
(2017) 03 BOM CK 0031
In the Bombay High Court
Case No : Tax Appeal No. 1 of 2015

Shankar Dalal

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 23-03-2017

Acts Referred:

Goa, Daman and Diu Land Revenue Code, 1968 — Section 105, Section 2(1)
Income Tax Act, 1961 — Section 2(14)(iii)

Citation : (2017) 294 CurTR 107 : (2017) 247 Taxman 170

Hon'ble Judges : Anoop V. Mohta and Nutan D. Sardesai, JJ.

Bench : Division Bench

Advocate : Tax Appeal Nos. 1, 2, 10, 16 of 2015 and 80, 81, 82, 83, 84, 86 of 2014; Mr. N.N. Sardesai, Senior Advocate with Ms. N. Shirodkar, Advocate, for the Appellant; Ms. S. Linhares, Additional Government Advocate, for the Respondent; Tax Appeal No. 12 of 2015; Mr. N.N. Sardesai, Senior Advocate with Ms. N. Shirodkar, Advocate, for the Appellant; Ms. A. Razaq, Additional Government Advocate, for the Respondent; Tax Appeal No. 85 of 2014; Mr. N.N. Sardesai, Senior Advocate with Ms. N. Shirodkar, Advocate, for the Appellant; Ms. Amira Razaq, Additional Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

Anoop V. Mohta, J. (Oral)—Taken out from the final hearing Board. Heard finally by consent of the parties. As common issues are involved revolving around the common facts and the properties, we are disposing of these Tax Appeals by this Judgment.

2. The Appellant-assesses have challenged a common order dated 6.6.2014, passed by the Income Tax Appellate Tribunal, Panaji Bench, Panaji (ITAT), thereby the respondent-Revenue Department's appeals have been partly allowed and so also the Cross Objections filed by the Assesseees. That resulted into reversal of the order passed by the Commissioner of Income-Tax (Appeals) (CIT) dated 8.4.2013 for the Assessment Year 2007-08. The Income Tax Officer, had by order dated 6.6.2014 Ward 2(3) under Section 143(3) read with section 147

of the Income Tax Act, 1961 (IT Act) therefore, revived the returns by showing the Long Term Capital Gains liabilities under Section 45 of the IT Act and initiated penalty proceedings under Section 271(1)(c) of the IT Act and further directed initiation of action for filing inaccurate particulars of income.

3. The Assessee's appeals, was allowed by the CIT(A) by order dated 8th April, 2013, and the findings given based upon the records and the Judgments of this Court, by observing as under :

"6. Since the facts of this case are identical to that of CIT v. Smt. Debbie Alemao & CIT v. Minguel Chandra Pais, respectfully following judgment of the jurisdictional Bombay High Court, the AO is directed to delete the addition made as Capital Gains arising on sale of agricultural land and this Ground of Appeal of the Appellant is allowed.

7. In view of the above, other Grounds of Appeal of the appellant become infructuous and therefore, they are not adjudicated upon." Reference was also made to the Judgment of this Court in case of CIT v. Minguel Chandra Pais 282 ITR 618 by noting as under :

"The AO has noted that the said land was entered in the revenue record as an agricultural land i.e. garden or orchard. It is contended by the revenue that the land was not actually used for agriculture in as much as no agricultural income was derived from this land and was not shown by the respondents in their Income Tax Return. This was explained by saying that there were coconut trees in the land but the agricultural income derived by sale of coconut was just enough to maintain the land and there was no actual surplus, hence, no agricultural income was shown from this land. In our opinion, if an agricultural operation does not result in general of surplus that cannot be a ground to say that the land was not used for the agricultural purpose. It is not disputed that the land was shown in the revenue record to be used for agricultural purpose and no permission was ever obtained for non-agricultural purpose by the respondents."

4. This Court admitted the appeals on two questions of law. The appellants are pressing only the following question of law. Whether, on a true and proper construction of Section 2(14) of the Income Tax Act, the Tribunal was justified in holding that 80% of the land is not an agricultural land and liable to capital gains tax and, as such, the finding thereon is perverse ?

5. For deciding the appeals, the factual background requires to be noted because of typical, nature of transfer of "agricultural land" within the State of Goa is involved. The ancestral properties were never divided/partitioned any time. It is necessary to clarify at this stage itself that there are total of 20 vendors to the Deed of Sale dated 4th May, 2007. However, out of the said 20 vendors, assessment of only 16 vendors was reopened by the Income Tax Department out of which in the following list of cases, are the 12 vendors. The Assessment of the remaining 4 vendors out of the total 20 vendors, namely Bhushan Prabhu

Gaonkar, (Vendor No.9), Mrs. Seema Prabhu Gaonkar (Vendor No.8), Mr. Nikhil Bhobe, (Vendor No.7) and Mrs. Seema Bhobe (Vendor No.6), was never re-opened by the Department and, therefore, we are proceeding to deal with the above 12 appeals.

LIST OF CASES

Sr. No.

Name of the party

Tax Appeal No.

Vendor No.

1.

Pundalik Khaunte

TXA/86/2014

15

2.

Sudha Khaunte

TXA/83/2014

16

3.

Prabhakar Prabhu Shastri

TXA/12//2015

1

4.

Gajanan Guinde

TXA/82/2014

10

5.

Shailesh Guinde

TXA/85/2014

11

6.

Archana Guinde

TXA/81/2014

12

7.

Radhesh Guinde

TXA/80/2014

13

8.

Sonia Guinde

TXA/84/2014

14

9.

Gopal Venkatesh Prabhu

TXA/10/2015

3

10.

Shankar Dalal

TXA/1/2015

17

11.

Gauri Dalal

TXA/2/2015

18

12.

Shama Pai

TXA/16/2015

4

6. The appellants are individuals deriving income from salaries and income from other source (interest income). The Appellants are also co-owners of an ancestral agricultural land in Canacona Taluka along with other family members. The Agricultural land is called "VATTORIAN" or "VADTURY" measuring 2,18,250 sq. meters within the limits of village panchayat of Loliem in Canacona Taluka, South

Goa District which was sold by the Appellants vide sale deed No. 39/2008 dated 19.2.2007.

On 30.7.2007, the Appellant filed their return of income declaring an income from the sources. The Appellants claimed gain on sale of agricultural land as exempt since the land does not constitute "Capital Assets" as defined under Section 2(14) of the Act. The said returns were assessed by the revenue under Section 143(1) of the Act. On 07.02.2012, the Appellants were served with a notice under Section 148 of the Act calling upon to file return of income since according to the AO income had escaped assessment. On 19.3.2012, the Appellants filed a letter in response to the above notice and stated that return filed on 30.07.2007 be treated as return filed in compliance to notice under Section 148 of the Act and also requested the AO to furnish reasons recorded for issuing the notice. On 20.03.2012, the AO furnished the reasons recorded for re-opening the case of the Appellants. 02.04.2012, the appellants filed its objection. On 7.04.2012 the AO rejected the objections. On 5.10.2012, the AO passed an order under Section 143(3) read with Section 147 of the Act assessing income derived by denying exemption on account of gains arising from sale of agricultural land inter alia on the ground that the land does not constitute agricultural land since no agricultural operations were carried out regularly and same is sold to a company engaged in the business of development of infrastructure, activity. However, the AO gave a finding that the though the land is located beyond the specified limits from the municipal limits i.e. beyond 8 kms, yet it is to be treated as capital asset.

On 09.11.2012, the Appellant filed an appeal against the aforesaid order with the office of Commissioner of Income Tax(CIT) Appeals, inter alia challenging the initiation of reassessment proceedings and also on the merits of the case. By order dated 08.04.2013, the aforesaid appeal was disposed off. The Commissioner of Income- tax (Appeals) did not decide the jurisdictional ground on validity of initiation of proceedings but on merits held the land as agricultural land and hence exempt from capital gains tax.

7. Aggrieved by the order, the Assessing Officer (AO) filed an appeal to the Income Tax Appellate Tribunal, Panaji Bench at Panaji, Goa. On 11.07.2013, the Appellants filed cross objections in the Appeals on the ground relating to validity of intuition of reassessment proceedings etc. The Appellants also filed a detailed paper book with the office of the Tribunal containing documents to be relied upon at the time of the hearing. The Appellants also filed an application of additional evidence. On 01.04.2014, a site inspection was ordered to be carried out by the Tribunal. On 7.08.2014, the Revenue filed their report of the site visit. On 08.05.2014, the Appellant filed its reply to the report. 06.06.2014, the Tribunal disposed off the aforesaid appeals and cross objection filed by the parties by a common order. The Tribunal held that proceedings under Section 147 read with 148 were validly initiated. As per the appellant the Tribunal fails to consider the Judgments of CIT v. Smt Debbie Alemao and Joaquim Alemao (196 Taxman 230

HC Mumbai/Tax Appeal 1/2006 and Tax Appeal 2/2006) and CIT v. Minguet Chandra Pais and Anr (282, ITR 618 HC Mumbai/Tax Appeal 1 of 2002). The judgments relate to sale of agricultural land in Goa and are also from the jurisdictional High Court of Mumbai.

8. The definition of "capital" includes certain properties but also excludes agricultural land in India, as specifically defined/explained under Section 2(14) (iii) of the IT Act. The term "long-term capital gain" is also settled, which means capital gain arising from the transfer of a long term capital asset. The scope and power of the respective Tax Authorities, including the Appellate Authority/Tribunal is also settled, as well defined by various Judgments, particularly the provisions of the IT Act and the Rules made thereunder.

9. It is necessary to consider the provisions of the Goa, Daman and Diu Land Revenue Code, 1968. (Code) and the Rules made thereunder. The Code defines the term "agriculture" under Section 2(1),

"2. (1) "agriculture" with its grammatical variations and cognate expressions, means raising of useful or valuable products which derive nutriment from the soil with the aid of human labour and skill and includes horticulture, dairy farming, poultry farming, stock breeding and grazing"

10. The term "agriculture" admittedly not defined specifically under the IT Act. However, judicially the said term has been explained in various Judgments, including the Judgments of the Supreme Court in the case of Commissioner of Wealth Tax v. H.V. Mungale [(1984) 145 ITR 208] and Motibhai D. Patel (Dr.) v. Commissioner of Income Tax [(1981) 127 ITR 671]. These Judgments are referred and relied upon by the learned Counsel appearing for the Department as the impugned Order revolves against the assessee which reflects the reasons and foundation so laid by the Supreme Court to ascertain which land and the activities in such situation or otherwise requires to be treated as "agricultural land" and/or "non-agricultural land". It depends upon the "agriculture" activities on such land recognised under the Local Land Law.

11. The impugned order and the whole action of the Department proceeds on the foundation and arrived at a conclusion against the assessee holding that the land in question so transferred is a "non-agricultural land" and falls within the ambit of "non-agricultural land" because of use and/or non-use and/or stated to be unused for specific agricultural purpose for want of labour and no-agricultural operations and/or no specific regular income continuously for three years, as required and many other such facets. We could have gone in detail of the same if required, as the law in this regard as opined by the Supreme Court needs to be respected by all. But, at the same time, it is necessary to consider the facts and circumstances of the case and the local laws/laws of land, which recognises the meaning of "agriculture" while dealing with the transfer of property of such agricultural lands.

12. For the purposes of such transfer of land, in our view, we have to consider

the provisions of the Code in question and so also the definition so provided to deal with the concept of "agricultural land". There is no issue that the land owners require to transfer the property within the framework of laws. Under the Code, there is no bar that an agriculturist and/or one who possesses agricultural land cannot transfer such land to any third party who is not agriculturist. Nothing contrary has been pointed out and/or placed on record that any permission and/or formalities are required to be completed before transfer of such lands. Under the Code, a transfer could be made to a non-agriculturist and/or to a person whose activities are not related to agricultural project or purpose. There is no question of raising any objection by third party, if the owner of such land decides to transfer the ancestral agricultural property/land to a third party by a common sale deed. The assessee had received the consideration. Admittedly, the property was not divided and/or sub-divided. Admittedly, before transfer of the property, the parties were fully aware about the nature of the land which includes rocky area, use and usable area for agricultural, purpose number of trees, plants growing or in existence for so many years, apart from certain plantations. Being the ancestral agricultural property, the families were using the agricultural produce for their own consumption.

13. Here, at this stage, it is relevant to note the definition of the term "agriculture" as reproduced above. This definition, in our view, ought not to have been overlooked, while taking any action against the assessees. The definition itself provides that expression "agriculture" means raising of useful or valuable products which derive nutriment from the soil with the aid of human labour. This inclusive definition, no where provides and/or takes away rights of the assessee to treat such land as an agricultural land which they had been using before transfer and/or till the date it came to be transferred as an "agricultural land". There is nothing to prevent them from using such land for deriving nutriment from the soil with the aid of human labour and skill, which also includes the appellants' own labour and/or skill. Whatever number of trees which are developed and/or grown were planted, developed and grown by the assessees for so many years and/or have been maintaining the same for various activities as, even reported by the Department, through the respective reports. This also is sufficient to support their claim that the land throughout has been used as an "agricultural land". The various trees planted and the fruit products derived from it are being consumed for their private purposes, in no way, can be or should have been the foundation against them to held that it was never used and/or unusable or remained unused for any agricultural activities. The definition of "agriculture" itself permitted, such unused land to be used and utilized even for grazing, horticulture, dairy farming, stock breeding. This is clear terms of the law and so also the intent of the Code which governs such agriculture land and its transfer. The report so submitted and/or referred to by the Department against the assessee, in our view, is unsustainable, unacceptable and contrary to the specific provisions of the Code. All the "agriculture" activities so defined covers the agriculture land in question. Therefore, exemption from the capital gain is

the only option, on fact and the law.

14. The Supreme Court Judgment so read, definitely requires to be used and utilized. The position of law is clear, so also the terms like "agriculture" and/or "agricultural land", "ancestral agricultural land. The assessees have been using it for agricultural purpose as claimed. Hence, the burden lies upon the Department to disprove and/or place material on record to show that activities or no activities or do use or no use of such land not fall within the ambit of "agriculture" so defined under the Code. The decision taken by the Revenue Department by overlooking this provision and Code is impermissible, unacceptable and so the demand and the penalty.

15. This Court further requires to consider that a person who wants to use such agricultural land for any non-agricultural purpose, requires to submit an application to the concerned Authority, which is subject to the order/decision and/or permission if sanctioned, such agricultural land can be used and converted into and/or usable for non-agricultural purpose and not otherwise. By any act or inaction of unauthorised use of such agricultural land to non-agricultural purpose, in no way, legally converts such agricultural land to non-agricultural land. It is only subject to penalty and/or charges for such use of agricultural land to non-agricultural purpose. Admittedly, there is nothing on record to show that such application was ever filed at any point of time prior to the date of its transfer and/or even thereafter at least by the assessee or by the third party, after purchase of such property. The owners of such property are always at liberty to convert and/or take action. Even otherwise such subsequent action or inaction, in no way is sufficient to prove such tax liability (Long term capital gain) upon the original vendor, who sold the property as the ancestral agricultural property.

16. The tax law is very clear that it requires clear provision and clear facts and defaults and/or act of suppression or inaccurate submissions of facts to avoid tax liability. The case in hand, therefore, requires to be considered in the background of geographical as well as physical conditions of the agriculture property and its use and utilization for the stated "agriculture" purpose. The agricultural purpose, so defined, under the Code therefore, always remains same one who owns such property and so also the purchaser and/or the third party. Therefore, merely because the assessees could not produce and/or could not use and utilize the land fully by employing labourers and/or unable to give the crop statements should not have been the criteria, specifically when the assessees and the owners of the land had been using the products for their personal consumption. The whole approach of the Tribunal and the AO is incorrect and unsustainable in law.

17. Section 105 of the Code further clarifies the position with regard to presumption of correctness of entries in the record of rights and register of mutations. It provides that an entry in the record of rights, and certified entry in the register of mutation shall be presumed to be true and until the contrary is proved or a new entry is lawfully substituted therefor. The assessees have placed

on record material to justify their claim. There is no issue with regard to assessee's ownership, title and the name recorded in the land records at the relevant time. Even, otherwise, in view of settled position of law, all concerned are bound by the entries, unless contra material is placed on record. On the contrary, adverse findings are given by the Department solely based upon the so called inspection initially taken at the stage of assessment by the concerned officer and later on by the Tribunal members. We are not going into the aspect of powers of the Tribunal to conduct inspection and give its own finding for the first time. This is in the background that the parties themselves requested the Appellate Authority to have inspection of the land. Such party cannot, therefore, and/or agitate any issue with regard to the inspections so made. Therefore, we are not dealing with the inspection report on merits, in the peculiar facts and circumstances of the case, as it was done at the instance of the assessee. But the fact that this inspection reports, in no way, has considered the purpose and object of the Code and the definition of "agriculture" so liberally mentioned. The relevant part of the report, reads thus :

"... The above property is bounded on the Southern side by a rain water gutter which quoin the Arabian Sea. On the western side of the property is Arabian Sea. The property is hill area on the Western side and plain on the Eastern side. I could see old trees such as Mango trees, Cashew trees, Jackfruit trees, coconut trees, kokum trees, acacia trees and wild trees. Thick bushes and grass grown between the trees and it was difficult to move around the property and there is no easy access. There were no labourers or workers seen inside the property. The village Talathi stated that no agriculture activity carried out in the said property."

18. The above is one illustration to show how the whole proceedings proceeded to impose such tax and the penalty. The first Appellate Authority however, did not accept the position and referring to the Judgment of the Division Bench of this Court, reversed the basic order of assessment. The Tribunal(ITAT) however, on the request, so recorded above, reinspected the land/area and gave additional reasons by observing that:

" ... It is not denied even by the Revenue that part of the land consists of dry crop i.e. trees of cashew, mango, jack, kokum and coconut. To the extent these trees are standing on the land, this portion of the land, in our opinion, has to be regarded to be agricultural land as this portion of the land is being used for the purposes of agricultural. Neither the Assessee nor the Revenue produced before us the exact measurement of the land on which the trees are standing and out of which dry crop is grown. To the extent the land is actually used for dry crop, the land has to be regarded to be an agricultural land. Since, there are approximately 3500 trees standing on the land, which is not denied even by the Revenue and has been accepted by the Id. AR, we therefore to the best of our knowledge estimate that at least 10 mtrs area is required for one fruit tree and therefore, there are approximately 35000 sq. metres area of the land which can

be regarded to be cultivable. On the upper side was estimate 7th of the land i.e. about 42,000 sq. mtrs. to be cultivable land therefore, we hold this importation of the land to be the agricultural land. The balance 7th of the land in our opinion cannot be regarded to be the agricultural land. "

19. The findings given by the ITAT, for the first time of this nature, therefore, ultimately require to be tested by this Court in this appeal for the first time. It is settled that the appeals under Section 260A of the IT Act have a limited scope and purpose. We have to deal with the question of law so framed and the arguments so advanced in respect thereof. But, as whole report itself and the findings given by the Tribunal(ITAT) about the nature of land and its use, without considering the definition and the provisions of the Code, we are not inclined to proceed further. The finding of facts so record by the Tribunal itself confirms the position that the case of the assessee fall within the ambit of definition of "agriculture" as defined under the Code. The property requires to be treated as agricultural land and its activities are "agricultural" in nature.

20. Submission is made by the learned Counsel appearing for the respondent-Department supporting the impugned orders so passed against the Assessee that the matter be remanded back for consideration as this factual aspect always goes to the root of the matter in view of the Judgment of the Supreme Court referred above to ascertain the nature and use of such land as "agricultural land" and/or "non-agricultural land". We are not inclined to accept this submission at this stage of the proceedings, specifically when the whole approach of reassessing and/or visiting the land by holding inspection after more than 2 to 3 years of the transfer of the property itself is an unacceptable situation. The Supreme Court Judgment, therefore, in our view, in the facts and circumstances of the case and the provisions of law, as referred above, ought not to have been applied by keeping in mind the purpose and object of the Code. The law laid down by the Supreme Court, as already recorded, needs to be respected by all, but always keeping in mind the facts and position of law. Those judgments also covers the case of the assessee. The subject land in agriculture land and had been used for the agriculture purpose as defined under the law.

21. The Division Bench of this Court in the Commissioner of Income Tax v. Shri Minguel Chandra Pais and another, Tax Appeals No.1 and 2 of 2002, dated 23.3.2005, considering the Supreme Court's Judgments referred above, has ultimately held that the subject land was agricultural land, ordinarily used for agricultural purpose. In para 19, it was observed thus :

"..... It is therefore obvious that the assessee had abundantly proved that the subject land sold by them was agricultural land not only as classified in the revenue record, but also it was subjected to the payment of land revenue and that it was actually and ordinarily used for agricultural purpose at the relevant time. .."

The judgment was further following by the Division Bench of this Court in the

Commissioner of Income Tax v. Smt. Debbie Alemao, Tax Appeal No. 1 and 2 of 2006 dated 9th September, 2010. For the reasons so recorded above, order passed by the CIT(A), referring to those Division Bench Judgments in the background are required to be maintained. The assessee is not liable for such tax. No question of penalty. Therefore, such demand and the penalty is required to be quashed and set aside.

22. Strikingly, an order is placed by the learned Senior Counsel appearing for the assessee that the Revenue Department, except these 12 matters, have not proceeded or reopened the similarly placed four matters. The order and the action therefore, on same facts and circumstances, as arising out of the same sale deed, has attained finality. In *Berger Paints India Ltd., v. Commissioner of Income Tax, Calcutta*, (2004) 12 SCC 42, the Supreme Court has opined in this regard, at paras 12 thus :

"12. In view of the judgments of this Court in *Union of India v. Kaumudini Narayan Dalal*, (2001) 10 SCC 231, *CIT v. Narendra Doshi*, (2004) 2 SCC 81, and *CIT v. Shivsagar Estate*, (2004) 9 SCC 420, the principle established is that if the Revenue has not challenged the correctness of the law laid down by the High Court and has accepted it in the case of one assessee, then it is not open to the Revenue to challenge its correctness in the case of other assesses, without just cause."

23. We are inclined to observe that the property in question cannot be treated as "Capital Asset" as contemplated under Section 2(14) (iii) of the Act. It is wrong to hold, in view of the facts and circumstances and the nature of agricultural land because of peculiar situation of the land near the sea side or stony side of the sea, that assessee is not doing any regular agriculture operation, this is also on the ground that they never shown agriculture income out of it. Any agriculture produce and products can be for personal use also.

24. Therefore, taking overall view of the matter including the reports placed on record, which supports the case of the assessee and for the reasons so recorded above, we are inclined to allow these appeals. Hence, we pass the following:-

ORDER

- a. The appeals are allowed.
- b. The issue is answered in favour of the assessee.
- c. No costs.