IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN

Before Shri Sanjay Arora, Accountant Member and
Shri Manomohan Das, Judicial Member

ITA No. 525/Coch/2011
(Assessment Year:2006-07)

Dy. CIT, Circle 2(1), Range – 2 C.R. Building, I.S. Press Road, Kochi 682018	vs.	M.J. George Mukkadayil House Krishnaswamy Cross Road Ernakulam, Kochi - 682035 [PAN: ADGPG6991D]
(Appellant)		(Respondent)

Revenue by:	Sri Sajit Kumar Das, CIT-DR
Assessee by:	Sri R. Lokanathan, CA

Date of Hearing:	17.08.2023
Date of Pronouncement:	31.10.2023

ORDER

Per Sanjay Arora, AM

This is an Appeal by the Revenue agitating the allowance of the assessee's appeal contesting it's assessment under section 143(3) of the Income Tax Act, 1961 (the Act) dated 31.12.2008 for Assessment Year (AY) 2006-07, by the Commissioner of Income Tax (Appeals)-2, Kochi [CIT(A)] vide his Order dated 31.03.2011.

2. The facts of the case in brief are that the assessee, an individual, who had returned his income for the year at Rs.63,420/- (from business and other sources), was found to have a credit of Rs.899.10 lakhs in his bank account on 14.02.2006. The same was explained in the assessment proceedings as sale proceeds of 5.21 acres of land at Kakkanad Village, falling under Thrikkakara Panchayat, sold for Rs.977.10 lakhs vide registered sale deed dated 13.02.2006. The sale was in pursuance of an Agreement to Sell dated 09.01.2006, receiving Rs.78 lakhs as advance. The said land

had been acquired during the period mid-1984 to early 1986 from different parties at a total cost of Rs.2.28 lakhs. Further, the land being agricultural, i.e., not a 'capital asset' in terms of section 2(14)(iii) of the Act, which reads as under, no income by way of capital gain arose on it's transfer, and which explained in the non-returning thereof:

> **"2.** In this Act, unless the context otherwise requires,—
>
> (1) to (13).....
>
> (14) "capital asset" means—
>
> (a) property of any kind held by an assessee, whether or not connected with his business or profession;
>
> (b).....,
>
> 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; 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." (emphasis, supplied)

This assessee's claim of the subject land being not a 'capital asset' is the bone of contention between the parties, with the assessee's case having been since accepted in first appeal, so that the Revenue, aggrieved, is in further appeal.

3. This is the second round before the Tribunal. In the first, the Tribunal vide it's order dated 16.11.2012, restored the matter back to the file of the Assessing Officer (AO) to ascertain whether the subject land fell within 8kms. of the Cochin Municipality, an aspect not considered by the Revenue authorities. Land, it opined, even if used for agricultural purposes, where it fell within 8 km. limit of the notified (by the Central Government) Municipality, it would be a capital asset. The matter was

carried to the Hon'ble High Court at the instance of the Revenue, contending that it was not in dispute that the subject land fell neither u/s.2(14)(iii)(a) nor (b) of the Act, so that the Tribunal ought to have decided the question as to whether it was agricultural, as required by s. 2(14)(iii), or not, i.e., without reference to either cl. (a) or (b). The Hon'ble Court restored the matter back to the Tribunal holding as under: -

> "5. Reading of the order passed by the Tribunal shows that after having arrived at its own conclusions, the Tribunal have remitted the matter to the Assessing Officer to reconsider the factual question whether the land is within 8 kms. limits of the Cochin Municipality. Since even according to the Tribunal land is situated beyond 8 kms. limit, we feel the Tribunal need not have remitted case for examining the issues on which parties are not at variance and should have, *on the evidence that is available*, considered the question whether the land otherwise is an agricultural land or not. This having not been done by the Tribunal, Annexure C order is set aside and answering the question in favour of the Revenue, matter is remitted to the Tribunal to reconsider the issue with notice to the parties and in accordance with law." (emphasis supplied)

4. The matter was before us argued at length; each side relying on the order by the Revenue authority, as indeed case law, favourable to it. The Revenue's case was that the subject land was within the jurisdiction of the Greater Cochin Development Authority (GCDA), the Authority constituted for planning and development of the Metropolitan area of Kochi. Kakkanad was in fact one of the fastest developing areas in Kerala, what with the setting-up of Cochin Special Economic Zone (CSEZ); Smart City Project; and Information Technology Park (Kinfra), borne out by the price fetched, i.e., Rs.977.10 lakhs for 521 cents, or at Rs. 187.543 lacs per cent. As per the structural plan of GCDA, the area fell under the town planning residential scheme. The land has accordingly been sold to a Developer, which has commenced construction thereon soon after, on 24.4.2006. The land had been classified in the village records as "Purayidam" or plain land, as against "Nilam" for agricultural land. No evidence to prove the carrying on of agricultural operations on the land prior to its sale has been furnished, nor is the agricultural income offered commensurate with either the crop or the trees stated to be standing thereat at the time of sale.

The assessee's case, on the other hand, which found favour with the learned CIT(A), was that the character of the land as agricultural is to be determined on the basis of the use to which the land was actually put. The same stands established as agricultural on the basis of returning agricultural income by the assessee over the years, and for which he has an electric connection, having in fact consumed 24136 units since inception. Variations therein from year to year, for which there could be various reasons, would not detract the fact that the land has been put to agricultural use, consistent with its classification in the Revenue record, with the assessee paying agricultural tax thereon as per the State Government legislation. The certificate by the Village Officer dated 03.02.2006 (PB pgs. 130-132) and the Valuation Certificate dated 05.01.2006 (PB pg. 133), both exhibit the electric connection as well as number of trees standing thereon, clarifying the user for agricultural purpose beyond doubt. That a residential complex was set-up by the buyer on the subject land, for which no permission had been applied for by the assessee, was an irrelevant fact, not connected with the assessee; all the approvals for the same having been taken by the buyer.

5.1 It would be, before we dwell on the facts of the case, necessary to state the law in the matter, settled per a series of decisions by the Hon'ble Apex Court, and which is therefore to be applied in the given facts and circumstances of the case:

(A) *CWT vs. Officer-in-Charge (CW), Paigah* [1976] 105 ITR 133 (SC)

'The determination of the *character* of the land, according to the purpose for which it is meant or set apart and can be used, is *a matter which ought to be determined on the facts of each particular case*. What is really required to be shown is the connection with an agricultural purpose and user and not the mere possibility of user of land, by some possible future owner or possessor, for an agricultural purpose. It is not the mere potentiality, which will only affect its valuation as part of "assets", but its actual condition and intended user which has to be seen for purposes of exemption from wealth-tax. One of the objects of the exemption is to encourage cultivation or actual utilisation of land for agricultural purposes. *If there is neither anything in its condition, nor anything in the evidence to indicate the intention of its owners or possessors so as to connect it with an agricultural purpose, the land could not be "agricultural land" for the purposes of earning an exemption under the Act*. Entries in revenue records are, however, good *prima facie* evidence.'

Though the term 'agricultural land' stands examined and explained by the Hon'ble Court in the context of the Wealth Tax Act, 1957, it's observations therein are equally applicable *qua* the Act; it, rather, making reference to the decision in *CIT vs. Raja Benoy Kumar Sahas Roy* [1957] 32 ITR 466 (SC), reproducing there-from (pg. 136), notes that the term 'agricultural' and 'agricultural purpose' are not defined under the Income Tax Act. The matter, it states, is principally factual, and there must be something to connect the holding of land with agricultural purpose that would bestow on it the character of an agricultural land. In the context of gain on transfer of 'agricultural land' this would extend to 'holding and 'transfer'. This is as, in contradistinction to ownership and holding an asset, which forms the basis of it being subject to tax under the WT Act, it is the transfer of ownership that results in income, nature of which is the subject matter of determination. The '*owners or possessors*' referred to by the Hon'ble Court would thus include both: the transferor and the transferee. Only an identity of purpose of both would bestow the asset under transfer with the character consistent with the said purpose, i.e., agricultural land or not, depending on whether the said purpose is agricultural or not so.Where the purpose of holding (by the transferor) and transfer (by the transferee), do not agree, it is the latter that would, in the absence of evidence led to the contrary, be determinative inasmuch as the same defines the purpose and the basis of the transfer and, thus, of the income arising. An asset held for purpose 'A', could be transferred for economic gain for purpose 'B', and where it leads to a change in character, it is the latter that would stand to be adopted inasmuch as it forms the basis of the transfer and, thus, income. It is though open for the transferor to exhibit that he, unaware of the intended purpose of the transaction by the transferee, i.e., the intended user of the asset being acquired by the vendee, had in fact sold it for agricultural purposes, as claimed in the instant case, so that the purpose to which the asset was subsequently subject to by the transferee notwithstanding, the nature of the transaction, as far as he is concerned,

must necessarily be ascertained with reference to the purpose for which the asset was agreed to be transferred by him.

(B) *Sarifabibi Mohamed Ibrahim vs. CIT* [1993] 204 ITR 631 (SC): The judgement is a classical example of the Hon'ble Court making an assessment, on facts, as to whether the land classified as an agricultural land in the Revenue records, land revenue in respect of which stood in fact paid upto 1968-69, i.e., just prior to the execution of sale deeds in May, 1969 after obtaining permission in April, 1969, which had been applied in June, 1968 and March, 1969, was indeed agricultural, i.e., *at the time of it's sale*. The said land, despite these antecedents, was regarded as not an agricultural land. Affirming the decision by the Hon'ble High Court, it held as:

'The entering into the agreement to sell the land for housing purposes, the applying for and obtaining permission to sell the land for non-agricultural purposes, and its sale soon thereafter and the fact that the land was not cultivated for a period of four years prior to its sale, coupled with its location and the price at which it was sold outweighed the circumstances appearing in favour of the appellants' case and established that the land was not agricultural land when it was sold. The appellants had no intention to bring it under cultivation at any time after 1965-66 *and certainly not after they entered into the agreement to sell the land to the housing co-operative society*. The High Court was right in holding that the land was not agricultural land *at the time of its sale* and the profit arising from its sale was liable to capital gains tax(See pg.643C-F).(emphasis, ours)

The law in the matter laid down by the Apex Court is culled as under:

'Whether a piece of land is agricultural land or not *is essentially a question of fact*. Several tests have been evolved in decisions of the Supreme Court and the High Courts, but all of them are more in the nature of guide-lines. The question has to be answered in each case, *having regard to the facts and circumstances of that case*. There may be factors both foror against a particular point of view. The court has to *answer the question on a consideration of all of them*-a process of evaluation. *The inference has to be drawn on a cumulative consideration of all the relevant facts*.
(see pg.637B, C)

(C) *CIT vs. Gemini PicturesCircuitP. Ltd*. [1996] 220 ITR 43 (SC): It was held as:

'The question whether a particular land is agricultural land has to be decided *on a totality of the relevant facts and circumstances*. There may be circumstances for and against. They have to be weighed together and a reasonable decision arrived at. One has to take a *realistic view and see how the persons selling and purchasing it understood it*. The tests evolved by the courts are in the nature of guidelines. No hard and fast rules can be laid down in the matter, *for the reason that it is essentially a question of fact*.' (emphasis, supplied)

As would be apparent, the Hon'ble Apex Court reiterated the lawexplained by it per it's earlier decisions. Pithily put, it clarified that no hard and fast rule can be laid down in the matter, being essentially a question/s of fact, which has to be viewed in a realistic manner, i.e., as the parties purchasing and selling understoodit as.

(D)*Kalpetta Estates Ltd. vs. CIT* [1990] 185 ITR 318 (Ker): The assessee's claim of the forest land purchased by it had since changed it's character to agricultural, was not accepted on facts in the absence of evidences being led by the assessee, validating though the statement in principle, i.e., *of the matter being principally factual and, further, the said character had to be that obtaining at the time of sale*. As held by it:

'Whether a piece of land is agricultural in character or a capital asset is largely a *question of fact which should be determined by the cumulative effect of fall facts and circumstances* in a given case. The *onus is on the assessee* to show that the character of the lands changed after the acquisition of the capital asset by the assessee and that the lands were agricultural lands at the time of transfer of the asset. The *material date* with reference to which the question whether the particular asset (land) which has been sold is agricultural land or not is to be decided is *the date of sale*. In other words, in order to entitle the assessee to earn the exemption, it is not enough to allege or show that the land was once agricultural land at the time of acquisition. *The assessee should further prove that it was agricultural land at the time of transfer*.' (emphasis, ours)

5.2 It would be useful here to advert to the tests succinctly culled out on an exhaustive consideration of the matter on the anvil of the judicial precedents by the Hon'ble Court in *Mahaveer Enterprises vs. Union of India*[2000] 244 ITR 798 (Raj):

'The question whether a piece of land is agricultural land or not, is essentially a question of fact. The facts that raise a presumption that the land is non-agricultural are—

(i) situation of the land, for example, land situated in an urban area within the municipal limits in the proximity of buildings and building sites,
(ii) sale of land to a non-agriculturist for non-agricultural purposes,
(iii) sale of land on a square yard basis at a price comparable to prices fetched by building sites,
(iv) sale of land on a square yard basis at a price comparable to prices fetched by building sites,
(v) sale at a price at which no *bona fide* agriculturist would *purchase* for genuine agricultural operations, and

(vi) when the price is such that no prudent owner would sell it at a price worked out on the capitalisation method taking into account its optimum agricultural yield in the most favourable circumstances.

When the question arises as to the real nature of land in the context of land situated in urban areas, the crucial two-fold test would be to find out, *if any prudent agriculturist would purchase the land in order to carry on agricultural operations having regard to the price he would have to pay and whether the owner of such land would sell it by valuing it as property yielding agricultural produce on the capitalisation method, even on the basis of optimum yield and maximum sale price*. The effect of the totality of the circumstances must be considered.' (emphasis, supplied)

5.3 The foregoing statement/s of law would equally apply to all matters of fact where,as in the instant case, the term under reference is not subject to any positive definition under the Act or the cognate Act, keeping, again, the purpose for which the exemption stands allowed under the taxing statute by the Legislature, in mind, even as referred to in *Officer-in-Charge, CW* (supra). *What is thus relevant from the stand point of factual determination of the character of the land sold is the object and purpose for which the land, even if put to agricultural use prior to it's sale, is sold*. A contract, it may be appreciated, is a result of the meeting of minds of the contracting parties. Of prime relevance is the intended user, agricultural or otherwise, of the subject land. This intention is to be gathered from the surrounding facts and circumstances, all of which, including the user of the land for agricultural purposes in the past and, more particularly, the immediate past, are relevant only from this perspective. All the tests, which are only in the nature of guidelines, are essentially factual indicators toward ascertaining the purpose and intendment of transfer from the conduct of the parties and the surrounding circumstances.

6.1 Before we proceed to appraise the facts of the case, it would be relevant to state that the burden to prove it's entitlement to exemption of, or deduction from, income, is on the assessee. A part of well-settled law, we may toward this refer to some decisions laying down the law in the matter, viz. *Parimisetti Seetharamamma v. CIT* [1965] 57 TR 532 (SC); *H.E. Nizam Religious Endowment Trust v. CIT* [1966] 59

ITR 582 (SC); *CIT v. Joseph John* [1968] 67 ITR 74 (SC);*Kalpetta Estates Ltd.* (supra). In the instant case it translates into proving, on facts, that the land sold by him was an 'agricultural land', and no further; it being admittedly not covered under the extended scope of 'capital asset', gain on transfer of which is assessable as capital gains, u/s. 2(14)(iii) defining 'capital asset', by including certain agricultural lands therein on the basis of their location and potential for non-agriculture user.

6.2 Our second observation is that the matter being principally factual, reference to any decision – both the parties relying before us on that favourable to them, would of limited relevance, what being even otherwise a binding judicial precedence is the *ratio decidendi*, the principle of law laid down, and not the decision *per se*, law on which is again well-settled (*The Mavilayi Service Cooperative Bank Ltd. & Ors. v. CIT* [2021] 431 ITR 1 (SC); *Sree Bhagavathi Textiles Ltd. v. CIT*[2000] 244 ITR 496 (Ker)). This also explains the decisions one way or the other by the Tribunal. And, further, non-interference by the Hon'ble jurisdictional High Court in the matters referred to it, viz. in *Sreedhar Ashok Kumar vs. CIT* (in ITA No. 251/2014 dated 11.12.2017) [reported at [2017] 253 Taxman 204 (Ker)] and *Pr. CIT vs. Seena Jojy* (in ITA No. 118 of 2016, dated 11.12.2017), decided differently by the Tribunal, holding the land as non-agricultural and agricultural respectively, per orders *delivered by the Hon'ble Court on the very same day*. Adverting to the decision in *Sarifabibi Mohamed Ibrahim* (supra), it was held, in either case, *that no substantial question of law arose*. The same could not therefore lead to any judicial precedent (*State of Punjab vs. Surinder Kumar* [1992] 194 ITR 434 (SC)), with, rather, the jurisdiction of the Hon'ble High Court under the Act being only *qua* a substantial question of law (*Maharaja Amrinder Singh vs. CWT*[2017] 397 ITR 752 (SC); *Santosh Hazari vs. Parshottam Tiwari* [2001] 251 ITR 84 (SC)).

7. Prior to its substitution by Finance Act, 1970, w.e.f. 01.04.1970, clause (iii) of section 2(14) read as under:

"(*iii*) agricultural land in India,"

Reference thereto is relevant for two purposes: (i) it explains our reference to and reliance on the decisions by the Hon'ble Supreme Court and jurisdictional High Court, which dilate on the concept of 'agricultural land' under the Act, which only is relevant inasmuch as, as afore-stated, the subject land does not fall under either clause (a) or clause (b) of section 2(14)(iii) of the Act, the opening part of which continues as such. The assessee's argument – and which explains our second reason for the said reference, that the land sold is, for that reason, i.e., the subject land not falling either under cl. (a) or (b), an agricultural land by law, is, being contrary to the clear law, turning the head on its tail as it were, misconceived. *How, we wonder, could he take such a plea despite the decision by the Hon'ble High Court dated 03.07.2015 in his case*? (refer para 3). To the same effect is the decision by the larger bench of the Tribunal in *Asst. CIT vs. Sreedharan Ashok Kumar* (in ITA No. 18/Coch/2012 dated 07.05.201/copy on record), for which reference is made to para 22 of the order by the ld. Third Member. Clauses (a) &(b) operate to deem agricultural land as 'capital asset' where it falls under the areas specified therein, both of which, being w.r.t. a Municipality, contours of and area under which is liable to change with time in view of the changing demography and urbanization, are variable. Thrikkakara Panchayat stands upgraded into a Municipality in 2010, so that the subject land is since covered u/s. 2(14)(iii)(a). *The status relevant though is at the time of sale*. Equally irrelevant from the stand-point of section 2(14)(iii), is the Revenue's argument of the subject land falling within 8 kms. of the Kochi Municipal Corporation. It is only on its Notification that the distance from the Municipal Corporation assumes relevance. Further, the contention itself proves that the subject land is outside the Municipal Corporation and, thus, not falling u/s. 2(14)(iii)(a).

8. As would be apparent from the elucidation of the law by the Hon'ble Courts, cited supra, it is the status of the land at the time of sale that is relevant, and not when

it was purchased. This is a character of any asset, particularly land, is liable to change over time, and which explain the rationale of clauses (a) & (b) of section 2(14)(iii) of the Act. As explained by it in *G.M. Omer Khan vs. CIT* [1992] 196 ITR 269 (SC), in the context of a land situated in a Village falling under a Municipality:

'pressure on land in the vicinity of towns being what it is, profits likely to arise in its transactions would rightly catch the ear and imagination of the taxman as a fertile area for his share of the harvest. Therefore, the said provision bears an evident contrast and defining between land in an area within the jurisdiction of the municipality, etc., and lands outside it. The limit of population fixed is to identify the focal point where transactions in lands attract taxation'.(pg. 272)

The subject land though comprised in a village was accordingly held as not an agricultural land; the Hon'ble Apex Court found it difficult to accept that it, falling in a Municipality, retained its identity as a Village (pgs. 272 & 273). Agricultural land is under the Constitution of India exempt from taxation by the Union of India. The Hon'ble Apex Court recognizing the concept of change of character of land as an agricultural land over time, thus, approved the 1970 amendment, also preempting any constitutional challenge thereto.

9. The Revenue's argument w.r.t. the location of the land w.r.t. the Kochi Municipality is, however, very relevant from the standpoint of the status of the said land as an agricultural land *per se*, i.e., as a matter of fact. The AO has waxed eloquent thereon at para 7 of his order, not without reason as its reading shows, with, further, the ld. CIT-DR being at pains before us to emphasize that the Kakkanad area falls nevertheless under the jurisdiction of GCDA (which spans, besides the Kochi Municipal Corporation, 9 Municipalities and 21 Panchayats) set-up on 24.01.1976 with the object of development of the said area:

"7. The sale has also to be understood in the context of the development of Kakkanadu in recent years. The area assumed importance after the setting up of the district administration headquarters there. The establishment of the Kochi Special Economic Processing Zone, the Info Park(KINFRA) and the Smart City project *has made Kakkanad the fastest developing area in Kerala*. The growth potential and the expectation of thousands of new jobs being created has seen a spurt in the number of housing construction projects coming up in Kakkanadu and caused a sharp rise in real estate prices

in the past five years. The accessibility to the national highway NH47 and vicinity to the Nedumbassery Airport has also contributed to hike in real estate. The premium price fetched by the land in question is owing to its central location and not for its agricultural potential. The said land is situated 1.4 kms from the Collectorate,3 kms from InfoPark and 4.5 kms from the Central Export Processing Zone (CEPZ). *The said property is in the midst of residential buildings*. In fact *a number of other housing projects* are coming up within the *immediate vicinity of the said land*. A project of villas is coming up within 100m of the said property and two other construction projects are under construction within 1 km of this land." (emphasis, supplied)

10. The proof of the pudding lies in it's eating. Even as noted by the AO, the premium fetched on the said land is only on account of its location, being one of the fastest growing areas, in terms of development, in Kerala. Besides the assessee's case,this stands also noted by the Tribunal in *Sreedhar Ashok Kumar* (supra), and *M.K. Abdul Rehiman vs. Dy. CIT* [2011] 16 Taxmann.com 406 (Cochin),also relied upon by the Revenue, which pertain to assessment years 2008-09 and 2005-06 respectively. Kochi Special Economic Processing Zone,CEPZ, Info-Park,Smart City, District administration headquarters were set-up, almost all prior to the current year. The Thrikkakara Panchayat itself was upgraded to Municipality in 2010. We do not think it necessary under the circumstances to refer to the projects existing in the vicinity of the assessee's land, or that may be under development and come up later, referred to by the ld. CIT-DR, including two by the vendee, in his submissions. Why, even the Tribunal itself is housed in a complex located in the area – as the assessee himself notes in his, construction of which was completed in June, 2005. Suffice to say that it is a hub of commercial and economic activity, and which also explains the number of residential projects coming up thereat; the assessee's land itself being sold to a Builder for construction of one such. *All this is undisputed*. It is under the given facts and circumstances ludicrous to even suggest that the subject land was an agricultural land, or was sold as one such. Not only was it an urban land, but a prime one at that, explaining both, the proposed construction, commencing immediately after the sale, and the sale price bargained and fetched.

11. The assessee's case rests primarily on the user of the land prior to it's sale, i.e., as agricultural. Even as we do not set much store on this, as the subject land, as explained, was sold not as an agricultural land but as a housing site to a Builder, we shall nevertheless, as indeed we have, issue our findings of the said examination. There is no proof of any agricultural activity, much less contemporaneous. A total of Rs.1.01 lacs has been returned as agricultural income by the assessee over 7 years ending with the current year. None of these returns has been subject to the verification procedure under the Act, *and is thus unsupported by any finding*. Merely returning income is by itself no proof of the nature of income earned by the assessee, particularly as, as afore-stated, the burden to prove his claim for exemption is on the assessee. *Why we wonder could the assessee not adduce the evidences it would have led had the returns for the earlier years come up for verification; the latest being for the immediately preceding year*? In fact, the income arises only for three of those years and at nil for the balance four. No reason for the same, much less substantiated, has been furnished toward this. This is all the more surprising in view of the claim of 13 different types of trees standing, all of which cannot fail together, which phenomenon is again unexplained. For all we know, the land at the time of its purchase, decades ago, may be forest land, full of trees. Further, even assuming agricultural activity, it is irregular, in the nature of a stopgap activity, as found by the Hon'ble Apex Court in *Gemini Pictures* (supra), not impacting the character of the land, but merely for generating some income there-from. This is also consistent with the assessee being admittedly not an agriculturist – there being no claim to that effect, but a businessman, being a managing partner in one concern and partner in another.

The assessee next relies on the certificate of the Village Officer (PB pgs. 130–132). To what effect, we wonder; he certifying the land as 'Purayidam' (i.e., plain land) as per the village records, even as stated in the sale deed (PB pgs. 121-129), on which fact the Revenue in fact relies. The stating of the same as agricultural land in the Revenue records –even otherwise not decisive of the matter (refer: *Sarifabibi*

Mohamed Ibrahim (supra)), by the ld. CIT(A)is thus incorrect and without basis. Likewise, his finding as to payment of agricultural-tax(refer para 11.1(v) (pg. 13) of his order). There is in fact no claim before us nor anything on record toward this.We, rather, find this exercise as of little moment. *Why, one may ask, is it not possible for an assessee undertaking agricultural activity (i.e., assuming so) on land, classified in the Revenue records as non-agricultural, to sell it for non-agricultural purposes*? The question would be equally valid and, thus, applicable where the land is, instead, classified as agricultural. The only difference in the latter case would be that the sale would be preceded by a change of user. To though no consequence in view of, as explained by the Hon'ble Courts, the purpose of sale.

12. Next, it is said that no permission for change of land user was taken by the assessee, who had no control over the subsequent events. The agreement to sell dated 09.01.2016, which was accompanied by receipt of Rs.78 lakhs by the assessee, *has not been brought on record*. The same would exhibit, among others, the purpose for which the land was sold and, at any rate, entitle the vendee to apply for various permissions from different authorities, i.e., *qua* the subject land. In fact, the same would, in view of the classification of the subject land in the Revenue record as non-agricultural, not include permission for change of land-user; it being in fact earmarked for residential purposes in the town planning scheme (refer paras 4, 9 of this order).Non-production of evidence in the possession of the assessee would lead to an adverse inference being drawn (*UoI v. Rai Deb Singh Bist* [1973] 88 ITR 200 (SC)). Continuing further, the said permissions/approvals would be taken only by the Builder-vendee which, inasmuch as the construction commences soon after the sale, appear to have been sought straight-away on entering the agreement to sell. The same would only be with the consent of the assessee inasmuch as the vendee has no *locus standi* otherwise, which right can only flow from the assessee. The argument, thus, whichever way one may look at it, is misplaced. Does the assessee, for instance, want us to believe that the land was sold to a builder *for agricultural purposes* – at rate

applicable therefor, and the user subsequently changed by the buyer? Or that he was unaware of the user to which his residential land would be put by the builder-buyer? That being the very premise of the sale transaction, accepting such a state of affairs would require us to put blinkers on our eyes. Besides being without evidence, what, then, explains the sale rate, which could hardly be justified *qua* an agricultural user.

13. Reliance on the valuation certificate dated 05.01.2006 (PB pg. 133) is again misplaced. *What; it valuing the land at Rs.50,000/- per cent, we wonder, its purport*? Does it mean that the assessee entered into an agreement to sell and was successful in selling his land at nearly four times the obtaining fair market value? This question, posed to Shri Lokanathan, the learned counsel for the assessee, was not answered. Sure, the valuation also includes standing trees, valued at Rs.2.15 lakhs, besides the buildings, thereat. We have already stated of there being nothing on record to exhibit the carrying on of agricultural activity over the years. Likewise, for the construction activity, or the purchase of fertilisers, insecticides, etc., for storing which the construction is supposed to be. The purpose of Valuation itself is oblique. In fact, where indeed so, i.e., the trees standing, the assessee would have realized the same, being, firstly, his property, and, two, the buyer has not allowed him any credit for the same even as the same are valued at Rs. 2.15 lacs, a no insubstantial sum considering that it isover twice the income earned from agriculture over the last seven years, which would otherwise stand lost! The non-allowance of any credit by the buyer-company is understandable as it may not have the trade links for the disposal thereof. Much less carry a value therefor, it, rather, imposes a cost thereon inasmuch as it is in that case required to incur expenditure on removing the same. The sale value arrived at is *de hors* the same. Mention of same in the sale deed is therefore not understood inasmuch as it does not agree with the conduct of the parties and, in any case, would not establish agricultural activity, particularly in the absence of any direct or indirect evidence. The assessee has stated of having an agricultural electric connection, producing certificates dated 02.12.2015 and 30.01.2008 (PB pgs. 134, 135). There is

no reference thereto in the assessment order, and neither anything to suggest of it having been admitted as additional evidence by the first appellate authority. This, coupled with the absence of any certificate, as required under the Appellate Tribunal Rules, to the effect that the same was before the authorities below, reliance cannot be placed thereon. The same, in fact, are not in original, but only a photocopy thereof. Why, we wonder, was the said electric connection not surrendered even years after the sale of land? In fact, the assessee was called upon to state the expenditure, i.e.,in terms of number of units and amount, for the three years prior to the date of sale, and which it could not, stating (vide letter dated 23.08.2023 from KSEB) the records being not traceable. An affidavit dated 24.8.2023 has been submitted alongwith the said letter. The same was not called for and, accordingly, no cognizance thereto is being placed. Going by the assessee's case, as some expenditure on maintenance, including labour and electricity, would in any case be incurred, how we wonder does the assessee report nil income!

14. It is then said that in Kerala, agricultural and non-agricultural lands lie adjacent to each other, and that such examples could still found in Kakkanad. The argument, rather supporting the assessee's case, defeats it. Once the commercial potential, be it for residential or non-residential purposes; the two being rather intertwined inasmuch as the residence shifts to be close to the work place, is perceived, it would stand to be realized over a period of time. Development does not happen overnight. Even if undertaken in an organized manner, as in the instant case where it is under the aegis and charge of a Development Agency, it would be in phases, according to a plan. As such, at any given point of time there would be construction activity in part of the area, while the other plots close by, or even adjacent thereto, may be lying either vacant or even perhaps with some agricultural activity being carried thereon. The roads, sewerage, electricity, communication network, markets, etc., all would be for the entire area, and not only for the plots on which construction is taking place. All will nevertheless be sold in time, only whereupon the income would arise, at the

prevailing market rate for non-agricultural purposes. As such, nothing turns on closely located pieces of land being subject to different activity at the same time. The same is rather consistent with organized development and, in fact, it is those as the assessee, owning a few acres, who seek further increase in land price who would wait before selling their property. The subject land, categorized as residential under the town plan, was, to realize it's potential fully, sold to a professional construction firm.

In sum

15. The matter to be decided, i.e., whether the subject land was agricultural at the time of it's sale, i.e., sold as an agricultural land, or not, is principally a matter of fact, is to be so in the conspectus of the case, taking the entirety of the facts and circumstances, as indeed the tests laid down, in view. The conduct of agricultural activity is not at all established and, at best, could have been a stopgap activity, to earn some income, even as the returning of sparse income over the years, never examined, suggests. All that the assessee, a non-agriculturist, needed to show, i.e., toward his claim of the subject land, which is classified as non-agricultural in the Revenue record and, further, falls under the residential areas under the Town Planning Scheme by GCDA, the development authority, and sold to a Builder, who commenced construction soon after sale, indicating of permissions having been, with the consent – explicit or implied, of the assessee, applied for even prior to sale, which presumption is validated by the non-furnishing the sale agreement, was nevertheless sold as an agricultural land, i.e., *sold for agricultural purposes and intended to be used for the same*, was to exhibit the rate of agricultural land (i.e., where agricultural activity is being carried out at the relevant time), in the area closest thereto, and no more, as that would only be the governing rate in that case. The facts arraigned so definitely and neatly against the assessee; the sale contract fructifying only on a meeting of minds, this alone would impel one to take notice of his case, and examine it further with a view to issuing definite and clear findings of fact, based on the material on record and the explanations furnished, on the *terra firma* of which alone

could the matter be determined. On the contrary, much less explain the aforesaid incongruities and inconsistencies that his case entails, the assesseesells his land for a princely sum, realizing it's commercial value, and yet claims to have sold it as an agricultural land. *His entire case is thus much ado about nothing*. Why, even the valuation of Rs.50,000 per cent (of land alone) per valuation dated 05.01.2006, i.e., nearly ¼ the price realized, proving the former as a gross under-valuation, is inconceivable considering the agricultural income of Rs. 5,000 to 10,000 per acre. The price difference (i.e., at Rs.187.543 lakhs per cent as against the cost of Rs.421 per cent), even accounting for the time difference, is mind boggling, which can be explained only in terms of change in the character of land, implying change in its user. This is precisely what moved the Tribunal in the case of *Sreedhar Ashok Kumar* (supra), toward which reference may be made to para 28of the order by the ld. TM. The land has not changed it's character overnight, i.e., on the change or transfer of hand, as the assessee would like us to believe, and the price bargained and fetched is only for a non-agricultural land sold for a residential project, i.e., it's location and the land user profile of the surrounding areas.

The law, we are afraid, has not been appreciated by the ld. CIT(A); the issue being essentially a matter of fact, so that the transaction has to be viewed in its normal, real sense in which it has taken place/occurred between the transacting parties, as explained by the Hon'ble Apex Court in *Gemini Pictures Circuit (P.) Ltd*. (supra).Agricultural activity, which forms the basis of the assessee's case, not established, is in the given facts rendered inconsequential. The same, if at all, was being carried as stopgap activity and, in any case, could be on the balance 1.22 acres of the assessee's land, not sold. Why we wonder the assessee needs to fence his agricultural land with a boundary wall, as the valuation report dated 5.1.2006 shows!Each of the arguments raised by the assessee only need to be stated to be rejected.

Where the Legislature required agricultural activity as the sole basis for entitlement to exemption, it especially states so, as in section 54B of the Act, which only requires the assessee, for a claim of exemption, to establish agricultural activity for a defined period of time prior to its transfer. This is as the law recognizes, even as explained in *Officer-in-Charge* (supra), that the passage of time could result in a change of the character of land. The assessee has in the instant case failed to establish both, it's user, and intended user, of the subject land for agricultural purposes, to promote which is the sole objective of the exemption on gain arising on it's transfer. There is as such no question of it's character being –at any time, agricultural.

Decision

16. We, in view of the foregoing, hold the subject land as non-agricultural land, sold as such and, thus, a capital asset u/s. 2(14)(a), sale of which thus results in capital gain arising to the assessee u/s. 2(24)(vi) r/w s. 45 of the Act. The findings by the ld. CIT(A) are vacated, and that of the AO restored. We decide accordingly.

17. In the result, the Revenue's appeal is allowed.

Order pronounced in the open court on October 31, 2023 under Rule 34 of The Income Tax(Appellate Tribunal) Rules, 1963.

Sd/-	Sd/-
(Manomohan Das)	(Sanjay Arora)
Judicial Member	Accountant Member

Cochin, Dated: October 31, 2023
n.p.

Copy to:

1. The Appellant
2. The Respondent
3. The Pr. CIT concerned
4. The CIT-DR, ITAT, Cochin
5. Guard File

By Order

Assistant Registrar
ITAT, Cochin