

IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT

BEFORE SHRI PAWAN SINGH, JM & DR. A.L.SAINI, AM

आयकर अपीलसं./ITA Nos.110/SRT/2022

(निर्धारणवर्ष / Assessment Year: (2017-18)

(Physical Court Hearing)

Bhikhabhai Rajabhai Dhameliya 13, Krishnanagar Society, Varachha Road, Surat-395006	Vs.	Principal Commissioner of Income Tax-1, Surat, Aaykar Bhavan, Majuira Gate, Surat- 395001
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: AAPPD 7018 L		
(अपीलार्थी /Appellant)		(प्रत्यर्थी /Respondent)

आयकर अपीलसं./ITA No.111/SRT/2022

(निर्धारणवर्ष / Assessment Year: (2017-18)

Dakshaben Shailesh Dhameliya B-1, Jay Gangeshwar Society, Hirabaug Varachha Road, Surat-395006	Vs.	Principal Commissioner of Income Tax-1, Surat, Aaykar Bhavan, Majura Gate, Surat- 39500
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: ARJPD 7467 J		
(अपीलार्थी /Appellant)		(प्रत्यर्थी /Respondent)

आयकर अपीलसं./ITA No.112/SRT/2022

(निर्धारणवर्ष / Assessment Year: (2017-18)

Ravjibhai Becharbhai Dhameliya 2 nd Floor, "Vrajshila", Kapodra Char Rasta, Nr. Gajjar Petrol Pump, Surat-395006	Vs.	Principal Commissioner of Income Tax-1, Surat Aaykar Bhavan, Majura Gate, Surat- 395001
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: ACCPD 5423 C		
(अपीलार्थी /Appellant)		(प्रत्यर्थी /Respondent)

निर्धारिती की ओर से /Assessee by : Shri Sapnesh R Sheth, C.A

राजस्व की ओर से /Respondent by : Shri Ashok B. Koli, CIT-DR

सुनवाई की तारीख/ **Date of Hearing** : **20/04/2023**

घोषणा की तारीख/**Date of Pronouncement** : **15/05/2023**

आदेश / ORDER

PER DR. A.L. SAINI, A.M:

By way of these three appeals, the different assesseees have challenged the correctness of the separate orders passed by the Learned Principal Commissioner of Income Tax-1, Surat (in short “ld. PCIT”] dated 21.03.2022, 17.03.2022 & 16.03.2022, under section 263 of the Income Tax Act, 1961, for the assessment year 2017-18.

2. Since the issues involved in these three appeals are common and identical; therefore, these appeals have been heard together and are being disposed of by this consolidated order. For the sake of convenience, the grounds as well as the facts narrated in ITA No.111/SRT/2022, in the case of Dakshaben Shailesh Dhameliya, for assessment year 2017-18, have been taken into consideration for deciding the above appeals *en masse*.

3. The grounds of appeals raised by the assessee in “*lead*” case in ITA No.111/SRT/2022 for assessment year 2017-18 are as follows:

“1. On the facts and in the circumstances of the case as well as law on the subject, the learned Pr. Commissioner of Income-tax has erred in passing revisionary order u/s 263 of I.T. Act, 1961 setting aside the order of ld. Assessing Officer passed u/s 143(3) of the I.T. Act, 1961 dated 05.12.2019 for the year under consideration although said order is neither erroneous nor prejudicial to the interest of revenue.

2. On the facts and in the circumstances of the case as well as law on the subject, the learned Pr. Commissioner of Income-tax has erred in holding agricultural land as non-agricultural land as per available records and sale deed.

3. On the facts and in the circumstances of the case as well as law on the subject, the learned Pr. Commissioner of Income-tax has erred in observing that order passed by Assessing Officer u/s 143(3) of the I.T. Act, 1961 is erroneous on the ground that Assessing Officer has erred in not disallowing the deduction of Rs.1,99,09,516/- claimed u/s 54B of the I.T. Act, 1961.

4. It is therefore prayed that order passed by Pr. Commissioner of Income-tax u/s 263 of the I.T. Act, 1961 setting aside the order of Assessing Officer and directing assessing officer to pass fresh assessment order may please be quashed.

5. Appellant craves leave to add, alter or delete any ground(s) either before or in the course of hearing of the appeal.”

4. The facts of the lead case which can be stated quite shortly are as follows: The assessee before us is an individual and filed her return of income for assessment year 2017-18 on 10.03.2018, declaring total income at Rs.23,95,640/-. Thereafter, the assessee`s case was selected for scrutiny through CASS, and assessment under section 143(3) of the Act was framed on 05.12.2019 accepting the return of income filed by the assessee.

5. Later, Ld PCIT has exercised his jurisdictional power u/s 263 of the Act. The ld PCIT, after going through the assessment records, noticed that assessee had sold a land at Block No.627/A, 628/A 629/A, TP84 FP 223, Moje Mota Varachha, Surat City, old tenure Non-agricultural land for a total consideration of Rs.7.15 crores and the assessee`s share being Rs.2,19,50,050/- to a firm Build Tech Enterprise. After deduction of indexed cost of acquisition of Rs.20,40,984/-, the assessee has earned long term capital gain of Rs.1,99,09,516/-. The said amount of Rs.1,99,09,516/-, has been claimed as deduction u/s 54B of the Act, against purchase of agriculture land at Block No.119 and 122/2, Vill, Laskana, Taluka-Kamrej, Surat of Rs.84,30,475/- and Rs.1,33,55,437/- respectively totaling of Rs.2,17,85,912/-. Further scrutiny of the sales Deed Regn. No.SRT/8/RDR/1014/2016 dated 19.10.2016 at para 01 of page No.09 revealed that the land so sold was a non-agricultural land situated in Surat City. The then owner of the land had applied for conversion of land into non-agricultural land before the District Development Authority and the conversion has been made vide order dated 09.05.2006. The land was later declared under Town Planning Scheme-84. As per Land Revenue Act, an agriculture land can be purchased only by a farmer. Therefore, it can be concluded that the land sold was not an agriculture land. Thus, the ld PCIT observed that criteria for deduction u/s 54B of the Act for transfer of agriculture land is not fulfilled and Assessing Officer has not made inquiries and verification with respect to fulfillment of various conditions required by the provisions of section 54B before allowing the deduction u/s 54B of the Act. For instance, Assessing Officer has not made any inquiry to

verify if the assessee was using the said land for agricultural purposes for two years immediately preceding the date on which transfer took place and considering that the assessee has not disclosed any agricultural income for A.Y. 2016-17 in her return of income. Therefore, deduction u/s 54B of the Act at Rs.1,99,09,516/- allowed by the Assessing Officer during the assessment was not regular and liable for disallowance. In view of facts discussed above, the Id PCIT observed that during the assessment proceedings, the Assessing Officer has erred in not disallowing the deduction of Rs.1,99,09,516/- u/s 54B of the Act while computing the total income. Therefore, Id PCIT issued a show cause notice bearing DINITBA/REV1/2020-21/1040135016(1) dated 25.02.2022 and duly served on the assessee.

6. In response to the above show cause notice dated 25.02.2022, the assessee submitted her reply on 02.03.2022 before the Id PCIT. The important point of reply of the assessee (as stated in revision order of Id PCIT) are as follows:

(i) The assessee stated that the previous owner Shri Natvarbhai Dolatbhai Desai of the land had applied for conversion of part of land into non-agriculture land and District Development Authority vide order No.355/2066 dated 06.05.2006 has given N.A permission for part of land admeasuring 5509 square meter out of total area of 22864 square meter. Shri Natvarbhai Dolatbhai Desai had sold this part and parcel of the land to M/s Princes Place Construction Pvt Ltd. The assessee further stated that the balance remaining part and parcel of land admeasuring area 17255 square meter was sold by the assessee along with three other co-owners as agriculture land.

(ii) It is further submitted by the assessee that the assessee and other three co-owners are farmer and as per Land Revenue Act, agriculture land can be purchased by farmer only.

(iii) The assessee further argued that agriculture income during the A.Y. 2016-17 was not shown in return of income as the agriculture produce in

the form of green grass was given free of cost to charity organization Shree Khoda Dhor Panjarapol Vav, managed by Shri Vav Jain Swetamber Murtipujak Sangh.

7. However, Id PCIT has rejected the contention of the assessee and observed the the previous owner of the land Shri Natvarbhai Dolatbhai Desai had applied for conversion of part of land into non-agriculture and sold it to other entity after N.A conversion and the remaining part was purchased by the assessee as agriculture land. However, the assessing officer has not inquired, whether the land was purchased by the assessee was an agricultural land or non-agricultural land. Further, Assessing Officer has not inquired whether at time of sale of land, the impugned land at Block No.627/A, 628/A, 629/A, TP84 FP 223, Moje Mota Varachha, Surat City was sold as non-agricultural after N.A conversion. The assessee had sold the above said land to a partnership firm M/s Build tech Enterprise on 18.10.2016. Further on verification of the details filed in income tax return for A.Y. 2015-16 and 2016-17 it is observed that the assessee has not shown any agriculture income in her return of income. Which proves that no agricultural activities carried out on the land sold during the preceding two year from the date of transfer of the said land. Further, the assessee also not furnished copy of 7/12 received from the Revenue Authority, therefore type of crop grown, means of irrigation etc., was not verified by the assessing officer. Therefore, Id PCIT noted that during the course of assessment proceedings, the Assessing Officer has not made inquiries with respect to the claim of deduction made by the assessee amounting to Rs.1,99,09,516/-. The Assessing Officer has failed to consider that the entire claim was liable to be disallowed in absence of proper evidence regarding the use of land sold at Moje Mota Varachha for agricultural purposes during the period of two years, immediately preceding the date on which transfer took place. This shows non application of mind by the Assessing Officer while completing the assessment proceedings. Therefore, the assessment order passed u/s 143(3) of the Act dated 05.12.2019 for A.Y. 2017-18 was treated as erroneous as well as prejudicial to the interest of Revenue.

8. Aggrieved by the order of Ld. PCIT, the assessee is in appeal before us.

9. Shri Sapnesh R Sheth, Learned Counsel for the assessee submitted that during the assessment proceedings, the Assessing Officer issued notice u/s 142(1) of the Act, (which is placed at page No.-51 of the paper book), wherein, the Assessing Officer has raised the same query as raised by Id PCIT in his revision order under section 263 of the Act. In response to notice under section 142(1) of the Act, the assessee submitted its reply with documentary evidences such as expenditure incurred by the assessee on agricultural activities, bills and vouchers, the crop grown by the assessee on land etc. The Assessing Officer has examined these documentary evidences, applied his mind and then framed the assessment order, therefore such assessment order which was framed after making due enquiry should not be erroneous and prejudicial to the interest of Revenue.

10. Shri Sapnesh R Sheth, also submitted that in case of one of the co-owners, namely, Shri Ravjibhai Becharbhai Dhamelia, the appeal effect of the order passed u/s 263 was given by the Assessing Officer vide order dated 06.03.2023 passed by the Assessing Officer u/s 143(3) r.w.s. 263 of the Act, wherein while giving the appeal effect of the order of Id PCIT, the Assessing Officer has allowed deduction under section 54B of the Act, as claimed by the assessee. Therefore, Ld. Counsel contended that the Revenue has accepted the claim of deduction u/s 54B of the Act, in case of one of the co-owners of assessee, therefore, other co-owners of case should not be treated differently. This way, Id Counsel prays the Bench that order passed by Id PCIT under section 263 of the Act, may be quashed.

11. On the other hand, Ld. CIT-DR for the Revenue, supported the order passed by Ld. PCIT and stated that in order to claim the deduction u/s 54B of the Act, the assessee should demonstrate that she was engaged in agricultural activities for previous two years. The Id DR pointed out that the said condition has not been fulfilled by assessee therefore deduction u/s 54B of the Act, should not be allowed to the assessee. The Ld. CIT-DR for the Revenue also submitted that at the time when assessee sold the said land, the assessee was not doing agricultural

activity as the land was converted into non-agricultural land. Therefore, land so sold by the assessee, was not used for the purpose of agricultural activities, therefore deduction u/s 54B of the Act should not be allowed to assessee. The Ld. CIT-DR further pointed out that just to submit Form 7/12 extract, is not a conclusive proof that assessee was doing agricultural activity. Therefore, assessee has not fulfilled the condition for claiming deduction u/s 54B of the Act, hence, the order passed by the Ld. PCIT should be upheld.

12. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position. We note that during the assessment proceedings, the Assessing Officer issued notice u/s 142(1) of the Act, (which is placed at page No.-51 of the paper book), wherein, the Assessing Officer has asked the assessee several questions and in response to notice under section 142(1) of the Act, the assessee submitted its reply with documentary evidences such as expenditure incurred by the assessee on agricultural activities, bills and vouchers, the crop grown by the assessee on land etc. Besides, Assessing Officer also asked the assessee to provide the details of agricultural products and the complete address of agricultural land and crop grown on land. In response to such notice, the assessee submitted reply to the Assessing Officer which is placed at page 55-68 of paper book, wherein assessee has submitted the details regarding sale of agricultural produce and the sale deed of joint ownership of such agricultural land etc. The Assessing Officer has issued another notice u/s 142(1) of the Act, which is placed at page No. 59 of the paper book wherein the Assessing Officer made enquiry about the issue raised by the Ld.PCIT. In response to said notice, assessee submitted her reply, which is placed at page No.62 of the paper book, wherein assessee has explained and narrated the facts about exemption u/s 54B of the Act in respect of agricultural land so sold by her. The Assessing Officer has also issued notice u/s 142(2) of the Act, dated 15.01.2019, which is placed at page No. 64 of the paper book, wherein the Assessing Officer made enquiry about the exemption/deduction u/s 54B of the Act. Thus, we note that assessee has produced adequate proof and evidences

before Assessing Officer. The Assessing Officer, after making detailed enquiry framed the assessment order.

13. The assessee also furnished the certificate issued by Talaati Kam Mantri, Gram Panchayat Mota Varachha, which is placed at page No. 39 of the paper book. The assessee has been doing agricultural activities for two years, before sale of such land hence, assessee is entitled to claim deduction u/s 54B of the Act. The Ld. Counsel for the assessee submitted before Bench the sale deed, wherein, it is mentioned that assessee along with other co-owners had applied for seeking permission for non-agricultural use of area of 2294.00, 1675.00 and 1540.00 sq. meters. The contents of the sale deed are reproduced below:

“WHEREFORE, Said Natwarbhai Dolatbhai Desai, along with other lands owned by him, applied for seeking permission for non-agriculture usage of area 2294.00 Square Meters from the land registered with Revenue Block Number: 627 (Survey Number 655/3), 1675.00 Square Meter are from the land registered with Revenue Block Number: 628 (Survey Number: 655/2), 1540.00 Square Meter are from the land registered with Revenue Block Number: 629 (Survey Number; 655/1) of said Moje Mota Varachha. According to this, the Hon'ble District Development Officer vide his order No.:4-D.P/N.A./Reg.No.35/2006, dated 09/05/2006, granted permission for non-agricultural use. The entry of the same has been recorded in the Revenue record vide Entry No.5575, Date;12/09/2006. The said entry was subsequently certified on 04/12/2006.

Thereafter, said Natwarbhai Dolatbhai Desai, had sold the said non registered lands of his own registered with BlockNo.627 (Survey No.655/3)of said Moje Mota Varachha admeasuring area 2294.00square meters, land registered with Block No.628 (Survey No.655/2) of said Moje Mota Varachha admeasuring area 1675.00 square meter land registered with Block No.629 (SurveyNo.655/1)of said Moje Mota Varachha admeasuring area 1540.00 square meter to Prince Palace Construction Pvt. Ltd. by writing separate sale documents. The said sale deeds were registered in the office of the Hon'ble Sub-Registrar, Surat City-4(Katargam) vide Serial No.11741, 11742 and 11744 dated 03/10/2006 respectively. The collective entry of the said sales has been recorded in the Revenue record vide Entry No5603, dated 11/10/2006. The said entry was subsequently certified on 16/12/2006.

With the inclusion of said Mota Varachha village in Surat City, the entire village office was transferred to Surat City Taluka. The entry of the same has been recorded in the Revenue record vide Entry No.5691 and Entry No.5692, dated 22/12/2006. The said entries were subsequently certified on dated 22/12/2006 and dated 26/12/2006.

Thereafter, said Natwarbhai Dolatbhai Desai, as a Head of members of Natwarbhai Dolatbhai Desai HUF, together with other members of the family had

sold the said agriculture lands of his own registered with Block No.627 (Survey No.655/3) of said Moje Mota Varachha admeasuring area 4980.00 square meter, land registered with Block No.628 (Survey No.655/2) of said Moje Mota Varachha admeasuring area.”

14. From the above sale deed, it is vivid that Shri Natwarbhai Dolatbhai Desai, along with other lands owned by him, applied for seeking permission for non-agriculture usage of area 2294.00 Square Meters from the land registered with Revenue Block Number: 627 (Survey Number 655/3), 1675.00 Square Meter are from the land registered with Revenue Block Number: 628 (Survey Number: 655/2), 1540.00 Square Meter are from the land registered with Revenue Block Number: 629 (Survey Number; 655/1). It means prior to seeking permission for non-agriculture usage, these lands were being used by the co-owners for agricultural purposes.

15. We note that in case of one of the co-owners, namely, Shri Ravjibhai Becharbhai Dhamelia, the appeal effect of the order of Id PCIT passed u/s 263 of the Act, was given by the Assessing Officer, vide order dated 06.03.2023 passed by the Assessing Officer u/s 143(3) r.w.s. 263 r.w.s. of the Act, wherein the Assessing Officer has allowed deduction under section 54B of the Act, as claimed by the assessee. Therefore, we note that when the Department (Revenue) has accepted the claim of deduction u/s 54B of the Act, in the case of one co-owner, then in that situation the other co-owners of the same land should not be treated differently.

16. We have examined the fact that in case of one of the co-owners, namely Shri Ravjibhai Becharbhai Dhamelia, the appeal effect order was passed by the Assessing Officer and assessment order was framed u/s 143(3) r.w.s. 263 on 06.03.2023, wherein the Assessing Officer held as follows:

“3. The assessee has filed return of income on 30.03.2018 by declaring income of Rs.3,68,59,440/-. The case was selected for scrutiny through CASS and subsequently the assessment was completed on 05.12.2019 by accepting the returned income. The PCIT-Surat-1, thereafter set aside the order bypassing order u/s 263 on 06.03.2022. the reason for set aside was that the deduction claimed by the assessee u/s 54B of the long term gain against purchase of agricultural land maybe verified to justify his claim. The assessee has claimed

deduction u/s 54B to the tune of Rs.1,99,09,516/-. The assessee was issued notice u/s 142[1] as per the above dates for giving details by giving copy of sale deed of agricultural land, copy of purchase deed of agricultural land, ledger account, copy of bank account for transaction done for amount of sale and purchase of land. The entire working of capital gain with deduction u/s 54B by justifying his claim the total agricultural land as on 06.05.2006 was 22764 square meter, and out of this the previous owner Shri Natvarbhai Dolatbhai Desai has converted 5509 square meter as non-agriculture land vide order no. 355/2066 dated 06.05.2006 and this land was sold to M/s Princess Palace Construction Pvt. Ltd. The balance land was 17255 square meter was left as agricultural land and this land was sold by all the three co-owners as agricultural land. The assessee has also submitted copy of the agricultural land purchased to justify his claim for deduction u/s 54B of the I.T. Act,1961. Subsequently a show cause notice was issued on 02.02.2023 to the assessee to submit reply by 06.02.2023. The assessee was issued notice u/s 142[1] as per the above dates for giving details by giving copy of sale deed of agricultural land, copy of purchase deed of agricultural land, ledger account copy of bank account for transaction done for amount of sale and purchase of land. The entire working of capital gain with deduction u/s 54B by justifying his claim. The total agricultural land as on 06.05.2006 was 22764 square meter, and out of this the previous owner, Shri Natvarbhai Dolatbhai Desai has converted 5509 square meter as non-agriculture land vide order no.355/2066 dated 06.05.2006 and this land was sold to M/s Princess Palace Construction Pvt. Ltd. The balance land was 117255 square meter was left as agricultural land and this land was sold by all the three co-owners as agricultural land. The assessee has also submitted copy of the agricultural land purchased to justify his claim for deduction u/s 54B of the I.T. Act 1961.

4. The assessee was issued notice u/s 142[1]as per the above dates for giving details by giving copy of sale deed of agricultural land, copy of purchase deed of agricultural land, ledger account, copy of bank account for transaction done for amount of sale and purchase of land. The entire working of capital gain with deduction u/s 54B by justifying his claim. The total agricultural land as on 06.05.2006 was 22764 square meter and out of this the previous owner Shri Natvarbhai Dolatbhai Desai has converted 5509 square meter as non-agriculture land vide order no355/2066 dated 06.05.2006 and this land was sold to M/s Princess Palace Construction Pvt. Ltd., the balance land was 117255 square meter was left as agricultural land and this land was sold by all the three co-owners as agricultural land. The assessee has also submitted copy of the agricultural land purchased to justify his claim for deduction u/s 54B of the I.T. Act 1961.”

17. From the above it is abundantly clear that in case of one of the co-owners, namely, Shri Ravjibhai Becharbhai Dhamelia, the Assessing Officer accepted the claim of the assessee and allowed the deduction u/s 54B of the Act. Therefore, other co-owners (assesseees) should not be treated differently. Hence, we are of the view that other co-owners should also be allowed deduction u/s 54B of the Act.

18. We note that before us assessee has submitted following documents and evidences:

- (i) Sale Deed of Moje Mota Varachha, Block No.627/A, 628/A, 629/A T.P. 84 FP 223 along with copy of 7/12 (Pages Nos. 8-38 of the paper book)
- (ii) Certificate issued by Talaati Kam Mantri, Gram Panchayat Mota Varachha (page no. 39 of paper book)
- (iii) Donation receipts of agriculture produce (corn green grass) given to trust (pages no. 40-42 of paper book)
- (iv) Letter/reply filed before AO (page 43-50 of Paper Book)
- (v) Notice u/s 142(1) of the Act issued by AO (pages 51-53 of PB)
- (vi) Letter/reply filed before AO (Pages 55-58 of PB)
- (vii) Notice u/s 142(1) issued by AO (pages 59-61 of PB)
- (viii) Letter/reply filed before the AO (pages 62-63 of PB)
- (ix) Notice issued u/s 142(1) by AO (pages 64-65 of PB)

19. From the above documents and evidences, it is clear that Assessing Officer made detailed enquiry before passing the assessment order. Therefore, it cannot be said that Assessing Officer has not applied his mind. Besides, the assessee was doing agricultural activities, prior to sale of land, hence land was being used for agricultural purposes for more than two years, prior to its sale, hence assessee is eligible to claim deduction under section 54B of the Act. On the same identical facts, our view is fortified by the judgment of Jurisdictional High Court of Gujarat in the case of Commissioner of Income Tax vs. Siddharth J Desai (1981) 49 CCH 0646 (Guj), wherein it was held as follows:

“11. On a conspectus of these cases, several factors are discernible which were considered as relevant and which were weighed against each other while determining the true nature and character of the land. It may be useful to extract from those decisions

some of the major factors which were considered as having a bearing on the determination of the question. Those factors are:

- (1) Whether the land was classified in the Revenue records as 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 way of a stop-gap arrangement?*
- (4) Whether the income derived from the agricultural operations carried on in the land before 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 cesser and/or alternative user was of a permanent, or temporary nature?*
- (7) Whether the land, though entered in revenue records, had never been actually used for agriculture, that is, it had never been ploughed or tilled? Whether the owner meant or intended to use it for agricultural purposes?*
- (8) Whether the land was situated in a developed area? Whether its physical characteristics, surrounding situation and use of the lands in the adjoining area were such as would indicate that the land was 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 Lands Act, 1948, was obtained because the sale or intended sale was in favour of a non-agriculturist? If so, whether the sale or intended sale to such non-agriculturist or for non-agricultural or agricultural user?*
- (12) Whether the land was sold on yardage or on acreage basis?*
- (13) Whether an agriculturist would purchase the land for agricultural purposes at the price at which the land was sold and whether the owner would have ever sold the land valuing it as a property yielding agricultural produce on the basis of its yield?*

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

12. One more thing before we turn to the facts and circumstances of the present case. While applying the test as to whether an agriculturist would have purchased the land for agricultural purposes at the price realized by the sale and whether the owner would have

ever sold the same by valuing it as property yielding agricultural produce on the basis of its yield, it must be remembered that the valuation of an agricultural land is a complex matter. Several factors enter into account in determining the value of an agricultural land such as the nature of the soil and its fertility, the type of crop for which the land is situated or is adaptable, the size of the land and the practicability of the use of mechanized implements in order to procure better yield, the proximity to village and availability of transport facilities, the availability of irrigation facility and power and, above all, the scarcity of the land in the area. Personal, social and economic considerations also influence, perceptibly or otherwise, the valuation of an agricultural land in our country. All these factors will have to be investigated into and a finding of fact will have to be recorded on each of the relevant aspects by the fact-finding authorities. In the absence of such findings, no presumption can ordinarily be raised, merely because high price is realized, that the land could never have been sold as an agricultural land for genuine agricultural user or purposes.

13. Against the aforesaid background, let us turn to the question whether, on the facts and in the circumstances of the present case, the land in question was an agricultural land. The land, when jointly purchased by the assessee from an agriculturist about four years prior to its present sale, was admittedly agricultural. It was and it continued to be listed in the Revenue records as agricultural land subject to the assessment of land revenue. For a period of three years immediately after its purchase, agricultural activity was carried on in the land which yielded agricultural produce. For the first two years, the crop of pulse (tuver) was raised and for the third year green grass was grown. Of course, quantitatively the yield was not much and there was no sale of the produce resulting in any profit to the assessee. However, the nature of exploitation of the land for the major part of the period during which the ae held it would indicate that not only its physical characteristics but the user also was agricultural. It is not shown that such user was of a temporary character or as and by way of a stop-gap arrangement. Even though the land was not actually put to agricultural use since about one year prior to the sale, there is no evidence to establish that it was converted to any other use. It is true that permission under s. 63 of the Bombay Tenancy and Agricultural Lands Act, 1948, was obtained by the assessee to sell the land to a co-operative housing society and that the permission was granted subject to the condition that the land should be used for residential purposes. This circumstance does not, however, militate against the land continuing to be agricultural on the date of its sale. The permission, in the instant case, was obtained only about two and a half months prior to the sale. The permission was necessary only because the land was agricultural and because it was governed by the provisions of the Bombay Tenancy and Agricultural Lands Act, 1948. The mee fact that such a permission was obtained does not mean that the land ceased to be agricultural in character since permission for the non-agricultural use of the land under s. 65 of the Bombay Land Reve Code was still not obtained from the competent authority. Such permission was, in fact, never obtained by the assessee in its obtained by the vendee after the sale was completed. Till the land was held by the assessee, therefore, its character as agricultural land was not changed either as a result of its reclassification in the Revenue records or by the actual alteration of its use. If, for any reason the sale transaction had not gone through or the conditions laid down in the permission issued under s. 63 had not been satisfied, the permission would have been treated as cancelled. There is no evidence on record to show that there was any development in the surrounding area or that the land itself was developed prior to its sale. The land is located on the outskirts of the Billmora town but it was not situated within the municipal limits. The land must, therefore, be to the date of its sale. There is no evidence or material on record to indicate that the price offered for the land by the vendee, even proceeding on the basis that the intended user on his part was non-agricultural, would not have been offered by an agriculturist who wanted to purchase the land for purely agricultural user. There being no evidence on record as regards the nature of the soil, its fertility, its suitability and

adaptability for raising cash crops, the irrigation facility and such or similar factors which, as earlier pointed out, have a great bearing on the valuation of an agricultural land, it would be hazardous to come to the conclusion that the price offered was such that no agriculturist would have paid the same if he wanted to purchase the land for purely agricultural purposes. The evidence on record does not show whether the sale was on acreage or yardage basis. The extract from the sale deed reproduced in the Tribunal's order shows that the land was sold as an "agricultural land". Having regard to the totality of circumstances, we are of the view that the conclusion reached by the Tribunal, after taking into account all the relevant circumstances and upon a balance consideration of the entire evidence and on the application of the correct legal test, is just and correct.

14. In the result, the questions referred for our opinion are answered as follows

Question No.1:

Answer: In the affirmative, i.e., against the Revenue and in favour of the assessee.

Question No.2:

Answer: In the negative, i.e., against the Revenue and in favour of the ae. The CIT will pay the costs of this reference to the assessee."

20. Let us take the guidance of judicial precedents laid down by the Hon'ble Apex Court in *Malabar Industries Ltd. vs. CIT* [2000] 243 ITR 83(SC) wherein their Lordship have held that *twin* conditions needs to be satisfied before exercising revisional jurisdiction u/s 263 of the Act by the CIT. The twin conditions are that the order of the Assessing Officer must be erroneous and so far as prejudicial to the interest of the Revenue. In the following circumstances, the order of the Assessing Officer can be held to be erroneous order, that is (i) if the Assessing Officer's order was passed on incorrect assumption of fact; or (ii) incorrect application of law; or (iii) Assessing Officer's order is in violation of the principle of natural justice; or (iv) if the order is passed by the Assessing Officer without application of mind; (v) if the Assessing Officer has not investigated the issue before him; then the order passed by the Assessing Officer can be termed as erroneous order. Coming next to the second limb, which is required to be examined as to whether the actions of the Assessing Officer can be termed as prejudicial to the interest of Revenue. When this aspect is examined one has to understand what is prejudicial to the interest of the revenue. The Hon'ble Supreme Court in the case of *Malabar Industries (supra)* held that this phrase i.e.

“*prejudicial to the interest of the revenue*” has to be read in conjunction with an *erroneous order* passed by the Assessing Officer. Their Lordship held that it has to be remembered that every loss of revenue as a consequence of an order of Assessing Officer cannot be treated as prejudicial to the interest of the revenue. When the Assessing Officer adopted one of the courses permissible in law and it has resulted in loss to the revenue, or where two views are possible and the Assessing Officer has taken one view with which the CIT does not agree, it cannot be treated as an erroneous order prejudicial to the interest of the revenue “**unless the view taken by the Assessing Officer is unsustainable in law**”.

21. Thus, from the assessee’s facts, it is abundantly clear that during the assessment stage, the Assessing Officer asked the assessee to furnish the details and documents which are placed in paper book. In response, the assessee submitted reply which is placed at paper book. Thus, all the documents, details and the explanations required by the Assessing Officer were submitted by the assessee. Just because the Assessing Officer does not bring these documents and details in his assessment order does not mean that assessing officer has not conducted proper enquiry during the assessment stage. In fact, assessing officer has applied his mind. The Learned Counsel for the assessee is right in his submission that one has to keep in mind the distinction between "lack of inquiry" and "inadequate inquiry". If there was any inquiry, even inadequate, that would not by itself, give occasion to the Commissioner to pass orders under section 263 of the Act, merely because he has different opinion in the matter. If an Income-tax Officer acting in accordance with law makes a certain assessment, the same cannot be branded as erroneous by the Commissioner simply because, according to him, the order should have been written more elaborately. Therefore, in the assessee’s case, it cannot be said that it is a case of 'lack of inquiry'.

22. In view of the facts of the case and judicial pronouncements relied upon, it is well established that the impugned order passed u/s. 143(3) of the Act, was passed by Assessing Officer, after calling for relevant information and after detailed examination of the same. The Assessing Officer has passed the

assessment order after calling for details on the issue and after considering the reply and documents and after verification of the same and after due application of mind passed the assessment order, so it cannot be termed as erroneous and prejudicial to the interest of the revenue. So, the Ld. PCIT's finding fault, with the order of the Assessing Officer is erroneous as well as prejudicial to the interest of revenue, on account of lack of inquiry, has to fail. Based on these facts and circumstances, we quash the order passed by the Id PCIT under section 263 of the Act

23. Since we have adjudicated the issue by taking the lead case in ITA No.111/SRT/2022 for A.Y. 2017-18, and in other two remaining assessee's appeals, viz: ITA No.110 & 112/SRT/2022, for same assessment year 2017-18, the identical and similar facts exist (as they are co-owners of the same land), therefore our instant adjudication in ITA No.111/SRT/2022, shall apply *mutatis mutandis* to other two appeals of assessee's also.

24.. In the combined result, three different assessee's appeals (*in ITA No.110/SRT/2022, 111/SRT/2022, & 112/SRT/2022*) are allowed.

A copy of the instant common order be placed in the respective case file(s)

Order is pronounced on 15/05/2023 by placing the result on the Notice Board.

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

Surat/दिनांक/ Date: 15/05/2023

Dkp Outsourcing Sr.P.S.

Copy of the Order forwarded to

1. The Assessee
2. The Respondent
3. The CIT(A)
4. Pr.CIT
5. DR/AR, ITAT, Surat
6. Guard File

Sd/-
(Dr. A.L. SAINI)
ACCOUNTANT MEMBER

By Order

// True Copy //

Senior Private Secretary/Private Secretary/
Assistant Registrar, ITAT, Surat