IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH

BEFORE SHRI INTURI RAMA RAO, AM
AND SHRI KESHAV DUBEY, JM

ITA No. 54/Coch/2012
Assessment Year: 2008-09

P.C. Jose ..... Appellant
Brothers Agencies, Jews Street
Ernakulam 682031
[PAN: ABBPJ8250F]

vs.

Dy. Commissioner of Income Tax ..... Respondent
Circle - 2(1), Kochi

ITA No. 84/Coch/2012
Assessment Year: 2008-09

Dy. Commissioner of Income Tax ..... Appellant
Circle - 2(1), Kochi

vs.

P.C. Jose ..... Respondent
Brothers Agencies, Jews Street
Ernakulam 682031
[PAN: ABBPJ8250F]

Assessee by:	Shri R. Krishnan, CA
Revenue by:	Shri Sanjit Kumar Das & Smt. Leena Lal, Sr. D.R.

Date of Hearing:	20.02.2025
Date of Pronouncement:	18.03.2025

O R D E R

Per: Inturi Rama Rao, AM

These are cross appeals filed by the assessee as well as Revenue directed against the order of the learned Commissioner of Income Tax (Appeals)-2, Kochi dated 15.12.2011 for AY 2008-09.

2. The brief facts of the case are that the assessee is an individual engaged in the business of real estate and dealing in wedding cards, New Year greeting cards, etc. The return of income for AY 2008-09 was filed declaring total income of Rs. 13,26,58,460/-. Against the said return of income the assessment was completed by the DCIT, Circle-2(1), Kochi (Hereinafter called "the AO") vie order dated 29.12.2010 passes u/s. 143(3) of the Income Tax Act, 1961 (the Act) at a total income of Rs. 24,99,82,580/-.

3. While doing so the AO brought to tax as business income gains arising out of sale of land, of Rs. 11,29,16,575/- claimed to the exempt from tax by holding that the lands sold were not agricultural land. Similarly, the AO also made an adhoc disallowance of expenditure of Rs. 1,92,763/-. The AO had disallowed the loss claimed from business of card division of Rs. 7,50,000/-. The brief factual background leading to the above addition is as under: -

Gains from sale of land

4. During the previous year relevant to the assessment year under consideration the assessee had sold properties situated in a place called 'Kakkanad' to a builder, details of which are given as under: -

Date	Purchaser	Doc. No.	Sale Amount Rs.	Place
5.1.2008	Calista Real Estates (P) Ltd.	42/2008	47,53,800	Kakkanad
16.07.07	Amon Estates (P) Ltd.	33/2007	79,95,250	Kakkanad
21.07.07	Calista Real Estates (P) Ltd.	3380/07	16,14,57,250	Kakkanad
18.07.07	- do -	3311/07	1,97,74,250	Kakkanad
			19,35,80,550	

5. The said lands were situated in Thrikkakara Panchayat. The area of Thrikkakara Panchayat was notified area during the period from 1984 to 1994, but denotified in the year 1994. The appellant purchased adjacent pieces of land from 8 different parties during F.Y. 2006-07. These lands were sold to different parties for a total consideration of Rs. 19,35,80,550/-. In the year of purchase of these lands, the appellant had shown the purchase consideration as advance and shown investment in the property under the head "loans and advances". It was claimed that the lands sold were agricultural both at the time of purchase and as well as sale and the land was not situated within the notified distance from the local limit of any municipality and, therefore, the gain arising on sale of such lands to be exempt from tax, as it is not capital asset within the meaning of section 2(14)(iii) of the Act. However, the AO was of the opinion that it is a capital asset by citing the following reasons: -

I. The land sold was situated in a highly developed residential area. The mere fact that vegetable and crops were available at the time of sale cannot make the property exempt.

II. The lands purchased were sold within a short span of time to the real estate companies. Therefore the intention of the assessee behind the purchase of land is only for business purpose.

III. Not only the land must be capable of use for agricultural purpose but also should have actually used.

IV. The assessee was already in real estate business and there were frequent purchases and sales of land. Therefore, the lands were purchased with the intention for resale for a profit, which is "an adventure in nature of trade". Accordingly the AO brought to tax the gains arising out of land amounting to Rs. 11,29,16,575/- as business income.

6. Further, the AO also made addition of the same amount under the head 'capital gains' on protective basis.

7. The AO also made disallowance of Commission expenses of Rs. 2,50,000/-.

8. The AO had made an adhoc disallowance of 1/5th of the expenditure claimed on selling and administrative expenses, on maintenance, travelling expenditure and car loan interest expenditure. The AO also disallowed professional fees paid to the

Auditor of Rs. 1,00,000/- for non-compliance of provisions of section 40(a)(ia) of the Act. The AO disallowed the loss claimed in respect of business of card division, as the loss was incurred on account of winding up of the business.

9. Being aggrieved, an appeal was filed before the CIT(A), who on due consideration of the submissions of the appellant that there is a prevailing legislation in the state of Kerala, which prohibits conversion of agricultural land, especially paddy fields into non-agricultural except with the prior approval of the prescribed authority on the certificate issue by Revenue Department of the State government, whereas the land in question were classified as 'Nilam' (paddy field) and the purchase and sale documents have clearly describes the land as 'agricultural land'. The profits arising on sale of land classified as 'paddy field' are exempt from tax, while confirming taxability of gains arising on sale of balance of lands. The CIT(A) also directed the AO that out of the total disallowance of development expenditure of Rs. 42,25,059/- while computing the capital gain only Rs. 33,25,059/- is to be allowed and the balance amount of Rs. 9,00,000/- to be confirmed, as the same was claimed in respect of properties held to be agricultural land. The CIT(A) also held that the AO was not justified in disallowing the loss arising from the business of card division of Rs. 7,50,927/- and proceeded to hold that the same is to be set off against other income. Thus, the appeal of the assessee was partly allowed by the CIT(A).

10. Being aggrieved with that part of the order of the CIT(A), which is against the Revenue, the Revenue is in appeal in ITA no. 84/Coch/2012 and the assessee is in appeal being aggrieved against that part of the order of the CIT(A), which is against the assessee in ITA No. 54/Coch/2012.

ITA No. 54/Coch/2012 – AY – 2012 (Assessee's appeal)

11. Now we shall take up assessee's appeal at the first instance. During the previous year relevant to assessment year 2008-09 the assessee sold lands situated in Thrikkakkara Panchayat, which are acquired in the immediately preceding previous year, to real estate company. The assessee sought exemption from tax of the gains arising on sale of such properties on the ground that the lands were not situated within the distance as specified in Item A & B of section 2(14)(iii) of the Act and claimed to be agricultural land based on the classification in the Revenue records of the Govt. It is the contention of the appellant that the lands were agricultural lands. Merely because it was sold to a real estate company, it does not cease to be agricultural land.

12. The AO held such lands as non-agricultural lands for the reasons cited supra and held it be to capital asset and gains arising from sale of the lands were brought to tax as business income of the assessee. On appeal before the learned CIT(A), the CIT(A) held that part of land which were 'nilam', i.e. 'paddy lands' were agricultural

lands and accordingly held that the gains arising on sale of such lands were exempt from tax. The gains arising on the balance of lands were held to be taxable without passing a speaking order.

13. Being aggrieved, assessee is in appeal before in the present appeal.

Assessee's contentions

14. The contentions of the assessee are that" –

1. There was no intention on the part of the assessee to hold the land for resale. The fact that the lands were sold within a short span of time from the date of purchase does not constitute "an adventure in the nature of trade" placing reliance on the decision of the Hon'ble Bombay High Court in the case of CIT v. Dhable, Bobde Parose, Kale, Lute and Choudhari 202 ITR 98 in support of the proposition that merely because the lands were sold within three months from its purchase does not constitute adventure in the nature of trade.

2. Merely because the appellant is in real estate business, it does not mean that it cannot hold a piece of land as investment as it is possible for a tax payer to have two portfolios, an investment portfolio comprising lands to be treated as capital asset and a trading portfolio comprising of stock-in-trade which are to be treated as trading assets placing reliance on

CBDT Circular No. 4/2008 dated 15.06.2007 issued in the context of dealings in shares and securities.

3. The treatment given in the books of account clearly establish the intention of the appellant that the said lands were held as investment.

4. Since the lands were not converted to non-agricultural use as per the law prevailing in the state, the lands continues to be agricultural placing reliance on the decision of the Hon'ble Bombay High Court in the case of CIT v. Debbie Alimao 331 ITR 59.

5. The mere fact that the land was sold to the real estate developer will not change the character of the land, placing reliance on the decision of the Hon'ble Madras High Court in the case of M.S. Sreenivas Naicker v. ITO 292 ITR 481.

6. Mere situation of the land in highly developed area does not change the character of land placing reliance of the decision of the coordinate bench in the case of ITO v. Kalathiingal Faizal Rahiman 158 ITD 448, as upheld by the Hon'ble High Court in 440 ITR 121.

7. There is no stipulation under the provisions of section 2(14)(iii) that the land should be used for agricultural purposes for any specified period.

15. The assessee also pointed out that the reasoning of the AO that there is no evidence for carrying out agricultural operations in the said land is contrary to his own finding in para 2.1 of the assessment order, which reads as under: -

"2.1 ……..……..

the mere fact that vegetables or seasonal crops were available at the time of sale cannot make the property exempt.
…….……..……..……..."

16. It is submitted that the judicial precedents rendered in the context of provisions of section 54B have no application in the context of provisions of section 2(14)(iii) of the Income Tax Act.

17. Finally, it is submitted that the appellant had discharged the onus of proving that it is agricultural land which remains uncontroverted by the Revenue.

18. On the other hand The contentions of the learned CIT-DR are as under: -

i. The said lands were situated in area which is highly developed.

ii. The lands were sold to a real estate company as a single parcel of land.

iii. It is submitted that the tests laid down by the Hon'ble Supreme Court in the case of Sarifabibi Mohammed Ibrahim v. CIT [1003] 204 ITR 631 outweigh against the assessee.

iv. Finally the learned CIT- DR placing reliance on the decision of the Hon'ble Jurisdictional High Court in the case of Sreedhar Ashok Kumar v. CIT (ITA No. 251/2024 dated

11.12.2017) to submit that mere categorization of land as agricultural in Revenue record was not sufficient to raise the presumption that the lands sold were agricultural land.

19. We have heard the rival contentions of both the parties and perused the material available on record. The issue that arises for our determination is whether the subject lands can be considered as agricultural land for the purpose of exemption from tax of the gains arising on sale of the said lands. On a mere reading of the provisions of sub-section (iii) of section 2(14) of the Act, it would be clear that only those lands, which come under clauses (a) & (b) of sub-clause (iii) can be considered as capital asset and the profits and gains arising from sale of such lands alone are taxable for income tax purposes. For better appreciation the relevant provisions of section 2(14) of the Act are extracted below: -

"Definitions.

2. In this Act, unless the context otherwise requires,—

……..…

(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 the distance, measured aerially,—

(I) not being more than two kilometres, from the local limits of any municipality or cantonment board referred to in item (a) and which has a population of more than ten thousand but not exceeding one lakh; or

(II) not being more than six kilometres, from the local limits of any municipality or cantonment board referred to in item (a) and which has a population of more than one lakh but not exceeding ten lakh; or

(III) not being more than eight kilometres, from the local limits of any municipality or cantonment board referred to in item (a) and which has a population of more than ten lakh."

20. We notice that the term "agricultural land" was not defined under the provisions of the Income Tax Act, 1961. The term has to be understood as in a common parlance for which the assessee claiming that the lands are agricultural should adduce necessary evidence. Whether a particular land is agricultural or not is essentially a question of fact. On the facts and circumstances of the case, it is found that a particular land is agricultural land, then it cannot be included in the definition of capital asset as defined under section 2(14)(iii) of the Act. Even then, if such lands are found to be situated within the distance specified in items (a) &(b) of section 2(14)(iii), then the gains arising on sale of such lands does not qualify for exemption from tax.

21. In the facts of the present case, we proceed to ascertain whether the subject lands were agricultural lands or not. Undisputedly, the subject lands were not situated within the prescribed distance of any municipality or municipal corporation, notified area committee or town area committee, whatsoever it is, nor was it the case of the AO. Therefore, provisions of clause (1) & (b) and sub-cause (iii) of section 2(14) have no application to the facts of present case.

22. Next we proceed to examine the nature of the land based on the material on record. Undisputedly, the lands were classified as agricultural lands in the Revenue records of the state government. There is no dispute on this aspect. The assessee also discharged the onus of proving that the lands were agricultural lands. No doubt the fact that the lands are assessed to land revenue as agricultural lands under the State Revenue Law, though relevant fact but is not conclusive factor to determine the character of the land. But the onus lies upon the Department to rebut such evidence.

23. The next issue that is required to be examined in order to ascertain the true nature of the land, it must be seen whether the land has been put to use for agricultural purposes for a reasonable span of time. From the findings given by the AO in para 2.1 of the assessment order that the mere fact the mere fact that vegetables or seasonal crops were available at the time of sale cannot make the property exempt clearly indicates that the AO himself had found that agricultural operations were actually carried on the subject lands. Thus, the findings of the AO that no agricultural operations were actually carried on are *ipse dixit.* Thus, there is clear evidence of agricultural operations being carried on and the land is also classified as agricultural in the Revenue records of the state government. That raises presumption in favour of the assessee which has to be rebutted by the Department to deny exemption.

24. The reasoning of the AO that the lands were sold for higher consideration for real estate purposes, therefore the character of lands would change cannot be accepted as it would not change the character of the land as held by the Hon'ble Jurisdictional High Court in the case of PCIT v. Kalathingal Faisal Rahman [2019] 416 ITR 311, wherein the Hon'ble High Court quoted the decisions of the Hon'ble Gujarat High Court in the case of CIT v. Manila Somnath [1977] 106 ITR 917 and Hon'ble Bombay High Court in the case of Gopal C. Sharma v. CIT [1994] 209 ITR 946 wherein it is observed that the potential value of the property of nonagricultural consideration and large price, obtained by reason of the market conditions would not detract from the essential nature of the land at the time of the sale and the use to which it was put, prior to sale.

25. The Hon'ble Madras High Court in the case of M.S. Sreenivas Naicker v. ITO 292 ITR 481 also held to the same effect that is also undisputed fact that the lands were not converted to non agricultural use as per the law prevailing in the state. In the absence of conversion of land into non agricultural, the character of land continues to be agricultural as held by the Hon'ble Bombay High Court in the case of CIT v. Debbie Alimao 331 ITR 59.

26. The Hon'ble Karnataka High Court in the case of CIT v. M.R. Anandaram (HUF) [2023] 450 ITR 94 stretched further by holding that even if conversion of lands into nonagricultural purpose had taken place, if the assessee continues to be carry on agricultural

operations, still the land is considered to be agricultural land. This decision was affirmed by the Hon'ble Supreme Court in 453 ITR 457.

27. We also noted that the ratio of the decision of the Hon'ble Jurisdictional High Court in the case of PCIT v. Kalathingal Faisal Rahman [2019] 416 ITR 311 is clearly applicable to the facts of the assessee as the Hon'ble High Court had reiterated the ratio of the decision of the Hon'ble Madras High Court in the case of M.S. Sreenivas Naicker v. ITO 292 ITR 481 and PCIT v. Mansi Finance Chennai Ltd. [2016] 388 ITR 514. However, in that case relief was not granted to the assessee for failure of the assessee to discharge the burden of proving that the lands were agricultural lands.

28. The next issue that requires to be determined by us is whether there was an intention on the part of the assessee at the time of purchase of the subject land, to resale these lands for a profit. No doubt, in the preset case, the said lands were sold within a short span, i.e. less than a year from the date of purchase. This fact does not constitute ‘an adventure in the nature of trade” as held by the Hon'ble Bombay High Court in the case of CIT v. Dhable, Bobde Parose, Kale, Lute and Choudhari 202 ITR 98. The assessee also discharged the onus of proving his intention at the time of purchase is to hold the lands as investment by showing this as a part of investment in the books of account. The treatment given in the books of account gives a clear picture of the intention of the assessee whether to hold this subject land as investment or as stock-in-trade.

29. Further, it is true that the assessee is also a dealer in lands but a dealer in lands can also hold a particular piece of land as investment and other part of his land as stock-in-trade. In this connection reference can be made to the CBDT Circular No. 4/2008 dated 15.06.2007 and decision of the Hon'ble High Bombay Court in the case of Gopal Prohit [2011] 336 ITR 287.

30. These facts clearly establish that the assessee had discharged onus in proving the intention at the time of purchase of land is only to hold the subject lands as investment and adduced necessary evidence on record in terms of the judgement of the Hon'ble Jurisdictional High Court in the case of Kalpetta Estates Ktd, v, CUT [1990] 185 ITR 318. Once the assessee had discharged burden of proving the intention to hold the lands as investment, then the onus to prove otherwise shifts to the Revenue. In the present case, we do not see that the Revenue had rebutted this evidence. Therefore, it cannot be said that the lands were acquired only for the purpose of resale for a profit constituting “an adventure in the nature of trade”.

31. Next we deal with the reasoning of the AO that the lands were situated in a highly developed area and sold to the real estate agent, therefore the subject lands cannot be considered as agricultural lands. The Hon'ble Jurisdictional High Court in the case of CIT v. Cochin Malabar Estates and Industires Ltd. [2022] 440 ITR 121 after adverting to the judgement of the Hon'ble Madras High Court

in the case of M.S. Sreenivas Naicker (supra) and PCIT v. Mansi Finance Chennai Ltd. [2016] 388 ITR 514 and also in the case of Kalathingal Faisal Rahman (supra) held as under: -

> *"8.3 The last argument is that the land was sold in favour of the Kerala State Industrial Development Corporation Limited, and the Kerala State Industrial Development Corporation Limited has put the land to use as an industrial estate. Therefore, even if the first two tests are satisfied, the last test fails and a cumulative effect on the applicable tests is not achieved. The schedule property should be held as non-agricultural land. The genesis for the above argument is drawn from V. A. Trivedi and Sarifabibi Mohmed Ibrahim cases. This court has carefully examined the circumstances which were considered by the Nagpur Bench of the Bombay High Court in V. A. Trivedi case, i. e, two parcels of land one situated in Ajni village and another in Binaki village. The assessee in the said case is not the first trans-feree and the first transaction is not subjected to capital gains. The asses-see, in the reported case, since has sold his property to housing societies etc., the observations have been made. The observation of ensuring agri-cultural use for a reasonable span of time in the near future is case-specific inasmuch as in the said judgment the assessee has applied for conversion of land from agricultural to non-agricultural use, etc. The test laid down in V. A. Trivedi case that it (i. e.. land) must also be seen whether on the relevant date the land was intended to be put to use for agricultural pur-poses for a reasonable span of time in the future, as understood by the Revenue. As land is put to use for agricultural purposes by the vendee, we are unable to accept the said submission of the Revenue In our under-standing, the test stipulates that the subject matter of land is capable of being used for agricultural purposes without inhibition both in fact by change of user and by law by orders of conversion from agricultural to non-agricultural. Any other future independent*

application of said tests, is impractical from the perspective of sale and purchase. The judgment of this court in Kalathingal Faizal Rahman case refers to the burden of proof, and that, what constitutes agricultural land essentially is a question of fact and the same has to be established by the assessee. While adverting to the future use, we are persuaded by the reasons given by the Madras High Court in M. S. Srinivasa Naicker and Mansi Finance Chennai Ltd."

32. Therefore, what can be deduced from the above decisions is that if the land is recorded as agricultural land in the Revenue records till the date of it sale and it used exploiting as agricultural land, if the owner of the land has not taken any step it, would indicate his intention to explore the land as nonagricultural land, such parcel of land shall be regarded as agricultural land, even though it is sold as arable land. The fact that the lands were situated in highly developed area and sold to a real estate developer would not alter the character of the land sold as agricultural land. There is no stipulation that the land should be used for agricultural purpose for any specified period and, therefore, in the light of the settled legal position, the CIT(A) clearly fell in error in holding that non-paddy lands were not agricultural lands and, therefore, the gain arising on sale of such lands were not exempt from tax. Therefore, the findings of the AO as well as the CIT(A) were reversed, we hold that the gains arising on sale of non-paddy lands as well, also exempt from tax. Accordingly we direct the AO to allow exemption from tax on the gains arising on sale of non-paddy lands also. The appeal of the assessee stands allowed.

ITA No. 84/Coch/2012 – AY – 2012 (Revenue's appeal)

33. The parity of the reasoning given by us in ITA No. 54/Coch/2012 allowing the exemption on gains arising on sale of non-paddy lands, the reasoning of the CIT(A) while allowing exemption of tax on gains arising of paddy lands is upheld, we do not find any reason to interfere in the order of the CIT(A). Revenue's appeal stands dismissed.

34. In the result, appeal filed by the assessee stands allowed and Revenue's appeal stands dismissed.

Order pronounced in the open court on 18th March, 2025.

Sd/-	Sd/-
(KESHAV DUBEY)	**(INTURI RAMA RAO)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Cochin, Dated: 18th March, 2025

n.p.

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2. The Respondent
3. The Pr. CIT concerned
4. The Sr. DR, ITAT, Cochin
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Assistant Registrar
ITAT, Cochin