

**IN THE INCOME TAX APPELLATE TRIBUNAL (VIRTUAL COURT),  
'H' BENCH MUMBAI**

**BEFORE: SHRI C.N. PRASAD, JM**

**&**

**SHRI M.BALAGANESH, AM**

**ITA No.996/Mum/2013  
(Assessment Year :2009-10)**

Income Tax Officer-11(2)(3) Room No.479, 4 <sup>th</sup> Floor Aayakar Bhavan M.K.Road Mumbai – 400 020	Vs.	Mr. Hari J. Thakur 71/72, Himmat Apartments Dr. R.P.Road, Mulund, Mumbai-400020
<b>PAN/GIR No.AAJP3008N</b>		
<b>(Appellant)</b>	..	<b>(Respondent)</b>

Assessee by	Shri Gurbinder Singh
Revenue by	Shri Mahesh Rajora
<b>Date of Hearing</b>	<b>27/01/2021</b>
<b>Date of Pronouncement</b>	<b>17/02/2021</b>

**आदेश / ORDER**

**PER M. BALAGANESH (A.M):**

This appeal in ITA No.996/Mum/2013 for A.Y.2009-10 arises out of the order by the Id. Commissioner of Income Tax (Appeals)-3, Mumbai in appeal No.CIT(A)-3/ITO 11(2)(3)/IT.207/11-12 dated 19/11/2012 (Id. CIT(A) in short) against the order of assessment passed u/s.143(3) of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 30/12/2011 by the Id. Income Tax Officer-11(2)(3), Mumbai (hereinafter referred to as Id. AO).

2. We find that this Tribunal had already disposed off this appeal for A.Y.2009-10 in ITA No.996/Mum/2013 dated 03/07/2015. On further appeal by the assessee before the Hon'ble Bombay High Court, the Hon'ble High Court vide its order dated 03/12/2018 in Income Tax Appeal No.633/2016 had restored the matter to this Tribunal in paragraph 14 & 15. We find that the relevant directions of the Hon'ble Bombay High Court are reproduced hereunder for the sake of convenience.

*“14. The alternative contention of the counsel for the assessee however, requires some consideration. Counsel for the assessee drew our attention to a letter dated 14.10.15 written by the Assistant Director, Town Planning, Navi Mumbai Municipal Corporation. According to this letter, the distance by road or the land in question and the Navi Mumbai Municipal Corporation is approximately 9 kms. If it is so established, in any case, the assessee may be entitled to the benefit under the Act. However, this document was not part of the proceedings below. We would, therefore, not examine this question before us for the first time. Instead, we allow the assessee to produce this document before the Tribunal. The Tribunal may thereafter enable the Revenue to respond to such document and take a fresh decision with respect to the distance between the limits of Navi Mumbai Municipal Corporation and the land in question. We also note that the statutory provision prevailing at the relevant time, did not clarify the manner in which the distance would be measured i.e. either by road or aerially. The legislature now specifically provides that such distance would be measured aerially. This was introduced by Finance Act, 2013 w.e.f.01.04.2013. In this respect, our attention was drawn to the Circular dated 06.10.2015 issued by the Central Board of Direct Taxes clarifying that judgment of this Court dated 30.03.2015 in ITA No.151 of 2013 in the case of Smt. Maltibai R. Kadu holding that the amendment in question would apply prospectively, is accepted by the Revenue.”*

*15. The impugned judgment of the Tribunal is set aside. The appeal of the Revenue is restored before the Tribunal, which may be disposed of in accordance with law after examining the issue noted above.”*

3. The effective ground to be decided in this appeal is as to whether the Id. CIT(A) was justified in deleting the addition made on account of sale of land by treating the same as agriculture land. As per AIR

information received by the Id. AO, the assessee had sold immovable property at a cost of Rs.3.80 Crores during the year under consideration. On perusal of the computation of income, the Id. AO found that the assessee had not disclosed any income from capital gains. Accordingly, vide letter dated 18/08/2011, the assessee furnished copy of purchase deed of agriculture lands. The perusal of the agreement revealed that the assessee had sold agricultural land comprising of survey numbers 30,37,38 and 46 situated at Nighu Village vide agreement dated 26/05/2008 for sale consideration of Rs.3,80,80,000/-. The assessee had purchased the agricultural land vide agreement dated 22/02/2001 for Rs.4.50 lakhs. The assessee had paid Rs.15,000/- as on the date of agreement. The said agreement was not registered initially but was later registered by way of confirmation deed executed on 26/07/2006. Before the Id. AO, the assessee pleaded that agricultural land which was the subject matter of sale was situated beyond 8 kms from the Municipal limit, in support of which assessee filed certificate deed dated 18/09/1999 issued by Thane Urban Agglomeration & Agricultural Department stating that Nighu village was situated beyond 8 kms from the Thane Municipal Corporation and that the population thereon was 12357. Accordingly, assessee claimed exemption from levy of capital gains since the land sold was only agricultural land. The Id. AO made enquiries u/s.133(6) of the Act. The Municipal authority of NMMC intimated to him that 13 villages including Nighu village has been separated from the corporation vide notification dated 08/06/2007 and that Nighu village was within 5 kilometers of the limit of NMMC. Accordingly, the Id. AO observed that the subject mentioned land would have to be classified as the urban agricultural land and hence, liable for capital gains taxation and accordingly, assessed long term capital gain of Rs.2.57 Crores while completing the assessment.

3.1. The Id. CIT(A) after considering the submissions of the assessee and the assessment order held that the assessee had sold agricultural land situated at Nighu village by placing reliance on the certificate dated 18/09/2009 filed by the assessee issued by Thane Urban Agglomeration & Agricultural Department and also held that Nighu village was beyond 8 kilometers from Thane Municipal Corporation. The Id. CIT(A) also observed that with regard to the letter issued by the competent authority that 13 villages including Nighu village had been separated from NMMC, the jurisdiction of the land was with Thane Municipal Corporation. Moreover, the registration and purchase of sale deed of the property had been carried out with Sub-Registrar, Thane. With these observations, the Id. CIT(A) deleted the addition made on account of long term capital gains.

4. Aggrieved, the Revenue is in appeal before us.

5. We find that the Id. AO had considered the aerial distance of 5 kilometers from the limits of NMMC for determining the fact as to whether the subject mentioned land would fall within the ambit of a capital asset liable for capital gains on its transfer. We find that the Hon'ble High Court in para 14 of its order dated 03/12/2018 had noted that the statutory provision prevailing at the relevant point in time i.e. for the year under consideration, did not clarify the manner in which the distance would be measured i.e. either by road or aerially. The said provision mandating measurement by aerial distance has been provided in the statute by way of introduction in Finance Act 2013 w.e.f. 01/04/2013 and that the said amendment is applicable only prospectively which is also accepted by the revenue vide CBDT Circular dated 06/10/2015. Hence, in this scenario,

the measurement of distance by aerial route cannot be made applicable for the year under consideration.

5.1. We find that assessee had obtained certificate dated 18/01/2021 from independent registered Architect who had certified the distance between land and the boundary of Navi Mumbai Municipal Corporation by stating that aerial distance is approximately 3.5 kilometers and by road distance it is 9.01 kilometers and more. We find that assessee had also obtained a certificate from Town Planning department of NMMC for travel distance by road on 14/10/2015 which certificate has also been taken due cognizance by the Hon'ble High Court in para 14 of its order. This certificate has been issued by the Architect and Interior designer Mr. Suresh Kirtane on 18/01/2021 on the basis of map generated with Google map for shortest travel distance by road, Google Earth for aerial distance along with map of NMMC boundary and proposed land – Mumbai Metropolitan Regional Plan.

5.2. It is not in dispute that the subject mentioned land sold is an agricultural land. What is to be seen is only whether it is a rural agricultural land or urban agricultural land which would determine the taxability under the head 'income from capital gains'. We find that the Hon'ble High Court had restored this issue to the Tribunal to consider a certificate dated 14/10/2015 issued by the Town Planning department of NMMC. We have considered the said certificate and from the perusal of the same, it is categorically clear that the travel distance of Nighu village by road is around 9 kilometers from boundaries of Navi Mumbai Municipal Corporation and hence, the same would decide the ambit of definition of capital asset within the meaning of Section 2(14) of the Act and hence, there cannot be any levy of capital gains. We find that the Id. CIT(A) had

rightly deleted the addition made on account of long term capital gains. Accordingly, the grounds raised by the revenue are dismissed.

**6. In the result, appeal of the Revenue is dismissed.**

Order pronounced on 17/02/2021 by way of proper mentioning in the notice board.

**Sd/-  
(C.N. PRASAD)  
JUDICIAL MEMBER**

**Sd/-  
(M.BALAGANESH)  
ACCOUNTANT MEMBER**

Mumbai; Dated 17/02/2021  
KARUNA, *sr.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.

//True Copy//

BY ORDER,

(Asstt. Registrar)  
ITAT, Mumbai

