

IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT
BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER AND
DR. ARJUN LAL SAINI, ACCOUNTANT MEMBER

ITA No.258 & 259/SRT/2018 (AY 2013-14)

(Hearing in Virtual Court)

The Deputy Commissioner of Income Tax, Circle-3(3), Surat.	Vs	Shri Manubhai Rajabhai Dhameliya, A-14, Jay Gneswar Society, Hira Baug, Varachha Road, Surat. PAN: ABQPD 3560 P & Shri Dhirubhai Becharbhai Dhameliya, B-9, Jay Ganeshwar Society, Hira Baug, Varachha Road, Surat. PAN: AAUPD 7447 G
Assessee / appellant		Revenue / respondent

Assessee by	Shri Sapnesh Sheth – CA
Revenue by	Ms. Anupama Singla – Sr. DR
Date of hearing	05.10.2021
Date of pronouncement	06.10.2021

Order under section 254(1) of Income Tax Act

PER PAWAN SINGH, JUDICIAL MEMBER:

1. These two appeals by the Revenue are directed against the common order of
ld. Commissioner of Income Tax (Appeals)-3, Surat under section 143(3) of
the Income Tax Act, 1961 dated 29.01.2018 for Assessment Year (AY) 2013-
14. In both the appeals, the Revenue raised identical grounds of appeal, the
facts in both the appeals are common, the ld. CIT(A) decided appeal of both

the assessee by common order, therefore, with the consent of parties, both the appeals were clubbed, heard and are decided by consolidated order to avoid conflicting decision. For appreciation of facts, the fact in ITA No.258/SRT/2018 in Shri Manubhai Rajabhai Dhameliya is treated as lead case. The grounds raised Revenue are as under:

- “1. *Whether, on facts and in law the ld. CIT (A) was justified in allowing the appeal of the assessee as not appreciated that even the word road distance does not constitute the distance followed by the traffic Rules.*
2. *On the basis of the facts and circumstances of the case, the learned CIT (A) ought to have upheld the order of the Assessing Officer.*
3. *It is therefore prayed that the order of the CIT (A) may kindly be set aside and that of Assessing Officer be restored.”*

2. Brief facts of the case are that the assessee filed his Return of Income for the Assessment Year (AY) 2013-14 declaring income at Rs.17,43,800/-. In the computation of total income the assessee has also shown agricultural income of Rs.2,66,710/-. The case was selected for scrutiny. During the assessment proceedings, the Assessing Officer (AO) noted that assessee alongwith his co-owner sold agricultural land out of Block No.173/B, Gam. Kosmadi, Tal. Kamrej, District Surat for a sale consideration of Rs.2.58 crore. The assessee is having 50% of share in the said land [remaining 50% share of assessee in ITA No.259/SRT/2018]. The AO asked the assessee to explain as to why the

agricultural land should not be treated as capital asset within the meaning of section 2(14) of the Act. The assessee furnished a certificate of Deputy Executive Engineer, Road and Buildings Division, Kamrej dated 27.10.2015 certifying that aerial distance of land from Surat Municipal Corporation (SMC) limit of Sartana Jacket Naka to Village Kosmadi is 9.12 kms. The evidence in the form of certificate of Deputy Executive Engineer was not accepted by the AO. The AO issued detailed show cause notice dated 19.02.2016 by raising specific issue as to why agricultural land should not be treated as capital asset. The assessee again vide reply dated 24.02.2016 submitted that method to measure to distance is not provided in the definition of capital asset and therefore, the distance has to be measured by road. To support his submission, the assessee relied on various case laws. The assessee also relied on CBDT Circular No.17/2015 dated 06.10.2015 wherein it was clarified that distance has to be measured aerially in respect of agricultural land. The assessee explained that after the decision of Hon'ble Bombay High Court in Smt. Maltibai R Kadu 374 ITR 531 (Bom), the CBDT issued said circular and clarified that distance between the Municipal limit and agriculture land to be measured aerially. The assessee submitted that the said circular is to be the circular is to be applied prospectively from A.Y. 2014-15 as clarified

in para -2 of CBDT Circular itself. The assessee again vide submission dated 26.02.2016 furnished the details of various approach road consisting national high way no.8, approach road and SMC limit and claimed that distance is more than 9 kms. The submission of assessee was not accepted by AO. The AO recorded that he himself visited and inspected the site from the agricultural land to municipal limit and that the shortest route is less than 7 kms. The AO also relied on distance shown in Google Map and concluded that municipal limit of Katodara to agricultural land was less than 7 kms. The AO thus, treated the agricultural land as capital asset and brought the capital to tax.

3. Aggrieved by the addition in the assessment order, the assessee filed appeal before the Id.CIT(A). Before the Id. CIT(A), the assessee filed detailed written submissions as recorded in para 7 of his order. In the written submission, the assessee contended that during the assessment, the assessee filed certificate of Deputy Executive Engineer, Road & Buildings, certifying aerial distance of land from SMC is 9.12 kms. Though the aerial distance is applicable from the A.Y. 2014-15 as per CBDT Circular, the land sold by assessee is a rural agricultural land as the same is situated beyond the 8kms of SMC limit. Therefore, it does not come under the definition of capital asset

as per section 2(14) of the Income tax. On the submission of assessee, the ld.CIT(A) sought Remand Report from the AO. The AO was directed to depute the Inspector to visit the impugned land and to make actual measurement of actual distance of land from the limits of SMC and to take the measurement in the present of assessee. The AO deputed the Inspector who visited on the spot and furnished the Remand Report wherein he measure the distance by road at 8.8 kms. The ld.CIT(A) after considering the submission of the assessee, report of Deputy Executive Engineer, the report of Inspector held that the land is situated beyond 8 kms from the limit of SMC, hence falls within the exemption provided under the definition of capital asset under section 2(14) of the Act and deleted the addition. Aggrieved by the ld.CIT(A), the Revenue has filed present appeal before this Tribunal.

4. We have heard the submission of ld. Senior Departmental Representative (ld. Sr. DR) for the Revenue and the ld.Authorised Representative (ld.AR) of the assessee. The ld.Sr.DR for the Revenue submits that AO himself measured the distance from limit of Municipal Corporation as well as by taking the help of Google Search. The AO find that the distance of the impugned land from the limits of SMC is less than 8 kms. The AO measured the distance of land from the limits of SMC at 7.1 kms. The ld.Sr.DR further submits that for

making the measurement, the traffic Rules are not to be followed. The inspector who visited to take the measurement of distance measured by Traffic Rules. Even if by road, it is measured, the distance would come only 6.8 kms. On the basis of aforesaid submission, the Id. Sr. DR for the revenue submits that the finding given by the Id.CIT(A) is liable to be reverse by restoring the order of AO.

5. On the other hand, the Id.AR of the assessee submits that during the assessment, the assessee furnished certificate of Deputy Executive Engineer, Road & Building, Kamrej, who certified that the distance of land is 9.1 kms from the boundaries of SMC. The Id.AR submits that no direct road is available as an approach road, where the land of assessee was situated. The Id.AR submits that CBDT in its Circular No.17/2015, after the decision of Hon'ble Bombay High Court in Smt. Maltibai R Kadu (supra) clarified that w.e.f 01.04.2016 the measurement of distance to be taken aerially. Thus, the concept of aerial distance was brought by way of Finance Act, 2013 would apply prospectively i.e. in relation to A.Y. 2014-15. These facts are clarified in para 2 of Circular No.17/2015. The Id.AR further submits that prior to that the distance was measure through road distance as held by Hon'ble Bombay High Court in Smt. Maltibai R Kadu (supra) the decision has been accepted by the Revenue and issue was not further contested. The Id.AR further

submits that during the pendency of appeal, the Id.CIT(A) sought Remand Report from AO with the direction to AO to depute the Inspector for measurement of distance. The Inspector made the measurement of exact distance of impugned land from SMC limit and in his report he stated that Block No.173, Village Kosmadi, Tal. Kamrej is 8.8 kms as measure by him. The Id. CIT(A) after appreciating the fact on the basis of report of Deputy Executive Engineer, and Inspector deputed by AO held that the land is situated more than 8 kms away from the boundary of SMC. Thus, the Id AR for the assessee fully supported the order of Id CIT(A).

6. We have considered the rival submission of the parties and have gone through the orders of authorities below. The AO treated the agricultural land as capital asset by taking view that aerial distance of land is less than 8 kms from Municipal Limit of Surat. Before the Id.CIT(A), the assessee vehemently submitted that there is no direct approach road to the land of assessee. The assessee also submitted the certificate of Deputy Executive Engineer of the area. On the submission of assessee, the Id.CIT(A) sought Remand Report from AO. In terms of the direction of Id.CIT(A), the AO deputed Inspector to take the measurement of distance. Distance of land from SMC boundaries. The Inspector furnished his report dated 11.09.2017 wherein he has reported

that the land is situated at the distance of 8.8 kms as measured by him by going through road.

7. Before us, the Id.Sr.DR for the Revenue vehemently submitted that aerial distance of the land on SMC is less than 8 kms and the agricultural land is a capital asset and thus, gain earned by assessee is liable to be capital gain. We find that CBDT in Circular No.17/2015 while accepting the decision of Hon'ble Bombay High Court in Smt. Maltibai R Kadu (supra) held that measurement of aerial distance is to be applied prospectively, therefore, considering the facts and circumstances of the case, particularly the finding of Id.CIT(A) that distance of land measured road is more than 8 kms, therefore, we affirm the order of Id.CIT(A). No contrary decision is brought to our notice to take other view. In the result the grounds of appeal raised by the revenue are dismissed.

8. In the result, appeal of the Revenue is dismissed.

ITA No.259/SRT/2018 for A.Y. 2013-14:

9. Considering the fact that on the common facts and identical grounds of appeal, we have dismissed the appeal of Revenue in ITA No. 258/SRT/2018. Therefore, following the principle of consistency, this appeal in ITA No.259/SRT/2018, the grounds of appeal raised by the Revenue is also dismissed with similar direction.

10. In the result, both appeal of the Revenue are dismissed.

Order announced on 06 October, 2021 by placing result on notice board.

Sd/-

(Dr ARJUN LAL SAINI)
ACCOUNTANT MEMBER

Surat, Dated: 06/10/2021 / SGR*

Copy to:

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR
6. Guard File

Sd/-

(PAWAN SINGH)
JUDICIAL MEMBER

By order

/ / TRUE COPY / /

Sr.Pvt. Secretary, ITAT, Surat