BOMBAY HIGH COURT

Commissioner of Income-Tax

Vs

V.A. Trivedi

S.P Bharucha and V Mohta, JJ.)

28.01.1987

JUDGMENT

S.P. Bharucha, J.

1. These are references under the provisions of section 256(1) of the Income-tax Act, 1961. The common questions referred read thus :

> "(1) Whether, on the facts and in the circumstances of the case, there was material for the assessment of the surplus from the sale of the Binaki lands as income from an adventure in the nature of trade in the assessment of the assessee for the year 1966-67 ?
>
> (2) Whether, on the facts and in the circumstances of the case, there was material for the assessment of the surplus from the sale of three acres of Ajni lands as income from an adventure in the nature of trade in the assessment of the assessee for the year 1969-70 ?
>
> (3) Whether, on the facts and in the circumstances of the case, there was material for the assessment of the surplus from the sale of three more acres of Ajni lands as income from an adventure in the nature of trade in the assessment of the assessee for the year 1971-72 ?
>
> (4) Whether, on the facts and in the circumstances of the case, the six acres of Ajni lands sold in the assessment years 1969-70 and 1971-72 could be considered to be agricultural lands for the purposes of section 2(14) ?
>
> (5) Whether, on the facts and in the circumstance of the case, the reopening of the assessment of the assessee for the assessment year 1969-70 under section 147(b) was legal ?"

The first four questions are raised at the instances of the Revenue. The fifth questions is raised at the instance of the assessee.

2. Mr. Jetly, learned counsel for the Revenue, submitted that the fifth question should not be answered in view of the judgment of the Supreme Court in *CIT v. V. Damodaran*[1] Mr. Manohar, learned counsel for the assessee, submitted that the question would not be hit by the judgment in the aforementioned case, but he stated, the assessee was not pressing for an answer to it. Accordingly, the fifth question shall not be answered.

3. The four surviving questions related to land in the village of Binaki and land in the village of Ajni. These land will hereafter the referred to as the "Binaki land" and the "Ajni land".

4. On March 22, 1963, the assessee entered into an agreement to purchase the Binaki land from one Rameshpuri. On December 6, 1963, Rameshpuri obtained permission to convert it to non-agricultural use. On January 2, 1964, 7.4 acres constituting part of the Binaki land were sold by Rameshpuri to the assessee for Rs. 10,763. On October 31, 1964, 27.27 acres constituting the balance of the Binaki land were sold by Rameshpuri to the assessee for Rs. 39,237. The aggregate price for the Binaki land was, therefore, Rs. 50,000. On May 31, 1965, the Binaki land was sold by the assessee to the Vidarbha Housing Board for Rs. 2,08,500.

5. On December 12, 1965, the assessee agreed to purchase 7.50 acres of land at Ajni from D. R. Gadgil. These 7.50 acres formed part of a larger plot of 25.85 acres. On January 18, 1963, D. R. Gadgil had sold 17.50 acres of adjoining land to the Central Telegraph Officer Staff Co-operative Housing Society Limited, Nagpur. On February 24, 1966, 7 acres (now called the "Ajni land") were conveyed by D. R. Gadgil to the assessee for the price of Rs. 93,331. The assessee paid Rs. 10,000 to one Dhanwatay in consideration of the latter's claim to an earlier right to purchase the Ajni land. The assessee also bore the expenses of registration, etc., in respect of the Ajni land aggregating to Rs. 6,892. The assessee thus obtained the Ajni land for the aggregate outlay of Rs. 1,10,223, which worked out of Rs. 15,746 per acre. The Ajni land fell within the Nagpur Improvement Trust Scheme. On August 8, 1966, the assessee obtained permission to covert the Ajni land to non-agricultural use. On June 14, 1968, the assessee entered into an agreement to sell 3 acres out of the Ajni land to the Brihan Nagpur Griha Nirman Sahakari Sanstha Maryadid (now called "the Brihan Society") for the aggregate price of Rs. 1,35,000, i.e., at the rate of Rs. 45,000 per acre. On October 17, 1968, the assessee conveyed these 3 acres to the Brihan Society. On December 21, 1968, the assessee entered into an agreement to sell another 3 acres out of the Ajni land to the Brihan Society for the aggregate amount of Rs. 1,35,000. On January 22, 1970, these 3 acres were conveyed to the Brihan Society. The Ajni land was assessed for the first time to non-agricultural assessment for the year ended March 31, 1970. The assessee appealed therefrom and by his order dated June 30, 1973, the Sub-Divisional Officer, Nagpur, found that the Ajni land was continuously under agricultural operations till the year 1969 and the nature of the land was not changed till then. Under section 115 of the Maharashtra Land Revenue Code,

1966, non-agricultural assessment was leviable with effect from the date on which land was actually used for non-agricultural purposes. The Sub-Divisional Officer, therefore, ordered that non-agricultural assessment upon the Ajni land should be recovered only with effect from the year 1970-71, i.e., "from the date of actual use of the land for non-agricultural purposes".

6. In his return for the assessment year 1966-67, the assessee declared the sum of Rs. 1,40,703 as surplus from the sale of the Binaki land, but contended that the income was not chargeable to tax. The Income-tax Officer held while making the assessment that the assessee had purchased the Binaki land with the object of selling it and the profit from the sale was from a transaction which was an adventure in the nature of trade. Accordingly, he included the sum of Rs. 1,40,708 in the assessee's total income. The assessee filed an appeal thereagainst which was allowed by the Appellate Assistant Commissioner. Neither the Income-tax Officer nor the Appellate Assistant Commissioner considered the possibility of taxing the surplus as a capital gain. Against the order of the Appellate Assistant Commissioner, the taxing authorities filed an appeal before the Income-tax Appellate Tribunal.

7. In his return for the assessment year 1969-70, the assessee declared a sum of Rs. 65,262 as income from the sale of agricultural land, i.e., he 3 acres of the Ajni land, and claimed exemption from tax on the basis that it was agricultural land. The Income-tax Officer made an order of assessment without considering the amount of the claim for exemption. In the return for the assessment year 1971-72, the assessee declared the income of Rs. 87,762 on accounts of the sale of the balance of 3 acres of the Ajni land and indicated that it was exempt being agricultural income. AT this stage, the Income-tax Officer reopened the assessment of the assessee for the assessment year 1969-70. The reassessment proceedings for the assessment year 1971-72 were concluded by orders passed on the same day. In both, the concerned income was held to arise from profits from an adventure in the nature of trade and was added to the total income of the assessees for the relevant assessment years. In appeal, the Appellate Assistant Commissioner held that the concerned income did not arise on an adventure in the nature of trade and was not, therefore, taxable under the head of "Business". He also found that the Ajni land was agricultural land and that, therefore, the surplus thereon received by the assessee was not taxable as a capital gain.

8. The taxing authorities filed appeals before the Tribunal in regard to the assessment for the assessment years 1969-70 and 1971-72.

9. The Tribunal disposed of the appeals for the assessment years 1966-67, 1969-70 and 1971-72 by a common order. It held that the assessee was a businessman, an agriculturist and an investor in lands; that the Binaki and Ajni lands were situated within the limits of the Nagpur Municipal Corporation and that the assessee had cultivated them till these sales; that Rameshpuri in the case

of the Binaki land and the assessee in the case of the Ajni land had obtained permission for using the same for non-agricultural purposes but the assessee had continued to cultivate the lands and used them for agricultural purposes till the dates of their respective sales; that the Binaki land had been sold as a measure of forestalling the acquisition thereof and that the assessee had purchased the Binaki and the Ajni lands as investment. Accordingly, the Tribunal held that the profits from the sales of the Binaki land and the Ajni land were not taxable under the heading "Business" as income from an adventure in the nature of trade in the assessee's assessments for the assessment years 1966-67, 1969-70 and 1971-72. The Tribunal also held that the Ajni land was agricultural land within the meaning of section 2(14) and the surplus from the thereof was not taxable as a capital gain in the assessments of the assessee for the assessment years 1969-70 and 1971-72.

10. The questions posed to us arise from this common order of the Tribunal.

11. Mr. Jetly urged, in regard to the first second and third questions, that the profits earned by the assessee upon the sales of the Binaki and Ajai lands were taxable under the heading "Business" as arising from an adventure in the nature of trade. He drew our attention to an ureported judgment of this court delivered at Nagpur in Income-tax Reference No. 78 of 1974 Shri Rikhabchand Sharma v. Commissioner of Income-tax, Vidarbha and Marathwada, Nagpur by Kantawala C.J. and Chandurkar J. on October 6, 1977. The court held that it was not possible to evolve a single test or formula which could be applied in determining whether or not a transaction was an adventure in the nature of trade. The questions had to be decided on the facts and circumstances of each case and taking into account the entirety of the circumstances. There had to be an intention to trade at the time of the purchase and the onus lay upon the Revenue to prove that a particular transaction amounted to an adventure in the nature of trade. Ordinarily, where a person acquired land with a view to selling it later after developing it and actually divided the land into plots and sold the same in parcels, the activity could only be described as a business adventure. Generally speaking, the original intention of the party in purchasing the property, the magnitude of the transaction of purchase, the property, magnitude of the transaction of purchase, the nature of the property, the length of its ownership and holding, the conduct and subsequent dealing of the assessee in respect of the property, the manner of its disposal and the frequency and multiplicity of transactions afforded valuable guides in determining whether the assessee was carrying on a trading activity and whether a particular transaction should be stamped with the character of a trading adventure.

12. The Karnataka High Court in *CIT v. B. Narasimha Eddy*[2] has said much the same thing.

13. Mr. Jetly submitted that the present case was one of systematic purchases and sale of land spread between March, 1963, and January, 1970. The volume in terms of money was substantial. The transaction were frequent and had consumed the assessee's time and money. The cumulative

effect must lead, in Mr. Jetly's submission, to the conclusion that the assessee had, in his contemplation, when he purchased the Binaki and Ajni lands, a business activity.

14. The onus of establishing that a purchase is made with the intention to trade is on the Revenue. That onus the Revenue has in the instant case failed to discharge. The only factor which we find at all relevant in the context is that the assessee obtained permission to change the use of the Ajni land to non-agricultural purposes. But that one factor by itself cannot establish that the purchase of the Binaki and the Ajni lands was with a view to reading in them especially when the assessee was, a found by the Tribunal, an agriculturist who owned other agricultural lands and the sale of the Binaki land was to forestall its acquisition. In the result, we must answer the first, second and third questions in the negative and in favour of the assessee.

15. This being us to the question as to whether the Ajni land was agricultural land when the assessee sold it. Mr. Manohar, learned counsel for the assessee, fairly summed up the facts found by the Tribunal which suggested that the Ajni land was agricultural land on the date of its sale but the facts found suggested the converse. The facts found are; (1) at the time of its purchase by the assessee, the Ajni land was agricultural land; (2) it had been under cultivation by the assessee till the dates of its sale, (3) it continued to be assessed to land revenue as agricultural land until sold, (4) the intention of the assessee, when he purchased it, was to acquire agricultural land for agricultural purposes, (5) the assessee's use of it was the normal use by the agriculturist, (6) it was not within any Town Planning Schemes, and (7) no material has been proceeded to show any development or building activity surrounding it. The facts found to suggest the converse are; (1) the location of the Ajni land within the Corporation and improvement trust limits; (2) the action of the assessee in obtaining on August 8, 1966, permission to convert the user of the Ajni land to non-agricultural purposes, and (3) the agreement to sell and the sale of the Ajni land for non-agricultural, i.e., building purposes.

16. The character or nature of the land is what is relevant in the context of whether land is agricultural land so as to qualify for exemption from tax. It is not enough that the land is put to use for agricultural purposes on the relevant date, the dates being of the conveyances of the Ajni land to the Brihan Society. To ascertain the true character or nature of the land, it must be seen whether it has been put to use for agricultural purposes for a reasonable span to time prior to the relevant date. It must also be seen whether on the relevant date the land was intended to be put to use for agricultural purposes for a reasonable span of time in the future. That this last criterion is also necessary is indicated by the decisions now mentioned.

17. In CWT v. Officer-in Charge (Court of Wards), Paigah , the question was whether the property called "Begumpet Place" within the municipal limits of Hyderabad, consisting of vacant lands of about 108 acres and building enclosed in compound walls constituted "agricultural land"

within the meaning of section 2(e), clause (i), of the Wealth-tax Act, 1957. The Supreme Court remanded the matter of the Appellate Tribunal to determine afresh whether the lands were agricultural after giving an opportunity to both sides to lead further evidence in the light of what was stated in its judgment. The Supreme Court observed that the exemption from wealth-tax was connected with the user of and for a purpose which must be agricultural. Credible evidence could not be dispensed with at least for appropriation or setting apart of the land for a purpose which could be regarded as agricultural and for which the land could be reasonably used without an alteration of its character. The assessee's counsel had complained that no evidence had been led on the use or intended use before the taxing authorities as the evidence provided by the entries in the revenue records had been considered to be enough. The Supreme Court observed that it had to be remembered that such entries could raise only a rebuttable resumption. It could, therefore, be contended that same evidence should have been led before the taxing authorities of the purpose or intended user of the land under consideration before the presumption could be rebutted. What was really required to be shown was the connection with an agricultural purposes and user and not the mere possibility of user of land by some possible future owner or possessor for an agricultural purpose. It was not the mere potentiality which would affect its valuation as part of the assets, but its actual condition and "intended user" which had to be seen. "One of the object", the Supreme Court said (at p. 144) : "of the exemption seemed to be to encourage cultivation or actual utilisation of land for agricultural purposes. If there is neither anything in its condition, nor anything in evidence to indicate the intention of its owners of possessors, as as to connect it with an agricultural purpose, the land could not be agricultural land....."

18. In *Ranchhodbhai Bhaijibhai Patel v. CIT*[3] the Gujarat High Court reaffirmed the view it had taken in *Rasiklal Chimanlal Nagri v. CWT*[4] in context of capital gains under the Income-tax Act. It reiterated that the intention of the owner, as gathered from all relevant circumstances, would have a bearing on the general nature of character of the land. The intention of the owner to put land to a particular use at any given point of time was not the determining factor but it certainly was a relevant factor and had to be taken into account.

19. In *Arundhati Balkrishna v. CIT*[5] a Division Bench of the Gujarat High Court again considered the question of land being agricultural for the purposes of exemption from capital gains under the Income-tax Act. Again it followed the judgment in Rasiklal Chimanlal Nagri's case [1965] 56 ITR 608 (Guj)(SUPRA). It noted the proposition that emerged from that case. One of these was thus set out : the intention of the owner to put the land to any particular use was one of the criteria, though not the sole or exclusive criterion. Actual user, the court said, may ordinarily furnish prima facie evidence of the nature and character of the land. The development and situation of land in the adjoining area or surroundings would be an important factor for consideration. Physical characteristics might throw some light. The mere fact that the lands were

assessed as agricultural lands or were not actually used for non-agricultural purposes did not necessarily mean that they were agricultural lands. A prudent and reasonable man would not purchase land for agricultural purposes in the midst of a developed residential area at a high price. The following extract from the judgment is of great relevance (p. 257 of 138 ITR) :

> "Besides, permission had in fact been obtained under section 63 of the Tenancy Act to sell the land to a non-agriculturist. The assessee, therefore, knew that the land was being sold to a non-agriculturist for the purpose of constructing houses at a rate at which non-agriculturist would purchase it for bona fide agricultural purposes. She had full knowledge that permission had been obtained to sell it to a housing society for building houses. This clearly shows that the character of the land had charged and she herself had considered this land to be non-agricultural land and in fact treated it as building site land. It is not in dispute that the land is situated in the midst of developed lands and there are buildings round about. The land was situated within the Corporation limits of Ahmedabad within the Draft Town Planning Scheme No. 29 framed on March 3, 1967, which was sanctioned on November 21, 1968, and was eminently suitable for construction of houses. Such had cannot be characterised as agricultural land merely because it was entered in the revenue records as agricultural land and the assessee was paying land revenue assessment on the basis that it was agricultural land. As we have discussed hereinbefore, it suited the assessee not to apply for permission to convert it into non-agricultural land because the assessee would be required to pay wealth-tax on it and also to pay capital gains tax in case the land was sold. The mere fact that it stood in the records as agricultural land is of no importance."

20. In *CIT v. Universal Cine Traders Pvt. Ltd*[6]. this court took into account the intention of the owner in regard to non-agricultural use of the land.

21. As against this, Mr. Manohar submitted that what had been obtained by the assessee on August 8, 1966, was only an order under section 115 of the Maharashtra Land Revenue Code and this, by itself, did not make for a conversion of the use to which the Ajni lands could be put. That is correct. It is not suggested that this factor is determinative of the question as to whether or not the Ajni land was agricultural land on the dates of its sale. What is rightly suggested is that the step the assessee took in this behalf is one of the relevant factors to be taken into account in determining the nature of character of the Ajni land. It is indicative of the intention of the assessee in respect of the use to which he intended to put the Ajni land.

22. Mr. Manohar placed emphasis upon several judgments of the Gujarat High Court, other than those cited above, which have held that the future use of the land is irrelevant in the context of determining whether it is agricultural land.

23. The first of the judgments relied upon in this behalf is in *Chhotalal Prabhudas v. CIT*[7] The Tribunal had held that the intention for using the land became clear when the agreement to sell the land for use for non-agricultural purposes was entered into and, therefore, when the land was sold, it was not agricultural land. The Gujarat High Court observed that what it had to consider was not what the purchaser did with the lands or what the purchaser was supposed to do with the land but what was the character of the land at the time when the sale took place.

24. A similar view was taken in *Gordhanbhai Kahandas Dalwadi v. CIT*[8] The court said that it had to be borne in mind that the correct test that had to be applied was whether, on the date of the sale, the land was agricultural land or not. That, after the sale, the purchaser was going to put the land to non-agricultural use did not, the court said, mean that the land had ceased to be agricultural land at the date of sale. The crucial date for the purpose of finding out the character of the land was the date of sale and the question that had to be asked was whether on the date of sale, the land was agricultural land or not. However, what had weighed with the Tribunal, inter alia, was the fact that after the sale, the purchaser was going to use the land for non-agricultural purposes and it was in the light of what was going to happen in future that the Tribunal had held that the land was non-agricultural in character. It had to be borne in mind that if the land was actually used for agricultural purposes, it could, at least prima facie, be said to be land which was either actually used to ordinarily used or means to be used for agricultural purposes.

25. Mr. Manohar drew out attention to the judgment of the Gujarat High Court in *CIT v. Lilavati Thakorelal Patel*[9] wherein the judgment in Arundhati Balkrishna's case [1982] 138 ITR 245 (Guj) was explained. In Arundhati Balkrishna's case, it was said, the court had found, having regard to the fact that the assessee, who was a lady and whose main source of income was dividends on shares and interest on securities, could not have intended to carry on agricultural operations on the land since there was no evidence to show that she possessed any agricultural implements, etc., and, therefore, the land was not means for being used for agricultural purpose. These speaking circumstances had carried weight and, on an overall consideration, particularly of the facts referred to above, it had been concluded that the land was not agricultural land.

26. With great respect to the learned judges who decided Smt. Lilavati Thakorelal Patel's case [1985] 152 ITR 565 (Guj)(Supra), this does not appear to be a wholly correct reading of the judgment in Arundhati Balkrishna's case [1982] 138 ITR 245 (Guj)(supra), for, it takes no account of what we have quoted from it.

27. Mr. Manohar drew our attention to yet another Gujarat High Court judgment in *CIT v. Siddharth J. Desai*[10] This judgment analyses in a tabular form the various judgments of the Gujarat High Court on the point and formulates tests based thereon. The judgment in Arundhati Balkrishna's case [1982] 138 ITR 245 (Guj) is, however, not noticed.

28. Upon the basis that there should be uniformity in the views expressed by High Courts in relation to taxing statutes, we would have been inclined to follow the Gujarat High Court's view in the cases of *Chhotalal Prabhudas [1979] 116 ITR 631(supra) and Gordhanbhai Kahandas Dalwadi's case [1981] 127 ITR 664(supra)*, but for the fact that they would seem to run counter to the aforementioned judgment of the Supreme Court and of the Gujarat High Court itself in the cases of *Rasiklal Chimanlal Nagri [1965] 56 ITR 608(Supra), Ranchhodbhai Bhaijibhai Patel [1971] 81 ITR 446(Supra) and Arundhati Balkrishna [1982] 138 ITR 245(Supra).*

29. In the last mentioned case, it was suggested that the conversion of land to non-agricultural purposes would, by itself mean that the land was not agricultural land. We do not go so far. We treat it only as one of the indicia.

30. The intention of the assessee was first indicated when the applied for permission to change the user of the Ajni land to non-agricultural purposes. If he had done no more and had continued to cultivate the Ajni land, the position that the Ajni land was agricultural land might not have changed.What are crucial, in our view, are the agreement entered into by the assessee with the Brihan Society. The assessee agreed to sell the Ajni land to the Brihan Society admittedly for utilisation for non-agricultural purposes. The sales were to take place within about 4 months of the respective agreements of sale. From the point of time the agreements for sale were entered into, agricultural operations upon the Ajni land were patently stop-gap arrangements to cover the space of about 4 months till the conveyances were entered into. On the date on which the Ajni land was conveyed by the assessee to the Brihan Society, its character or nature was, therefore, not agricultural. It was not entitled to the exemption given to agricultural land, an exemption given, as the Supreme Court said in the case noted above, "to encourage cultivation or actual utilisation of land for agricultural purposes".

31. Mr. Manohar submitted, lastly, that the taxing authorities bad for other purposes treated the Ajni land as agricultural land. So far as the answer to the forth question is concerned, this is of no relevance.

32. The answer to the fourth question must, accordingly, be in the negative and in favour of the Revenue.

33. In the result, questions Nos. 1, 2 and 3 are answered in the negative and in favour of the assessee. Question No. 4 is answered in the negative and in favour of the Revenue. An answer was not sought to the question raised on behalf of the assessee and it is, accordingly, not answered.

34. No order as to costs.

Cases Referred.

1[1980] 121 ITR 572
2[1984] 150 ITR 347
3[1971] 81 ITR 446
4[1965] 56 ITR 608 (Guj)
5[1982] 138 ITR 245
6[1986] 161 ITR 696
7[1979] 116 ITR 631 (Guj)
8[1981] 127 ITR 664 (Guj)
9[1985] 152 ITR (Guj)
10[1983] 139 ITR 628