आयकर अपीलीय अधिकरण, 'सी' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL

'C' BENCH, CHENNAI

श्री एन.आर.एस. गणेशन, न्यायिक सदस्य एवं

श्री ए. मोहन अलंकामणी, लेखा सदस्य केसमक्ष

BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND
SHRI A. MOHAN ALANKAMONY, ACCOUNTANT MEMBER

आयकर अपील सं./**ITA Nos.256 & 257/Chny/2018**

निर्धारण वर्ष / Assessment Years : 2007-08 & 2009-10

Shri T.S.R. Khannaiyann, 67, Avarampalayam Road, K.R. Puram, Coimbatore – 641 006. PAN : AFZPK 7832 C (अपीलार्थी/Appellant)	v.	The Assistant Commissioner of Income Tax, Non-Corporate Circle -2, The Joint Commissioner of Income Tax, Range-II, Coimbatore. (प्रत्यर्थी/Respondents)

आयकर अपील सं./**ITA No.812/chny/2018**

निर्धारण वर्ष / Assessment Year : 2007-08

The Income Tax Officer, Corporate Ward – 2, 63-A, Race Course Road, Coimbatore. (अपीलार्थी/Appellant)	v.	Shri T.S.R. Khannaiyann, 67, Avarampalayam Road, K.R. Puram, Coimbatore – 641 006. (प्रत्यर्थी/Respondent)

निर्धारिती की ओर से /Assessee by : Sh. T. Banusekar, CA

राजस्व की ओर से /Revenue by : Shri Sailendra Mamidi, PCIT
Shri AR.V. Sreenivasan, JCIT

सुनवाई की तारीख/Date of Hearing : 05.07.2018

घोषणा की तारीख/Date of Pronouncement : 12.09.2018

आदेश /O R D E R

PER N.R.S. GANESAN, JUDICIAL MEMBER:

The appeals filed by the assessee and Revenue are directed against the respective orders of the Commissioner of Income Tax (Appeals)-1, Coimbatore. When the assessee has filed appeals for assessment years 2007-08 and 2009-10, the Revenue has filed appeal for assessment year 2007-08. Therefore, we heard all these appeals together and disposing the same by this common order.

2. Let's first take Revenue's appeal in I.T.A. No.812/Chny/2018 for assessment year 2007-08.

3. Shri Sailendra Mamidi, the Ld. Departmental Representative, submitted that the only issue arises for consideration is with regard to disallowance claimed by the assessee under Section 10(38) of the Income-tax Act, 1961 (in short 'the Act'). According to the Ld. D.R., the Assessing Officer found that the assessee disclosed ₹4,63,21,320/- as long term capital gain, however, the same is short term capital gain. According to the Ld. D.R., the CIT(Appeals) by placing reliance on the order of this Tribunal in the case of the

assessee's wife and his daughter, found that the gain is a long term capital gain. According to the Ld. D.R., no appeal was filed against the order of this Tribunal in the case of the assessee's wife and his daughter since the tax effect was very less. Therefore, according to the Ld. D.R., the CIT(Appeals) is not justified in placing reliance on the orders of this Tribunal in the case of assessee's wife and his daughter.

4. On the contrary, Sh. T. Banusekar, the Ld. representative for the assessee, submitted that during the year under consideration, the assessee sold 750 shares of M/s Ganesar Ginning Mills Ltd. and offered ₹4,51,43,911/- as long term capital gain. In fact, the shares were sold to M/s DLF Retails. According to the Ld. representative, the shares of M/s Ganesar Ginning Mills Ltd. were purchased by the assessee on 23.09.2005 and the same were sold by the assessee on 29.11.2006. The holding period of shares was 432 days, i.e. more than 12 months. Referring to Section 2(29A) of the Act, the Ld. representative submitted that in the case of shares, if the assessee holds the shares for more than 12 months, then it has to be treated as long term capital gain. The Ld. representative placed his reliance on the judgment of Karnataka High Court in

Bhoruka Engineering Industries Ltd. v. DCIT (2013) 36 taxmann.com 82 and also on the judgment of Apex Court in Andhra Pradesh State Road Transport Corporation v. ITO (1964) 52 ITR 524. The Ld. representative has also placed his reliance on the judgment of Apex Court in Mrs. Bacha F. Guzdar v. CIT [1955 SCR(1) 876]. Since the shares were held by the assessee for more than 12 months, according to the Ld. representative, the CIT(Appeals) has rightly found that it is only a long term capital gain.

5. We have considered the rival submissions on either side and perused the relevant material available on record. The dates of purchase and sale of shares are not in dispute. In fact, the assessee purchased 750 shares of M/s Ganesar Ginning Mills Ltd. on 23.09.2005 which falls in the financial year 2005-06 and the same were sold by the assessee on 29.11.2006 which falls in financial year 2006-07. Therefore, it is clear that the assessee was holding the shares for more than 12 months. Hence, it has to be treated only as long term capital gains. A similar view was taken by the co-ordinate Bench of this Tribunal in the case of assessee's wife Smt. T.R.K. Saraswathy and his daughter Smt. K. Priya in I.T.A.

Nos.1600/Mds/2015 and 1601/Mds/2015 respectively. Therefore, this Tribunal do not find any reason to interfere with the order of the lower authority and accordingly the same is confirmed.

6. Now coming to the assessee's appeal in I.T.A. No.256/Chny/2018 for the assessment year 2007-08.

7. Sh. T. Banusekar, the Ld. representative for the assessee, submitted that the first issue arises for consideration is non-service of notice under Section 143(2) of the Act. The Ld. representative submitted that the assessee has raised this issue before the Assessing Officer specifically by a letter dated 16.12.2014. According to the Ld. representative, the assessee received the notice only on 25.03.2015, which was beyond the period of six months. The Assessing Officer ought to have served the notice on or before 30.09.2014. Referring to Section 143(2) of the Act, the Ld. representative submitted that the Assessing Officer was expected to serve the notice within a period of six months from the end of financial year in which the return was filed. Admittedly, according to the Ld. representative, the notice was not served on the assessee, therefore, it has to be presumed that the Assessing

Officer has accepted the return filed by the assessee. Hence, the consequential assessment cannot stand in the eye of law. The Ld. representative placed his reliance on the judgment of Apex Court in ACIT v. Hotel Blue Moon (2010) 321 ITR 362 and submitted that omission on the part of the Assessing Officer to issue notice under Section 143(2) of the Act cannot be a procedural irregularity and it is not curable, therefore, requirement of notice under Section 143(2) of the Act cannot be dispensed with. In view of the judgment of Apex Court in Hotel Blue Moon (supra), according to the Ld. representative, the consequential assessment order cannot stand in the eye of law.

8. On the contrary, Shri Sailendra Mamidi, the Ld. Departmental Representative, submitted that the assessee by a letter dated 05.03.2014 requested the Assessing Officer to treat the return already filed as the return filed in response to notice issued under Section 148 of the Act. According to the Ld. D.R., the reason for reopening of assessment was also furnished to the assessee on 01.07.2014. In the case before the Apex Court in Hotel Blue Moon (supra), it was a search case. Therefore, according to the Ld. D.R., the assessee may not know what are the material found during the

course of search operation. In the case before us, the Assessing Officer informed the assessee about the reason for reopening, therefore, the assessee knows will that why the case was taken up for scrutiny even though the notice was not issued within a period of six months. Since the assessee knows fully well that the income has escaped from assessment and the case was reopened only to assess the escaped income, according to the Ld. D.R., the Assessing Officer has rightly reopened the assessment.

9. We have considered the rival submissions on either side and perused the relevant material available on record. Admittedly, the assessee requested the Assessing Officer to treat the return filed already as one filed in response to the notice issued under Section 148 of the Act for reopening. Once the return was treated as one filed in response to the notice issued under Section 148 of the Act, the other formalities contemplated under Section 143 of the Act have to be followed. Therefore, the CIT(Appeals) may not be correct in distinguishing the facts before the Supreme Court that it was a search case. Whether it was a search case or otherwise, the procedure contemplated under Section 143(2) of the Act cannot be

overlooked. In fact, the Apex Court observed at pages 369 and 370 as follows:-

"……This section does not provide for accepting the return as provided under section 143(1)(a). The Assessing Officer has to complete the assessment under section 143(3) only. In case of default in not filing the return or not complying with the notice under section 143(2)/142, the Assessing Officer is authorized to complete the assessment ex parte under section 144. Clause (b) of section 158BC by referring to section 143(2) and (3) would appear to imply that the provisions of section 143(1) are excluded. But section 143(2) itself becomes necessary only where it becomes necessary to check the return, so that where block return conforms to the undisclosed income inferred by the authorities, there is no reason, why the authorities should issue notice under section 143(2). However, if an assessment is to be completed under section 143(3) read with section 158BC, notice under section 143(2) should be issued within one year from the date of filing of block return. Omission on the part of the assessing authority to issue notice under section 143(2) cannot be a procedural irregularity and the same is not curable and, therefore, the requirement of notice under section 143(2) cannot be dispensed with. The other important feature that requires to be noticed is that section 158BC(b) specifically refers to some of the provisions of the Act which require to be followed by the Assessing Officer while completing the block assessments under Chapter XIV-B of the Act. This legislation is by incorporation. This section even speaks of sub-sections which are to be followed by the Assessing Officer. Had the intention of the Legislature been to exclude the provisions of Chapter XIV of the Act, the Legislature would have or could have indicated that also. A reading of the provision would clearly indicate, in our opinion, if the Assessing Officer, if for any reason, repudiates the return filed by the assessee in response to notice under section 158BC(a), the Assessing Officer must necessarily issue notice under section 143(2) of the Act within the time prescribed in the proviso to section 143(2) of the Act. Where the Legislature intended to exclude certain provisions from the ambit of section 158BC(b) it has done so specifically. Thus, when section 158BC(b) specifically refers to applicability of the proviso thereto it cannot be excluded. We may also notice here itself that the clarification given by the Central Board of

Direct Taxes in its Circular No. 717 dated August 14, 1995, has a binding effect on the Department, but not on the court. This circular clarifies the requirement of law in respect of service of notice under sub- section (2) of section 143 of the Act. Accordingly, we conclude that even for the purpose of Chapter XIV-B of the Act, for the determination of undisclosed income for a block period under the provisions of section 158BC, the provisions of section 142 and sub-sections (2) and (3) of section 143 are applicable and no assessment could be made without issuing notice under section 143(2) of the Act. However, it is contended by Sri Shekhar, learned counsel for the Department that in view of the expression " so far as may be" in section 153BC(b), the issue of notice is not mandatory but optional and are to be applied to the extent practicable. In support of that contention, the learned counsel has relied on the observation made by this court in Dr. Partap Singh' s case [1985] 155 ITR 166. In this case, the court has observed that section 37(2) provides that " the provisions of the Code relating to searches, shall so far as may be, apply to searches directed under section 37(2). Reading the two sections together it merely means that the methodology prescribed for carrying out the search provided in section 165 has to be generally followed. The expression ' so far as may be' has always been construed to mean that those provisions may be generally followed to the extent possible" . The learned counsel for the respondent has brought to our notice the observations made by this court in the case of Maganlal v. Jaiswal Industries, Neemach, [1989] 4 SCC 344 wherein this court while dealing with the scope and import of the expression " as far as practicable" has stated " without anything more the expression ' as far as possible' will mean that the manner provided in the Code for attachment or sale of property in execution of a decree shall be applicable in its entirety except such provision therein which may not be practicable to be applied."

16. The case of the Revenue is that the expression " so far as may be apply" indicates that it is not expected to follow the provisions of section 142, subsections (2) and (3) of section 143 strictly for the purpose of block assessments. We do not agree with the submissions of the learned counsel for the Revenue, since we do not see any reason to restrict the scope and meaning of the expression " so far as may be apply" . In our view, where the Assessing Officer in repudiation of the return filed under section 158BC(a) proceeds to make an enquiry, he has necessarily to follow the provisions of section 142, sub-sections (2) and (3) of section 143."

10. In view of the above judgment of Apex Court, this Tribunal is of the considered opinion that even though the case was reopened and reason for reopening was supplied, the Assessing Officer was expected to serve the notice under Section 143(2) of the Act within a period of six months. As held by the Apex Court, if the notice under Section 143(2) of the Act was not issued within the prescribed time, then there will be presumption that the Assessing Officer accepted the return filed by the assessee. In this case, the assessee requested the Assessing Officer to treat the return already filed as one filed in response to the notice under Section 148 of the Act. Therefore, there is a presumption that the Assessing Officer accepted the return already filed since the notice under Section 143(2) of the Act was not served within a period of six months. Therefore, this Tribunal is unable to uphold the orders of the lower authorities. Accordingly, orders of both the authorities below are set aside.

11. In the result, the appeal filed by the assessee is allowed.

12. Now coming to the assessee's appeal for assessment year 2009-10 in I.T.A. No.257/Chny/2018.

13. Sh. T. Banusekar, the Ld. representative for the assessee submitted that the only issue arises for consideration is exemption claimed by the assessee in respect of sale of agricultural land. The Ld. representative further submitted that the assessee purchased 16 acres of agricultural land on 27.11.2003. The assessee was cultivating the same from the date of purchase. According to the Ld. representative, the assessee has also disclosed agricultural income in the return. Admittedly, the same was situated beyond 8 KMs radius of municipality. According to the Ld. representative, it is an agricultural land within the meaning of Section 2(14)(iii) of the Act. However, the Assessing Officer disallowed the claim of the assessee on the ground that the agricultural land in question was surrounded by factories and industries. The price offered by the assessee would not have been offered by an agriculturist and the Assessing Officer found that the land in question was classified as industrial land. The Assessing Officer further found that the assessee was in the habit of purchasing and selling of lands on continuous basis, therefore, it is an adventure in the nature of trade. Hence, it has to be assessed as business profit.

14. Referring to copy of patta, which is otherwise known as Village Account No.10(1), the Ld. representative submitted that the land was not classified as industrial land. It was a Punja land. Merely because the purchase of land was for industrial purpose or other than agricultural purpose, according to the Ld. representative, the sale of land will not lose its character as sale of agricultural land. Placing reliance on the order of this Tribunal in the assessee's own case for assessment year 2011-12 in I.T.A. No.804/Mds/2016 dated 28.10.2016, the Ld. representative submitted that this Tribunal found the assessee is not in the business of real estate. By placing reliance on the judgment of Madras High Court in Mrs. Sakunthala Vedachalam v. Mrs. Vanitha Manickavasagam (2014) 369 ITR 558, the Ld. representative submitted that the High Court found in similar circumstances that the land is agricultural land. Since the assessee cultivated the land and merely because the land was sold to a non-agriculturist, according to the Ld. representative, it cannot be construed as non-agricultural land. Moreover, this Tribunal in the assessee's own case for to assessment year 2011-12 found that the assessee is not in the business of purchase and sale of land. Therefore, according to the Ld. representative, the Assessing

Officer is not justified in treating the profit on sale of land as business profit and the CIT(Appeals) is also not justified in confirming the order of the Assessing Officer.

15. On the contrary, Shri Sailendra Mamidi, the Ld. Departmental Representative, submitted that the land in question is situated in an area which is surrounded by factories and industries. According to the Ld. D.R., the price offered by the buyer would not have been offered by an agriculturist. Since the CIT(Appeals) found that the assessee is engaged in the business of purchase and sale of land, according to the Ld. D.R., he has not found that the land in question is an agricultural land. According to the Ld. D.R., the CIT(Appeals) found that the transaction of purchase and sale of land is adventure in the nature of trade and the investment made by the assessee is a stock-in-trade, therefore, the profit on sale of such land has to be assessed as business profit.

16. We have considered the rival submissions on either side and perused the relevant material available on record. The State Revenue Department admittedly classified the land as Punja land. Punja land can be used for cultivation. In this case, the assessee

contends that the land in question was cultivated and agricultural income was disclosed by the assessee in the return of income regularly. This fact was not denied by the Revenue. The only objection of the Ld. D.R. is that the land in question is surrounded by industries and factories. This Tribunal is of the considered opinion that merely because the adjoining land was converted into industrial and factory land, the agricultural land of the assessee would not lose its character as agricultural land. It is not the case of the Revenue that the assessee's land was used for industry or factory. The assessee's land continues to be an agricultural land. This Tribunal in the assessee's own case for assessment year 2011-12 in I.T.A. No.804/Mds/2016 by an order dated 28.10.2016, examined this issue elaborately and observed as follows:-

"12. We have considered the rival contentions and perused the orders of the authorities below. The first issue that is to decided is whether the sale of land done by the assessee during the relevant previous year is to be considered as part of a business activity or not. Assessee had sold two pieces of land during the relevant previous year. First piece of land at Sowripalayam on which assessee returned long term capital gains ₹33,52,365/-. Obviously, the land was more than three years old since its purchase. Second piece of land sold by assessee at Othakalmandapam, claimed by the assessee as agricultural in nature, measured 4.34 acres. It's location was beyond fourteen kilometers from Coimbatore Corporation limits. The said land was sold by the assessee to a Charitable Trust of which assessee was the Managing Trustee, for a price of ₹5,26,80,000/-. Apart from these two transactions, there were certain other land

transactions entered by the assessee in previous years relevant to assessment years 2006-2007, 2007-08 and 2009-10. In the previous year relevant to assessment year 2006-2007, there was purchase of agricultural land for ₹3,67,00,000/-. Though during that year assessee had attempted to make investments in land of M/s. Standard Motors Ltd it had not fructified. This position has not been disputed by the Revenue. During the very same year assessee has sold land for ₹74,00,000/-. The next transaction was during the previous year relevant to assessment year 2007-08. Assessee had sold land for ₹48.81 lakhs and also given an advance of ₹241.11 lakhs for purchasing another land. The assessee also appear to have sold shares of M/s. Ganesha Ginning Co. Ltd to M/s. DLF Retails during the said year. However, this in our opinion cannot be equated to a land sale. During the previous year relevant to assessment year 2009-2010 assessee had sold a piece of land for ₹10.67 crores. There obviously was no purchase or sale during the relevant previous year 2008-2009. In our opinion, above transactions which happened over a number of years were so sporadic that it could not be considered as one creating a series which could show an intention to trade in land. None of the land sold by the assessee over the period of five years was developed by the assessee or plotted by the assessee. Assessee had shown the land always as investments in its balance sheet. No doubt it was held that Bombay High Court in the case of *Gopal Ramnarayan Kasat(supra*) that even an isolated transaction could qualify as an adventure in the nature of trade. But their Lordship also held that a continuity was necessary for reaching a conclusion that assessee was indulging in a trade or business. In our opinion, purchase and sale done by the assessee over a period of five years was not of such frequency that could create a chain or continuity, which can persuade us to believe that assessee had an intention to do a business or trade of purchase and selling a land. Just like any other investor, assessee invested in land over a long period of time at disparate places. It effected sale of land whenever an opportunity arose. In some years, there were more than one number of such transactions. In certain other years, there were no transaction of purchase or sale of land. In our opinion, the conclusion of the lower authorities that there existed a series of transactions and assessee had an intention to trade in land or do real estate business was incorrect. Especially so, since assessee was in the business of manufacturing transformers. Thus, according to us, surplus arising out of sale of land

during the relevant previous year could not have been considered under the head 'income from business' but only under the head 'capital gains'.

13. This takes us to second issue as to whether 4.34 acres land sold by the assessee at Othakalmandapam to M/s. Hindustan Educational and Charitable Trust, was agricultural or not. If it was agricultural land assessee would not be exigible to capital gains tax, since Section2(14)(iii) of the Act excluded agricultural land from the definition of 'capital assets'. Claim of the assessee was that the said land was classified by Revenue Department as agricultural in revenue records. Ld. Assessing Officer himself has stated that in the assessment order that the land sold was classified in the Revenue records as agricultural and it was subject to payment of land revenue. However, as per Assessing Officer, the land was not actually used for agricultural purpose. In our opinion this conclusion was reached by the Assessing Officer without any material evidence. The land was owned by assessee since 1995 and was purchased at a cost of ₹89,915/- Therefore conclusion of the Assessing Officer that income derived from agricultural operation did not bear a rational proportion to the cost is itself incorrect. Assessee had declared agricultural income of ₹18,10,750/- during the relevant previous year. Assessing Officer had also come to a conclusion that the land was situated in a developed area, when in reality the land was situated 14 km from the Coimbatore Corporation limit. There was no plotting of land done by the assessee. Certificate from the registration department placed at page 101 of paper book does not classify the land as industrial land. It simply mentioned the land fell under a category called dry special type of land class II. It might be true that purchaser of land had no intention to carry on any agricultural activity in the said land. No doubt Hon'ble Apex Court in the case of *Smt. Sarifabibi Mohammed Ibrahim (supra*) has laid down thirteen tests for declaring whether a piece of land is agricultural or not. However it does not require a cumulative satisfaction of all the thirteen indicators. The question has to be answered, considering the answers to all the thirteen indicators. In the case before us, it is an admitted position that the revenue records classified the land as agricultural in nature. Assessee had held the land for more than fifteen years before he sold it and had also shown agricultural income in his returns. There is nothing on record to show that adjoining areas were used for non agricultural only. There is nothing on record to show that land was sold on square foot basis. On the other hand, copy of sale deed placed at page no.65 to 76 show that land

was sold on acreage basis. In the case *of Sakunthala Vedachalam vs. Vanitha Manicka Vasagam (supra)* the Hon'ble Jurisdictional High Court had after considering the judgment of Gujarat High Court in the case *Siddartha Desai (supra)* held as under:-

''9. The issue involved in the above tax case (appeals) lies on the narrow compass, viz., whether the lands sold by the assessees are agricultural lands and whether they are entitled to the benefit of exemption from capital gains tax.

10. It is on record that in a report has been submitted by the Revenue authorities, it is admitted that the lands are classified as agricultural lands in the revenue records and they are dry lands. The remand report of the Assessing Officer in this regard reads as follows :

"During the time of assessment proceedings itself, a confirmation was obtained from the headquarters Deputy Tahsildar, Thiruka zhukundram, who has certified in his letter dated December 23, 2010, referred to at 2 above, that in the lands in question casuarinas are grown for the past one and a half year and hence the same are agri cultural lands. He has also confirmed in the said letter that the lands are situated at one kilometre distance from the town panchayat of Mamallapuram (i.e., within the specified distance from the outer limits of the nearest municipality/town panchayat) and the popula tion of the Mamallapuram town panchayat as per the 2001 census was 12,345."

11. The assessee has also produced a copy of the adangal and the letter from the tahsildar, which showed that the lands were agricultural in nature and the Revenue has also accepted that the lands are falling within the restricted zone in terms of section 2(14) of the Income-tax Act.

12. Hence, the only point that has to be considered is that whether the test as laid down in the decision reported in CIT v. Siddharth J. Desai [1983] 139 ITR 628 (Guj) has been satisfied by the assessees. In the said decision, in paragraph 11, it is held as follows (page 638) :

"On a conspectus of these cases, several factors are discernible which were considered as relevant and which were weighed against each other while determining the true nature and character of the land. It may be useful to extract from those decisions some of the major factors which were considered as having a bearing on the determination of the question. Those factors are :

(1) Whether the land was classified in the revenue records as agri cultural and whether it was subject to the payment of land revenue ?

(2) Whether the land was actually or ordinarily used for agricultural purposes at or about the relevant time ?

(3) Whether such user of the land was for a long period or whether it was of a temporary character or by way of a stop-gap arrangement ?

(4) Whether the income derived from the agricultural operations carried on in the land bore any rational proportion to the investment made in purchasing the land ?

(5) Whether, the permission under section 65 of the Bombay Land Revenue Code was obtained for the non-agricultural use of the land ? If so, when and, by whom (the vendor or the vendee) ? Whether such permission was in respect of the whole or a portion of the land ? If the permission was in respect of a portion of the land and if it was obtained in the past, what was the nature of the user of the said portion of the land on the material date ?

(6) Whether the land, on the relevant date, had ceased to be put to agricultural use ? If so, whether it was put to an alternative use ? Whether such cesser and/or alternative user was of a permanent, or temporary nature ?

(7) Whether the land, though entered in revenue records, had never been actually used for agriculture, that is, it had never been ploughed or tilled ? Whether the owner meant or intended to use it for agricultural purposes ?

(8) Whether the land was situate in a developed area ? Whether its physical characteristics, surrounding situation and use of the lands in the adjoining area were such as would indicate that the land was agri cultural ?

(9) Whether the land itself was developed by plotting and provid ing roads and other facilities ?

(10) Whether there were any previous sales of portions of the land for non-agricultural use ?

(11) Whether permission under section 63 of the Bombay Tenancy and Agricultural Lands Act, 1948, was obtained because the sale or intended sale was in favour of a non-agriculturist ? If so, whether the sale or intended sale to such non-agriculturist was for non-agricultural or agricultural user ?

(12) Whether the land was sold on yardage or on acreage basis ?

(13) Whether an agriculturist would purchase the land for agricultural purposes at the price at which the land was sold and whether the owner would have ever sold the land valuing it as a property yielding agricultural produce on the basis of its yield ?

At the risk of repetition, we may mention that not all of these factors would be present or absent in any case and that in each case one or more of those factors may make appearance and that the ultimate decision will have to be reached on a balanced consideration of the totality of circumstances."

13. According to the Tribunal, that if the above tests are applied, the assessees could not satisfy any of the conditions except conditions Nos. 1, 5, 11 and 12. The Tribunal held that the assessees could not prove that the lands was actually or ordinarily used for agricultural purposes. This reasoning does not appear to be correct in view of the abovesaid decision of the Gujarat High Court, wherein it was clearly held in clause (1) in paragraph 11 that whether the land was classified in the revenue records as agricultural and whether it was subject to the payment of land revenue has to be considered for grant of exemption.

14. Thus, it is evident from the above, which clearly states that any one of the above factors can be present in a case to qualify for the benefit of classification as agricultural lands. In this case, the assessees have qualified under clause 11(1) since

as per the adangal records, these lands were classified as agricultural lands and the assessees have also paid revenue kist, namely, revenue payment. Therefore, the Tribunal has misconstrued the judgment of the Gujarat High Court (supra) that all conditions laid down in paragraph 11 should be satisfied, which is not a correct interpretation.

15. To get exemption, the assessee has to satisfy the conditions laid down in section 2(14) of the Income-tax Act, which reads as follows :

"2. (14) 'capital asset' means property of any kind held by an asses see, whether or not connected with his business or profession, but does not include—

(i) any stock-in-trade,

consumable stores or raw materials held for the purposes of his busi ness or profession ;

(ii) personal effects, that is to say, movable property (including wearing apparel and furniture, but excluding jewellery) held for per sonal use by the assessee or any member of his family dependent on him :

Explanation.-For the purposes of this sub-clause, 'jewellery' includes-

(a) ornaments made of gold, silver, platinum or any other pre cious metal or any alloy containing one or more of such precious met als, whether or not containing any precious or semi-precious stone, and whether or not worked or sewn into any wearing apparel ;

(b) precious or semi-precious stones, whether or not set in any furniture, utensil or other article or worked or sewn into any wearing apparel ;

(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 corpora tion, notified area committee, town area committee, town committee, or by any other name) or a cantonment board and which has a popu lation of not less than ten thousand according to the last preceding census of which the relevant figures have been published before the first day of the previous year ; or

(b) in any area within such distance, not being more than eight kilometres, from the local limits of any municipality or cantonment board referred to in item (a), as the Central Government may, having regard to the extent of, and scope for, urbanisation of that area and other relevant considerations, specify in this behalf by notification in the Official Gazette ;

(iv) 6½ per cent. Gold Bonds, 1977, or 7 per cent. Gold Bonds, 1980, or National Defence Gold Bonds, 1980, issued by the Central Government ;

(v) Special Bearer Bonds, 1991, issued by the Central Government ;

(vi) Gold Deposit Bonds issued under the Gold Deposit Scheme, 1999, notified by the Central Government."

16. Once the Tribunal has accepted that the classification of lands as per the revenue records are agricultural lands, which are evidenced by the adangal and the letter of the tahsildar and satisfies other conditions of section 2(14) of the Income-tax Act, we are of the view that the Tribunal has misdirected itself as stated above.

17. Yet other reason given by the Tribunal is that the adjacent lands are put to commercial use by way of plots and, therefore, the very character of the lands of the assessees is doubted as agricultural in nature. The manner in which the adjacent lands are used by the owner therein is not a ground for the Tribunal to come to a conclusion that the assessees' lands are not agricultural in nature. The reason given by the Tribunal that the adjacent lands have been divided into plots for sale would not mean that the lands sold by the assessees were for the purpose of development of plots. Also the reasoning given by the Tribunal "No agriculturists would have purchased the land sold by the assessee for pursuing any agricultural activity" is based on mere conjectures and surmises.

18. The plea of the learned standing counsel appearing for the Revenue that there was no agricultural operations prior to the date of sale is of no avail as the definition under section 2(14) of the Income-tax Act has the answer to such a plea raised. Furthermore, it is also on record that the lands are agricultural lands classified as dry lands, for which kist has been paid.

19. The view of the assessee is fortified by the decision reported in CIT v. Raja Benoy Kumar Sahas Roy [1937] 32 ITR 466 (SC) wherein, it is held as follows (page 476) :

"There was authority for the proposition that the expression 'agri cultural land' mentioned in entry 21 of List II of the Seventh Schedule to the Government of India Act, 1935, should be interpreted in its wider significance as including lands which are used or are capable of being used for raising any valuable plants or trees or for any other purpose of husbandry (see Sarojinidevi v. Shri Krishna Anjanneya Subrahmanyam ILR [1945] Mad 61 and Megh Raj v. Allah Rakhia [1942] FCR 53)."

20. For the foregoing reasons, we pass the following order :

(i) On the question of law raised, we are of the view that the Tribunal was not justified in rejecting the exemption. Accordingly, the questions of law are answered in favour of the assessees ;

(ii) Consequently, the order of the Tribunal dated April 11, 2013, is set aside.

In the result, both the above tax case (appeals) are allowed. No costs. Consequently, connected miscellaneous petitions are closed".

Their lordship had clearly held that nature of use of adjacent land was not relevant in deciding the nature of land sold by an assessee. Their lordship had also held that a presumption could never be taken regarding the purpose for which the buyer purchased the land. Lordship also observed that nature of classification of land by the Revenue authorities in the revenue record was of prime importance in determining the nature of land sold by the assessee. Considering the facts and circumstances of the case and also applying the law laid down by Hon'ble Jurisdictional High Court in the case of *Sakunthala Vedachalam vs. Vanitha Manickavasagam* (supra), we are of the opinion that lower authorities fell in error in considering the land measuring 4.34 acres at Othakalmandapam sold by the assessee to M/s. Hindustan Educational and Charitable Trust as non agricultural in nature and exigible to capital gains. The said land could not be considered as capital asset by virtue of Sec. 2(14)(iii) of the Act. Assessee was justified in claiming that surplus arising out of sale of land as not exigible to capital gains tax."

16. In view of the above order of this Tribunal in the assessee's own case for assessment year 2011-12, this Tribunal is unable to uphold the orders of the lower authorities. Moreover, this Tribunal in the assessee's own case for the assessment year 2011-12 in I.T.A. No.802/Mds/2016 dated 28.10.2016 found that the assessee is not in the business of real estate. Accordingly, orders of both the authorities below are set aside by holding that the land in question is agricultural land and the profit on such sale of land is not liable for taxation by virtue of Section 2(14)(iii) of the Act. Therefore, the addition made by the Assessing Officer is deleted.

17. In the result, the appeal filed by the assessee is allowed.

18. To sum up, both the appeals of the assessee are allowed and the appeal filed by the Revenue is dismissed.

Order pronounced in the court on 12th September, 2018 at Chennai.

sd/-	sd/-
(ए. मोहन अलंकामणी)	(एन.आर.एस. गणेशन)
(A. Mohan Alankamony)	(N.R.S. Ganesan)
लेखा सदस्य/Accountant Member	न्यायिक सदस्य/Judicial Member

चेन्नई/Chennai,
दिनांक/Dated, the 12th September, 2018.
Kri.

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. निर्धारिती /Assessee 2. Assessing Officers
3. आयकर आयुक्त (अपील)/CIT(A)-1, Coimbatore
4. Principal CIT-1, Coimbatore 5. विभागीय प्रतिनिधि/DR 6. गार्ड फाईल/GF.