IT: Mere participation of illiterate assessee in proceedings for conversion of agricultural land initiated by purchaser under section 143 of Uttarakhand Zamindari Abolition Act, 2001 after registration of agreement to sale but prior to registration of sale deed would not lead to conclusion that land sold was non-agricultural and, thus, treating assessee differently from all other co-owners

[2018] 96 taxmann.com 537 (Delhi - Trib.)

IN THE ITAT DELHI BENCH 'SMC'

Kranti Devi

v.

Income-tax Officer-1(2), Rampur*

SMT. DIVA SINGH, JUDICIAL MEMBER
IT APPEAL NO. 2132 (DELHI) OF 2016
[ASSESSMENT YEAR 2009-10]
JUNE 26, 2018

Section 2(14), read with section 2(47), of the Income-tax Act, 1961 and section 143 of the Uttarakhand Zamindari Abolition and Land Reform Act, 2001 - Capital gains - Capital assets (Agricultural land) - Assessment year 2009-10 - Agreement to sale of agricultural land was entered on 29-12-2006 and advance payment was received by assessee from purchaser UDPL - Sale deed was executed on 18-9-2008/24-9-2008 - Revenue's case was that vide order dated 10-10-2007 passed under section 143 of Uttarakhand Zamindari Abolition Act, 2001, State Revenue Authority had changed character of land and, thus, land was no longer agricultural on date of sale - Assessee's case was that in case of other 3 co-owners, sale of land was accepted as sale of agricultural land and no action was taken for imposing capital gain tax - Whether no doubt res judicata does not apply strictly to tax proceedings, however, fact that legitimate expectation of being treated similarly in identically placed facts by co-owners at same point of time cannot be outrightly ignored - Held, yes - Whether mere participation of illiterate assessee and her sisters in proceedings for conversion of agricultural land before Appropriate Authority initiated by purchaser UDPL after registration of agreement to sale but prior to registration of sale deed was at best only as proforma parties and same by itself did not give cause to Revenue to take common fact in case of all co-owners to differently treat assessee - Held, yes [Para 6.3] [In favour of assessee/Matter remanded]

FACTS

- The agreement to sale was entered on 29-12-2006 and advance payment was received with the condition that within 7 months the final registry will be executed. The agreement to sale was registered on 29-12-2006. The land in question was confirmed to be used as agricultural land and the assessee's case was that there was no change in nature of land at any time upto the final and absolute registry on 18-9-2008 and even after that. It was further case of the assessee that the land under question was not the capital assets liable to capital gain tax being not covered by the

definition of capital assets given in section 2(14). The alternative additional grounds of appeal were that or in case of other 3 co-owners, the sale of land was accepted as sale of agricultural land and no action was taken for imposing capital gain tax.

- The Revenue's case was that the assessee along with her sisters entered into an agreement on 29-12-2006 to sell the inherited land to a developer UDPL. The fact that thereafter the characters of the land was converted from agriculture to non-agriculture was a fact on record. It was submitted that *vide* order dated 10-10-2007 passed under section 143 of the Zamindari Abolition and Land Reform Act *vide* Case No. 22/05 by the State Revenue Authority, the character was changed. Therefore, in view of the subsequent sale deed executed/registered in the office of the sub-registrar on 18-9-2008/24-9-2008, the land was no longer an agricultural land.

HELD

- Mere participation of the illiterate assessee and her sisters in the proceedings for conversion of agricultural land before the Appropriate Authority initiated by purchaser UDPL after registration of agreement to sale by prior to registration of sale deed was at best only as proforma parties and same by itself does not give cause to the revenue to take this common fact in the case of all co-owners to differently treat the assessee.
- Considering the totality of facts and circumstances of the present case in the absence of any distinguishing fact brought to the notice of Bench by the revenue, there appears to be no justification for taking a different view in the matter. It is evident that under similar set of facts and circumstances, in the case of the other co-owners for the sale of the same very land, at the very same point of time the proceeds received from the specific land in the hands of the co-owners have not been brought to tax. In the absence of any supporting argument for taking a contrary view in the facts of the present case, the legitimate expectation of the co-owner for a similar treatment cannot be snuffled. The law and the respect of law is founded on the principle of fairness, equality and certainty. Admittedly in the case of the assessee, nothing is available on record for the revenue to justify why the attitude of pick and choose of meeting out different treatments towards similarly situated identical assessees has been held to be appropriate. Such actions lay the exercise of power open to the challenge of being whimsical and perverse. The legitimate expectation of the tax payers to similar treatment from the administration or quasi administration authorities cannot be crushed the right to call upon the authority to justify why the identically situated assessees should be differently treated has to be addressed. [Para 6]
- While the principle in tax matters that an assessments for one year is not binding on the officer for the next year is well settled but there is no statutory bar on considering similar points of facts and circumstances in respect of the issues of taxability of income arising from sale of the same land under the same documents of sale of such land by co-owners on the principles akin to the principles of 'consistency' rule enunciated in *Radhasomi Satsang* v. *CIT* [1992] 193 ITR 321/60 Taxman 248 (SC) which in the peculiar facts of the present case would avoid the unequal application of laws to co-owners and check the tax authorities from adopting an arbitrary manner of proceeding in the matter on the basis of varied interpretations to suit individual

assessees, subjective to their convenience, a result at once debilitating and destructive of the rule of law. [Para 6.1]

- In the facts of the present case though the Assessing Officer and the Commissioner (Appeals) had taken note of the fact that there were other co-owners along with the assessee. However, for reasons best known to the tax authorities these issues are left unaddressed. As noted no doubt *res judicata* does not apply strictly to the tax proceedings. However, the fact that the legitimate expectation of being treated similarly in identically placed facts by co-owners at the same point of time cannot be outrightly ignored. The authority of the state rests on the assumption and the presumption that the state acts for the welfare of the individual. No doubt when the benefits of the individual are pitted against the benefits of the society the individual benefit has to yield to the greater good of the society. However by no stretch of imagination the greater good of the society can be presumed to be served when identically placed individuals are meted with separate codes and actions. There is presumption of legitimate expectation embedded in the social democratic frame work where individual can be presumed to have an inherent right of expecting similar treatment in the eyes of law for similar conduct. The doctrine of *res judicata* cannot be picked up and abused to shelter any and every wrong doing of the state. To condone such an action would lead to eroding the trust and faith in the state action and clothe state functionaries as an alien exploitive machinery which lets loose unchecked the personal whims and fancies of the state functionaries. Such a belief at no point of time can be countenanced. Therefore, it is appropriate to set aside the impugned order *in toto.* [Para 9]

CASE REVIEW

Radhasomi Satsang v. *CIT* [1992] 193 ITR 321/60 Taxman 248 (SC) (para 6.1) *followed.*

CASES REFERRED TO

Radhasomi Satsang v. *CIT* [1992] 60 Taxman 248/193 ITR 321 (SC) (para 6.1).

K. Sampat and **V. Raja Kumar**, Advs. *for the Appellant.* **Ms. Ashima Neb**, Sr. DR *for the Respondent.*

ORDER

1. The present appeal has been filed by the assessee, assailing the correctness of the order dated 10.03.2016 of Commissioner of Income Tax (Appeals)-Moradabad pertaining to 2009-10 assessment year on various grounds which read as under:

1. "That the Ld. CIT (Appeals) Moradabad (UP) has erred in law and on facts in confirming the action of the AO initiated u/s. 147/148 of the Income Tax Act, 1961.
2. That the Ld. CIT (A) Moradabad (UP) has erred in law and on facts in not giving his verdict on the arguments before him that the land sold as per agreement to sale was entered on 29.12.2006 and advance payment was received with the condition that within 7 months the final registry will be executed and in case of default from any side the both parties in vice versa authorized to get the registry executed by way of filing the specific

performance suit in the Court of Law of the Jurisdiction. The Vendee was also given the power to make survey of the land and to get it demarcated according to his plan. Therefore, actual transfer of land u/s. 2(47)(v) and (vi). The transfer of land was as on the date of execution and registry of the agreement to sale which was 29.12.2006.

3. That the Ld. CIT (A) Moradabad (UP) has erred in law and on facts in holding that at the time of final and absolute agreement of sale the character of land from agriculture to non-agriculture was converted by order dated 10/10/2007 u/s. 143 of Jamindari Abolition and Land Reform Act.

4. That as per the revenue records the land in question was confirmed to be used as agriculture land and no nature of land was changed at any time upto the final and absolute registry on 18.09.2008 and even after that.

5. That the land under question was not the capital assets liable to capital gain tax being not covered by the definition of capital assets given in sec. 2(14) of the Act.

6. That the Ld. CIT (A) Moradabad (UP) has erred in law and on facts in not giving his verdict on the alternative additional ground taken by the appellant before him and which were referred for comments of the AO and was received by the Ld. CIT (A) and conveyed and replied by the appellant. These alternative additional grounds of appeal are as under:

1. That in other 3 co-owners the sale of land was accepted as sale of agricultural land and no action for imposing capital gain tax. Thus, it is evident that the land sold was agricultural land and no capital gain tax was chargeable.

2. Without prejudice to the other grounds the Ld. AO has erred in law and on facts in taking the stamp value for registry as sale consideration in place of fair market value of the land.

3. That the Ld. AO has erred in law and on facts in not taking the stamp value as on the date of agreement to sale registered and part payment of sale consideration was made.

4. That the Ld.AO has erred in law and on facts in not allowing allowable deduction u/s. 54B of the Act of Rs. 2,48,000/- for investment in purchase of other agricultural land.

5. That the Ld. AO has erred in law and on facts in not allowing allowable deduction u/s. 54F of the Act of Rs. 15,00,000/- for investment in construction of residential house.

It is, therefore, prayed to kindly allow due relief to the appellant."

2. Some of the above appear to be supportive arguments instead of grounds. Accordingly ground numbers no. 1, 5 & 6 of the above are being taken to be the grounds raised by the assessee in the present appeal and the rest are treated as arguments in support of the grounds.

3. Both the parties were heard. The Ld. AR inviting attention to the assessment order and the impugned order submitted that the tax authorities considering the very same set of facts and circumstances in the case of the co-owners have accepted the sale of this specific piece of land as a sale of agricultural land and held it to be not eligible to tax. However in the facts of the assessee's case they have proceeded to deny similar treatment to the assessee. It was his argument that there is no distinction whatsoever in the case of the co-owners who happened to be the sisters of the assessee and in the case of the assessee.

Thus the denial of similar treatment to the assessee on similar set of facts and circumstances it was submitted is an arbitrary exercise of power and contrary to law.

4. The Ld. Sr. DR, relying upon the order, submitted that the assessee along with her sisters for the same land entered into an agreement on 29-12-2006 to sell the inherited land to M/s. Uttar Develop Pvt. Ltd. The fact that thereafter the characters of the land was converted from agriculture to non-agriculture is a fact on record. It was submitted that vide order dated 10/10/2007 passed u/s. 143 of the Jamindari Abolition and Land Reform Act vide case number 22/05 by the state revenue authority, Kashipur the character was changed. Therefore in view of the subsequent sale deed executed/registered in the office of the sub-registrar Kashipur on 18.09.2008/24.09.2008 the land was no longer an agricultural land. The Ld. Sr. DR, further submitted that though the assessee had argued that the land was agricultural land but the enquiry carried out at the behest of the assessee about the status of the specific land at the relevant point of time as noted in para 6 of the assessment order showed that at that point of time there was no agricultural activity being carried on as has been noted in para 6 by the Assessing Officer.

4.1 The Ld. Sr. DR submitted that reliance on the orders in the case of the sisters/co-owners is of no consequence as principles of resjudicata do not strictly apply to the income tax proceedings. Thus the argument that simply because it has not been taxed in the case of the co-owners was no reason for it not to be taxed in the hands of the assessee.

5. The Ld. AR, on the other hand, submitted that as per statements extracted in para 3 of the assessment order itself shows that the assessee alongwith her three sisters entered into an agreement for sale dated 29.12.2006 with M/s. Uttar Development P. Ltd. for the specific consideration and this Agreement was registered with sub-registrar Kashipur of 30.12.2006. It is further submitted that it was only upon the execution of the agreement for sale that the buyers i.e. M/s. Uttar Development P. Ltd. got this land declared as Private Industrial Estate on 02.01.2007 and applied for change of land use from cultivation to non-cultivation u/s. 143 of the Uttrakhand Zamindari Abolition and Reform Act, 2001 and hence the participation of the illiterate assessee and her sister was only for furthering the Agreement entered into for which payments were received. It was his submission that since in similar set of facts and circumstances in the case of the other co-owners of the specific land the proceeds received from the specific land in the hands of the co-owners have not been brought to tax the Assessing Officer and the CIT (A) have arbitrarily ignored the facts .

6. I have heard the submissions and perused the material available on record. Before addressing the other issues which arise for consideration in the present case it is worth noting that the mere participation of the illiterate assesee and her sisters in the aforesaid proceedings for conversion of land before the Appropriate Authority initiated by purchaser M/s. Uttar Development Pvt. Ltd. was at best only as pro-forma parties and by itself does not give cause to the Revenue to take this common fact in the case of all co-owners to differently treat the assessee. The submission of the Ld. Sr. DR that there is no res judicata, in the tax proceedings at the outset cannot be disputed with. As it is well settled that the assessment orders, and assessments for one year may not necessarily bind the officer for the next year. But considering the totality of facts and circumstances of the present case in the absence of any distinguishing fact brought to the notice of Bench by the Sr. DR there appears to be no justification for taking a different view in the matter. It is evident that under similar set of facts and circumstances, in the case of the other co-owners for the sale of the same very land, at the very same point of time the proceeds received from the specific land in the hands of the co-owners have not been brought to tax. In the absence of any supporting argument for taking a contrary view in the facts of the present case I find that the legitimate expectation of the co-owner for a similar treatment cannot be snuffled. The law and the respect of law is founded on the principle of fairness, equality and certainty. Admittedly in the case of the assessee nothing is available on record for the Revenue to justify why the attitude of pick and choose of meeting out different treatments towards similarly situated identical assessees has been held to

be appropriate. Such actions lay the exercise of power open to the challenge of being whimsical and perverse. The legitimate expectation of the tax payers to similar treatment from the administration or quasi administration authorities cannot be crushed the right to call upon the authority to justify why the identically situated assesses should be differently treated has to be addressed.

6.1 While the principle in tax matters that an assessments for one year is not binding on the officer for the next year is well settled but there is no statutory bar on considering similar points of facts and circumstances in respect of the issues of taxability of income arising from sale of the same land under the same documents of sale of such land by co-owners on the principles akin to the principles of "consistency" rule enunciated in *Radhasomi Satsang* v. *CIT* [1992] 60 Taxman 248/193 ITR 321 (SC) which in the peculiar facts of the present case would avoid the unequal application of laws to co-owners and check the tax authorities from adopting an arbitrary manner of proceeding in the matter on the basis of varied interpretations to suit individual assesses, subjective to their convenience, - a result at once debilitating and destructive of the rule of law.

6.2 On considering the facts I find that before the CIT (Appeals) the assessee has advanced the following submissions which are extracted at page 4 & 5 of the impugned order for ready reference and reproduced hereunder:

> "Alternatively it is submitted to your honor that the land even at the time of final sate deed was used for agricultural activities and character of the land remains that time as also agricultural land as under:-
>
> The assessee is the owner of 'A' the share in 1.586 hectare of in the agricultural land situated at village Mahua Khera Ganj Tehseel Kashipur Distt. U.S. Nagar bearing khatauni No. 322, khasra No. 964 measuring 1.586 hectare 15 Km away from Kashipur Municipality. In Khasra Khatauni the land is shown as agricultural from generation to generation and even after sale on 18/9/2008. The payment for irrigation to canal is made year to year. The other 3 co-owners are as under:-
>
> Smt. Jagwati W/o Shri Madan R/o Moh. Tanda Ujjain Kashipur Smt. Kamlesh W/o Shri Vijay R/o Villag Datram Manpur Tehseel Thakurdwara K. Kishania D/o Shri Dallu R/o Village Mahua Khera Ganj Tehsel Kashipur.
>
> These co-owners got this land by inheritance from her mother Smt. Somwali W/o Late Dalchand (Dalloo) situated at village Mahua Khera Ganj Tehsil Kashipur 15 Km away from Municipality Kashipur. The Municipality Kashipur is not notified in the notification of Urbanisation No. 9447 (F.No. 164/3/87/IT/Al) dated 6/1/1994. The distance of 15 Km. from Municipality Kashipur is accepted in the assessment order on last page of the order. The land by generation to generation was used for agricultural purposes. Land Tax (Lagaan) was also fixed at Rs. 39.65 per year. Revenue record showed that land was agricultural land and it remains even after sale. The other 3 co-owners namely Smt. Jagwati, Smt. Kamlesh and Km. Kishania exempted from capital gain as no any notice was issued or proceedings were initiated.
>
> The Proceedings were initiated u/s. 147/148 in case of Smt. Kranti Devi one of the co-owner by observing that Smt. Kranti has sold out property and got registered documents with Sub-registrar Kashipurdistt. U.S. Nagar on 18/9/2008 making transaction of Rs. 1,22,91,500/-. Verification letter u/s. 133(6) issued to the party. Assessee replied and placed on records. Transfer deed executed has also been obtained and placed on records. The share of the assessee party in the questioned property is only 'A in sale consideration amount is Rs. 98,52,000/-. The property was converted into non-agricultural use from 17/3/2008. Therefore the land is considered to be a plot of land. However situated out of municipal area of Teh. Kashipur Distt. U.S. Nagar. Therefore he drawn his reason that capital gain is escaped to Assessment."

6.3 I find that in the facts of the present case though the AO and the CIT (A) take note of the fact that there were other co-owners alongwith the assessee. However, for reasons best known to the tax authorities these issues are left unaddressed. As noted no doubt res judicata does not apply strictly to the tax proceedings. However, the fact that the legitimate expectation of being treated similarly in identically placed facts by co-owners at the same point of time cannot be out rightly ignored. The authority of the state rests on the assumption and the presumption that the state acts for the welfare of the individual. No doubt when the benefits of the individual are pitted against the benefits of the society the individual benefit has to yield to the greater good of the society. However I find that by no stretch of imagination the greater good of the society can be presumed to be served when identically placed individuals are meted with separate codes and actions. There is presumption of legitimate expectation embedded in the social democratic frame work where individual can be presumed to have an inherent right of expecting similar treatment in the eyes of law for similar conduct. The doctrine of resjudicata cannot be picked up and abused to shelter any and every wrong doing of the state. To condone such an action would lead to eroding the trust and faith in the state action and clothe state functionaries as an alien exploitive machinery which lets loose unchecked the personal whims and fancies of the state functionaries. Such a belief at no point of time can be countenanced. Therefore without getting into the other issues which have been addressed before the CIT (A) by way of specific grounds and left unaddressed by the said authority, I deem it appropriate to set aside the impugned order in toto and restore the issue back to the file of the CIT (Appeals) with the direction to denovo pass a speaking order in accordance with law in the light of the aforesaid directions. Said order was pronounced in the open court at the time of hearing itself.

7. In the result, the appeal of the assessee is allowed for statistical purposes.

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*In favour of assessee/Matter remanded.