

आयकर अपीलीय अधिकरण, राजकोट न्यायपीठ, राजकोट ।
IN THE INCOME TAX APPELLATE TRIBUNAL
RAJKOT BENCH, RAJKOT

BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER
AND SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER

सर्वश्री राजपाल यादव, न्यायिक सदस्य एवं एन.के.बिल्लैया, लेखा सदस्य के समक्ष।

आयकर अपील सं./ ITA Nos. 260 & 294/Rjt/2014

निर्धारण वर्ष/Assessment Years: 2009-10

Shailesh Gangaram Ramani C/o. Gayatri Hardware Store, Station Road, Bhuj	Vs	ITO, Ward - 2, Bhuj
अपीलार्थी/ (Appellant)		प्रत्यर्थी/ (Respondent) and Cross Objector
Revenue by :	Shri M. J. Ranpura, A.R.	
Assessee by :	Smt. Hargovind Singh, D.R.	

सुनवाई की तारीख/Date of Hearing : 08/11/2017

घोषणा की तारीख /Date of Pronouncement : 04/12/2017

PER RAJPAL YADAV, JUDICIAL MEMBER:

The assessee and Revenue are in Cross Appeal against order of Id. Commissioner of Income Tax (Appeals)-II, Rajkot dated 21.02.2014 passed for Assessment Year 2009-10.

2. The Grounds taken by both the appellants are not in consonance with Rule 8 of ITAT Rules, they are descriptive and argumentative in nature. In brief short common question involved in both the appeals relates to determination of nature of income derived by the assessee on sale of land, i.e. whether the profit on sale of land is to be assessed as business income or under the head capital gain.

3. The brief facts of the case are that assessee has filed his return of

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income on 21.01.2010 declaring total income at Rs.9,48,823/-. His case was selected for scrutiny assessment and notices u/s. 143(2) and 142(1) were issued and served upon the assessee. On scrutiny of accounts it revealed to the Assessing Officer that assessee has derived income from trading in plastic, cotton and steel, also shown profit of Rs.3,52,19,658/- from sale of agricultural land situated at village : Paddhar, Tal : Bhuj-Kutch. This profit has been claimed as exempt on the ground of that the said land is not a capital asset within the meaning of Section 2(14) of the IT Act, 1961.

4. Ld. Assessing Officer did not accept the contentions of the assessee and treated him as a trader in the land. He assessed the alleged amount as business income.

5. On appeal ld. CIT(A) has partly accepted the contention of the assessee. He confirmed the assessment of Rs.2,60,55,922/- under the head "business income" and accepted the contention of the assessee qua the balance amount. The revenue is challenging the order of ld.CIT(A) qua the amount, which has been accepted as assessable under the head "capital gain" and exempt from tax being arisen on sale of agriculture land. On the other hand, assessee is impugning the order of the ld.CIT(A) for assessing the balance amount of Rs.2,60,55,922/- under the head business income. We will be reverting to the facts in details.

6. With the assistance of ld. Representative, we have gone through the record. The issue, whether gain from sale of agricultural land is to be assessed as a business income or short term capital gain/long term

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capital gain, is a highly debatable issue. It always puzzled the adjudicator even after availability of large numbers of authoritative pronouncements by the Hon'ble Supreme Court/Hon'ble High Court. The reason for the puzzle is, one has to gather the intention of an assessee while he entered into the transaction. The expression "intention" as defined in Meriam Webster Dictionary means, what one intends to accomplish or attain, it implies little more than what one has in mind to do or bring out. It suggests clear formulation or deliberation. Thus, it is always difficult to enter into the recess of the mind of an assessee to find out the operative forces exhibiting the intention for entering into the transaction. This would give rise a debate. Nevertheless, we have to look into the curious features of this case which will goad us on just conclusion.

7. Before we embark upon an inquiry on the facts of present case so as to find out, whether assessee is to be termed as involving in the trading of land or to be treated as a *simplicitor* agriculturist. We would like to refer the three basic questions formulated by Id. first appellate authority for adjudicating the controversy. These questions are as under:-

- i. Is the sold land 'agricultural land' ?
- ii. Whether the transaction carried out by the appellant was 'adventure in the nature of trade' and the profits thus required to be taxed as business income ?
- iii. Is the transaction a sham transaction and can it be labeled as a colourable device ?

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8. Ld. first appellate authority has made a lucid enunciation of law and facts under each question. She accepted that the land sold by the assessee was agricultural land. She also accepted that the transaction was not sham or colourable transaction.

9. The parties are not disputing on these conclusions. Thus, the controversy between assessee and revenue boils down to question 2 formulated by the Id.CIT(A). The Ld. first appellate authority has partly treated the assessee as indulged in adventure in the nature of trade and thus the profit resulted to him has been assessed as a business income. Ld. first appellate authority accepted the assessee as an investor in agriculture land, same would not result any capital gain, because the asset possessed by the assessee was not a capital asset within the meaning of section 2(14)(iii) of the Act.

10. Thus, at this stage, let us first note the facts in a little more detail. It is pertinent to observe that assessee is an agriculturalist by inheritance. He purchased agricultural land comprised in Survey No.563/2 and 564 admeasuring 10.18 Acre at village Paddhar Tal. Bhuj in Kutch District in the month of April 2005 for consideration of Rs.84,600/-. Brother of the assessee has also purchased the adjoining agricultural land comprised at Survey No. 559/1, 562/1 and 563/1, subsequently, in the month of Feb-March 2007. They have purchased further land in Survey No. 567/1, 567/2 admeasuring 4.33 and 9.23 Acre. This land was purchased for a consideration of Rs.22,000/- and Rs.43,600/-. The assessee has sold the land in July-August 2008. The details have been noticed by the Id. first

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appellate authority, while taking cognizance of the submissions made by the assessee. Such details read as under:-

Sr. No.	Survey No. of Village Paddhar	Name of purchaser	Date of sale	Sale consideration
1.	567/1/1	Naru Kheraj Gadhvi	29.08.08	42,70,112
2.	564	Vejanand Vira Gadhvi	29.07.08	63,05,664
3.	568/3	Rana Parbat Gadhvi	22.07.08	24,00,088
4.	563/2	Vejanand Vira Gadhvi	29.07.08	29,42,672
5.	568/1	Rana Parbat Gadhvi	22.07.08	19,34,986
6.	560/3	Harsur Kheraj Gadhvi	22.07.08	72,00,115
7.	568/2	Rana Parbat Gadhvi	22.07.08	19,49,960
8.	567/2	Naru Kheraj Gadhvi	03.10.08	84,73,961
				3,54,77,558

11. According to the assessee, lands have been mentioned as agricultural land in the land revenue record. Agriculture operations were carried on and they were situated about 20 km from Bhuj. The gain realized on sale of such land was claimed exempt u/s.2(14) of the I.T. Act.

12. The Assessing Officer did not accept this contention of the assessee and treated the profit as business income. On appeal ld.CIT(A) accepted the gain arisen on sale of agricultural land purchased in April 2005 as exempt u/s.2(14) of the I. T. Act. However, with regard to the land purchased in the month of Feb-March 2007, he treated the gain arisen to

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the assessee as business income. This action of the Id.CIT(A) is being impugned by the assessee in his appeal, whereas rest is being impugned by the revenue.

13. While appreciating the controversy, Id. First appellate authority took into consideration. The broad principles laid down by the Hon'ble Jurisdictional High Court in the case of CIT vs. Siddharth J. Desai [1983] 139 ITR Page 628/10. Alongwith the test propounded by Hon'ble jurisdictional High Court, Id. first appellate authority has considered the reply given by the assessee as to how his transactions do not fall within the ambit of an adventure in the nature of trade. We deemed it appropriate to take note of those tests as well as the reply given by the assessee, which has been reproduced by the Id.CIT(A) in the impugned order on Page 9. They read 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?

Yeas the land is classified in the revenue records as agricultural land.

2. Whether the land was actually or ordinarily used for agricultural purposes at or about the relevant time?

Yes the land was used for agricultural purpose.

3. Whether such user of the land was for long period or whether it was of a temporary character or by any or a stopgap arrangement?

It was not for stopgap arrangement but the intention was for longer period.

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?

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The crop of Juwar was given to the trust/Panjarapol for cattle feeds.

5. *Whether, the permission under Section 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?*

Not applicable as the land was converted into NA and was sold as agricultural land.

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?*

Not applicable as the land was converted into NA and was sold as agricultural land.

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?*

Yes the land has been used for agricultural purposes till the date of sale.

8. *Whether the land was situated 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?*

In surrounding area there are adjoining agricultural land only and the area was not developed.

9. *Whether the land itself was developed by plotting and providing roads and other facilities?*

No the appellant being agriculturist has carried out agricultural activities and sold to the agriculturist.

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

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11. *Whether permission under section 63 of the Bombay Tenancy and Agricultural Lands Act, 1948, was obtained because the sale or intended sale was in favour of a non-agriculturist? If so, whether the sale or intended sale to such non-agriculturists was for non-agricultural or agricultural user?*

Not applicable.

12. *Whether the land was sold on yardage or on acreage basis?*

Acreage basis."

14. It is pertinent to observe that ITAT Lucknow Bench in the case of Sarnath Infrastructure (P) Ltd. v. ACIT (2009) 120 TTJ 216 has also considered issue whether an assessee deserves to be treated as a "trader" or "investor". Though the issue involved in that case relates to investment/trading in shares, but broad principle carved out by the ITAT is applicable on all sorts of transactions, where adjudicator is required to find out whether transaction was entered into by the assessee with a pre-dominant intention of trading or investment. The following tests are worth to note:

"13. After considering above rulings we cull out following principles, which can be applied on the facts of a case to find out whether transaction(s) in question are in the nature of trade or are merely for investment purposes:

(1) What is the intention of the assessee at the time of purchase of the shares (or any other item). This can be found out from the treatment it gives to such purchase in its books of account. Whether it is treated stock-in-trade or investment. Whether shown in opening/closing stock or shown separately as investment or non-trading asset.

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(2) *Whether assessee has borrowed money to purchase and paid interest thereon? Normally, money is borrowed to purchase goods for the purpose of trade and not for investing in an asset for retaining.*

(3) *What is the frequency of such purchase and disposal in that particular item? If purchase and sale are frequent, or there are substantial transaction in that item, it would indicate trade. Habitual dealing in that particular item is indicative of intention of trade. Similarly, ratio between the purchases and sales and the holdings may show whether the assessee is trading or investing (high transactions and low holdings indicate trade whereas low transactions and high holdings indicate investment).*

(4) *Whether purchase and sale is for realizing profit or purchases are made for retention and appreciation its value? Former will indicate intention of trades and latter, an investment. In the case of shares whether intention was to enjoy dividend and not merely earn profit on sale and purchase of shares. A commercial motive is an essential ingredient of trade.*

(5) *How the value of the items has been taken in the balance sheet? If the items in question are valued at cost, it would indicate that they are investments or where they are valued at cost or market value or net realizable value (whichever is less), it will indicate that items in question are treated as stock-in-trade.*

(6) *How the company (assessee) is authorized in memorandum of association/articles of association? Whether for trade or for investment? If authorized only for trade, then whether there are separate resolutions of the board of directors to carry out investments in that commodity? And vice verse.*

7. *It is for the assessee to adduce evidence to show that his holding is for investment or for trading and what distinction he has kept in the records or otherwise, between two types of holdings. If the assessee is able to discharge the primary onus and could prima facie show that particular item is held as investment (or say, stock-in-trade) then onus would shift to Revenue to prove that apparent is not real.*

8. *The mere fact of credit of sale proceeds of shares (or for that matter any other item in question) in a particular account or not so much frequency of sale and purchase will alone will not be sufficient to say that assessee was holding the shares (or the items in question) for investment.*

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9. *One has to find out what are the legal requisites for dealing as a trader in the items in question and whether the assessee is complying with them. Whether it is the argument of the assessee that it is violating those legal requirements, if it is claimed that it is dealing as a trader in that item? Whether it had such an intention (to carry on illegal business in that item) since beginning or when purchases were made?*

10. *It is permissible as per CBDT's Circular No. 4 of 2007 of 15th June, 2007 that an assessee can have both portfolios, one for trading and other for investment provided it is maintaining separate account for each type, there are distinctive features for both and there is no intermingling of holdings in the two portfolios.*

11. *Not one or two factors out of above alone will be sufficient to come to a definite conclusion but the cumulative effect of several factors has to be seen."*

15. The Hon'ble Gujarat High Court had also an occasion to consider this issue in the case of Commissioner of Income Tax vs. Riva Sharkar A Kothari reported in 283 ITR 338. Hon'ble court has made reference to the test laid by it in its earlier decision rendered in the case of Pari Mangaldas Girdhardas vs. CIT reported in 1977 CTR 647. These tests read as under:

“After analyzing various decisions of the apex court, this court has formulated certain tests to determine as to whether an assessee can be said to be carrying on business.

- (a) The first test is whether the initial acquisition of the subject-matter of transaction was with the intention of dealing in the item, or with a view to finding an investment. If the transaction, since the inception, appears to be impressed with the character of a commercial transaction entered into with a view to earn profit, it would furnish a valuable guideline.
- (b) The second test that is often applied is as to why and how and for what purpose the sale was effected subsequently.

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- (c) The third test, which is frequently applied, is as to how the assessee dealt with the subject-matter of transaction during the time the asset was the assessee. Has it been treated as stock-in-trade, or has it been shown in the books of account and balance sheet as an investment. This inquiry, though relevant, is not conclusive.
- (d) The fourth test is as to how the assessee himself has returned the income from such activities and how the Department has dealt with the same in the course of preceding and succeeding assessments. This factor, though not conclusive, can afford good and cogent evidence to judge the nature of the transaction and would be a relevant circumstance to be considered in the absence of any satisfactory explanation.
- (e) The fifth test, normally applied in case of partnership firms and companies, is whether the deed of partnership or the memorandum of association, as the case may be, authorizes such an activity.
- (f) The last but not the least, rather the most important test, is as to the volume, frequency, continuity and regularity of transaction of purchase and sale of the goods concerned. In a case where there is repetition and continuity, coupled with the magnitude of the transaction, bearing reasonable proportion to the strength of holding then an inference can readily be drawn that the activity is in the nature of business.”

16. In the light of the above, let us examine order of the Id.CIT(A). A perusal of the impugned order would indicate that the Id.CIT(A) has devoted much energy towards highlighting position of law laid down in various judgment viz. G. Venkataswami Naidu & Co. Vs. CIT, 35 ITR 594 (SC) and Janki Ram Bahadur Ram Vs. CIT, 57 ITR 21 (SC). Conclusions briefly drawn by the CIT(A) are on page no.35 of the impugned order. It reads as under:

“1. The appellant's case is required to be broken into two parts to get the correct perspective.

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2. The appellant had purchased eight pieces of land. Two pieces were held for more than three years while the remaining six pieces were held for less than ten to fifteen months. There has been a massive increase of about 800% in the price of the land within a very short span of time. There are two possibilities. Either the purchase price has been doctored or there are some exceptional circumstances leading to such an abnormal increase in price. The first possibility cannot be commented upon as no efforts have been done by the A.O. in this regard. Also, what exactly has brought about the massive increase in the price of the lands is not clear. However, it can be said with certainty that the appellant was very much aware of the developments in that area and in respect of the six pieces of lands which have been held for less than ten to fifteen months, he has sensed the business opportunity of making a kill and has therefore purchased these lands and sold them after a short period. This conduct on the part of the appellant can definitely point to these transactions being in the nature of business activity or adventure in the nature of trade.

7.19 However, the above logic cannot be applied in entirety to all pieces of land. This can be applied only to the six pieces of land which have been held for less than ten to fifteen months. The profit from sale of these six lands, are treated as business profit arising out of transactions by way of adventure in the nature of trade. In respect of the other two lands which have been held for more than three years, it cannot be said that their sale amounts to adventure in the nature of trade. Thus, the AO is directed to recompute the business profits as above."

17. Thus, an analysis of complete record would indicate that basic point which weigh with the Id.CIT(A) for treating the assessee partly as trader is the fact that the increase in sale price is 800%. In other words, volume of profit resulted to the assessee persuaded the Id.CIT(A) to harbour a belief that the land purchased in the year of 2007 and sold after 15-16 months is to be treated as a trade asset. No doubt the profit on transfer of alleged agriculture land was quite high. But this is one of the corroborative evidences, amongst other, propounded in various case laws noticed by us. Merely if an assessee is getting a higher volume of sale consideration, then it could not be construed that transaction would take colour of a business transaction. The assessee is basically an

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agriculturist; purchases land at a distance of more than 20 kms. away from municipality and close to his native village. After sale of this land, he has again purchases agriculture land. He has not entered into any sale/purchase of land in earlier period of time or in subsequent period of time. He has not borrowed money for purchase of land and incurred interest expenditure. There might be reasons for all of a sudden spurt in the price of land in the area. There could be change of policy of Government level; introduction of some project, but that type of change in the policy, whether, was in the notice of the assessee. No such factors have been brought on record by the AO. It is also pertinent to observe that whether the assessee could anticipate such substantial increase in the sale price of the land because of any policy introduced by the Government, no such factors have been brought on record. Facts are to be view keeping in view perspective the assessee, i.e. from where he belongs; whether he has ventured in any trading activities of similar nature; his educational background etc. Even the entire transaction is being looked into with that angle, then it would reveal that he has not traded in the land, rather it was a *simplicitor* investment for agriculture operation, but on account of getting good price land has been sold, and higher volume of land purchased at different places. Every agriculturist would like to enhance his land holding, if similar type of sale of land can result into a price, which can enable him to buy higher volume of other agriculture land. In view of the above discussion, we allow appeal of the assessee and direct the AO to treat the assessee as an investor in the agriculture land. Entire land sold to be treated as agriculture land and gain on sale of this land is beyond the purview of the capital gain under

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section 2(14) of the Income tax Act, 1961. The exemption claimed by the assessee be granted.

18. In the result, appeal of the assessee is allowed, and that of the Revenue dismissed.

Pronounced in the Open Court on 4th December, 2017

Sd
(N.K. BILLAIYA)
ACCOUNTANT MEMBER

Sd/-
(RAJPAL YADAV)
JUDICIAL MEMBER