

IN THE INCOME TAX APPELLATE TRIBUNAL DELHI

(DELHI BENCH 'H' : NEW DELHI)

**BEFORE SH. SHAMIM YAHYA, ACCOUNTANT MEMBER
AND**

SH. ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No.7620/Del/2019, A.Y. 2011-12

Sh. Vipin Kumar S/o. Sh. Jagbeer Singh VIII-Atoota, Hapur PAN : BBGPV1275C	Vs.	ITO, Ward-3(5), Hapur
(APPELLANT)		(RESPONDENT)

Assessee by	Sh. R.K.Garg, CA
Revenue by	Sh. R.S. Yadav, Sr. DR

Date of hearing:	21.12.2022
Date of Pronouncement:	16 .01.2023

ORDER

PER ANUBHAV SHARMA, JM:

The appeal has been filed by the Assessee against order dated 31.07.2019 passed in appeal no. 358515721080118 for assessment year 2011-12, by the Commissioner of Income Tax (Appeals)-Ghaziabad (hereinafter referred to as the First Appellate Authority or in short 'Ld. F.A.A.')

in regard to the appeal before it arising out of assessment order dated 13.12.2017 u/s 143(3)/147 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') passed by ITO-Ward-3(5), Hapur (hereinafter referred as Ld.Assessing officer or in short Ld. AO).

2. The facts of the case are that the AIR information from sub registrar, Hapur Second in the case was received w.r.t sale of property for total

consideration of Rs. 1,42,11,000/- during the F.Y, 2010-11. To verify the correctness of the information, query letter dated 26.08.2016 was issued and duly served upon the assessee. In compliance to the same, assessee filed his reply along with copy of sale deed, Khatauni and report of Gram Pradhan regarding situation of land from municipal limit of Hapur. The assessee in his reply before Ld. AO, has stated that he has sold his agricultural land situated in Viliage-Upeda, Hapur, which is more than 7 km from outside of municipal limit from all sides of Hapur. The land in question is not a capital asset within the meaning of Section 2(14) of the I.T. Act. Besides, after sale of land, he has purchased another agriculture land for cultivation. However, the Ld. Ao observed that the assessee had not, filed any evidence for purchase of agricultural land and claim of exemption u/s 54B of the I.T. Act.

2.1 Ld. AO observed that, on the perusal of sale deed it was found that above property was co-owned by two persons namely Vipin Kumar and Sh. Sankoch (assessee). The said Immovable property was sold for total sale consideration of Rs.1,00,00,000/-though the circle rate as per the registering authority is Rs. 1,42,11,000/-. Hence, in view of the provisions of section 50C of the I.T. Act Ld. AO was of view that the sale consideration of Rs. 1,42,11,000/- is required to be adopted for computation of Capital gains. Further that as per the sale deed page no. 36, the land was sold for the purpose of residential use and hence is a capital asset, sale of which renders the assessee for payment of LTCG.

2.2 On these fact having reason to believe that the income of Rs.71,05,500/- chargeable to tax has escaped assessment within the meaning of Sec. 147 of the Income tax Act, 1961, case was reopened. Assessee however, pleaded the land sold is agricultural land, which is non capital asset. However, from the documents available on record, the following facts were observed by the Ld. AO :

1. Copy of registered sale deed dated 13.01.2011 filed by the assessee reveals that the circle rate of the property (not agricultural land as per deed) has been adopted as the circle rate for residential property and not for agricultural land. The deed has been executed as “Vikray Vilekh Bhumi” and not as agricultural land.
2. No where in the sale deed it has been mentioned that there is any standing crop or any tubewell on the said land, though as per the evidence furnished by the assessee with regards to growing of crop for Fasli year 1416 (01.07.2008 to 30.06.2009), in the name of Sankoch, Vipin Kumar, Vinod Kedar, Khasra no. 175, 0.6190, the land has tubewell and crop grown is Chara and Wheat. Fasli Year 1417 (01.07.2009 to 30.06.2010) in the name of Sankoch, Vipin Kumar, Usha Sharma, Khasra No. 175,0.6190, the land has tubewell and crop grown is Dhan and wheat. Similarly for Fasli Year 1418, in the name of Sankoch, Vipin Kumar, Usha Sharma, Khasra No. 175,0.6190, the land has tubewell and crop grown is Bajra, Chara and wheat. It is further relevant to mention that the evidence for fasli year 1418 (01.07.2010 to 30.06.2011), there are some citations in the name of Vinay Kedar, Chara 143,05.11.2004 etc. which are not clearly understandable. However, it is clear that even after the sale the wheat crop has been grown on this land which has been registered as residential plot. The registered deed has been executed on 29.01.2011 and the fasli year ends on 30.06.2011. Will growing of crop on residential property change its status to agriculture land, as alleged by the counsel. How the name of Smt. Usha Sharma is appearing on the document for Fasli Year 1417 is again not proven by any documentary evidence. Where the tubewell has gone on the date of registered deed which has again emerged for fasli year 1418.
3. The sale deed at page no 31 mentions that the area of land sold is

4330 Sq. mts and further that after this sale there is no portion of this khasra left with the seller. How the name of Sankoch and Vipin are still appearing is not known. The sale deed further clarifies that there is a room constructed on this plot on 9 sq mts, Hotel of Krishanveer in the East, Land (not agricultural land) of others in North and In South direction, the land has a front of 8 mts on Garh Delhi Road, i.e. NH-24, Purpose of purchase has been stated as for residential use. The exact facts are reproduced from the sale deed relevant to the location, construction, utilization and payment of stamp charges, land being located on National Highway and is well covered by Abaadi,

4. The counsel in reply dated 30.09.2016 filed on 05.10.2016 has stated that Besides, after sale of land, the assessee purchased the agriculture land for further cultivation. This clearly indicates that even the counsel was fully aware that the land sold was a capital asset, otherwise further purchase of another agricultural land has no significance of any kind.
5. The assessee in his affidavit filed on 10/- stamp paper has stated on oath that the deponents before the sale never applied for change of land use (point 7 of the affidavit filed on 31.05.2017. However, the document filed from the Rajaswa Abhilekhagar signed by Tehsildar on 27.09.2016 states as under :- “.....”
6. The above change of land use for the portion of same property which has now been sold by the assessee to Smt. Usha Sharma clearly evidences that the assessee has furnished incorrect facts in the affidavit. It is further surprising that as per the sale deed there is no portion of the Sand left with the seller, but as per this document duly signed by the Tehsildar, Hapur, another portion of the same Khasra no

175/0.6390 Hect, has been transferred in the name of Smt. Krishna Devi W/o Sh. **Krishna veer Singh for** total consideration of Rs. 80,000/- dated 16.08.2011. The registered deed in the name of Smt. Usha Sharma was executed on 29.01.2011 and her name transferred on 09.03.2011. Here it is worth noting, that another part of the same khasra has been sold merely for Rs. 80,000/- and that too after the sale of land to Smt. Usha Sharma. This clearly indicates that the land sold to others was being used for agriculture, which could fetch only this small sale consideration of Rs. 80,000/- only. It is further relevant to mention that while changing the name of the owner in the records, the circle rate is written and not the actual sale consideration, as is evident from the details of Smt. Usha Sharma, from whom sale consideration received is Rs. 1,00,00,000/- whereas the circle rate is Rs. 1,42,11,000/-, which has been entered in the document for change of name.

7. As regards the certificate from Gram Pradhan, Smt. Reenu Kori in her letter dated 19.09.2016, has stated that the assessee is resident of Atoota Village and is engaged in agriculture activity only. further in letter dated 27.09.2016, she has stated that the distance of Upeda from Nagr Palika is about 7 kms, but which Nagar Palika has been mentioned is not at all clear.
8. Similar certificate from Lekhpal has been filed which states the distance as 9 Kms. However, neither the lekhpal nor Gram Pradhan is competent authority to certify the distance.
9. Further in view of the case of CIT vs. Sidsharth J. Desai (1982) 10 Taxman 1 of Hon'ble Gujrat High Court the Hon'ble Court has stated many factors to be considered while determining whether a particular land is agricultural land or not. One of the factor is whether there were

any previous sales of the portion of land for non-agricultural use. In the instant case, the order u/s 143 by Revenue authorities has been passed for portion of the same land indicating that another portion of the same land was being used for purpose other than agriculture and the same has been sold as non agricultural land.

10. The provisions of section 54B of the I.T.Act, also clearly states that the land which was being used for agriculture two years prior to sale can be a capital asset, the sale of which attracts payment of LTCG.

2.3 Then for further verification of the status of land and the reason for charging of stamp charges as non agricultural land, a letter dated 21.09.2017 was sent to the Sub Registrar-II, Hapur, for furnishing information. On which it was reported that *“The words “sale for residential property” simply state that the document refers to sale of a property that is residential in nature and hence the stamp duty charged is as per the relevant provisions of the collector’s rate list pertaining to sale of property for residential purposes. To clarify further, when parties by virtue of sale deed declare in unequivocal terms that the said property is “residential” in nature then only the valuation of the property is done as one as per the prevailing rates in the circle”.*

3. Accordingly , Ld. AO made an addition of Rs. 71,05,500/- of sales consideration as per section 50C of the Act and also added purchase consideration Rs. 39390/-, thus, arising at long term capital gain of Rs. 68,25,450/-.

4. Ld. CIT(A) has sustained the addition. However, what transpires is that appellant had prejudiced additional evidences to be considered under Rule 46A of the Income Tax Rules, 1962 which included following :

1) Copy of affidavit to assert that request were made before making the decision regarding the nature of land sold which was requested repeatedly during the assessment proceedings three times.

2) Copy of order of Collector stamp duty dated 28.10.2014 which confirmed that there was no abadi or other activities in the area in question, when the agriculture land was sold on 31.01.2011.

3) Copy of 4 purchase deed of agriculture land which was purchased after sale of the agriculture land in question.

The Ld. CIT(A) had however not taking the additional evidences that in spite of having opportunity, these evidences were not produced before Ld. AO.

5. Assessee has come in appeal before this Tribunal raising following grounds :-

“1. That under the facts & circumstances of the case, the learned CIT (Appeal) has erred not to admit the additional evidence filed under rule 46A on the plea that appellant could not substantiate why these evidences were not placed before the AO. The finding is arbitrary, unjust, uncalled-for, and in any case illegal.

2. That under the facts and circumstances of the case, the ld. CIT(A) has erred not to decide categorically the legality of proceedings u/s 148 on the basis that legality was already disposed of by the AO. The finding and decision is arbitrary, unjust, uncalled for, and against the principal of natural justice.

3. That under the facts and circumstances of the case, the ld. CIT(A) has erred to merge the ground no. 2 to 4 and dismiss the same without considering the material placed on record and not to decide the ground no. 2, 3 & 4 separately. The merger of ground and finding the dismissal is arbitrary, unjust, uncalled for, and in any case illegal.

4. That under the facts and circumstances of the case, the Ld. CIT(A) has erred to hold that agriculture land sold was a

capital assets assessable at Rs. 68,25,450/- u/s 50C as against exempt u/s 2(14)(III). The finding of capital assets at assessability at Rs. 68,25,450/- is arbitrary, unjust, uncalled for, illegal and gaisnt the material placed on record.

5. *That under the facts and circumstances of the case, the ld. CIT(A) has erred to decide the appeal without making the local enquiries which were requested to be made through Tehsildar, SDM and the departmental authorities. The decision without finding of correct facts is arbitrary, unjust, uncalled for, illegal and against the natural justice.*

6. *That under the facts and circumstances of the case, the ld. CIT(A) has erred to confirm the computation of LTCG at Rs. 68,25,450/- without providing an opportunity to substantiate the value adopted by the AO. The confirmation and finding is arbitrary, unjust, uncalled for, illegal and against the natural justice.*

7. *That under the facts and circumstances of the case, the Ld. CIT(A) has erred not to admit the evidence of deduction u/s 54B for purchases of agriculture land on the plea that same was not claimed through revised return an confirming the computation of LTCG at Rs. 68,25,450/-. The finding is arbitrary, unjust, uncalled for, illegal and against the principal of natural justice.*

8. *That under the facts and circumstances of the case, the ld. CIT(A) has erred not to decide the legality of levy of interest u/s 234A & 234B at Rs. 15,997/- and 12,76,983/-, non adjudication of this ground is arbitrary, unjust, uncalled for and illegal.”*

6. Heard and perused the record.

7. On behalf of the assessee it was primarily submitted that only on the basis of high stamp duty levied by the registration authority, Ld. AO has concluded the land is a capital asset being non-agricultural land while copy of Khasra and Khatauni and other relevant documents were ignored in which the land was shown as agricultural land and the nature of standing crops is also mentioned. It was submitted that the agricultural land was abutting the main highway,

therefore, the market value was more the circle rate. The land was purchased by Ms. Sharma for her use and the land purchase was converted into non-agricultural land on order of SDM in favour of Usha Sharma. It is also submitted that the Ld. Tax Authorities below failed to appreciate. The relevant evidence produced and sub unit CIT(A) arbitrarily rejected the additional evidences produced before it. The ld. Counsel further submitted that in the case of CIT vs. Sarita Rani (2004) 270 ITR Page 43, Punjab & Haryana High court has held that if at the time of sale of land no agriculture was done but the assessee was doing agriculture on the land within 2 years from the sale, he is entitle to the benefit of section 54B. That similar view has also been taken in case of CIT vs Siddharth J Desai 1982 10 TAXMAN Page 1. He also relied Goverdhan Bhai Kahan Das Dalwadi vs CIT Gujarat (1981) 127 ITR Page 669 to submit that if entries of land in land revenue shows that land was agriculture, land revenue was paid, land was for agriculture use and permission for non agriculture use not obtained by the purchaser before the date of sale, presumption is that land is agriculture. He relied for similar view Dr Modi Bhai D Patel vs. CIT (1981) 127 ITR Page 67, CIT vs Madha Bhai H Patel 1994 208 ITR Page 638.

8. Ld. DR however submitted that the Tax Authorities below have committed no error. It was submitted that when the Stamp Authority have considered the land to be non-agricultural and the land is not established to be within the statutory limits the same has been rightly treated as capital asset. It was submitted that by merely mentioning of growing crops in the revenue record, the nature of land would not change from a capital asset to agricultural land.

9. The Bench has given thoughtful consideration to the matter on record and submissions and what transpires from the orders of Ld. Tax Authorities below is that on the basis of situation of the disputed land outside the municipal limits

the land has not been considered to be capital land for the purpose of Section 2(14) of the Act. Primarily it is on the basis of the fact that in the sale deed, land was mentioned to be sold for residential purpose and that it has been assessed to stamp duty as a non-agricultural land, the land was considered to be of capital in nature. However, the matter of fact is that in the revenue record copies filed before Ld. AO it was mentioned that land is under use for agricultural purposes. It has standing crops and irrigated by tubewell. At page no. 30 of the paper book there is report of the concerned revenue officer Lekhpal that Khasra no. 175 of which the land sold is part is situated at distance of 9 kilometer away from Nagar Palika.

10. However, the matter of fact is that at page no. 23 of the paper book, there is a copy of revenue record in the form of Kisan bahi and Khatauni for the Falsi year 1414 to 1422 i.e. assessment year 2008-09 to 2012-13. There it is mentioned that in proceedings u/s 143 of the UP Jamindar abolition of Land Reforms Act, 1950 which authorizes Sub Divisional Magistrate / Assistant Collector to change the type and nature of any land from agricultural land to residential proceedings was initiated under a petition title Vinay and Kedar vs. State and by order dated 05.11.2004 land forming part of Khasra no. 175/ 0.619 Hectare stood converted for non-agricultural purposes. Ld. AO has specifically taken note of it in the assessment order. Thus, there was the change of land use before it was sold by the assessee.

11. In this context, in its written submission dated 18.08.2017 filed before Ld. CIT(A), the assessee had claimed that *“the land in question was already sold much earlier to Vinay and Kedar as agricultural land who applied for conversion of land use for which assessee has no concern and third party sold the aforesaid land to Usha Sharma in the preceding year as per Khasra filed. That after sale of land to Usha Sharma further agricultural land was sold to Krishna Devi. It is in material as per land revenue record there was an adverse*

possession in possession of Krishanveer which was handed over to Usha Sharma and land of assessee was transfer in the name of Krishna Devi, w/o of Krishanveer". In its affidavit dated 27.05.2017 available at page no. 35 -36 of the paper book. The assessee has made specific deposition that at the time of sale of land, it was an agricultural land and was not non-agricultural land and was not non-agricultural land and that the deponents (assessee) before the sale never applied for change of land use.

12. It appears that Ld. AO has not taken any inquiry to ensure that when there were various co-sharers holding different title in a survey number to which assessee was also a co-sharer, then if the whole land in the survey number was converted to non-agricultural purpose or land falling in the share of assessee was not converted to non-agriculture purpose. Ld. AO seems to have fallen in error in reading the revenue records without seeking its due clarification from the assessee. At the stage of appeal, Ld. CIT(A) has fallen in error in not allowing assessee to produce further evidences to show that of land falling in the share of assessee of which he was also co-sharer was not converted, before its transfer by the assessee.

13. The crucial point of controversy thus, needs to be restored to the files of Ld. CIT(A) to allow the additional evidences of the assessee and to let the assessee establish that the land falling in the share of assessee which was sold by the impugned sale deed was not converted to non-agricultural purposes by any order of revenue authorities. If that stands establish the mere fact that it was sold for the purpose of residence of the vendor or that it was valued for the purpose of stamp papers by the registered authority as a non-agricultural land would not be material and assessee will be entitled to benefit of Section 54B of the Act.

14. According the grounds raised are allowed for statistical purposes and **the appeal of assessee is allowed for statistical purposes** only. The issue is restored to the files of Ld. CIT(A) to pass a fresh order in terms aforesaid observations of this bench.

Order pronounced in the open court on 16th January, 2023.

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Date:- 16.01.2023

Binita, SR.P.S

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-
(ANUBHAV SHARMA)
JUDICIAL MEMBER

ASSISTANT REGISTRAR
ITAT, NEW DELHI