

IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "D", MUMBAI

BEFORE SHRI RAJESH KUMAR, ACCOUNTANT MEMBER  
& SHRI AMARJIT SINGH, JUDICIAL MEMBER

ITA No. 5497/MUM/2018  
Assessment Year : 2015-16

Radheshyam Savarmal Agrawal, Shivshakti Rice Mill Compound, Pandit Naka, Shahapur, Thane 421 601.	Vs.	Dy. CIT Circle - 2, Kalyan
PAN : ACWPA2683H (Appellant)		(Respondent)

Appellant by : Shri Bhupendra Shah  
Revenue by : Shri Bharat Andhle

Date of Hearing : 11.01.2021	Date of Pronouncement : 21.01.2021
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**ORDER**

**Per Rajesh Kumar, Accountant Member:**

This appeal by the assessee is directed against order of learned CIT(A)-3, Thane, dated 02.07.2018, pertaining to A.Y. 2015-16.

2. The assessee has raised following Grounds of appeal:

"1) On the facts and circumstances of the case and in law, the Hon. CIT (Appeals) erred in upholding the addition of Rs.16,40,000/- as unexplained as unexplained cash credit u/s 68 r.w.s 115BBE of the I.T Act, 1961 in respect of agricultural income earned by the appellant, not appreciating that such income was exempt from tax u/s 2(1A) of the I.T Act, 1961.

2) On the facts and circumstances of the case, the Hon. CIT (Appeals) erred in confirming the addition of Rs.9,04,44,852/- by upholding the surplus arising on sale of agricultural lands at villages Lahe, Pimpalpada, Shahpur etc. Dist. Thane to be in the nature of Business income liable to tax u/s 28(i) r.w.s 2(13) of the I.T Act, 1961 not appreciating that the lands sold were agricultural lands and the surplus arising on sale thereof was not liable for tax as per exceptions contained in section 2(14)(iii) of the I.T Act, 1961."

3. The issue raised in ground no.1 is against confirmation of addition of Rs.16,40,000/- as unexplained cash credit u/s. 68 r.w.s. 115BBE of the Act.

4. The facts of the case in brief are that the assessee filed return of income on 30.11.2015 declaring total income at Rs 51,71,990/- excluding agricultural income of Rs 16,40,000/-. The case of the assessee was selected for scrutiny and accordingly, notice u/s. 143(2) was issued, which was duly served on the assessee. During the course of assessment proceedings, the AO noticing that the assessee had shown agricultural income of Rs 16,40,000/- and called upon the assessee to file details of the said income. According to the AO the assessee failed to submit any documentary evidences to prove that agricultural activities were carried out by him. The AO also obtained a report from the Inspector of Income-tax, who visited the land. The report stated that the land is barren and there was no irrigation facilities available in and around the land owned by the assessee. Accordingly, the AO treated the agricultural income of Rs 16,40,000/- as unexplained cash credit u/s. 68 read with section 115BBE of the Act.

5. In the appellate proceedings, the learned CIT(A) affirmed the order of the AO on this issue by observing and holding as under:

*"On perusal of the above stated facts, I am of the considered view that the AO has rightly treated the agricultural Income as unexplained cash credit u/s.68 on the ground that*

*a) The appellant has not carried out any agricultural activities and this fact has been supported by the Circle Inspector's report that the lands of the appellant are fallow/barren and there are no irrigation facilities and further reported that as per local enquiry, it was gathered that since last*

*so many years no agricultural activity had been carried-out on the lands owned by the appellant. Therefore, the onus lies on the appellant to prove that the lands were used for cultivation, however, failed to proof that the lands were used for agricultural purposes or the lands were being cultivated.*

*b) The AO observed that on examination of land documents submitted by the appellant, it is gathered that these lands are marked as "Pad" grass (means barren) which is not used for agricultural purpose. The Photos of the land are enclosed as Annexure -A with the assessment order. The nature of land as per Google Earth extract is "RAPAD/VARKAS" which means infertile/barren land on which no cultivation is possible.*

*In view of the above stated facts, the addition made by the AO Is sustained and the appeal of the appellant on this ground is dismissed."*

6. The learned AR vehemently submitted before us that the assessee has submitted proof of agricultural income for A.Ys. 2012-13, 2013-14, 2014-15 and 2015-16 on 18.12.2017, which can be seen from the certified copies of the proceedings sheet of the AO (placed at page 151 of the paper-book). The learned AR submitted that this is also supported by the explanation of the assessee given to the learned CIT(A) a copy of which is filed at page 157 of the paper-book. The learned AR further submitted that the AO did not verify any of these details u/s. 133(6) or 131 of the Act from the cultivator with whom the assessee had entered into an MOU. The copy of which has been filed at page 174 to 178 of the paper-book. Besides, the learned AR argued that the AO has not issued any show cause notice for making the additions of agricultural income and relied heavily on the CBDT instruction No.20/2015 dated 29.12.2015, wherein it has been categorically stated that show cause notice must be given before making any addition. He further placed reliance on the decisions in the case of Zenith Process Mill [219 ITR 121 (Guj)] and M/s. Lal Construction in ITA No. 980/Hyd/2019. It was stated that in

both the cases referred, addition made without proper show cause notice were held to be invalid and void-ab-initio. The learned AR therefore submitted that in view of the non-issuance of notice, the addition was not tenable in law. He further submitted that the MOU with the cultivator was available at page 174 to 178 of the paper book, which clearly does not require it to maintain any details of items grown etc., the assessee received agricultural income under MOU from the said cultivator and the same was offered as agricultural income. He further stated that the addition was made by the AO merely on the basis of suspicion and surmises.

7. The Ld. AR also relied upon provisions of Section 2(1A)(a) in which it is mentioned that any rent or revenue derived from land in India used for agricultural purpose is also agricultural income. It is therefore submitted that the income derived from the cultivator in the MOU is also agricultural income. He further relied upon the decision in the case of Mansi Finance Chennai Ltd. [76 taxmann.com 312] wherein it has been held that, "where assessee earned profit on sale of land, in view of fact that land was classified as agricultural land in revenue records, it was given on lease for agricultural purpose and it had not been converted into non-agricultural land prior to sale, profit earned from sale of it could not be brought to tax".

8. The learned DR, on the other hand, relied on the orders of the authorities below and submitted that the assessee has failed to furnish necessary documents/evidences before the Assessing Officer. He also submitted that the Inspector's report also clearly indicated that the land has not been put to use for agricultural purposes and, therefore, the addition so made may be kindly confirmed.

9. We have heard both the parties and perused the material available on record. The assessee owned agricultural land, which was leased out to a cultivator to carry out agricultural activities on the said land as is evident from the revenue records /certificates placed before us during the course of appellate proceedings the copy whereof is filed at page no. 174 to 178. The assessee has received Rs 16,40,000/- as agricultural income from the cultivator under the MOU. Now the issue before us is whether the said receipt is agricultural income or not. After perusing the case laws, we find that the income so received from leasing of the agricultural land is apparently also an agricultural income and, therefore, the addition confirmed by the learned CIT(A) cannot be upheld. On perusal of the order sheet entries, we find that the AO has not issued show cause notice to the assessee before making the addition. In our considered view, any addition made without issuing show-cause notice cannot be sustained. The case is supported by the decision of Hon'ble Gujarat High Court in the case of Zenith Process Mill (supra) and the order of the Co-ordinate Bench in the case of M/s. Lal Construction (supra). We find that the lower authorities have failed to appreciate the terms and conditions of the MOU (a copy of which has been filed at page 174 to 178) of the paper-book as per which the assessee is not required to maintain any bills, vouchers and books of accounts and consequently the income received from the cultivator was the net agricultural income. This proposition is also supported by the provisions of section 2(1A)(a), wherein it has been provided that any any rent or revenue derived from land in India used for agricultural purpose is also agricultural income. Accordingly, we are inclined to set aside the order of the CIT(A) and direct the Assessing Officer to delete the addition. This ground is allowed.

10. In ground no. 2, the assessee has disputed the addition of Rs. 9,04,44,852/- made by the AO in respect of Profit on sale of agricultural land as business income u/s. 2(13) r.w.s. 28(1) of the Act which has been confirmed by the CIT(A). The facts in brief are that the assessee sold land vide registered agreements on various dates to various persons for total consideration of Rs 11,03,89,000/-. The land holding period ranges from five to twenty-five years, the details whereof are given at page 11 of the assessment order. The assessee claimed that the gain resulting from sale proceeds of the land was exempt from tax being agricultural land situated beyond 8 kms from local limits of the nearest municipal council and also the population of the area being less 10000. The Assessing Officer has stated that assessee has not carried out any agricultural activities and the land was acquired with the sole intention to sell it to various companies on profit. The Assessing Officer observed that the assessee had been doing similar transactions in each year. The Assessing Officer noted that keeping in view the nature of land traded, quantity of land traded and frequency of sales and purchases over the years prove that the assessee is involved in land trading and, accordingly, the profit therefrom has to be treated as business income. According to the Assessing Officer, the Inspector who was recruited to inquire about the land has reported that the land is barren and not being used for agricultural purposes. Finally, the Assessing Officer held that the activity of the assessee i.e. buying and selling of land was nothing but an adventure in the nature of trade and, therefore, Rs 9,04,44,852/- profit arising from sale of agricultural land is treated as business income of the assessee u/s. 28(i) r.w.s. 2(13) of the Act.

11. In the appellate proceedings, the learned CIT(A) affirmed the order of the Assessing Officer by holding that the assessee has purchased land not for agricultural activity but to derive profit from sale of land. The intention of the assessee was to make profit from sale of land and not income from cultivation. The CIT(A) has passed a very detailed order discussing various case laws at pages 38 to 47 of the appellate order.

12. The learned AR vehemently submitted before the Bench that the order passed by the learned CIT(A) suffered from several infirmities and too was passed without taking into consideration necessary facts and documents filed during the appellate proceedings. The learned AR drew our attention to Index no II known as 7/12 extracts of the land revenue record on 19.09.2017 (Page no 17-55 of the paper-book). He pointed out that a perusal of Page nos. 22, 25, 29, 32, 36, 39, 42, 45, 48, 52 and 55 of the paper-book it is clear that the agricultural land stands in the name of the assessee as the owner and the type of the land was shown as agricultural land. The assessee also filed copy of certificate showing distance of 28 kms from the Municipality limit issued by the Talati, filed at Page no 58 of the paper-book. He also filed certificate showing population less than 10,000 people, filed at page nos. 179 and 180 of the paper-book. The learned AR further pointed out that both conditions of population and distance as contained in Section 2(14) have been fulfilled by the assessee and, accordingly, the sale of agricultural land does not fall within the definition of Capital Asset and, therefore, any gain arising from sale of such land has rightly been claimed as exempt. The learned AR relied on the decision

of Chennai Benches of the Tribunal in the case of N.Jaymurgan (70 taxmann.com 2), wherein it has been held as under:-

*"Where assessee received certain amount from sale of land, in view of fact that in revenue records said piece of land had been classified as agricultural land and, moreover, it was situated beyond 8 k.m. from municipal limits and, thus, it did not come within purview of section 2(14)(iii) either under item (a) or (b), net proceeds of land in question could not be brought to tax as business, income."*

13. The learned AR further referred to the case of Mohit Harchandrai (980 taxmann.com 174) wherein, it has been held that merely because purchasers converted land to non-agricultural and it remained uncultivated for long time, would not make it as non-agricultural at time of selling of land. The learned AR therefore submitted that the said property does not fall under the definition of capital asset as defined under section 2(14) of the Act as the assessee has fallen under the exception provided by fulfilling the necessary conditions of the distance of the land being 8 Kms away from the Municipality limit and the population of the place being less than 10000. The learned AR also pointed out that the report of the inspector is obtained in the month of December 2017 i.e. three years after the sale of land i.e. FY 2014-15 hence, that does not reveal the condition on the date of sale. He further pointed out that the different use of land by subsequent buyer in December 2017 cannot be criteria for treating the land as non-agricultural. He further submitted that the land was held for a very long period before being sold which ranged from 5 to 25 years. The learned AR relied on the decision of Hon'ble Gujarat High Court in the case of Heenaben Mehta (96 taxmann.com 164) wherein it has been held that, "where assessee was an agriculturist and land owned by him had been shown as agricultural land in revenue records, mere fact that said land had been sold to an



industrial unit and had potential to be used for industrial purpose, could not be a determinative factor to treat profit earned by assessee on sale of agriculture land as business income." The learned AR further submitted that income from this land has been treated as agricultural income and has been claimed exempt and allowed as such by the Revenue in the earlier years. In support of his arguments, learned AR relied on the following decisions:

- Nandlal Agrawal [ITA 2534/AHD/2015]
- Mr. S.H.MohamedNowfel [ITA 435/Chny/2019]
- Sarnath Infra Pvt Ltd [124 ITD 71 (Lucknow)]
- Harniks Park Pvt Ltd. [41 taxmann.com 109 (Hyderabad Tribunal)]
- Smt. Bilkishbai [225 ITR 570 (MP)]
- K.P.R, Developers Ltd [117 taxmann.com 822 (Madras)]

The learned AR therefore, pleaded that profit on sale of agricultural land is wrongly treated by the AO as the business income instead of the exempt income u/s 2(14) of the Act and, therefore, prayed for deleting the same.

14. The learned DR, on the other hand, submitted that keeping in view the frequency of sales, nature of land and conduct of the assessee in buying and selling of land was nothing but an adventure in the nature of trade and not for earning agricultural income. He relied heavily on the orders of the authorities below by submitting that the Assessing Officer had elaborated the issue in depth. He, therefore, submitted that the addition so affirmed by the learned CIT(A) may be upheld.

15. We have heard both the parties and have carefully perused the material on record. We find that in this case the assessee has made a number of sale transactions during the year on which he has made gain of Rs 9,04,44,852/-. The assessee has treated the said gain as exempt as arising from sale of agricultural land which does not constitute capital asset within the meaning of section 2(14) of the Act; whereas, the Assessing Officer has treated the same as income from business u/s. 28(i) r.w.s. 2(13) of the Act by holding that the assessee has been doing business of land purchase and sale though the land sold during the year were held by the assessee from five to twenty-five years. According to the Assessing Officer this has been the regular practice of the assessee. Undisputed facts are that as per Index no II known as 7/12 extract of the land revenue record on 19.09.2017 it is clear that the agricultural land stands in the name of the assessee as the owner and the type of the land was shown as agricultural land. This land was sold in the F.Y. 2014-15 when the nature of land was agricultural land. The assessee has duly fulfilled the conditions of distance and population, which are provided for in Section 2(14) i.e. the land is location 8 kms away from the limits of the municipality and the population is less than 10000 people. In our opinion, the said land has to be held as agricultural land and the income therefrom has to be treated as gain arising from agricultural land, which cannot be brought to tax under the Act. Another fact which attracts our attention is the Inspector's report, wherein it is mentioned that the land is barren and that there is no source for irrigation and no agricultural operations were undertaken on the land, was based on the inquiry/inspection carried out in 2017, whereas the land was sold in FY 2014-15, which is approximately three years after the date of sale of land and, therefore, we cannot place reliance on this report.

The case of the assessee is supported by the decisions in the case of N Jaymurgan (supra) and Mohit Harchandrai (supra). It also finds support from decision of Hon'ble Gujarat High Court in the case of Heenaben Mehta (supra), wherein it has been held that "where assessee was an agriculturist and land owned by him had been shown as agricultural land in revenue records, mere fact that said land had been sold to an industrial unit and had potential to be used for industrial purpose, could not be a determinative factor to treat profit earned by assessee on sale of agriculture land as business income. In view of these facts and ratio laid down by the various judicial forums as discussed above, we hold that the profit earned on sale of land by the assessee cannot be treated as business income. Accordingly we set aside the order of the CIT(A) and direct the Assessing Officer to delete the addition and treat the same as exempt from tax. The ground of appeal of the assessee is allowed.

17. In the result, the appeal is allowed.

Order pronounced in the open court on 21<sup>st</sup> January, 2021

Sd/-  
(AMARJIT SINGH)  
JUDICIAL MEMBER

Sd/-  
(RAJESH KUMAR)  
ACCOUNTANT MEMBER

Mumbai, Date : 21<sup>st</sup> January, 2021.

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Copy to :

- 1) The Appellant
- 2) The Respondent
- 3) The CIT(A) concerned
- 4) The CIT concerned
- 5) The D.R, "D" Bench, Mumbai

By Order

(Assistant Registrar)  
Income Tax Appellate Tribunal, Mumbai