IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "B", PUNE

BEFORE SHRI G.S. PANNU, ACCOUNTANT MEMBER
AND SHRI R.S. PADVEKAR, JUDICIAL MEMBER

ITA No.1299/PN/2012
(Assessment Year : 2008-09)

Shri Krishnakumar K Goyal,
Shop No.7 & 8, Prestige Plaza,
Phase-II, Pune Mumbai Road,
Akurdi, Pune – 411 035.

PAN : AASPG3891P …. Appellant

Vs.

Asstt. Commissioner of Income Tax,
Circle-9, Pune. …. Respondent

ITA No.1300/PN/2012
(Assessment Year : 2008-09)

Shri Vinit K Goyal,
Shop No.7 & 8, Prestige Plaza,
Phase-II, Pune Mumbai Road,
Akurdi, Pune – 411 035.

PAN : AEMPG4196B …. Appellant

Vs.

Addl. Commissioner of Income Tax,
Range-9, Pune. …. Respondent

Assessee by	:	Mr. Sunil Ganoo
Department by	:	Mrs. S. Praveena
Date of hearing	:	25-07-2014
Date of pronouncement	:	15-09-2014

ORDER

PER G. S. PANNU, AM

The captioned two appeals have been preferred by two different assessees belonging to the same family and certain issues involved are common, therefore, they have been clubbed and heard together and a consolidated order is being passed for the sake of convenience and brevity.

2. First, we shall take-up the appeal vide ITA No.1299/PN/2012 in the case of Shri Krishnakumar K. Goyal which is directed against the order of the

Commissioner of Income Tax (Appeals)-V, Pune dated 04.04.2012 which, in turn, has arisen from an order dated 31.12.2010 passed by the Assessing Officer u/s 143(3) of the Income Tax Act, 1961 (in short "the Act") pertaining to the assessment year 2008-09.

3. In this appeal, the Grounds of Appeal raised by the assessee read as under :-

> *"1. Commissioner of Income Tax (Appeals) has erred in confirming Assessing Officer's action of assessing Rs.1,40,40,140.00 as business income against appellant's claim of exemption being surplus on sale of Agricultural Land at Dhamane, which is held by assessee as Investment and is not within definition of "Capital Asset". Appellant prays for exclusion of the same from Computation of Income.*
>
> *2. Commissioner of Income Tax (Appeals) has erred in confirming in assessing surplus on Sale of Kondhwa Plot under the business Income against appellants claim of Capital Gain, same being not a business/Trading Asset."*

4. In brief, the facts are that assessee is an individual who filed his return of income for the assessment year 2008-09 on 29.09.2008 declaring total income of Rs.9,63,17,030/- which was revised to Rs.9,60,50,160/- by filing a revised return. The return filed by the assessee was picked-up for scrutiny assessment wherein the total income has been assessed at Rs.11,04,92,366/. The difference between the returned and the assessed income was on two aspects. Firstly, the assessee had sold agricultural land at Dhamane village, the surplus whereof was treated as not liable to be taxed as it was not a 'capital asset' within the meaning of section 2(14)(iii)(b) of the Act. The Assessing Officer, however, treated the transaction of the sale of agricultural land as a 'business profit' and accordingly added a sum of Rs.1,40,21,140/- to the returned income. Secondly, the assessee had earned gain on sale of a piece of land at Kondhwa which was treated as a long term capital gain, but it has been treated by the Assessing Officer as a business transaction thereby adding a sum of Rs.40,11,300/- to the returned income. Both the aforesaid

actions of the Assessing Officer have since been affirmed by the CIT(A). Not being satisfied with the order of the CIT(A), assessee is in further appeal before us challenging the aforesaid action of the Assessing Officer by way of aforestated Grounds of Appeal.

5. In so far as the first Ground of Appeal is concerned, it relates to surplus earned by the assessee of Rs.1,40,21,140/- out of the sale of agricultural land situated at Dhamane village. In the return of income assessee claimed that the land in question was not a capital asset within the meaning of section 2(14)(iii)(b) of the Act and thus surplus on sale of such land was not liable to be taxed as capital gains.

6. The Assessing Officer, however, noted that one of the business activities of the assessee was sale/purchase of plots and income from such activity was being regularly offered by the assessee as 'business profits'. Therefore, according to the Assessing Officer, the surplus on sale of agricultural land could not be treated as gain arising from sale of investment, but instead it was liable to be assessed as 'business income'. On being show-caused, assessee contended before the Assessing Officer that the land at village Dhamane was located beyond a distance of 8 kilometers from the local limits of the Municipality and population of the village was less than ten thousand and therefore it did not fall within the definition of 'capital asset' as per section 2(14)(iii) of the Act. It was also pointed out that the land in question was an agricultural land and agricultural activity was carried out on the said land by one Shri Dilip Dagdu Jogdand on behalf of the assessee. The Assessing Officer, however, was not impressed with the arguments put-forth by the assessee and according to him the transaction of purchase and sale of agricultural land at village Dhamane was a transaction of business and the profits earned thereon by the assessee were liable to be taxed as business income. The CIT(A) has also affirmed the stand of the Assessing Officer.

7. In the above background, the learned counsel for the assessee has made his submissions. According to him, the assessee has shown the land at village Dhamane as a Personal asset in the Balance-Sheet as distinct from 'Business assets' and therefore the same could not be treated as part of stock-in-trade so as to be treated as a business transaction. The learned counsel has referred to the exhaustive submissions made before the CIT(A), and which have been reproduced by him in para 6 of his order, in support of the case of the assessee. Pertinently, it is sought to be made out by the learned counsel that merely because assessee had a business of sale/purchase of plots would by itself not imply that the surplus earned on sale of the agricultural land at village Dhamane was a business transaction. It has been pointed out that even a person carrying on business can have an investment portfolio in the same commodities and the investment portfolio was to be treated as 'capital asset'. In this context, reliance has also been placed on the CBDT Circular No.4 of 2007 dated 15.06.2007. It has been pointed out that between the date of purchase of agricultural land and sale thereof assessee has not changed the land use and in-fact, the land has been ultimately sold to agriculturists only. Reference has also been made to 7/12 extracts of the land to show that in the land revenue records the character of the land was an agricultural land. For all the above reasons, it has been sought to be made out that the lower authorities erred in treating the purchase and sale of land at village Dhamane to be a business transaction.

8. On the other hand, the learned Departmental Representative appearing for the Revenue has submitted that assessee being a land developer, it is a natural corollary that the impugned gain is liable to be taxed as business income. Furthermore, it has been pointed out that the action of the assessee of having given the land for cultivation to Shri Dilip Dagdu Jogdand does not justify the inference that the land was cultivated by the assessee. It is submitted that the aforesaid arrangement was being shown with the purpose

of giving colour to the land of being under cultivation. The learned Departmental Representative pointed out the subsequent act of the assessee of selling the land at a huge surplus within a short span of time also shows the primary intention of the assessee at the time of purchase of land, being in the nature of a business transaction.

9. We have carefully considered the rival submissions. Factually speaking, the land in question is located at village Dhamane admeasuring 106 acres. The appellant alongwith other co-owners purchased the land from the local agriculturists on 10.05.2006. The total cost of assessee's share of the land is Rs.12,28,860/- and in the Balance Sheet as on 31.03.2007 annexed with the return of income filed for the earlier assessment year 2007-08, it has been shown as a part of Personal assets. During the year under consideration i.e. on 25.10.2007, the same was sold and assessee's share in the surplus on sale amounting to Rs.1,40,21,140/- was claimed as exempt, being sale of agricultural land. The claim of the assessee is that the land in question is located at a distance which is beyond 8 kilometers from the local limits of any Municipality and the population of the village in which such land is situated is less than ten thousand and therefore it qualifies to be an 'agricultural land', which is excludible from the expression "capital asset" as defined in clause (iii) of sub-section (14) of section 2 of the Act. It is emerging from the record that in support of above proposition, assessee furnished a communication from Talathi of Dhamane village demonstrating that the land was more than 25 kilometers away from the nearest Municipal limits. A certificate from the office of Tehsildar dated 07.09.2007 was also furnished before the lower authorities to show that the population of village Dhamane as per the last census was 780 which is below ten thousand. It is also an accepted position that the land in question was an agricultural land notified in the land revenue records. In support of the same, a certificate of Dy. Director, Town Planning certifying that the land has been classified as an agricultural land in land revenue record is

forming part of the sale-deed, a copy of which has also been placed in the Paper Book filed before us. All the aforesaid features pertaining to the land are not in dispute. However, the stand of the Revenue is that assessee being an individual engaged in the business of purchase and sale of lands, the intention to purchase the impugned land was a business proposition and not merely investment.

10. In our considered opinion, the issue as to whether impugned transaction is an activity in the nature of trade or an investment is a question which is required to be addressed having regard to the peculiar facts of the case. In the present case, one of the businesses of the appellant is purchase and sale of lands. The income from such activity in the past has been offered as business income. So however, the aforesaid factor *ipso facto* cannot be conclusive to establish that the purchase and sale of agricultural land at Dhamane village is also to be assessed as a business transaction. We say so for the reason that it is possible for a taxpayer to have two portfolios i.e. an investment portfolio comprising of commodities which are to be treated as capital assets and a trading portfolio comprising of stock-in-trade which are to be treated as trading assets. Therefore, it is conceivable that an assessee having two portfolios would have income under both heads i.e. capital gains as well as business income. The aforesaid principle has also been accepted by the CBDT in its Circular No.4 of 2007 (supra). Be that as it may, in the present case, the assertions of the assessee before the lower authorities as well as before us have been that the investment made in the purchase of agricultural land at village Dhamane was not with the intention of acquiring stock-in-trade of business. Firstly, it is asserted that the land at Dhamane village has been shown in the Balance Sheet as a part of ‘Personal Assets’ and not as a part of ‘Business assets’. For this purpose, the Balance Sheet as on 31.03.2007 annexed to the return of income for the earlier assessment year 2007-08 has also been placed on record. Secondly, it has also been pointed out that

assessee had made investments in purchase of other agricultural lands also in the past years and that the same have not been treated to be 'Business assets'. In this connection, a Tabulation has been furnished in the course of hearing which shows that assessee has purchased agricultural lands at various places like Latur, Chowisawadi, etc. as early as in January, 1991. Thereafter, investment in agricultural lands have also been made in April 1996, May 1995, November, 1996, etc.. The Tabulation also reveals that the other agricultural lands continue to be held by the assessee and it is only the land at village Dhamane which has been sold during the year under consideration. Prima-facie, the aforesaid Tabulation does not show that assessee was a dealer in purchase and sale of agricultural lands because the period of holding in all cases except the land at village Dhamane is quite substantial. Pertinently, assessee has taken us through the Balance Sheets filed alongwith respective returns of income from the earlier assessment years of 2004-05, 2005-06, 2006-07 as well as 2007-08 to point out that the aforesaid lands have been shown in the Balance Sheet as 'Personal Assets' and not as 'Business Assets'.

11. At this stage, we may deal with one of the observations made by the Assessing Officer, and the same has also been affirmed by the CIT(A), which is to the effect that subsequent to purchase of the land in question assessee has done land consolidation and development activity so as to improve the quality of land. The discussion made by the Assessing Officer in this regard read as under :-

> ***"5. Whether there was any act subsequent to the purchase to improve quality of the commodity purchased?***
>
> *Though it is not known as to whether there was any act subsequent to the purchase to improve quality of the land purchased, but the fact that the assessee has got a sale consideration of Rs.1,53,50,000/- for a purchase cost of Rs.13,28,860/- within a span of just one and a half year points to the fact that there must be a land consolidation and land development activity on the part of the assessee on the said land to improve its quality."*

12. On this aspect, the CIT(A) has also noted that the entire land comprising of 106 acres was purchased by assessee alongwith other co-owners by four separate agreements.

13. In this context, we find that assessee submitted that the land was purchased for holding as investment and to carry on agricultural activity as a pride cultivation of Medicinal Plant and Horticulture. By way of detailed submissions, which have been reproduced in the order of the CIT(A), assessee submitted that the intention was to purchase land to carry out agricultural activity of Medicinal Plant and Horticulture. However, due to the inability of the other co-owners to raise requisite funds assessee was forced to sell the land as it is. It is also submitted that during the period of holding of the land it was leased out to one Shri Dilip Dagdu Jogdand in terms of lease agreement to carry out agricultural activities. Assessee has also shown income in the return of income from such activity in assessment year 2007-08 as well as during the year under consideration. In-fact, there is no material lead by the Revenue to negate any of the aforesaid assertions of the assessee. There is no denying the fact that the land in question continues to be an agricultural land in the land revenue records and further during the period of assessee's holding, no steps have been taken to change the land use for any non-agricultural activities. In-fact, the charge made by the Assessing Officer that subsequent to purchase, assessee undertook development activity is a bald assertion and is quite unconvincing. In-fact, the Assessing Officer merely records *"that there must be a land consolidation and land development activity on the part of the assessee on the said land to improve its quality".* The significance of the aforesaid observations of the Assessing Officer is that it is based on mere presumptions and not on any material or evidence. In-fact, in the course of hearing, the learned counsel also referred to the fact that the land has been ultimately sold to an agriculturist for agricultural purposes only. It was also asserted that the

purchasers are using it for agricultural purposes only. Before the CIT(A), assessee pointed out that the Assessing Officer had issued summons/notices to the purchasers, copies of which have been placed in the Paper Book at pages 371 to 375. The assertions of the appellant are that such persons appeared before the Assessing Officer and confirmed that they were carrying out agricultural operations on such lands. In this context, we find there is no discussion in the assessment order. However, it would not be out of place to mention here that there is no credible material brought on record by the Assessing Officer to negate assessee's plea that the land in question continued to be in the nature of agricultural land even after it sale.

14. In view of the aforesaid discussion, it is quite clear that the land in question has been disclosed by the assessee as 'Investment' and not as stock-in-trade. It is also clear that no steps were undertaken by the assessee for development of property during the period it held the same. Of-course, in the case of other agricultural lands owned by the assessee the period of holding is quite substantial. The circumstances explained by the assessee for having sold the agricultural land within a span of 17 months have also not been found to be false. Considering the aforesaid circumstances, in our view, the lower authorities erred in assessing the gain on sale of such land as a business income.

15. At this point, we may refer to the judgement of the Hon'ble Bombay High Court in the case of CIT vs. Baguio Investment Pvt. Ltd. vide Income Tax Appeal No.998 of 2011 dated 24.01.2013 which has been relied upon by the assessee before us. The issue before the Hon'ble High Court was relating to income on sale of land which was treated by the Assessing Officer as a sale of stock-in-trade and taxed under the head income from business whereas the assessee claimed it as a sale of investment assessable under the head capital gains. The Hon'ble High Court noted three factual findings arrived at by the

Tribunal, namely, (i) that the assessee had disclosed the land in its books of account as an investment and not stock-in-trade; (ii) that the land sold was held for a period of 10 years by the assessee; and, (iii) that no steps were taken for development of property by assessee during the period it held the land. Considering the aforesaid features the Hon'ble High Court affirmed the order of the Tribunal holding that the income arising on sale of land was chargeable under the head capital gains.

16. Further, a reference has also been made to the judgement of the Hon'ble Bombay High Court in the case of CIT vs. Minguel Chandra Pais & Anr., (2006) 282 ITR 618 (Bom) for the proposition that the land classified as agricultural land in the land revenue records was to be understood as agricultural lands and insufficiency of agricultural income cannot be a ground to treat the same as a non-agricultural land.

17. In the present case, in our view, the factual matrix clearly establishes that the land in question is an agricultural land which is so recognized in the land revenue records at the time of purchase by the assessee and nothing has been done by the assessee for putting it to non-agricultural use. Therefore, the sale of such land cannot be treated as sale of stock-in-trade merely because assessee is otherwise engaged in the business of sale/development of lands. In-fact, in our considered opinion, the lower authorities have been overtly influenced by the fact that assessee is in the business of purchase and sale of lands. No doubt, the onus under such circumstances is on the assessee to show that the impugned purchase of agricultural land was an investment activity and not an activity of acquiring stock-in-trade. In our view, in the present case, such onus has been aptly discharged by the assessee. Evidently, the assessee has shown the land in question as a 'Personal Asset' as distinct from 'Business Assets' in the Balance Sheets. The circumstances in which the land has been sold is also not found to be false. Otherwise, the

agricultural lands held by the assessee are for a substantial period of time and assessee has been showing such assets as a part of his 'Personal Assets', being 'investments' and not as 'Business Assets' in the Balance Sheet filed alongwith the respective returns of income. At this point, we may also make a reference to a plea raised before the lower authorities which is to the effect that assessee was undertaking agricultural activities. In this context, assessee furnished an agreement with the Military Farm Kirkee, Pune for the period 07.07.2005 to 06.07.2008, a copy of which has been placed at pages 381 to 392 in the Paper Book. In terms of the said agreement, assessee was leased out the sowing rights of crops in the lands owned by Military Farm Kirkee. Assessee further submitted that due to certain difficulties the aforesaid agreement could not be completed but the same was furnished before the lower authorities to demonstrate that assessee was indeed undertaking agricultural activities also.

18. Considering the aforesaid factors and having regard to the judgements of the Hon'ble Bombay High Court in the cases of Baguio Investment Pvt. Ltd. (supra) and Minguel Chandra Pais & Anr. (supra), we hold that the lower authorities erred in treating the income arising on the sale of land at village Dhamane to be sale of stock-in-trade. In our view, the income arising on the sale of land at village Dhamane was on account of sale of investment. Since, there is no dispute that the land in question carried the features prescribed in section 2(14)(iii) of the Act, and, therefore it qualifies to be an agricultural land excludible from the expression "capital asset". In this view of the matter, we therefore set-aside the orders of the authorities below and restore the return of income filed by the assessee qua the surplus on sale of agricultural land at village Dhamane. As a result, the Ground of Appeal No.1 raised by the assessee is allowed.

19. Now, we may take-up the Ground of Appeal No.2 which relates to the nature of income arising on the sale of plot at Kondhwa. As per the assessee, the surplus on sale of two plots of land at Kondhwa is to be assessed as long term capital gain as it reflected sale of a capital asset held for more than three years. The Assessing Officer treated the transaction as a business transaction since assessee was engaged in the business of sale and purchase of land. The long term capital gain was determined at Rs.40,52,52/- in the original return of income which was subsequently revised to Rs.37,85,659/- in the revised return of income on account of change in the cost of acquisition. The Assessing Officer treated the sale of land at Kondhwa to be a business transaction and treated a sum of Rs.40,11,300/- (disregarding the indexation benefit availed by the assessee to compute capital gains) as business income. The CIT(A) has also affirmed the said position.

20. On this aspect, we have heard the rival submissions. The primary stand of the assessee is that the said land was purchased in 1998 and in all the years it has been shown in the Balance Sheet as 'Personal asset', as a part of investments. It is submitted that the lands held as stock-in-trade are separately disclosed in the Balance Sheet as well as in Profit & Loss Account as 'business assets' and that such position has also been accepted in the past years even in scrutiny assessments finalized by the Assessing Officer. It has also been contended that the land has been held for a fairly long period of 9 to 10 years before being sold and therefore it could not be said that the land was held with the objective of a trading activity.

21. On the other hand, the learned Departmental Representative has pointed out that the plea of the assessee that the land at Kondhwa is shown as 'Personal assets' in the books of account does not match with the action. The treatment in the books of account does not show the intention because

assessee was indeed dealing in purchase and sale of lands and therefore the said transaction has been rightly assessed as business transaction.

22. We have carefully considered the rival submissions. The aspect that a taxpayer can have two portfolios i.e. investment portfolio comprising of assets which are to be treated as capital assets and a trading portfolio comprising of stock-in-trade which are to be treated as trading asset has already been noted by us in the earlier paras. Therefore, merely because assessee is dealing in purchase and sale of land also cannot be a conclusive factor in holding that the impugned sale of land was a business transaction. We may hasten to add here that the onus under such circumstance is on the assessee to show that the impugned transaction was not a business transaction because the assessee is otherwise engaged in the business of purchase and sale of lands. Thus, the issue is whether in relation to the sale of land at Kondhwa, assessee has discharged such onus.

23. In this context, it is quite clear that the land in question has been disclosed in the account books as an 'Investment' and not as a stock-in-trade. Secondly, the land has been held for a period of 9 to 10 years by the assessee. Thirdly, there is no charge made by the Revenue against the assessee that any steps were undertaken by the assessee for development of the land during the period it has been held by him. Considering the aforesaid three factors and in the light of the judgement of the Hon'ble Bombay High Court in the case of Baguio Investment Pvt. Ltd. (supra) the aforesaid transaction of sale of land at Kondhwa is to be treated as sale of investment chargeable to tax under the head 'capital gains'. Therefore, we set-aside the order of the CIT(A) and direct the Assessing Officer to assess the income on sale of land at Kondhwa as sale of investment chargeable under the head capital gains. Thus, on this Ground also assessee succeeds.

24. In the result, appeal in ITA No.1299/PN/2012 in the case of Shri Krishnakumar K. Goyal is hereby allowed.

25. Now, we may take-up the appeal vide ITA No.1300/PN/2012 in the case of Shri Vinit K. Goyal which is directed against the order of the Commissioner of Income Tax (Appeals)-V, Pune dated 04.04.2012 which, in turn, has arisen from an order dated 29.12.2010 passed by the Assessing Officer u/s 143(3) of the Act pertaining to the assessment year 2008-09.

26. In this appeal, the Ground of Appeal raised by the assessee read as under :-

> *"1. Commissioner of Income Tax (Appeals) has erred in confirming Assessing Officer's action of assessing Rs.1,45,33,815.00 as business income against appellant's claim of exemption being surplus on sale of Agricultural Land at Dhamane and village Sanswadi, which is held by assessee as Investment and is not within definition of "Capital Asset". Appellant prays for exclusion of the same from Computation of Income."*

27. The aforesaid Ground of Appeal relates to surplus earned by the assessee on sale of agricultural lands at village Dhamane and village Sanswadi amounting to Rs.1,45,33,815/-.

28. At the time of hearing, it was a common point between the parties that the facts and circumstances in relation to the sale of land at village Dhamane are identical to those considered by us in the earlier paragraphs by way of Ground of Appeal No.1 in the case of Shri Krishnakumar K. Goyal. The present assessee is one of co-owners of the land which was purchased at village Dhamane alongwith Shri Krishnakumar K. Goyal. Therefore, our decision in Ground of Appeal No.1 in the case of Shri Krishnakuma K. Goyal shall apply *mutatis-mutandis* on this aspect also. Therefore, the surplus on sale of agricultural land at village Dhamane is directed not to be treated as business income.

29. In so far as the sale of land at village Sanswadi is concerned, the CIT(A) notes that the said transaction is more or less identical to the transaction relating to the land at Dhamane village. Considering the aforesaid finding of the CIT(A), to which there is no controversion before us, our decision in relation to the land at Dhamane would apply mutatis-mutandis with respect to the sale of land at Sanswadi village also. In view of the aforesaid, we therefore, allow the said Ground of Appeal raised by the assessee.

30. In the result, appeal in ITA No.1300/PN/2012 in the case of Shri Vinit K. Goyal is also hereby allowed.

31. Resultantly, both the appeals of the assessee are allowed, as above.

Order pronounced in the open Court on 15th September, 2014.

Sd/-	**Sd/-**
(R.S. PADVEKAR) **JUDICIAL MEMBER**	**(G.S. PANNU)** **ACCOUNTANT MEMBER**

Pune, Dated: 15th September, 2014.

Sujeet

Copy of the order is forwarded to: -

1) The Assessee;
2) The Department;
3) The CIT(A)-V, Pune;
4) The CIT-V, Pune;
5) The DR “B” Bench, I.T.A.T., Pune;
6) Guard File.

By Order

//True Copy//

Assistant Registrar
I.T.A.T., Pune