

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

श्री डी. करुणाकरा राव, लेखा सदस्य, एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष ।
BEFORE SHRI D. KARUNAKARA RAO, AM AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA No.1045/PUN/2016

निर्धारण वर्ष / Assessment Year : 2011-12

Shri Prakash Choitram Tekwani,
88, Adarsh Nagar, Nr. RTO Office,
Jilha Peth, Jalgaon – 425001

PAN : AAKPT0929P

.....अपीलार्थी / Appellant

बनाम / V/s.

Dy. Commissioner of Income Tax,
Circle – 1, Jalgaon

.....प्रत्यर्थी / Respondent

Assessee by : Smt. Deepa Khare
Revenue by : Shri Sanjeev Ghei

सुनवाई की तारीख / Date of Hearing : 05-04-2019

घोषणा की तारीख / Date of Pronouncement : 22-04-2019

आदेश / ORDER

PER VIKAS AWASTHY, JM :

This appeal by the assessee is directed against the order of Commissioner of Income Tax (Appeals)-2, Nashik dated 31-03-2016 for the assessment year 2011-12.

2. The brief facts of the case as emanating from records are : The assessee is an individual. The assessee filed his return of income for the

impugned assessment year on 30-09-2011 declaring total income of Rs.72,69,115/-. The case of the assessee was selected for scrutiny under CASS. Statutory notice u/s. 143(2) of the Income Tax Act, 1961 (hereinafter referred to as "the Act") was issued to the assessee on 02-08-2012. In scrutiny assessment proceedings, the Assessing Officer observed that the assessee had sold four parcels of land and had claimed deduction u/s. 54B of the Act in respect of one of the land comprising in S. No. 37/6 admeasuring 18.07 gunthas at Ashane Shiwar, Taluka-Karjat, Distt.-Raigad. Summons were issued to the assessee u/s. 131 seeking details of property sold. The Assessing Officer after analyzing the documents furnished by the assessee concluded that the assessee has failed to establish that the agricultural activities were carried out by the assessee. The Assessing Officer remarked that the assessee has failed to conclusively substantiate the sale of agricultural produce. Thus, the Assessing Officer disallowed assessee's claim of deduction u/s. 54B of the Act.

As regards the other three parcels of land comprising in S. No. 37/2, 37/4 and 37/5 at Ashane Shiwar, Taluka-Karjat, Distt.-Raigad the assessee had offered the gain from sale aforesaid lands as Short Term Capital Gain. The Assessing Officer held the gain arising from sale of said three parcels of land as business income. Aggrieved against the order of Assessing Officer dated 11-03-2014, the assessee filed appeal before the Commissioner of Income Tax (Appeals).

In proceedings before First Appellate Authority, the assessee raised additional ground stating that the agricultural land sold by assessee does not fall within the definition of Capital Asset as defined u/s. 2(14) of the Act. The Commissioner of Income Tax (Appeals) sought remand report before the Assessing Officer on the fresh claim made by assessee. The

Commissioner of Income Tax (Appeals) after considering the documents on record and the remand report held that the land comprising in S. No. 37/6 does not fall within the meaning of capital asset u/s. 2(14) of the Act. However, as regards gain on sale of the other three parcels of land comprising in S. No. 37/2, 37/4 and 37/5 at Ashane Shiwar, Taluka-Karjat, Distt.-Raigad the Commissioner of Income Tax (Appeals) upheld the findings of Assessing Officer in treating the same as 'Business Income'. Now, the assessee is in second appeal before the Tribunal assailing the findings of Commissioner of Income Tax (Appeals) by raising following grounds :

- “1. *The learned CIT(A) erred in law and on facts in confirming the action of the learned AO in treating the surplus on sale of Agricultural land at Gat No.37/2, 37/4 and 37/5 Mauge Ashane Shiwar Karjat of Rs.70,64,920/- as adventure in the nature of trade and assessing the same as business income.*
2. *The learned CIT(A) erred in law and on facts in not appreciating that the Agricultural land at Gat No. 37/2, 37/4 and 37/5 Mauge Ashane Shiwar Karjat was outside the purview of definition of capital assets within the meaning of Section 2(14) of the I.T Act and thus not liable or chargeable to tax.*
3. *The learned CIT(A) erred in law and on facts in directing the amount of Rs.25,85,147/- to be assessed as exempt in respect of Gat No. 37/6 Mauge Ashane Shiwar Karjat Instead of Rs.26,56,000/- which is assessed by learned AO. There has been thus a mistake in adopting the amount may kindly be rectified.*
4. *The appellant craves to add, alter, modify or substitute any ground of appeal at the time of hearing.”*

3. Smt. Deepa Khare appearing on behalf of the assessee submitted that the assessee had sold agricultural land vide two registered Sale Deeds, both dated 04-02-2011. The land comprising in S. No. 37/2, 37/4 and 37/5 at Ashane Shiwar, Taluka-Karjat, Distt.-Raigad were sold by a single Sale Deed for a consideration of Rs.86,00,000/-, whereas, the land comprising in S. No. 37/6 was sold vide separate Sale Deed of even date for

a consideration of Rs.29,50,000/-. The ld. Counsel submitted that above parcels of agricultural land were purchased by the assessee on different dates as under :

Date of Purchase	S. No.	Part Hissa	Area H.R.	Purchase Price Rs.
05/06/2009	37/2	2	0.68.0	6,28,500
15/06/2010	37/4	4	0.05.7	57,500
12/08/2010	37/5	5	0.27.1	3,00,000
05/11/2007	37/6	6	18.07.0	2,24,000

3.1 The ld. Counsel for assessee submitted that the assessee was using the land for agricultural purpose and was cultivating the land. In support of her contentions the ld. Counsel referred to 7/12 extracts of the land at pages 139 to 146 of the paper book. The ld. Counsel pointed that as per 7/12 extracts during the Financial Year 2010-11 rice was cultivated. The land comprising in S. No. 37/6 was the purchased by the assessee in the year 2007. The other parcels of land adjoining the aforesaid land of assessee were purchased subsequently. Land in S. No. 37/2 was purchased in the years 2009 and land in S. No. 37/4 and 37/5 were purchased in 2010 vide separate sale deeds. When the assessee had purchased land comprising in S. No. 37/2, 37/4 and 37/5 the assessee was already cultivate land comprising in S. No. 37/6 as is evident from 7/12 extract at page 142 of the paper book. The assessee never used the said lands for purpose other than agriculture. At no point of time the assessee applied for change of land use from agriculture to non-agricultural purpose. No activity whatsoever was carried out by the assessee to commercially exploit the land for purpose other than agriculture. The ld. Counsel further contended that the authorities below have erred in coming to the conclusion that the income earned by the assessee from sale of land comprising in S. No. 37/2, 37/4 and 37/5 is the

business income without appreciating the documents on record and the facts of the case. The assessee is not trader of land. The assessee inadvertently in the return of income had offered Short Term Capital Gain from sale of land comprising in S. No. 37/2, 37/4 and 37/5. Later on, when the assessee released his mistake at the time of filing appeal before the Commissioner of Income Tax (Appeals), the assessee corrected the mistake and claimed that the four parcels of land do not fall within the meaning of Capital Asset u/s. 2(14) of the Act. The Id. Counsel submitted that on the basis of remand report from the Assessing Officer, the Commissioner of Income Tax (Appeals) held that the land comprising in S. No. 37/6 is not a capital asset. However, the claim of assessee with regard to land comprising in S. No. 37/2, 37/4 and 37/5 was rejected merely on the ground that the holding period of land was very less. The Id. Counsel submitted that holding period of land alone would not determine the nature of transaction and the nature of asset. In support of his contentions the Id. AR placed reliance on the following decisions :

- i. Commissioner of Income Tax Vs. Smt. Debbie Alemao, 331 ITR 0059(Bom);
- ii. Commissioner of Income Tax Vs. Dhable, Bobde, Parose, Kale, Lute & Choudhary, 202 ITR 98 (Bom);
- iii. Supriya Kanwar Vs. Income Tax Officer, 149 ITD 001 (Jodhpur)(TM);
- iv. Hareesh V. Milani Vs. Joint Commissioner of Income Tax, 114 ITD 428 (Pune-Trib.);
- v. Shri Anil R. Bihani Vs. Income Tax Officer in ITA No. 2502/PN/2012 for assessment year 2009-10 decided on 11-04-2016.

4. *Au contraire*, Shri Sanjeev Ghei representing the Department vehemently defended the impugned order. The Id. DR submitted that in

return of income the assessee had himself offered the land comprising in S. No. 37/2, 37/4 and 37/5 as Short Term Capital Gain. However, in proceedings before the Commissioner of Income Tax (Appeals) the assessee changed his stance and claimed that the aforesaid lands do not fall within the meaning of Capital Asset u/s. 2(14) of the Act. The assessee is engaged in trading of land as is evident from sale/purchase transactions of land. The holding period of lands comprising in S. No. 37/4 and 37/5 was 6-8 months only. The land comprising in S. No. 37/2 was sold within 20 months from the date of purchase. The assessee in his return of income has never shown any income from sale of agricultural produce and has also not claimed any expenditure on agricultural activities. This clearly indicates that the assessee had never carried out any agricultural activities on the lands. The assessee had purchased the land on power of attorney and sold the land through power of attorney. The inevitable conclusion that can be drawn is that the assessee was never interested in retaining the land for agricultural purpose.

5. We have heard the submissions made by representatives of rival sides and have perused the orders of authorities below. The assessee in ground Nos. 1 and 2 of the appeal has assailed the findings of Commissioner of Income Tax (Appeals) in holding the gain on sale of agricultural lands as Business Income. It is an undisputed fact that the assessee in the return of income had offered income from sale of land comprising in S. No. 37/2, 37/4 and 37/5 as Short Term Capital Gain. However, in proceedings before the Commissioner of Income Tax (Appeals) the assessee made fresh plea that the aforesaid lands do not fall within the meaning of section 2(14) and hence, income from sale of land is not chargeable to tax. The Commissioner of Income Tax (Appeals) sought

remand report from the Assessing Officer with respect to assessee's fresh claim. The Assessing Officer in his remand report dated 24-02-2016 (at pages 136 to 138 of paper book) observed as under :

"5. However, during the course of appellate proceedings, the assessee has taken a ground that the assessee was not aware of the fact that the asset sold was not a capital asset as per the section 2(14). In support of the same, he has filed certain details as evidences. The same has been considered. Based on the submission, it appears that the land is not capital asset as per the definition of section 2(14) of the Income Tax Act, 1961."

The Assessing Officer further observed that since the assessee has sold the land comprising in S. No. 37/2, 37/4 and 37/5 within a short duration, the income from purchase/sale of agricultural land appears to be business of the assessee. The Assessing Officer finally concluded that income from sale of lands may be treated as business transaction.

6. The assessee has placed on record 7/12 extracts of the land in question. A perusal of same reveals that the lands comprising in S. No. 37/2, 37/4 and 37/5 were under cultivation. In so far as the objection of the Commissioner of Income Tax (Appeals) that the assessee had not disclosed agricultural income in the return of income, we are of considered view that non-disclosure of meager income from agriculture activities in the return of income does not lead to a conclusion that the land was not used for cultivation in the relevant period. The Hon'ble Jurisdictional High Court in the case of Commissioner of Income Tax Vs. Smt. Debbie Alemao (supra) has held that where the assessee had explained that the agricultural income derived was barely sufficient to maintain the land, and hence was not disclosed in the return of income, cannot be a ground to hold that land was not used for the agriculture purpose.

7. The Hon'ble Bombay High Court in the case of Commissioner of Income Tax Vs. Dhable, Bobde, Parose, Kale, Lute & Choudhary (supra) in a case where the Department intended to tax the proceeds from sale of land as business income, whereas the assessee had claimed that the land does not fall within the ambit of capital asset u/s. 2(14) has held that the onus of proving that the land formed part of the business assets of the assessee was on the Department. In the present case, we find that except for the land transactions in question, no other evidence has been brought on record by the Revenue to substantiate that the assessee was engaged in the business of trading in lands. The Assessing Officer in remand report has made a categoric observation that the lands do not constitute Capital Asset within the meaning of section 2(14) of the Act. Merely for the reason that the assessee had sold the three parcels of land within a short duration from the date of acquisition, would not lead to a conclusion that the assessee had held the land for business transaction. In the facts and documents on record, we see no reason to hold that the lands comprising in S. No. 37/2, 37/4 and 37/5 are the business assets of the assessee. The aforesaid agricultural lands are neither capital assets as defined u/s. 2(14) of the Act. The documents on record clearly show that the lands in question are agriculture lands, hence, exempt from tax. Accordingly, ground Nos. 1 and 2 of the appeal are allowed.

8. In ground No. 3 of appeal, the assessee has claimed that the Commissioner of Income Tax (Appeals) has erred in directing that the amount to be exempted in respect of land comprising in Gat No. 37/6 is Rs.25,85,147/- instead of Rs.26,56,000/-. In principle the relief has been allowed by Commissioner of Income Tax (Appeals) holding the land in Gut No. 37/6 as agriculture land exempt from tax. For the purpose of

ascertaining correct amount to be allowed as exempt, the ground No. 3 of the appeal is restored to the file of Assessing Officer. The Assessing Officer after ascertaining the correct amount shall allow the relief, accordingly. Thus, ground No. 3 of the appeal is allowed for statistical purpose.

9. The ground No. 4 is general in nature, hence, requires no adjudication.

10. In the result, the appeal of assessee is allowed in the terms aforesaid.

Order pronounced on Monday, the 22nd day of April, 2019.

Sd/-	Sd/-
(डी. करुणाकरा राव/D. Karunakara Rao)	(विकास अवस्थी / Vikas Awasthy)
लेखा सदस्य / ACCOUNTANT MEMBER	न्यायिक सदस्य / JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 22nd April, 2019
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)-2, Nashik
 4. The Pr. Commissioner of Income Tax-2, Nashik
 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