

IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT
BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER AND
DR. ARJUN LAL SAINI, ACCOUNTANT MEMBER
ITA No. 563/SRT/2019 (AY: 2011-12)
(Hearing in Physical Court)

I.T.O. Ward-3(2)(4), Surat.	Vs.	Late Khushmanbhai Chandubhai Patel (HUF), L/h Jigisha Patel, Opp. Nityanandeshwar Mahadev Temple, Nanived, Katargam, Surat-395004. PAN : AAIHP 4025 L
APPELLANT		RESPONDEDNT

Department by	Shri Vinod Kumar, Sr. D.R.
Assessee by	Shri Rushi Parekh, A.R.
Date of hearing	14/12/2022
Date of pronouncement	23/12/2022

Order under section 254(1) of Income Tax Act

PER PAWAN SINGH, JUDICIAL MEMBER:

1. This appeal filed by the Revenue is directed against the order of the learned Commissioner of Income Tax (Appeals)-3, Surat [in short 'Id. CIT(A)] dated 10/10/2019 for the Assessment Year (A.Y.) 2011-12. The Revenue in its appeal has raised the following grounds of appeal:

- "1. Whether on the facts and circumstances of the case, the Id. CIT(A) has erred in deleting the addition made by the AO of Rs. 42,07,648/- by treating the land as not capital asset, without appreciating the fact that the Assistant Town Planner, SUDA, Surat in his report stated that the property in question is within 8 KM from the limits of Surat Municipal Corporation.*
- 2. Whether on the facts and circumstances of the case, the Id. CIT(A) has erred in accepting the submission of the assessee that the Assistant Town Planner has measured the distance of land from Municipal limits aerially, despite of the fact that nowhere in the report, the Assistant Town Planner, SUDA, Surat has stated that the distance indicated in his report is on the basis of measurement taken aerially.*

3. *On the facts and circumstances of the case and in law, the Id. CIT(A) ought to have upheld the order of the AO. It is, therefore, prayed that the order of the Id. CIT(A) may be set aside and that of the A.O. may be restored.”*
 4. *It is therefore, prayed that the order of the Id. CIT(A) may be set aside and that of assessing officer may be restored to the above extent.*
2. Brief facts of the case are that the assessment order under Section 143(3) r.w.s 263 of the Income Tax Act, 1961 (in short, the Act) was passed by the Assessing Officer on 17/10/2016. The Assessing Officer passed the assessment order in pursuance of direction dated 08/02/2016, the learned Principal Commissioner of Income Tax (in short, the Id. Pr.CIT) under Section 263 wherein the assessment order dated 31/03/2013 was set aside. In pursuance of the direction of Id. Pr.CIT, the Assessing Officer initiated reassessment/order giving effect proceedings. During such assessment proceedings, the Assessing Officer noted that the assessee sold a piece of agricultural land situated at Moje Sarol, Sub-district-Oplad, District- Surat having R.S. No. 85, Block No. 107 on 22/03/2011. The assessee received sale consideration of Rs. 63,53,600/-. The assessee claimed deduction under Section 54 of Rs. 54,71,945/- on account of construction of residential house and remaining amount was offered as long term capital gain of Rs. 7,94,120/- for taxation. During the assessment, the assessee was asked to substantiate the claim of deduction under Section 154F of the Act. The assessee furnished required details. On verification of such details, the Assessing Officer noted that the assessee furnished valuation report of Government Registered Valuer

dated 07/03/2014 about construction of residential house. On verification of such report, the Assessing Officer noted that the assessee has constructed shops on the ground floor, commercial hall on first floor and residential-cum-commercial hall on second floor. The property constructed by assessee was having total area of 435.37 square meter. The rate adopted by the Government approved valuer was at Rs. 12,374/- per square meter, accordingly, the assessee claimed deduction of Rs. 54,,11,929/- (435.37 X 12,374). The Assessing Officer was of the view that the exemption under Section 54 is allowable for the purpose of residential property or for construction of residential property and not for commercial property. Thus, the Assessing Officer issued show cause notice to the assessee as to why allow only proportionate deduction about residential unit.

3. The assessee furnished its detailed reply as recorded in para 5 of the assessment order. In the said reply the assessee took new plea that the surplus earned on sale of agriculture land is not taxable as the land sold by the assessee was not capital asset within the meaning of section 2(14) of the Act. In the reply, the assessee stated that the assessee sold agricultural land which was not a capital asset and hence not liable to tax of capital gain at all. The land pertains to Juni Sharat as clearly recorded in Form No. 7/12. The assessee also furnished Form 8A shown the agricultural activities on such land and Form 6 of Hak Patra issued by

Gram panchayat. The assessee also claimed that the land is situated beyond 8 KM from Municipal limit, which is approximately 12 KM from municipal limit and the population of village is only 600 which is less than 10000.

4. The reply of assessee was not accepted by Assessing Officer. The Assessing Officer noted that the land of assessee is situated at Oplad which is within 8 KM from Surat Municipal Corporation (SMC). The information from Town Planner was called for ascertain that the land is covered within the Surat Urban Development Limited (SUDA) i.e. within 8 KM or not. The Town Planner, Surat in his letter dated 30/09/2016 stated that the land at survey No. 85 of Block No. 107 of village Saroli, Sub-District- Oplad situated within 8 KM from the municipal limit of SMC. The Assessing Officer accordingly, treated the land as capital asset and noted that the assessee claimed exemption of Rs. 54,11,928/- on account of construction of new residential house. The assessee furnished revised valuation report of constructed property. In the revised valuation report, the second floor was residential house. The area of residential on second floor was of 96.87 square meter as per the valuation report. The Assessing Officer accordingly provided proportionate deduction under Section 54F of the Act of Rs. 12,04,120/- and remaining amount of Rs. 42,07,647/- (54,11,928 – 1,204,120) was disallowed and added as an long term capital gain.

5. Aggrieved by the addition of long term capital gain, the assessee filed appeal before the Id. CIT(A). Before the Id. CIT(A), the assessee filed his detailed written submission. The submission of assessee is recorded in para 5 of order of Id. CIT(A). In the written submission, the assessee stated that during the assessment, the assessee filed his submission vide letter dated 06/06/2019 wherein the assessee contended that the land sold by assessee was agricultural land and not a capital asset and exempted from taxation. The explanation of assessee was disbelieved on the report of Town Planner, SUDA. The assessee requested the Assessing Officer to send the Inspector to measure the distance by road. The request of assessee was turndown and treated the land as capital asset and taxed the consideration as long term capital gain. The Assessing Officer reopened the case on the basis of direction of Id. Pr.CIT under Section 263 of the Act. The assessee again made request to Id CIT(A) to send the Inspector for measurement of distance by road. The Inspector of the department visited the spot and furnished his report dated 29/05/2019 wherein he reported that the distance from SMC limit to land i.e. block No. 107 of R.S. No. 85 is 9.20 KM i.e. beyond 8 KM from municipal limit. The assessee also objected against the erroneous calculation of capital gain.
6. The Id. CIT(A) after considering the submission of assessee and the report of Inspector on measurement of land from Municipal limit, noted

that as per enquiries from SUDA, the land in question was found within 8 KM from the limit of SMC and the Assessing Officer treated the land as capital asset and taxed the consideration on sale as long term capital gain. The assessee constructed a commercial house on which he claimed deduction under Section 54 which was not allowed the restricted to Rs. 12,04,120/-. The Id. CIT(A) further recorded that in order to verify the claim of assessee about the distance of land from Municipal limit, he directed the Assessing Officer to verify the distance. The Assessing Officer vide his letter dated 06/12/2018 deputed Inspector to measure the road distance of land from SMC limit was found at about 9.2 KM. On the basis of such finding, the Id. CIT(A) held that the land in question is not capital asset and the provision of capital gain are not applicable, therefore, directed the Assessing Officer to delete the addition of Rs. 42,07,468/-. Aggrieved by the order of Id. CIT(A), the revenue has filed the present appeal before this Tribunal.

7. We have heard the submissions of learned Senior departmental representative (Id. Sr. DR) for the Revenue and the Ld. Authorised Representative (AR) for the assessee and have gone through the orders of the authorities below. The Id. Sr. DR for the Revenue submits that as per report of Town Planner, SUDA, the land sold by assessee falls within 8 KM from SMC limit, therefore, the Assessing Officer taxed the gain earned on sale of such land as capital gain. Since the assessee

constructed residential-cum-commercial property, the Assessing Officer in a reasonable manner, restricted the deduction under Section 54F to the extent of area of residential house. The Id. CIT(A) granted relief to the assessee on the report of Inspector that the land sold by assessee is situated at 9.2 KM from SMC limit.

8. On the other hand, the Id. AR of the assessee supported the order of Id. CIT(A). The Id. AR of the assessee submits that once the officer of the revenue has given authentic report about the distance of land from municipal limit at 9.2 KM, which was not disputed by the Assessing Officer, thus the land sold by assessee was not a capital asset and the gain earned on sale of such land is not liable to be taxed. The Id. CIT(A) appreciated the facts and granted relief to the assessee. In other alternative submissions, the Id AR submits that the tax effect in the present appeal is also less than the monitory limit for filing appeal before Tribunal and thus, the appeal is not maintainable.
9. We have considered the rival submissions of both the parties and have gone through the orders of the authorities below. We find that the Assessing Officer made the addition by taking a view that land of assessee is situated at Oplad which is within 8 KM from SMC limit. The information from Town Planner was called for ascertain that the land is situated within the Limits of SUDA i.e. within 8 KM or not. The Town Planner, Surat in his letter dated 30/09/2016 stated that the land at

survey No. 85 of Block No. 107 of village Saroli, Sub-District- Oplad situated within 8 KM from the municipal limit of SMC. The Assessing Officer accordingly, treated the land as capital asset and noted that the assessee claimed exemption of Rs. 54,11,928/- on account of construction of new residential house. The assessee furnished revised valuation report of constructed property. In the revised valuation report, the second floor was residential house. The area of residential on second floor was of 96.87 square meter as per the valuation report. The Assessing Officer accordingly provided proportionate deduction under Section 54F of the Act of Rs. 12,04,120/- and remaining amount of Rs. 42,07,647/- was disallowed and added as an long term capital gain.

10. We find that the Id. CIT(A) has given relief to the assessee by taking a view that in order to verify the claim of assessee about the distance of land from municipal limit, the Id. CIT(A) directed the Assessing Officer to verify the distance. The Assessing Officer vide his letter dated 06/12/2018 deputed Inspector of the department to measure the road distance of land from SMC limit was found at about 9.2 KM. On the basis of such finding, the Id. CIT(A) held that the land in question sold by the assessee is not capital asset and the provision of capital gain are not applicable in this case. We find that the Id. CIT(A) granted relief to the assessee after proper appreciation of facts. No contrary facts or law is brought to our notice by the Id. Sr. DR to take other view, therefore, considering the

totality of the facts and circumstances, we do not find any reason to deviate from the findings so recorded by the Id. CIT(A) which we affirms the order of Id. CIT(A) on merit. In the result, the grounds of appeal raised by the revenue are dismissed.

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

Order pronounced on 23/12/2022, in open court.

Sd/-
(Dr. ARJUN LAL SAINI)
ACCOUNTANT MEMBER

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

Surat, Dated: 23/12/2022

**Ranjan*

Copy to:

1. Assessee –
2. Revenue -
3. CIT(A)
4. CIT
5. DR
6. Guard File

By Order

// True Copy //

Sr. Private Secretary, ITAT Surat