

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

BEFORE SHRI R.S.SYAL, VP AND
SHRI PARTHA SARATHI CHAUDHURY, JM

आयकर अपील सं. / ITA No.1582/PUN/2013

निर्धारण वर्ष / Assessment Year : 2008-09

Shri Rajesh Krishnakumar Goyal,
A-102, ICC Trade Towers,
Senapati Bapat Road,
Pune-411 016.
PAN : AELPG9647L

.....अपीलार्थी / Appellant

बनाम / V/s.

The Deputy Commissioner of Income Tax,
Circle-3, Pune.

.....प्रत्यर्थी / Respondent

Assessee by : Shri Sunil Ganoo
Revenue by : Shri Nitin S.K. Patil

सुनवाई की तारीख / Date of Hearing : 06.08.2019

घोषणा की तारीख / Date of Pronouncement : 07.08.2019

आदेश / ORDER

PER PARTHA SARATHI CHAUDHURY, JM :

This appeal preferred by the assessee emanates from the order of the
Ld. CIT(Appeals)-V, Pune dated 10.07.2013 for the assessment year 2008-09
as per the grounds of appeal on record.

2. The assessee is in appeal before us on two issues: (i) Whether the surplus earned from sale on agricultural land at Village Dhamane could be charged as “business income”. (ii) Whether business advance received by the assessee from Kohinoor Shelter Private Limited was deemed dividend u/s. 2(22)(e) of the Income Tax Act, 1961 (hereinafter referred to as ‘the Act’) and at the same time, the assessee has preferred additional ground with respect to the issue that the Ld.CIT(Appeals) has not admitted the additional evidences in contravention to Rule 46A of the Income Tax Rule, 1962.

3. With regard to the first issue, at the time of hearing, the Ld. AR of the assessee reiterated the submissions as placed before the Assessing Officer and Ld. CIT(Appeals). The Ld. AR emphasized that the facts were already placed before the Revenue Authorities that the land at Village Dhamane is located beyond the distance of 8 kms from local limits and population is less than 10000 as per last census and therefore, these are the agricultural land and do not fall within the definition of “Capital Asset” as per Section 2(14)(iii) of the Act. It was further pointed out that even in the 7/12 extracts which is land revenue record, it was stated land was agricultural land. Further, the Ld. AR invited our attention to the decision of the Co-ordinate Bench of the Tribunal, Pune in ITA No.1299/PN/2012 and ITA No.1300/PUN/2012 for assessment year 2008-09 in the case of Shri Krishnakumar K Goyal and Shri Vinit K Goyal who are the father and brother of the assessee herein. In their cases also, the lands from same Village Dhamane and its characteristic were determined by the Tribunal in order to decide whether these surplus could be taxed as “business income” or not. The main contention of the Revenue is that the assessee is land developer and therefore, it is a natural corollary that the surplus gain should be taxed as “business income”. The assessee had

stated that even a person carrying on business can have an investment portfolio in the same commodities. In this context, reliance was placed on CBDT Circular No. 4 of 2007 dated 15.06.2007. That placing strong reliance on the aforesaid decision with regard to the land at the same Village Dhamane, the Ld. AR of the assessee prayed for deletion of addition.

4. Per contra, the Ld. DR placed strong reliance on the findings of the Sub-ordinate Authorities. The Ld. DR also emphasized on the ground that the land was sold earning huge surplus within short span of holding time and therefore, primary intention of the assessee at the time of purchasing of land was essentially to enter into business transaction.

5. We have perused the case records and heard the rival contentions. We have also considered the judicial pronouncements placed before us. The Tribunal analyzed the nature and characteristic of the land situated at Village Dhamane in the case of assessee's father and brother as hereinabove referred to. The assessee had submitted justifying the agricultural nature of the land regarding distance from the local limits where the land was situated and regarding population limit also and also filed 7/12 extracts wherein land was stated to be in the nature of agricultural land. The Revenue by very fact that assessee was land developer and because of the fact that within short span of time of holding of the land and earning surplus, made addition in the hands of the assessee as "business income". This land pertains to the land at Village Dhamane where the lands in question are situated as in the case of the assessee before us. In the case referred herein above, the Tribunal observed and held as follows:

"The claim of the assessee is that the land in question is located at a distance which is beyond 8 kilometers from the local limits of any

Municipality and the population of the village in which such land is situated is less than ten thousand and therefore it qualifies to be an 'agricultural land', which is excludible from the expression "capital asset" as defined in clause (iii) of sub-section (14) of section 2 of the Act. It is emerging from the record that in support of above proposition, assessee furnished a communication from Talathi of Dhamane village demonstrating that the land was more than 25 kilometers away from the nearest Municipal limits. A certificate from the office of Tehsildar dated 07.09.2007 was also furnished before the lower authorities to show that the population of village Dhamane as per the last census was 780 which is below ten thousand. It is also an accepted position that the land in question was an agricultural land notified in the land revenue records. In support of the same, a certificate of Dy. Director, Town Planning certifying that the land has been classified as an agricultural land in land revenue record is forming part of the sale-deed, a copy of which has also been placed in the Paper Book filed before us. All the aforesaid features pertaining to the land are not in dispute. However, the stand of the Revenue is that assessee being an individual engaged in the business of purchase and sale of lands, the intention to purchase the impugned land was a business proposition and not merely investment.

10. *In our considered opinion, the issue as to whether impugned transaction is an activity in the nature of trade or an investment is a question which is required to be addressed having regard to the peculiar facts of the case. In the present case, one of the businesses of the appellant is purchase and sale of lands. The income from such activity in the past has been offered as business income. So however, the aforesaid factor ipso facto cannot be conclusive to establish that the purchase and sale of agricultural land at Dhamane village is also to be assessed as a business transaction. We say so for the reason that it is possible for a taxpayer to have two portfolios i.e. an investment portfolio comprising of commodities which are to be treated as capital assets and a trading portfolio comprising of stock-in-trade which are to be treated as trading assets. Therefore, it is conceivable that an assessee having two portfolios would have income under both heads i.e. capital gains as well as business income. The aforesaid principle has also been accepted by the CBDT in its Circular No.4 of 2007 (supra). Be that as it may, in the present case, the assertions of the assessee before the lower authorities as well as before us have been that the investment made in the purchase of agricultural land at village Dhamane was not with the intention of acquiring stock-in-trade of business. Firstly, it is asserted that the land at Dhamane village has been shown in the Balance Sheet as a part of 'Personal Assets' and not as a part of 'Business assets'. For this purpose, the Balance Sheet as on 31.03.2007 annexed to the return of income for the earlier assessment year 2007-08 has also been placed on record. Secondly, it has also been pointed out that assessee had made investments in purchase of other agricultural lands also in the past years and that the same have not been treated to be 'Business assets'. In this connection, a Tabulation has been furnished in the course of hearing which shows that assessee has purchased agricultural lands at various places like Latur, Chowisawadi, etc. as early as in January, 1991. Thereafter, investment in agricultural lands have also been made in April 1996, May 1995, November, 1996, etc.. The Tabulation also reveals that the other agricultural lands continue to be held by the assessee and it is only the land at village Dhamane which has been sold during the year under consideration. Prima-facie, the aforesaid Tabulation does not show that assessee was a dealer in purchase and sale of agricultural lands because the period of holding in all cases except the land at village Dhamane is quite substantial. Pertinently, assessee has taken us*

through the Balance Sheets filed alongwith respective returns of income from the earlier assessment years of 2004-05, 2005-06, 2006-07 as well as 2007-08 to point out that the aforesaid lands have been shown in the Balance Sheet as 'Personal Assets' and not as 'Business Assets'.

11. At this stage, we may deal with one of the observations made by the Assessing Officer, and the same has also been affirmed by the CIT(A), which is to the effect that subsequent to purchase of the land in question assessee has done land consolidation and development activity so as to improve the quality of land. The discussion made by the Assessing Officer in this regard read as under :-

“5. Whether there was any act subsequent to the purchase to improve quality of the commodity purchased?”

Though it is not known as to whether there was any act subsequent to the purchase to improve quality of the land purchased, but the fact that the assessee has got a sale consideration of Rs.1,53,50,000/- for a purchase cost of Rs.13,28,860/- within a span of just one and a half year points to the fact that there must be a land consolidation and land development activity on the part of the assessee on the said land to improve its quality.”

12. On this aspect, the CIT(A) has also noted that the entire land comprising of 106 acres was purchased by assessee alongwith other co-owners by four separate agreements.

13. In this context, we find that assessee submitted that the land was purchased for holding as investment and to carry on agricultural activity as a pride cultivation of Medicinal Plant and Horticulture. By way of detailed submissions, which have been reproduced in the order of the CIT(A), assessee submitted that the intention was to purchase land to carry out agricultural activity of Medicinal Plant and Horticulture. However, due to the inability of the other co-owners to raise requisite funds assessee was forced to sell the land as it is. It is also submitted that during the period of holding of the land it was leased out to one Shri Dilip Dagdu Jogdand in terms of lease agreement to carry out agricultural activities. Assessee has also shown income in the return of income from such activity in assessment year 2007-08 as well as during the year under consideration. In-fact, there is no material lead by the Revenue to negate any of the aforesaid assertions of the assessee. There is no denying the fact that the land in question continues to be an agricultural land in the land revenue records and further during the period of assessee's holding, no steps have been taken to change the land use for any non-agricultural activities. In-fact, the charge made by the Assessing Officer that subsequent to purchase, assessee undertook development activity is a bald assertion and is quite unconvincing. In-fact, the Assessing Officer merely records “that there must be a land consolidation and land development activity on the part of the assessee on the said land to improve its quality”. The significance of the aforesaid observations of the Assessing Officer is that it is based on mere presumptions and not on any material or evidence. In-fact, in the course of hearing, the learned counsel also referred to the fact that the land has been ultimately sold to an agriculturist for agricultural purposes only. It was also asserted that the purchasers are using it for agricultural purposes only. Before the CIT(A), assessee pointed out that the

Assessing Officer had issued summons/notices to the purchasers, copies of which have been placed in the Paper Book at pages 371 to 375. The assertions of the appellant are that such persons appeared before the Assessing Officer and confirmed that they were carrying out agricultural operations on such lands. In this context, we find there is no discussion in the assessment order. However, it would not be out of place to mention here that there is no credible material brought on record by the Assessing Officer to negate assessee's plea that the land in question continued to be in the nature of agricultural land even after its sale.

14. *In view of the aforesaid discussion, it is quite clear that the land in question has been disclosed by the assessee as 'Investment' and not as stock-in-trade. It is also clear that no steps were undertaken by the assessee for development of property during the period it held the same. Of-course, in the case of other agricultural lands owned by the assessee the period of holding is quite substantial. The circumstances explained by the assessee for having sold the agricultural land within a span of 17 months have also not been found to be false. Considering the aforesaid circumstances, in our view, the lower authorities erred in assessing the gain on sale of such land as a business income."*

The Tribunal also made reference to the judgment of the Hon'ble Bombay High Court in the case of CIT Vs. Minguel Chandra Pais & Anr. (2006) 282 ITR 618 (Bom.) wherein it was held that *"the land classified as agricultural land in the land revenue records was to be understood as agricultural lands and insufficiency of agricultural income cannot be a ground to treat the same as a non agricultural land"*.

6. Reverting to the facts of the present case, the land at Village Dhamane is clearly established to be an agricultural land. It had been specifically analyzed in detail by the Tribunal in the aforesaid order and the Revenue has not brought in any evidence or materials on record to negate the assertions made by the assessee neither they have controverted any facts on record. Evidently, the assessee has shown in the Balance Sheet the land in question as a 'Personal Asset' as distinct from 'Business Assets'. The agricultural lands held by the assessee are for a substantial period of time and assessee has been showing such assets as a part of his 'Personal Assets', being

'investments' and not as 'Business Assets' in the Balance Sheet filed along with the respective returns of income.

7. In view of the matter, we hold that the Sub-ordinate Authorities had erred in treating the income arising on the sale of such land at Village Dhamane as sale of stock in trade and in our view, income arising on sale of land at Village Dhamane was on account of sale of investment. Since, there is no dispute that the land in question carried the features prescribed in section 2(14)(iii) of the Act and moreover, being analyzed by the Tribunal in the earlier orders, it qualifies to be an agricultural land excludable from the expression "capital asset". We therefore, set aside the order of the Ld. CIT(Appeals) and direct the Assessing Officer to delete the addition on this count from the hands of the assessee. Thus, **this ground of appeal raised by the assessee is allowed.**

8. Next ground pertains to the assessee's grievance on the action of the Assessing Officer of treating business advance received by the assessee from Kohinoor Shelter Private Limited and taxed Rs.1,01,54,628/- as deemed dividend u/s.2(22)(e) of the Act as per discussion given at Para 16 to 20 of the assessment order.

9. Before the Ld. CIT(Appeals), the assessee has made detailed written submissions which are placed on record. Thereafter, the assessee filed additional evidences vide letter dated 15.03.2012 containing Memorandum of understanding between the assessee and M/s. Kohinoor Shelters Pvt. Ltd. which was subsequently cancelled along with confirmation of accounts from M/s. Kohinoor Shelters Pvt. Ltd. The assessee also filed affidavit from Shri L.R. Agarwal, stating that the same was presented before the Addl. CIT,

Range-9, Pune on 29.12.2010 and the same was not accepted by him as the assessment order was already passed. The Ld. CIT(Appeals) while upholding the addition made by the Assessing Officer on this issue has mostly deliberated upon the timing within which these additional evidences were filed. The Ld. CIT(Appeals) has not adjudicated upon the admissibility or genuineness of these additional evidences. Rule 46A of the Income Tax Rules, 1962 does not specify any time limit for producing additional evidences. The view of the Ld. CIT(Appeals) is that since the affidavit of Mr. L.R Agarwal dated 14.03.2012 was filed at delayed time and therefore, the Assessing Officer is correct that the story of MOU and its cancellation is nothing but an afterthought without any specific findings or reasons given on his part, is therefore, not correct. That within the ambit of Rule 46A, the Ld. CIT(Appeals) should have admitted the additional evidences and should have followed the procedure laid down therein. The grievance of the assessee in the additional ground along with this ground in the appeal Memo is with regard to non admission of additional evidences by the Ld. CIT(Appeals). We further observe that these additional evidences were not accepted by the Assessing Officer since the assessment order was already passed. In the interest of justice, we set aside the order of the Ld. CIT(Appeals) on this issue and restore the matter to the file of Assessing officer and direct the assessee to produce all the additional evidences before the Assessing Officer and present their case on merits. The Assessing Officer shall adjudicate the issue after providing reasonable opportunity of hearing to the assessee in compliance with the principles of natural justice. **Thus, this ground in the appeal memo as well as additional ground of the assessee are allowed for statistical purposes.**

10. In the result, **appeal of the assessee is partly allowed for statistical purposes.**

Order pronounced on 07th day of August, 2019.

Sd/-
R.S.SYAL
VICE PRESIDENT

Sd/-
PARTHA SARATHI CHAUDHURY
JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 07th August, 2019.

SB

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(Appeals)-V, Pune.
4. The CIT-V, Pune.
5. विभागीय प्रतिनिधि , आयकर अपीलीय अधिकरण, "सी" बेंच,
पुणे / DR, ITAT, "C" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

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आदेशानुसार / BY ORDER,

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

		Date	
1	Draft dictated on	06.08.2019	Sr.PS/PS
2	Draft placed before author	06.08.2019	Sr.PS/PS
3	Draft proposed and placed before the second Member		JM/AM
4	Draft discussed/approved by second Member		AM/JM
5	Approved draft comes to the Sr. PS/PS		Sr.PS/PS
6	Kept for pronouncement on		Sr.PS/PS
7	Date of uploading of order		Sr.PS/PS
8	File sent to Bench Clerk		Sr.PS/PS
9	Date on which the file goes to the Head Clerk		
10	Date on which file goes to the A.R		
11	Date of dispatch of order		