IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "A", PUNE

BEFORE SHRI R.S. SYAL, VICE PRESIDENT
AND SHRI VIKAS AWASTHY, JUDICIAL MEMBER

आयकर अपील सं. / ITA No.1144/PUN/16
निर्धारण वर्ष / Assessment Year : 2008-09

Murtuza Shabbir Jamnagarwala, 910, Synagogue Street, Camp, Pune – 411 001	**Vs.**	ITO, Ward-4(5), Pune

PAN : ADXPJ6957F

Appellant	Respondent

Appellant by	Shri Hari Krishan
Respondent by	Ms. Shabana Parveen
Date of hearing	07-02-2019
Date of pronouncement	08-02-2019

आदेश / ORDER

PER R.S.SYAL, VP :

This appeal by the assessee arises out of the order passed by the CIT(A)-5, Pune on 26-02-2016 in relation to the assessment year 2008-09.

2. First issue raised in this appeal is against not allowing of exemption u/s.54B of the Income-tax Act, 1961 (hereinafter also called 'the Act').

3. Succinctly, the facts of the case are that the assessee, along with two others, transferred certain land admeasuring 81

Are equal to 8100 sq.mtr (equal to 2 Acres) on 08-12-2007 to one Mr. Dhanraj Malchand Rati, a Builder and Developer. The assessee computed its share of capital gain at Rs.27,79,450/-. The said amount of capital gain was claimed as exempt u/s.54B(1) of the Act on the ground that he had purchased two agricultural lands on 28-01-2008 and 22-04-2008 for a total consideration of Rs.57,39,500/-. The Assessing Officer (AO) noticed that the assessee, along with other two co-owners, entered into a "Development Agreement" with Mr. Dhanraj Malchand Rati for transfer of the land, which was situated within the Municipal Corporation limits of Pune. He held that the land ceased to be an agricultural land. On being called upon to explain as to why the exemption u/s.54B of the Act should not be denied because the property transferred was not an agricultural land, the assessee tendered his explanation which has been reproduced in the assessment order. The crux of the assessee's submission was that the land was classified by the land Revenue authorities as "Jirayat" type of agricultural land and nowhere in the land records it was mentioned as "Non-agricultural land". The assessee further submitted that agricultural income was earned from such land and as per the 7/12 extract, the

agricultural land was subjected to cultivation and Jowar crop was grown. It was further submitted that all the rights in the land were transferred to Mr. Dhanraj Malchand Rati and the nomenclature of "Development Agreement" was misleading. Not convinced with the assessee's submission, the AO held that the capital gain arising from the transaction was out of non-agricultural land and hence, no exemption u/s.54B could be allowed towards investment made by the assessee in two agricultural lands. The ld. CIT(A) echoed the action of the AO on this score.

4. We have heard both the sides and perused the relevant material on record. The assessee along with other two co-owners transferred 2 acres of land to Mr. Dhanraj Malchand Rati vide agreement dated 08-12-2007. The case of the assessee is that the land transferred by him was an agricultural land and since he invested a sum of Rs.57,39,500/- in purchasing two other agricultural lands, he was entitled to exemption u/s.54B of the Act. On the other hand, the Revenue has canvassed a view that since the land transferred by the assessee was non-agricultural land, there can be no grant of exemption u/s.54B of the Act.

5. Section 2(14) of the Act defines `capital asset' to mean property of any kind etc. held by the assessee but does not include certain assets including "agricultural land in India", not being a land situated within 2/6/8 kms, as the case may be, from the local limits of any Municipality. If an agricultural land satisfying the conditions as given in section 2(14) of the Act is transferred, any gain arising from such a transfer is a capital receipt, not chargeable to tax as the same does not arise from the transfer of any capital asset. If on the other hand, certain agricultural land, not satisfying the conditions laid down in section 2(14), is transferred, any profit arising from such a transfer is chargeable to tax under the head "Capital gains". There is no quarrel over the proposition that the land transferred by the assessee did not satisfy the conditions given in section 2(14) of the Act and hence qualified as a "capital asset".

6. Section 54B(1) of the Act provides that if "capital gain" arises from the transfer of a capital asset, being, land which was being utilized by the assessee etc. for agricultural purposes in the two years immediately preceding the date of transfer and the assessee has within a period of two years after

that date purchased any other land for being used for agricultural purposes, then such capital gain, otherwise chargeable to income-tax as income of the previous year in which the transfer of the land took place, shall qualify for exemption subject to the conditions set out in the provision. The case of the assessee is that he transferred the agricultural land, being, a capital asset and purchased two other agricultural lands for a sum of Rs.57,39,500/- within two years and hence, he is entitled to exemption u/s.54B of the Act. The AO has not disputed that the lands purchased by the assessee on 21-08-2008 and 22-04-2008 are agricultural lands. Thus, the second part of the exemption provision, being, purchase of new agricultural lands within period of two years, stands satisfied. The dispute is on the first part of the exemption as to whether or not the land transferred by the assessee was an agricultural land?

7. We have noticed above that it is nobody's case that the land transferred by the assessee was not a capital asset. Now the question arises as to whether such capital asset was an agricultural land or not? If the assessee succeeds in proving

that the land transferred by him was an agricultural land, his claim to exemption u/s.54B would be justified.

8. In order to decide if the land transferred was an agricultural land, we will first espouse the factors taken note of by the authorities militating against the claim of agricultural land. The Revenue has deeply relied on the fact that the assessee entered into an agreement dated 08-12-2007 with Mr. Dhanraj Malchand Rati for `the development of land'. We have perused the agreement, a copy of which has been placed on page 26 of the paper book. The agreement styled as `Development agreement' was entered into between the assessee and two other co-owners, who transferred the land, on one hand and Mr. Dhanraj Malchand Rati, a builder and developer, on the other. Clause (1) of the Agreement provides the description of the property as 00 Hector 81 Are or 8100 sq.mtr situated at Village Kondhwa Budruk. The assessee and other two co-owners have been defined as "Owners" in this agreement, while Mr. Dhanraj Malchand Rati as a `Developer'. It has been mentioned in clause (2) of the Agreement that the Owners have decided to develop and construct the said property for which they

forwarded the proposal to the Developer. Consideration has been set out in clause (7) of the agreement at Rs.1.70 crore. It has been mentioned in clause (6) that the Developer will obtain necessary building plans and sanctioned layouts and maps and he will appoint Architect and will obtain necessary permission and sanctions from the Pune Municipal Corporation. Clause (7) provides that the Developer will construct the said property as per the sanctioned plans and layouts from the Pune Municipal Corporation. Clause (8) states that : "The owners and party of the second part has delivered the actual possession of the said property for the development/construction purpose to the Developer and party of the first part on today". Clause (9) provides that : "The owners of the said property are not holding any units in relation with the said property as per rules of the Urban Land (Ceiling and Regulation) Act, 1976". Clause (16) provides that : "The owners of the said property has given entire rights to the said Developer to develop the said property". Clause (22) provides that: "The owners of the said property has executed the irrevocable Power of Attorney along with the said developer in relation to the scheme of the construction

work as per the sanctioned layouts and plans within the said property".

9. A close scrutiny of various clauses of the Agreement, described as "Development Agreement", transpires that though the nomenclature of "Development Agreement" was assigned by the parties to the agreement, but it was, in fact, a case of outright sale of 81 Are of land by the assessee and other co-owners to Mr. Dhanraj Malchand Rati. The assessee along with other two co-owners received total consideration of Rs.1.70 crore in full and did not have any further interest in the property to be constructed by the Developer. The land transferred by the assessee was to be utilized by the transferee for construction of flats to be sold by him at a later date, as owner. The sum and substance of the above clauses is that the assessee transferred the land on an outright sale basis and did not intend to develop the land through Mr. Dhanraj Malchand Rati by retaining his ownership rights in it.

10. We have examined the 7/12 extract of the land transferred by the assessee, whose english translation has also been provided. The first thing which emerges from the 7/12 extract is that the assessee transferred "Jirayat land". The

authorities below have noted from the 7/12 extract that the land in question was "Jirayat land". The assessee also stated before the AO that the land transferred has been classified as "Jirayat type of agricultural land". The ld. CIT(A) has noticed in Para 3.5 of the impugned order that "Jirayat" means `a barren land'. Similar fact has been recorded at page 18 of the impugned order, whereby he has held that the "Jirayat land" means that "the land was a fallow land". It, therefore, emerges that the authorities below have proceeded on the premise that the land transferred by the assessee was a "Jirayat land", which as per them means a barren or a fallow land. The assessee has admitted w.r.t. the 7/12 extract that the land transferred was a `Jirayat land'. However, we find that the meaning ascribed to the *Jirayat land* by the authorities, is not correct. We have gone through the commentary by A.K. Gupte on "Maharashtra Land Revenue Code, 1966", relevant pages from which have been placed on record. Certain classification has been given in this commentary, as per which *"Jirayat or Jirait"* means '*land appropriated to or fit for agriculture*'. The term *"Jirayat"* has been defined on page 20 of the commentary to mean *dry crop land,* which means *"the cultivation mainly depends upon annual rainfall"*. Even

otherwise, a *Jirayat land* is used for seasonal crops like Khariff and Rabi, where cultivation depends upon annual rainfall. In this commentary, it has been mentioned that "*land unfit for cultivation*" or a barren land is described by the expression *"Kharaba"*. This discussion shows that the bedrock of the opinion formed by the authorities below, being, the meaning of the term "Jirayat" land as a barren or fallow land, is erroneous. We have examined the english translation of the 7/12 extract of the land transferred by the assessee, which also declares the land in question as "Jirayat land", which means that it was a cultivable land as against the view of the authorities of the same being a barren or fallow land. The 7/12 extract which deals with the possession/ownership and crops on the land in question provides details of crop grown on it. There is a reference to the years 2004-05 to 2007-08 in this extract and the name of the cultivator has been given as "Self". The crop grown has been written as "Jowar crop" in all the four years. These facts amply prove that not only the land was a cultivable land, but "Jowar crop" was also raised by the assessee on it during the year under consideration and immediately preceding three years as well.

11. It is further pertinent to note from the 7/12 extract that the land Revenue of the said property has been determined at 33 paise. This fact proves that the land was subjected to land revenue. Another factor which weighs in favour of the assessee is that the land was transferred for a consideration of Rs.1.70 crore determined by 00 Hector 81 Are area, i.e. 8100 sq.mtr and not by rate of square feet or square yard.

12. At this juncture, it would be pertinent to note the landmark judgment rendered by the Hon'ble Supreme Court in *Smt. Sarifabibi Mohmed Ibrahim and others Vs. CIT (1993) 204 ITR 637(SC).* In that case, the dispute was as to whether the land transferred by the assessee was a capital asset or not? The Hon'ble Supreme court, considering certain other judgments in which some tests for determining the nature of land were set out, came to the conclusion that the land transferred by the assessee was not an agricultural land. The tests so considered and set out in the judgment are reproduced *verbatim,* as under :-

> "(1) Whether the land was classified in the revenue records as agricultural and whether it was subject to the payment of land revenue ?
>
> (2) Whether the land was actually or ordinarily used for agricultural purposes at or about the relevant time ?

(3) Whether such user of the land was for a long period or whether it was of a temporary character or by way of a stop-gap arrangement ?

(4) Whether the income derived from the agricultural operations carried on in the land bore any rational proportion to the investment made in purchasing the land ?

(5) Whether the permission under s. 65 of the Bombay Land Revenue Code was obtained for the non-agricultural use of the land ? If so, when and by whom (the vendor or the vendee) ? Whether such permission was in respect of the whole or a portion of the land ? If the permission was in respect of a portion of the land and if it was obtained in the past, what was the nature of the user of the said portion of the land on the material date ?

(6) Whether the land, on the relevant date, had ceased to be put to agricultural use? If so, whether it was put to an alternative use ? Whether such cesser and/or alternative user was of a permanent or temporary nature ?

(7) Whether the land, though entered in revenue records, had never been actually used for agriculture, that is, it had never been ploughed or tilled ? Whether the owner meant or intended to use it for agricultural purposes ?

(8) Whether the land was situate in a developed area ? Whether its physical characteristics, surrounding situation and use of the lands in the adjoining area were such as would indicate that the land was agricultural ?

(9) Whether the land itself was developed by plotting and providing roads and other facilities ?

(10) Whether there were any previous sales of portions of the land for non-agricultural use ?

(11) Whether permission under s. 63 of the Bombay Tenancy & Agricultural Lands Act, 1948, was obtained because the sale or intended sale was in favour of a non-agriculturist was for non- agricultural or agricultural user ?

(12) Whether the land was sold on yardage or on acreage basis ?

(13) Whether an agriculturist would purchase the land for agricultural purposes at the price at which the land was sold and whether the owner would have ever sold the land valuing it as a property yielding agricultural produce on the basis of its yield ?

13. Holding the land in question as a non-agricultural land and hence a `capital asset', their Lordships further held that the question as to whether a land is agricultural land or not needs to be tested on the facts and circumstances of each case. There may be factors both for and against a particular point of view and the question needs to be answered on a cumulative consideration of all the relevant facts.

14. When we examine the facts of the instant case on the touchstone of the tests enshrined above, it becomes manifest that the following important factors weigh for and against the assessee:

For: -

(i) the land was classified in the revenue records as "agricultural land" and was subject to land revenue.

(ii) the land was actually used for agricultural purposes at the relevant time.

(iii) user of such land was not temporary and was for at least 4 years in a row, as emerged from 7/12 extract.

(iv) the land was not sold on yardage basis.

Against : -

(i) the land was situated in a developed area.

(ii) after transfer, it was to be developed by plotting and providing road facilities etc.

15. On a cumulative consideration of all the relevant factors prevailing in the instant case, both for and against the treatment of land transferred by the assessee as agricultural land, we have no hesitation in holding that the assessee transferred `agricultural land' to Mr. Dhanraj Malchand Rati. It is so for the reason that the land was classified as "agricultural land" in land revenue records; subjected to land revenue; was being cultivated on which "Jowar crop" was grown. Reliance placed by the ld. DR on a Tribunal order dated 27.5.2015 passed in the case of Abhijit Subhash Gaikwad (ITA Nos. 699/Pn/2013 etc.) is misplaced in as much as the Tribunal returned a categorical finding in that case that the concerned Talathi had stated : "that the land was never used for agricultural activity". This position is contrary to the extant case. Here the concerned Talathi of the land transferred by the assessee has certified in the 7/12 extract that the "Jowar Crop" was grown on the land in last four years in line. It is, therefore, held that the land transferred by the assessee was an

"agricultural land" and the capital gain arising from such land is eligible for exemption u/s.54B of the Act. We, therefore, overturn the impugned order on this issue and uphold the assessee's point of view.

16. The only other ground raised by the assessee in his appeal is against treatment of agricultural income of Rs.1,12,000/- as "income from other sources".

17. It is noticed that the assessee offered agricultural income at Rs.1.12 lakh. The AO treated the same as chargeable to tax, which view came to be upheld in the first appeal. We have held in earlier paras of this order that the land transferred by the assessee was an agricultural land on which jowar crop was raised. However, in order to claim exemption for a particular sum as an agricultural income, it is *sine qua non* for the assessee to prove the quantum of agricultural income claimed with relevant evidence. Existence and quantum of agricultural income are two separate things. The ld. AR fairly conceded that no formal sale of crop receipts were available as the "Jowar crop" was sold directly without routing it through commission agents. In view of the foregoing and in the absence of direct evidence of quantum of income, we estimate

the existence of agricultural income in the peculiar facts of this case at half of the amount declared at Rs. 56,000/- and the remaining half is held to be "Income from other sources".

18. In the result, the appeal is partly allowed.

Order pronounced in the Open Court on 08th February, 2019.

Sd/-	Sd/-
(VIKAS AWASTHY)	**(R.S.SYAL)**
JUDICIAL MEMBER	**VICE PRESIDENT**

पुणे Pune; दिनांक Dated : 08th February, 2019
सतीश

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to</u>:

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. आयकर आयुक्त(अपील) / The CIT (Appeals)-5, Pune
4. The Pr.CIT-4, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "**ए**" / DR 'A', ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune

		Date	
1.	Draft dictated on	07-02-2019	Sr.PS
2.	Draft placed before author	08-02-2019	Sr.PS
3.	Draft proposed & placed before the second member		JM
4.	Draft discussed/approved by Second Member.		JM
5.	Approved Draft comes to the Sr.PS/PS		Sr.PS
6.	Kept for pronouncement on		Sr.PS
7.	Date of uploading order		Sr.PS
8.	File sent to the Bench Clerk		Sr.PS
9.	Date on which file goes to the Head Clerk		
10.	Date on which file goes to the A.R.		
11.	Date of dispatch of Order.		

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