

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "B", MUMBAI**

BEFORE SHRI JASON P.BOAZ (AM) AND SHRI RAM LAL NEGI (JM)

**ITA No. 364/MUM/2014
Assessment Year: 2010-11**

Mr. Mohit Suresh Harchandrai. Harchandrai House, 81, Queens Road, Marine Drive, Mumbai- 400 002. PAN : AAAPH 0742 E	Vs.	The ACIT, Circle 14(1). Room No. 202, Earnest House, Nariman Point, Mumbai- 400 021.
(Appellant)		(Respondent)

**ITA No. 365/MUM/2014
Assessment Year: 2010-11**

Mr. Nihal Suresh Harchandrai. Harchandrai House, 81, Queens Road, Marine Drive, Mumbai- 400 002. PAN : AABPH 5300 B	Vs.	The ACIT, Circle 14(1)(3). Room No. 202, Earnest House, Nariman Point, Mumbai- 400 021.
(Appellant)		(Respondent)

&

**ITA No. 367/MUM/2014
Assessment Year: 2010-11**

Mr. Niranjan Suresh Harchandrai. Harchandrai House, 81, Queens Road, Marine Drive, Mumbai- 400 002. PAN : AAAPH 7382 L	Vs.	The ACIT, Circle 14(1) Room No. 202, Earnest House, Nariman Point, Mumbai- 400 021.
(Appellant)		(Respondent)

Appellant by : Shri. Nitesh Joshi & Vipul Mody.
Respondent by : Shri. T.P.Khan

Date of Hearing: 20/01/2017
Date of Pronouncement: 28/02/2017

ORDER

PER BENCH

These are the three appeals filed by the Appellants/assesseees Shri. Mohit Suresh Harchandrai, Shri. Nihal Suresh Harchandrai and Shri Niranjan Suresh Harchandrai against three separate orders dated 23/12/2013 passed by the Ld. CIT(Appeals)- 25, Mumbai, for the Asst. year 2010-11, whereby the Ld CIT(A) partly allowed the appeals filed by the assesseees against assessment order dated 19/02/2013, 31/12/2012 & 31/12/2012 respectively, passed u/s 143(3) r.w.s. 147, 143(3) and 143(3)(ii) of the Income Tax Act, 1961 (for short 'the Act') respectively. Since all the three appeals are arising out of the transaction of sale of land by the assesseees as co-owners, all the three appeals were clubbed, heard together and are being disposed of by this common order for the sake of convenience.

2. Brief facts which need necessary mention for adjudication of the issues involved in these appeals are that during the financial year 2009-10, the assesseees being the owners-in-possession of land bearing GAT No 929, area measuring 1-69-4 hectares situated at village Dhokawala, Taluka Alibag Distt. Raigarh sold their shares in the said land to Shri. Abhijit Bhandari for a total consideration of Rs. 4,21,00,000/-. However, the assessee did not offer any capital gain on the sale of property in their income tax returns for the reason that the land sold does not fall within the preview of capital asset under section 2(14) of the Act, being an agricultural land. In case of assessee Mohit Suresh Harchandani, ITA No. 364/M/2013 the assessee filed its return of income for the assessment year 2010-11 declaring the total income of Rs. 19,75,502/-.

The return was processed u/s 143(1). However, on the basis of information received from ITO -14, Mumbai that the assessee had sold his asset i.e., share in the aforesaid land but not offered the capital gain to tax, the assessment was reopened and assessment order u/s 143(3) r.w.s. 147 of the Act, was passed determining the total income of the assessee at Rs. 1,16,57,086/- after making addition of Rs. 96,81,584/- as Long Term Capital Gain on sale of land.

3. The assessee challenged the assessment order by filing appeal before the Ld. CIT(A). The Ld. CIT(A) after hearing the assessee upheld the findings of the A.O holding that the land sold by the appellant was a capital asset within the meaning of section 2(14) of the Act; the land in question was not being used for agricultural purposes therefore the gain on transfer of such capital asset is liable to be taxed u/s 45 of the Act. The Ld. CIT(A), however, included the amount Rs. 1,20,000/- paid towards stamp duty for execution of sale deed in the cost and calculated the indexation cost at Rs., 36,43,558/- instead of Rs. 33,75,665/- calculated by the AO and confirmed the Long Term Capital Gain of Rs. 96,14,611/-. Still Aggrieved, the assessee is in appeal before the Tribunal on the following effective grounds of appeal:-

“1. The Learned Commissioner of Income-tax (Appeals) erred in upholding the order of the Learned Assessing Officer treating the “Agricultural Land” as “Capital Asset” within the meaning of Section 2(24) of the Act and thereby taxing the gains arising on sale of the said Agricultural Land as “Capital Gains” .

IT is submitted that the Land sold during the year is an “Agricultural Land” and not a “Capital Assets” and as such gains arising on sale of said Agricultural Land is not chargeable to tax.

The conclusion arrived at by the Learned lower authorities is based on presumptions and surmises and is contrary to the facts.

2. Without Prejudice to ground no 1 above, the Learned Commissioner of Income-tax(Appeals) erred in confirming the order of the Assessing Officer, not allowing deduction of Rs. 4,21,000/- in respect of brokerage paid towards sale of said agricultural land.

It is submitted that the appellant along with other co-owners paid brokerage aggregating to Rs. 4,21,000/- towards sale of agricultural land and for the purpose of computing Capital Gains, the same is ought to be reduced from Sale Value of agricultural land.”

4. Before us, the Ld. Counsel for the assessee submitted that the Ld. CIT(A) has wrongly upheld the erroneous order passed by the A.O. The Ld. Counsel further submitted that the assessee along with his co-owners sold his share in the land situated in Taluka Alibaug, Distt. Raigarh bearing GAT No. 929 of village Dhokawade admeasuring 1-96-4 hectares equivalent to 169.4 gunthas equivalent to 16,940 sq. meters on 09th August, 2009 for a total consideration of Rs. 4,21,00,000/-. The assessee did not offer any capital gain on the sale of the land because at the time of sale the land was an ‘agricultural land’ within meaning of section 2(14)(iii) of the Act. That as per certificate issued by Sarpanch Gram Panchayat Dhokawade the land in question is at the distance of 16 KM from Alibaug Nagarpalika and the population of the said village in the year 2009 was 3,086 persons. The land was recorded as agricultural land in the records of rights maintained by the department of revenue and was subject to payment of land revenue. The said land was never put to any non-agricultural use by the assessee and that the assessee carried on agricultural activities on said land viz. planting of saplings of Mango, Supari, Coconut, rice and vegetables. The Ld. counsel further submitted that since the findings of the AO are based on wrong assumptions and not based on the evidence on record, the Ld. CIT(A) ought to have set aside the same. Since, the Ld. CIT(A) has passed the impugned order without taking into consideration the documentary as well as circumstantial evidence placed on record, the same is liable to be set aside.

5. On the other hand the Ld. Departmental Representative (DR) relying on the concurrent findings of the authorities below submitted that enquiry conducted during assessment proceedings revealed that the land sold by the assessee and his co-owners was not an agricultural land but was a capital asset within the meaning of section 2(14) of the Act. Enquiry conducted by the ward inspector further established that purchaser of land Shri. Abhijit Bhandari has developed a Bangalow making substantial investment after getting the land converted into non-agricultural land with the approval of the land revenue. As per the latest 7/12 extract furnished by the office of the Talathi, Alibaug the land in question was never used for the agricultural purposes till the date of sale by the assessee and others. The Ld. DR further submitted that the Ld. CIT(A) has upheld the assessment order keeping in view the law laid down by the Hon'ble Supreme Court in *Smt. Sarifabibi Mohmed Ibrahim vs. CIT (1993) 204 ITR 631 (SC)*, Hon'ble jurisdictional High court in *Fazalbhoy Investment Co P Ltd. vs. CIT (1989) 176 ITR 523 (Bom)* The Ld. DR further submitted that in the present case the purchaser has not purchased the said land for genuine agricultural operation as the sale price works out at Rs. 2.34 lacs per guntha i.e. 1000 sq. ft. and that Rs. 2.34 lacs per guntha cannot be the purchase price for an agricultural land. Since the land was never cultivated by the assessee and remained barren for more than twelve years the same had lost of its agricultural character. Hence, the Ld. CIT(A) has rightly upheld the findings of the A.O. and there is no further scope for interfere with the impugned order.

6. We have heard the rival submissions and also perused the material placed on record before us including the decisions relied upon by the parties in support of their contentions. The common issue involved in these case are at the time sale of the land in question whether the land was an agricultural land or the capital asset within the meaning of section 2(14) of the Act. The

Ld. CIT(A) has upheld the findings of the A.O relying on the various judicial pronouncements in which it was held that a piece of land cannot be characterized as agricultural land merely because of entries in the revenue records to that effect. However, in the present case the assessee has claimed that agricultural activities such as planting of Mango trees, Supari trees, Coconut trees, cultivation of rice and vegetables etc. was carried on by the assessee as co-owner in possession of the land. The assessee has submitted the copies of 7/12 extracts to prove the classification of land as agricultural land, copies of receipts issued against the land revenue paid to prove that land in question was agricultural land and land revenue was paid accordingly from time to time, copies of affidavits sworn by Mr. Kesarinath Patil and Mr. Vijay Wakde, to establish that the land was used for agricultural purposes since it was acquired by the assessee and others and they used to carry out the agricultural activities in the said land and they were paid in cash or kind by the assessee. The assessee has placed on record the Bills and Vouchers to prove that seeds fertilizers pesticides and other materials required for carrying on agricultural activities to substantiate its claim. The assessee has also submitted the site plan to show the location of Ground Well, Bore Well, mango trees, coconut trees, supari trees, rice and vegetable cultivation etc. to establish that agricultural land was sold by the assessee.

7. On the other hand the Ld. CIT(A) has confirmed the findings of the AO mainly on the ground that the land was not used for agricultural purposes and was lying barren from the year 1996-97. The assessee has not shown any agricultural income in the income tax return. The purchaser agreed to pay hefty price of Rs. 421.00 lacs as against the stamp valuation for agricultural land of just Rs. 85.20 lacs and soon thereafter converted the land to non-agricultural purposes and developed a Bungalow making substantial investment of approx Rs. 1.50 crores, such prove the intentions of the purchaser to use the land for other purposes other than agricultural.

8. Relying on the decision of Hon'ble Supreme Court in *Smt. Sarifabibi Mohmed Ibrahim vs. CIT (supra)* the Ld CIT(A) has held that since the land in question remained uncultivated for long period it cannot be treated as agricultural land and in order to treat a piece of land as agricultural land, the same must not only be capable of being used for agricultural purposes but should have actually been used as such at some point of time. As per the Ld. CIT(A) in the present case, the assessee has failed to prove that the land was actually used for agricultural purposes.

9. In *Smt. Sarifabibi Mohmed Ibrahim vs. CIT (supra)* the Hon'ble Supreme Court has upheld the decision of Hon'ble Gujarat High Court and held the land in question was not an agricultural land at the time of its sale and that the income arising from its sale was not exempt from the capital gain tax irrespective of the fact that the land was registered as agricultural land in the revenue record; the appellant made payment of land revenue till it was sold in the year 1969; that the land was actually cultivated till 1964-65. The Hon'ble Supreme court in the aforesaid case has further held that whether a land is an agricultural land or not is essentially a question of fact. The several tests evolved by the courts are more in the nature of guidelines. Therefore, the question has to be answered on consideration of all of them.

10. We find that the AO has decided the issue involved in this case without rebutting the direct and circumstantial evidence on record which is in favour of the assessee. No verification was conducted by the AO to falsify the documentary and circumstantial evidence placed on record by the assessee. Even the persons who carried out the agricultural activities at the instance of the assessee were not examined to controvert the contents of the affidavits sworn by them. Before us, the counsel for the assessee placed on the record the copy of application dated 23/03/2010 under sub-section (1) of section 44

of Maharashtra Land Revenue Act, 1966 submitted by the purchaser of the land Sh. Abhijit Bhandari for permission for using the land for horticulture or similar purposes. The contents of the said application further establish that the land in question was agricultural land in the year 2010 when the said application was moved. Further we find that the facts of the present case are different from the facts of the case of *Smt. Sarifabibi Mohmed Ibrahim (supra)* relied on by the Ld CIT(A) on certain material points. In the said case, the property was situated within the limits of Surat Municipality and at the distance of one K.M. from Surat Railway station. A portion of the plot had already been converted to non-agricultural purposes after obtaining requisite permission from the concerned authority. The land was sold at per sq. yard basis to a co-operative housing society for constructing house and buildings. No agricultural operations such as growing of wheat, Bajra, jawar, rice or any other crop had been carried on for the last four years. On the other hand in the present case the land was sold to an agriculturist who later on converted the land for non-agricultural purposes after obtaining permission from the competent authority. Moreover, in the present case neither there is any cogent evidence to rebut the presumption of truth attached with the revenue record maintained by the department nor any verification was conducted by AO during assessment to rebut the documentary evidence placed on record by the assessee to falsify contention of the assessee. The authorities below have not given any cogent and convincing reason for disbelieving the documentary and circumstantial evidence discussed in the foregoing paras which, in our considered opinion, *prima facie* establish that the land in question was an agricultural land within the provisions of the Act at the time of sale to the purchaser. Since, in our considered opinion the assessee has been able to establish that the land in question at the time of its sale was an agricultural land and not a capital asset within the definition of section 2(14) of the Act, the Ld. CIT(A) has wrongly affirmed the findings of the AO. We, therefore, set aside the impugned order and allow this ground of appeal of the assessee.

11. Since, we have decided the first ground of appeal in favour of the assessee, ground no 2 has become academic. Hence, we do not consider it necessary to adjudicate the said ground.

12. So far as ITA No 365/Mum/14 and 367/Mum/14 are concerned, the appellants/assessee being co-owners of the land in question also sold their shares in the said land along with Sh. Mohit Suresh Harchandrai, assessee in ITA No 364/Mum/14. Hence, the facts of both these case are similar to the facts of the case ITA No 364/Mum/14 aforesaid except on the point that assessment in the said cases were passed u/s 143(3) and 143(3)(ii) of the Act respectively, and the issues involved are also identical. Since we have allowed the appeal ITA No 356/Mum/14 filed by one of the co-owners of the land in question, Sh. Mohit Suresh Harchandrai, by setting aside the impugned order, we also set aside the impugned orders passed by the Ld. CIT(A) passed in ITA No 365/Mum/14 and ITA No 367/Mum/14 filed by the assessee Mr. Nihal Suresh Harchandrai and Mr. Nirjan Suresh Harchandrai, other co-owners on the same reasoning.

13. In the result, all the three appeals filed by the assessee for the A.Y.2010-11 are allowed.

Order pronounced in the open court 28th February, 2017.

Sd/-
(JASON P BOAZ)
ACCOUNTANT MEMBER

Sd/-
(RAM LAL NEGI)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated:28/02/2017

आदेश प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR,
ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**

Pramila