

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "D" BENCH

**Before: Smt. Annapurna Gupta, Accountant Member
And Shri T.R. Senthil Kumar, Judicial Member**

**ITA No. 417/Ahd/2023
Assessment Year 2017-18**

Income Tax Officer, Ward-5(3)(1), Ahmedabad (Appellant)	Vs	Urmila Bharatbhushan Agarwal 11, Hirabhai Market, Kanakaria Ahmedabad-380022, Gujarat PAN: ABCPA2925R (Respondent)
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**Revenue Represented: Shri Pushpendra Singh
Chaudhary, CIT
Assessee Represented: Shri Sudhir Mehta, A.R.**

Date of hearing : 28-05-2024
Date of pronouncement : 22-08-2024

आदेश/ORDER

PER : T.R. SENTHIL KUMAR, JUDICIAL MEMBER:-

This appeal is filed by the Revenue as against the appellate order dated 27.03.2023 passed by the Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi, (in short referred to as "CIT(A)"), arising out of the assessment order passed under section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') relating to the Assessment Year 2017-18.

2. The brief facts of the case is that the assessee is an individual and Partner in two Partnership Firms. The assessee filed her Return of Income on 05.08.2017 declaring total income of Rs.6,45,330/-. The return was taken for complete scrutiny to verify the claim of exempt income namely capital gain/loss on sale of Lands. During the year the assessee declared agricultural income of Rs.3,80,352/- after deducting agricultural expenses of Rs.1,26,782/-. The assessee is the owner of 34 bighas of agricultural land at Janshali doing seasonal agricultural goods. The assessee was consistently showing agricultural income from the above agricultural lands from Asst. Year 2011-12 ranging from Rs. 4,96,779/- to 8,13,361/-. During the financial year 2016-17, the assessee sold agricultural lands on 09.08.2016 for a consideration of Rs.10,53,81,144/- to M/s. Industrial Cluster Private Ltd. who has obtained permission from Industries Commissioner, Government of Gujarat for purchasing agricultural land parcels for bonafide Industrial use, which is approved under Gujarat Industrial Policy, 2015 to set up an Industrial Park project vide Industries Commissioner letter dated 13.10.2015.

2.1. It is seen from the registered Sale Deed dated 09.08.2016 by the assessee for land measuring 21954 Sq. Mtrs. in Survey No. 162, Janshali Village, the following Clauses in the Sale Deed which explain the details as follows:

(B) The Vendor has acquired the ownership rights over the said Land from its erstwhile owner viz. Narshibhai Lalabhai vide Sale Deed registered at the Office of the Sub-Registrar of Assurances under serial No. 511 dated 20/03/2012 in respect of the same, mutation entry No. 2871 was entered in the revenue records on 20.03.2012.

(C) *In view of the aforesaid, the Vendor became the lawful owner of the said land.*

(D) *The purchaser has received a **Certificate bearing no. IC/Infra/Ind/-Park-Land/1140663 dated 23.12.2015 issued by the Industries Commissioner, Government of Gujarat for purchasing agricultural land parcels (inclusive of the said Land) for bonafide industrial use, as well as, an In Principle approval under Gujarat Industrial Policy, 2015 to set up an Industrial Park Project on the same vide a Letter of the Industries Commissioner bearing no. IC/INFRA/Industrial Park/1119214 dated 13.10.2015.***

(E) *The purchaser being desirous of **purchasing contiguous land for industrial use had approached the Vendor to transfer all the rights**, title and interest over the said land in favour of the purchaser.*

(F) *In view of the aforesaid, the Vendor has agreed to sell, transfer and assign upto the Purchaser and the Purchaser has agreed to purchase and acquire from the Vendor under section 55 of the Saurashtra Gharkhed Tenancy Settlement and Agricultural Land Act, R/W Section 65B of the Gujarat Land Revenue Code for bonafide industrial purpose, with all the rights, and interest of the Vendor in respect of the said land at or for the total consideration of Rs.1,68,11,240/-.*

(G) *In the aforesaid circumstances, the parties are now desirous of executing these presents for sale and transfer of the said land by the Vendor to the Purchaser more particularly mentioned hereunder.*

2.2. Further at Page No. 32 of the Sale Deed, the copy of the Certificate dated 23.12.2015 issued by Industries Commissioner, Gandhinagar is reproduced wherein it is stated that M/s. Industrial Cluster Private Ltd. has to set up an Industrial Park at Janshali village, Limdi Taluka, Surendranagar District measuring 140 hectares as per approval of State Level Empowered Committee for setting up of Industrial Park within three years from date of registration of the Industrial Park and commence production of goods or providing of services on such land within stipulated period under resolution.

2.3. However without considering the above documents and submissions, the Assessing Officer called for information from Director, Bhaskaracharya Institute for Space Applications and Geo-Informatics, Gandhinagar calling for satellite image of the land owned by the assessee, whether cultivation was being done by the assessee. Based on the above report the A.O. held since the agricultural land was sold to non-agriculturist, as per the provisions of Section 63AA of Land Revenue Code, treated the sale transaction is to be non-agricultural land. Thus Ld. A.O. denied the claim of exemption u/s. 2(14)(iii) of the Act and determined the Long Term Capital Gain of Rs.9,78,66,687/- and demanded tax thereon.

3. Aggrieved against the assessment order, the assessee filed an appeal before Ld. CIT(A). During the appellate proceedings, the assessee submitted if a non-agriculturist purchases agriculture land for bonafide industrial purposes, as per provisions of Section 63AA of Land Revenue Code, the said land is to be treated as agricultural land only. Since the permission issued by Industries Commissioner also mentioned the land to be agricultural and the Sale Deed registered also mentions the land to be agricultural land. Thus the assessee relied upon Hon'ble Gujarat High Court Judgment in the case of PCIT-Vs-Heenaben Bhadresh Mehta and Kishorbhai Harjibhai Patel -Vs-ITO and claimed the sale of land is exempt u/s. 2(14)(iii) of the Act. Considering the above submissions of the assessee, the ld. CIT(A) allowed the claim by observing as follows:

“.....5.10 The appellant has produced certificate of talati that the land is 32 km away from the nearest Municipality of Limbdi, Population of the village

was also 1304 as per the last census of 2011. The conditions for claiming the land to be agricultural land as per section 2(14) is satisfied.

*5.11 The learned AO has made the contention that since the land is being sold to a non-agriculturist for development of industrial Park, the same will be considered as non-agricultural land. **The appellant has made the contention that it has sold agricultural land and what the buyer does with such land will not change the nature of the land to non-agricultural. The same has been clarified with the help of judicial proceedings as stated above.***

5.12 In view of the above, the contention made by the appellant is found correct. The land is established as agricultural land as per provisions of the act & the mere sale of such land to a non-agriculturist will not change the nature of the land to non-agricultural land. Therefore, addition made by the learned AO is deleted.

5.13 Accordingly, ground 1 of the appellant is allowed.”

4. Aggrieved against the appellate order, the Revenue is in appeal before us raising the solitary ground that the Ld. CIT(A) erred in deleting the addition made on account of Capital Gain of Rs.9,78,66,687/- on sale of non-agriculture land.

5. The Ld. CIT-DR Shri Pushpendra Singh Chaudhary appearing for the Revenue supported the order passed by the Assessing Officer and requested to uphold that the sale of land as non-agricultural and confirm the Long Term Capital Gain worked out by the Assessing Officer.

6. Per contra Shri Sudhir Mehta ld. Advocate appearing for the assessee submitted before us a detailed Paper Book containing various Documents, Revenue Records, Income Tax Returns and copy of registered Sale Deed by the assessee. Ld. Counsel drawn our attention to the various clauses in the registered Sale Deed more particularly, Clause (b) to (g) of the Sale Deed (copy already extracted in Para 2.1 above) registered as Document No. 1305 of

2016. More particularly, Clause (f) of the Sale Deed which clearly specifies the above land was purchased from the assessee u/s. 55 of the Saurashtra Gharkhed Tenancy Settlement and Agricultural Land Act r.w.s. 65B of the Gujarat Land Revenue Code for bonafide industrial purpose. Ld. Counsel referred to various case laws and more particularly, the Co-ordinate Bench of this Tribunal decision in the case of Hiten Tulshibhai Engineer –Vs-ITO reported in (2023) 157 Taxmann.com 81(Ahmedabad-Trib.) and thus submitted the sale of land is not a capital asset within the definition of Section 2(14)(iii) of the Act and not liable for capital gains and the additions made by Ld. A.O. is liable to be deleted.

7. We have given our thoughtful consideration and perused the materials available on record including the Paper Book and case laws filed by the Assessee. It is clearly seen from record that the Assessing Officer has misconstrued the provisions of Section 63AA of the Land Revenue Code, thereby treated the sale of land as non-agricultural. Even though the assessee's land which clearly not falls within the provisions of Section 2(14)(iii) of the Income Tax Act and liable for Capital Gains. In our considered view, this issue is no more resintegra, because of the following judicial precedents.

7.1. The Hon'ble High Court of Gujarat in the case of CIT-Vs-Rajshibhai Meramanbhai Odedra reported in (2014) 42 taxmann.com 497 (Guj) wherein it was held that merely because agricultural land was sold in favour of non-agriculturist in breach of law prevailing in State, said land would not lose its character as

agricultural land and, hence, could not be treated as capital assets by observing as follows:

"...3.1 Short question which is posed for consideration of this Court is, whether the learned Tribunal has committed any error and/or illegality in confirming the order passed by the CIT(A) treating the land in question which was sold during the Assessment Year as agricultural land and/or not treating the same as capital asset and therefore, not liable to be taxed?"

3.2 It is mainly argued on behalf of the revenue that as the agricultural land was sold in favour of non-agriculturist and as per the law prevailing in the State, there is a ban to transfer/sell agricultural land in favour of non-agriculturist without prior permission of appropriate authority and without getting the land converted into non-agriculture and therefore, the said land is to be considered as capital asset and therefore, liable to be taxed. It is not in dispute that what was sold by the assessee was an agricultural lands which were situated beyond 8 Kms of local limits of the Municipality. As rightly observed by the tribunal, merely because the land came to be sold during the year under consideration to non-agriculturist, the same will not change the characteristics of the land in the hands of the seller - assessee. It is not in dispute that at the relevant time, the lands were held/used by the assessee as agricultural land. Merely because the said land came to be sold to a non-agriculturist, may be in breach of law prevailing in the State, character of the land would not be changed and the land still would continue as an agricultural land. At the most the sale in favour of non-agriculturist can be declared as illegal and/or invalid. There is no provision that if the agricultural land is sold in favour of non-agriculturist in breach of law prevailing in the State, it would lose its character as agricultural land and would be treated as non-agricultural land.

3.3 At this stage, definition of capital asset as provided under section 2(14) of the Act is required to be referred to. As per section 2(14) of the Act "capital asset" means property of any kind held by an assessee whether or not connected with his business or profession, but does not include... (3) agricultural land in India which is situated in an area within such distance not being more than 8 Kms from local limits of any Municipality or Cantonment Board.

Considering the aforesaid facts and circumstances of the case, it cannot be said that the ITAT has committed any error in holding the land in question not as capital asset and not liable to be taxed. While holding that the land in question is not a "capital asset" within the meaning of section 2(14) of the Act and deleting addition of Rs. 18,70,749/- on account of long term capital gain, and addition of Rs. 4,56,83,750/- on account of short term gain, the Tribunal in para 15 has observed and held as under:-

“15. We have heard the parties with reference to material on record. The impugned order has been perused carefully. The fact of the matter is that the assessee has laid on record of the authorities below the copies of Revenue record in Form No. 7/12 which reveals that the land under consideration were being used for agricultural purpose. The Assessing Authority himself has accepted assessee's claim of deriving agricultural income therefrom and has made assessment accordingly. Merely because the State Law do not permit transfer of agricultural land to non-agriculturist that fact by itself cannot make the said land a "Capital Asset" within the meaning of section 2(14) of the Act. The assessee has laid on record a certificate from revenue department that the land is situated beyond 8 Km from the Municipal Limits. This certificate was available before the Assessing Authority in remand proceedings. The Assessing Authority brought no material to show that the certificate so produced is not a genuine document nor that the land is not situated beyond 8 Kms from the Municipal Limits and hence this is not a "Capital Asset". We, therefore, find no reason to interfere with such finding of fact reached by him and in his conclusion that the income assessed as "Long Term Capital Gains" in the name of the assessee and "Short Term Capital Gains" in the name of his family members could not be assessed as capital gains in his hands as the same was not "Capital Asset". Thus deducting addition on that account by Id. CIT(A) is found justified.”

3.4 Considering the above, and when the land in question was an agricultural land, which was situated beyond 8 Kms from the municipal limits, no error has been committed by the learned tribunal in not considering the land in question as "capital asset". We see no reason to interfere with the impugned judgment and order passed by the learned Tribunal in dismissing the appeal preferred by the revenue and confirming the order passed by the CIT(A) deleting addition of Rs. 18,70,749/- on account of long term capital gain and addition of Rs.4,56,83,750/- on account of short term gain.

4. In view of the above and for the reasons stated above, both the proposed questions of law are answered against the revenue and consequently, present Tax Appeal deserves to be dismissed and is accordingly dismissed.”

7.2. Further it is settled position of law by the Jurisdictional High Court in the case of PCIT-Vs-Heenaben Bhadrash Mehta reported in (2018) 96 taxmann.com 164 wherein it was held that when the purchaser use the land other than agricultural activities or industrial purpose that cannot be the determinative factor to treat

the profit earned by the assessee on sale of agriculture land as “business income” by observing as follows:

“...8. Therefore, on plain reading of Section 2(14) of the Act, if the "agriculture land" as mentioned in Section 2(14)(iii) is sold, the assessee shall be entitled to claim exemption on profit earned on sale of agricultural land as per Section 2(14) read with Section 45 of the Act, unless it is established and proved that the transaction carried out was "adventure in the nature of trade" and the profit thus required to be taxed as business income. On appreciation of evidence, the learned Tribunal has specifically observed and held that the transaction carried out by the assessee was not "adventure in the nature of trade" and therefore, profit earned was not required to be taxed as business income. The aforesaid is the finding recorded by the learned Tribunal on appreciation of evidence.

9. As observed hereinabove, the land was sold as an agricultural land and in fact, what was sold was agriculture land. What was the intention of the purchaser cannot be the determinative factor to treat the profit earned by the assessee on sale of agriculture land as business income. Similarly, merely because for whatever reason, the assessee has earned sufficient huge amount of profit also cannot be a ground to treat the profit earned by the assessee on sale of agriculture land as business income.

10. Under the circumstances and on the facts and circumstances of the case, the learned Tribunal has not committed any error in directing the Assessing Officer to treat the profit of Rs. 68,18,800/- earned by the assessee on the sale of agriculture land as exempt under Section 2(14) of the Income Tax Act.

11. Now, so far as the reliance placed upon the decision of the Hon'ble Supreme Court in the case of G. Venkataswami Naidu & Co. (supra) is concerned, considering the facts before the Hon'ble Supreme Court, we are of the opinion that the said decision shall not be applicable to the facts of the case on hand. The Hon'ble Supreme Court was considering Section 2(13) of the Income Tax Act and the definition contained in Section 2(13) fell for consideration before the Hon'ble Supreme Court. The wordings in Sections 2(13) and 2(14) are different. Therefore, the said decision shall not be applicable to the facts of the case on hand.

12. Similarly, decision of the Hon'ble Supreme Court in the case of Officer-In-Charge (Court of Wards) (supra) also shall not be applicable to the facts of the case on hand. In the said decision, the Hon'ble Supreme Court was considering definition of "agricultural lands" within the meaning of Section 2(e)(i) of the Wealth-tax Act. Considering Section

2(e)(i) of the Wealth-tax Act and Section 2(14) of the Income Tax Act, it appears that the definitions in both the Sections are different and for different purposes. Under the circumstances, this decision also shall not be applicable to the facts of the case on hand.

13. The decision of the Division Bench of this Court in the case of Smt. Minal Rameshchandra (supra) shall also not be applicable to the facts of the case on hand. In the case before the Division Bench, the Division Bench, on facts, held that the assessee was businessman and dealing in land business and he along his mother and brother purchased the land with a view to earn profit and therefore, it was having a characteristics of "adventure". Therefore, on facts, the said decision shall not be applicable to the facts of the case on hand.

4 14. In view of the above and for the reasons stated hereinabove, we are of the opinion that in the facts and circumstances of the case, the learned Tribunal has not committed any error in directing the Assessing Officer to treat the profit of Rs. 68,18,800/- earned by the assessee on the sale of agriculture land as exempt under Section 2(14) of the Income Tax Act. No substantial question of law arises. Hence, the present appeal deserves to be dismissed and it is accordingly dismissed."

7.3. Further Co-ordinate Bench of this Tribunal in the case of Hiten Tulshibhai Engineer-Vs-ITO reported in (2023) 157 taxmann.com 81 considered the provisions of Section 63AA of Gujarat Tenancy and Agricultural Lands Laws (Amendment) Act, 1997 and held that the sale of land to non-agriculturist is not liable to Capital Gain by observing as follows:

"...16. What transpires from a conjoint reading of the relevant provisions of Gujarat Tenancy and Agricultural Lands Laws (Amendment) Act, 1997 and the Bombay Land Revenue Code, 1879, is that in case of agricultural lands designated by authorities for bona fide industrial purposes the requirement of seeking prior permission for land use change is done away as per the Bombay Land Revenue Code, 1879. Such agricultural lands can be transferred to non-agriculturist as per section 63AA of the GT&ALL Act, which Act otherwise prohibits such transfers.

Thus Lands purchased u/s. 63AA of Gujarat Tenancy and Agricultural Lands Laws (Amendment) Act, 1997, is nothing but agricultural land.

17. Applying this to the facts of the present case wherein the land has been sold u/s.63AA of the GT&ALL, undoubtedly the said land is

agriculture land. This fact is further evidenced by various covenants of the conveyance deed stating the character of the land sold in clear terms to be agricultural.

Also, as noted above, as per the relevant land laws, once the agriculture land is sold to a non-agriculturist for bona fide industrial use, the notice of change of land use is to be given by the purchaser to the collector who after verification issues certificate of valid user for bona fide industrial purposes.

18. As per the facts of the present case the purchaser of land, Le the company, after purchase of the agricultural land from the assessee u/s. 63AA of the GT&ALL Act, notified the purchase of agricultural land for bona fide industrial use and was issued a certificate in this regard by the collector after verifying its user for bona fide industrial purposes. Thus, it was subsequent to purchase of land, that its use was changed to non-agriculture purpose.

19. We hold therefore that the AO/DRP has erred in interpreting section 63AA of the Gujarat Tenancy and Agricultural Lands Laws (Amendment) Act, 1997 to mean that the land sold by the assessee had been converted into non-agriculture prior to the date of sale. At the cost of repetition, we may state that what it only implies is that the land was designated for use for non-agriculture purpose. It was only designated so, and its user for non-agriculture purpose was completed only when the non-agriculture usage was commenced and notified to the Collector, which in the present case was done by the company, which purchased the land subsequent to its purchase. The conveyance deed, all along mentions the land sold by the assessee as agricultural land. Its conversion from agricultural to non-agricultural land is certified by the Collector post-sale of the land.

20. The land sold by the assessee, having been held to be agricultural land, and since there is no dispute vis-à-vis its distance from the municipal limits, the impugned land, we hold, did not qualify as "capital asset" in terms of section 2(14)(iii) of the Act. The claim of the assessee to the entire capital gain earned on these piece of land amounting to Rs. 3,56,70,539/-, as not being liable to tax is, we hold, in accordance with law. The order passed by the A.O., therefore, treating the land sold by the assessee, as non- agricultural and subjecting to capital gain thereon to the tune of Rs. 3,56,70,539/- as liable to tax, is set aside.

Ground of appeal No. 2 of the assessee is allowed.”

7.4. Respectfully following the above judicial precedents, the ground raised by the Revenue is devoid of merits, hence, the same is liable to be dismissed.

8. In the result, the filed by the Revenue is hereby dismissed.

Order pronounced in the open court on 22-08-2024

Sd/-
(ANNAPURNA GUPTA)
ACCOUNTANT MEMBER True Copy
Ahmedabad : Dated 22/08/2024

Sd/-
(T.R. SENTHIL KUMAR)
JUDICIAL MEMBER

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
अहमदाबाद