench ITAT, Mum order dated 22.12.2016.
- (vi) Vannit Kumar Inderkumar Gupta v/s JCIT, ITA No. 2736/M/2013 'F' Bench, ITAT, Mum order dated 16.12.2015.
- (vii) ITO v/s Ashok Shukla, 139 ITD 666 (Indore) (2012).
- (viii) Harish V. Milani v/s JCIT, 114 ITD 428 (Pune) (2008)
- (ix) Thanmel Ganeshmal Parmar v/s ITO, ITA No. 266/M/2013 'B' Bench, ITAT, Pune order dated 04.11.2015.

7. On the other hand, the Id. DR for the Revenue supported the order of authorities below. It was argued that the Id. CIT (A) considered the entire factual background of the facts of the case in para 4.4 of his order. The Id.

CIT(A) after considering the fact concluded that the assessee has purchased the land for developing it which fact is strengthened by the contention of the assessee that he had incurred an expenditure of Rs. 48,22,906/-. The contents of Conveyance Deed dated 02.12.2010 also reveals that the land was purchased for development purpose after obtaining necessary permission and other approval as may be required for the purpose of development of construction of the structure. The sole intention and purpose of the assessee to develop the land and to sell it as a business asset. The contents of Conveyance Deed clearly spelt that the property/assets under reference is definitely not an agricultural land. The assessee incurred the alleged expenses for commercial purpose, the assessee has allegedly incurred more than 45% of cost of the land and thus huge investment was made with a view to exploit the commerciality of the assets.

8. We have considered the rival submissions of the parties and have gone through the orders of authorities below. The AO while passing the assessment order denied the exemption u/s 2(14)(iii) on sale of agricultural land holding that the land in question was not used for agricultural purpose. The land which is vacant and not used for agricultural or allied activities and/or is under development could not be termed as agricultural land. Such land was used for commercial activities other than for agricultural activities. Though, the AO has not disputed the fact that impugned land is at the distance of more than 8 KM from the local limit of Municipalities and less

population as provided u/s 2(14)(iii) of the Act. The Id. CIT(A) while considering the contention of the assessee observed that in the return of income the assessee has not revealed any agricultural income. The said land was shown by assessee in his balance-sheet as “fixed asset”. The assessee along with his brother entered in an agreement with purchaser Shri Ranjit Jain for sale of entire land. The Id. CIT(A) further observed that under the recital of Conveyance Deed dated 02.12.2010, the assessee has referred the property “for the purpose of development”. The Id. CIT(A) based of his observation on the decision of Smt. Sarifabibi Mohamed Ibrahim & Ors. Vs. CIT [204 ITR 631 (SC)] wherein it was held that the agricultural land sold to Housing Society, the land though entered in Revenue record as agricultural and profit on sale assessable to Capital Gain tax. The Id. CIT(A) further examined the activities undertaken by the assessee for a period of four years and concluded that there was no agricultural activities undertaken by the assessee except developing the land as no verifiable evidence is placed by assessee and confirmed the action of AO.

9. We have noted that the ratio of decision of Hon’ble Supreme Court in Smt. Sarifabibi Mohamed Ibrahim & Ors. (supra) squarely applicable is applicable on the fact of the present case. The assessee is permanent resident of Mumbai. The assessee has not shown any income from agriculture activities. The assessee in the return of income has also shown as income from ‘salary’ from M/s Federal Brands Ltd. No evidence to substantiate that

any agriculture activity was undertaken by the assessee during the period of holding the land with him, was placed on record by the assessee. The assessee claimed that during the period of holding installed irrigation system, created check dam, water sprinkle etc. No evidence of such activity is filed on record. None of the activity carried by the assessee during the period qualified as agriculture activity. The facts of the various decision relied by Id. AR of the assessee are at variance and the ratio of none of the case is applicable. Moreover, the decision of the Hon'ble Supreme Court is a binding precedent by virtue of Article 141 of the Constitution of India. Thus, we do not find any illegality or infirmity in the order passed by Id. CIT(A).

10. The ground No.2(additional ground) relates to deduction of cost of acquisition as per section 48 of the Act. We have seen that while taxing the Capital Gain arising on sale of land, the AO and the Id. CIT(A) has not considered the deduction on account of Index Cost of Acquisition and the cost of Improvement as provided under section 48 of the Act. The assessee has filed an application for addition ground of appeal which we have admitted in para 5 (supra) of this order. As we have noted that assessee's claim for deduction on acquisition of cost of improvement has not been considered by the lower authorities. Thus, we deem it appropriate to restore the additional ground of appeal to the file of AO to verify the Cost of Acquisition and improvement thereon and grant the appropriate relief to the assessee in accordance with law. Needless to say that before considering the

deduction of Index Cost of Acquisition along with the Cost of Improvement the AO shall grant the assessee an opportunity of hearing . The AO further directed to grant the benefit of beneficial rate of tax as provided u/s 112 of the Act.

11. In the result, appeal of the assessee is partly allowed.

Order pronounced in the open court on 22nd day of September 2017.

Sd/-

(B.R.BASKARAN)

ACCOUNTANT MEMBER

Mumbai; Dated 22/09/2017

S.K.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

Sd/-

(PAWAN SINGH)

JUDICIAL MEMBER

)

BY ORDER,
(Asstt.Registrar

ITAT, Mumbai