

आयकर अपीलिय अधिकरण “जी” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL “G” BENCH, MUMBAI
BEFORE SHRI SANJAY ARORA, AM AND SHRI AMARJIT SINGH, JM

आयकर अपील सं./I.T.A. No.2424/Mum/2014
(निर्धारण वर्ष / Assessment Year: 2009-10)

Yatin Hariram Ruparel 7, View Villa, 425, Shradhanand Cross Road, Matunga, Mumbai-400 019	बनाम/ Vs.	ITO-17(3)(4), Piramal Chambers, Lalbaug, Parel-12
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AACPR 2921 D		
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)
अपीलार्थी की ओर से / Appellant by	:	Shri Dinesh Shah
प्रत्यर्थी की ओर से/Respondent by	:	Shri Airiju Jaikaran
सुनवाई की तारीख / Date of Hearing	:	20.6.2016
घोषणा की तारीख / Date of Pronouncement	:	04.10.2016

आदेश / ORDER

Per Sanjay Arora, A. M.:

This is an Appeal by the Assessee directed against the Order by the Commissioner of Income Tax (Appeals)-19, Mumbai ('CIT(A)' for short) dated 07.2.2014, partly allowing the Assessee's appeal contesting its assessment u/s.143(3) of the Income Tax Act, 1961 ('the Act' hereinafter) for the assessment year (A.Y.) 2009-10 vide order dated 28.12.2011.

2. The issue arising in the instant appeal, raised per several grounds, is the exigibility to tax of the gains arising to the assessee on the sale of his interest in a land and, in case taxable, the value and the manner of taxability of such gain under the Act.

The facts

3. The facts of the case are that the assessee-individual, along with his brother, Shri Ashwin H. Ruparel, inherited a plot of land admeasuring 4960 sq. mtrs on the demise on their sister, Vijaylaxmi Hariram Ruparel, on 07.4.1994 (*) – the sister having no other survivor. The said land was initially allotted to one, Narain Lilaram Chandwani, by Government of India (acting through the Ministry of Labour, Employment and Rehabilitation, Department of Rehabilitation, Office of Custodian of Evacuee Property) on 22.5.1971 (refer PB pgs. 241-242, 257-258) as an evacuee property under the Displaced Persons (Compensation and Rehabilitation) Act, 1954; he having migrated to Bombay from, and in lieu of his agricultural land in, Sindh (now in Pakistan). Narain Chandwani, the original claimant, had earlier (in 1967) sold his right to compensation against his claim under the said Act, since verified, to Vijaylaxmi H. Ruparel, vide agreement dated 28.9.1967 (PB pgs. 225-229), for a consideration of Rs.3,200/-; also executing an irrecoverable general power of attorney in her favour, as also her father, Hariram D. Ruparel and one, S. P. Joshi, on 30.9.1967 (PB pgs. 230-234). The intimation of the GPOA, constituting attorneys, both jointly and severally, by the OC was duly made by him to the Regional Settlement Commissioner (PB pg. 243). The same clearly constitutes a transfer u/s. 2(47) of the Act. The claim of the original claimant (OC) had been, as afore-stated, since verified, bearing Index number S/DD-7/1187-C and registration number B/T/UT/4493/IV-NT dated 29.8.1967 for 8-30 standard acres of agricultural land or, in the alternative, a payment of Rs.3,786/-, as compensation (PB pgs. 255-256). The agricultural land (14-37 local acres), allotted subsequently, was at Village Hedutane, Taluka Kalyan, Dist. Thane, Maharashtra.

(*) Though we observe a mention of the said date as ‘07.4.1974’ at more than one place, the same appears to be a typographical mistake in view of her having executed a GPOA on 10.12.1974 (PB pgs. 218-223) as well as her date of death being stated as ‘on or about 31.3.1994’ in the GPOA dated 18.10.2008 by Narain L. Chandwani (OC) as well as in the statement of facts (SOF) (PB pgs. 10-11).

The assessee, during the relevant year, along with his brother, Ashwin H. Ruparel, transferred all their rights in the said property to M/s. Lodha Dwellers Pvt. Ltd. (LDPL), a company in the business of development of real estate on 'as is, where is' basis, for a consideration of Rs.12,41,750/-, returning 50% thereof (Rs.6,20,875/-), being the assessee's share, as his business income.

The respective cases

4. As per the assessee, the agricultural land was not in the possession of the assessee and his brother or even the OC, but of the agricultural tenants, whose names find mention in the 7/12 Extracts (PB pgs. 259-261). The agreement, titled 'Agreement of Assignment', dated 18.2.2009, had in fact been signed by them as confirming parties (PB pgs. 147-158). What the assessee had thus sold was only a right to conveyance or the right to legal title. The assessee's right to land was limited to its user. The tenants were, in fact, protected by the Bombay Tenancy and Agricultural Lands Act. *De hors* possession, there could be no transfer even in terms of section 2(47) of the Act. An agreement to sell, which is what the agreement dated 28.9.1967 is, would not confer either legal or beneficial ownership of the subject property. The said agricultural land, not falling within the exceptions laid down in, or the areas referred to under, s.2(14)(iii)(a)/(b), the gain on the transfer of the said land could not be in any case charged to tax. In view of the Revenue, on the other hand, what the assessee had sold was agricultural land, gain on which is chargeable under the head 'capital gains'. The land having not been cultivated by either the assessee or his parent at any time, much less in the two years preceding the transfer, the condition of exemption u/s.10(37) was not met. The land is an agricultural land and not meant for business. It had even otherwise not been converted into the assessee's stock-in-trade at any time. Why, the assessee himself does not dispute it being so, claiming it as not excepted by section 2(14)(iii)(a)/(b). Further, being land, the gain on its transfer would stand to be computed u/s.50C of the Act. Its value, initially adopted at

Rs.146.60 lacs, i.e., as per the stamp valuation, on being objected to by the assessee, was referred to the Valuation Officer, who valued the same at Rs.66.06 lacs, 50% of which has accordingly been assessed in the assessee's hands.

Discussion

5. We have heard the parties, and perused the material on record.

5.1 The foregoing (paras 3 & 4) delineate the broad facts of the case as well as the respective cases of both the parties. The first question before us is if the land under question and, therefore, what has been sold, can be regarded as a part of the assessee's stock-in-trade. This is as only in that case it could be regarded as a business income, i.e., as returned. Else, even if connected with the assessee's business, the gain would be only on capital account. No connection with the assessee's – a proprietor of a firm 'Ruparel Electronics', business has been shown. It is rather the assessee's father who is stated to purchase evacuee claims from the persons in need of funds; the assessee and his brother having only inherited the same. The assessee, in fact, himself admits the same per the SOF before the first appellate authority; the relevant part of which reads as under:

'However although it is not business asset it is also not capital asset as it is agricultural land as per clause (14)(iii) of Section 2.'

We accordingly find no basis for, or any material on record toward, the subject land being the assessee's business asset or the gain on its' transfer being assessable as business income.

5.2 The second question before us is if the subject land is a capital asset u/s. 2(14)(iii) of the Act, which would determine whether the income by way of gain on its transfer is chargeable to tax or not. However, before we address this issue, it would be relevant to examine and determine the nature of the assessee's interest in land, i.e., whether proprietary or, as claimed, a mere right to use the land. That is, what the assessee transferred is land itself or a right to cultivate it. The land was finally allotted

to Narain Chandwani, the OC, on 22.5.1971; the assessee's father – a power of attorney holder, predeceasing (the allotment of land) on 10.5.1970. The same reads as under, clarifying thus that *agricultural land* has been allotted, in satisfaction of an evacuee claim in lieu of the agricultural land of the OC (or his ancestors) in West Pakistan:

GOVERNMENT OF INDIA
Ministry of Labour, Employment and Rehabilitation
Department of Rehabilitation
Office of the Custodian of Evacuee Property

Contractor. Bldg. Nicol Bond,
Bellard Estate, Bombay-1,
Dated 22.5.91.

Allotment Order No. Thana/50

Order No. S/DD-1/1187-C & S/DD-1/1230-D
CIF No. B/T/UT/4493/IV NT
Particulars of the verified claim.
Under the I.T. Act.

Name and address of the allottee

Shri Narain Lilaram
C/o. Shri V. H. Ruparel
Nursi Natha Trust Bldg.,
18/20, Kazi Syed Street,
Bombay-9.

Assessee in 42-15 499/2560 St. Acres
Area due after Punjab cut. 28-14 3059/5120 S.A
Balance compensation Rs.3860/-

1. You are hereby allotted following agrl. Land in Thana District on Quasi permanent basis from the date of this order.

District	Taluka	Village	Sr. Nos. allotted	Local Acres allotted	Std. Areas allotted
Thana	Kalyan	Hedutane	131/1, 146, 147	14-37	6-10/ 4/5

2. You will be liable to pay land revenue/rent/cess and any other dues which may be payable to the Government or to local Bodies under any Law for the time being in force in MAHARASHTRA STATE
3. The allotment will be liable to be cancelled if:
- i. You are found to have made false statement or declaration in the application or in the course of scrutiny thereof or have committed fraud in obtaining allotment of the said land.
 - ii. You fail to discharge any obligations as mentioned above or that may be prescribed hereafter.
 - iii. You fail to pay the land revenue/rent/cess or any other dues which may be payable by you to the Government or local Bodies.

You are requested to contract the Collector Thana for possession

Sd/-
(MANAGING OFFICER)
BOMBAY'

The allotment, as apparent, casts no obligation on the allottee (or the person claiming through him), so that failing the said condition – where stipulated - the property would get resumed or the allotment cancelled. That is, the allotment is conditioned only by the circumstances stated in the allotment letter and, accordingly, subject to the some pre-emptive stipulations as to payment of land revenue/rent; the declaration/s made being true (not false), etc., absolute in its scope. All the rights, title and interest *qua* the said land vests on allotment with the OC, who had, in turn, and in fact apriori, assigned the same to the assessee's sister, whom the assessee and his brother succeed, for a consideration. Interest in the property includes right to possession as well as right to cultivate. In fact, the right to use or cultivate the land, which the assessee claims the OC – and, thus, the person/s claiming through him, to have obtained, *itself includes the right to possession*. In fact, the assignment deed itself clarifies that the assignee has the right to, among others, take possession of land in question, toward which we may reproduce from the assignment deed (dated 28.9.1967): (PB pg. 228)

‘10) That you will bear and pay all the expenses for obtaining allotment of the lands, their possession, transfer, registration etc., in your name or in the name of your nominee or nominees.

11) That as soon as the lands are proposed to be allotted by the Authorities, you will be entitled to obtain possession and all documents in connection with the same and to do such things as are necessary for fully assuring the same permanently to yourself or your nominee/nominees.’

The irrevocable general power of attorney (GPOA) dated 28.9.1967 reiterates the same, the attorney holder being also entitled to sell or otherwise dispose the land in question, as under: (PB pg. 231-232)

‘b) To make application for allotment of land or property and obtain possession thereof from the Regional Settlement Commissioner or any other authority competent to grant the same.

c) To take possession of such land or other property that is ultimately allotted and to enter in such agreement or liabilities with such authority as the authority may require.

d) To make possession of and hold and manage and/or develop the land and or property allotted (whether the possession is provisional or final). If land is granted to cultivate, raise crops, sell the same and do all things incidental to management and development thereof. If any other property to receive rents, or sell the same, carry out repairs, improvements, develop such property or properties and manage the same.'

The GPOA dated 10.12.1974 executed by Vijaylaxmi H. Ruparel (alias Vijaylaxmi Jitendra Dhablewala) in favour of Harish H. Ruparel and Ashwin H. Ruparel (PB pgs. 218-224) and as well as the GPO dated 18.10.2008 by the OC contain similar clauses, which we may reproduce as under: (PB pgs. 219-220)

'3. To take possession of such lands or other property that is ultimately allotted and to enter in such agreement or liabilities with such authority or the authorities which may be required.

4. To take possession of and hold and manage and/or develop the properties acquired. If land is granted to cultivate, raise crops, sell the same if any other property is acquired to receive rents, or sell the same, carry our repairs, improvements, develop such property or properties and do things incidental thereto.'

That the assessee, being not an agriculturist, was, as it appears, not interested in cultivating the land, or did not, take any steps (since allotment in May, 1971) to take possession of the agricultural land, or did not consider it feasible to do so, etc., is another matter. He may also have, after all these years of adverse possession, found it infeasible to do so. How, one may ask, would then the purchaser, LDPL, take possession of the land? That is, if the assessee (and his brother), from whom it derives its' rights, did not have the right to possession. The reference, therefore, to the clauses in the Agreement dated 18.2.2009 (PB pgs. 147-158) to the effect that the OC or the 'confirming parties' (the assessee and his brother) are not in possession of the land, is

to no moment; the said agreement clearly transferring all the rights conferred by the allotment letter, including the right to possession, which is in fact admitted (refer clause 4(a)) thereof. That the land user may be required to be changed; the land being admittedly agricultural, for the transferee to use it for its purposes, is another matter. *Then, again, how does the assessee explain the non-possession of the land claimed to be barren?* (refer paragraph 4.6.1 of the assessment order). The non-possession of land by the assessee, part of which is stated to be in the possession of the tenants and the rest barren, is thus only deliberate and, at best, an encumbrance, which may impact its' valuation. In fact, the assessee himself (vide his reply dated 8/12/2011) states it as one of the encumbrances adversely impacting it's valuation (refer paragraph 4.6.1 of the assessment order).

The assessee also claims to be not the assignor, but only the confirming party and, therefore, that it is not he who has transferred the 'rights'. Who, then, we wonder, is, the assignor? Put differently, if a confirming party, could the assessee have sold the right to conveyance, or any right for their matter? The OC, Narain Chandwani, has already assigned all his rights in favour of the assessee's sister for a consideration, reserving no right. His, therefore, executing the deed of confirmation on 18.10.2008 (PB pgs. 175-178) or GPOA of even date (PB pgs. 160-168) in favour of the assessee and his brother, is of no moment. In fact, the said documents itself clarify this aspect, i.e., of Vijaylaxmi H. Ruparel (alias Vijaylaxmi Jitendra Dhabliwala) being entitled to land, including its possession, and of the assessee and his brother, Ashwin H. Ruparel, becoming entitled to the said property as her legal heirs. The execution of the GPOA by the assignee Vijaylaxmi H Ruparel (alias Vijaylaxmi Jitendra Dhabliwala), as explained therein, is only by way of delegating the powers acquired under the irrecoverable power of attorney in her favour, so as to enable the execution of the necessary acts. Similarly, the execution of the GPOA/s, as explained therein is only as the OC could not purchase the land or the property utilizing the claim certificate. The same, thus, is only a confirming document, affirming him having assigned his interest

in the land and, thus, to have no interest in the subject property. This is, in fact, the admitted position; the assessee and his brother, Ashwin Ruparel, inheriting the property from their sister (and father) as their legal heirs. It is therefore they, i.e., the assessee and his brother, who are thus the assignors, and who have agreed to transfer the land – on ‘as-is-where-is’ basis, to LDPL, the purchaser, for a consideration. That is, notwithstanding the Agreement stating the OC as the Assignor, on whose behalf the assessee and his brother have signed as GPOA holders. The GPOA dated 18.10.2008 (PB pg. 160-168) admits to this position. The assessee’s objection of being only a confirming party is therefore to no consequence.

The assessee’s claim, therefore, of having only a limited right of cultivation of the subject agricultural land, or only to acquire legal title, u/s.54 of the Transfer of Property Act, 1882, is untenable and inconsistent with the admitted facts and circumstances as well as the material on record. The same also meets the assessee’s objection to the in-application of section 50C of the Act on that ground. The assessee’s constant refrain to having no right of possession is thus also misplaced. The reference in this regard to the Bombay Tenancy and Agricultural Lands Act is again not clear, with we being even not as much as taken through the said Act (PB pgs. 112-116) during hearing nor do we find any reference thereto in the Grounds of Appeal or SOF or even the orders of the Revenue authorities. The land is agricultural, and if the same status is sought to be ensured and sustained through the law by, *inter alia*, prohibiting its transfer to a non-agriculturalist, it would not make the assessee any less the owner or impact his ownership status (of the said land). Even regarding it as an encumbrance, the same is by law, applicable for all owners, and would only impact the use to which the land can be put to and, consequentially, its value, which aspect is admitted. The assessee is thus under the terms of the allotment deemed to be an agriculturalist with constructive possession of the land. Again, how then, one may ask, the same stands assigned/sold to LDPL, which is per a registered document? As it

appears, the land user would be required to be changed for being put to use for other than agriculture, with the same purchased in anticipation thereof.

5.3 Coming back to the status of the land under the Act, the land is admittedly an agricultural land. However, for the purposes of the Act, it is still regarded as a capital asset where it falls in the areas referred to in sub-clause (a) or (b) of section 2(14)(iii). Toward this, the assessee claims it as falling under neither, so that it is an agricultural land as defined u/s. 2(14)(iii) of the Act and, thus, not a capital asset. That being so, a gain on its' transfer would stand to be chargeable as 'capital gains'. Section 10(37) of the Act, reading as under, stipulates exclusion by way of exemption of gain on the transfer of agricultural land situate in areas referred to in section 2(14)(iii)(a)/(b) in certain circumstances, so that it would therefore not apply:

'Incomes not included in total income.'

10. In computing the total income of a previous year of any person, any income falling within any of the following clauses shall not be included—

(1)

(2)

(37) in the case of an assessee, being an individual or a Hindu undivided family, any income chargeable under the head "Capital gains" arising from the transfer of agricultural land, where—

(i) such land is situate in any area referred to in item (a) or item (b) of sub-clause (iii) of clause (14) of section 2

(ii) such land, during the period of two years immediately preceding the date of transfer, was being used for agricultural purposes by such Hindu undivided family or individual or a parent of his;

(iii) such transfer is by way of compulsory acquisition under any law, or a transfer the consideration for which is determined or approved by the Central Government or the Reserve Bank of India;

(iv) such income has arisen from the compensation or consideration for such transfer received by such assessee on or after the 1st day of April, 2004.

Explanation

We agree with the assessee in principle. The first thing to ascertain, therefore, is if the subject land is situate in the areas referred to in sub-clauses (a) or (b) of section 2(14)(iii). Toward this, the assessee has furnished a certificate dated 01.8.2012, issued by Sub-Ward Officer's Office, Kalyan in response to the assessee's request dated 09.7.2012, purportedly to the effect that the distance of the subject land from the local limits of Kalyan (stated to be the nearest town) Municipality is 9 km (PB page 30). The same, firstly, was not produced before the AO. Even the impugned order bears no reference thereto, including *qua* admission or, as the case may be, non-admission of the said additional evidence. As it appears, the assessee made no application for admission of the same as additional evidence before the first appellate authority, so that the same was not regarded as requiring adjudication *qua* its admission by him. We say so as there is no ground or even prayer before us with regard to its non-admission or non-consideration of admission. There is accordingly no finding *qua* the satisfaction or otherwise of the condition/s (as to location) of s. 2(14)(iii)(a)/(b) in the impugned order. The same, though, therefore, technically not incorrect in-as-much as no infirmity could be said to inflict the said order on that score, we would be disinclined to proceed to decide the matter on the basis of the said certificate not forming part of the record. The aspect sought to be evidenced goes to the root of the matter, i.e., *whether the subject (agricultural) land is a capital asset u/s. 2(14)(iii) of the Act or not?* We, accordingly, relying on *Prabhavati S. Shah vs. CIT* [1998] 231 ITR 1 (Bom), direct the admission of the said evidence by the first appellate authority. The same is in fact, in vernacular, and would therefore require being translated in English. We are aware of an English translation on record. The same, however, has to be by an authorized person. The same also bears no reference to the survey numbers of the subject agricultural land, and indeed it is not even clear if it stands issued by the competent authority. The Id. CIT(A) shall cause examination of these aspects as well. Then, again, the matter would require being verified and considered by the Revenue authorities. Rather, the reliance on the said evidence is subject to the mandatory

procedure prescribed under rule 46A. He shall decide this matter after hearing both the parties before him, issuing definite findings of fact, and in accordance with law. Clearly, if the land is, as claimed, an agricultural land (i.e., a rural agricultural land in the assessee's words), which is to be determined as on the date of transfer, i.e., 18.02.2009, the same is not a capital asset u/s. 2(14) of the Act and, accordingly, no capital gain chargeable to tax arises to the assessee on its transfer. The Id. CIT(A) shall in this regard also; the assessee having returned the same as business income, dwell on the aspect of reduction in income to that extent.

5.4 Before parting, we may add that the assessee has placed on record several orders/decisions, which were not referred to during hearing, much less read thereat. The issues arising and decided by us are principally factual, so that the same would be of little moment. As regards the legal issue, *qua* which the assessee relied on *CIT vs. Nitish Rameshchandra Chordia* [2015] 374 ITR 531 (Bom), we have restored the matter back to the file of the first appellate authority, who shall decide the same, determining the facts, in accordance with law, and before whom the assessee shall be at liberty to rely on any decision deemed proper.

5.5 We decide accordingly.

6. In the result, the assessee's appeal is allowed for statistical purposes.

Order pronounced in the open court on October 04, 2016

Sd/-
(Amarjit Singh)

न्यायिक सदस्य / Judicial Member

मुंबई Mumbai; दिनांक Dated : 04.10.2016

व.नि.स./Roshani, Sr. PS

Sd/-
(Sanjay Arora)

लेखा सदस्य / Accountant Member

आदेश की 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 - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

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