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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision: 20.03.2023*

\+ **<u>ITA 106/2023</u>**

PREET SINGH ..... Appellant

Through: Mr Satyen Sethi, Advocate.

Versus

ASSTT. COMMISSIONER OFINCOME TAX, CIRCLE 32(1), & ANR. ..... Respondents

Through: Mr Shailendera Singh, Sr. Standing Counsel.

CORAM:
HON'BLE MR JUSTICE RAJIV SHAKDHER
HON'BLE MS JUSTICE TARA VITASTA GANJU

[Physical Hearing/Hybrid Hearing (as per request)]

<u>RAJIV SHAKDHER, J.</u> (ORAL):

1. We have heard this matter, at some length on the previous date i.e., 20.02.2023. On that date we had recorded the following:

> *"2. This appeal is directed against the order dated 22.09.2022 passed by the Income Tax Appellate Tribunal [in short, "Tribunal"]. This appeal concerns Assessment Year (AY) 2013-2014.*
> *3. Via the impugned order, the Tribunal has, in fact, dismissed the appellant/assessee's applications preferred under Rules 11 and 29 of the Income Tax (Appellate Tribunal) Rules, 1963 [in short, "1963 Rules"].*
> *4. The first application, which was preferred under Rule 11 of the 1963 Rules, was filed by the appellant/assessee to bring on record an additional ground, while the second application, which was preferred under Rule 29, was filed to bring on record additional evidence.*
> *5. The heart of the matter is, as to whether or not the appellant/assessee should have been allowed to raise an additional ground (supported by the evidence placed along with the applications) that the land which the appellant/assessee sold was not a capital asset within the meaning of Section 2(14) of the Income Tax Act, 1961 [in*

short, "Act"].

6. Broadly, the Tribunal has concluded that since the additional ground did not emerge from the facts and material that was available with the Assessing Officer (AO), the applications could not be entertained.

7. Prima facie, in our view, the record seems to disclose that what was sold was agricultural land. However, the appellant/assessee had claimed deduction under Section 54B and Section 54F of the Act.

8. The statutory authorities, which included the Tribunal, have concluded that exemptions claimed under the said provisions were not available.

9. Section 54B, inter alia, required the appellant/assessee to invest the proceeds from sale of land in a land which was used for agricultural purposes, while Section 54F required the proceeds to be invested in a residential house.

10.The finding of fact returned by the AO was that the proceeds obtained by the appellant/assessee were invested in a commercial property. Thus, the deduction claimed, both, under Sections 54B and 54F was denied.

10.1 It is this finding which has been sustained by the Tribunal.

11. Mr Satyen Sethi, who appears on behalf of the appellant/assessee, has stated that, although, the land which he had sold was an agricultural land, it was not a capital asset within the meaning of the provisions of Section 2(14)(iii) of the Act.

11.1 In support of this plea, Mr Sethi has drawn our attention to sub-clause (a) and (b) of Section 2(14)(iii), as it stood at the relevant time. The relevant part of the said provisions are extracted hereafter:

> *"2. In this Act, unless the context otherwise requires:*
>
> *xxx xxx xxx*
>
> *(14) capital asset means-*
>
> *xxx xxx xxx*
>
> *(iii) agricultural land in India, not being land situate-*
>
> *(a) in any area which is comprised within the jurisdiction of a municipality (whether known as a municipality, municipal corporation, notified area committee, town area committee, town committee, or by any other name) or a cantonment board and which has a population of not less than ten thousand; or*
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> *(b) in any area within such distance, not being more than eight kilometers, from the local limits of any municipality or cantonment board referred to in item (a), as the Central Government may, having regard to the extent of, and scope for, urbanization of that area and other relevant considerations, specify in this behalf by*

notification in the Official Gazette."

12. Mr Sethi says that the land which was sold was beyond the 8 km range. According to him, the land was at a distance of 24 kms from the municipal corporation of Bhiwadi.
12.1 In support of this plea, Mr Sethi has placed reliance on the certificate issued by the concerned Tehsildar of Kotkasim.
12.2 Furthermore, Mr Sethi says that the population of the concerned village, i.e., Village Biranvas, was at the relevant time only 800 and, therefore, it fulfilled other attributes necessary for excluding it from the scope and ambit of the definition of capital asset, as contained in Section 2(14)(iii) of the Act.
12.3 The argument is that if what was sold/transferred is not a capital asset, no capital gains would arise.
13.In support of this plea, Mr Sethi has relied upon the following judgments:
(i) DCM Benetton India Ltd. v. CIT (2008) 173 Taxman 283 (Del)
(ii)National Thermal Power Co. Ltd. v. CIT (1998) 229 ITR 383 (SC)
14.On the other hand, Mr Shailendera Singh, who appears on behalf of the respondents/revenue, has opposed the admission of the appeal.
*15. Mr Singh says that the judgment of the Supreme Court in the **National Thermal Power Co. Ltd**. case clearly holds that additional ground or material can be admitted if no fresh facts are required to be examined.*
16. It is Mr Singh's contention that in this case, the additional ground that the appellant/assessee sought to press before the Tribunal would require examination of additional material, i.e., the certificates issued by the Tehsildar and Sarpanch.
17. Prima facie, the argument advanced by Mr Singh does not impress us. The reason being that the order passed by the AO clearly reveals that what was sold was agricultural land. The finding of fact returned by the AO in this behalf is extracted hereafter:

> *"….Therefore, the proceeds of capital gains arose due to sale of agricultural property in tune of Rs. 46,51,412/- is being added back to the total income of the assessee."*

18. Therefore, what is required to be examined is: whether the subject agricultural land is a capital asset within the meaning of Section 2(14)(iii) of the Act?
19. However, Mr Singh is right that in order to reach a conclusion either way, the material sought to be placed on record by the appellant/assessee would have to be examined.
20. In our view, which is again prima facie, the Tribunal being, under the Act, the final fact-finding authority for determining both issues of

> *fact and law, it could have examined the said aspect, either on its own or in the alternate, remitted the matter to the AO for examination of the material brought on record by the appellant/assessee.*
> *21. Given this position, in our view, the matter requires further examination.*
> *22. Issue notice.*
> *22.1. Mr Shailendera Singh accepts notice on behalf of the respondents/revenue.*
> *23. Mr Singh says that he will return with instructions.*
> *24. In case instructions are received to resist the appeal, the matter will be heard on the next date of hearing."*

2. We have heard the matter, once again, today. As would be evident from what was recorded by us at the hearing held on 20.02.2023, there are aspects which need to be examined based on the material placed on record by the appellant/assessee. Accordingly, the following questions of law are admitted:

> *"(i) Whether the additional grounds based on jurisdictional facts coming to the knowledge of the Appellant during appellate proceedings before the ITAT but going to the root of the matter deserve admission and adjudication, for the tax cannot be levied and collected without the authority of law?*
> *(ii) Whether on the facts and circumstances of the case and in law, ITAT was right in not admitting the additional grounds that capital gains on sale of agricultural land at Village Biranvas was not liable to tax because certificates of the Tehsildar that land in question is situated at 24 km of Municipal Corporation Bhiwadi and that of the Sarpanch as to the population of the village were not on record of the authorities below?"*

3. To be noted, it is the case of the appellant/assessee that the subject land was agricultural land but not a capital asset. Reliance, in this behalf, is placed on the provisions of Section 2(14)(iii) of the Income Tax Act, 1961 [in short, "Act"].

4. Both counsels agree that this aspect of the matter would require

examination/appreciation of the material placed on record by the appellant/assessee. Pertinently, the Tribunal did not deem it fit to examine this aspect of the matter. According to the Tribunal, this aspect did not emerge from the facts and material made available to the Assessing Officer (AO). Therefore, the Tribunal did not permit the appellant/assessee to press the additional ground.

5. In our view, the Tribunal could have examined this aspect of the matter either itself or had it examined by the AO, having regard to the fact that it is required to deal with both issues of fact and law. This aspect of the matter would clearly go to the root of the jurisdiction of the AO to assess the income that arose on account of the transfer of the subject agricultural land.

6. In these circumstances, the questions of law, as framed, are answered in favour of the appellant/assessee and against the respondents/revenue.

7. Accordingly, the impugned order is set aside.

8. The matter is remanded to the AO to reexamine the issue as to whether or not the subject land was, in fact, a capital asset within the meaning of Section 2(14)(iii) of the Act, based on the additional material sought to be placed by the appellant/assessee before the Tribunal.

9. Needless to state, nothing stated hereinabove would impact the decision on merits that the AO will take in the matter.

10. The appeal is disposed of in the aforesaid terms.

RAJIV SHAKDHER, J

TARA VITASTA GANJU, J

MARCH 20, 2023 / tr

Click here to check corrigendum, if any