IN THE INCOME TAX APPELLATE TRIBUNAL
BENCHES 'E' MUMBAI

ITA No.4174/Mum/2009
Assessment Year: 2005-2006

INCOME TAX OFFICER TDA-2
GR FLOOR, ITO OFFICE
QURESHI MANSION, NAUPADA

Vs

THE SPECIAL LAND ACQUISITION OFFICER
SPECIAL UNIT, THANE, 3rd FLOOR
COLLECTOR OFFICE, COURT NAKA
THANE, THANE
PAN NO:PNES17194C

J Sudhakar Reddy, AM and Vijay Pal Rao, JM

Dated: April 29, 2011

Appellant Rep by: Shri Vimal Punamiya
Respondent Rep by: Shri Sanjiv Dutt

Income Tax - Sections 2(14), 194LA, 201(1), 201(1A) of the Act - Whether when the compensation is paid for acquiring the agricultural land, the rigours of Sec 194LA are not attracted - Whether, even if the land is not cultivated for long, it remains agricultural in nature as long as it is not put to any other use.

The Assessee in this case is Special Land Acquisition Officer, Thane (SLAO). It paid 80% of the cost of the land to 29 persons as compensation for the land acquired from them without deducting any TDS. Observing this the AO issued a show cause notice asking him to explain as to why he should not be treated as assessee in default under section 201(1) of the Act for the above default and the interest u/s 201(1A) should not be levied for the same. The SLAO submitted the required information such as a copy of the government order for land acquisition, extract of the awards, statement showing compensation payable to the interested persons on the land acquisition and argued that land in question was agricultural land hence rigours of section 194LA were not applicable - CIT(A) accepting the plea of the assessee allowed the appeal - Before the ITAT, the AR of the assessee argued that though the land was not cultivated since long yet the same was having character of agricultural land and hence the order of the CIT(A) was tenable.

After hearing the parties the ITAT held that,

++ as we understood that the definition u/s 2(14) of the Act is for the purpose of taxing the capital gain on transfer of the land. Whereas the term used u/s 194LA is only for the limited purposes of deduction of TDS in compulsory acquisition, therefore, as held by the Kerala High Court the definition is given in section 2(14)

cannot be imported for the purpose of section 194LA;

++ there is no quarrel on this point that when there is a dispute about the question of whether the land acquired is an agricultural land, the competent authority is the Income Tax authorities. However, in the case in hand, the AO has dealt with the question and the CIT(A) has already considered this question and came to the conclusion that the land in question acquired by the authority is agricultural land and therefore no tax was required to be deducted u/s 194LA. Therefore, the question has been decided by the revenue authorities;

++ moreover, after considering the relevant provisions of the Act and particularly section 194LA, we find that the land in question is basically an agricultural land and there is no material either pointed out by the AO or brought before us to show that the land acquired was used for non agricultural purposes by the owners of the land. The AO as well as the DR have come out with the arguments that since the land was not under cultivation and it was not fit for agricultural, therefore, it cannot be treated as agricultural land. To our mind it is not a decisive factor when the land itself is agricultural land though may not be used for agricultural purposes but unless and until the same is used for non agricultural purposes it cannot be said that the land cannot be treated as agricultural land for the purposes of section 194LA.

Revenue's appeal dismissed

ORDER

Per: Vijay Pal Rao:

This appeal by the revenue is directed against the order dated 15.04.2009 of CIT(A) for the assessment year 2005-06 arising from the order passed under section 201(1) and 201(1A) of the Income Tax Act, 1961.

2. The revenue has raised he following grounds in this appeal :

"1. On the facts and in the circumstances of the case, the ld. CIT(A), Thane, erred in holding provisions of section 194LA which are not attracted in this case by ignoring the material fact these are non agricultural lands as admitted by the assessee.

2. The ld. CIT(A) further erred in admitting fresh evidence and not giving the AO the opportunity to rebut the same in form no. 7/12 extract which has been reproduced in the appellate order which is different from what is in the folder of the AO thereby ignoring the fact that these are non agricultural lands.

3. The ld. CIT(A) has further erred in holding that these are agricultural land ignoring the decision of Kerala High Court 294 ITR 423 wherein in the Hon. High Court has held that the classification of agricultural land is on the basis of definition contained in IT Act , 1961, but not with reference to the tenure of agricultural land"

2.1 On the basis of the information collected by the Income Tax Officer, TDS-Ward-2(3), Thane regarding the payment of compensation on account of compulsory land acquisition, the AO proceeded u/s 201(1) and 201(1A) of the Act. The AO noticed that as per the said information, the Special Land Acquisition Officer, Thane in short

SLAO paid 80% of the cost of the land to the 29 persons as compensation for the land acquired from them amounting to Rs.60,66,01,426/ - during the financial year 2005-06. The compensation was Rs1 lakh or more in each case. The AO observed that the SLAO has not deducted the tax from the above payment as required u/s 194LA of the Act. Hence a show cause notice was issued to the SLAO asking him to explain as to why he should not be treated as assessee in default under section 201(1) of the Act for the above default and the interest u/s 201(1A) should not be levied for the same. The SLAO submitted the required information such as copy of government order of land acquisition, 7/12 extract of land of the awards, statement showing compensation payable to the interested persons on the land acquisition. It was explained before the AO by the SLAO that the land under acquisition were agricultural land since agricultural cess or set sara is collected as per the procedure laid down in the Maharashtra Rent Revenue Code. IT was contended that the agricultural land needs to be converted into the Non-agricultural land only after permission granted by the COLLECTOR u/s 244A and 242 of the Code. This agricultural land were remained uncultivated as it was intended for acquisition for railway, therefore in the agricultural produce section it is shown as uncultivated but this does not change the nature of land as such. The AO did not accept the contention of the SLAO and observed that on verification of the 7/12 extract filed, it is cleared that the acquired land shown as PAD or OSHAD. Barr on or Desolate and the acquisition of the said land shown in the column as land not available for cultivation. Therefore, the AO concluded that the land acquired is not agricultural land as per the definition of agricultural land under the Income Tax Act and clearly attracts the provisions of section 194LA of the Act. The AO held that the SLAO failed to deduct the tax of payment of compensation on compulsory acquisition. Accordingly, the AO treated the SLAO as assessee in default a s per the provision of section 194LA read with section 201(1) in respect of the non deduction of tax u/s 201(1) at Rs.1,85,25,861/ - and interest payable thereon u/s 201(1A) at Rs.5816468/ - total amounting to Rs.2,43,42,329/ - vide order dated 12.3.2008.

2.2 The SLAO challenged the said order before the CIT(A) who held that the assessee was correct in not deducting the tax at source on payment of compensation on acquisition of agricultural land u/s 194LA and cancelled the order passed under section 201(1) and 201(1A) vide impugned order and upheld the action of the assessee for not deducting the tax at source.

2.3 Before us, the learned DR has submitted that in most of the 7/12 extract, the State Revenue authority itself has given remark in the column of land available for cultivation as ‘binseti ”/PAD or OSHAT which means agriculturists were not cultivating the land. The ld. DR has referred the notification under Land Acquisition Act and submitted that in the acquisition notification the land under acquisition itself mentioned as “Binseti ”, PAD or OSHAD which clearly shows that the land under in question was not used for agricultural purposes, therefore, in view of the definition of the Agricultural Land under Income Tax Act, the land acquired under acquisition was not agricultural land. When no agricultural activities were carried out on the land then the land cannot be treated as agricultural land for the purpose of Income Tax Act. The learned DR has further contended that merely because the land under acquisition was recorded as agricultural land in the Revenue record cannot be treated as agricultural land for the purpose of Income Tax Act.. He has referred and relied upon the decision of the Hon. Supreme Court in the case of *CIT V/s Office In-charge Officer-in-Charge (Court of Wards), Paigah [1976] 105 ITR 133 (SC)* and submitted that the agricultural land must have the connection with the agricultural use or purpose. The exemption is connected with the user of the land for the purposes

which must be agricultural. Therefore, the agricultural land must be used for agricultural purposes and have a connection with agricultural use or purpose. Accordingly, potential use of the agricultural land is not enough for treating the land as agricultural land. The learned DR has then referred the decision of the hon. Supreme Court in the case of. *Sarifabibi Mohmed Ibrahim v.Commissioner of Income- tax reported in [1993] 204 ITR 631 (SC)* and submitted that for deciding the nature of land various factors are to be taken into account and one of which is whether the land is actually under cultivation or not and the purpose for which the land is sought. He has further contended that the Hon. Supreme Court has held that when the land sought for Housing Society Scheme, the application of the sale of land is for non agricultural purposes and the land was sold per sq. ft, the consideration of these factors are to be taken into account while deciding the issue of the nature of the land. The learned DR has also relied upon the decision of the Hon. Kerala High Court in the case of *Nalini Vs Deputy Collector, Land Acquisition (Ker) reported in 294 ITR 423*, State of Kerala V/s Mariyamma and ors reported in 144 Taxman 744, and submitted that the question whether the land acquired was agricultural land within the meaning of section 2 (14) (a)(b) of Income Tax Act and was not liable to TDS u/s 194LA could be decided by the Income Tax Authorities and not by the LAND Acquisition Court and the remedy available with the party is either to approach the competent authority u/s 197 or to pay tax and get it refunded. Thus, the learned DR has given more emphasis on the point that the question whether the land acquired was agricultural land and liable to deduct tax under section 194 LA has to be deducted by the Revenue authority and not by SLAO. THE learned DR has also submitted that the AO has pointed out the various discrepancy in the 7/12 extracts filed by the assessee filed before the CIT(A) which are also the part of the paper book filed before the Tribunal. Therefore, in view of the matter the issue requires verification at the level of the AO. To but tress his point the learned DR submitted that since the CIT(A) has considered the additional evidence without giving opportunity to the AO, therefore, there is a violation of Rule 46A of the Income Tax Rules, 1962. The learned DR submitted that the CIT(A) has considered the fresh evidence in the form of 7/12 extract without giving opportunity to the AO to rebut the same. He has relied upon the orders of the AO.

2.4 On the other hand, the learned AR has submitted that all the lands except two lands listed at sr. no.54 and 55 of the list recorded in the body of the assessment order acquired by the revenue in the year under appeal were agricultural lands. The learned AR further submitted that the tehsildar Vasai in his certificate has certified that as on 8.08.2005 i.e. the date of acquisition all acquired lands were agricultural lands except two lands bearing survey no. 4(part), area 0.01.20H/A and survey no.5, area 0.31.80 H/A appearing at sr. no.1 and 2 of the said certificates. In respect of these two non-agricultural lands the SLAO has correctly deducted tax at source and there is no dispute.

2.5 The learned AR submitted that the State Revenue Authorities have collected the “shetsera” or agricultural cess in respect of the agricultural lands from the holders of the lands in accordance with the procedure laid down under the Maharashtra land revenue Code, which itself indicates the land to be as the agricultural land. The 7/12 extracts in respect of each parcel of land clearly identifies the land in question to be “agricultural land”. It may kindly be appreciated that in case the land is non agricultural land, then it is distinctly so identified in the 7/12 extracts by the legend “Binsheti ” which means non agricultural.

2.6 The learned AR submitted the revenue vide letter dated 13.03.2009 has stated that the acquired lands were mentioned in the 7/12 extracts to be either “non-agricultural or pad/asad”. In this regards, it was pointed out that none of the 7/12 extracts in respect of the acquired lands bear the nomenclature “non agricultural land” He submitted that the remark of the revenue (TDS) in this regard appears to be casual in nature and is not supported by any specific instance being pointed out in the said letter dated 13.03.2009. As the remark is not supported by evidence the same may be discarded as being factually incorrect. As far as the issue of acquired lands bearing the remarks of the same being either “PAD/OSAD” is concerned, it is submitted that the lands being notified for acquisition, the same were not used by the holders of the land in the year of acquisition for raising any agricultural crops and hence the revenue authorities have put the remark of said lands being “PAD or OSAD” i.e. fallow.

2.7 The learned AR further pointed out that any land which is an agricultural land does not automatically become a nonagricultural land if agricultural produce is not raised thereon. Unless specific permission as provided u/s 42 and 44 of the Maharashtra Land Revenue Code is received by the holder of the land from the collector, agricultural lands cannot be converted to nonagricultural use.

2.8 The learned AR submitted that the assessing officer has held that tax was required to be deducted from the consideration paid, for the only reason that agricultural operations may not have been carried out on these lands. The AO did so while confusing the meaning of the term “agricultural land” as specifically provided in the explanation to section 194LA with the term “agricultural income” as contained in section 2(1A) of the IT Act, 1961. He submitted that for any assessee to claim the beneficial liability to tax on agricultural income, it is required that the onus of establishing the existence of agricultural income as defined in section 2(1A) and as more particularly clarified by the various decision of the higher judicial authorities be satisfied. The assessing officer has erroneously diverted to this area when he says in the order that the agricultural lands have not been put to use for raising agricultural produce. The terms agricultural income and agricultural land are not synonymous with each other but quite distinct and separate and have been assigned specific meaning under the various provisions of the IT Act.

2.9 He has relied upon the decision of the Hon. Supreme *[1971] 82 ITR 44 (SC)* **=** ***(2002-TIOL-642-SC-IT)*** and the decision in the case of *CGT Vs N.S.Getti Chettiar (82 ITR 599) (SC)*. He has also relied upon the order of Ahmedabad Bench of this Tribunal in the case of *SLAO V/s reported in 42 SOT 9 (Ahmd)* and submitted that the definition of the term agricultural has given under section 194LA is distinguished from the term agricultural land is given u/s 2(A) of the Income Tax Act. The definition of agricultural land contained in section 2(14) (iii)(a) (b) cannot be borrowed for the purposes of deduction of tax at source u/s 194 LA. The learned AR has also relied upon the decision of the Kerala High Court in he case of *Mysore Urban Development Authority and ors V/s ITO and another reported in 218 CTR 678 (KAR)* and submitted that the meaning of agricultural land is mention in the definition of capital asset u/s 2(14) is not imported for the purposes of section 194LA. The learned AR has further submitted that when the land in question show agricultural in revenue record and never sought to be used for nonagricultural purposes till it was acquired then it is to be treated agricultural land even though no agricultural activities were carried out on this land. In support of his contention, he has relied upon the decision of this TRIBUNAL in the case of *CIT V/s Debbile Alemao (Smt) 46 DTR 341 (Bom)***.**

2.10 We have considered the rival contentions and relevant record. As far as the objection for admitting fresh evidence by the CIT(A) is concerned we note that the CIT(A) has given the opportunity to the AO of being heard and also forwarded the relevant record for his comments. The AO vide letter dated 13.03.2009 submitted the report which been reproduced by the CIT(A) in paragraphs 3 and 5 of the impugned order. From the said report it is evident that the AO has taken into account 7/12 extract in respect of each transfer of land. Thus, in view of this fact that the AO was offered proper opportunity of hearing as well as to file written report which was considered by the learned CIT(A), the objection raised by the revenue that there is a violation of Rule 46A has no legs to stand. Accordingly, we reject the objection raised by the learned DR.

2.11 The second main objection raised by the learned DR is that since the land under acquisition was not cultivated and as per the 7/12 extract as well as the notification of acquisition, the land under acquisition was shown as Barron, desolate and not under cultivation. It is to be noted that these facts and factors are relevant only for the purpose of acquisition and determination of compensation and does not change the basic nature of land being agriculture. These are categories of agricultural land relevant for the purpose of compulsory acquisition and compensation. This question is also relevant for the purposes of deciding the charge of taxability of the income from transfer of land by the owners. The decision relied upon by he learned DR in the case *CWT V/s Office incharge (court of wards) (supra) and Sarifabibi Mohmed Ibrahim v .Commissioner of Income-tax reported in [1993] 204 ITR 631 (SC)* are not applicable in the facts of the present case. In the first case the issue was for the asset for Wealth Tax Purpose and meaning of agricultural land u/s 2(A) (1) and the hon. Supreme Court observed that the exemption is connected with the user of the land for the purpose must be agricultural. Therefore, the use of the land was very much relevant for the purpose of seeking exemption from tax. In the second case, the Hon. Supreme Court has clearly laid down the various tests to be taken into account if the land in question was sought to be used for non-agricultural purposes or owners of the land intended to sell and transfer the land for non-agricultural purposes by taking the permission of non-agricultural use but it was for the purpose of capital gain. The hon. Supreme Court has observed that if the land is situated within the MUNICIPAL Limit, not being cultivated for certain period before it was sold, sale of the land was for using by cooperative society after seeking non agricultural purpose. Thus the sale of land was intended for non agriculture purpose. The hon. Supreme Court has also cited certain factors in favour of the assessee such as land registered as agricultural land, revenue paid, in absence of any evidence for non agricultural use, the land actually cultivated etc.

2.12 In the case in hand, it was not the case of selling the land by the owners for earning the income but it is a compulsory acquisition by the government. The revenue authority acquired land under the category of the agricultural land the compensation was also paid as applicable for acquisition of agricultural land. The various categories as mentioned in 7/12 extract and in the acquisition notification are necessary for the purpose of acquisition of agricultural land because the compensation as well as the acquisition has to be decided on the basis these classes of the agricultural land. Various factors whether the land is under cultivation or Barron/desolated, if the land is thickly habituated and constructed are relevant for the purpose of acquisition. Accordingly these are the various necessary factors have to be taken into account for acquisition of the land. These are categories of the agricultural land itself and does not change the nature and character of the agricultural land itself. The rate of compensation of the agricultural land also depend

upon the various classes /categories of the agricultural land if the land is under cultivating, the compensation has to be determined by taking into consideration the land and loss of income of the owner. If the land is not under cultivation the rate of compensation would be without any income or loss of the owner. Moreover, when the land has been acquired as agricultural land and compensation is paid for the agricultural land then there is no scope for doubting the nature of land acquired by the authorities for the purpose of section 194LA. The Explanation provided u/s 194LA clearly manifests that the definition u/s 2(14) of the Act is not relevant because the land situated in the area as referred in the item (a and b) of the clause of the sub-clause (iii) clause 14 of Section 2 is also included in the term agricultural land. For ready reference the Explanation to section 194LA is reproduced below:

[Payment of compensation on acquisition of certain immovable property.

194LA. Any person responsible for paying to a resident any sum, being in the nature of compensation or the enhanced compensation or the consideration or the enhanced consideration on account of compulsory acquisition, under any law for the time being in force, of any immovable property (other than agricultural land), shall, at the time of payment of such sum in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct an amount equal to ten per cent of such sum as income-tax thereon:

Provided that no deduction shall be made under this section where the amount of such payment or, as the case may be, the aggregate amount of such payments to a resident during the financial year does not exceed one hundred thousand rupees.

Explanation.-For the purposes of this section,-

(i) "agricultural land" means agricultural land in India including land situate in any area referred to in items (a) and (b) of sub-clause (iii) of clause (14) of section 2;

(ii) "immovable property" means any land (other than agricultural land) or any building or part of a building.]

2.13 It is clear from the Explanation to section 194LA that the term agricultural land as expressed in the provisions of section 194LA is entirely different and separate from the definition of agricultural land as provided u/s 2(14(A) for the purpose of other taxing provisions of the Income Tax Act. The definition which is provided u/s 2(14) of the Act has not been incorporated into the provisions of section 194LA. In the case of Mysore Development Authorities, the Hon. Kerala High Court (supra) held as under :

"This is further made very explicit, particularly, by ensuring that the meaning of "agricultural land" as found in the definition of "capital asset " under sec 2(14) Is not imported for the purpose of section 194LA of the Act which not only refers to retaining the agricultural land as it is for the purpose of section 194LA in all situations irrespective of their location but also by making it further clear that "immovable property" means only land or part of the other land other than agricultural land. A proper reading and understanding of section 194LA leaves one with no ambiguity or misunderstanding about the object and scope of this section. It is very clear that obligation cast on a person distributing compensation is only in respect of payment for immovable property. Such immovable property does not

include agricultural land and such agricultural land may be located in any place including in an urban agglomeration and the meaning of agricultural land as given in section 2(14) o the Act is not imported for the purpose of section 194LA of the Act "

The authority functioning under the Act has obviously gone wrong by quoting artificial meaning of agricultural land as contained in section 2(14) of the Act, defining capital asst. The definition of capital asst is given for the purpose of indicating that the transfer of capital asst if has resulted in some gain and becomes capital gain, it is an income taxable as income include capital gains"

2.14 As we understood that the definition u/s 2(14) of the Act is for the purpose of taxing the capital gain on transfer of the land. Whereas the term use u/s 194LA is only for the limited purposes of deduction of TDS in compulsory acquisition, therefore, as held by the Hon. Kerala High Court the definition is given in section 2(14) cannot be imparted for the purpose of section 194LA.

2.15 As regard the contention of the learned DR that the question whether the land acquired is an agricultural land has to be decided by the Income tax authority is concerned, we find that the decision relied upon by the learned DR are in respect of the order passed by the land Acquisition Court and the Hon. High Court has held that this question has to be decided by the Income Tax Authority and not by the Land Acquisition Authority. There is no quarrel on this point that when there is a dispute about the question of whether the land acquired is a agricultural land, the competent authority is the Income Tax authorities. However, in the case in hand, the AO has dealt with the question and the CIT(A) has already considered this question and came to the conclusion that the land in question acquired by the authority is agricultural land and therefore no tax was required to be deducted u/s 194LA. Therefore, the question has been decided by the revenue authorities. Moreover, after considering the relevant provisions of the Act and particularly section 194LA, we find that the land in question is basically an agricultural land and there is no material either pointed out by the AO or brought before us to show that the land acquired was used for non agricultural purposes by the owners of the land. The AO as well as the learned DR has come out with the arguments that since the land was not under cultivation and it was not fit for agricultural, therefore, it cannot be treated as agricultural land. To our mind it is not a decisive factor when the land itself is agricultural land though may not be used for agricultural purposes but unless and until the same is used for non agricultural purposes it cannot be said that the land cannot be treated as agricultural land for the purposes of section 194LA. Even otherwise these questions are relevant only for deciding the taxability of income in the hands of the owners of the land. The SLAO has already specified certain lands which were non agricultural land and therefore, we do no find any reason to interfere with the order of the CIT(A). Accordingly, the order of the CIT(A) is upheld.

15 The appeal of the revenue is dismissed.

(Pronounced in the Open Court on 29.4.2011)