IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 3099 OF 2022

Ashok Chaganlal Thakkar)
(PAN: AAAPT7754L) aged 60 years,)
occupation business an individual)
residing at 1403/04, Marathon)
Galaxy-II, L.B.S. Road, Mulund)
West, Mumbai 400 080) ...Petitioner

Versus

1.National Faceless Assessment Centre)
(formerly Known As National)
E-assessment Centre)
Income Tax Department, New Delhi)

2.Income Tax Officer – Ward 26(1)(1))
303, 3rd floor, Aaykar Bhavan,)
Maharishi Karve Road, Mumbai-20)

3.The Principal Commissioner of)
Income Tax-17, Mumbai)
241, 2nd floor, Kautilya Bhawan, G-)
Block BKC, Mumbai 400 051)

4. The Union of India)
Through the Secretary, Ministry of)
Finance, Government of India,)
North Block, New Delhi 110001) ...Respondents

Mr. Devendra H. Jain a/w Ms Radha Halbe for Petitioner.
Mr. Akhileshwar Sharma for Respondents-Revenue.

CORAM : K. R. SHRIRAM &
Dr. NEELA GOKHALE, JJ.
DATED : 13th FEBRUARY 2024

ORAL JUDGMENT (PER K. R. SHRIRAM J.) :

1 Rule. Rule made returnable forthwith and heard. As the pleadings are completed, this court, by consent of the parties has taken up the matter for final hearing.

2 Petitioner is an individual, who had invested in certain parcels of lands at Ardhe and Aase at Taluka Karjat, District Raigad. During the pervious year, i.e., 2012-13, petitioner sold those parcels of lands. Petitioner filed return of income for A.Y.-2013-14 on 22nd April 2014 disclosing income of Rs.6,91,540/-. The return of income was processed under Section 143(1) of the Income Tax Act 1961 (the Act). Later, the case was selected for scrutiny under CASS and notice dated 28th August 2015 under Section 143(2) of the Act was issued. Subsequently, a notice dated 15th January 2016 under Section 142(1) of the Act was issued to petitioner calling upon to furnish copy of the agreement for purchase and sale of the agricultural lands. Petitioner was also called upon to furnish details of agricultural produce in the previous years and income offered in the return of income with documentary evidence and show cause as to why the capital gain earned or accrued should not be taxed as per the provisions of the Act. Therefore, by notice dated 12th February 2016 petitioner was also called upon to show cause as to why the sale of land should not be brought to tax as no agricultural activity were undertaken on the land under consideration. By another notice dated 7th March 2016 under Section 142(1) of the Act petitioner was asked to explain the applicability of

Section 50C of the Act in respect of the sale of the land under consideration.

3 Petitioner, on its part, vide letter dated 24th February 2016, submitted, and which is also the case of petitioner in this petition as well, that the agricultural land sold was a rural agricultural land as per Section 2(14)(iii) of the Act and the agricultural land situated in rural area was not covered in the definition of capital asset. Therefore, no capital gain was applicable. It was submitted that provisions of Section 2(14)(iii) of the act does not require that agricultural operations should be undertaken on such land at the time of transfer or immediately prior to the transfer. It was also submitted that only in cases where Section 10(37) and Section 54B of the Act were applicable, for claiming exemption from sale of agricultural land, there was requirement that the land should be used for agricultural purposes during the preceding two years from the date of transfer. Petitioner also relied upon circular dated 13th April 2011 issued by Government of India, Ministry of Rural Department, New Delhi-F.M.24011/2009-LRD, which provides that there is no tax liability on the transfer of rural agricultural lands.

4 The Assessing Officer (AO) by his order dated 28th March 2016, rejected the contention of petitioner and held that land was a capital asset and,therefore, capital gain was payable. The AO proceeded on the basis that most of the alleged agricultural land sold was held for a period of less than

two years and, therefore, intention of petitioner was not to do any agricultural activities but was to make investment and earn profit. The AO held that there was no evidence submitted by petitioner that petitioner had carried out agricultural operations during the year under consideration. The AO felt that the intention of the legislature will be defeated if the exemption in respect of sale of agricultural land is provided to petitioner without any agricultural activities made by petitioner. Aggrieved by this assessment order dated 28th March 2016, petitioner preferred an appeal before the Commissioner of Income Tax (Appeals) [CIT(A)]. The CIT(A) called upon petitioner to submit documents that the parcels of land were agricultural lands. Admittedly, petitioner submitted documents from the Talati stating that the parcels of agricultural lands were located more than 8 k.m. away from the urban area and a letter from Gram Sevak in Grampanchayat certifying that the total population of these villages were 1216. The CIT(A) by his order dated 29th March 2016 accepted petitioner's contention that actual carrying on of agricultural operations is not a necessary condition for deciding that a particular parcel of land was agricultural land. At the same time, CIT(A) rejected petitioner's claim on the solitary ground that petitioner has failed to furnish any evidence to show that the land sold by petitioner have been referred to as agricultural land in Government records. We have to note that in his order itself, the CIT(A) has observed that petitioner had submitted additional evidences by

way of confirmation letter dated 6th May 2016 from Talati and from Gram Sevak. The documents issued by the Talati referred to the parcels of lands as "शेतजमीन" which means agricultural land. Therefore, it was not correct on the part of CIT(A) to come to a conclusion that there was no evidence to show that the land was referred to as agricultural land in Government records. In the order the CIT(A) has also recorded that the AO was requested to comment on the admissibility of the documents submitted by petitioner and was requested to furnish his reply on 20th March 2019. Despite reminder being sent, the AO did not furnish any reply. There is nothing on record to indicate whether any action was taken against the said AO. We would expect the department atleast, now to take action against the concerned AO for not responding to the communication, stated to have been sent by the CIT (A).

5 Aggrieved by the order of CIT(A), petitioner preferred an appeal before the Income Tax Appellate Tribunal (ITAT). No appeal was filed by the Revenue or any cross objection filed. Therefore, the finding of the CIT(A) that actual carrying on of agricultural operations is not a necessary condition for deciding that a particular parcel of land was agricultural land, has attained finality. In our view also, in the facts and circumstances of this case, actual carrying on of agricultural operation was not necessary condition. We say this because it is petitioner's claim that the agricultural land sold was not within the jurisdiction of municipality or municipal

corporation or notified area committee or town area committee or town committee or a cantonment board and which has a population of not less than ten thousand. The only requirement was to see whether this fact as alleged by petitioner was correct.

6 The ITAT in its order dated 28th November 2019 noted this submission of the departmental representative that carrying on of agricultural activity was condition to treat the parcel of land as agricultural land. The ITAT did not disturb the findings of CIT (A). At the same time, the ITAT also quashed and set aside the order passed by CIT(A) by observing as under:

> *"6. We have considered rival submissions and perused the material on record. It is evident, the Assessing Officer has brought the income derived from sale of lands to tax under the head "Capital Gain" after rejecting assessee's claim that they are in the nature of agricultural land, hence, do not come within the definition of "Capital Asset" as per section 2(14) of the Act. While rejecting assessee's claim, the Assessing Officer has observed that no evidence has been brought on record by the assessee to demonstrate that agricultural activity was carried out on the land during the period the assessee was holding such land. Whereas, learned Commissioner (Appeals), though, has accepted assessee's contention that actual carrying on of agricultural operation is not a necessary condition for deciding the nature of a particular land as agricultural land, however, he has rejected assessee's claim on the solitary ground that the assessee has failed to furnish any evidence to show that the lands sold by the assessee have been referred to as agricultural land in Government record. Qua the aforesaid observation of learned Commissioner (Appeals), it must be observed that in the course of proceedings before the learned Commissioner (Appeals), the assessee has furnished certain document by way of additional evidences which are as under:-*
>
> *(a) Confirmation letter from Talati dated 06.05.2016 stating that all the plots at Village "Aase" sold by the appellant were agricultural land;*
>
> *(b) Confirmation letter from Talati dated 06.05.2016 stating that all the plots at Village "Ardhe" sold by the appellant were agricultural land;*
>
> *(c) Letter from Gramsewak, Group Grampanchayat of the census of*

the villages."

7. In fact, learned Commissioner (Appeals) has not only acknowledged filing of documentary evidences before him, but has also called for a report from the Assessing Officer on the additional evidences filed by the assessee. As observed by the learned Commissioner (Appeals), the Assessing Officer chose not to offer any comment on the additional evidences filed by the assessee. Be that as it may, the facts on record clearly reveal that the assessee produced certain documentary evidences from the Village level officers to demonstrate that the lands sold were in the nature of agricultural land. Further, the sale deed also describes the lands sold as agricultural land. Unfortunately, learned Commissioner (Appeals) has not whispered even a single word on the veracity of additional evidences furnished by the assessee. If the additional evidences furnished by the assessee mentioning the lands sold as agricultural land did not inspire confidence or required further verification, learned Commissioner (Appeals) should have conducted proper enquiry to ascertain the authenticity of the certificates issued by Talati and Gramsewak. Without disproving the correctness of the confirmation/certificates issued by the Talaties and Gramsewak, learned Commissioner (Appeals) was not justified in rejecting assessee's claim of agricultural land, that too, on the premise that the assessee failed to furnish any evidence to show that the lands are recorded as agricultural land in the Government record. Moreover, the details of land sold are very much available with the Departmental Authorities. Therefore, it would not have been difficult on their part to ascertain/verify the exact nature of land sold as mentioned in Government records by conducting necessary enquiry with the concerned Government authorities. Without doing so, the Revenue authorities cannot presume that the lands sold are not in the nature of agricultural land. When the assessee has brought some evidence on record to establish its claim that the land sold is in the nature of agricultural land, the Revenue authorities are duty bound to verify the authenticity of such evidence and if they want to reject assessee's claim, they must bring contrary material on record to disprove assessee's claim. It is evident, the Revenue authorities have not conducted any enquiry to verify the nature of land sold by the assessee, whether agricultural or otherwise. In fact, the evidences furnished by the assessee have not at all been examined in proper perspective. In view of the aforesaid, we are inclined to set aside the impugned order of learned Commissioner (Appeals) and restore the issue to the file of the Assessing Officer for de novo adjudication after examining the evidences filed by the assessee and conducting enquiry, if necessary, with the concerned authorities of the Government to find out the true nature and character of the land sold. Only after the Assessing Officer comes to a conclusion on the basis of material brought on record that the lands sold by the assessee are not in the nature of agricultural land, hence, come within the purview of "Capital Asset" as defined u/s 2(14) of the Act, then the question of applicability of section 50C of the Act would arise. In such event, the Assessing Officer has to compute the capital gain by applying

> *provisions of section 50C of the Act after following the procedure laid down in sub-sections (2) and (3) of the said provision. Needless to mention, the Assessing Officer must allow reasonable opportunity of being heard to the assessee before deciding the issue. Accordingly, grounds no.1 to 5, are allowed for statistical purposes."*

7 Despite the matter being remanded for denovo consideration and the ITAT directing the AO to grant reasonable opportunity of being heard before deciding the issue, an assessment order dated 5th May 2021 came to be passed. A petition was filed challenging the said assessment order on the ground that the AO did not strictly follow the mandatory provisions of Section 144B of the Act. The said order does not indicate that any personal hearing was granted. The said order was quashed and set aside by this court on 3rd January 2022 in Writ Petition No.1292 of 2021 and the matter was remanded for denovo consideration. The AO was directed to strictly comply with the mandatory requirements of Section 144B of the Act and also the order passed by the ITAT on 28th September 2019. Subsequently, a fresh assessment order dated 24th March 2022 has been passed which is impugned in this petition. The fresh assessment order also proceeds on the basis that petitioner did not show any evidence of carrying on of agricultural operation in the land. This is despite recording in the impugned order, what the ITAT had held that the CIT(A) has accepted petitioner's contention that actual carrying on of agricultural operation is not a necessary condition for deciding that a particular parcel of land was agricultural land. Therefore, the AO should have, instead of passing the

impugned order, restricted his scope to ascertain whether the documents submitted by petitioner would indicate that the land was an agricultural land. The AO should have restricted his scope of work only to determine whether the land was situated in an area which is comprised within the jurisdiction of municipality or cantonment board and whether it has a population in excess of ten thousand. If the additional evidence submitted by petitioner mentioning that the land sold as agricultural land did not inspire confidence or require further verification, the AO should have conducted proper enquiry to ascertain the authenticity of certificates issued by Talati and Gram Sevak. Without disproving the correctness of the confirmation / certificates issued by the Talati and Gram Sevak, the AO was not justified in rejecting petitioner's claim of agricultural land particularly when evidence shows that the lands are recorded as agricultural lands in the Government records. We do not think it would have been difficult for the AO to ascertain / verify the exact nature of land as mentioned in Government records by conducting necessary enquiry with the concerned Government authorities. When petitioner has brought some evidence on record to establish its claim that the land sold is in the nature of agricultural land, revenue authorities are duty bound to verify the authenticity of such evidence and if they want to reject petitioner's claim, they must bring contrary material on record to disprove petitioner's claim. As there is nothing on record to indicate that the AO has conducted any enquiry to

verify the nature of land sold by petitioner. whether agricultural or otherwise, the AO has failed in his duty to examine the evidence in the proper perspective.

8 Mr. Sharma submitted that because the ITAT has directed the AO to adjudicate denovo, the AO was entitled to disregard the findings of the CIT(A) in its entirety. We do not agree with Mr. Sharma's submission that the AO was being directed to deal with the entire matter on its own merits. The order of the ITAT must be read and understood in the proper context and in law. All that is stated in the order itself. There was considerable force in the submission of Mr. Jain that the order must be read as restricting the scope of the AO only to question the evidence filed by petitioner and nothing more, and to ascertain whether the land would not be covered under definition of capital asset as stated in Section 2(14)(iii) of the Act. Moreover, the ITAT has not disturbed the findings of the CIT(A) that actual carrying on of agricultural operation is not a necessary condition for deciding that a particular parcel of land was agricultural land. As noted earlier, we agree with the opinion of the CIT(A) in this regard because Section 45(1) of the Act reads as under:

> *Capital gains.*
>
> *"45. (1) Any profits or gains arising from the transfer of a capital asset effected in the previous year shall, save as otherwise provided in sections 54, 54B, 54D, 54E, 54EA, 54EB, 54F, 54G and 54H, be chargeable to income-tax under the head "Capital gains", and shall be deemed to be the income of the previous year in which the transfer took place.*

****

Capital asset is defined under Section 2(14) of the Act, and reads as under:

> *(14) "capital asset" means—*
>
> *(a) property of any kind held by an assessee, whether or not connected with his business or profession;*
>
> ************************************
>
> *but does not include -----*
>
> ************************************
>
> *(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*
>
> *(b) in any area within the distance, measured aerially,—*
>
> *(I) not being more than two kilometres, from the local limits of any municipality or cantonment board referred to in item (a) and which has a population of more than ten thousand but not exceeding one lakh; or*
>
> *(II) not being more than six kilometres, from the local limits of any municipality or cantonment board referred to in item (a) and which has a population of more than one lakh but not exceeding ten lakh; or*
>
> *(III) not being more than eight kilometres, from the local limits of any municipality or cantonment board referred to in item (a) and which has a population of more than ten lakh.*
>
> *Explanation.—For the purposes of this sub-clause, "population" means the population according to the last preceding census of which the relevant figures have been published before the first day of the previous year;*
>
> ************************************

None of these provisions require that it has to be used for agricultural purpose. Only Section 10(37) and Section 54B of the Act provide for agricultural activity to be carried out and these sections read as under:

> ***Section 10(37):*** ***In computing the total income of a previous year of any person, any income falling within any of the following clauses shall not be included-***
>
> **********
>
> **********
>
> *(37) in the case of an assessee, being an individual or a Hindu undivided family, any income chargeable under the head "Capital gains" arising from the transfer of agricultural land, where—*
>
> *(i) such land is situate in any area referred to in item (a) or item (b) of sub-clause (iii) of clause (14) of section 2;*
>
> *(ii) such land, during the period of two years immediately preceding the date of transfer, was being used for agricultural purposes by such Hindu undivided family or individual or a parent of his;*
>
> *(iii) such transfer is by way of compulsory acquisition under any law, or a transfer the consideration for which is determined or approved by the Central Government or the Reserve Bank of India;*
>
> *(iv) such income has arisen from the compensation or consideration for such transfer received by such assessee on or after the 1st day of April, 2004.*
>
> *Explanation.—For the purposes of this clause, the expression "compensation or consideration" includes the compensation or consideration enhanced or further enhanced by any court, Tribunal or other authority;*
>
> *(emphasis supplied)*
>
> ***Section 54B***
>
> ***"Capital gain on transfer of land used for agricultural purposes not to be charged in certain cases.***
>
> *54B. (1) Subject to the provisions of sub-section (2), where the capital gain arises from the transfer of a capital asset being land which, in the two years immediately preceding the date on which the transfer took place, was being used by the assessee being an individual or his parent, or a Hindu undivided family for agricultural purposes (hereinafter referred to as the original asset), and the assessee has, within a period of two years after that date, purchased any other land*

> *for being used for agricultural purposes, then, instead of the capital gain being charged to income-tax as income of the previous year in which the transfer took place, it shall be dealt with in accordance with the following provisions of this section, that is to say,—*
>
> *(i) if the amount of the capital gain is greater than the cost of the land so purchased (hereinafter referred to as the new asset), the difference between the amount of the capital gain and the cost of the new asset shall be charged under section 45 as the income of the previous year; and for the purpose of computing in respect of the new asset any capital gain arising from its transfer within a period of three years of its purchase, the cost shall be nil; or*
>
> *(ii) if the amount of the capital gain is equal to or less than the cost of the new asset, the capital gain shall not be charged under section 45; and for the purpose of computing in respect of the new asset any capital gain arising from its transfer within a period of three years of its purchase, the cost shall be reduced, by the amount of the capital gain.*
>
> **********
>
> *(emphasis supplied)*

It is nobody's case that petitioner's case falls under these two categories. Further, the ITAT has in its order stated "……. *It is evident, the Revenue authorities have not conducted any enquiry to verify the nature of land sold by the assessee, whether agricultural or otherwise. In fact, the evidences furnished by the assessee have not at all been examined in proper perspective…….. and restore the issue to the file of the Assessing Officer for de novo adjudication after examining the evidences filed by the assessee and conducting enquiry, if necessary, with the concerned authorities of the Government to find out the true nature and character of the land sold. Only after the Assessing Officer comes to a conclusion on the basis of material brought on record that the lands sold by the assessee are not in the nature of agricultural land, hence, come within the purview of "Capital Asset" as defined u/s 2(14) of the Act,*

then the question of applicability of section 50C of the Act would arise." Therefore, it is obvious that the matter has been restored to the AO only to examine the evidence filed by petitioner and conducting enquiry, if necessary, with the concerned authorities of the Government to find out the true nature and character of the land sold and only if, the AO comes to a conclusion on the basis of material brought on record that the lands sold by petitioner are not in the nature of agricultural land, can he come to conclusion that the land would come within the purview of "capital asset" as defined under Section 2(14) of the Act.

9 In the circumstances, we hereby quash and set aside the impugned order dated 24th March 2022 and remand the matter for passing the fresh assessment order. The AO will only examine whether the evidence brought on record to establish the claim that the lands sold are in the nature of agricultural land, was authentic. If the AO has to reject the evidence filed by petitioner, he shall bring contrary material on record. For that, the AO has to conduct an enquiry to ascertain the authenticity of the certificates filed by petitioner. The AO may take such steps as required by conducting necessary enquiry with the concerned Government authorities. The contention of petitioner cannot be rejected purely on presumption that the lands sold were not an agricultural lands because petitioner sold the parcels of lands within two years of purchase. If the AO is satisfied that the parcels of land actually are not situated in an area which will fall under Section

2(14)(iii), the AO shall proceed on the basis that in the facts and circumstances of the case, actual carrying on of agricultural operation is not a necessary condition for deciding that the parcels of lands were agricultural lands.

10 Though, we were inclined to impose cost on the AO for not strictly complying with the directions of ITAT, Mr. Sharma persuaded us not to do so. Mr. Sharma states that it would be easier for Jurisdictional Assessing Officer (JAO) to call for records or make enquiries with the Government authorities since the parcels of lands sold were within Maharashtra. If it is assigned to Faceless Assessment Officer (FAO), there is possibility that the FAO could be based anywhere in the country and that would make it difficult for the FAO to ascertain the veracity of petitioner's claim. Mr. Sharma, therefore, requested to remand the matter to JAO. Ordered accordingly.

11 Before passing any order, the JAO shall give personal hearing to petitioner, notice whereof shall be communicated atleast seven working days in advance. If the JAO wants to rely on any documents or records or statements of any Government authorities, then copies of those documents / statements / certificates shall be made available to petitioner alongwith the notice for personal hearing. So also, if the AO is going to rely on any judicial precedents, a list thereof shall be made available to petitioner so that petitioner may able to deal with / distinguish the same

during the personal hearing.

12 Rule made absolute in terms of prayer clause (a), which reads as under:

> *"(a) that this Hon'ble Court may be pleased to issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order or direction, calling for the records of the petitioner's case and after going into the legality and propriety thereof, to quash and set aside the impugned assessment order passed under section 143(3) read with section 260 read with section 144B dated 24.03.2022 (Exhibit R1) and the impugned notice of demand issued under section 156 dated 24.03.2022 (Exhibit R2), show cause notice for initiating penalty proceedings under section 274 read with section 271(1)(c) dated 24.03.2022 (Exhibit R3)."*

13 Petition disposed.

(Dr. NEELA GOKHALE, J.) **(K. R. SHRIRAM, J.)**