

(1993) 01 OHC CK 0010
In the Orissa High Court
Case No : S.J.C. No. 66 of 1990

Commissioner of Income Tax

APPELLANT

Vs

Gouri Shankar Agarwalla

RESPONDENT

Date of Decision : 05-01-1993

Acts Referred:

Income Tax Act, 1961 — Section 2(14), 45

Citation : (1993) 201 ITR 550

Hon'ble Judges : D.M. Patnaik, J;A. Pasayat, J

Bench : Division Bench

Advocate : A.K. Ray, for the Appellant; None, for the Respondent

Judgement

A. Pasayat, J.—The Income Tax Appellate Tribunal, Cuttack Bench (in short, " the Tribunal"), has referred the following question to this court u/s 256(1) of the Income Tax Act, 1961 (in short, "the Act"), for opinion :

" Whether, on the facts and in the circumstances of the case and in view of the Explanation to Section 2(1A) of the Income Tax Act, 1961, the Tribunal is right in law in holding that the capital gain arising out of sale of agricultural land within the municipal town of Puri would be exempt as income from agriculture?"

2. The background facts as indicated in the statement of case are as follows :

For the assessment year 1982-83, Gouri Shankar Agarwalla (hereinafter referred to as " the assessee ") filed his return of income in the status of an individual. The net income was indicated to be Rs. 10,212. Though the assessee had filed a return showing his income to be below the taxable limit, from the documents filed, the Income Tax Officer was of the view that income chargeable to tax had escaped assessment for the assessment year in question. Therefore, notice u/s 148 of the Act was issued to the assessee. It was observed by the Income Tax Officer that 9.65 acres of land belonging to the assessee in the outskirts of Puri town was compulsorily acquired by the Government of Orissa on November 17, 1981, for construction of official buildings of the Orissa State Electricity Board (in

short, " the Board"), and a sum of Rs. 7,86,888 was paid to the assessee as compensation. The sale consideration was deposited in a nationalised bank, and, on May 15, 1982, a sum of Rs. 6 lakhs out of the net consideration received was invested in National Rural Development Bonds (in short, " the N. R. D. Bonds ") to get relief from levy of tax on capital gain. Besides the investment, the assessee had utilised a part of the net consideration in acquiring a plot of land for agricultural purposes. The assessee disclosed the income from capital gain at Rs. 5,40,916 and after claiming exemption u/s 54B of the Act, the net income from capital gain was shown as nil since the value of the net asset (N. R. D. Bonds) exceeded the resultant capital gain. The contention of the assessee was not accepted and it was observed that a sum of Rs. 63,093 was to be taxed.

3. A reference was made to Section 54E(1) which provides for proportionate exemption from capital gain, in case the entire net consideration has not been invested in the specified asset. Only so much of the capital gain as bears to the whole of the capital gain the same proportion as the cost of acquisition of the new asset (N. R. D. Bonds) bears to the net consideration shall not be charged to tax u/s 45. The Assessing Officer found that the gross compensation received was Rs. 7,86,888. The cost of land including the cost of registration, subsequent development and expenditure incurred for the transfer were calculated at Rs. 1,60,972. The assessee had purchased a plot of land for Rs. 85,000 for being used for agricultural purposes within two years of the transfer, vide sale deed dated November 5, 1983, and was, therefore, held entitled to deduction of Rs. 85,000. The assessee's stand that he had purchased specified assets to the tune of Rs. 6,00,000 which was more than Rs. 5,40,000 arrived at after deduction of the cost of land and purchase of the plot and, therefore, the resultant capital gain chargeable to tax was nil, did not find acceptance with the Assessing Officer.

4. The matter was carried in appeal before the Appellate Assistant Commissioner of Income Tax, Berhampur Range, Berhampur. The stand of the assessee before the appellate authority was that the capital gain on transfer of agricultural land arises either when such land is situated within the municipal limits, or when the land is declared as urban land by issuance of a notification by the Government of India. Since the land in question has not been covered by any notification of the Government of India and since the land is situated outside the periphery of Puri municipal area, transfer of such land would not attract levy of capital gains. The Appellate Assistant Commissioner accepted the stand of the assessee. It was observed that the capital gain is charged in case of any transfer, by virtue of Section 2(14). "Capital asset" is defined in that provision as property of any kind held by an assessee, whether or not connected with his business or profession. It further goes on to say that capital asset does not include agricultural land in India, not being the land (a) which is comprised within the jurisdiction of a municipality (whether known as a municipality, municipal corporation, notified area committee, town area committee, town committee or by any other name) or a cantonment board and which has a population of not less than ten thousand according to the last preceding census of which the relevant figures"have been

published before the first day of the previous year or ; (b) in any area within such distance, not being more than eight kilometres, from the local limits of any municipality or cantonment board referred to in item (a) as the Central Government may, having regard to the extent of, and scope for, urbanisation of that area and other relevant considerations, specified in this behalf by notification in the Official Gazette. It was observed that there was no dispute that the land was agricultural land. The land was not situated within the municipal limits of Puri town and, therefore, the condition laid down in Sub-clause (iii)(a) of Clause (14) of Section 2 was not applicable. The further question was whether Sub-clause (b) of Clause (iii) of the above section had application. In order to bring the consideration received within the net of taxation, transfer of land should be in an area within such distance not being more than eight kilometres from any municipality or cantonment board which is specified in the Official Gazette. The Government of India has issued a notification, vide SO 77(E) dated February 6, 1973, reproduced at [1973] 89 ITR 145, where certain areas have been specified and Puri town is not one of them. Accordingly, it was held that the Income Tax Officer was not correct in levying capital gains on the sale consideration. The matter was carried in appeal before the Tribunal. The Tribunal referred to a decision of the Bombay High Court in *Manubhai A. Sheth and others Vs. N.D. Nirgudkar*, 2nd Income Tax Officer, A-II Ward, Bombay and another, . It was held that the land being agricultural land, capital gains received out of sale of such agricultural land was not taxable. The Tribunal also referred to a case decided by the Jaipur Bench in *ITO v. Ajit Kumar Arya* 25 ITD 37, for such view. The Revenue's appeal was, accordingly, dismissed. On being moved by an application u/s 256(1) of the Act, the question as indicated above has been referred to this court for opinion.

5. Heard Mr. Ray for the Revenue. There is no appearance on behalf of the assessee in spite of notice. So far as the first question referred to this court is concerned, the question has not been correctly framed. The Tribunal has neither observed nor concluded that the capital gain received out of sale of agricultural land within the municipal town of Puri would be exempt as being income from agriculture. Such question does not arise out of the order of the Tribunal. Similar is the second question. The Tribunal has not observed that the land subject to capital gains was agricultural land within the meaning of Section 2(1A) of the Act. In order to bring out the true essence of the dispute, we reframe the question as follows :

" Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that no capital gains tax was leviable on the consideration received for acquisition of the assessee's land ?"

6. On a reference to the notification issued by the Government of India, it is clear that the name of Puri town in the State of Orissa has not been notified. For and from the assessment year 1970-71, a new Sub-clause (iii) of Clause (14) of Section 2 has been substituted by which agricultural land situated within the

limits of any municipality (whether known as a municipality, municipal corporation, notified area committee, town committee or by any other name) or a cantonment board having a population of 10,000 or more according to the last published census was brought within the term " capital asset ". Further, agricultural land situated in areas lying within a distance not exceeding eight kilometres from the local limits of such municipalities or cantonment boards are also covered by the amended definition of " capital asset ", if such areas are, having regard to the extent and scope for their urbanisation and other relevant considerations, notified by the Central Government in this behalf. Prior to April 1, 1970, "agricultural land in India" was excluded from the definition of "capital asset" in Clause (14) of Section 2. The change, as indicated above, was introduced with effect from April 1, 1970. Section 45 of the Act prescribes levy of capital gains tax. Section 47 sets out certain transactions which shall not be regarded as transfer. Agricultural land not falling within items (a) and (b) of Sub-clause (iii) of Clause (14) of Section 2 continued to be not " capital asset" for the purpose of the Act. The Tribunal was justified in concluding that capital gains tax was not leviable.

7. Our answer to the question is in the affirmative, in favour of the assessee and against the Revenue. No costs.

D.M. Patnaik, J.

8. I agree.