

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01.09.2016

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MR.JUSTICE D.KRISHNA KUMAR

T.C.A.No.483 of 2016

The Principal Commissioner of Income Tax 4,
Chennai. .. Appellant/Appellant

versus

M/s.Mansi Finance Chennai Ltd.,
No.22, Mansi Mansion,
Mulla Saheb Street, Sowcarpet,
Chennai 600 079. ... Respondent/Respondent

Prayer: Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961, against the order of the Income Tax Appellate Tribunal, "A" Bench, Chennai, made in I.T.A.No.1560/MDS/2015, dated 20.11.2015 against the order passed by the Commissioner of Income Tax (Appeals) - 8, Chennai ITA.No.68/14-15 dated. 25/03/2015 and against the order passed by the Deputy Commissioner of Income Tax, Company circle-IV (2), Chennai, in PAN/GIR.No.AAACM5326N dated. 25/03/2014 for the Assessment year 2011-2012.

For Petitioner :Mr.T.R.Senthil Kumar,
Senior Standing Counsel
for Income Tax Department

ORDER

(Order of the Court was made by S.MANIKUMAR, J.)

Tax Case Appeal is directed against the order dated 20.11.2015 made in I.T.A.No.1560/Mds/2015, for the assessment year 2011-2012, in the matter of M/s.Mansi Finance Chennai Ltd., Chennai, by which, the Tribunal has dismissed the appeal filed by the revenue.

2. Brief facts leading to the appeal are that the respondent, non-banking finance company, filed its return of income for the assessment year 2011-12 on 26.09.2011, admitting

total income of Rs.25,91,180/-. The case was taken up for scrutiny and notice, under Section 143(2) of the Income Tax Act, 1961 (hereinafter referred to as "the Act"), was issued on 01.08.2012 and duly served on the assessee on 08.08.2012. Assessee's authorised representative appeared in person and produced a copy of the Memorandum of Articles of the Company, financials with reports, ledger accounts of parties, copies of purchase and sale deed of agricultural lands, donation receipt, Demat account, details of loans, copy of Village Administrative Officer Certificate, stating that the lands are fit for agricultural operations, copy of lease agreement, and other documents. The assessee Company has admitted income from financing business and income from other sources. They have also admitted agricultural income of Rs.8,03,730/-, in Schedule 11 - "other income" and also the profit on sale of agricultural land for Rs.3,79,99,376/-, shown in other in Schedule 11 of the profit and loss account. However, they claimed the same, in the statement of total income.

3. The assessing officer has called for information from the Tahsildar and the report of the Tahsildar was received on 12.03.2014. Reports of the Tahsildar, Sri Perumpudur Taluk, Village Administrative Officer, Thandalam and Revenue Inspector, Thandalam and copies of Revenue Records, were shown to the assessee's authorised representative. The assessee was asked to show cause, as to why, the profit on sale of agricultural land and agricultural income, should not be brought to tax, based on Tahsildar's report shown to them.

4. Responding to the notices issued, the assessee produced a copy of the Village Administrative Officer's Certificate, Thandalam, which states that the lands are fit for agricultural operations. The assessee also contended that they carried on agricultural operations and at the time of sale, the lands were used for agriculture and thus, claimed that the profit on sale of agricultural lands, has to be deducted.

5. After considering the material on record and reply of the assessee, the assessing officer, vide order, dated 25.03.2014, completed the assessment, as hereunder:

"(i) Treatment of profit on sale of agricultural land of Rs.3,56,73,957/- as long term capital gains arising out of sale of capital assets.

(b) The AR has also raised an additional ground vide letter dated 26.09.2014 (which was admitted as the omission of the said ground from the appeal form, was not willful or unreasonable), pleading that agricultural income of Rs.8,03,730/- returned by it, was treated as 'Income from Other Sources.

(c) Levy of interest u/s 234B."

6. Reasons for the above conclusion of the assessing officer, are as follows:

"(i) In the agreement for sale, the impugned lands were mentioned as "Land" and not "Agricultural Land".

(ii) As per the Memorandum of Association the main object and object ancillary/incidental to the attainment of main object was money lending and not dealing with agricultural land.

(iii) The appellant was registered as Non-Banking Finance Company with RBI for carrying out money business and not agricultural operations.

(iv) Appellant had not filed evidence for income and expenditure from the agricultural operations.

(v) Tahsildar approached by the Revenue reported that the lands in question were not cultivated for the past 8 years.

(vi) The buyer, to whom the appellant sold the lands, i.e. M/s. Rajalakshmi Education Services Pvt. Ltd., purchased the lands for the purpose of construction of Engineering college."

7. Being aggrieved by the assessment order, dated 25.03.2014, the assessee filed an appeal in I.T.A.No.68/2014-15, before the Commissioner of Income Tax (Appeals)-8, Chennai, and contentions were made that the assessee purchased the agricultural land in Thandalam Village from various parties in the financial year 2005-06 and that they have sold the agricultural land to M/s.Rajalakshmi Education Services Pvt. Ltd., and during the interregnum period, they used the lands in question for agricultural purposes. The assessee had also given the lands on lease to one Mr.D.David, vide lease deed, dated 06.04.2008, with a condition that the lands were to be used only for agricultural purposes. Reliance has been made to Clauses (v) and (vii) of the said lease deed, which are as follows:

"(v) To use the farm for agricultural purpose only.

(vii) To farm cultivate manure and manage the farm in a good and husband like manner according to the most approved methods of cultivation, so as to keep the farm in good condition."

Therefore, it was contended that till the lands were sold in the financial year 2010-11, they were used for agricultural purpose and not capital assets.

8. Before the appellate authority, a further contention has been made that the assessee had disclosed and claimed

exemption, in respect of lease rentals received from the agricultural lands, in the returns filed for the assessment years 2009-10 and 2010-11 and out of the total amount of agricultural income disclosed by the assessee, during assessment years 2009-10 and 2010-11, Rs.1,20,000/- and Rs.1,35,000/- were the lease rentals for the assessment years 2009-10 and 2010-11 respectively, and that the above were also reflected, in the returns of income and computation of income for the assessment years 2009-10 and 2010-11 respectively.

9. Further contention has been made before the appellate authority that the Village Administrative Officer of Thandalam Village had issued certificate on 18.11.2009, certifying that the said lands as fit for cultivation and also issued a certificate, identifying the numbers, measurement of each land, evidence of crop cultivation etc., and though Chitta, Patta, Adangal, Fasali and other evidences were also produced before the assessing officer, he had failed to appreciate the same, in proper perspective.

10. It was further contended before the appellate authority that the intention of the assessee, at the time of purchasing the land, was to use the same for agricultural purpose and it was subsequently, leased out. Therefore, the gain from the agricultural land, cannot be treated as capital gains, on sale of capital assets, in the hands of the assessee. Reliance was also placed on a decision of the ITAT, Hyderabad, in Tulla Veerender vs ACIT reported in (2014) 160 TTJ (Hyd) 435, wherein, it has been held:

"It is important to note what was the intention of the assessee at the time of acquiring the land or interval action by the assessee between the period from purchase and sale of the land and the relevant improvement/development taken place during this time is relevant for deciding the issue whether transaction was in the nature of trade. Though intention subsequently formed may be taken into account, it is the intention at the inception which is crucial. One of the essential elements in an adventure of the trade is the intention to trade; that intention must be present at the time of purchase".

11. On the report of the Tahsildar, dated 12.03.2014, relied on by the assessing officer, certifying that, "the Village Administrative Officer of the above village has stated that the above lands are not cultivated for the past eight years, and the statement of the Village Administrative Officer and the village accounts", before the appellate authority, the appellant has submitted that it was perplexing, as to how, the

Village Administrative Officer of Thandalam Village, who had given a certificate, dated 18.11.2009, stating that the lands in question were cultivable and also certified during the Fasili, evidencing that agricultural activities were carried on by the assessee, has purportedly stated that the subject lands were not cultivated for past eight years and on that basis, the Tahsildar, has issued a letter, dated 12.03.2014.

12. Before the appellate authority, a further contention has been made that when the assessee, vide letter, dated 19.03.2014, prayed to the assessing officer, for an opportunity to cross examine the above statement of the Tahsildar, relied on by the assessing officer, allegedly obtained on the back of the assessee, the assessing officer has refused to provide such opportunity, which is in violation of the principles of natural justice.

13. On the said aspect, the assessee has relied on a decision of the ITAT, Hyderabad in Ramakrishnaiah v. ITO reported in [2010] 39 SOT 379, wherein, the Tribunal observed that,

"Natural justice requires cross-examination of witnesses, if asked for and must be granted. The assessee should be afforded an opportunity to deal with and rebut such material. Cross-examination to be allowed to the assessee when third party accounts are relied upon by the Department. The normal principle is that ordinary cross examination has to be granted when asked for. If the Department to rely on any exceptions, the burden is on the Department to establish the existence of any exceptions. The non-providing of cross-examination of witness clearly constitutes infraction of the right conferred on the assessee and that vitiated the order of the assessment made against the assessee."

14. Further reliance has been made to a decision in Ram Saroop Saini, HUF v. ACIT reported in (2007) 15 SOT 470 (Del.), wherein, the Delhi Tribunal, relying on the case of Kishanchand Chelaram vs. CIT reported in (1980) 19 CTR (SC) 360, held as follows:

"In so far as the reliance placed by the Revenue on the statement of K, the said statement has been collected at the back of the assessee. Other feature that has been noted by the CIT(A) is the lack of opportunity to the assessee for cross-examining the said witness and for that reason the said evidence deserves to be ignored."

15. Therefore, before the appellate authority, a contention has been made that the assessee was denied an opportunity to

cross-examine the Village Administrative Officer, who has given a contrary statement and that vitiates the action of the assessing officer. Further contention has also been made that there was no necessity to mention the lands as agricultural lands, in the agreement of sale, so long as it is classified as agricultural lands in the revenue records. Further contention has been made that under the sale deed, the subject lands have been categorically described as agricultural lands in the schedule. Reliance has been made on *M.J. Thomas v Deputy Commissioner of Income-Tax* reported in (2014) 47 TAXMANN 421, wherein, the Cochin Tribunal held as follows:

"What is required for treating the land as capital asset under section 2(14) is the connection between the land and the agricultural purpose and if the land is cultivated in any of the earlier years, the land has to be treated as agricultural land. The material evidence produced by the assessee are - (i) the certificate issued by the Village Officer; (ii) certificate issued by the Agricultural Officer; (iii) classification of the land by state government as agricultural land; (iv) receipt for payment of contribution to agricultural workers' welfare fund; and (v) Basic Tax Officer. From these materials, it appears that the State Government has classified the subject land as agricultural land."

16. Perusal of the order of the Commissioner of Income-Tax (Appeals), dated 25.03.2014, shows that there was no representation, on behalf of the department to rebut anyone of the submissions, extracted supra. After considering the materials on record, submissions of the authorised representative of the assessee and the decisions relied on, the Commissioner of Income Tax (Appeals), vide order dated 25.03.2014, allowed the appeal filed by the assessee, the summary of the same, extracted in the impugned order, before us, is as follows:

"04. The Commissioner of Income Tax (Appeals) observed that the AO has nowhere disputed that as per revenue records the impugned lands were classified as agricultural land. Besides as per the certification of the VAO of Thandalam village, the said lands were cultivable or in other words fit for cultivation, which again has not been questioned by the AO. Further, the AO has also not disputed the fact that the assessee had given the land on lease to Shri. D. David wherein as per the lease deed, the lands were only to be use for agricultural purposes. Further still, the Assessing Officer has also not disputed the fact or questioned that the agricultural income disclosed by the assessee during the AYs 2009-10 and 2010-11 which is immediately

prior to the sale of the impugned lands in the AY 2010-11 which illustrates that the impugned lands were indeed cultivated. As regards the contention of the AO that the appellant's claim of profit on sale of agricultural lands was contrary to the MOA of the assessee company, there is merit in the AR's contention that as a non-banking financing company, the assessee was entitled to purchase or deal with any property in whichever way it deemed fit for the purpose of making investments and there was no limitation or restriction on the nature of assets that the company could hold as investment which fact becomes clear from the following clauses in the Memorandum of Association of the assessee company:

Under objects incidental or ancillary to the attainment of the main objects:

"12. To invest and deal with the money of the company not immediately required in such manner and upon such security or without security at all as the company may from time to time think fit"

Under other objects:

"8. To invest the funds of the company in any manner as the company may think fit and/without prejudice to the said generally

a. In the purchase of lands and buildings, or any interest therein or on ground rents or where else in the world."

"13. To develop and turn to account any land acquired by the company or in which it is interested, and in particular by laying out and preparing the same for building purposes, constructing, pulling down, decorating, maintaining, furnishing, fitting up and improving buildings and by planting, paving, draining, farming, cultivating, letting on building lease or building agreement and by advancing money to and entering into contracts and arrangement of all kind with builders, tenants and others."

Therefore, evidently there was no constraint even as per the MOA, on the assessee to invest in agricultural lands and engage in agricultural activities and earn income thereby as the same was very much covered by the above referred clauses of MOA of the assessee company and therefore the AO's argument that the sale of the impugned lands was contrary to the MOA is also not factually borne out from the relevant documentation as cited above. The AR's reliance on the jurisdictional High Court in the case of M.S. Srinivasa Naicker vs. ITO (2007) 292 ITR 481(Mad) to buttress his point that the intention of the buyer, in this instant case, M/s. Rajalakshmi Education Services Pvt. Ltd. in

purchasing the impugned property for the purpose of construction of Engineering College was irrelevant in determining the character of the impugned lands, is quite pertinent in the context of the present case, as undisputedly it was the intention of the assessee to earn income by way of agricultural activities which matters and it does not shed its character as agricultural land on the sale effected or even on the basis of use it is subsequently put to by the transferee, which in the case of the instant assessee's transferee was to build an Engineering college. The relevant part of the judgement supra is reproduced hereunder:-

''It is no doubt true that the purpose for which the purchaser had purchased was totally different from what the transferor had intended to use the land in question but with the admitted finding that the lands in question were under the agricultural operation on the date of sale for the purpose of considering the meaning or capital assets, it matters very little how the subsequent purchaser intended the land in question to be put to use. In the circumstances, there is no reason to accept the plea of the Revenue that the asset in question is a capital asset and it attracts levy of capital gains tax, it having shed its character as an agricultural land on the sale effected. In the absence of any contra indication that the assessee was using if or intending to use it for non-agricultural purposes, it is difficult to accept the stand of the Department.

Therefore correlating the ratio of the above jurisdictional High Court judgement to the facts of the instant assessee, it was submitted that the intention of the purchaser of the land from the assessee was not really relevant in determining whether the impugned land was agricultural land or capital asset in the hands of the assessee. Further, the Commissioner of Income Tax (Appeals) observed that the instant assessee purchased lands in 2005-06 spread over 64 survey Nos. in Thandalam Village, Sriperumbudur Taluk classified in the revenue records as "wet agricultural land" as certified by the jurisdictional Tahsildar and VAO extracts which is reproduced at para 7 of the assessment order. The VAO had also certified vide certificate dated 18.11.09 that it was also fit for cultivation. Secondly as seen from the records furnished at the time of appellate hearing that the said lands were given on lease with specification that the said lands were to be used only for agricultural purpose which it was indeed used for and also the assessee had shown lease rentals received

from the said agricultural lands as agricultural income in the relevant assessment years including the two AYS i.e. 2009-10 and 2010-11 immediately prior to the sale of the said lands in AY 2011-12 as mentioned aforesaid. The same has also not been disputed by the AO and nor has he doubted that the assessee had paid taxes for cultivating crops individually on the said agricultural lands to the State government as evidenced by the tax receipts acknowledged by the VAO which further indicates that the said lands were indeed put to use for agricultural purposes, albeit not by the assessee directly but by the lessee, which is a normal practice adopted in large parts of the country including Tamil Nadu, by absentee landlords which the assessee in the instant case is. Thirdly there is also no dispute that the impugned lands were not converted into non-agricultural land prior to the sale and therefore it retained its character as agricultural land till the time of the sale. Fourthly it is also not disputed that the impugned lands were not situated as per limbs (a) and (b) of Section 2(14)(iii) of the Act. i.e. within the jurisdiction of a municipality or a cantonment board having population of not less than ten thousand or in an area not being more than eight kilometers from the local municipality / cantonment board limits. The Commissioner of Income Tax (Appeals) relied on the judgment in the case of Sakunthala Vedhachalam Vs Vanitha Manickavasagam [2014] 90 CCH 0038 (Mad) relied on by the AR. wherein the Madras High Court held that the assessee cannot be denied exemption from capital gains tax, once it has been accepted by revenue authorities that the classification of land as per the revenue records was Agricultural lands and it satisfied other conditions of limbs (a) & (b) of Section 2(14)(iii) of the Act. In the said case, the Madras High Court concluded that the Tribunal was not justified in rejecting the exemption and reasoned as follows:

"Once the Tribunal had accepted that the classification of lands as per the revenue records were agricultural lands, which are evidenced by the adangal and the letter of the Tahsildar and satisfied other conditions of Section 2(14) of the Income Tax Act, the court is of the view that the Tribunal had misdirected itself as stated above. "

Apart from the rebuttals by the AR to the AO's reasoning for treating the impugned properties as capital assets and its sale of long term capital gains in the foregoing paragraphs which has considerable merit, the four undisputed facts obtained in the case as

discussed immediately above as also the ratio off the jurisdictional court cited supra is persuasive enough in treating the impugned properties as agricultural lands and therefore, the profits of its sale as profits derived by the transfer of agricultural lands and not of capital assets as held by the AO. The AO is therefore directed to treat the sale of impugned lands as sale of agricultural lands, exempt from tax and allowed the claim of the assessee. Further, he also treated the agricultural land as lease rent of B8,03,730/- as income from agriculture as against claim of the Assessing Officer as income from other sources."

17. Being aggrieved by the order of the Commissioner of Income-Tax (Appeals), dated 25.03.2014, the revenue has filed an appeal before the Income Tax Appellate Tribunal in I.T.A.No.1560/Mds/2015 and made contentions as follows:

"05. The ld. Departmental Representative submitted that Tahsildar reported that lands in question was not used for agricultural purposes for the last eight years i.e from 2005 and filed objection with proof on 21.03.2014. When it is put to the assessee by Assessing Officer he has no response. The lease agreement in question is a device to claim such deduction which is an afterthought. The Revenue Tahsildar is a competent authority to report whether the agricultural operations are carried on the lands. The lands in question is not agricultural land at the time of sale as reported by the competent authority, the Revenue Tahsildar and hence the lands are treated as capital assets u/s.2(14) of the Income Tax Act, 1961 and the Long Term Capital Gains on sale of land is brought to tax u/s.45 and also agricultural income is treated as income from other sources. The Departmental Representative further submitted that Commissioner of Income Tax (Appeals) failed to appreciate that no agricultural operations were carried out in the sold land for 8 years prior to the sale as confirmed by the Tahsildhar of Sriperumbudur and the statement of the VAO, who where competent authority in this regard. The Commissioner of Income Tax (Appeals) also failed to appreciate that the land was shown in schedule to the balance sheet in the fixed assets and as such should be treated as capital asset. The Departmental Representative further submitted that the Commissioner of Income Tax (Appeals) failed to appreciate that the assessee has not given any evidence during the assessment proceedings to prove that agricultural operations were actually carried out in the sold land and finally he also relied on the order of the

Assessing Officer."

18. Rebutting the same, before the Tribunal, the authorised representative of the assessee has submitted as follows:

"06. On the other hand, the ld. Authorised Representative submitted that till the assessee sold the land, agricultural operations, in fact, were carried out by the assessee. The assessing authority, in its order, stated that the land was actually under cultivation till the date of sale. A perusal of Sec.45 shows that the requirement as on the date of sale of transfer is that the asset must be capital asset, considering the description under the Act. The chargeability to tax under Sec.45 arises only if on the date of sale, the land in question retained its character as a capital asset, which means, an asset, which does not answer the definition of a capital asset and which is an agricultural land would automatically be outside the scope of sec.45. It is no doubt that the purpose for which the purchaser had purchased was totally different from what the transferor had intended to use the land in question but with the admitted finding that the lands in question were under agricultural operation on the date of sale for the purpose of considering the meaning of capital assets, it matters very little how the subsequent purchaser intended the land in question to be put to use. In the circumstances, there is no reason to accept the plea of the Revenue that the asset in question is a capital asset and attracts levy of capital gains tax, it having shed its character as an agricultural land on the sale effected. In the absence of any contra indication that the assessee was using it or intending to use it for non agricultural purposes, it is difficult to accept of the Department. Further, he submitted that the assessee cannot be denied exemption from capital gains tax once it has been accepted by Revenue authorities that the classification of lands as per the Revenue records was agricultural lands and it satisfies other conditions of Sec.2(14) of the Income Tax Act in this regard. The manner in which adjacent lands are used by the owner therein is not a ground to come to a conclusion that the assessee's land are not agricultural in nature and further Authorised Representative relied on the judgments of jurisdictional High Court in the case of M.S. Srinivasa Naicker vs. ITO 292 ITR 481 and Sakunthala Vedachalam vs. Vanitha Manickavasagam 369 ITR 558."

19. After hearing the learned counsel for the parties and

the material on record, the Tribunal, vide order in I.T.A.No.1560/Mds/2015, dated 20.11.2015, held as follows:

"07. We have heard both the parties and perused the material on record. It is an admitted fact that the land was held by the assessee as a capital asset from the date of purchase till the date of sale. There is no dispute on this aspect that it is evidenced by the entries reflected in the Balance Sheet of the assessee company. The assessee's contention is that it is intended to retain the agricultural land acquired as a capital asset. The assessee never treated the land as stock in trade. The assessee reflected the same in the Balance Sheet as a fixed asset. The assessee carried on agricultural operations though leasing the same to Shri. D.David. This agricultural land is situated beyond 08km from any municipal limits. The Assessee has not taken any permission from the Government for making plots, as the assessee company never had any intention to make the land into plots and carry on real estate business in respect of the land. Thus, the assessee never created an asset as stock in trade but treated it as capital asset (agricultural land). The assessee has sold said land in the assessment year. The same is reflected under the head fixed assets in the Balance Sheet as on 31.03.2010. Revenue records of the above said land is brought on record by the assessee to prove the fact that the land held/sold by the assessee is agricultural land.

7.1 The AR submitted that the sale transaction effected by the assessee in respect of the above agriculture land constituted only sale of agriculture land, and by no stretch of imagination it can be treated as adventure in trade and so as to treat the same as 'business transaction' for the following reasons:

(i) Purchase and holding of land for a period and subsequent sale thereof itself cannot be an indicator to hold that the intention of the assessee was to carry on business with those assets. The intention cannot be presumed unless supported by evidence. In this case the treatment given by the assessee for this asset in the account books clearly indicate that the intention of the assessee is to hold the same as capital asset to have good returns from the same.

(ii) The assessee held land for considerable time. The asset acquired was agriculture land as per the evidence brought on record. Thus, the assessee held the agriculture land for more than 3 years. During that period the assessee carried on regular agricultural operations in the land by leasing for agricultural purpose. In the light of favourable market conditions

the assessee thought it good to sell the asset to realize a good amount. Realization of better price in a booming market cannot be considered as an adventure in trade.

(iii) The expression adventure in the nature of trade occurs in the definition of business under section 2(13) but the expression adventure in the nature of trade has not been defined in the Act. It may be pertinent to mention here that a specific transaction partake the character of business or an adventure in the nature of trade or realization of capital asset or a mere conversion of asset has to be decided depending upon facts of each case.

(iv) In deciding as to whether a particular transaction is an adventure in the nature of trade, the Assessing Officer must consider all the relevant and proved facts and circumstances. Realization of investments consisting of purchase of agricultural land and resale, though profitable are clearly outside the domain of adventure in the nature of trade.

(v) The assessee treated the assets as investment in agricultural land. Therefore disposal of the same would not convert, what was a capital accretion, to an adventure in the nature of trade. To make it more clear, sale of agricultural land by the assessee and realisation of good price would not alter the basic nature and characteristic of the transaction. In the case of the assessee, land was acquired by the assessee and reflected in the balance-sheets of the concern as fixed-assets. The assessee never treated the land as stock-in-trade and reflected in profit and loss account (closing stock). There was no element of trade attached to the activity of the assessee in purchase and sale of the land. A continuous business requires more activity and greater organization. This is absent in the transaction of sale of land by the assessee. Therefore, although there is profit in the transaction the transaction cannot be characterized as an adventure in the nature of trade.

(vi) Whether a transaction in respect of an asset is capital or business income being adventure in the nature of trade depends on the facts and circumstances of the case. There are many factors like frequency of transactions, period of holding, intention for resale etc, which determine whether the gain arising of a transaction is in the process of realisation of investment or in the course of business. The mere fact that the person has purchased a land and subsequently sold it, giving rise to a substantial profit cannot

change the character of the transaction. It is the general human tendency to earn profit out of capital asset. No one invests to incur a loss. If the market condition suddenly goes up or down, it is always the tendency of a person to take a quick decision so that the realization on the investment is maximum or the loss is minimum.

(vii) As already mentioned the assessee company carried on regular agricultural operations in the said agriculture land by leasing to Shri. D. David.

(viii) By leasing the above agriculture land the assessee earned agriculture income which were brought into the account books of the assessee. Such income was offered to income tax.

7.2 From the above, it is clear that:

(a) The assessee purchased agriculture land now under consideration situated beyond 8 km from the municipal limits.

(b) The assessee treated the same as fixed asset in their books along with other agriculture land which was already acquired by them in the earlier years.

(c) The land was identified as agriculture land in the revenue records.

(d) The assessee carried on routine agriculture operations through Shri. D. David and the land was used for agriculture operations.

(e) The assessee did not carry on any commercial activity with reference to that land such as getting of approval for converting into sites, plotting of the same into sites etc. Thus, the character of the land i.e., agriculture nature was continuing till the same was sold by the assessee company.

(f) Because of favourable market conditions the assessee sold the land and the same fetched them a good price.

7.3 Therefore, in the present case there is no dispute that the assessee acquired agricultural land. There is also no dispute that there was agricultural operation in this land before sale of this land.

7.4 The Assessing Officer was of the opinion that the amount received on sale of this agricultural property is nothing but on account of adventure in the nature of trade and the same was brought into income from business. In this case, the assessee held the land always as investment and not at all converted into stock-in-trade. The character of the land in the hands of the assessee has not changed. There is no material on record to show that the assessee carried on activities of buying and selling of land in a systematic

manner so as to justify the action of the AO in treating the activities of the assessee as adventure in the nature of trade. The land was sold by the assessees in acreage and not by making plots.

7.5 Now the question as to whether a land is agricultural land or not is essentially a question of fact. The question has to be answered in each case having regard to the facts and circumstances of that case. There may be factors both for and against a particular point of view. We have to answer the question on a consideration of all of them, a process of evaluation and the inference has to be drawn on a cumulative consideration of all the relevant facts. It may be stated here that not all the factors or tests would be present or absent in any case and that in each case one or more of the factors may make appearance and that ultimate decision will have to be reached on a balanced consideration of the totality of the circumstances.

7.6 The expression 'agricultural land' is not defined in the Act, and now, whether it is agricultural land or not has to be determined by using the tests or methods laid down by the Courts from time to time.

7.7 The Supreme Court in the case of Smt. Sarifabibi Mohmed Ibrahim v. CIT [1993] 204 ITR 631/70 Taxman 301 has approved the decision of a Division Bench of the Gujarat High Court in the case of Siddharth J. Desai (supra) and has laid down 13 tests or factors which are required to be considered and upon consideration of which, the question whether the land is an agricultural land or not has to be decided or answered. We reproduce the said 13 tests as follows:

"1. Whether the land was classified in the Revenue records as agricultural 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 any of a stopgap 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 s. 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 lesser 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 situated in a developed area? Whether its physical characteristics, surrounding situation and use of the land in the adjoining area were such as would indicate that the land was agricultural?

9. Whether the land itself was developed by plotting and providing roads and other facilities?

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

11. Whether permission under s. 63 of the Bombay Tenancy and Agricultural Land 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 nonagriculturists 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?"

7.8 A reference could be made to the case of CWT v. Officer-in-charge (Court of wards) [1976] 105 ITR 133(SC) wherein the Constitution Bench of the Supreme Court stated that the term 'agriculture' and 'agricultural purpose' was not defined in the Indian IT Act and that we must necessarily fall back upon the general sense in which they have been understood in common parlance. The Supreme Court has observed that the term 'agriculture' is thus understood as comprising within its scope the basic as well as subsequent operations in the process of agriculture and raising on the land all products which have some utility either for someone or for trade and commerce. It will be seen that the term 'agriculture' receives a wider interpretation both in regard to its

operation as well as the result of the same. Nevertheless there is present all throughout the basic idea that there must be at the bottom of its cultivation of the land in the sense of tilling of the land, sowing of the seeds, planting and similar work done on the land itself and this basic conception is essential sine qua non of any operation performed on the land constituting agricultural operation and if the basic operations are there, the rest of the operations found themselves upon the same, but if the basic operations are wanting, the subsequent operations do not acquire the characteristics of agricultural operations. The Constitution Bench of the Supreme Court in the aforesaid case observed that the entries in Revenue records were considered good prima facie evidence.

7.9 The Gujarat High Court in the case of Dr. Motibhai D. Patel v. CIT [1981] 127 ITR 671/5 Taxman 147 referring to the Constitution Bench of the Supreme Court had stated that if agricultural operations are being carried on in the land in question at the time when the land is sold and further if the entries in the Revenue records show that the land in question is agricultural land, then, a presumption arises that the land is agricultural in character and unless that presumption is rebutted by evidence led by the Revenue, it must be held that the land was agricultural in character at the time when it was sold. The Division Bench of the Gujarat High Court further held that there was nothing on record to show that the presumption rose from the long user of the land for agricultural purpose and also the presumption arising from the entries of the Revenue records are rebutted.

7.10 The Bombay High Court in the case of CWT v. H.V. Mungale [1984] 145 ITR 208/12 Taxman 201 held that the Supreme Court had pointed out that the entries raised only a rebuttable presumption and some evidence would, therefore, have to be led before taxing authorities on the question of intended user of the land under consideration before the presumption could be rebutted. The Court further held that the Supreme Court had clearly pointed out that the burden to rebut the presumption would be on the Revenue. The Bombay High Court held that the ratio of the decision of the Supreme Court was that what is to be determined is the character of the land according to the purpose for which it was meant or set apart and can be used. It is, therefore, obvious that the assessee had abundantly proved that the subject land sold by them was agricultural land not only as classified in the Revenue records, but also it was

subjected to the payment of land revenue and that it was actually and ordinarily used for agricultural purpose at the relevant time.

7.11 We may also refer to the case of CIT v. Manilal Somnath [1977] 106 ITR 917(Guj.), wherein the Division Bench of the Gujarat High Court observed that the potential non- agricultural value of the land for which a purchaser may be prepared to pay a large price would not detract from its character as agricultural land on the relevant date of sale.

7.12 We may also refer to the case of Gopal C. Sharma v. CIT [1994] 209 ITR 946/72 Taxman 353(Bom), in which, the case of Smt. Sarifabibi Mohamed Ibrahim (supra) was referred to and relied, amongst other cases. In this case, the Division Bench of the Bombay High Court has stated that the profit motive of the assessee selling the land without anything more by itself can never be decisive for determination of the issue as to whether the transaction amounted to an adventure in the nature of trade. In other words, the price paid is not decisive to say whether the land is agricultural or not.

7.13 We may refer to a judgment of the Madras High Court in the case of CIT v. E. Udayakumar [2006] 284 ITR 511 where the Madras High Court has referred to the decision of the Punjab & Haryana High Court in the case of CIT v. Smt. Savita Rani [2004] 270 ITR 40/[2003] 133 Taxman 712 and has observed and held as under :

"8. It is well settled in the case of CIT v. Smt. Savita Rani (2004) 186 CTR (P&H) 240: (2004) 270 ITR 40 (P&H), wherein it is held that the land being located in a commercial area or the land having been partially utilised for nonagricultural purposes or that the vendees had also purchased it for non-agricultural purposes, were totally irrelevant consideration for the purposes of application of s. 54B.

9. In the abovesaid case, the assessee an individual sold 15 karnals, 18 marlas of land out of her share in 23 karnals, 17 marlas land during the financial year 1990-91, relevant to the asst. yr. 1991-92, the sale was effected by three registered sale deeds. While filing her return of income, she claimed exemption from levy of capital gains under s. 54B of the Act on the ground that the land sold by her was agricultural land and the sale proceeds were invested in the purchase of agricultural land within two years. The AO rejected the claim of the assessee holding that the land sold by the assessee was not agricultural land and this was upheld by the CIT(A). On further appeal, the Tribunal accepted the claim of the assessee holding that the transaction

in question duly fulfilled the conditions specified for relief. On further appeal to the High Court, the Punjab & Haryana High Court found that the finding that the land had been used for agricultural purposes was based on cogent and relevant material. The Revenue record supported the claim. Even the records of the IT Department showed that the assessee had declared agricultural income from this land in her returns for the preceding two years. The land being located in commercial area or the land having been partially utilised for nonagricultural purposes or that the vendees had also purchased it for nonagricultural purposes, were totally irrelevant consideration for the purposes of application of s. 54B.

10. It is seen from the aforesaid decision that the agricultural land sold by the assessee with an intent to purchase another land within two years had also been permitted to claim exemption under s. 54B of the IT Act, 1961. In the instant case, even though there was no sale as such, the assessee owned agricultural land within the limits of Tirunelveli Corporation and he had not put up any construction thereon, the assessee is entitled to claim exemption from the WT Act for the assessment of wealth-tax. That the land in question is adjacent to the hospital is totally irrelevant."

7.14 Adverting to the facts of the present case, the land in question is classified in the Revenue records as agricultural land and there is no dispute regarding this issue and actual cultivation has been carried on this land by leasing the same to Shri.D. David and income was declared from this land in the return of income filed by the assessee for the earlier years as agricultural income. It is also an admitted fact that the AO has not brought on record any evidence to show that the agricultural land was used for nonagricultural purposes and the assessee has not put the land to any purposes other than agricultural purposes. It is also an admitted fact that neither the impugned property was subject to any developmental activities at the relevant point of time of sale of the land.

7.15 Recently the Karnataka High Court in the case of CIT v. Madhukumar N. (HUF) [2012] 208 Taxman 394/23 taxmann.com 341, held as follows:

"9. An agricultural land in India is not a capital asset but becomes a capital asset if it is the land located under Section 2(14)(iii)(a) & (b) of the Act, Section 2(14)(iii)(a) of the Act covers a situation where the subject agricultural land is located within

the limits of municipal corporation, notified area committee, town area committee, town committee, or cantonment committee and which has a population of not less than 10,000.

10. Section 2(14)(m)(b) of the Act covers the situation where the subject land is not only located within the distance of 8 kms from the local limits, which is covered by Clause (a) to section 2(14)(iii) of the Act, but also requires the fulfilment of the condition that the Central Government has issued a notification under this Clause for the purpose of including the area up to 8 kms, from the municipal limits, to render the land as a "Capital Asset."

11. In the present case, it is not in dispute that the subject land is not located within the limits of Dasarahalli City Municipal Council therefore, Clause (a) to section 2(14)(iii) of the Act is not attracted.

12. However, though it is contended that it is located within 8 kms, within the municipal limits of Dasarahalli City Municipal Council in the absence of any notification issued under Clause (b) to section 2(14)(iii) of the Act, it cannot be looked in as a capital asset within the meaning of Section 2(14)(iii)(b) of the Act also and therefore though the Tribunal may not have spelt out the reason as to why the subject land cannot be considered as a 'capital asset' by giving this very reason, we find the conclusion arrived at by the Tribunal is nevertheless the correct conclusion."

7.16 Further the word "Capital Asset" is defined in Section 2(14) to mean property of any kind held by an assessee, whether or not connected with his business or profession, but does not include "(iii) agricultural land in India, not being land situated (a) in any area which is comprised within the jurisdiction of a municipality (whether known as a municipality, municipal corporation, notified area committee, town area committee, town committee, or by any other name) or a cantonment board and which has a population of not less than ten thousand 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, urbanization of that area and other relevant considerations, specify in this behalf by notification in the Official Gazette;"

7.17 It is very clear from the above that the gain

on sale of an agricultural land would be exigible to tax only when the land transferred is located within the jurisdiction of a municipality. The fact that all the expressions enlisted after the word municipality are placed within the brackets starting with the words 'whether known as' clearly indicates that such expressions are used to denote a municipality only, irrespective of the name by which such municipality is called. This fact is further substantiated by the provisions contained under clause (b) wherein it has been clearly provided that the authority referred to in clause (a) was only municipality.

7.18 From the facts and circumstances of the case, as narrated before us, it is important to note that what was the intention of the assessee at the time of acquiring the land or interval action by the assessee between the period from purchase and sale of the land and the relevant improvement/development taken place during this time is relevant for deciding the issue whether transaction was in the nature of trade. Though intention subsequently formed may be taken into account, it is the intention at the inception is crucial. One of the essential elements in an adventure of the trade is the intention to trade; that intention must be present at the time of purchase. The mere circumstances that a property is purchased in the hope that when sold later on it would leave a margin of profit, would not be sufficient to show, an intention to trade at the inception. In a case where the purchase has been made solely and exclusively with the intention to resell at a profit and the purchaser has no intention of holding the property for himself or otherwise enjoying or using it, the presence of such an intention is a relevant factor and unless it is offset by the presence of other factors it would raise as strong presumption that the transaction is an adventure in the nature of trade. Even so, the presumption is not conclusive and it is conceivable that, on considering all the facts and circumstances in the case, the court may, despite the said initial intention, be inclined to hold that the transaction was not an adventure in the nature of trade. The presumption may be rebutted. In the present case, considering the facts and circumstances of the case it cannot be considered as an adventure in the nature of trade. The intention of the assessee from the inception was to carry on agricultural operations and even there was no intention to sell the land in future at that point of time. It was due to the boom in real estate market came into picture at a later stage, the assessee

has sold the land. Merely because of the fact that the land was sold for profit, it cannot be held that income arising from the sale of land was taxable as profit arising from the adventure in the nature of trade. The period of holding should not suggest that the activity was an adventure in the nature of trade.

7.19 Further, we make it clear that when the land which does not fall under the provisions of section 2 (14)(iii) of the IT Act and an assessee who is engaged in agricultural operations in such agricultural land and also being specified as agricultural land in Revenue records, the land is not subjected to any conversion as non-agricultural land by the assessee or any other concerned person, transfers such agricultural land as it is and where it is basis, in such circumstances, in our opinion, such transfer like the case before us cannot be considered as a transfer of capital asset or the transaction relating to sale of land was not an adventure in the nature of trade so as to tax the income arising out of this transaction as business income. Accordingly, the ground raised by the Revenue is dismissed.

08. In the result, the appeal of the Revenue in ITA No.1560/Mds/2015 is dismissed."

20. Being aggrieved by the same, the Principal Commissioner of Income Tax-4, Chennai, has filed the instant Tax Case Appeal, is filed, on the following substantial questions of law,

"(1) Whether on the facts and circumstances of the case, the Appellate Tribunal was correct in law in holding that the impugned land is an agricultural land within the meaning of section 2(14)(iii) of Income tax Act, 1961 at the time of transfer and hence the profit on sale of impugned land is exempt from capital gains tax?

(2) Whether on the facts and circumstances of the case, the ITAT was correct in law in ignoring the findings of the AO that though such land purchased by the assessee, were stated to be agricultural lands, the assessee had not carried out any agricultural operation on the same for the past 8 years i.e., from the year 2005 as per the revenue records. Therefore, by virtue of not carrying on agricultural activities for a quiet long time in the past, the character of the land occupied by the assessee has been naturally converted into a non-agricultural land and hence the profit on sale of the impugned land is exigible to capital gains tax?

3. Whether on the facts and circumstances of the

case and in law, the ITAT was correct in not appreciating and ignoring the ratio of decision wherein it is held that in the absence of any evidence to show that the land was put to any agricultural use at any particular point of time even in the past, it could not be held that the lands could be treated as agricultural lands?"

21. Though, reiterating the very same submissions made before the appellate authority, Mr.T.R.Senthil Kumar, learned senior standing counsel for the Income-Tax Department, assailing the correctness of the orders stated supra, made submissions on the substantial questions of law, contending inter alia that,

"(i) The Tribunal erred in not following the judgment of the Hon'ble Supreme Court in Sarifabibi Mohmed Ibrahim vs. CIT, 204 ITR 631, which has laid down various tests for determining the nature of a land. One of the tests laid down by the Hon'ble Supreme Court is whether the land was actually or ordinarily used for agricultural purposes at or about the relevant time. In the instant case, it is clear that the subject land was not ordinarily used for agricultural purposes. This fact is more relevant in the light of the fact that the assessee company never had the intention to treat the property as an asset, generating agricultural income. There was no evidence shown and produced to prove that the land was used for agricultural purposes or to show that any agricultural operations were carried on in the land. An entry in the revenue record as agriculture will not be sufficient evidence to hold that the land was agricultural in nature, when actual agricultural use was not proved.

(ii) The Tribunal has misplaced the decision in Sakunthala Vedachalam v. ACIT [(2014) 53 Taxmann.com 62 (Mad.)], and erred in granting exemption.

(iii) The lands in question were not purchased for the purpose of agriculture and it was purchased with an intention to hold them as capital assets. When there is no merit in the contention of the assessee that the agricultural lands were excluded from the capital assets and in the light of the materials available on record, the Tribunal ought to have accepted the case of the revenue.

(iv) The Tribunal has failed to consider the decision of the Kerala High Court in the case of Kalpetta Estates Ltd. vs. CIT [(1992) 185 ITR 318], which held that burden of proof is on the assessee to prove that the land was agricultural land at the time of transfer.

(v) The Tribunal has also failed to consider the decision in *Fazalbhoy Inv. Company Pvt. Ltd., v. CIT* [(1989) 176 ITR 523], wherein, the Bombay High Court held that in the absence of any evidence to show that the land was put to any agricultural use at any particular point of time, even in the past.

(vi) The Tribunal has failed to consider the decision in *M.Ranganatha Sastri v. CIT* [(1979) 119 ITR 488], wherein, it has been held that if no agricultural operations was carried out before the sale, then the land has to be treated as non-agricultural land and liable to capital gain tax."

and prayed for an answer on the substantial question of law in favour of the revenue, going through the material on record and the orders of both the appellant authority and tribunal, we do not find any manifest error or illegality. On the other hand, we are of the considered opinion that orders of the appellate authority and the tribunal, are in accordance with the principles of law, considered. All the contentions now raised before this Court, have been considered in detail. There is no rebuttal on the evidences produced before the appellate authority. No contra material is produced by the revenue, before the final fact finding authority, the Income Tax Appellate Tribunal.

22. From the material on record, it could be deduced that the respondent has discharged his burden and proved that the lands were agricultural lands, at the time of transfer. Sufficient evidence has been adduced by the respondent, to prove that the subject lands have been put to agricultural operations before sale. Classification of the lands, in the revenue records, as agricultural lands, is not varied and that is a determinative factor.

23. A substantial question of law does not arise on the findings of fact, unless it is substantiated that there is perversity. In *Bhagat Construction Co. (P) Ltd., v. CIT* reported in (2001) 250 ITR 291 (Del.), the Delhi High Court held that a question of fact, becomes a question of law, if the finding is either without any evidence or material or, if the finding is contrary to the evidence, or is perverse or there is no direct nexus between the conclusion of fact and the primary fact upon which that conclusion is based. But it is not possible to turn a mere question of fact into a question of law by asking whether as a matter of law the authority came to the correct conclusion on a matter of fact.

24. In *M.Janardhana Rao v. Joint CIT* reported in (2005) 273 ITR 50 (SC), the Hon'ble Supreme Court held that in exercise of

the powers under Section 260A, findings of fact of the Tribunal cannot be disturbed.

S. MANIKUMAR, J.
AND
D. KRISHNAKUMAR, J.

skm

25. We have given our careful consideration, as to how both the appellate authority and the tribunal have considered the facts of the case and rendered findings, on the rival submissions of the parties. Going through the material on record, we are of the considered view that the concurrent findings of fact, rendered by the CIT (Appeals) and the Income Tax Appellate Tribunal, do not call for any interference, as no substantial question of law, is involved.

26. In the result, the Tax Case Appeals are dismissed. No costs.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

skm

To

1 The Income Tax Appellate Tribunal,
"A" Bench, Chennai.

2 The Principal Commissioner of Income Tax
Chennai 600 004

3 The Commissioner of Income Tax
(Appeals) 8 Chennai

4 The Deputy Commissioner of Income Tax,
Company Circle, IV (2), Chennai

+1 CC to Mr. T.R. Senthil Kumar, Advocate Sr.No.50372

T.C.A.No.483 of 2016

CA (CO)
MD : 03/10/2016