

आयकर अपीलीय अधिकरण "ए" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, PUNE

श्री अनिल चतुर्वेदी, लेखा सदस्य, एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष ।
BEFORE SHRI ANIL CHATURVEDI, AM AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA No.171/PUN/2012

निर्धारण वर्ष / Assessment Year : 2008-09

The Assistant Commissioner of Income Tax,
Circle – 2, Aurangabad

.....अपीलार्थी / Appellant

बनाम / V/s.

Shri Bajaj Satyanarayan Girdharilal,
Bajaj Galli, Tq. Majalgaon,
Distt.-Beed

PAN : APNPB2019Q

.....प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA No.172/PUN/2012

निर्धारण वर्ष / Assessment Year : 2008-09

The Assistant Commissioner of Income Tax,
Circle – 2, Aurangabad

.....अपीलार्थी / Appellant

बनाम / V/s.

Shri Bajaj Jugalkishor Girdharilal,
Bajaj Galli, Tq. Majalgaon,
Distt.-Beed

PAN : APGPB6877B

.....प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA No.173/PUN/2012
निर्धारण वर्ष / Assessment Year : 2008-09

The Assistant Commissioner of Income Tax,
Circle – 2, Aurangabad

.....अपीलार्थी / Appellant

बनाम / V/s.

Shri Bajaj Murlidhar Girdharilal,
Bajaj Galli, Tq. Majalgaon,
Distt.-Beed

PAN : APNPB2018R

.....प्रत्यर्थी / Respondent

Assessee by : Shri S.N. Puranik
Revenue by : Shri Achal Sharma

सुनवाई की तारीख / Date of Hearing : 25-02-2018
घोषणा की तारीख / Date of Pronouncement : 28-03-2018

आदेश / ORDER

PER VIKAS AWASTHY, JM :

These three appeals have been filed by the Revenue in the case of three assessees (closely related to each others-brothers) in their respective cases against the order of Commissioner of Income Tax (Appeals), Aurangabad for assessment year 2008-09. All the three impugned orders are dated 28-11-2011.

Since, the grounds raised by Revenue in all the three appeals are identical and the issue in appeal is emanating from same set of facts, these

appeals are taken up together for adjudication and are disposed of vide this single order.

For the sake of convenience the facts are taken from ITA No. 171/PUN/2012.

2. The brief facts of the case as emanating from records are: The assessee is an individual. The assessee is a co-owner of land comprising in Survey No. 384/244 measuring 4 Hectors 63.5 R situated at Majalgaon. The assessee is having 1/3rd share in the aforesaid land. The assessee and the other co-owners (brothers) sold the aforesaid land for a consideration of Rs.3,68,06,250/-. The assessee declared Long Term Capital Gain on sale of land Rs.66,33,750/- (1/3rd share) after claiming exemption u/s. 54B Rs.53,45,000/-. During the course of scrutiny assessment proceedings the Assessing Officer held that the assessee is not eligible for claiming exemption u/s. 54B as no agricultural activities were carried out by the assessee on the land in the last two years immediately preceding the date of sale.

Aggrieved by the assessment order dated 30-12-2010, the assessee filed appeal before the Commissioner of Income Tax (Appeals). The assessee furnished various documents before Commissioner of Income Tax (Appeals) to substantiate that the land in question was under cultivation in the immediately two preceding years from the date of sale and the assessee had earned agricultural income from cultivation of land. The Commissioner of Income Tax (Appeals) by placing reliance on various decisions and also by applying tests as laid down by the Hon'ble Supreme Court of India in the case of Smt. Sarifabibi Mohmed Ibrahim & Ors. Vs. Commissioner of Income Tax reported as 204 ITR 631 held that the land in

question was under cultivation and the assessee is eligible to claim exemption u/s. 54B of the Act. Against the order of Commissioner of Income Tax (Appeals), the Revenue is in appeal before the Tribunal.

3. The Revenue has raised following grounds of appeal impugning the findings of Commissioner of Income Tax (Appeals) :

“1. Whether on the facts and circumstances of the case the CIT(A) is correct in directing to allow deduction u/s. 54B of the Income Tax Act, 1961 claimed by the assessee at Rs.53,45,000/-?”

2. Whether the CIT(A) was justified in holding that the land was Agricultural Land when the assessee Shri Satyanarayan G. Bajaj during the course of recording his statement u/s. 131 of the Income Tax Act, 1961 has accepted the fact that the land was under purview of municipal area and the Agricultural Activities has been discontinued since 5 to 6 years back i.e. F.Y. 2003-04 & 2004-5?”

4. The order of the AO is to be restored and that of the CIT(Appeals) be vacated.

5. The appellant craves leave to add, amend or alter any grounds of appeal.”

Identical grounds have been raised by the Revenue in ITA Nos. 172 & 173/PUN/2012.

4. Shri Achal Sharma representing the Department submitted that the land comprising in Survey No. 384/244 admeasuring more than 4 Hectors situated at Majalgaon is jointly owned by the three assesseees having 1/3rd share each. The aforesaid land was sold by the assesseees in the period relevant to the assessment year 2008-09 for a total consideration of Rs.3.68 crores. The assesseees thereafter claimed deduction u/s. 54B in respect of Long Term Capital Gains arising on the sale of land. The claim of the assesseees was rightly disallowed by the Assessing Officer as the assessee failed to qualify the condition i.e. the land should have been used

by the assessee or his parents for agricultural purpose in immediately two preceding years from the date of transfer.

4.1 The ld. DR pointed that in the first instance the land sold was not agricultural land. The said land was situated within municipal limits of city Majalgaon. The land was within yellow zone i.e. zone wherein residential activity is permitted. During the course of assessment proceedings the Assessing Officer had carried out verification from the office of : (i) Municipal Council, Majalgaon; (ii) Tehsildar, Majalgaon; (iii) District Town Planner, Bashirgunj Beed and (iv) District Collector, Beed. On inquiry it transpired that the assessee and his two brothers had filed an application for converting the land from agricultural land to residential/commercial land in the year 1981. The office of District town Planner, Beed vide letter dated 15-10-1981 prepared a layout plan for Survey No. 384/1 and 384/2 whereby the part of land was allocated to the Police Department, Irrigation Department and remaining land was divided into plots. The District Town Planner, Beed has issued No objection for conversion of land from agricultural to non-agricultural. The assessee and his two brothers had sold one of the plots i.e. Plot No. 22 from Survey No. 384/1 to one Mr. Chandmal Jainarayan Zangid, vide Registered Deed dated 08-12-1981. Thus, the ld. DR referred to No Objection Certificate dated 07-12-2007 issued by Nagar Parishad, Majalgaon for use of land for industrial purpose at page 373 of the paper book.

4.2 The ld. DR further referred to the statement of Shri Satyanarayan Girdharilal Bajaj i.e. the assessee recorded u/s. 131 of the Act at pages 243 to 246 of the paper book. The ld. DR pointed that in reply to Question No. 5 the assessee has categorically admitted that no agricultural activities

were carried out on the land in the past 5-6 years i.e. since Financial Years 2003-04 and 2004-05. The ld. DR further referred to 7/12 extract at pages 19-20 of the paper book to show that the land comprising in Survey No. 384/244 is Padat land i.e. barren. Therefore, no cultivation could have been carried out on the said land. The ld. DR pointed that the assessee in its return of income has not shown any income from agricultural operations. The ld. DR referred to report of DVO at pages 53/54 of the paper book to contend that the land in question had potential for being exploited for residential/commercial purpose. The ld. DR contended that immediately after the sale of land the purchaser obtained NA permission on the land. This, clearly indicates that the land was not being used for agricultural purpose.

4.3 The ld. DR assailing the findings of Commissioner of Income Tax (Appeals) submitted that the First Appellate Authority granted relief to the assessee merely on the basis of 7/12 extracts. The ld. DR referring to the decision of Pune Bench of the Tribunal in the case of Mr. Abhijit Subhash Gaikwad Vs. Dy. Commissioner of Income Tax in ITA No. 699/PN/2013 for assessment year 2009-10 decided on 27-05-2015 submitted that the Co-ordinate Bench of Tribunal has held that merely because the land is shown as agricultural land in revenue records, is not a conclusive test to hold that the land is agricultural land.

4.4 The ld. DR to further buttress his submissions placed reliance on the decision of Hon'ble Bombay High Court in the case of Lilavati M. Amin Vs. Commissioner of Income Tax reported as 201 ITR 293 to contend that the test would determine whether the land is agricultural or not, depends upon the actual condition of the land. In the aforesaid case the plot had been

fenced. Under the Town Planning Scheme, roads were developed for the purpose of giving access to the plots. Each plot was of less than 1 acre. There was no well or canal for irrigation. There were buildings around the plot. There was no positive evidence to show that the land was ever used for agricultural purpose. In such circumstances the Hon'ble High Court held that it was not possible to hold that the land was agricultural land. In the present case, as well no agricultural activities were carried out as per assessee's own admission, the assessee and his brothers had applied for change of land used from agricultural to non-agricultural way back in the year 1981. The Collector had granted NA permission on the plot adjacent to the plot which is subject matter of dispute in the present set of appeals. There is no material available on record to show that the land in question was being used for agricultural purpose in immediately two years preceding the date on which the transfer took place. Thus, the assessees are not eligible to claim exemption u/s. 54B of the Act.

5. On the other hand Shri S.N. Puranik appearing on behalf of the assessee vehemently supporting the findings of Commissioner of Income Tax (Appeals) submitted that the land comprising in Survey No. 384/244 owned by assesseees was sold on 29-09-2007. Thus, in the two years immediately preceding the date of sale i.e. the years starting from 29-09-2005 to 28-09-2007 the land was used by assesseees for agricultural purpose. The ld. AR referred to page 255 of the paper book to show that in response to notice issued u/s. 133(6) of the Act, a report has been furnished by the Talathi to the Tehsildar clearly indicates that though permission for non-agricultural use of land has been granted by Collector, Beed vide order dated 28-12-2005. However, some parts of the land are still under cultivation during the years 2004-05 to 2006-07. During the

years 2007-08 to 2009-10 the land was uncultivated and plots have been demarcated. The ld. AR pointed that from the report of Talathi it is clearly evident that during the Financial Years 2005-06 and 2006-07, the land in question was under cultivation. The ld. AR further referred to the letter of Tehsildar dated 09-09-2010 at page 257 of the paper book address to the ACIT wherein on the basis of report of Talathi the Tehsildar has certified that land in Gut No. 384/244 is a agricultural land and was in cultivation as per 7/12 extracts up to 2006-07. The ld. AR further submitted that the assessee had sold agricultural produce through market yard. In support of his submissions the ld. AR referred to receipts issued by Agricultural Produce Market Committee, Majalgaon at pages 229 to 241 of the paper book. The ld. AR further submitted that the Assessing Officer had verified the genuineness of said receipts from the Secretary, Agricultural Produce Market Committee. The Secretary vide letter dated 15-10-2010 verified that the agricultural produce has been sold to license holder of market committee in the market area by the assessee and his brothers.

5.1 The ld. AR submitted that the Commissioner of Income Tax (Appeals) while allowing assessee's claim of exemption u/s. 54B had applied the test as laid down in the case of Smt. Sarifabibi Mohmed Ibrahim & Ors. Vs. Commissioner of Income Tax (supra) and the assessee qualified the test. Therefore, no doubt should be raised regarding carrying out of agricultural activities by the assessee on the land in question in the period of 2 years immediately preceding the date of sale of land. The ld. AR submitted that without prejudice to his earlier submissions, the provisions of section 54B only states that agricultural activity should be carried out on the 'land'. The section nowhere states that it should be an 'agricultural land'. He further asserted that even if the assessee had taken NA permission from

the Collector with respect to land in question in the year 2005. It would not alter the position as the assessee was still cultivating the land and the land was being used for agricultural purpose. Till the time land was sold by the assessee, no development activity such as plotting of land, laying of roads, laying of sewage, etc. was carried out on land. The ld. AR in support of his submissions placed reliance on the following decisions :

- i. Commissioner of Income Tax Vs. Narsing Gopal Patil in Income Tax Appeal No. 2319 of 2013 decided on March 1, 2016 by Hon'ble Bombay High Court;
- ii. Commissioner of Income Tax Vs. Smt. Savita Rani, 270 ITR 40 (P&H);
- iii. Asha George Vs. Income Tax Officer, 351 ITR 123 (Kerala);
- iv. Asstt. Commissioner of Income Tax Vs. Govardhan S. Pawar, 167 ITD 511 (Pune);
- v. Majid Khan Nisar Khan Vs. ITO, 59 ITR (Pune-Trib.) 68.

6. We have heard the submissions made by representatives of rival sides and have perused the orders of authorities below. We have also considered the documents and decisions on which the rival sides have placed reliance. In all these three appeals, the Revenue has raised solitary issue of allowing exemption u/s. 54B of the Act to the assessee on Capital Gains arising from sale of land at Majalgaon. Undisputedly, the land jointly owned by the assessee was within the Municipal limits of Majalgaon. The primary reason for disallowing benefit of exemption u/s. 54B to the assessee by Assessing Officer is that the land was not used for agricultural purpose in the two years immediately preceding the date on which the land was sold. The land was sold by the assessee on 29-09-2007. Thus, the period that has to be considered for ascertaining whether

the land was under cultivation falls within the Financial Years 2005-06 and 2006-07.

7. The assesseees have furnished a copy of 7/12 extract at pages 19 and 20 of the paper book. A perusal of same shows that during Financial Years 2005-06 and 2006-07 part of the land was under cultivation and cotton, green gram and black gram crops were grown. This fact has been further corroborated by Talathi's letter dated 02-09-2010 (at page 255 of the paper book) addressed to the Tehsildar, Majalgaon. An examination of the record reveal that the Assessing Officer has made inquiries from the revenue authorities with respect to land comprising in Survey No. 384/244, Majalgaon owned by assesseees. The Tehsildar vide letter dated 09-09-2010 addressed to the Assessing Officer confirmed that the land in question was under cultivation up to the year 2006-07. The Tehsildar has further pointed that the Collector, Beed vide Order No. 2005/R.B./Dex-2/L.N.D.-2/-111 dated 28-12-2005 has permitted use of land for non-agricultural purpose. The assesseees have furnished photocopies of sale invoices/bills for purchase of seed and fertilizers at pages 31 to 38 of the paper book. Further, the assesseees have furnished photocopies of invoices/receipts vide which the agriculture produce were sold by the assesseees to commission agents at Agriculture Produce Market Committee, Majalgaon. The Assessing Officer u/s. 133(6) of the Act sought verification of sale receipts from the office of Agriculture Produce Market Committee, Majalgaon, Distt.-Beed. The Secretary, Agricultural Produce Market Committee, Majalgaon vide communication dated 15-10-2010 at page 259 of the paper book confirmed that the produce has been sold to the license holders of Market Committee in the market area. The assesseees have brought sufficient material on record to show that agricultural activities were

carried out on the land in question and that the assesseees have sold agricultural produce through the licensed commission agents in the market yard. The assesseees by furnishing relevant land revenue records and the details of sale of agricultural produce have discharged their onus to show that the land in question was under cultivation during the Financial Years 2005-06 and 2006-07.

8. The next question that arises for consideration is whether for claiming exemption u/s. 54B, the capital asset to be transferred should be an agricultural land. Before proceeding further here it would be relevant to refer to the provisions of section 54B of the Act.

“Capital gain on transfer of land used for agricultural purposes not to be charged in certain cases.

54B. [(1)] *[Subject to the provisions of sub-section (2), where the capital gain arises from the transfer of a capital asset being land which, in the two years immediately preceding the date on which the transfer took place, was being used by the assessee or a parent of his for agricultural purposes (hereinafter referred to as the original asset), and the assessee has, within a period of two years after that date, purchased any other land for being used for agricultural purposes.]*

A perusal of section 54B shows that the benefit of exemption u/s. 54B is available, if the land is being used for agricultural purposes in the two years immediately preceding the date of transfer. The requirement of section 54B is that the land should be used for agricultural purpose. The section does not mandate that the capital asset transferred should be an agricultural land for claiming exemption u/s. 54B of the Act.

Our view is fortified by the decision of Hon'ble Kerala High Court in the case of Asha George Vs. Income Tax Officer (supra). The Hon'ble High Court held :

“8. the emphasis under Section 54B is the use to which the land is put (In fact, the tribunal has correctly held that it is the user of the land and not the nature of the land that is relevant). In other words, it is not necessary that the land which is transferred, must be an agricultural land as such. The fact that the land is located in an urban area, cannot by itself be relevant to deny the benefit under Section 54B. What is essential is that it must be used for agricultural purposes for a period of two years prior to the date of the transfer.”

Similar view has been taken by the Hon’ble Punjab and Haryana High Court in the case of Commissioner of Income Tax Vs. Smt. Savita Rani (supra) wherein the Hon’ble High Court held :

“There is no dispute regarding condition No. (ii). The dispute is regarding condition No. (i). For the purposes of this condition, it is not necessary to go into the various authorities referred to by the AO or the CIT(A) to determine whether the land was agricultural land or not. The exemption is available to the seller of "a capital asset being land". It does not restrict the benefit to the agricultural land only. However, the land against which the benefit is sought must have been used by the assessee or his parent for agricultural purposes in the two years immediately preceding the date of sale.”

Thus, it is unambiguously clear that nature of land would not determine assessee’s eligibility for claiming exemption u/s. 54B of the Act. It is the use of land for agricultural purpose in the period two years immediately preceding the date of sale which is vital consideration for determining the assessee’s eligibility for claiming the benefit.

9. The assesseees have admitted that they have applied for change of land use from agricultural to non-agricultural. Ostensibly, the change of land use was granted to the assesseees by the Collector, Beed. Merely, for the reason that the permission has been granted for change of land use would not per-se change the nature of land till the time the land is being actually used for purposes other than agriculture. The assessee has substantiated from document on record that during the Financial Years 2005-06 and 2006-07 the land was being used for agricultural purposes

and crops were cultivated. On the contrary, the Revenue has failed to establish that the land which is subject matter of dispute was used for non-agricultural purpose i.e. certain development activities viz. plotting of land, laying of roads, etc. was carried out on the land. The entries made in the revenue record are presumed to be correct in terms of section 157 of the Maharashtra Land Revenue Code, 1966 unless rebutted. In the present case the Assessing Officer has failed to rebut the revenue entries indicating that land was under cultivation during the Financial Years 2004-05, 2005-06 and 2006-07.

10. The Bombay High Court in the case of Commissioner of Income Tax Vs. Narsing Gopal Patil in Income Tax (supra) upheld the findings of Tribunal where the benefit of exemption u/s. 54B was granted to the assessee based on the revenue records. The relevant extract of the judgment is reproduced here-in-below :

“(d) We find that both the CIT(A) as well as the Tribunal have come to a concurrent finding of fact that the subject land was being used for agricultural purpose in the two years preceding the date of the sale. This finding of fact was rendered on the basis of 7/12 extract led as evidence before the Assessing Officer which indicates the manner in which the land is being used. In fact, as correctly observed by the Tribunal, there is a presumption of the correctness of entries in the land revenue record in terms of Section 157 of the Maharashtra Land Revenue Code, 1966. This presumption is not an irrebuttable presumption and it will be open for the Assessing Officer to lead evidence to rebut the presumption. However, no such evidence was brought on record by the Revenue to rebut the presumption. Moreover, the Respondent-assessee has also placed before the authorities its return of income filed for the assessment year 2005-06 to 2007-08 wherein he had inter alia declared agricultural income. In view of the fact that the revenue has not been able to establish that the evidence led by the Respondent-assessee is unreliable by leading any contrary evidence, there is no reason to discard the evidence produced by the Respondent-assessee. Thus, there is a concurrent finding of fact by CIT(A) as well as the Tribunal that the land has been used for agricultural purpose. This finding of fact is not been shown to be perverse and/or arbitrary. Thus, no substantial question of law arises. Accordingly, Question(A) as framed is not entertained.”

Similar view has been taken by the Co-ordinate Bench of Tribunal in the case of Majid Khan Nisar Khan Vs. ITO (supra).

11. The Revenue has placed reliance on the decision of Pune Bench of the Tribunal in the case of Mr. Abhijit Subhash Gaikwad Vs. Dy. Commissioner of Income Tax (supra) to contend that entries in revenue records are not conclusive test to hold the land as agricultural land. We find that the facts in the said case are distinguishable. In any case apart from 7/12 extracts the assesseees in the present case have brought sufficient material on record to show that agricultural operations were carried out on the land in the period immediately before sale. Therefore, the decision in the case of Mr. Abhijit Subhash Gaikwad Vs. Dy. Commissioner of Income Tax (supra) would not support the cause of Revenue.

12. Thus, in view of the facts of the case and the decisions discussed above, we find no infirmity in the orders of Commissioner of Income Tax (Appeals) in the case of all the three assesseees. Accordingly, the impugned orders are upheld and the appeals of Revenue are dismissed.

13. In the result, all the three appeals by the Revenue are dismissed.

Order pronounced on Wednesday, the 28th day of March, 2018.

Sd/-	Sd/-
(अनिल चतुर्वेदी / Anil Chaturvedi)	(विकास अवस्थी / Vikas Awasthy)
लेखा सदस्य / ACCOUNTANT MEMBER	न्यायिक सदस्य / JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 28th March, 2018

RK

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A), Aurangabad
4. आयकर आयुक्त / The CIT, Aurangabad
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "ए" बेंच, पुणे / DR, ITAT, "A" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

//सत्यापित प्रति // True Copy//

आदेशानुसार / BY ORDER,

निजी सचिव / Private Secretary,
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune