IN THE INCOME TAX APPELLATE TRIBUNAL

"B" BENCH, MUMBAI

BEFORE SHRI PRAMOD KUMAR, VICE PRESIDENT AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no.1516/Mum./2021
(Assessment Year : 2017–18)

Noshir Darabshaw Talati
Level–6, Ceejay House
Shiv Sagar Estate, Dr. A.B. Road
Worli, Mumbai 400 018 PAN – AAAPT6890R ……. Applicant

v/s

Asst. Commissioner of Income Tax
Central Circle–7(1), Mumbai ……. Respondent

Assessee by : Shri B.V. Jhaveri, Advocate
Revenue by : Shri Hoshang B. Irani, Sr. A.R.

Date of Hearing – 08.07.2022	Date of Order – 03.10.2022

O R D E R

PER SANDEEP SINGH KARHAIL, J.M.

The present appeal has been filed by the assessee challenging the impugned order dated 13/07/2021 passed under section 250 of the Income Tax Act, 1961 ('the Act') by learned Commissioner of Income Tax (Appeals) – 49, Mumbai ['learned CIT(A)'], for the assessment year 2017 – 18.

2. The assessee, in the present appeal, has raised following grounds:–

> *1. The Commissioner of Income Tax (Appeals)-49 Mumbai ("the CIT-A) has erred in law and on facts by confirming the addition of short term capital gain of Rs.47,58,980/- on sale of agricultural land to the total income of the assessee.*

2. The CIT(A) has failed to appreciate the fact that the land in fact is not an agricultural land and as such is not a capital asset as defined u/s.2(14) of the Income Tax Act, 1961 ("the Act").

3. The CIT(A) has erred in law and on facts by coming to the conclusion that the agricultural land in question is not an agricultural land on the ground that no agricultural activity has been carried out by the Appellant on the said land.

4. The CIT(A) has failed to appreciate the fact that the Appellant has produced documentary evidences to substantiate that the land in question is situated outside the specified area as stated in sub-clauses (a) and (b) of clause (iii) of section 2(14) of the Act and as such the land in question is an agricultural land not liable to capital gain tax.

5. The CIT(A) has wrongly relied on the decision of Supreme Court in the case of Raja Benoy Kumar's case (1957) 32 ITR 466 (SC) and has wrongly come to the conclusion that the for the land to be agricultural, agricultural activity should have been carried out on it.

6. The CIT(A) has failed to appreciate the fact that the said decision relied upon is given under the old Act i.e. Income Tax definition of capital asset but only the land, the income derived from which was agricultural and accordingly the purpose for which the land actually used was a relevant factor under 1922 Act but it is not so under 1961 Act."

3. The only grievance of the assessee is against addition of Rs. 47,58,980 made on account of short term capital gains by treating the land as capital asset.

4. The brief facts of the case pertaining to this issue, as emanating from the record, are: The assessee is an individual and derived income under the head house property, business income, capital gains and other sources. For the year under consideration, the assessee e-filed his return of income on 31/10/2017 declaring total income of Rs. 36,23,60,810. In the said return of income, the assessee claimed profit of Rs. 47,58,980, arising on sale of land claimed to be agricultural land, as exempt under section 45 r/w section

2(14) of the Act. During the course of assessment proceedings, the assessee was asked to submit the details of such gains as well as documentary evidence to substantiate the claim that the said land was an agricultural land and also that the assessee has carried out agricultural activities on the said land. In reply, assessee, by referring to the purchase and sale deeds of conveyance, submitted that the land is an agricultural land. Further, copy of the land revenue record, i.e. 7/12 extract, was also furnished wherein the land in question was stated to be fit for cultivation. The assessee also submitted that its case does not fall in the other conditions provided in section 2(14) of the Act, i.e. pertaining to distance from local limits of any municipality or cantonment board as well as population. Accordingly, the assessee submitted that there is nothing in law to suggest that when no agricultural activity is carried out by the assessee on the land, the said land ceases to be agricultural land. The AO vide order dated 23/12/2019 passed under section 143(3) of the Act did not agree with the submissions of the assessee and held that no agricultural activity has been carried out on the land since the 7/12 extract itself shows the land as barren. The AO further held that nothing has been brought on record to prove that the agricultural activity was carried out on the land in question and merely because land is recorded as agricultural in revenue records, the same would not mean that the said land is an agricultural land. Accordingly, the AO treated the land as '*capital asset*' and treated the profit of Rs. 47,58,980 on sale of land as short-term capital gains and added the same to the total income of the assessee.

5. In appeal, learned CIT(A) vide impugned order dated 13/07/2021 dismissed the appeal filed by the assessee and held that in order to come within the category of agricultural land, it must not only be capable of being used for agricultural purposes but should have been actually used as such at some point of time. The learned CIT(A) also held that a temporary non-user for agricultural purposes may not affect the character of the land but the permanent abandonment of user for agricultural purposes will certainly affect the character of the land as agricultural land. The relevant findings of learned CIT(A) are as under:

> "*7.3.16. In the case before me, however, it is evident from the extract of 7/12 document that the land was classified as barren and hence, the onus squarely on the assessee to establish that the land was ordinarily used for the purposes of agricultural or allied to agriculture, and that it was left fallow in a particular year or years owing to adverse seasonal conditions or to some other special reason. I, however, find that assessee has not induced any evidence to establish that the land was ever used for agricultural purposes, rather the claim of the assessee before me is that 'having put the land for a culture purposes' is not even a requirement for claiming exemption, which could not be accepted in light of the detailed discussion and judicial pronouncements referred to earlier. I am, therefore, of the considered view that the assessee has failed to discharge the onus to establish that the impugned land was 'agricultural land' as defined in section 2 (14) of the Act, which could not be subjected to charge of capital gain under section 45 of the Act."*

Being aggrieved, the assessee is in appeal before us.

6. During the course of hearing, learned Authorised Representative ('*learned AR*') by referring to the conveyance deeds as well as land revenue record, forming part of the paper book, submitted that the land is an agricultural land. The learned AR submitted that the term '*Jirayat land'* used in the land revenue record means land where cultivation depends upon annual rainfall and therefore, the said land cannot be called to be barren as it was cultivable land. The learned AR further submitted that from the date

of purchase to the date of sale, the said land was agricultural land and it was ready for cultivation of kharif crops. Further, the other conditions in section 2(14) of the Act are not applicable in the present case.

7. On the other hand, learned Departmental Representative ('learned DR') vehemently relied upon the orders passed by the lower authorities and submitted that no evidence has brought on record to prove that land was ever used for agricultural purpose.

8. We have considered the rival submissions and perused the material available on record. The assessee, as noted above, is an individual and also claimed to be an agriculturist. The assessee purchased a plot of land bearing survey No. 88/3, admeasuring 36 Gunthas, situated at Village Kunenama, Maval Taluka, District-Pune on 06/12/2013 along with his wife for a total consideration of Rs. 1,56,65,000. In the deed of conveyance in respect of the aforesaid purchase transaction, the land is stated to be an agricultural land. Subsequently, vide deed of conveyance dated 20/07/2016 assessee along with his wife sold the said land for a total consideration of Rs. 2,60,00,000. Since, the assessee's share was only to an extent of 50% in the aforesaid property, assessee claimed exemption of Rs. 47,58,980 (i.e. 50% of Rs. 95,17,960 being profit arising from sale of aforesaid property). It is the claim of the assessee that the aforesaid land, purchased in the year 2013 and thereafter sold in the year 2016, was an agricultural land and therefore the same is not a '*capital asset*' for the purpose of section 2(14) and gains arising from transfer is not taxable under section 45 of the Act. In

this regard, apart from the aforesaid deeds of conveyance reliance has also been placed upon Maharashtra Land Revenue Record i.e. 7/12 extracts, forming part of the paper book. The learned AR, during the course of hearing, referred to the various entries in the aforesaid record to submit that the land has been mentioned as suitable for cultivation and grass was grown on it. Apart from the deeds of conveyance and 7/12 extracts from land revenue records, no other document has been placed to substantiate that the land was an agricultural land or any agricultural activity was ever conducted on it.

9. At this stage, it would be relevant to observe that after conclusion of hearing of appeal initially on 31/03/2022, a decision of coordinate bench of Tribunal in Abhijit Subash Gaikwad vs DCIT, (2015) 70 SOT 429 (Pune-Trib.) came to the notice of the bench. In the interest of fair play and justice, the appeal was again fixed for hearing to provide an opportunity to the litigating parties to examine the aforesaid decision of the coordinate bench of the Tribunal and make their submissions.

10. When the appeal was fixed for hearing, learned AR reiterated the submissions made on earlier occasions. The learned AR submitted that the decision of the coordinate bench of the Tribunal in Abhijit Subash Gaikwad (supra) refers to the decision of Hon'ble Supreme Court in CIT vs Raja Binoy Kumar Sahas Roy (32 ITR 466) wherein provisions of 1922 Act were considered by the Hon'ble Supreme Court, which excluded agricultural land from the definition of '*capital asset*' only if the land is generating agricultural

income. However, in the 1961 Act, the condition of generating agricultural income is not relevant for the purpose of determining whether the land is an agricultural land. The learned AR also placed reliance upon the decisions of Hon'ble Delhi High Court in Hindustan industrial Resources Ltd vs ACIT (335 ITR 77) and Hon'ble Madras High Court in Mrs. Sakunthala Vedachalam vs ACIT (369 ITR 558).

11. As is evident from the record, the other conditions of section 2(14) of the Act, which defines the term '*capital asset*', pertaining to population and distance from local limits of any municipality or cantonment board, are not in dispute in the present case. The claim of the Revenue is that the land in respect of which profit was earned by the assessee is not an agricultural land and therefore the same falls within the category of the term '*capital asset*' for the purpose of section 2(14) of the Act and thus the gain arising from transfer of said capital asset is chargeable to tax under the head '*capital gains*'. As noted above, apart from the purchase and sale deeds of conveyance entered into by the assessee as well as 7/12 extracts from land revenue records, no other evidence has been brought on record to establish the fact that the land in question is an agricultural land. Since, it is the claim of the assessee that the land is an agricultural land, therefore, the primary onus is on the assessee to prove the same. The assessee has also not brought any evidence on record that the said land prior to its purchase by assessee in the year 2013 was ever used for the purpose of agriculture. We find that the said fact is also not evident from the 7/12 extract from land revenue records.

12. We find that the coordinate bench of the Tribunal in Abhijit Subash Gaikwad (supra), after considering various decisions, inter-alia, including the decisions referred by the learned AR as well as decisions of Hon'ble Jurisdictional High Court, denied similar claim of the taxpayer made merely on the basis of purchase and sale deeds and also land revenue records. The relevant findings of the coordinate bench of the Tribunal, in aforesaid decision, are as under:

> *20. Following the judicial proposition laid down by the Supreme Court and various High Courts in order to determine the nature of the agricultural land, the first and foremost test was whether the land was actually and ordinarily used for the purpose of agriculture. Where the said land had not been actually cultivated in the recent past and/or there was no intention of using the land for agricultural purposes in near future, was held by the courts to be the most conclusive feature to determine the nature of land in question. Merely because the land was shown as agricultural in revenue records was held to be not the conclusive test to determine that the land was agricultural land.*
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> *21. The Bombay High Court in Gopal C. Sharma (supra) had held as under:-*
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> > *'The expression "agricultural land" is not defined in the Income Tax Act, 1961. The underlying object of the Act to exempt agricultural income from income tax is to encourage actual cultivation or de facto agricultural operations. Actual use of the land for agricultural purpose 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 land may undergo a change depending upon its situation, growth of the locality or zone in which it is situate and its potentiality. The fact that the land is sold or transferred to a non-agriculturist for a non-agricultural purpose 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 its continues to be assessed to land revenue a agricultural land is not decisive. In order to ascertain the true character and 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 future'*
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> *22. The judicial precedents have laid down that the expression 'agricultural land' though not defined under the Income-tax Act, but would be applicable to such land where the actual user of the land was for agricultural purposes in recent times. Just because the land was used for agricultural purposes in the remote past or it continues to be assessed in the land revenue records as agricultural land is not decisive to determine the nature of land being agricultural land. Where the land has not been put to use for agricultural purposes for reasonable span of time prior to the date of its transfer, the land in question cannot be held to be agricultural land. The onus was upon the assessee to establish its case of having cultivated the land in recent past and in the absence of assessee having discharged its onus and merely*

because the land is recorded as agricultural land in the revenue records, does not establish the case of assessee.

23. Now, coming to the facts of the present case, the assessee before the Assessing Officer had furnished the copy of 7/12 extract,according to which the land was a Jirayat fallow land i.e. land being not capable of cultivation. The 7/12 extract furnished by the assessee has been scanned by the Assessing Officer, copy of which is placed at pages 4 and 5 of the assessment order, which reflects no agricultural activity having been carried on by the assessee. The assessee has not declared any agricultural income in its hands nor any evidence has been produced by the assessee in any of the proceedings or even before us to establish that the land in question was actually being used for cultivation at any time or any basic operation or subsequent operations were carried out in the land. The report of the Inspector was obtained by the Assessing Officer, which clearly mentioned that the land was not fit for cultivation which has not been challenged by the assessee. In the absence of fulfilment of fundamental fact that the land was used for agriculture, merely mentioning of the land as agricultural land in the purchase deed and or in the sale deed or even in the revenue records cannot establish the case of the assessee that the land sold by it was an agricultural land. Even otherwise, the assessee in the return of income had computed the income from capital gains as under:—

Full Value of Consideration	*1,01,00,000*
Cost of acquisition after indexation	*4,72,572*
Balance	*96,27,428*
Deduction u/s 54/54B/54D/54EC/54F/54G 54GA	*96,27,428*
Taxable Capital Gains	*NIL*

24. The assessee in the return of income had not claimed that it sold agricultural land, but on the other hand had claimed deduction under section 54 of the Act, in support of which, assessee failed to furnish any documents and hence that claim of section 54 of the Act was held to be not allowable to the assessee. Only during the course of assessment proceedings, the learned Authorized Representative for the assessee claimed that the said land was agricultural land being outside the city limits and in support thereof, the necessary evidence was filed. However, the assessee failed to furnish on record any evidence to establish its case of having cultivated the said land or having carried out any agricultural operations. No agricultural income has been declared in any of the year of holding of such land. In the absence of the same and in the totality of the facts and circumstances, we find no merit in the claim of the assessee that the said land sold by the assessee is an agricultural land and sale proceeds of which are exempt from tax.

25. The learned Authorized Representative for the assessee on the other hand placed reliance on the ratio laid down by the Hon'ble Delhi High Court in Hindustan Industrial Resources Ltd. (supra), wherein it was held that the fact that the assessee did not carry out any agricultural operations did not result in any conversion of the said land into industrial land and the finding that the land was not agricultural land was reversed by the Hon'ble Delhi High Court (supra). However, the finding of the Hon'ble Delhi High Court (supra) is contrary to the finding of jurisdictional High Court in Gopal C. Sharma (supra), which has been referred to by us in the paras hereinabove, which in turn has been relied upon by the Assessing Officer/CIT(A) and

also by the learned Departmental Representative for the Revenue. Though the learned Authorized Representative for the assessee had filed compilation of case laws, but during the course of hearing had only relied on the ratio laid down by the Hon'ble Delhi High Court in Hindustan Industrial Resources Ltd. (supra). The learned authorized Representative for the assessee placed reliance on the decision of Hon'ble High Court of Bombay at Goa in CIT v. Smt. Debbie Alemao [2011] 331 ITR 59/196 Taxman 230/[2010] 8 taxmann.com 243 and Pune Bench of Tribunal in Haresh V. Milani v. Jt. CIT [2008] 114 ITD 428. The Perusal of facts of both the cases reflect that in both the abovesaid decisions, the land was cultivated by the assessee and even the nature of the crop is mentioned. However, in the facts of the present case before us as pointed out by us in the paras hereinabove, the assessee has failed to establish whether the land was used for carrying on any agricultural activity. On the other hand, findings of the authorities below is that the land was in fact barren land, as reported in 7/12 extract furnished prior to the completion of assessment and the land was not at all used for agricultural activities as being claimed by the assessee. In reply, the case of the assessee is that the land is capable of doing cultivation and agricultural activity. However, the assessee has not filed on record any evidence of having cultivated the land or any agricultural activity was being carried on except for his claim that the status of the land both in the purchase and sale deed and also in the revenue records was an agricultural land.

26. In view of the decision of jurisdictional High Court in V.A. Trivedi (supra) and Gopal C. Sharma (supra), we find not merit in the reliance placed upon by the learned Authorized Representative for the assessee on the ratio laid down by the Hon'ble Delhi High Court in Hindustan Industrial Resources Ltd. (supra). Rejecting the same, we hold that in the absence of the assessee having established its case of the land sold by him was agricultural land, we uphold the order of CIT(A) in assessing the income under the head 'income from capital gains' at Rs.96 lakh. In the absence of assessee having failed to furnish any evidence vis-a-vis its claim of deduction under section 54 of the Act, the same is also rejected. Upholding the order of CIT(A), we dismiss the grounds of appeal raised by the assessee.

13. As noted above, in the present case also, apart from the purchase and sale deeds of conveyance and 7/12 extracts from land revenue records, no other evidence has been brought on record by the assessee of having cultivated the land or carrying any agricultural activity during the period when land was held by the assessee or period prior thereto or subsequent to its sale. Thus, respectfully following the aforesaid decision of coordinate bench of the Tribunal in Abhijit Subash Gaikwad (supra), we find no infirmity in the impugned order passed by the learned CIT(A). Accordingly, grounds raised by the assessee are dismissed.

14. In the result, appeal by the assessee is dismissed.

Order pronounced in the open court on 03.10.2022.

Sd/ -	**Sd/-**
PRAMOD KUMAR	**SANDEEP SINGH KARHAIL**
VICE PRESIDENT	**JUDICIAL MEMBER**

MUMBAI, DATED: 03.10.2022

Copy of the order forwarded to:

(1) The Assessee;
(2) The Revenue;
(3) The CIT(A);
(4) The CIT, Mumbai City concerned;
(5) The DR, ITAT, Mumbai;
(6) Guard file.

By Order

Pradeep J. Chowdhury
Sr. Private Secretary

Assistant Registrar
ITAT, Mumbai