IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH : BANGALORE

BEFORE SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER
AND SHRI. LALIET KUMAR, JUDICIAL MEMBER

Sl. No.	ITA Nos. & Assessment Year	Appellant	Respondent
1.	ITA No. 1046/Bang/2015 AY: 2005-06	Shri. D. Dasappa, 2nd Floor, Central Chambers, 2C and D, Gandhinagar, Bengaluru-560009. **PAN : ANAPD8675M**	Deputy Commisisoner of Income Tax, Central Circle – 1(3), Bengaluru.
2.	ITA No. 1047/Bang/2015 AY: 2005-06	Shri. T. Suresh Gowda, Flat No. 24, Lavelle Regency, Lavelle Road, Bengaluru. **PAN : ASYPS3503Q**	
3.	ITA No. 1048/Bang/2015 AY: 2005-06	Shri. T. Prasanna Gowda, No. 2/1, "Ranga" 26th A Main, 4 'T' Block, Jayanagar, Bengaluru. **PAN : ACAPP6356J**	
4.	ITA No. 1058/Bang/2015 AY: 2005-06	Shri. T. Raghavendra Gowda, No. 63, Ayyappa Nilaya, Vanivilas Road, Basavanagudi, Bengaluru-560004. **PAN : ABEPR3827R**	

Revenue by	:	Shri. L. Bharath, CA
Assessee by	:	Shri. G. Kamaladhar, Standing Counsel

Date of hearing	:	14.03.2017
Date of Pronouncement	:	17.05.2017

O R D E R

Per Inturi Rama Rao, Accountant Member

Since in all these appeals common issue is involved, we proceed to dispose the same for the sake of convenience vide this consolidated order. For the sake of clarity and convenience, the facts relevant to the ITA No.1046/2015 in the case of Mr. D. Dasappa are stated herein.

2. The brief facts of the case are the appellant is an individual and no regular return of incomes have been filed. The search and seize operations were conducted in the case of M/s. SPR Developers Pvt. Ltd., on 8.12.2011. During the course of search and seize operations, it was found that the appellant was owning agricultural lands at Manchanayakanahalli, Bheemanahalli and Hampapura villages and these lands were transferred to M/s. Vijaya Bank Employee's Cooperative Housing Society Ltd., through M/s. SPR Developers. The gains made on transfer of lands were not offered to tax. Hence, notice u/s 148 was issued to the appellant. The brief facts of the case as set out by the AO are extracted below:

5. Transaction with M/s. SPR Group:

M/s. VBEHCS has entered into a sale agreement dt: 23.11.2005 and MoU's dt|: 06.10.2005 and 28.07.2007 with M/s. SPR Developers Pvt. Ltd., for the purchase of residentially converted land measuring around 180 acres at Manchanayakanahalli, Bheemanahalli and Hampapura villages, all situated on Mysore-Bangalore road.

As per the MoU and agreement, the developers (M/s. SPR Developers Pvt Ltd.,) has to form the residential sites and transfer the same to the members of the society at the rate of Rs. 276/- per sq. Ft of saleable area for the first 80 acres of land and subsequently increased to Rs. 360/- per sq. Ft of saleable area for the rest 100 acres of land. So far, the developers has registered the lands to an extent of 118 acres by way of sale deed to the society.

These lands have been transferred during the F.Y. 2005-06 and 2006-07. These lands were transferred from Shri. M. Thimme Gowda and his family members to the society, wherein, M/s. SPR Developers is the confirming party.

As discussed above, the converted lands to an extent of 118 acres has been transferred to M/s. Vijaya Bank society by M/s. SPR Developers Pvt. Ltd. These lands were purchased by M/s. SPR Developers Pvt. Ltd., from various land owners who are the family members of Shri. Thimme Gowda during the financial year 2004-05, 2005-06, 2006-07 & 2007-08. Since, there is a transfer of converted lands from different land owners to M/s. SPR Developers Pvt. Ltd., there is a liability of capital gain in the hands of different land owners. When this issue was confronted to Shri. Thimme Gowda by DDIT(Inv.) and he was asked to submit the details of land transfers along with name of the transferor, date of transfer and the consideration for the land transferred. Shri. Thimme Gowda has submitted the above details in his letter dt: 17.01.2012. the relevant portion of the submission made by the assessee is reproduced as under

"Capital gains in the hands of the land owners in respect of lands sold to SPR Developers"

For the purpose of fulfilling it's contractual obligation with the society, SPR Developers Pvt. Ltd., had to acquire lands, mainly agricultural in nature from various land owners, most of whom are our group members. Having entered into an agreement of sale with possession, the company made application on behalf of the owners for the land conversion for developmental activity. Each of these land owners would be subjected to exposure of capital gains on having

transferred the possession and thus deeming a transfer within the meaning of section 2(47) of the Act. We enclose herewith a details statement of land transferred to SPR Developers as Annexure-1. Pages 1 and 2 pertains to land converted for development of sites for Vijaya Bank Employees and page 3 pertains to Syndicate Bank Employees. We agree to have these owners to consider the capital gains in accordance with the provisions of the Act for the respective assessment years and file the return of income. This step of filing the return of income would be undertaken the moment we ascertain the exact extent of the effect of capital gains. Conservatively the capital gains being offered to tax would be approximately around Rs. 10 crores.

As per the details collected the DDIT(Inv.), the total consideration paid by M/s. SPR Developers Pvt. Ltd., for the purchase of 111 acres 6 guntas to the different land owners as mentioned above is Rs. 48,63,50,000/-. The cost of acquisition of the same lands by the land owners is Rs. 9,03,89,113/-. Thus the total capital gain in the hands of different land owners is Rs. 39,35,39,245/- (Rs. 48,63,50,000 - Rs. 9,03,89,113).

But Sri. Thimme Gowda has contented that the total capital gain in the hands of the land owners who are his family members is only to an extent of Rs. 10 crores in his letter dt: 17.01.2012 which is annexed as Annexure-2. However, Shri. Thimme Gowda in his letter dt: 19.01.2012 which is annexed as Annexure - 4 has re-computed the capital gains in respect of Shri. T. Ganesh and Shri. C.H. Krishnappa at Rs. 8,25,58,350/- and Rs. 1,42,95,746/- respectively totalling to Rs. 9,68,54,096/-. Further, Shri. Thimme Gowda has also undertaken to declare the capital gain arising in the name of Shri. C.H. Krishnappa. Who happens to be a benami.

As the assessee had not responded to notice u/s. 148 and various notices issued from this office, a show cause notice dt: 21.03.2013 was issued and served on the assessee, the relevant parts of the show cause notice are reproduced as under:

"It is noticed in the return of income, filed by you on 07.02.2013 in response to notice u/.s 148 of IT Act, that long term capital gian on transfer of land at Manchanayakanahalli, Bidadi Hobli, is not declared by you. However, in the enclosure to the return of income, you have

mentioned that the land which is transferred to M/s. SPR Developers Pvt. Ltd., is a agriculture land within the meaning of section 2(14)(iii) and as per section 2(47) of the IT Act, the possession is given to the company on 15.01.2004 when the land is agricultural land.

This is to inform you that, as per section 80 of Karnataka Land Reforms Act, transfer of agricultural land to non-agriculturalist is barred. M/s. SPR Developers Pvt. Ltd., being a company cannot acquire agricultural land. Hence, as per your sale agreement dt: 15.01.2004, the transfer of agricultural land to the company is invalid. Therefore, the actual transfer of land is construed as the date of conversion, being 08.06.2004, You are requested to explain as to why the land, which is a non-agricultural land transferred, be treated as "Capital Asset" and thereby, the consideration received on transfer of such land being Rs. 4,02,00,000/- should not be treated as "Long Term Capital Gain ".

The compliance to this notice was solicited by 25.03.2013.

In response, to the above show cause notice the assessee has filed his reply dt: 26.03.2013, the relevant parts of the assessee's reply are reproduced:

"I am in receipt of your above cited letter. In the return of income filed by me, I have claimed exemption from levy of capital gains in respect of sale of agricultural lands to M/s. SPR Developers Pvt. Ltd., In you letter cited above you have contended that the land sold by me is not an agricultural land in view of subsequent conversion of the same on 08.06.2004 by the company.

I owned 10 acres 2 guntas of agricultural land in Sy. Nos. 14/2, 14/3B, 58/1, 14/3A & 13/1A situated at Manchanayaka halli village, Bidadi Hob.li, Bangalore rural district. I was cultivated the land regularly. I have already provided the pahani extracts of these land evidencing the cultivation activities on these lands.

M/s. SPR Developers Pvt. Ltd., acquired the land from me. Under an agreement dt: 15.01.2004, I have agreed to sell these lands to M/s. SPR Developers Pvt. Ltd., for a total

consideration of Rs. 402 lakhs. Further, the possession of the land was given to the purchaser with an authority to carry on the cultivation and do any such activities which may deem fit from time to time. What I have transferred is agricultural land on which cultivation was being carried on till the possession was handed over.

As I understand subsequent to taking the possession under the agreement of sale along with the power of attorney, the purchaser had applied for conversion of the land to non agricultural purposes and apparently got conversion order on 08.06.2004. Since, I for a consideration of Rs. 402 lakhs handed over the possession of the lands to the company, this transaction attracts the provisions of section 2(47) amounting to transfer within the meaning of the provisions of the I T Act (the Act) for the purpose of computing the capital gains. Since what I sold was agricultural land, the sale does not qualify to a capital asset within the meaning of section 2(14) as such I am not liable to pay any capital gains tax on this transaction. In your above cited letter you have taken two contentions like:

- SPR Developers Pvt. Ltd., being the company was not entitled to purchase land within the meaning of section 80 of Karnataka Land Reforms Act and thus transfer of land to the company is invalid;
- Since the land is converted subsequently on 08.06.2004, you would like to treat the same as a capital asset as on that day and bring it to tax as long term capital gains.

I object to both the contentions taken by you. For the following reasons:

- Section 80 of the Karnataka Land Reforms Act, 1961 does bar sale, gift, exchange, lease of any land to a non-agriculturalist. The incidence of transfer, under the context of section 80 would be triggered only on actual sale or gift or exchange or lease or mortgage is affected by way of actual registration of the document of transfer under the Registration Act read with the provisions of the Transfer of Property Act. Thus, mere agreement of sale would not affect a transfer by any mode as

specified in section 80 of the Land Reform Act. Thus, the agreement of sale entered into by me on 15.01.204 is a valid document and transaction and cannot treat the same as invalid transaction. As I understand this proposition is supported by many a judgments of the court while dealing with section 80 of the Land Reforms Act.

However, situation is different when dealing with this transaction under the provisions of the Act. Section 2(47)(v) reads as under:

2(47)..... "transfer", in relation to a capital asset, includes-

.....(i) to (iva).....

(v) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of the contract of the nature referred to in section 53A of the Transfer of Property Act: or

Thus, for the purposes of the Act, transfer has to be viewed on the day when the possession of an immovable property is handed over to the transferee. Thus, the transaction of mine with M/s. SPR Developers, entered into under an agreement of sale dt: 15.01.2004 for a consideration of Rs. 144 lakhs and handing over possession qualified to be a transfer within the meaning of section 2(47). Since what is transferred as on that day is agricultural land falls outside the ambit of being a capital asset within the meaning of section 2(14), trigger no capital gains taxable under section 45 of the Act. For this reason the claim made by me in the return of income is proper and correct.

You proposed to treat the date of transfer as 08.06.2004, being the date on which the conversion took place. This stand of your is not in accordance with the provisions pertaining to taxability of capital gains under the Act. What is required to activate taxability of capital gains are –

i. The assets should be a capital asset;
ii. It should be transferred within the meaning of section 2(47)
iii. Should be transferred for a consideration.

The date of conversion cannot be treated as a transfer. Neither the possession is handed over on that day nor is any sale deed registered on that day. You cannot deem the date of conversion as the date of transfer in the absence of specific provisions to that effect.

For these reasons I object to the stand taken by you in your letter dt: 21.03.2013 and request you to kindly appreciate the facts and the legal position and accept my contention of the transfer of agricultural land not being liable to capital gains tax.

In this regard, the assessee has made the following contentions before the DDIT(Inv.) and during the assessment proceedings.

1. There will not be liability of capital gain on all the land transfers as mentioned in the table, since, some of the lands were transferred after two years of conversion to residential purposes. Thereby, his contention is that the lands have lost the status of residential conversion and reverted back to agricultural status.
2. Some of the lands were transferred by land owners to M/s. SPR Developers by way of GPA with possession even when they (land) were in the agricultural status. Hence, there would not be any liability of capital in the hands of land owners on such transfers.

The contentions of the assessee are not acceptable for the following reasons:

1. The assessee's claim that the lands would revert back to agricultural status after two years of conversion order is not acceptable. Since, as per the State Government rules, the conversion order of the lands will

only lapse which can be re-activated on payment of specified developmental charges. Hence, assessee's contention that they are agricultural lands after two years is untenable.

2. *The assessee's claim that some of the lands were transferred to M/s SPR Developers under GPA with possession is not correct, since, there is no registered GPA.*
3. *As reflected in the registered sale deeds wherein the converted lands have been transferred directly from the land owners to the Vijaya Bank society, wherein, M/s. SPR Developers is a confirming party. It is an undisputed fact that the conversion was carried out in the names of the transferors, thereby the capital gains liability is fastened to the individuals.*
4. *Before the transfer of land by the land owners, these lands were converted as per the request of the land owners. The conversion orders were also issued in the names of the land owners. Hence, effectively, there is a transfer of converted land by the land owners to M/s. Vijaya Bank Society, where in M/s. SPR Developers is the confirming party.*

3. Finally, the claim of the appellant that the agricultural land transferred to M/s. Vijaya Bank Employees' Housing Cooperative Society Ltd., is an agricultural land was not accepted by the AO by setting out the following reasons militating against the case of the appellant that what was sold is an agricultural land and brought the transaction of sale of the land to tax under the head "capital gains" vide Assessment Order dated 30.03.2013 passed u/s 143(3) r.w.s. 148 of the Act:

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2. *The assessee's claim that some of the lands were transferred to M/s SPR Developers under GPA with possession is not correct, since, there is no registered GPA.*
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4. *Before the transfer of land by the land owners, these lands were converted as per the request of the land owners. The conversion orders were also issued in the names of the land owners. Hence, effectively, there is a transfer of converted land by the land owners to M/s. Vijaya Bank Society, where in M/s. SPR Developers is the confirming party.*

4. Being aggrieved by the AO, the appellant filed the appeal before the CIT(A) contending interalia that the appellant had been cultivating the said land by growing crops like ragi, etc., and in support of this, he also filed the copies of land records. The possession of the said land was handed over to M/s. SPR Developers vide agreement of sale dated 15.01.2004 and the conversion of the said land for non-agricultural purpose also was undertaken by the buyer only and the said land was not situated within the prescribed area of any municipality and hence it does not constitute to the "capital asset" and there was no transfer

undertaken by the appellant after conversion of the said land into non-agricultural purpose as the possession of land was already handed over to the M/s. SPR Developers vide agreement of sale dated 15.01.2004. Thus it was submitted that the transaction of sale of agricultural land is not exigible to tax. The said contentions have been rejected by the CIT(A) vide para 8 to 10 of his order which reads as under:

8. The case of the appellants was examined and it was found that :-

The said agreement to sell in respect of two of the appellants, i.e. Sri T Raghavendra Gowda, s/o Sri M Thimme Gowda, appellant at (1) above, Sri D Dasappa, appellant at (2) above was evidently **pre-dated** as the stamp paper, is purchased on 05.10.2004, whereas the date of agreement is mentioned as '15.01.2004'. [copies of the said agreements enclosed as Annexures A and B].

Evidently, as all the agreements in respect of all these 4 appellants have been entered on the same day, these have all been predated, having clearly been prepared on the same date, before the same notary in the presence of the same witnesses.

When all these 4 agreements in respect of all the 4 appellants were confronted to the appellant's counsel with this evidence during the course of appeal, the appellant's counsel had no answer. The inference thus drawn is that all the 4 agreements have been entered into not earlier than 05.10.2004, the date of purchase of stamp paper in the case of the appellants mentioned above.

This shows that the said agreements in respect of all the 4 appellants are 'tailor made', to suit the appellants and to push back the 'transfer' date to A.Y. 2004-05 in light of the findings on record, and also to show that the same was transferred prior to the date of conversion from agricultural land to non agricultural land which took place on 08.06.2004.

Moreover, it is seen that in A.Y. 2004-05, no transfer of money to the appellants has actually taken place as the claimed 'transfer of money' is only through journal entries in books of M/s SPR Developers Pvt Ltd. The Balance Sheet and other financial statements of [A.Y. 2005-06] for M/s SPR Developers Pvt Ltd have been prepared **on 07.02.2012 and income tax returns have been filed only in March 2013.** No actual transfer of cash has taken place.

As such, the said claim of the appellant that the 'transfer' took place in financial year 2004-05 cannot stand. The claim, however, that 'transfer' took place on the date of agreement is accepted, however, the said date is 05.10.2004 and not 15.01.2004 as evident from the facts and Annexures A and B to this Order.

9. Effective transfer of the land in question has taken place only in F.Y. 2004-05 i.e. A.Y. 2005-06 on 05.10.2004 i.e. the actual date of the said agreement and not on 15.01.2004, [which is a fabricated date] and after the date of conversion of the said land, from agricultural purpose to residential purpose [i.e. 08.06.2004]. Thus, as held by the Assessing Officer, transfer [and therefore capital gain] arises in A.Y. 2005-06, though not on 08.06.2004, but on the date on which possession is transferred as per the agreement [as also claimed by the appellant] which is actually 05.10.2004 and not 15.01.2004 [as held above].

Now,

2) Whether the land in question was an agricultural land or capital asset on the date of transfer and whether capital gain arises on its transfer?

As clearly brought out above, the entire transaction is based on an arrangement for profit as a business prospect by M/s SPR Developers. It is for this purpose that the said land was converted from agricultural land to residential purpose on 08.06.2004. This has evidently taken place on the basis of an oral agreement of M/s SPR Developers Pvt Ltd with M/s Vijaya Bank Employees Housing Co-operative Society on an understanding for

transfer/purchase of land belonging to the appellants, who are family members of the Managing Director, which has later been reduced to writing on 23.11.2005 just before the actual sale deed dated 12.12.2005. The land has admittedly been first transferred to M/s SPR Developers Pvt Ltd, [a company who cannot own agricultural land] and the land use has clearly been converted for use, for a specific purpose on 08.06.2004. The agricultural nature of the land if any, no longer survives after the conversion i.e. 08.06.2004.

The land in question is therefore a capital asset, as on 08.06.2004.

10. For the said reasons, Capital gain arises as brought out above, in the hands of the appellant on the date of agreement i.e, 05.10.2004 (and not 15.01.2004) and taken over possession and has correctly been brought to tax by the Assessing Officer for A.Y. 2005-06.

5. Being aggrieved, the appellant is in appeal before the Tribunal in the present appeals. The learned AR of the assessee contended that the subject lands are agricultural lands as the assessee continued to carry on the agricultural activity as evident from the land revenue records. The possession of the said land was handed over to M/s. SPR Developers on 15.01.2004 pursuant to the agreement of sale entered between the appellant and M/s. SPR Developers in terms of the said agreement the said possession of the land was handed over to M/s. SPR Developers on the said date. He further submitted that the conversion of the land into non-agricultural purpose was undertaken by the purchaser himself and said conversion took place on 08.06.2004. Thus it was submitted that when the lands were actually transferred pursuant to the agreement of the sale, the land was actually agricultural in nature

and therefore not liable to the capital gains, cannot be brought to tax. On other hand, the learned Standing Counsel vehemently contended that when the lands were transferred, land was already converted into non-agricultural purpose and therefore the gains made on transfer of such lands is liable to tax.

6. We heard the rival submissions and perused the material on record. The only issue that arises for our consideration is whether profit arising out of sale of the land situated at Manchanayakanahalli, Bheemanahalli and Hampapura villages sold to M/s. Vijaya Bank Employees' Housing Cooperative Society Ltd., through M/s. SPR Developers are taxable in the hands of the appellant. The undisputed facts of the case are that the lands are not situated within the prescribed area of any municipality or cantonment. There is also no dispute that the agricultural activities are continued to be carried on the said land till the date of sale to M/s. Vijaya Bank Employees' Housing Cooperative Society Ltd. No doubt as on the date of execution of sale deed between the appellant and M/s. Vijaya Bank Employee's Housing Cooperative Society Ltd., and M/s. SPR Developers i.e., 12.12.2005 the lands were converted for non-agricultural purposes on 08.06.2004.

It is needless to mention once the lands does not fall within the definition of the capital asset as defined under the provisions of section 2(14) of the Act, the question of subjecting the profit arising on sale of such land to tax does not arise. The provisions of section 2(14) also excludes the agricultural land from the purview of definition of the capital asset. Therefore once it is proved beyond doubt that the subject land are agricultural in nature, then the question of levying tax on the profits arising on the transfer of such land does not arise. In the present case, the assessee was carrying on the agricultural activity on the said land and the lands were also not situated within the prescribed area of any municipality, the only factor to be considered is as on the date of execution of sale deed when the land was converted for non-agricultural purposes, whether this fact alone can change the character of land. The contention of the learned AR of the appellant that the transfer of the land took place when the possession was handed over pursuant to the agreement of sale entered on 15.01.2004 cannot be accepted, for the reason that agreement of sale was not registered which is a mandatory condition as per the provisions of the Registration Act, 1862. It is an undisputed fact that the lands were converted for non-agricultural purposes on 08.06.2004. It is also an

undisputed fact that the conversion fees was paid by the buyer and not by the appellant. Therefore this factor goes to prove that the conversion was taken place at the instance of the buyer of the land. The only factor as mentioned (supra) is that as on date of execution of sale deeds, the land was already converted for non-agricultural purpose. Therefore, the issue to be adjudicated by us is whether this factor alone can militate against the appellant to claim that it is an agricultural land. The Hon'ble Gujarat High Court in the case of CIT Vs. Vajulal Chunilal 120 ITR 21 (Gujarat) after referring to its earlier decision in the case of Smt. Chandravati Atmaram 114 ITR 302 (Guj.) and the Hon'ble Supreme Court's decision in the case of CWT V. Officer-in-Charge (Court of Wards) 105 ITR 133 held that the land does not seem to be agricultural land merely because the permission is granted for non-agricultural use and the land would continue to be agricultural land until the land is put to non-agricultural use by the purchaser himself. The relevant judgment is extracted below:

> *"The legal position as to when land can be said to be agricultural land has been considered in several decisions of this High Court and by the Supreme Court in CWT v. Officer-in-Charge (Court of Wards) [1976] 105 ITR 133. A decision relating to the law on the point after considering all the decisions available till then, that is, till September 15, 1977, was by this court in Smt. Chandravati Atmatam Patel v. CIT [1978] 114 ITR 302 (Guj.). At page 312, the position was summarised as under :*
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> > *"In this case, the law, therefore, is very clear. If the land is actually used for agricultural purpose as shown by Manilal Somnath's case [1977] 106*

ITR 917 (Guj.) and also by the Supreme Court in Commissioner of Wealth-tax v. Officer-in-Charge Court of Wards) [1976] 105 ITR 133, it can be said to be agricultural land, at least, prima facie, as agricultural land could be said to be land which is either actually used or ordinarily used or meant to be used for agricultural purposes. If it is actually used at the relevant date for agricultural purposes and there are no special features, for example, building plot being actually used as a stop-gap arrangement for agricultural purposes or a building site being used for agricultural purposes, actual user or ordinary use or intention to use the land for agricultural purposes or land is meant to be used for agricultural purposes, it would be 'agricultural land'. Secondly, potential use of the lands as agricultural land is totally immaterial. Thirdly, entries in the record of rights are good prima facie evidence regarding agricultural land and if the presumption raised either from actual user of the land or from agricultural use of the land is to be rebutted, there must be material on the record to rebut that presumption. The approach of the fact-finding authorities, namely, the income-tax authorities and the Tribunal should be to consider the question from the point of view of presumption arising from entries in the record of rights or actual user of the land and then consider whether that presumption is dislodged by the presence of other factors in the case."

This decision in Smt. Chandravati Atmaram's case [1978] 114 ITR 302 (Guj.) has been subsequently followed in the case of Chhotalal Prabhudas (HUF) (Income-tax Reference No. 105 of 1975) (since reported in [1979] 116 ITR 631 (Guj.)). The Tribunal, in the instant case, in the course of its order, has referred to the fact that the entries in panipatraks, that is, revenue records, show that this land was agricultural land and was being used for agricultural purposes. As we have pointed out earlier, permission for non-agricultural use was obtained by the co-operative housing society after it had purchased the land from Devidas. In para. 9 of its order, the Tribunal has observed :

"Now, it appears from the record of rights and the aforesaid accounts produced by the assessee that grass and vegetables were grown on the land. There were also fruit bearing trees on the land. There is no evidence as to show who was cultivating this land and growing grass and vegetables thereon. Therefore, the only evidence which we have regarding the agricultural operations carried on on the land consists of the entries made in the record of rights and the aforesaid accounts produced by the assessee. The accounts do not appear to be regularly maintained. We do not know as to who maintained the accounts which are produced before us. In our opinion, the accounts are not reliable. We are then left with the entries made in the record of rights. In our opinion, these entries are not sufficient to establish that agricultural operations were carried on on the land."

The question that has to be decided in the present case is not whether who was carrying on agricultural operations on the land, but whether the land was agricultural land or not, that is, whether the land was being put to agricultural use or not. Secondly, as pointed out by the Supreme Court in CWT v. Officer-in-Charge (Court of Wards) [1976] 105 ITR 133 *(SC), the presumptive value of the entries in the record of rights must be borne in mind and if evidence is not led by the department or if the evidence is not available on the record to rebut*

the presumption arising from the actual user of the land as agricultural land or from the entries in the record of rights, the revenue's case must fail. The Tribunal has proceeded on the footing that agricultural operations appear to have been carried on by way of temporary arrangement. In the instant case, it must be borne in mind that the land was purchased by the original holder, Vajulal Chunilal, as far back as 1929 and, since that date, it was being used as agricultural land. The entries in the record of rights consistently go to show that, over several years, crops are being grown, plantations of Khajura trees, Chiku trees and other crops were being reared and nurtured on the land in question, and it cannot be said that from 1929 to 1966 it was a temporary arrangement. In Himatlal Govindji v. CWT [1977] 106 ITR 658 (Guj.) a plot of land which was already converted to non-agricultural use for the purpose of the Land Revenue Code was being cultivated pending the finalisation of the transaction of sale. In the instant case, the land was put to agricultural use right till the date of sale and was being used for agricultural purposes. Crops were being grown, grass, vegetables and other materials were being grown on the four survey numbers as shown by the panipatraks. The circumstance that the land was surrounded by residential locality would not render the land non-agricultural, if, in fact, continuously during the years from 1929 it was being used for agricultural purposes. The question of the land under consideration being wanted by a co-operative society or being surrounded by housing development was considered by this court in CIT v. Manilal Somnath [1977] 106 ITR 917 and that factor of development coming up to the land in question was discounted by the court. In Manilal Somaath's case [1977] 106 ITR 917 (Guj.), this court also pointed out that though the land might have potential non-agricultural value, that factor did not mean that the land had ceased to be agricultural land or that it had lost the character of agricultural land. In this case, the Tribunal has observed at the end of para. 9 : "In any case, we have no doubt that the character of the land changed to that of a non-agricultural one when the assessee obtained permission under section. 63 of the Bombay Tenancy and Agricultural Lands Act." At page 929 of the report in Manilal Somnath's case [1977] 106 ITR 917 (Guj.), it has been pointed out :

> *"Under section 63 of the Tenancy Act, no sale of any land or interest therein shall be valid in favour of a person who is not an agriculturist unless the Collector or an officer authorised by the State Government in this behalf grants permission for such sale on such conditions as may b prescribed. Under section 2, sub-section (8) of the Tenancy Act, 'land' means land which is used for agricultural purposes and it is, therefore obvious that it was for the sale of land used for agricultural purpose for which the City Deputy Collector acting under section 63 of the Bombay Tenancy and Agricultural Lands Act granted permission. There is nothing to show that between the date of the permission, namely, March 24, 1967 and April 7, 1967, that is, the execution of the sale deed by the assessee in favour of Tarakkunj Co-operative Housing Society Ltd., agricultural operations which were being carried on were by way of stop-gap arrangement. We are not, in the present case, concerned with the question whether agricultural operations were such as a prudent agriculturist would carry out. The sole question that we have to decide is whether on the date of the sale by the assessee-Hindu undivided family to Tarakkunj Co-operative Housing Society Ltd. on April 7, 1967, the land was agricultural land or not. As*

T.U. Mehta J. has pointed out in Narandas Motilal's case [1971] 80 ITR 39 (Guj.), the fact that the land was being used for agricultural purposes till the date of the sale raises a prima facie presumption that it was agricultural land."

At page 931, it was further observed :

"It is true that permission to sell the land to Tarakkunj Co-operative Housing Society Ltd. was granted on condition that the land would be used for residential purposes and the application for permission under section 63 of the Bombay Tenancy and Agricultural Lands Act was applied for on the footing that, after the sale, the land would be used for residential purposes. Bat that only goes to show that, after the date of the sale, this land was to cease to be agricultural land. The permission granted by the City Deputy Collector under section 63 of the Bombay Tenancy and Agricultural Lands Act clearly goes to show that in case the land did not cease to be agricultural land, the permission would be treated as cancelled and, therefore, the sale in favour of Tarakkunj Co-operative Housing Society Ltd. would be infructuous and the land would revert back to the assessee. In such an eventuality, the land would still continue to be agricultural land because the permission to sell to a non-agriculturist would be treated as cancelled. That eventuality has not happened and as pointed out it was some time in February, 1969, that the permission for non-agricultural use was granted to the purchaser..."

The same reasoning would also apply to the facts of the present case. It is axiomatic under the Bombay Tenancy and Agricultural Lands Act that when permission is granted by the authorities concerned for sale of agricultural land to a non-agriculturist, the land does not cease to be agricultural land merely because of such permission being granted. If the conditions of the permission are not complied with, the land in respect of which permission was granted under section 63 would revert to its original character of agricultural land. Therefore, the land was agricultural land at the date of the sale and would continue to be agricultural land until permission for non-agricultural use is granted and the land is put to non-agricultural use by the purchaser, as was contemplated by the permission under section 63 itself. But, as emphasised in Manilal Somnath's case [1977] 106 ITR 917 (Guj.) mere granting of the permission under section 63 does not alter the agricultural character of the land and on that aspect of the matter, the Tribunal has obviously erred in law and the legal position has now been explained in Manilal Somnath's case [1977] 106 ITR 917 (Guj.) and Chandravati Atmaram's case [1978] 114 ITR 302 (Guj.). The Tribunal's conclusion is, therefore, based on two errors in law. Error No. 1 is that the presumption arising from the actual user of the land for agricultural purposes has not been given proper effect and, further, the presumption arising from the entries in the record of rights has not been considered at all. The Tribunal has not considered, nor is there any material on the record to show, whether the presumption arising from these twin factors of actual user and entries in the record of rights is rebutted or not. Secondly, the Tribunal has erred in law in considering the effect of permission granted under section 63 of the Bombay Tenancy and Agricultural Lands Act."

7. There is no dispute that the agricultural operations continued to be carried on the said land till the date of execution of the sale deed in favour of M/s. Vijaya Bank Employees' Housing Cooperative Society Ltd., and the fact that the permission was obtained for non-agricultural purposes does not militate against the claim of the appellant that it is agricultural land, in the light of the above decisions. Therefore, we hold that the profit arising on sale of this land cannot be brought to tax. Therefore, the appeal filed by the assessee is allowed.

8. The facts in these appeals are identical and therefore for the parity of the reasoning given in the above orders, we hold the profit arising on sale of lands cannot be brought to tax. The appeals in ITA No.1047/Bang/2015, ITA No.1048/Bang/2015 and ITA No.1058/Bang/2015 in the cases of Shri. T. Suresh Gowda, Shri. T. Prasanna Gowda and Shri. T. Raghavendra Gowda are allowed.

7. In the result, the appeals filed by the assessee are allowed.

Pronounced in the open court on this 17th day of May, 2017.

Sd/-	Sd/-
(LALIET KUMAR)	**(INTURI RAMA RAO)**
Judicial Member	**Accountant Member**

Bangalore.
Dated: 17th May, 2017.
/NShylu/*

Copy to:

1. Appellants
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore.