
(1993) 10 BOM CK 0016

In the Bombay High Court

Case No : Income-tax Reference No. 414 of 1983

Gopal C. Sharma

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 11-10-1993

Acts Referred:

Income Tax Act, 1961 — Section 10(1), 2(1), 2(14), 2(1A), 2(47)

Citation : (1994) 116 CTR 377 : (1994) 209 ITR 946

Hon'ble Judges : D.R. Dhanuka, J;B.P. Saraf, J

Bench : Division Bench

Advocate : Shobha Jagtyani, for the Appellant; G.S. Jetley, for the Respondent

Judgement

D.R. Dhanuka, J.—By this reference made at the instance of the assessee u/s 256(1) of the Income Tax Act, 1961, the Income Tax Appellate Tribunal had referred the following questions to this court for its opinion :

- "1. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding the intention of the assessee at the time of the purchase of the land was to trade in the same and not to hold it as an investment ?
2. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the said land was not agricultural land ?
3. Whether there was any evidence before the Tribunal to hold that the said land was not agricultural land ?
4. Whether, on the facts and in the circumstances of the case, the lease rent was assessable under the head "Business" and not under the head "Other sources" ?
5. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the profit received by the assessee from the sale of the assessee's land was on revenue account and not on capital account, namely :

- (i) for 1965-66, Rs. 1,00,486 on sales of land to the Voras,
- (ii) for 1968-69, Rs. 5,59,821 out of compensation received from Larsen and Toubro,
- (iii) for 1972-73, Rs. 1,03,896 out of additional compensation from Larsen and Toubro ?"

2. The "reference lands" consist of the following :

(A) Land bearing survey No. 8 (part) situate at village Paspoli admeasuring about 25 acres, leased by the trustees for Sir Mohammed Yusuf Trust in favour of the assessee's father, Shri Chandrabhan B. Sharma, sub-leased by Chandrabhan B. Sharma in favour of Larsen and Toubro Ltd., purchased by the assessee from his father during pendency of acquisition proceedings in respect thereof for the said company and transferred to Larsen and Toubro Ltd. as a result of compulsory acquisition thereof on payment of "compensation" to the assessee as contemplated under the Land Acquisition Act, 1894.

(b) Land admeasuring about 15,000 sq. yards situate at village "Saki" forming part of survey Nos. 64, 65, 66 (part) - New Survey No. 11 leased by the trustees of Sir Mohammed Yusuf Trust in favour of Chandrabhan B. Sharma, sub-leased by Chandrabhan B. Sharma in favour of Narottamdas Vora and Girdharlal Vora, purchased by the assessee from his father, sold and transferred by the assessee to the "Voras" in pursuance of the agreement of sale entered into by Chandrabhan Sharma in favour of "Voras" resulting in profit and gain to the assessee.

3. The basic controversy arising in this reference centres around the question as to whether the profits and gains made by the assessee as a result of the transfer of reference lands was liable to be considered as "agricultural income" and exempt from tax or whether the same was liable to be taxed as business income or to capital gains tax.

4 . The Income Tax Officer, the Appellate Assistant Commissioner and the Income Tax Appellate Tribunal held that the "reference lands" could not be considered as "agricultural lands" on the date of transfer and the income of the assessee resulting from the transfer thereof could not be classified as "agricultural income". The Appellate Assistant Commissioner held that the reference lands were not agricultural lands on the date of transfer and the profits and gains made as a result of the transfer thereof were liable to be taxed to capital gains tax. The Appellate Assistant Commissioner held that the transfers in question did not constitute adventure in the nature of trade. The Appellate Assistant Commissioner held that the assessee had no choice in the matter of completion of the pending land acquisition proceedings or completion of the sale in favour of the "Voras" in pursuance of the commitment already made by the predecessor-in-title of the assessee before he became the purchase thereof. The Appellate Assistant Commissioner held that the transactions in question amounted to

transfer of a capital asset and were liable to be taxed to capital gains tax. The Income Tax Appellate Tribunal held that the transactions concerning the transfer of reference lands constituted adventure in the nature of trade and the profits and gains thereof were liable to be taxed as business income. For the reasons discussed in detail hereinafter, we are in agreement with the conclusions arrived at by the Appellate Assistant Commissioner summarised above.

5. Having regard to the ratio of the latest judgment of the Supreme Court in the case of Smt. Sarifabibi Mohmed Ibrahim and others Vs. Commissioner of Income Tax, Gujarat, , dated September 14, 1993, and the applicability thereof to the facts of this case, we have no hesitation in holding that the reference lands were not "agricultural lands" on the date of transfer whatever might have been the character of the land in the past.

6. We shall now proceed to summarised the facts.

7. Sir Mohammed Yusuf Trust owned extensive plots of land in Powai Estate situate at villages Paspoli, Saki, Kapri, etc. The said plots of land were assessed to agricultural land revenue. The said trust owned at least about 1,500 acres of land as particularised in para 5 of the order of the Income Tax Tribunal dated January 25, 1977. On October 21, 1948, the trustees of the said trust granted a lease in respect of certain plots of land forming part of "Powai estate" in favour of a firm known as Gopal Housing and Plantation Society. The said lease was for a period of 99 years. By this indenture of lease, the lessor granted a lease in respect of 376 acres 20 1/2 gunthas of land in favour of the said firm. At the time when the said lease was granted, the firm of Gopal Housing and Plantation Society consisted of the following three partners :

1. Shri Chandrabhan B. Sharma (father of the assessee).
2. Shri Cheddilal B. Gupta; and
3. Shri Shrilal M. Bhatt.

8. By another indenture of lease, the owners granted lease of several other plots of land in favour of Shri Chandrabhan Sharma individually.

(b) The above referred partnership firm of Gopal Housing and Plantation Society was dissolved on August 15, 1951. Shri Chandrabhan B. Sharma, the assessee's father, took over the assets and liabilities of the dissolved firm including the leasehold rights in respect of lands leased to the dissolved firm, i.e., lands admeasuring about 376 acres. On October 21, 1948, the said trust granted lease in respect of various other plots of land admeasuring about 945 acres in favour of the assessee's father, Shri Chandrabhan B. Sharma, for a period of 20 years. Each of the said indentures of lease stipulated that the leased lands shall be used by the lessee for agricultural purposes only.

(c) On or about November 1, 1948, Shri Chandrabhan B. Sharma, the assessee's father, sub-leased land bearing Survey No. 8 (Part) situate at village Paspoli

admeasuring about 25 acres in favour of a company known as Larsen and Toubro Limited. Larsen and Toubro Ltd. is an industrial company. The said sub-lease was for a period of 19 years. Larsen and Toubro acquired possession of several plots of land including the reference lands. Land bearing Survey No. 8 (part) is one of the reference lands and was situated at the material time behind the factory premises of the said company. The said land was situate in the heavy industrial zone in the development plan of the Bombay Municipal Corporation. Some time in the year 1959, Larsen and Toubro Ltd. applied to the Revenue authorities for their sanction to use the above referred land for non-agricultural purposes. Such sanction was received by the company much later. About 10 acres of the sub-leased land was in fact used by Larsen and Toubro Ltd. for non-agricultural purposes from the year 1960. Larsen and Toubro Ltd. was interested in using the said land for the purpose of its business and expansion of factories and not for agricultural purposes. The Appellate Assistant Commissioner has recorded a finding of fact to this effect in his order dated September 29, 1975.

(d) On or about September 13, 1963, Shri Chandrabhan B. Sharma, granted sub-lease in respect of plots of land bearing Survey Nos. 64, 65 and 66 (part) - new Survey No. 11 situate at village Saki admeasuring about 15,000 sq. yds., in favour of Narottamdas Vora and Girdharlal J. Vora carrying on business in the name and style of Forage and Co. The said sub-lessees are hereinafter referred to as the "Voras". Soon thereafter, the said sub-lessee acquired possession of the above referred lands from the lessor, Shri Chandrabhan B. Sharma. The "Voras" were never interested in cultivation of the said lands or use thereof for agricultural purposes.

(e) On or about July 20 1961, Shri Chandrabhan B. Sharma, the assessee's father, agreed to purchase reversionary rights in respect of all these plots and land from the trustees of Sir Mohammed Yusuf Trust for an aggregate sum of Rs. 30 lakhs. Shri Chandrabhan B. Sharma, in his turn, sold some of the plots of land to various third parties and some others to members of his family including the assessee. On March 30, 1964, the assessee, Shri Gopal C. Sharma purchased plots of land admeasuring 53.33 acres situate at village Paspoli and Kopri and 49.12 acres of land situate at village Paspoli and Saki from his father for the aggregate sum of Rs. 1,20,000 on the footing that the price of the said lands agreed to be purchased by the assessee could be paid by him to his father in due course. The assessee purchased the reference lands from his father. The reference lands formed part of the above referred plots of land admeasuring about 102 acres purchased by the assessee from his father. Part of the lands purchased by the assessee from his father was already the subject-matter of compulsory acquisition proceedings under Part VII of the Land Acquisition Act, 1894, and the subject-matter of the prior agreement of sale already executed by the predecessor-in-title of the assessee in favour of the "Voras". By this time, the situation in respect of these lands had completely changed. As a matter of fact the reference lands were not being used for agriculture or cultivation since long. There was no evidence worth its name on record to prove that the reference

lands were factually and actually used for agriculture at or about the time of transfer or within a reasonable span of time prior to the date of transfer.

(f) Some time in the year 1962, a notification u/s 4 of the Land Acquisition Act, 1894, was issued in connection with intended acquisition proceedings pertaining the land bearing Survey No. 8 (part) situate at village Paspoli already in the possession of Larsen and Toubro Ltd. The said acquisition proceedings were initiated at the instance of the company under Part VII of the Land Acquisition Act, 1894, as the said company wanted to purchase the said land for expansion of this factories and its negotiations for purchase of land with the owners had failed. Some time in the year 1966, declaration and notification was issued for acquisition of the said land for Larsen and Toubro Ltd. The assessee filed his claim for compensation before the Special Land Acquisition Officer. An award was made. The requisite amount of compensation was paid by the Special Land Acquisition Officer to the assessee. The assessee received an additional amount of compensation as a result of the consent order in the land acquisition reference made at the instance of the assessee to this court.

(g) On September 23, 1966, Chandrabhan B. Sharma, the assessee's father, agreed to sell the land situate at village Saki admeasuring about 15,000 sq. yds. in favour of the "Voras". On or about August 14, 1964, the assessee conveyed the said lands admeasuring about 15,000 sq. yds. forming part of Survey Nos. 64, 65, 66 (part) situate at village Saki in favour of the "Voras" for the stipulated sale price.

(h) Under the award of the Special Land Acquisition Officer dated March 21, 1967 (which became fully operative on April 3, 1967), the assessee received a sum of Rs. 5,59,821 as compensation from the Special Land Acquisition Officer (II), Bombay, and the Bombay Suburban District. Being aggrieved by the quantum of compensation awarded to the assessee, the assessee sought a reference to this court as contemplated u/s 18 of the Land Acquisition Act (1 of 1894). Some time in or about the year 1972, the assessee received a further sum of Rs. 1,03,896 as and by way of additional compensation for acquisition of the said land as a result of the orders passed by the court in Land Acquisition Reference No. 162 of 1969.

(i) During some of the relevant assessment years, the assessee had also sold three "Saki plots" to Acme Tiles (2 acres, 10 gunthas), Hindustan Sheet Metal (3,445 + 3,654 sq. yds.) and Chawla Bros. (17,998 sq. yds.). The said lands are not the reference lands in this reference.

(j) During the course of the relevant assessment proceedings, the assessee contended that the reference lands were "agricultural lands" on the date of transfer thereof and the profits and gains made by the assessee as a result thereof constitute "agricultural income" and were thus exempt from Income Tax. The assessee relied upon the description of the said land as agricultural land in the indentures of lease and agreements of sub-lease, the mamlatdar's certificate

and extracts from the land revenue records issued by the revenue authorities showing that the reference lands were assessed to land revenue on the footing of the said lands being agricultural lands. The Income Tax Officer reached the conclusion the effect that the said lands were not agricultural lands within the meaning of section 2(14) of the Income Tax Act, 1961, at the material time and the profits and gains made by the assessee from the transfer of these lands were liable to be assessed to Income Tax as business income of the assessee. Several appeals were filed before the Appellate Assistant Commissioner for and on behalf of the assessee. All these appeals were consolidated. The Appellate Assistant Commissioner examined the question as to whether the reference lands were agricultural lands in depth and at considerable length. The Appellate Assistant Commissioner recorded his finding to the effect that the reference lands were not agricultural lands on the date of transfer. The Appellate Assistant Commissioner did not agree with the conclusion of the Income Tax Officer on the issue as to whether the profits and gains made were liable to be assessed as business income of the assessee. The Appellate Assistant Commissioner held that the transactions concerning the transfer of reference lands could not be treated as an adventure in the nature of trade. The Appellate Assistant Commissioner reached the conclusion that the profits and gains made by the assessee in respect of the transactions concerning the transfer of reference lands were liable to be assessed to capital gains tax. The Appellate Assistant Commissioner contrasted the transactions pertaining to sale of the lands by the assessee to Acme Tiles Manufacturing Company, Hindustan Sheet Metal and Chawla Brothers with the transactions of the transfer concerning the reference lands and held that the transactions concerning the transfer of lands to Acme Tiles and others constituted an adventure in the nature of trade whereas the transaction pertaining to transfer of reference lands could not be so treated.

9. Being aggrieved by the order of the Appellate Assistant Commissioner, the assessee as well as the Revenue filed several appeals before the Income Tax Appellate Tribunal. The appeals filed by the assessee were time-barred. Delay in filing of the said appeal was not condoned by the Tribunal. However, in the Department's appeals, it became necessary for the Income Tax Appellate Tribunal to decide the question as to whether the profits and gains arising from the transfer of reference lands sold to Voras as well as from compulsory acquisition of land acquired for Larsen and Toubro Ltd. were liable to be classified as business income or as agricultural income or capital gains. In the Department's appeals, the assessee contended that the profits and gains made by the assessee from the transfer of reference lands were neither liable to be classified as business income nor as capital gains but were liable to be treated as "agricultural income". At the hearing of the said appeals, the assessee contended that the reference lands were agricultural lands and the profits and gains made by the assessee from the transfer of the reference lands were exempted from levy of Income Tax invoking section 10(1) of the Income Tax Act, 1961. The Income Tax Appellate Tribunal held that the reference lands were not

"agricultural lands" on the date of transfer. The Income Tax Appellate Tribunal confirmed the conclusions arrived at by the Income Tax Officer and the Appellate Assistant Commissioner on this issue. The Income Tax Appellate Tribunal highlighted some of the relevant factors having a bearing on this issue and reached the conclusion that the reference lands could not be considered as "agricultural lands" on the date of transfer. The Income Tax Appellate Tribunal reversed the findings of the Appellate Assistant Commissioner on the issue concerning classification of income. The Tribunal reached the conclusion that the transaction in respect of transfer reference lands constituted an adventure in the nature of trade and the profits and gains made therefrom were liable to be classified as business income.

10. The first question which arises for the consideration of this court is as to whether the Tribunal was justified in law holding that the reference lands were not agricultural lands and as to whether there was any evidence before the Tribunal on the basis of which it could be held that the said lands were not agricultural lands on the date of transfer.

11. Shri Jetley, learned counsel for the Revenue, raised a preliminary objection to the effect that questions Nos. 2 and 3 ought not to have been referred by the Tribunal to this court u/s 256(1) of the Income Tax Act, 1961, in view of the rejection of the assessee's appeals as time-barred and, as according to him, the said question did not really arise out of the Tribunal's order. We have carefully considered this submission. In our opinion, there is no merit in the preliminary objection. It was necessary for the Tribunal to decide the question as to whether the reference lands were agricultural lands or not even for the purpose of deciding the appeals filed by the Revenue before the Tribunal. The Income Tax Appellate Tribunal did decide the issue in the Revenue's appeals on the merits. Learned counsel for the assessee has pointed out several passages from the judgment of the Income Tax Appellate Tribunal dealing with the controversy. The Income Tax Tribunal has itself referred to questions Nos. 2 and 3 to this court for its opinion u/s 256(1) of the Income Tax Act, 1961, on the footing that the said questions arose out of the Tribunal's order. The Income Tax Appellate Tribunal has recorded its findings on the issue under consideration in the appeals filed by the Revenue even though the assessee's appeals were held to be time-barred. We are satisfied that the question do arise out of Tribunal's order and the same are rightly referred by the Tribunal to this court.

12. Section 10(1) of the Income Tax Act, 1961, exempts "agricultural income" from levy of Income Tax. The said section provides that "agricultural income" of a person shall not be included in the total income of the assessee. Section 2(1) of the Act defined the expression "agricultural income" prior to its being renumbered as section 2(1A) as a result of the amendment thereof. Section 2(14) of the Act defines the expression "capital asset". The expression "transfer" is defined by section 2(47) of the Act. Section 2(14) of the Act and other connected provisions were amended by the Finance Act, 1970.

13. Section 47(viii) of the Act as amended provides that nothing contained in section 45 of the Act shall apply to any transfer of agricultural land in India effected before March 1, 1970. In the instance case, the transfer of reference lands took place prior to March 1, 1970. There is a serious controversy between the parties in respect of the issue as to whether the reference lands were agricultural lands at the relevant time.

14. The expression "agricultural land" is not defined under the Income Tax Act, 1961. The question as to whether the land in question was liable to be considered as agricultural land for purposes of Income Tax is liable to be decided with reference to the criteria laid down by judicial decisions of the Supreme court and High Courts. The underlying object of the Act to exempt "agricultural income" from Income Tax is to encourage actual cultivation or de facto agricultural operations. Actual user of the land for agricultural purposes or absence thereof at the relevant time is undoubtedly one of the crucial tests for the determination of the issue. It is well-settled that the nature and character of the land may undergo a change depending upon its situation, growth of the locality of zone in which it is situate and its potentiality. According to recent decisions of the Supreme Court, the fact that the land is sold or transferred to a non-agriculturist for a non-agricultural purposes or that it is likely to be used for non-agricultural purposes soon after its transfer is also a relevant factor germane to the determination of the issue. Merely because the land was used for agricultural purposes in the remote past or it continues to be assessed to land revenue to the footing of agricultural land is not decisive.

15. At one stage, the High Court of Madras *Sarojini Devi v. Sri Krishna*, AIR 1994 Mad 401, had taken a view that any land which was capable of being used for agriculture was liable to be considered as agricultural land. This view was in terms overruled by the Supreme Court in its judgment in *Commissioner of Wealth Tax, Andhra Pradesh Vs. Officer-in-charge (Court of Wards), Paigah*. The latest judgment of the Supreme Court in the case of *Smt. Sarifabibi Mohamed Ibrahim and others Vs. Commissioner of Income Tax, Gujarat*, clinches the issue.

16. Learned counsel for the Revenue submitted that the question as to whether the reference lands were agricultural lands or not was basically a question of fact and it could not be said in this case that the finding of fact arrived at by the Tribunal or other authorities was perverse or was arrived at as a result of misapplication of relevant tests or the principles applicable for the determination of the issue. Learned counsel for the Revenue appeals to be right on both these facets concerning issues Nos. 2 and 3.

17. Both learned counsel for the assessee as well as learned counsel for the Revenue cited a large number of authorities in support of their respective contentions, pertaining to questions Nos. 2 and 3 referred to us by the Tribunal. We have heard learned counsel on both sides at some length. We have gone through the relevant authorities cited by either side in detail. We however, do not think it necessary to refer to all the authorities cited at the Bar.

18. Learned counsel for the assessee relied, inter alia, on the following factors in support of her contention that "the reference lands" were liable to be treated as "agricultural lands" on the date of transfer for purposes of the Income Tax Act, 1961.

(a) The documents of lease and sub-lease described the "reference lands" as agricultural lands and stipulated that the said lands shall be used by the lessee or sub-lessee for agricultural purposes only.

(b) That the reference lands were assessed to land revenue on the footing that the said land continued to be agricultural lands.

(c) That the assessee had at no stage applied to the Revenue authorities for permission to convert the said lands to non-agricultural use.

19. Learned counsel for the assessee further submitted as under :

The factum of non-user of the said reference lands for several years prior to the date of transfer was of non consequence in law as it must be presumed that the reference land continued to be agricultural lands until non-agricultural user thereof was sanctioned by the Revenue authorities on the application of the assessee made prior to the transfer of the said lands. No such application was made in this case. The initial presumption arising from the assessment of the reference lands to land revenue on the footing of their being agricultural lands was not rebutted by the Revenue in this case.

Learned counsel for the Revenue emphasised the following factors in support of his submission that the reference lands could not be treated as "agricultural lands" on the relevant date. Learned counsel submitted that even if the reference lands were agricultural lands in the past, the nature and character of said lands had undergone a change prior to the date of transfer in view of several relevant factors broadly listed hereinafter.

(i) There reference lands were situate in a heavy industrial zone and were surrounded by factories and industries in the locality. Thus the situation of the reference lands at the material time proved that the nature and character, of the reference lands and its potentiality for non-agricultural user had undergone a complete change.

(ii) The reference lands were not being cultivated by the assessee or by the sub-lessee in possession or any third party for several long years prior to the date of transfer. IT was settled law that if the lands in question were not factually and actually used for agricultural purposes for a reasonable span of time prior to the date of transfer, the fact of such non-user was germane to the issue under consideration. The reference lands were transferred to business companies and were not likely to be used for agricultural operations. Learned counsel submitted that this factor was also a crucial factor for the determination of the issue.

(iii) On March 30, 1964, the assessee has purchased the reference lands from his

father. The assessee did not intend to use the reference lands for agricultural purposes. The assessee could not do so as the assessee was not in possession of these lands on the date of transfer thereof from his father. The concerned sub-leases (who were in possession of reference lands) never cultivated these lands for agricultural operations or otherwise. Some time in the years 1959, Larsen and Toubro Ltd. had made an application to the Revenue authorities for their permission to use the land for non-agricultural purposes. Compulsory land acquisition proceedings were initiated by the Govt. of Maharashtra for acquisition of the said land (land bearing Survey No. F (part)) not for purpose of enabling Larsen and Toubro Ltd. to use the reference land for purpose of agriculture but for purpose of business user thereof, i.e., expansion of their factories.

(iv) It was obvious from the order passed by the District Deputy Collector B. S. D., Andheri, on March 21, 1968, relied on by the Appellate Assistant Commissioner that 40 per cent. of the land under acquisition, i.e., 10 acres out of 25 acres was in fact used by Larsen and Toubro Ltd. for non-agricultural purposes from the year 1960 onwards, i.e., since about seven years prior to the date of transfer.

(v) Actual user of part of the reference lands for non-agricultural purposes coupled with non-user of the remaining land for agricultural purpose was an extremely relevant factor for the determination of the issue.

20. Learned counsel for the Revenue submitted that it was not of any consequence that the assessee did not make any application to the Revenue authorities for sanction of conversion of the reference lands to non-agricultural user till the date of transfer thereof. The initial presumption of the reference lands being agricultural lands arising from their assessment to land revenue was outweighed and rebutted by other crucial factors as indicated below. Learned counsel for the Revenue submitted that the ratio of the judgment of the Supreme Court in *Smt. Sarifabibi Mohmed Ibrahim and others Vs. Commissioner of Income Tax, Gujarat*, was clearly applicable to this case. Learned counsel submitted that in any event the finding of fact arrived at by the three authorities below was based on evidence and the same could not be treated as perverse or erroneous in law. Learned counsel submitted that no case was made out for interference with the conclusion of the Tribunal on this issue.

21. At the outset, we would like to refer to the latest judgment of the Supreme Court in the case of *Smt. Sarifabibi Mohmed Ibrahim and others Vs. Commissioner of Income Tax, Gujarat*, being a judgment delivered by the apex court on September 14, 1993. In our opinion, this judgment is a complete answer to the controversy raised by the assessee concerning questions Nos. 2 and 3 referred to us. It is necessary to analyse the ratio of judgment of this case and apply the same to the reference under consideration. In the case before the Supreme Court, the land in question was assessed to land revenue on the footing of the same being agricultural land throughout and right up to the date of the transfer thereof. In this case also, no permission was obtained by the assessee

for conversion of the land for non-agricultural user as contemplated u/s 65 of the Bombay Land Revenue Code. In the case before the apex court, the assessee had obtained permission from the Revenue authorities to sell the land in question to a non-agriculturist co-operative housing society for non-agricultural purposes, i.e, building purposes. In this case, the Income Tax Appellate Tribunal had held that the land in question was agricultural land within the meaning of section 2(14) of the Income Tax Act, 1961. The High Court of Gujarat had, however, taken the view that the said land was not agricultural land at the time of its sale and that the income arising from its sale was thus not exempt from capital gains tax. In the case before the Supreme Court the following factors were noticed and high-lighted by the court :

The land was assessed to land revenue on the footing of the same being "agricultural lands". The land was lying unused for at least four years prior to the date of its transfer and no agricultural operations were carried thereon for four years prior to the date of its transfer except for a few months immediately prior to the transfer thereof just with a view to create evidence of user of the land for agricultural purposes. The land was situate at a distance of one kilo metre from Surat Railway Station and was the subject-matter of transaction of sale in favour of a co-operative housing society for building of houses thereon immediately after the completion of sale.

22. In paragraph 9 of its judgment in Smt. Sarifabibi Mohmed Ibrahim and others Vs. Commissioner of Income Tax, Gujarat, , B. P. Jeevan Reddy J., speaking for the Bench, observed (at page 637) :

"Whether a land is an agricultural land or not is essentially a question of fact."

23. In paragraph 10 of the judgment, the Supreme Court referred to the judgment of the constitutional Bench in the case Commissioner of Wealth Tax, Andhra Pradesh Vs. Officer-in-charge (Court of Wards), Paigah, . In this case, the constitutional Bench of the Supreme Court had in terms observed that the expression "agricultural land" could not be given the wide meaning as desired by the assessee in view of the underlying object of the Act providing for exemption of land being to encourage cultivation of the land. In the above-referred case reported in Commissioner of Wealth Tax, Andhra Pradesh Vs. Officer-in-charge (Court of Wards), Paigah, , the Supreme Court reversed the decision of the High Court of Madras in T. Sarojini Devi Vs. T. Sri Kristna, , and also the Full Bench judgment of the High Court of Andhra Pradesh which was the subject-matter of the appeal before the Supreme Court in the case reported in Commissioner of Wealth Tax, Andhra Pradesh Vs. Officer-in-charge (Court of Wards), Paigah, . The apex court emphasised that the object of the Legislature in exempting agricultural land from tax was to encourage the cultivation of agricultural land and agricultural operations. In the above-referred case reported in Commissioner of Wealth Tax, Andhra Pradesh Vs. Officer-in-charge (Court of Wards), Paigah, , the Supreme Court considered the object of the Legislature in exempting agricultural land for taxation for purposes of the Wealth-tax Act, 1957. It is

obvious to us that the same is the object of exemption for granting exemption in respect of "agricultural income" for purposes of the Income Tax Act, 1961. After laying down the narrower test for the purpose of determining the nature and character of land at the time of transfer for the purpose of the Income Tax Act, 1961, and the Wealth-tax Act, 1957, the apex court remanded the matter to the Tribunal for fresh determination of the issue in the light of the principles laid down. In paragraph 13 of its judgment, the Supreme Court referred to the judgment of this court in *Commissioner of Income Tax Vs. V.A. Trivedi*, and approved the ratio of the said judgment. In paragraph 14 of the judgment, the Supreme Court referred with approval to the observations made by the Division Bench of this court in *Commissioner of Income Tax Vs. V.A. Trivedi*, to the effect that to ascertain the true character and the nature of the land, it must be seen whether the land had been put to use for agricultural purposes for a reasonable span of time prior to the relevant date and further as to whether on the date of the transfer the land in question was intended to be put to use by the purchaser for agricultural purposes for a reasonable span of time in the future. The relevancy of the test of "factual user" of the land for agricultural purposes was emphasised by the Division Bench of this court, consisting of Bharucha and Mohta JJ. in *Commissioner of Income Tax Vs. V.A. Trivedi*, after interpreting and applying the ratio of the judgment of the Supreme Court in the case of *Commissioner of Wealth Tax, Andhra Pradesh Vs. Officer-in-charge (Court of Wards), Paigah*. The said test was duly approved by the Supreme Court in its latest judgment in *Smt. Sarifabibi Mohmed Ibrahim and others Vs. Commissioner of Income Tax, Gujarat*.

24. In paragraph 14 of its judgment in *Smt. Sarifabibi Mohmed Ibrahim and others Vs. Commissioner of Income Tax, Gujarat*, the Supreme Court summarised the Bombay view as expressed in *Commissioner of Income Tax Vs. V.A. Trivedi*, decided by S. P. Bharucha J., as his Lordship then was, in the following words (at page 641) :

"The Bench (meaning thereby the Division Bench of the High Court of Bombay deciding *Trivedi*'s case) observed that : to ascertain the true character and the nature of the land, it must be seen whether it has been put to use for agricultural purposes for a reasonable span of time prior to the relevant date and further whether on the relevant date the land was intended to be put to use for agricultural purposes for a reasonable span of time in the future. : .

25. While dealing with the factor of the land in question being assessed to agricultural land revenue, the apex court held in the above referred case that several other relevant factors relied on on behalf of the Revenue outweighed the circumstances relied on by the assessee. It was argued on behalf of the assessee that no permission had been obtained on behalf of the assessee for conversion thereof for non-agricultural user and this factor clinched the issue in favour of the assessee. Dealing with this aspect of the matter, the Supreme Court held that though a formal permission as contemplated u/s 65 of the Bombay Land

Revenue Code was not obtained by the assessee right up to the date of transfer, the land in question was liable to be considered as non-agricultural land on the date of transfer. The Supreme Court emphasised the following factors in support of its conclusion that the land in question was not agricultural land on the relevant date :

(a) That the said land was situated within the municipal limits and at a distance of 1 k.m. for the railway station;

(Note : In this case, the reference lands were situate in a heavy industrial zone and were located in the midst of factories, etc.)

(b) That the said land was not cultivated for a period of four years prior to the date of sale;

(c) That the land was sold to a housing society for construction of residential buildings, i.e., for non-agricultural user;

(d) That the purchaser had in fact started user of the said land for non-agricultural purposes soon after the completion of transaction of transfer as expected.

26. In the above-referred case, the Supreme Court interpreted and applied the ratio of the judgment of the constitutional Bench of the Supreme Court in the case of Commissioner of Wealth Tax, Andhra Pradesh Vs. Officer-in-charge (Court of Wards), Paigah, and approved the criteria laid down by the Division Bench of this court in Commissioner of Income Tax Vs. V.A. Trivedi, . On the application of the ratio of the above-referred three judgments to this case, we find no justification whatsoever for the grievance made by the assessee in respect of the controversy concerning questions Nos. 2 and 3.

27. Learned counsel for the assessee mainly relied upon the Division Bench judgment of this court in the case of Commissioner of Wealth-tax, Poona Vs. H.V. Mungale, , the ratio of the judgment of the Division Bench of this court in the case of Wealth-tax Reference No. 5 of 1964 decided on Tuesday, December 4, 1973 CWT v. Podar Mills Ltd. and the judgment of this court in Commissioner of Income Tax Vs. P.C. Joshi and Another, . The thrust of the argument of learned counsel for the assessee is that the fact that the land was lying vacant and was not used for cultivation for several years was not of any legal consequence. Learned counsel for the assessee submitted that the court must presume that the vacant land continued to be "agricultural land" in nature and character once it was shown that the land was assessed to land revenue as agricultural land. Learned counsel for the assessee relied upon the last two paragraphs from the judgment of Chandurkar J., as his Lordship then was, from Commissioner of Wealth-tax, Poona Vs. H.V. Mungale, where in it was observed that unless the land was allowed to be converted for non-agricultural purposes by the order of the Collector under the provisions of the Land Revenue Act, the initial presumption to the effect that the land was agricultural in nature would continue

to operate. To some extent, some of the observations appear to be in conflict with the view not taken by the Supreme Court in *Smt. Sarifabibi Mohmed Ibrahim and others Vs. Commissioner of Income Tax, Gujarat*. It is far too obvious to us that the view taken by the Supreme Court in *Smt. Sarifabibi Mohmed Ibrahim and others Vs. Commissioner of Income Tax, Gujarat*, would prevail. In our opinion, the principles laid down by the Supreme Court in the case of *Smt. Sarifabibi Mohmed Ibrahim and others Vs. Commissioner of Income Tax, Gujarat*, and by this court in *Commissioner of Income Tax Vs. V.A. Trivedi*, do emphasise the factor of non-user of the land for cultivation for a reasonable span of time prior to the date of transfer as a crucial factor for determination of the issue. Applying the ratio of the Supreme Court judgment in *Smt. Sarifabibi Mohmed Ibrahim and others Vs. Commissioner of Income Tax, Gujarat*, to the facts of the case, we hold that the reference lands could not be considered as "agricultural lands" on the date of transfer.

28. The Appellate Assistant Commissioner and the Tribunal were more than justified in highlighting the fact that the reference land were situated in a heavy industrial zone and that the said lands were not in fact used or intended to be used for agricultural purposes at the relevant time since several years. The Appellate Assistant Commissioner also recorded a finding of fact based on relevant evidence that at least 10 acres of the land out of 25 acres was in fact used for non-agricultural purposes by Larsen and Toubro Limited since the year 1960, i.e., for seven years prior to the date of transfer of the land. If the relevant tests laid down by the Supreme Court in *Smt. Sarifabibi Mohmed Ibrahim and others Vs. Commissioner of Income Tax, Gujarat*, and the test laid down by this court in *Commissioner of Income Tax Vs. V.A. Trivedi*, are to be applied to this case as they ought to be, it would become obvious that the finding of fact arrived at by the Income Tax Officer, the Appellate Assistant Commissioner and the Tribunal cannot be characterised as perverse or unsupported by evidence or erroneous in law. It is not possible to accept the submission made by learned counsel for the assessee that the authorities below did not apply the correct test or misdirected themselves in law or that the finding of fact arrived at by the Tribunal was not supported by evidence.

29. In view of the above discussion we do not think it necessary to refer to the other authorities cited at the Bar. We uphold the finding of the Income Tax Appellate Tribunal to the effect that the reference lands were not agricultural lands.

30. The next question which arises for the consideration of the court is as to whether the transactions pertaining to transfer of reference lands constitute an adventure in the nature of trade and whether the profits and gains made by the assessee from transfer of these lands are liable to be taxed as business income or as income in the nature of capital gains.

31. We have heard learned counsel on both sides at length. We have gone through the large number of authorities cited at the Bar. Learned counsel for the

assessee relied on the Division Bench judgment of this court in Commissioner of Income Tax Vs. Principal Officer, Laxmi Surgical Pvt. Ltd, . Learned counsel for the Revenue relied mainly on the ratio of the judgment of the Supreme Court in the case of G. Venkataswami Naidu and Co. Vs. The Commissioner of Income Tax, . Both learned counsel relied on various other authorities also. We do not think it necessary to refer to all the authorities cited at the Bar.

32. The Income Tax Appellate Tribunal reached the conclusion that the transactions in question constituted an adventure in the nature of trade as the assessee had purchased the reference lands from his father on March 30, 1964, with an intention to make profit. The lands sold to the Voras was already the subject-matter of the prior agreement of sub-lease dated September 13, 1963, and the prior agreement of sale dated October 29, 1963. The lands compulsorily acquired for Larsen and Toubro Limited under the acquisition made by the Special Land Acquisition Officer was already the subject-matter of compulsory acquisition proceedings initiated by issue of notification u/s 4 of the Land Acquisition Act on August 21, 1962. The transaction of compulsory acquisition of land in respect of a capital asset could never be viewed as an adventure in the nature of trade. The assessee had acquired a capital asset from his father. The said capital asset was already the subject-matter of pending acquisition proceedings. The assessee had no choice but to claim compensation for acquisition of the said land. Even as far as the sale land to the Voras is concerned, the said lands were already the subject-matter of the prior agreement of sub-lease and prior agreement of sale entered into by the predecessor-in-title of the assessee in favour of the said purchaser was binding on the assessee. The reference lands did not constitute stock-in-trade of the assessee. As far as the reference lands are concerned, the assessee had no choice but to complete the sale of the lands in favour of the Voras and file a claim for compensation with the Special Land Acquisition Officer in respect of the lands under acquisition. After careful consideration of the facts and circumstances of the case and after applying the applicable principles laid down by the Supreme Court and this court, we have reached the conclusion that the Appellate Assistant Commissioner was more than justified in coming to the conclusion that these transactions did not constitute an adventure in the nature of trade and were liable to be taxed to capital gains tax and not on the footing of "business income". We shall now refer to the principles laid down by the Division Bench of our High Court in the above-referred case in Commissioner of Income Tax Vs. Principal Officer, Laxmi Surgical Pvt. Ltd, to which one of us (Justice Dr. B. P. Saraf) was a party. The said case was decided after interpreting and applying the ratio of various judgments of the Supreme Court. The profit motive of the assessee in selling the land without anything more by itself can never be decisive for determination of the issue as to whether the transaction amounted to an adventure in the nature of trade. The assessee may acquire a capital asset in the expectation that it may be sold at a profit. On this aspect, the observations made by the Supreme Court in the case of Janki Ram Bahadur Ram

Vs. Commissioner of Income Tax, Calcutta, are of considerable significance. In this case, J. C. Shah J., speaking for the apex court, in terms, observed that the profit motive in entering into a transaction was to be decisive for determination of the issue and an accretion to capital could not be taxed as "business income" merely because the capital asset was acquired by the assessee in the expectation that it may be sold at a profit. If the relevant test laid down by the Supreme Court is to be applied to this case, it would follow that the Tribunal was in error while holding that the said transactions constitute an adventure in the nature of trade and were liable to be taxed as business income. We are in agreement with the conclusion of the Appellate Assistant Commissioner to the effect that the transactions of transfer in respect of the reference lands were liable to be taxed to capital gains tax. Question No. 4 is merely consequent to other questions. The said question need not be dealt with separately.

33. In the light of the above discussion, we answer the questions referred to us as under :

(i) We answer question No. 2 in the affirmative and in favour of the Revenue

(ii) We answer question No. 3 in the affirmative and in favour of the Revenue.

(iii) We answer question No. 4 as under :

"the lease rent was assessable under the head "Other sources."

(iv) We answer question No. 5 in the negative and in favour of the assessee. We hold that the profit received by the assessee from the sale of the land as well as compulsory acquisition was liable to capital gains tax.

34. As regards the answer to question No. 1, we decline to answer the said question as unnecessary. The answer to question No. 1 is covered by our answer to question No. 5 and the said question need not be separately dealt with.

35. Having regard to the facts and circumstances of the case, there shall be no order as to costs.