

<b>IN THE INCOME TAX APPELLATE TRIBUNAL</b>
<b>COCHIN BENCH, COCHIN</b>
<b>BEFORE S/SHRI CHANDRA POOJARI, AM &amp; GEORGE GEORGE K., JM</b>

I.T.A. No.194/Coch/2018
Assessment Year : 2012-13

The Income Tax Officer, Ward-2(1), Trivandrum.	<b>Vs.</b>	Smt. G.S. Lekha, Qtrs. 19, Ext. Training Centre, Kottarakara, Kollam. [PAN:AHZPL 9038K]
<b>(Revenue-Appellant)</b>		<b>(Assessee-Respondent)</b>

C.,O. No. 51/Coch/2018 (Arsg. out of I.T.A. No.194/Coch/2018)
Assessment Year : 2012-13

Smt. G.S. Lekha, Qtrs. 19, Ext. Training Centre, Kottarakara, Kollam. [PAN:AHZPL 9038K]	<b>Vs.</b>	The Income Tax Officer, Ward-2(1), Trivandrum.
<b>(Revenue-Appellant)</b>		<b>(Assessee-Respondent)</b>

<b>Revenue by</b>	Smt. A.S. Bindhu, DR
<b>Assessee by</b>	Shri Surendranath Rao, CA

<b>Date of hearing</b>	14/11/2018
<b>Date of pronouncement</b>	/11/2018

**ORDER**

Per CHANDRA POOJARI, AM:

This appeal by the Revenue and the Cross Objection by the assessee are directed against the order of the CIT(A), Trivandrum dated 08/03/2018 and pertains to the assessment year 2012-13.

2. The Revenue has raised the following grounds:

1. The CIT(A) erred in deleting the capital gain brought to tax amounting to Rs.1,65,31,119/-.

2. The CIT(A) allowed the relief on capital gain following the Supreme Court decision in Civil No.1607/2010 dated 11.01.2017 in the case of Balakrishnan Vs UoI and others. The sole question of law for consideration before the Supreme Court, in this case, was whether the property acquired by Kerala Govt. was compulsory acquisition or not and whether the assessee is eligible for exemption u/s 10(37). The said judgment is not applicable in the case of appellant, as the nature of land transferred was not in dispute in the case decided by the Supreme Court. The legal requirement to get covered u/s 10(37) is that the land should be agricultural in first place and should satisfy the following conditions:

(i) Land is situated in area covered by section 2(14)(iii)(a) or (b) and was used for agricultural purposes.

(ii) Such land, during the period of two years immediately preceding the date of transfer, was being used for agricultural purposes.

(iii) Transfer is by way of compulsory acquisition.

(iv) Income has arisen from the compensation of consideration for such transfer.

The decision of the Supreme Court in Civil Appeal no. 1607/2010 covers only condition (iii) above.

As per Minutes of District Level Purchase Committee, dated 04.06.2010, the assessee's land comes in Category 'A', and is "dry land facing Vizhinjam-Balaramapuram Road". The assessee relies on a certificate from "agricultural officer" to state that the land is "agricultural". The "Agricultural Officer" is not the authority competent to declare a land as "agricultural", it is a Revenue authority to do so. In the property document also, it is mentioned that the character of land is "purayidom" (indicating dry land). This being the background, there is no proof that land is agricultural. There is no proof to establish that land was used for agricultural purpose for two years prior to transfer.

Thus clause (i) and (ii) are not satisfied in this case and CIT(A) passed the order without examining all the above aspects.

2.1 The assessee has raised the following grounds of cross objection:

1. The CIT(A) should have appreciated that the Assessing Officer had held the property to be non agricultural only because, according to the Assessing Officer, at the time of transfer of the land, it was situated within the extended limits of Trivandrum Corporation and also because, the transaction was concluded by means of sale through negotiated settlement and not compulsory acquisition. He should have appreciated that, it was not the case of the Assessing Officer that the land was put to non agricultural use.
2. The CIT(A) should have held that if at all the land transferred was a capital asset the Assessing Officer should have adopted the value at 1/10<sup>th</sup> of the consideration fixed for transfer.
3. The facts of the case are that the assessee had in possession a piece of land at Vizhinjam village and sold the same during the year under consideration to Vizhinjam International Seaport for a consideration of Rs.1,70,98,612/-. In the return of income filed for the year under consideration, she claimed that the entire amount of sale consideration received was exempted from tax as the land sold was an agricultural land and compulsorily acquired by the Government of Kerala for the development of the said seaport which in turn is covered by the

provisions of sections 2(14)(iii) and 10(37) of the Act. Contradicting the assessee, the Assessing Officer had worked out the long term capital gain at Rs.1,65,31,119/- over the sale consideration received and brought the same to tax since the land transferred falls within the limits of Trivandrum Municipal Corporation and the assessee's claim for exemption under sections 2(14)(iii) and 10(37) are not admissible. The Assessing Officer was of the further view that the land which was sold was not an agricultural land and it was not compulsorily acquired by the Government. The Assessing Officer in this regard relied on the decision of the High Court of Kerala in the case of Infopark Kerala vs ACIT(TDS) (187 Taxman 1). Thus, he brought to tax a sum of Rs.1,65,31,119/- as long term capital gain.

4. On appeal, the CIT(A) observed that section 10 of the Act provides for income which cannot be included in the total income. Section 10(37) of the Act provides for exclusion from total income, capital gains arising from transfer of agricultural land which is compulsorily acquired and the land which is situated in areas referred to in section 2(14) clause(iii)(a)(b). As per the provisions of section 10(37), in order to get the benefit, the land acquired should have been used for agricultural operations atleast for a period of two years prior to the date of acquisition. According to the CIT(A), the Assessing Officer himself had agreed in para 5.3 of the assessment order to the fact that the impugned land was an agricultural land as confirmed by the Agricultural Officer, Krishibhavan,

Trivandrum and Village Officer, Vizhinjam Village, Trivandrum vide certificates issued on 11.12.2015 and 08.12.2015 respectively. The CIT(A) observed that the land which was acquired under the provisions of Land Acquisition Act might have been acquired only under compulsory acquisition and never can be with the complete consent and concurrence of the assessee. The CIT(A) held that on transfer of agricultural land situated at Vizhinjam village by way of compulsory acquisition under Land Acquisition Act, no capital gain tax need be paid by relying on the judgment of the Supreme Court in the case of Balakrishnan vs Union of India & Ors (81 taxman.com 51).

5. Against this, the Revenue is in appeal before us. The Ld. DR submitted that the land is not an agricultural land in terms of section 10(37) r.w.s. 2(14) of the I.T. Act.

6. On the other hand, the Ld. AR submitted that the AO had never doubted the actual user of the land for agricultural purposes and the only reason why the capital gains on transfer was not exempted by the AO was due to the fact it was located within Trivandrum Municipal Corporation limits and that there was no compulsory acquisition but a sale in favour of Vizhinjam International Seaport Ltd. The Ld. AR relied on the judgment of the Supreme court in the case of Balakrishnan Vs Union of India (391 ITR 178) wherein it was held that though a sale deed was executed, it was only a compulsory acquisition and based on the

decision, the CIT(A) had allowed the appeal filed. The Ld. AR also relied on the decision of the Cochin Bench in the case of ITO, Ward 1(4),Trivandrum Vs. Smt. Girijakumari M.(ITA No, 236/Coch/2018 dated 10/10/2018) and ACIT Vs. Smt. Jayasree Sreedharan (ITA No. 96/Coch/2018 dated 24/10/2018).

6.1 Moreover, it was submitted that the department had totally erred on facts when it mentioned in the grounds that the land as per Minutes of the District Level Purchase Committee dated 04.06.2010, the assessee's land comes in category " A ". For Category A land the compensation fixed by the committee was Rs 3,30,000/- per cent whereas the compensation paid in this case was only Rs 2,00,000/- per cent which is for category " E " land which is clear from G.O (MS)No.74/10/F&PD dated 12/10/2010. It was submitted that the sale deeds in favour of Vizhinjam International Sea Ports Ltd. were executed by the land owners at the rates fixed as per the above Government Order. It was contended that the department had mentioned that the Agricultural Officer was not the authority competent to declare a land as agricultural but it is the Revenue authority. But in the case of the assessee, the land owned was surveyed by the Special Thahsildar (LA) for fixing the compensation and the status of the land as agricultural has been accepted by the Special Thahsildar (LA) also. So, it was submitted that this ground taken by the department was not factually correct. Further, the assessee submitted that the Chief Secretary of Kerala State had taken up the issue of the exemption of land owned by the assessee along with

the land of some other owners also with the Member (I&T) CBDT. According to the Ld. AR, it was clearly mentioned in the letter of the Chief Secretary that the land is agricultural at the time of notification and exemption u/s 10(37) was recommended to the assessee along with the other owners which was done as there was a commitment from the Government before the acquisition proceedings were started that there would be no income tax liability on compensation received on transfer of the agricultural land . Similarly, it was submitted that the Chief Minister of Kerala had also sent a written request to the Union Finance Minister requesting that exemption be granted to the land owners at Vizhinjam as the land transferred was agricultural land. According to the Ld. AR, a follow up request was forwarded by the Principal Secretary, Fisheries & Ports (E) Department to The Member (IT), Department of Revenue , CBDT, informing that most of the land owners who had transferred the land were poor farmers and to take steps to ensure exemption u/s 10(37) to them on the compensation received on transfer of their land holdings. It was submitted that all these documents prove without doubt that the land of the assessee was agricultural and that it was used for cultivation till it was transferred.

7. We have heard the rival submissions and perused the record. Section 10(37) reads as follows:

*10(37) In the case of an assessee, being an individual or a Hindu undivided family, any income chargeable under the head "Capital gains" arising from the transfer of agricultural land, where –*

*(i) such land is situate in any area referred to in item (a) or item (b) of sub-clause (iii) of clause (14) of section 2;*

*(ii) such land, during the period of two years immediately preceding the date of transfer, was being used for agricultural purposes by such Hindu undivided family or individual or a parent of his;*

*(iii) such transfer is by way of compulsory acquisition under any law, or a transfer of the consideration for which is determined or approval by the Central Government or the Reserve Bank of India;*

*(iv) such income has arisen from the compensation or consideration for such transfer received by such assessee on or after the 1<sup>st</sup> day of April, 2004.*

*Explanation – For the purposes of this clause, the expression “compensation or consideration” includes the compensation or consideration enhanced or further enhanced by any court, Tribunal or other authority;*

Section 2(14)(iii)(a) and section 2(14)(iii)(b) reads as under

*Section 2(14) “capital asset” means property of any kind held by an assessee, whether or not connected with his business or profession but does not include –*

*(i) .....*

*(ii) .....*

*(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 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 kilometers, from the local limits of any municipality or cantonment board referred to in item 9a), 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;*

7.1 Section 2(14)(iii)(a) shows that the assessee's case is not covered by this section as the land in question was within the municipal limit as recorded by the Assessing Officer in para 6.3 of his order. This fact was not controverted by the Ld. AR. Further, it is also not covered u/s. 2(14)(iii)(b) of the Act because there was to be a notification by the central government that the area is an agricultural land and non urban land. No such notification has been presented by the assessee before any of the authorities below or even before us. Regarding section 10(37)(ii), the condition is that the land should be used for agricultural purpose during the period of two years immediately preceding the date of transfer. The assessee herein had not placed an iota of evidence regarding carrying out of agricultural operations in the impugned land. On the other hand, the assessee is relying on the certificate issued by the Agricultural Officer, Krishi Bhavan, Trivandrum and Village Officer, Vizhingam stating that the land is agricultural land. The following documents were also filed before us.

1. Certificate from the Agricultural Officer, Krishi Bhavan, Vizhinjam, Kottappuram stating that the land is Agricultural Land and the English Version of Certificate.
2. Copy of the order from Government of Kerala regarding fixation of price for land acquired based on categorization.
3. Copy of Sale Deed in Malayalam and English Version.

4. Letter from the Chief Secretary dated 16.03.2016 to Member, CBDT stating that the land was agricultural and seeking exemption under section 10(37).
5. Letter from Principal Secretary, Government of Kerala dated 20.12.2016 to Member, CBDT stating that the land was agricultural and seeking exemption under section 10(37).
6. Letter from the Chief Minister of Kerala to the Union Finance Minister seeking exemption u/s 10 (37).

7.2 In our opinion, evidence regarding carrying out of agricultural operations cannot be replaced or substituted by the above evidences. No agricultural operations were carried out and no agricultural income was derived from the said land by the assessee. The Ld. AR pleaded before us that the assessee is not liable for income tax. As such, she had not filed any income tax return. It is to be noted that we are not concerned about the income chargeable to tax. We are concerned about the agricultural operations carried out by the assessee. Section 10(37)(ii) states that if the individual derives any capital gain on transfer of agricultural land, it is exempt from tax on acquisition by the Central Government on the condition that the said land should have been used for agricultural purposes during the period of two years immediately preceding the date of transfer. The documents produced by the assessee before us herein above does not show the actual carrying out of agricultural activities by the assessee in the impugned land.

7.3 In our opinion, the land entered as agricultural land in the revenue records and assessed as such under the Land Revenue Act, would be a circumstance in favour of conclusion that it is an agricultural land. The land situated in an urban area or the agricultural land situated within the municipal limits are not outside the ambit of "capital assets". This should raise only a prima facie presumption and the said presumption can be destroyed by other circumstances pointed out to the contrary. In the present case, there is no evidence of carrying out agricultural operations by the assessee. Being so, the assessee has not fulfilled the condition laid down in section 10(37)(ii) of the Act. Accordingly, we hold that the assessee is liable for capital gains tax on transfer by compulsory acquisition. Thus, this ground of appeal of the Revenue is allowed. The appeal of the Revenue is allowed.

8. Coming to the Cross Objection in C.O. No.51/Coch/2018, the first ground raised by the assessee is that the land was not put to use for non agricultural purpose. As we have observed that the land is situated within the municipal limits of Trivandrum Municipal Corporation and the assessee has not fulfilled the conditions laid down u/s. 10(37)(ii) of the Act and section 2(14)(iii)(b) of the Act, this ground of appeal of the assessee is rejected.

9. The next ground is that the CIT(A) should have held that even if the land was non agricultural land, the value as on 1/4/1981 should have been adopted at 1/10<sup>th</sup> of the transfer value. Admittedly, this ground is not emanating from the

order of the CIT(A). However, there is no basis for valuation of the impugned land as on 1/4/1981 at 1/10<sup>th</sup> of the transfer value of the said asset. Thus, this ground of appeal of the assessee is also rejected. Thus, the Cross objection of the assessee is dismissed.

10. In the result, the appeal filed by the Revenue is allowed and the Cross Objection filed by the assessee is dismissed.

Order pronounced in the open Court on this November, 2018.

(GEORGE GEORGE K.)  
JUDICIAL MEMBER

Sd/-  
(CHANDRA POOJARI)  
ACCOUNTANT MEMBER

Place: Kochi  
Dated: November, 2018  
GJ

Copy to:

1. Smt. G.S. Lekha, Qtrs. 19, Ext. Training Centre, Kottarakara, Kollam.
2. The Income Tax Officer, Ward-2(1), Trivandrum.
2. The Commissioner of Income-tax(Appeals), Trivandrum.
4. The Pr. Commissioner of Income-tax, Trivandrum.
5. D.R., I.T.A.T., Cochin Bench, Cochin.
6. Guard File.

By Order

(ASSISTANT REGISTRAR)  
I.T.A.T., Cochin

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<b>BEFORE S/SHRI CHANDRA POOJARI, AM &amp; GEORGE GEORGE K., JM</b>

I.T.A. No.194/Coch/2018
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<b>Revenue by</b>	Smt. A.S. Bindhu, DR
<b>Assessee by</b>	Shri Surendranath Rao, CA

<b>Date of hearing</b>	14/11/2018
<b>Date of pronouncement</b>	/12/2018

**ORDER**

**Per George George K., JM**

I have gone through the draft order of the Hon'ble Accountant Member. I respectfully differ from the conclusions reached by the Hon'ble Accountant Member. The facts are elaborately narrated in the order of the Hon'ble Accountant Member, hence the same is not reiterated here.

2. The solitary issue raised by the Revenue is whether the assessee's 93.56 cents of land, which was acquired by the Government for the Vizhinjam

International Seaport was agricultural land or not. Admittedly, the said land was a family property inherited by the assessee in the year 1997 (settlement deed No.902/1997).

3. The Assessing Officer held against the assessee only on the basis that the land on the date of transfer was situated within the limits of the Trivandrum Municipal Corporation whose local limit was extended during year 2013 in a delimitation exercise by the Government of Kerala and by which process Vizhinjam village was included in the Trivandrum Corporation limits. The denial of exemption from capital gains was on the ground that there was no compulsory acquisition but a sale by execution of sale deed by the assessee in favour of Vizhinjam International Seaport Ltd. The Ld. AM in his order had stated (para 7.1) that the impugned land is not covered u/s. 2(14)(iii)(a) or 2(14)(iii)(b) of the I.T. Act. According to me this finding of learned AM is immaterial. If a land is not notified u/s. 2(14)(iii)(a) or 2(14)(iii)(b) and is an agricultural land, same would not be a capital asset u/s. 2(14) of the I.T. Act liable for capital gains. Only urban agricultural land notified u/s. 2(14)(iii)(a) or 2(14)(iii)(b) and compulsorily acquired would be entitled to exemption u/s. 10(37) of the I.T. Act. Therefore, only point in dispute in this case is whether the impugned land is an agricultural land and agricultural operation was carried out on it.

4. Subsequent to the introduction of the Kerala Agricultural Income-tax Act, 1991 (KAIT Act), the person holding less than 5 acres of land, is exempted from paying tax under the KAIT Act. Therefore, marginal farmers having agricultural land less than 5 acres of land are not required to maintain any account for his agricultural operation. Even individual land owners having more than 5 acres of agricultural land need not maintain the account for agricultural operation when he is paying taxes under the KAIT Act on presumptive basis. The agricultural income is not taxable under the Central Income-tax Act, however, the same is to be taken into computation/aggregation for the rate purpose under the Central Income-tax Act. Under the Central Income-tax Act, when assessee declares agricultural income for the rate purpose, the Income-tax Rules, prescribe maintenance of accounts of the agricultural operation. Therefore, it is clear that a person having less than 5 acres of agricultural land and was not having Central Income, liable to taxation was not required to maintain any accounts as regards the agricultural operation undertaken by him. If the books of accounts are maintained, evidence can easily be produced for proving that agricultural operation was carried on the land. Evidences such as bills for fertilizer, manual labour cost, sales invoices of agricultural products etc. can be produced to prove the agricultural operations on the land. Big plantations and persons having large land holdings would be maintaining such accounts for their agricultural operations. Large plantations would also require registration under the Rubber Board, Spices Board depending upon the agricultural operation undertaken on

the land. In other words, a marginal farmer having less than five acres of land cannot be expected to maintain books of accounts for his agricultural operations foreseeing that his land would be compulsorily acquired some day, especially when no law mandates him to maintain such books of accounts. In such cases, one has to go by the primary evidence whether there was any agricultural operation when small land holdings are taken over/compulsorily acquired. The primary evidence such as narration of land in the revenue records, certificate of the authorities certifying the land as agricultural land or not etc. are only evidence that can be made available by a marginal land owner who is doing agricultural operations.

5. In this case, the land that was acquired is only 93.53 cents of land and the assessee would not be liable for agricultural income tax Act. Therefore, there would be no evidence maintained by the assessee for the agricultural operation that was undertaken by her. In the instant case, the Assessing Officer admitted that assessee had produced certificate of the village officer dated 08/12/2015 stating that the impugned land is agricultural land (par 5.3 of the order of the Assessing Officer). Moreover, when the land acquisition proceedings were initiated under the Land Acquisition Act, the Special Tahasildhar had accepted the Agricultural Officer's certificate that the above said land as on the date of acquisition was an agricultural land. Copy of the certificate issued by the

Agricultural Officer, Krishi Bhavan, Vizhinjam, which was accepted by the Special  
Thahasildhar, land Acquisition, reads as follows:-

*From*  
*The Agricultural Officer*  
*Krishi Bhavan, Vizhinjam*  
*Kottappuram P.O.*

*Date : 22.11.2011*

*To:*  
*Special Tehsildhar (LA)*  
*Vizhinjam International Sea Port*  
*Vizhinjam.*

*Sir,*

*Sub : Land Acquisition for Sea Port – Certificate as Agricultural Land regarding.*

<i>Sl. No.</i>	<i>LAC No.</i>	<i>Survey No.</i>	<i>Remarks</i>
<i>1</i>	<i>530/10</i>	<i>425/4</i>	<i>Agricultural Land</i>
<i>2</i>	<i>531/10</i>	<i>425/5</i>	<i>Agricultural Land with building</i>
<i>3</i>	<i>532/10</i>	<i>425/6</i>	<i>Agricultural Land</i>
<i>4</i>	<i>544/10</i>	<i>425/24</i>	<i>Agricultural Land</i>
<i>5</i>	<i>547/10</i>	<i>425/25</i>	<i>Agricultural Land</i>
<i>6</i>	<i>533/10</i>	<i>425/7B</i>	<i>Agricultural Land</i>
<i>7</i>	<i>533/10A</i>	<i>425/7A</i>	<i>Agricultural Land with building</i>
<i>8</i>	<i>407/10</i>	<i>271/3</i>	<i>Agricultural Land with building</i>

*I confirm that the land mentioned against the above survey Nos. are Agricultural Land.*

*Your's faithfully,*

*Certified True Copy.*

*Sd/-*  
*Agricultural Officer*  
*Krishi Bhavan,*  
*Vizhinjam*  
*Kottappuram PO*

*Sd/-*  
*Special Tehsildhar (LA)*  
*Vizhinjam International*  
*Sea Port, Vizhinjam*  
*Thiruvananthapuram.*

*Sd/-*  
*V.Prabhakaran Nair*  
*Advisor (Land Matters)*  
*Vizhinjam International*  
*Sea Port, Trivandrum.*

6. The above documents clearly prove that the said land was agricultural land at the time of its acquisition and the same was certified by the Special Tahasildhar (LA). Moreover the AO in the assessment order had analysed the claim of the assessee for construction, installation and improvements of agricultural facilities on the land owned by the assessee and allowed a part of the same in arriving at the cost of acquisition of the property. The AO has treated a part of the expenses incurred by the assessee on the following as part of the cost of improvement of the property while computing the taxable capital gains:

- (i) Stone and Iron Rope fencing
- (ii) Cattle shed
- (iii) Manure Storage Tank
- (iv) Bio Gas Plant
- (v) Land Development
- (vi) Pump House & Water tank
- (vii) Water Delivery system.

7. The above proves that the assessee had constructed /installed Manure storage tank, Water delivery system, Pump House, etc which undoubtedly goes to prove that the land was used for the purposes of agriculture. The AO has clearly mentioned in his order that the claim for improvements were verified by analyzing the same and comparison of the amount claimed with the similar cases in the neighborhood and accepted 50% of the claim made. Thus it is clear that the AO had never doubted the actual user of the land for agricultural purposes and the only reason why the capital gains on transfer was not exempted by the AO was due to the fact it was located within Trivandrum Municipal Corporation

limits and that there was no compulsory acquisition but a sale in favor of the Vizhinjam International Seaport Ltd. This point was decided by the Hon'ble Supreme court in favour of the assesseees in the case of Balakrishnan Vs Union of India (3911TR 178) (SC). The Hon'ble Apex Court held that though a sale deed was executed, it was only a compulsory acquisition. It was based on the above judgment of the Hon'ble Supreme Court that the appeal of the assessee was allowed by the CIT(A). It was also to be mentioned that the orders of the Cochin Bench of the Tribunal in the case of ITO, Ward 1(4), Trivandrum Vs. Smt. Girijakumari in ITA No.236/Coch/2018 (order dated 10.10.2018) and ACIT Vs. Smt. Jayasree Sreedharan in ITA No.96/Coch/2018 (order dated 24.10.2018) had held that land acquired for Vizhinjam port is urban agricultural land entitled to the benefit of section 10(37) of the I.T. Act.

8. In the grounds raised by the department it is stated that the land as per Minutes of the District Level Purchase Committee dated 04.06.2010, the assessee's land comes in category "A". For Category A land the compensation fixed by the committee was Rs.3,30,000 per cent whereas the compensation paid in this case was only Rs.2,00,000/- per cent which is for category "E" land. This is clear from G.O (MS)No.74/10/F&PD dated 12/10/2010 (The GO is placed on record).The sale deeds in favour of Vizhinjam International Sea Ports Ltd. were executed by the land owners at the rates fixed as per the above Government Order.

9. The department has also stated in the grounds that the Agricultural Officer is not the authority competent to declare a land as agricultural but it is the Revenue authority. As mentioned earlier, the land owned by the assessee was surveyed by the Special Thahsildar (LA) for fixing the compensation and the status of the land as agricultural has been accepted by the Special Thahsildar (LA) also. Therefore the said ground taken by the department is not factually correct.

10 It is also to be mentioned that the Chief Secretary of Kerala State had taken up the issue of the exemption of land owned by the assessee along with the land of some other owners also with the Member (IT) CBDT. It is clearly mentioned in the letter of the Chief Secretary that the land is agricultural at the time of notification and exemption u/s 10(37) has been recommended to the assessee along with the other owners. This was probably done as there was a commitment from the Government before the acquisition proceedings were started that there would be no income tax liability on compensation received on transfer of the agricultural land. Similarly the Chief Minister of Kerala, had also sent a written request to the Union Finance Minister requesting that exemption be granted to the land owners at Vizhinjam as the land transferred was agricultural land. A follow up request was forwarded by the Principal secretary I Fisheries & Ports (E) Department, to the Member (IT), Department of Revenue,

CBDT,

informing that most of the land owners who had transferred the land were poor farmers and to take steps to ensure exemption u/s 10(37) to them on the compensation received on transfer of their land holdings. Copies of the above mentioned letters are on record.

11. All these documents prove without doubt that the land of the assessee was agricultural and that it was used for cultivation till it was transferred. Therefore, I hold that the assessee is entitled to the benefit u/s 10(37) of the I.T. Act with regard to acquisition of her 93.56 cent land for Vizhinjam International Seaport.

12. In the result, the appeal filed by Revenue is dismissed.

The order pronounced on      day of December, 2018

**sd/-**  
**(George George K)**  
**Judicial Member**

**IN THE INCOME TAX APPELLATE TRIBUNAL  
COCHIN BENCH, COCHIN**

**Before Shri N.V.Vasudevan, Vice-President (As Third Member)**

ITA No.194/Coch/2018 :Asst.Year2012-2013

The Income Tax Officer Ward 2(1) Trivandrum.	Vs.	Smt.G.S.Lekha Qrs 19, Extension Training Centre ETC P.O. Kottarakkara Kollam. <b>PAN :AHZPL9038K.</b>
(Appellant)		(Respondent)

CO No.51/Coch/2018 :Asst.Year2012-2013

Smt.G.S.Lekha Qrs 19, Extension Training Centre ETC P.O. Kottarakkara Kollam.	Vs.	The Income Tax Officer Ward 2(1) Trivandrum.
(Cross Objector)		(Respondent)

Revenue by :Smt.A.S.Bindhu, Sr.DR  
Assessee by :Sri. G.Surendranatha Rao, CA

<b>Date of Hearing : 29.03.2019</b>	<b>Date of Pronouncement : 29.03.2019</b>
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**ORDER**

**Per N.V.Vasudevan, VP (As Third Member):**

As there was a difference of opinion between the Members, who heard the aforesaid appeal and cross objection,

the Members referred the following question for consideration by a Third Member.

*“Whether the assessee’s land, which was acquired by the Government for Vizhinjam International Seaport, is an agricultural land so as to grant exemption u/s 10(37) of the Income-tax Act?”*

The Hon’ble President has nominated me for a decision as Third Member on the point of difference between the members constituting the Division Bench.

2. The facts and circumstances under which the aforesaid question was referred to the Third Member is sufficiently set out in the orders of the Hon’ble AM as well as the Hon’ble JM. For the sake of clarity, I recapitulate the facts of the case.

3. The admitted facts are that the assessee is the owner of landed property together with trees and house standing thereon admeasuring 93.56 cents situated in Re-Sy.Nos.425/4, 425/5, 425/6, 425/24, 425/25, 421/34 and 420/6 in Vizhinjam Village. The land belonging to the assessee as well as adjoining lands were acquired for the purpose of development of Vizhinjam International Seaport (VISL) vide notification u/s 4(1) of the Land Acquisition Land, 1894 was issued on 12.03.2010. The assessee’s land measuring 79.534 cents was also notified for acquisition for the aforesaid public purpose. Thereafter there were several

meetings between the land owners and Thiruvananthapuram District Collector. Several proposals were exchanged between the parties and finally the Assessee agreed for compensation of Rs.2 lakh per cent on the basis that the lands of the assessee would fall under E category. According to the Assessee lands categorized as "E" in the settlement process between the Government and the land owners wherein the nature of Agricultural lands.

4. Thereafter the assessee by a registered sale deed dated 25.11.2011 conveyed the property to VISL. At the time when the lands were notified for acquisition Vizhijam Village in which the land of the Assessee was situate was a gram panchayat and the lands located therein were outside the purview of "capital asset" within the meaning of section 2(14) of the Income-tax Act, 1961 (Act). Between the notification u/s 4(1) of Land Acquisition Act 1894 on 12.03.2010 and subsequent negotiations and ultimate sale by the assessee to VSIL on 25.1.1011, Vizhinjam Village was notified as part of Thiruvananthapuram Corporation with effect from 01.11.2010. Therefore, the lands in Vizhinjam Village assumed the character of a capital asset within the meaning of section 2(14)(iii)(a) of the Act as on the date of transfer of the land by the Assessee to VSIL.

5. U/s 10(37) of the Act, capital gains arising from transfer of agricultural land were exempt from tax and had to be regarded as income which do not form part of total income under the Act.

6. In this background, the question before the Assessing Officer was as to whether the capital gain arising on transfer of land in question will be entitled to the benefit exemption u/s 10(37) of the Act. The provisions of Sec.10(37) of the Act which were inserted in the Act by Finance (No.2) Act, 2004 reads thus:

“(37) in the case of an assessee, being an individual or a Hindu undivided family, any income chargeable under the head "Capital gains" arising from the transfer of agricultural land, where-

(i) such land is situate in any area referred to in item (a) or item (b) of sub-clause (iii) of clause (14) of section 2;

(ii) such land, during the period of two years immediately preceding the date of transfer, was being used for agricultural purposes by such Hindu undivided family or individual or a parent of his;

(iii) such transfer is by way of compulsory acquisition under any law, or a transfer the consideration for which is determined or approved by the Central Government or the Reserve Bank of India;

(iv) such income has arisen from the compensation or consideration for such transfer received by such assessee on or after the 1st day of April, 2004.

Explanation.-For the purposes of this clause, the expression "compensation or consideration" includes the compensation or consideration enhanced or further enhanced by any court, tribunal or other authority;"

7. The case of the A.O. was that as on the date of transfer of the land owned by the assessee, i.e., on 25.11.2011, Vizhinjampanchayat become part of Thiruvananthapuram Corporation, and therefore, cannot be regarded as agricultural land because of section 2(14)(iii)(a) of the Act. Sec.2(14) of the Act defines "Capital Asset" and it reads thus:

"Sec.2: Definitions: In this Act unless the context otherwise requires:

.....

(14) "capital asset" means property of any kind held by an assessee, whether or not connected with his business or profession, but does not include-

(i)

(ii)

(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 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 1st 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;"

8. Clause (a) & (b) to Sec.2(14(iii)) of the Act were inserted in the definition of Capital Asset by the Finance Act, 1970. Upto asst. yr. 1969-70, the exclusion from capital asset under sub-cl. (iii) of section 2(14) was in respect of "agricultural land in India". This exclusion was narrowed down from asst. yr. 1970-71 as a result of substitution of new sub-cl. (iii) from asst. yr. 1970-71 by the Finance Act, 1970. As a result of this substitution, all agricultural lands in India are no longer outside the purview of "capital asset". Only those agricultural lands in India are outside the purview of "capital asset" as do not fall either under paragraph (a) or paragraph (b) of sub-cl. (iii) of section 2(14). In other words, out of agricultural lands in India, lands falling in these two paragraphs would fall within the capital assets. These lands are (a) agricultural land situate within the jurisdiction of a municipality or a cantonment board and which has a population of not less than ten thousand according to last preceding census of which the relevant figures have been published before the first day of the

previous year. (The municipality referred to here is a body whether known as municipality, municipal corporation, notified area committee, town area committee, town committee or by any other name); (b) agricultural land situate in any area within such distance, not more than eight kilometres, from the local limits of any municipality (by whatever name called) or cantonment board as the Central Government may specify by a notification in the Official Gazettee. (The Central Government in specifying this area, has to take into account the extent of and scope for urbanisation of that area and other relevant considerations).

9. The CBDT in Circular No.45 of 1970 dated 2.9.1970 explained the scope and purpose of the aforesaid amendment in the following words:

**“Capital gains arising from transfer of agricultural land in urban areas**

**29.** Capital gains arising from the transfer of a capital asset have been chargeable to income-tax for several years past. Where the transfer of the capital asset is effected within a period of 24 months from the date of its acquisition by the assessee, the capital gain is treated on a par with ordinary income and charged to tax on that basis. Gains arising from the transfer of a capital asset held by the assessee for more than 24 months are charged to tax on a concessional basis. In the case of companies, such gains are taxed at the rate of 40% where they relate to lands and buildings, and at 30% where they relate to other assets. In the case of non-corporate taxpayers, only a certain portion of the capital

gains in excess of Rs. 5,000 is included in the taxable income. This proportion is 55% where the gains relate to lands and buildings and 35% where they relate to other assets.

**30.** Prior to the amendment made by the Finance Act, 1970, the definition of the term "capital asset" in s. 2(14) of the IT Act excluded from its scope, inter alia, agricultural land in India. Accordingly, no liability to tax arose on gains derived from transfer of agricultural land in India. This exemption of the agricultural land from the scope of levy of tax on capital gains has a historical origin and is not due to any bar in the Constitution on the competence of Parliament to legislate for such levy. Agricultural land situated in municipal and other urban areas is essentially similar to non-agricultural land in such areas in its potentialities for use due to the progress of urbanization and industrilisation. The Finance Act, 1970, has accordingly amended the relevant provisions of the IT Act so as to bring within the scope of taxation capital gains arising from the transfer of agricultural land situated in certain areas. For this purpose, the definition of the term "capital asset" in s. 2(14) of the IT Act has been amended so as to exclude from its scope only agricultural land in India which is not situate in any area comprised within the jurisdiction of a municipality or cantonment board and which has a population of not less than ten thousand persons according to the last preceding census for which the relevant figures have been published before the first day of the previous year. The Central Government has been authorised to notify in the Official Gazette any area outside the limits of any municipality or cantonment board having a population of not less than ten thousand, up to a minimum distance of 8 kilometers from such limits, for the purposes of this provision. Such notification will be issued by the Central Government having regard to the extent of, and scope for, urbanisation of such area, and, when any such area is notified by the Central Government, agricultural land

situated within such area will stand included within the term "capital asset". Agricultural land situated in rural areas, i.e., areas outside any municipality or cantonment board having a population of not less than ten thousand and also beyond the distance notified by the Central Government from the limits of any such municipality or cantonment board, will continue to be excluded from the term "capital asset".

**31.** The amendment to s. 2(14), as stated in the preceding paragraph, applies from 1st April, 1970, i.e., for and from the asst. yr. 1970-71. However, by an amendment to s. 47 of the IT Act, it has been specifically provided that no capital gain or loss will be computed with reference to any transfer of agricultural land in India effected before 1st March, 1970.

**32.** The effect of the amendments to s. 2(14) and s. 47, as stated above, will be that capital gains arising from transfer of agricultural lands situated in the municipal and other urban areas on or after 1st March, 1970, will become liable to taxation even where such land was held for bona fide agricultural purposes, often as the main source of livelihood. With a view to relieving the burden of taxation on the capital gains in such cases, a provision has been made, in a new s. 54B of the IT Act, for exempting from tax the capital gain arising from the transfer of agricultural land in certain circumstances. Under the new s. 54B, where the capital gain arises from transfer of land which in the two years immediately preceding the date of transfer was being used by the assessee or a parent of his for agricultural purposes, and the assessee has, within a period of two years after that date, purchased any other land (whether in the same area or elsewhere) for being used for agricultural purposes, then the capital gain will not be charged to tax to the extent that it has been utilised for acquiring the fresh land. Where the amount of the capital gain exceeds the cost of acquisition of the fresh land, only the excess

will be chargeable to tax. The concession will, however, be forfeited if the assessee transfers the fresh land acquired by him within a period of three years from the date of its purchase."

10. According to the A.O., the primary condition for claiming exemption u/s 10(37) of the Act was that the capital gain should have arisen on transfer of agricultural land. Since the land in question was not an agricultural land, the A.O. came to the conclusion that the basic condition for allowing deduction u/s 10(37) of the Act has not been satisfied. Another reason given by the A.O. was that provisions of section 10(37) would be applicable only if the land in question was transferred by way of compulsory acquisition. According to him, since the assessee in present case conveyed the property to VISL under the sale deed after due negotiation, the transfer in question was not by way of compulsory acquisition under any law. On that basis, the A.O. denied the benefit of deduction u/s 10(37) of the Act.

11. Incidentally, the assessee made a claim for deduction u/s 54B of the Act, which is available to the assessee, who sells land that was used for agricultural purpose in the past and the capital gain on sale of such land is invested in acquiring another agricultural land. This was denied by the A.O. for the reason that the assessee did not declare any agricultural income in any of the returns in the past. In this regard, it is to be clarified at this stage itself that the assessee

was not an assessee in the past as her income was below the taxable limit, and therefore, the question of the assessee disclosing agricultural income in her return did not arise for consideration at all. Therefore, this reason assigned by the A.O. was not proper. This fact will be material while considering the question whether the land in question can be regarded as an agricultural land.

12. Another factor which would be material to notice is that the assessee had claimed that it had incurred cost of improvement of the land and the details in this regard were as follows:-

(a) Stone & Iron Rope fencing, Cattle shed, Manure storage tank etc.

Fin. Year 1998-99 : Rs.2,33,500/-

(b) Bio gas plant construction, land development, Pump house & water tank, house maintenance, replanting entire plot, manure storage tank etc.

Fin. Year 1999-2000: Rs.7,39,500/-

(c) Replanting entire plot, manure storage tank, water delivery system etc.

Fin. Year 2000-01 Rs.37,800/-

(d) Water delivery system etc.

Fin. Year 2001-02 Rs.18,500/-

(e) Water delivery system etc.

Fin. Year 2002-03 Rs.19,500/-

(f) Water delivery system, replanting entire plot, manure storage tank etc.

Fin. Year 2003-04 Rs.41,600/-

(g) Water delivery system etc.

Fin. Year 2004-05 Rs.21,000/-

(h) Water delivery system, replanting entire plot,  
manure storage tank etc.

Fin. Year 2005-06 Rs.44,300/-

(i) Water delivery system etc.

Fin. Year 2006-07 Rs.22,500/-

(j) Water delivery system, replanting entire plot,  
manure storage tank etc.

Fin. Year 2007-08 Rs.45,400/-

(k) Water delivery system etc.

Fin. Year 2008-09 Rs.24,000/-

(l) Water delivery system, house maintenance,  
replanting entire plot, manure storage tank etc.

Fin. Year 2009-10 Rs.2,59,600/-

(m) Manure storage tank etc.

Fin. Year 2010-11 Rs.2,800/-

Total amount claimed by assessee as cost of improvement  
:Rs.15,10,000/-.

13. The A.O. accepted the factum of the existence of the aforesaid facility in the land of the assessee. The claim made by the assessee for deduction was a sum of Rs.15,10,000 was allowed only to the extent of 50% of the following expenses claim made by the assessee.

(i) In respect of stone and iron rope fencing, cattle shed, manure storage tank at Rs.2,33,500 and

(ii) Bio gas plant, land development, pump house and water tank, water delivery system at Rs.2,23,500.

14. The long term capital gain was computed by the A.O. at Rs.1,65,31,190 as per the following details:-

Sale consideration		1,70,98,612
Cost of acquisition - 1997-98 (40,000 * 32.20/37.77)	34,101	
Indexed cost of Acquisition (34,101*785/331)		80,874
Cost of improvement - 1998-99 (2,33,500/ 50%)	1,16,750	
Indexed cost of improvement (116750*785/351)		2,61,108
Cost of improvement - 1999-2000 (2,23,500/50%)	1,11,750	
Indexed cost of improvement (111750*785/389)		2,25,511
Total cost		5,67,493
Net Taxable Capital Gain		1,65,31,119

15. On appeal by the assessee, the CIT(A) held that the Hon'ble Supreme Court in the case of *Balakrishnan v. Union of India* [(2017) 391 ITR 178 (SC)] took the view that notwithstanding the sale of land voluntarily by the assessee after notification of land for acquisition under the Land Acquisition Act, 1894, the nature of transfer would continue to remain as transfer on compulsory acquisition, and therefore, such an assessee would be entitled to the benefit of exemption u/s 10(37) of the Act. The learned A.O. had

incoming to the contrary conclusion, placed reliance on the judgment of the Hon'ble Kerala High Court in the case of *Infopark Kerala v. ACIT [(2010) 187 taxman 1 (Ker.)]*. But that decision was overruled by the decision of the Hon'ble Supreme Court in the case of *Balakrishnan (supra)*. Accordingly, the claim of the assessee was directed to be allowed by the CIT(A).

16. On further appeal, the learned AM took the view that the benefit of exemption u/s 10(37) of the Act, the assessee has to establish not only the fact that his land was situate in an area mentioned in section 2(14)(iii)(a) of the Act, but should also further prove that his land was used for agricultural purpose. He took the view that the evidence filed by the assessee in this regard was insufficient and held that the assessee will not be entitled to the benefit of exemption u/s 10(37) of the Act. The discussion in this regard is contained in para 7 to 7.3 of the learned AM's order. As against the above conclusions of the Hon'ble AM, the Hon'ble JM took the view that the assessee had proved that the land in question was an agricultural land in the sense that it was used for agricultural purpose. In short, the Hon'ble JM came to the conclusion that in respect of small holding of agricultural land of less than 5 acre, no books of account or other document are required to be maintained by an assessee and in this regard referred to Kerala Agricultural Income-tax Act, 1991. The second aspect noticed by the Hon'ble JM was the fact that the Agricultural

Officer, KrishiBhavan, Vizhinjam accepted the nature of land as agricultural land in his communication dated 22.11.2011 to the Special Tahsildhar, Land Acquisition. Third aspect the learned JM has noticed is the fact that the AO while allowing the expenses on improvement, while computing capital gain, has considered allowing 50% of expenses of the claim on the following heads:-

- (i) Stone and Iron Rope fencing
- (ii) Cattle shed
- (iii) Manure Storage Tank
- (iv) Bio Gas Plant
- (v) Land Development
- (vi) Pump House & Water tank
- (vii) Water Delivery system.

The forth aspect noticed by the Hon'ble JM was the fact that the assessee's lands were categorized as category E for fixing land acquisition compensation and category E was with reference to lands which are agricultural lands.

17. I may also mention here that when the acquisition proceedings commenced, the lands in question located at Vizhinjam were not part of Thiruvananthapuram Corporation, and therefore, the negotiations between the parties proceeded on the basis that the compensation received for acquisition of the land would not suffer Income-tax. However, because of

the subsequent inclusion of Vizhinjam Village as part of Thiruvananthapuram Corporation, the compensation received on acquisition of land would suffer capital gain tax. Since the owners of the lands were taken by surprise because of the inclusion of Vizhinjam Village as part of Thiruvananthapuram Corporation and consequent income tax liability, The Hon'ble Chief Ministry of Kerala, Principal Secretary, Government of Kerala have had addressed letters to the CBDT as well as the Union Finance Minister seeking appropriate relief to the land owners who would suffer irreparable losses.

18. I have heard the submissions of the learned Departmental Representative and the learned Counsel for the assessee. The learned DR primarily placed reliance on the order of the Hon'ble AM besides placing reliance on the order of the A.O. The learned Counsel for the assessee while relying on the order of the Hon'ble JM, also placed reliance on the order of the CIT(A). Besides the above, my attention was also drawn on two decision of the ITAT Cochin Bench in respect of lands situated in the very same village at Vizhinjam and in respect of compensation paid to the land holders of those two assesseees relief u/s 10(37) of the Act was allowed by the Tribunal. The two decisions referred are (i) ITO v. Smt.Padmaja Devi Amma [ITA No.235/Coch/2017 order dated 05.02.2019] and (ii) ITO v. Sri.Harimurali Sreedhara Panickar [ITA No.207/Coch/2017 – order dated 05.02.2019]. Both the

aforesaid appeals relate to assessment year 2012-2013, which is incidentally the assessment year involved in the present appeal before me as well.

19. At the outset, I notice that the provisions of section 10(37) of the Act are meant specifically for the purpose of removing hardship to a land holder, whose lands are situated in an area specified in section 2(14)(iii)(a)(b) of the Act. These lands which were originally used for agricultural purpose if retained by the owner would continue to be used for agricultural purpose but if they are compulsorily acquired, the owners have to part with title and possession of such lands and further have to pay income tax on capital gain on compulsory acquisition. In order to mitigate hardship to such owners who apart from being deprived of their lands also have to pay income tax on capital gain on compulsory acquisition, relief was provided to them in the form of Sec.10(37) of the Act. Apart from the above, lands which would otherwise fall outside the ambit of capital asset become capital asset because of its nearness to urban area. Therefore, the legislature thought it fit to give exemption if such lands are compulsorily acquired for public purpose subject to the condition that, two years prior to their acquisition, the land was used for agricultural purposes. Therefore, the A.O. is not right in coming to the conclusion that if a land falls within the discretion of capital asset u/s 2(14)(iii)(a) of the Act then it would be a transfer of land which

is not agricultural and therefore, one should not look at the provisions of section 10(37) of the Act at all. It is clear from reading of clause (i) (ii) (iii) of section 10(37) of the Act that the character of the land in the past has to be seen.

20. This now takes me to the question whether the land in question can be regarded as agricultural land notwithstanding the fact that the land falls within the discretion of section 2(14)(iii)(a) of the Act. The expression "agricultural land" has not been defined in the 1961 Act. It was also not defined in the 1922 Act. Nor has it been defined either in the WT Act, 1957, GT Act, 1958 or the ED Act, 1953. The expression "agricultural land" should therefore be given the meaning as is generally understood in the common parlance and as it ordinarily bears in plain English language. Basic evidence to show the character of the land as Agriculture would be entries in the record of rights which would constitute prima facie evidence about agricultural character of the land. The characteristic of "agricultural land" is not determined by the nature of the produce cultivated, as grain and food products for consumption. A coconut, jackfruit grove has to be regarded as Agricultural land. Where trees standing on an agricultural land are transferred alongwith the land as its integral part in one transaction, they would be regarded as "agricultural land" and not a separate capital asset. Trees until they are cut and removed, from an integral part of the land and such land has to be regarded as Agricultural land. The

initial burden to prove that land in question was being used for agricultural purpose at the relevant time is on the assessee. Where the assessee has produced evidence to prove that land was agricultural land, Department has to lead evidence to controvert it. When the land is classified as agricultural land in revenue papers and agricultural operations are found to have been carried on the date of transfer, there is a presumption that land is an agricultural land and the burden is then on the Department to rebut it

21. With the aforesaid background let us look at the evidence in the present case. A perusal of the sale deed dated 25.11.2011 under which the property in question was transferred by the assessee to VISL, clearly gives the description as land together with trees standing thereon. The relevant portion of the English transaction of the sale deed, which is at page 29 to 39 shows that out of the total consideration of Rs.1,69,14,391 a sum of Rs.9,060 has been given value of trees that was standing on the land. There were about 77 to 80 coconut trees besides jackfruit trees in the property in question. This intrinsic evidence to show the character of the land was agricultural land, has not been noticed by the Hon'ble AM. Besides the above, the Agricultural Officer, Krishi Bhavan, Vizhinjam has certified in his certificate that the land to be agricultural land. The A.O. himself has considered the expenses towards improvement of the land as allowable deduction while computing the capital

gain. A perusal of the nature of this expense, which we have extracted in the earlier part of the order, shows that the same are all in relation to agricultural activities. The absence of declaration of agricultural income, as I have mentioned in the earlier part of this order, would not in my view negate the fact that the lands were used for agricultural purpose. The admitted position is that the assessee does not have taxable income in the past and there was no occasion for her to file her return of income in which she can declare her agricultural income.

22. As far as the decision of the Hon'ble Kerala High Court in the case of *Infopark Kerala (supra)*, the same stands overruled by the decision of the Hon'ble Supreme Court in the case of *Balakrishnan (supra)*. In the case of *Balakrishnan Vs. Union of India* 391 ITR 178 (SC), the question before the Hon'ble Supreme Court was:

*"Whether, on the facts and circumstances of the case, the High Court was justified in denying the claim for exemption under Section 10(37) of the Income Tax Act, 1961 to the appellant?"*

The factual background was that the Assessee was the owner of 27.70 Acres of land in Sy. No. 18.60 hectares of paddy field in Block No. 17 of Attippra village in Thiruvananthapuram District comprised in Sy. No. 293/8. This was agricultural land. The assessee was using the same to grow paddy. The

Government of Kerala sought to acquire the aforesaid property of the appellant for the public purpose namely, '3<sup>rd</sup> phase of development of Techno Park'. For this purpose, Notification under Section 4(1) of the Land Acquisition Act, 1894 (hereinafter referred to as the 'LA Act') was issued on 01.10.2005. It appears that the amount of compensation fixed by the Land Acquisition Collector was not acceptable to the assessee. Ultimately it was agreed by the Techno Park, for whom the property in question was acquired, to pay a sum of Rs. 38,42,489/-. After this amount was agreed upon between the parties, the assessee agreed to execute a sale deed of the property in question in favour of Techno Park. Such sale deed was executed on 08.05.2008 and duly registered with the Sub-Registrar, Kazhakkootam. The question was whether no capital gain was payable on the aforesaid amount in view of Section 10(37) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act'). The stand which was taken by the Revenue in this notice was that the amount of compensation/consideration received by the appellant against the aforesaid land was not the result of compulsory acquisition and on the contrary it was the voluntary sale made by the appellant to the Techno Park and, therefore, the provisions of Section 10(37) of Act were not applicable. The Hon'ble Supreme Court held that notwithstanding sale by Assessee under a sale deed, the transfer was on account of

compulsory acquisition. The following were the observations of the Hon'ble Supreme Court:

"9. In our view, insofar as acquisition of the land is concerned, the same was compulsorily acquired as the entire procedure prescribed under the LA Act was followed. The settlement took place only qua the amount of the compensation which was to be received by the appellant for the land which had been acquired. It goes without saying that had steps not been taken by the Government under Sections 4 & 6 followed by award under Section 9 of the LA Act, the appellant would not have agreed to divest the land belonging to him to Techno Park. He was compelled to do so because of the compulsory acquisition and to avoid litigation entered into negotiations and settled the final compensation. Merely because the compensation amount is agreed upon would not change the character of acquisition from that of compulsory acquisition to the voluntary sale. It may be mentioned that this is now the procedure which is laid down even under the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 as per which the Collector can pass rehabilitation and resettlement award with the consent of the parties/land owners. Nonetheless, the character of acquisition remains compulsory.

10. This Court has doubts about the correctness of the judgment in the case of Info Park Kerala vs. Assistant Commissioner of Income Tax (2008) 4 KLT 782. The Court in the said case took the view that since the title in the property was passed by the land owners on the strength of sale deeds executed by them, it was not a compulsory acquisition. We are not in agreement with the aforesaid view. It is clear that but for Notification under Section 4 and Award under Section 9 of the LA Act, the appellant would not have entered into any negotiations for the compensation of the consideration

which he was to receive for the said land. As far as the acquisition of the land in question is concerned, there was no consent. The appellant was put in such a condition that he knew that his land had been acquired and he cannot reiterate the same. The appellant, therefore, only wanted to salvage the situation by receiving as much compensation as possible commensurate with the market value thereof and in the process avoid the litigation so that the appellant is able to receive the compensation well in time. If for this purpose the appellant entered into the negotiations, such negotiations would be confined to the quantum of compensation only and cannot change or alter the nature of acquisition which would remain compulsory. We, therefore, overrule the judgment of the Kerala High Court in Info Park Kerala vs. Assistant Commissioner of Income Tax (2008) 4 KLT 782.

11. As a result the appeal of the appellant is allowed and proceedings under Section 148 of the Act are quashed."

23. In the light of the aforesaid factual and legal position, I agree with the learned JM in his conclusion that the assessee was entitled to exemption u/s 10(37) of the Act.

24. The matter now will be listed before the Division Bench for giving effect to the view of the majority and passing consequential order.

Sd/-  
**(N.V.Vasudevan)**  
**VICE-PRESIDENT**

Cochin ; Dated : 19<sup>th</sup> March, 2019.  
Devdas\*

**IN THE INCOME TAX APPELLATE TRIBUNAL  
COCHIN BENCH, COCHIN**

**Before Shri Chandra Poojari, AM & Shri George George K, JM**

ITA No.194/Coch/2018 :Asst.Year2012-2013

The Income Tax Officer Ward 2(1) Trivandrum.	Vs.	Smt.G.S.Lekha Qrs 19, Extension Training Centre ETC P.O. Kottarakkara Kollam. <b>PAN :AHZPL9038K.</b>
(Appellant)		(Respondent)

CO No.51/Coch/2018 :Asst.Year2012-2013

Smt.G.S.Lekha Qrs 19, Extension Training Centre ETC P.O. Kottarakkara Kollam.	Vs.	The Income Tax Officer Ward 2(1) Trivandrum.
(Cross Objector)		(Respondent)

Revenue by :Smt.A.S.Bindhu, Sr.DR  
Assessee by :Sri. G.Surendranatha Rao, CA

Date of Hearing : 05.04.2019	Date of Pronouncement : 05.04.2019
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**ORDER**

**Per George George K, JM :**

As there was a difference of opinion between the Members in respect of the aforesaid appeal and cross

objection, the Members referred the following question for consideration by a Third Member.

*“Whether the assessee’s land, which was acquired by the Government for Vizhinjam International Seaport, is an agricultural land so as to grant exemption u/s 10(37) of the Income-tax Act?”*

2. The Hon’ble President has nominated Shri N.V.Vasudevan, Vice-President for a decision as Third Member on the point of difference between the members constituting the Division Bench. The Third Member vide his order dated 29.03.2019, by agreeing with the view taken by the Judicial Member, held that the assessee is entitled to exemption u/s 10(37) of the Income-tax Act, 1961.

3. In view of the majority opinion, we hold that the assessee is entitled to the benefit of section 10(37) of the I.T.Act with regard to acquisition of her 93.56 cent land for Vizhinjam International Seaport. It is ordered accordingly.

4. Since we have dismissed the appeal of the Revenue, the cross objection filed by the assessee, which is in support of the order of the CIT(A), becomes infructuous and the same is dismissed as infructuous.

5. In the result, the appeal filed by the Revenue and the cross objection filed by the assessee are dismissed.

Order pronounced on this 05<sup>th</sup> day of April, 2019.

Sd/-  
**(Chandra Poojari)**  
**ACCOUNTANT MEMBER**

Sd/-  
**(George George K)**  
**JUDICIAL MEMBER**

Cochin ; Dated : 05<sup>th</sup> April, 2019.  
Devdas\*

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent.
3. The Pr.CIT, Trivandrum.
4. The CIT(Appeals) Trivandrum.
5. DR, ITAT, Cochin
6. Guard file.

BY ORDER,  
(Asstt.  
Registrar)  
**ITAT, Cochin**