IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.633 OF 2016

Mr. Hari Jasumal Thakur .. Appellant

v/s.

Commissioner of Income Tax(Appeals)-3
Mumbai .. Respondent

Mr. Jehangir Mistri, Senior Counsel a/w Ms. Viloma Shah, Ms. Juhi Bahirwani I/b Hariani & Co. for the appellant
Mr. Suresh Kumar for the respondent

CORAM : AKIL KURESHI &
M.S. SANKLECHA, J.J.

DATED : 3rd DECEMBER, 2018.

P.C.

1. This appeal is filed by the assessee challenging the judgment of the Income Tax Appellate Tribunal ("the Tribunal" for short) raising following questions for our consideration :-

> *(i) Whether on the facts and circumstances of the case and in law, the Tribunal was right in holding that the agricultural land bearing Survey No.37, admeasuring 32 Aar, and Survey No.38 Hissa No.2(Pt.) admeasuring 96.7 Aar aggregating to 128.7 Aar equivalent to 12870 sq.mts. or thereabouts situate lying and being at Mauje Nighu, Taluka Talathi Saja Naygaon, Taluka Thane District Thane i.e. the said property was a capital asset under the provisions of the Income Tax Act, 1961?*
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> *(ii) Whether on the facts and circumstances of the case and in law, the Tribunal was right in holding that a chargeable*

capital gain arose in the hands of the appellant as a result of the execution of the Sale Deed dated 26 May 2008?

(iii) Whether on the facts and circumstances of the case and in law, the Tribunal ought to have held that the agricultural land bearing Survey No.37, admeasuring 32 Aar, and Survey No.38, Hissa No.2(Pt.) admeasuring 96.7 Aar aggregating to 128.7 Aar equivalent to 12870 sq.mts. or thereabouts situate lying and being at Mauje Nighu, Taluka Talathi Saja Naygaon, Taluka Thane District Thane i.e. the said property was within the distance of 8 kms from the local limits of the Municipality?

(iv) Whether on the facts and circumstances of the case and in law, the Tribunal ought to have held that the agricultural land bearing Survey No.37, admeasuring 32 Aar, and Survey No.38, Hissa No.2(Pt.) admeasuring 96.7 Aar aggregating to 128.7 Aar equivalent to 12870 sq.mts. or thereabouts situate lying and being at Mauje Nighu, Taluka Talathi Saja Naygaon, Taluka Thane District Thane i.e. the said property fell beyond the distance of 8 kms as measured by the shortest road distance as referred to in Circular bearing no.17/2015 issued by the Central Board of Direct Taxes dated 6 October, 2015 ?

2. The issues relate to Assessment Year 2009-10. The facts may be recorded in brief which are as under.

3. The appellant assessee had sold agricultural land, comprising of Survey Nos. 30, 37, 38 and 46 situated at village Nighu for a sale consideration of Rs.3.80 crores under an agreement dated 26.05.2008. The assessee on the premise that the said land did not form part of the his capital asset, did not offer the profit arising out of said sale to capital gain in the return filed for the said assessment year 2009-10.

The Assessing Officer held that the land in question was a capital asset. The sale of such capital asset would give rise to capital gain chargeable to tax. The assessee carried the matter before the Commissioner of Income Tax (Appeals) ["CIT(A)" for short]. The CIT(A) allowed the appeal. Upon which, the issue travelled to the Tribunal at the hands of the Revenue. The Tribunal allowed the Revenue's appeal mainly on the ground that the land in question was situated at the distance of 5 kms from the limits of Navi Mumbai Municipal Corporation and, therefore, it was not excluded from definition of term "Capital Asset". A contention which is sought to be raised before us that the distance by shortest route by road from the limits of Navi Mumbai Municipal Corporation and the land in question is more than 8 kms, was not raised before the Revenue Authorities or the Tribunal.

4. Before recording and dealing with the rival contentions, we may note that before the Assessing Officer, the assessee had contended that the land in question was situated beyond 8 kms from municipal limit. In support of this, the assessee had produced a certificate issued by Thane Urban Agglomeration and Agricultural Department that Nighu was beyond 8 kms from Thane Municipal Corporation. The Assessing Officer however, found that Nighu and several other villages were

separated from the Corporation vide notification dated 08.06.2007. He also noted that village Nighu was situated at a distance of 5 kms from Navi Mumbai Municipal Corporation.

5. Counsel for the appellant drew our attention to the relevant statutory provisions and strenuously urged that the Tribunal has committed an error in interpreting Section 2(14) and in particular clause 3 thereof. He submitted that it was the Thane Municipal Corporation which had jurisdiction over the land in question. The distance of land from Thane Municipal Corporation limits is in excess of 8 kms. Counsel also submitted that the assessee now has reliable material to point out that even the distance by road between the limit of Navi Mumbai Municipal Corporation and the land in question is in excess of 8 kms. In this context, he relied on a letter dated 14.10.2015 written by the Assistant Director, Town Planning, Navi Mumbai Municipal Corporation to the assessee certifying that the distance between the land in question and the limit of Navi Mumbai Municipal Corporation is approximately 9 kms.

6. On the other hand, learned Counsel for the Revenue opposed the appeal contending that the Tribunal has rightly interpreted Section

2(14) of the Act. The interpretation advanced by the assessee is not acceptable. He further submitted that as the question of road distance between the land in question and Navi Mumbai Municipal Corporation limits was never raised by the assessee earlier, such contention should not be permitted now.

7. In connection with the assessee's legal contention regarding definition of term "Capital Asset', we may peruse the relevant statutory provision. Section 2(14) of the Act defines the term capital asset which includes property of any kind held by an assessee whether or not connected with his business or profession. However, clause (iii) thereof excludes agricultural land which as it stood at the relevant time read as under :-

> *" 2(14) (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, urbanisation of that area and other relevant considerations, specify in this behalf by notification in the Official Gazette".*

8. A perusal of sub-clause (iii) would show that exclusion of agricultural land from the term 'capital asset' would again be excluded if the land falls either under (a) or (b) thereof. Sub-clause (a) would cover any agricultural land which is comprised within the jurisdiction of the municipality or cantonment board etc. and which has a population of not less than ten thousand. Accordingly, if the agricultural land under reference is one which is comprised within the jurisdiction of a municipality or cantonment etc. board having population of not less than ten thousand, it would not fall outside the definition of 'capital asset'. Clause (b) would cover any area within such distance not more than 8 kms from local limits of municipality or cantonment board etc. referred to in item (a) as a Central Government may specify under a notification.

9. In plain terms, therefore, an agricultural land may fall either in clause (a) or clause (b) or neither but not both. If it happens to be a land comprised within the jurisdiction of municipality or cantonment board etc., having population not less than ten thousand, it would fall under clause (a). If this specification is not satisfied, the question would be does it still fall under clause (b), in which requirement is that

the distance of the land should not be more than 8 kms from the local limits of any municipality or cantonment board referred to in item (a). In the present case, the eventuality of the land falling neither in sub-clause (a) or sub-clause (b), as we have explained below, does not arise.

10. The contention of the Counsel for the assessee that the land in question is within the jurisdiction of the Thane Municipal Corporation and, therefore, it would fall neither within clause (a) nor within clause (b), cannot be accepted. Firstly, there is nothing on record to suggest that the land in question is within the jurisdiction of Thane Municipal Corporation. Reference to the Notification dated 08.06.2007 of the Government of Maharashtra Rural Development and Water Conservation Department would not clarify this position. This notification provides that local areas specified in several villages, which includes village Nighu are included in the Thane District. It is an agreed position that the Thane Municipal Corporation is entirely different entity having different existence and jurisdictional limits as compared to Thane District. Thus, the very basis of the argument that the land comprises of Thane Municipal Corporation is not correct. Even if it were so, then also the land would be covered by sub-clause

(a) in which case, it is not necessary to verify if it satisfies the conditions of sub-clause (b) at all. Reference to the distance of the land being more than or less than 8 km from limits of the Corporation would then not arise at all.

11. Additionally, we also find that accepting the contention of Counsel for the assessee, would make sub-clause (b) of clause (iii) of section 2(14), otiose. It is only when a particular land is not comprised within the jurisdiction of municipality or cantonment board etc., as referred to in sub-clause (a), the question of applicability or inapplicability of sub-clause (b) would arise. We do not think that legislature has envisaged any land fulfilling the description contained both in sub-clause (a) and sub-clause (b). The reference to the words "any municipality or cantonment board referred to in item (a)" in sub-clause (b) must be to "any municipality or cantonment board which has a population of not less than ten thousand", which is the phrase used in sub-clause (a).

12. Contention of the Counsel for the appellant was some what unusual. He argued that land comprised within the jurisdiction of Thane Municipal Corporation (a contention which we have not

accepted) and was situated beyond 8 kms from the limits of the Corporation. According to him therefore, the land would therefore not fall within sub-clause (a) or (b); even though it may be situated at a distance less than 5 kms from Navi Mumbai Municipal Corporation. We cannot accept this proposition. If land comprises within the jurisdiction of the Thane Municipal Corporation, it falls falls within sub-clause (a). In which case, reference to sub-clause (b) is not necessary. On the other hand, as we held, if it does not comprise within the jurisdiction of Thane Municipal Corporation, it would not fall under sub-clause (a). But if it is situated at a distance of less than 8 kms from Navi Mumbai Municipal Corporation, it would fall under sub-clause (b). In either case, it would be referred as a capital asset.

13. In our opinion, therefore, the Tribunal has correctly appreciated the legal position in this regard. No question of law, therefore, arises.

14. The alternative contention of the counsel for the assessee however, requires some consideration. Counsel for the assessee drew our attention to a letter dated 14.10.15 written by the Assistant Director, Town Planning, Navi Mumbai Municipal Corporation. According to this letter, the distance by road or the land in question and

the Navi Mumbai Municipal Corporation is approximately 9 kms. If it is so established, in any case, the assessee may be entitled to the benefit under the Act. However, this document was not part of the proceedings below. We would, therefore, not examine this question before us for the first time. Instead, we allow the assessee to produce this document before the Tribunal. The Tribunal may thereafter enable the Revenue to respond to such document and take a fresh decision with respect to the distance between the limits of Navi Mumbai Municipal Corporation and the land in question. We also note that the statutory provision prevailing at the relevant time, did not clarify the manner in which the distance would be measured i.e. either by road or aerially. The legislature now specifically provides that such distance would be measured aerially. This was introduced by Finance Act, 2013 w.e.f. 01.04.2013. In this respect, our attention was drawn to the Circular dated 06.10.2015 issued by the Central Board of Direct Taxes clarifying that judgment of this Court dated 30.03.2015 in ITA No.151 of 2013 in the case of Smt. Maltibai R. Kadu holding that the amendment in question would apply prospectively, is accepted by the Revenue.

15. The impugned judgment of the Tribunal is set aside. The appeal of the Revenue is restored before the Tribunal, which may be disposed

of in accordance with law after examining the issue noted above.

16. Accordingly, the appeal is disposed of.

(M.S. SANKLECHA, J.) **(AKIL KURESHI, J.)**