

आयकरअपीलीयअधिकरण, 'सी' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH, CHENNAI

श्री बी.आर. बास्करन, लेखा सदस्य एवं श्री विकास अवस्थी, न्यायिक सदस्यकेसमक्ष

BEFORE SHRI B.R. BASKARAN, ACCOUNTANT MEMBER AND
SHRI VIKAS AWASTHY, JUDICIAL MEMBER

आयकर अपील सं./ITA No. 70/Mds/2012

निर्धारण वर्ष /Assessment Year : 2008-09

R P Darrmalingam, No.1379 C "Golden Villa", I Block, 6 th street, Valalar Kudiyeruppu, 18 th Main road, Anna Nagar, Chennai-6000040	बनाम/ Vs.	Dy.Commissioner of Income Tax, Company Circle II(13), Chennai-600034
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

आयकर अपील सं./ITA No. 593/Mds/2012

निर्धारण वर्ष /Assessment Year : 2008-09

Asstt. Commissioner of Income Tax Company Circle II (3), No.121, Uthamar Gandhi Salai, Chennai-600034	बनाम/ Vs.	R P Darrmalingam, No.1379 C "Golden Villa", I Block, 6 th street, Valalar Kudiyeruppu, 18 th Main road, Anna Nagar, Chennai-6000040
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. :AEAPD7363R

अपीलार्थी ओर से / Assessee by	Shri N Devanathan
प्रत्यर्थी की ओर से/ Revenue by	Shri A V Sreekanth

सुनवाई की तारीख / Date of Hearing : 03.02.2015

घोषणा की तारीख /Date of Pronouncement: 11.03.2015

आदेश / ORDER**Per B.R.BASKARAN, Accountant Member:**

These Cross Appeals are directed against the order dated 26.12.2011 passed by Ld CIT(A)-III, Chennai and they relate to the assessment year 2008-09. Both the appeals were heard together and are being disposed of by this common order, for the sake of convenience.

2. The assessee is aggrieved by the decision of Ld CIT(A) in confirming the assessment of Capital gain arising on sale of agricultural land as business income of the assessee.

3. The revenue is aggrieved by the decision of Ld CIT(A) in deleting the disallowance of part of development expenses as excessive.

4. The facts relating to the above said issues are stated in brief. The assessee is engaged in the business of land development and sale. In the return of income filed for the year under consideration, the assessee declared business profit on land development and sale. Besides the above, the assessee also declared gain on sale of agricultural land, which is exempt from taxation. The agricultural lands were located at three places viz., Kundrathur Village, Perumbakkam village and Thirumudivakkam village. The AO compared the Gross Profit rate and Net Profit rate declared by the assessee in both the activities, i.e., in the activity of development and sale of land and in the sale of agricultural land. He found that the rate of profit shown on sale of agricultural land was very high. Hence, the AO formed the view that the profit declared on sale of agricultural land did not appear to be credible.

5. Before the AO, the assessee submitted that he has maintained separate account for each of his activity, i.e., for business activity and investment activity. He further submitted that the Agricultural land was

shown as his investment and hence the gain arising on its sale was shown as Capital gain and accordingly exemption was claimed. The Assessee placed reliance on the Circular no.4/2007 dated 15-06-2007 and submitted that the CBDT has recognized that an assessee can hold the Shares in two portfolios, viz., as "Investment" and "Stock in trade". The assessee further submitted a certificate obtained from local panchayat office also to show that these lands were held as agricultural land only. The assessee had also declared agricultural income from out of these lands.

6. However, the AO was not convinced with the explanations of the assessee and accordingly held that the gain arising on sale of these lands should also be assessed as business income. The reasoning of the AO is summarized below:-

(a) The lands have been acquired through power of attorney or sale agreement and were not registered in the name of the assessee.

(b) The assessee is a property developer and is engaged in purchase of land. Hence the purchase and sale of land is his regular business activity.

(c) The assessee did not carry on any agricultural activity.

(d) Some of the lands sold by the assessee have been categorized as "residential land" by the Sub-registrar Office. However, in respect of remaining lands, the details of which were filed by the assessee, they have been categorized as wet land – single crop.

(e) The lands have been sold in small plots, which points out that the land has been purchased by the intending purchaser for investment or construction and not for carrying on agricultural activity.

(f) The lands have been sold at around 1.75 lacs to 2 lacs per cent and normally agricultural lands do not fetch such a high price.

(g) The lands are situated in a fast developing area where industries are coming up.

(h) The Hon'ble Supreme Court has held in the case of CIT Vs. Sutlej Cotton Mills Supply Agency Ltd (100 ITR 706) has held that if a transaction is in the assessee's ordinary line of business, there can be no difficulty in holding that it is in the nature of trade. The Hon'ble Apex Court has held in the case of Sarifabibi Mohamed Ibrahim and Others Vs. CIT (204 ITR 631) that the ultimate decision on whether the profit arising from sale of a particular land is exempt being agricultural land would depend upon cumulative consideration of number of facts. In the case of Sarifabibi Mohamed Ibrahim (supra), the assessee therein was not a person engaged in the business of trading of land. However, in the instant case, the assessee is engaged in the business of trading of land.

Thus it is seen that the assessing officer has taken the view that the assessee has held these lands as his business assets only. Though the AO has not expressly stated that the impugned lands were not agricultural lands, but the reference made by him to the classification of the Sub-registrar office, observations about agricultural activity etc. would show that the assessing officer appears to doubt about the character of land as agricultural land. Accordingly, he rejected the claim of the assessee and assessed the profit arising on sale of agricultural land as Business income of the assessee.

7. During the year under consideration, the assessee had also declared profit from sale of developed land as his business income. From the computation of business profits, the AO noticed that the assessee has claimed development expenses of Rs.26.56 crores, which was about nine times of the cost of land. Hence, the AO considered the same on higher side and accordingly called for details. However, the assessee did not furnish the details called for by AO. The AO further noticed that identical issue was considered by him in the assessee's sister concern named M/s Jubilee Plot and Housing Pvt Ltd, wherein the assessee held 99% of the shares. In the above said case, the expenses were restricted to 43.06% of the Sale receipts. Accordingly, the assessing officer also restricted the

claim of the assessee on development expenses to 43.06% of the sale receipts and the same resulted in a disallowance of Rs.12.09 crores.

8. In the appeal filed before Ld CIT(A), the first appellate authority held that the dominant intention of the assessee was to hold these agricultural lands as Stock in trade only, since he is in the business of development of lands. He further held that the agricultural income declared by the assessee was only incidental. He further held that the method of exploitation of land is of least significance, when the intention of the assessee is only to enjoy the fruits of appreciation and not to reap the benefit by way of cultivation. Accordingly he upheld the action of the AO in assessing the Capital gains realized on sale of impugned lands as business income of the assessee. Thus, it is seen that the Ld CIT(A) did not find it necessary to examine the character of land claimed as agricultural land. With regard to the disallowance made out of development expenses, the Ld CIT(A) noticed that the AO had followed his decision taken in the case of M/s Jubilee Plot & Housing Pvt Ltd. He further noticed that the addition made in the case of above said concern has since been deleted by the Ld CIT(A) in ITA No.488/09-10/A-III dated 18.3.2011 and ITA No.800/10-11/A-III dated 15.04.2011 relating to AY 2007-08 and 2008-09 respectively. Accordingly, by following the decision of Ld CIT(A) rendered in the case of M/s Jubilee Plot & Housing Pvt Ltd, the first appellate authority also deleted the disallowance made by the AO out of development expenses. Aggrieved by the order of Ld CIT(A), both the parties have filed these appeals on the points decided against each of them.

9. We shall first take up the appeal filed by the assessee. The Ground no. 1 is general in nature and hence requires no adjudication. The Ground No.2 relates to the validity of the action of the AO in assuming jurisdiction against the scrutiny norms. However, at the time of hearing, the assessee

did not advance any argument on this issue and accordingly, the said ground also requires no adjudication. The remaining grounds relate to

- (a) Character of land, i.e., whether they are agricultural land or not.
- (b) Whether the lands were held as "Investment" or as "Stock in trade".

There is no dispute between the parties that the impugned lands were located beyond the prescribed municipal limits. If these lands were considered to have been held by the assessee as "Stock in trade", then the profit realized on their sale is assessable as business profits of the assessee, even if the character of land remains agricultural land. On the other hand, if they were considered to have been held by the assessee as "Investment", the gain realized on their sale would result in taxable Capital gains, if they are not agricultural lands and would be exempt from taxation u/s 10(1) r.w.s. 2(1A)(a) and 2(14) of the Act, if they are held as agricultural lands.

10. We heard the parties and perused the record. We notice from the assessment order that the assessee has declared the profit realized on land development and sale as his Business income. It has been further claimed that the agricultural lands have been held as "Investment" and accordingly the gain realized on their sale was claimed to be Capital gains exempt from taxation. This bifurcation, prima facie, would show that the assessee has held the lands both as "Investment" and as "Stock in trade". We also notice that the assessee has submitted that he has demarcated lands as "Stock in trade" and "Investment" in the books of accounts.

11. We notice that both the tax authorities have rejected the contentions of the assessee, mainly on the reasoning that the assessee, being engaged in the business of land development and sale, could not have purchased any land to hold it as "Investment". However, the view so expressed by the tax authorities does not appear to be in accordance with

the settled proposition laid down by the various Courts. The CBDT Circular No.4/2007 dated 15.06.2007 also states that an assessee is entitled to hold two separate portfolios, viz., one for "investment" and another for "Stock in trade". In the above said Circular, the CBDT has referred to the decision of Hon'ble Supreme Court rendered in the case of CIT Vs. Associated Industrial Development Company (P) Ltd (82 ITR 586), where in the Hon'ble Apex Court has observed as under:-

"Whether a particular holding of shares is by way of investment or forms part of the stock in trade is a matter which is within the knowledge of the assessee who holds the shares and it should, in normal circumstances, be in a position to produce evidence from its records as to whether it has maintained any distinction between those shares which are its stock in trade and those which are held by way of investment."

Further, the Hon'ble jurisdictional Madras High Court has also recognized the above said principle in the case of Felspar Credit and Investment (P) Ltd Vs. CIT (2012)(27 taxmann.com 137). Further, the Hon'ble Madras High Court has observed in the case of CIT Vs. S. Ramaamirtham (306 ITR 239) that there is nothing in law which prohibits a trader in shares to invest in shares and the intention of the assessee is relevant to determine whether he is carrying on the business in shares or investments. Though the above said circular was issued and the decision of Hon'ble Madras High Court was rendered in the context of Share transactions, yet we are of the view that the principle laid down therein equally applies to the present case also. In the instant case, the assessee is engaged in the business of land development and sale and hence the normal presumption would be that he would have purchased the land only with the intention to hold the same as Stock in trade. However, as observed by the Hon'ble Courts, the assessee cannot be precluded from holding some of the lands as his Investments. The intention of the assessee at the time of purchase of

land would normally decide as to whether the land forms part of his stock in trade or it would form part of his investment.

12. The next question that arises is as to how to ascertain the intention of the assessee in order to determine about the classification of assets, i.e., whether they were held as "Investment" or as "Stock in trade". In this regard, the settled proposition is that the answer to the above said question would depend upon cumulative consideration of a number of facts. The Circular issued by the CBDT and the Courts have listed out various criteria for this purpose. We may observe that the criteria so listed out are not the exhaustive list, but they were in the nature of guiding factors only. One has to consider all the factors in a holistic manner in order to decide the above said question.

13. We notice that the Ld CIT(A) has correctly pointed out that the main factor/criteria is the "dominant intention of the assessee" at the time of purchase of an asset. It is also pertinent to note that the entries made in the books of account are only one of the factors to be considered, but the same cannot be the sole deciding factor. However, once it is found that the assessee has held the shares as "Investment", then the gain arising on its sale can be assessed as Capital gains only and not as business profit, as held by the Hon'ble Bombay High Court in the case of CIT Vs. Yatish Trading Co. Pvt Ltd (ITA No. 1007 of 2011 dated 28-01-2013).

14. The JODHPUR BENCH (THIRD MEMBER) of the Tribunal, in the case of Smt. Supriya Kanwar V/s ITO in IT APPEAL NO. 362 (JU) OF 2010 (AY 2007-08) vide order dated 20.3.2014 has considered an identical issue. The relevant observations made by the Third Member are extracted below:-

"The issue as to whether a particular transaction amounts to mere sale of investment or an adventure in the nature of trade was subject matter of several judicial decisions and the Apex Court have

time and again observed that no principle can be evolved which would govern the decision of all cases in which the character of the impugned transaction falls to be considered. In the case of *G. Venkataswami Naidu & Co. (supra)* the court observed that even an isolated transaction can satisfy the description of adventure in the nature of trade and metaphorically observed that a single plunge in the waters of trade may partake of the character of an adventure in the nature of trade but at the same time cautioned that the 'single plunge must be in the waters of trade'. The Hon'ble court observed that it is impossible to evolve any formula which can be applied in determining the character of isolated transactions; if a person invests money in land intending to hold it, enjoys its income for some time, and then sells it at a profit, it would be a clear case of capital accretion and not profit derived from an adventure in the nature of trade. Merely because it is sold at a profit it cannot be assumed that it is an adventure in the nature of trade unless other characters of such transaction support such stand. In deciding the character of such transaction several factors are treated as relevant - Was the purchaser a trader and were the purchase of the commodity and its resale allied to his usual trade or business or incidental to it? Did the purchaser, by any act subsequent to the purchase, improve the quality of the land and thereby made it more readily resaleable? What were the incidents associated with the purchase and resale? - etc. will have to be taken into consideration and *a holistic view has to be taken.*"

15. We shall examine the facts prevailing in the instant case under various factors/criteria.

(a) We notice that the assessee, in his activity of development of land and sale, was used to divide the land into different plots of small sizes after earmarking major portion of land for roads, public facilities etc. The lay out plan is also required to be approved by a competent authority. Another important factor is that the assessee was required to incur huge expenditure on such kind of development of land. However, in the case of assets held as "Investments", no such development activity shall be carried out. In the instant case, the assessee has incurred huge development expenses in respect of land held as "Stock in Trade". In fact, the assessing officer himself has disallowed a major part of development expenses. However, it is an admitted fact that the assessee did not develop the lands held as "Investments" and he has sold them in the same condition in which they were purchased.

(b) We have already noticed that the assessee has submitted that he has demarcated the lands held as stock in trade and that held as Investment in separate account.

(c) Further, we notice that the assessee has submitted that the lands held as stock in trade has been sold after developing the land; converting them into plots of various sizes after laying approach roads. However, the lands held as investment has been sold without laying approach roads, meaning thereby the lands were sold in continuous stretch. It is in the common knowledge of everybody that the approach roads are vital part of any development activity and hence without approach roads, nobody would come to purchase the plots. The fact that the assessee has sold the land without approach roads only proves that he has sold the lands as land only.

(d) The lands held as Stock in trade has been sold within 1 – 3 years. However, the lands held as “Investments” have been sold after expiry of 4 years. If the assessee had intended to hold the lands as Stock in trade, he would have started the development activities immediately after its purchase, so that he could make quick profit there from. The fact that the assessee did not carry on any development activity coupled with the fact that he has held them for a long period of above four years would, in fact, support the claim of the assessee.

(e) The assessee has sold the lands held as agricultural lands only. He did not apply for reclassification of land as “non-agricultural”. If the assessee had intended to hold as “Stock in trade”, he would have applied for reclassification of land.

(f) The assessee has declared agricultural income in his return of income, meaning thereby, the assessee was using the land as agricultural land, which further fortifies the fact that the assessee has intended to hold the land as Investment only.

All the above said factors support the case of the assessee that he has held the impugned lands as “Investment” only.

16. The next issue that requires to be considered is about the character of land. In this regard we may gainfully refer to the decision rendered by the Hon’ble jurisdictional Madras High Court in the case of Mrs. Sakunthala

Vedachalam & Mrs. Vanitha Manickavasagam Vs. The ACIT (Tax Case (Appeal) Nos. 566 and 567 of 2013 – Order dated 06-08-2014) to ascertain the principles to be followed in order to answer this question. In the above said case, the assessee therein sold certain lands which were claimed to be agricultural lands. In support of the said claim, they did not furnish any document before the AO and hence he rejected the claim of the assessee. However, before Ld CIT(A), they furnished a copy of Adangal extract and also claimed that there were casuarinas crops grown in those lands as shown in the chitta adangal, which indicated that the lands were agricultural lands. Accordingly, the Ld CIT(A) allowed the claim of the assessee, but his decision was reversed by the Tribunal by following the decision of Hon'ble Gujarat High Court in the case of CIT Vs. Siddharth J Desai (139 ITR 628). The Hon'ble Gujarat High Court, in the above cited case had laid down various tests that have to be considered in order to ascertain the true nature and character of land. The Hon'ble Madras High Court has extracted the following observations made by the Hon'ble Gujarat High Court:-

"On a conspectus of these cases, several factors are discernible which were considered as relevant and which were weighed against each other while determining the true nature and character of the land. It may be useful to extract from those decisions some of the major factors which were considered as having a bearing on the determination of the question. Those factors are:

(1) Whether the land was classified in the revenue records as agricultural and whether it was subject to the payment of land revenue?

(2) Whether the land was actually or ordinarily used for agricultural purposes at or about the relevant time?

(3) Whether such user of land was for a long period or whether it was of temporary character or by way of a stop-gap arrangement?

(4) *Whether the income derived from the agricultural operations carried on in the land bore any rational proportion to the investment made in purchasing the land?*

(5) *Whether the permission under s. 65 of the Bombay Land Revenue Code was obtained for the non-agricultural use of the land? If so, when and by whom (the vendor or vendee)? Whether such permission was in respect of the whole or a portion of land? If the permission was in respect of a portion of the land and if it was obtained in the past, what was the nature of the user of the said portion of the land on the material date?*

(6) *Whether the land, on the relevant date, had ceased to be put to agricultural use? If so, whether it was put to an alternative use? Whether such user and/or alternative user was of a permanent or temporary nature?*

(7) *Whether the land, though entered in revenue records, had never been there were actually used for agriculture, that is, it had never been ploughed or tilled? Whether the owner meant or intended to use it for agricultural purposes?*

(8) *Whether the land was situate in a developed area? Whether its physical characteristics, surrounding situation and use of lands in the adjoining area were such as would indicate that the land was agricultural?*

(9) *Whether the land itself was developed by plotting and providing roads and other facilities?*

(10) *Whether there were any previous sales of portions of land for non-agricultural use?*

(11) *Whether permission under s. 63 of the Bombay Tenancy and Agricultural Lands Act, 1948, was obtained because the sale or intended sale was in favour of a non-agriculturist? If so, whether the sale or intended sale to such non-agriculturists was for non-agricultural or agriculture user?*

(12) *Whether the land was sold on yardage or on acreage basis?*

(13) *Whether an agriculturist would purchase the land for agricultural purposes at the price at which the land was sold and whether the owner would have ever sold the land valuing*

it as a property yielding agricultural produce on the basis of its yield?

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

The Tribunal, in the case before the Hon'ble Madras High Court, had held that the assessee, in the above cited case, could not satisfy any of the conditions except condition Nos. 1, 5, 11 and 12 and accordingly held that the assessee could not prove that the lands were actually or ordinarily used for agricultural purposes. This view of the Tribunal was not acceptable to the Hon'ble Madras High Court. The relevant observations made by the High Court in this regard are extracted below:-

"13.....This reasoning does not appear to be correct in view of the above said decision of the Gujarat High Court, wherein it was clearly held in clause (1) in paragraph 11 that whether the land was classified in the revenue records as agricultural and whether it was subject to the payment of land revenue has to be considered for grant of exemption.

14. Thus it is evident from the above, which clearly states that any one of the above factors can be present in a case to qualify for the benefit of classification as agricultural lands. In this case, the assessee has qualified under clause 11(1) since as per the adangal records, these lands were classified as agricultural lands and the assessee has also paid revenue kist, namely, revenue payment. Therefore, the Tribunal has misconstrued the judgment of the Gujarat High Court (supra) that all conditions laid down in paragraph 11 should be satisfied, which is not a correct interpretation."

The Hon'ble Madras High Court further rejected the contentions of the assessee that the adjacent lands are put to commercial use by way of plots. The following observations made by the High Court are relevant here:-

"17. Yet other reason given by the Tribunal is that the adjacent lands are put to commercial use by way of plots and therefore, the

very character of the lands of the assessee is doubted as agricultural in nature. The manner in which the adjacent lands are used by the owner therein is not a ground for the Tribunal to come to a conclusion that the assessee's lands are not agricultural in nature. The reason given by the Tribunal that the adjacent lands have been divided into plots for sale would not mean that the lands sold by the assessee were for the purpose of development of plots. Also the reasoning given by the Tribunal "No agriculturists would have purchased the land sold by the assessee for pursuing any agricultural activity" is based on mere conjectures and surmises.

18. The plea of the learned standing counsel appearing for the Revenue that there was no agricultural operations prior to the date of sale is of no avail as the definition under section 2(14) of the Income tax Act has the answer to such a plea raised. Furthermore, it is also on record that the lands are agricultural lands classified as dry lands, for which kists has been paid.

19. The view of the assessee is fortified by the decision reported in (1937) 32 ITR 466 (Commissioner of Income tax V Raja Benoy Kumar Sahas Roy) wherein, it is held as follows:

"There was authority for the proposition that the expression "agricultural land" mentioned in Entry 21 of List II of the Seventh Schedule to the Government of India Act, 1935, should be interpreted in its wider significance as including lands which are used or are capable of being used for raising any valuable plants or trees or for any other purpose of husbandry (See Sarojinidevi V. Shri Krishna Anjaneya Subrahmanyam and other (1) and Megh Raj V. Alla Rakhia (2))."

Accordingly, the Hon'ble Madras High Court reversed the decision of the Tribunal and restored the order of Ld CIT(A)

17. We shall now apply the principles discussed by the Hon'ble Madras High Court in the case of Mrs. Sakunthala Vedhachalam and Mrs. Vanitha Manickavasagam (supra) to the facts prevailing in the instant case. We shall first examine the various criteria laid down by the Hon'ble Gujarat High Court to the facts of the instant case.

- (a) The land has been classified as agricultural land in revenue records.
- (b) The assessee has declared agricultural income, meaning thereby, he has used the lands for agricultural purposes.
- (c) The assessee has held the land for more than four years, meaning thereby it was not a stop-gap arrangement.
- (d) The agricultural income disclosed by the assessee for the year under consideration was Rs.4,60,000/- and the cost of investment in purchase of lands was Rs.1.36 crores. The correctness or otherwise of this income was not ascertainable.
- (e) The assessee has submitted that he has sold the lands as agricultural lands only and no permission was obtained for non-agricultural use of the land.
- (f) There is no finding of tax authorities that the land has been ceased to be put to agricultural use.
- (g) There is no finding of tax authorities that the land has never been actually used for agriculture.
- (h) According to the AO, the lands were located in fast developing area, where industries are coming up. However, according to Hon'ble Madras High Court, the manner of usage of adjacent lands was not a ground to come to the conclusion that the assessee's lands are not agricultural in nature.
- (i) The lands have not been developed by plotting and providing road and other facilities.
- (j) There was no instance of sale of portion of impugned lands for non-agricultural use.
- (k) No permission was obtained for non-agricultural use before sale.
- (l) The lands have not been sold on yardage basis, but have been sold on cents/acreage basis.

(m) The question as to whether an agriculturist would purchase the land for agricultural purposes at the prices at which the land was sold, was not ascertainable.

Thus, we notice that the lands sold by the assessee satisfy most of the criteria prescribed by the Hon'ble Gujarat High Court. We have also noticed that the Hon'ble Madras High Court has held that it was not necessary that the land should satisfy all the criteria PRESCRIBED BY THE Hon'ble Gujarat High Court. Hence, we have no hesitation in holding that the impugned lands should be accepted as 'agricultural lands' only.

18. The reasons given by the AO for rejecting the claim of agricultural land were discussed by us in an earlier paragraph. We shall now examine them with the principles laid down by the Hon'ble Courts along with the submissions made by the assessee in that regard.

(a) The lands have been acquired through power of attorney or sale agreement and were not registered in the name of the assessee.

Submission of the assessee:- Power of attorney is coupled with interest makes the assessee is owner u/s 2(47) of the Act. Further there is no dispute with regard to the ownership and enjoyment of property. Sec. 2(47) of the Income tax Act provides for taxation of Power of attorney transactions. Right to exploit is a Capital asset as held by Hon'ble Madras High Court in the case of A.R.Krishnamurthy and A.R. Rajagopalan Vs. CIT (133 ITR 922).

(b) The assessee is a property developer and is engaged in purchase of land. Hence the purchase and sale of land is his regular business activity.

Submission of the assessee:- The assessee is entitled to maintain two different portfolios, one for "Stock in Trade" and another one for "Investment" as per the decisions of various High Courts. The intention of the assessee was to hold these agricultural lands as Investment only.

(c) The assessee did not carry on any agricultural activity.

Submission of the assessee:- The assessee has declared agricultural income in the returns of income filed by him. Further, the assessee

has also filed certificates obtained from Village administrative officer to prove the fact of use as agricultural lands.

(d) Some of the lands sold by the assessee have been categorized as "residential land" by the Sub-registrar Office. However, in respect of remaining lands, the details of which were filed by the assessee, they have been categorized as wet land – single crop.

Submission of the assessee:- The classification is made in the Sub-registrar officer for the purpose of collection of Stamp duty and hence such classification would not determine the character of land. The fact remains that the assessee has cultivated the lands and has declared agricultural income, which is also supported by the certificate of the Village Administrative Officer.

(e) The lands have been sold in small plots, which points out that the land has been purchased by the intending purchaser for investment or construction and not for carrying on agricultural activity.

Submission of the assessee:- This is against the facts. The assessee did not develop these lands by forming roads etc., but has sold as agricultural lands only in cents and acres and not in 'square feet', which is the normal case in case of housing plots. Lands have been sold in continuous stretches without creating any road for access.

(f) The lands have been sold at around 1.75 lacs to 2 lacs per cent and normally agricultural lands do not fetch such a high price.

Submission of the assessee:- Future potential is not relevant and the Character of land as on the date of sale is more relevant as held by the Hyderabad bench of ITAT in the case of DCIT Vs. M. Kalyan Chakravarthy (ITA No.729/Hyd/2013 dated 24.10.2014) and the Third member decision of Jodhpur in Supriya Kanwar Vs. ITO (ITA No.362/JU/2010 dated 13.5.2014). In the case of M. Kalyan Chakravarthy (supra), the Hyderabad bench has followed the decision rendered by the Hon'ble Madras High Court rendered in the case of M.S. Srinivasa Naicker and Others Vs. ITO (292 ITR 481).

(g) The lands are situated in a fast developing area where industries are coming up.

Submission of the assessee:- In the case of Mrs. Sakunthala Vedachalam and Mrs. Vanitha Manickavasagam (supra), the Hon'ble jurisdictional High Court has held that the manner in which the

adjacent lands are used by the owner therein is not a ground to come to a conclusion that the assessee's lands are not agricultural lands.

(h) The Hon'ble Supreme Court has held in the case of CIT Vs. Sutlej Cotton Mills Supply Agency Ltd (100 ITR 706) has held that if a transaction is in the assessee's ordinary line of business, there can be no difficulty in holding that it is in the nature of trade.

Submission of the assessee:- The principle that the assessee can hold assets either as "Stock in trade" or as "Investment" is now recognized.

19. On a combined consideration of the reasons given by the assessing officer and the submissions made by the assessee, we are of the view that there is merit in the submissions of the assessee, in view of the principles discussed in various decisions rendered by the Hon'ble High Courts, which we have discussed in detailed manner in the earlier paragraphs. Further, we notice that the Id CIT(A) has upheld the view of the assessing officer without examining the facts prevailing in this case. Hence, we are unable to sustain his order. The Ld A.R also contended that the gain arising on sale of agricultural lands, which are situated outside the prescribed local limits should be considered as Agricultural income exempt u/s 10(1) of the Act and in support of this contention, the Ld A.R also placed reliance on few case laws. However, we do not find it necessary to examine this contention, in view of our decision discussed above. Accordingly, we set aside the order of Ld CIT(A) on this issue and direct the AO to delete assessment of gain arising on sale of agricultural land.

20. Now we shall take up the appeal filed by the Revenue. We have already noticed that the AO has disallowed the claim of development expenditure to the tune of Rs.12.09 crores. The assessee had claimed the development expenses of Rs.26.56 crores in his business venture of land development and sale. Before the AO, the assessee did not furnish the evidences in support of the claim of development expenses. The AO

noticed that the assessing officer had disallowed part of development expenses claimed in the case of assessee's sister concern named M/s Jubilee Plot and Housing Pvt Ltd. The expenses allowed in the above said sister concern worked out to 43.06% of the gross sale receipts. Accordingly, the AO restricted the development expenses to 43.06% of the Gross sale receipts and disallowed the balance amount.

21. However, the Id. CIT(A) noticed that the identical disallowance made in the assessee's sister concern M/s Jubilee Plot and Housing Pvt. Ltd has been deleted by him and accordingly he deleted the addition made in the assessee's case also. Aggrieved, the revenue has filed appeal challenging the decision of Ld CIT(A) on this issue.

22. The Id. DR submitted that the assessee in the present case did not furnish evidences to substantiate the claim of development expenses. However, in the case of M/s Jubilee Plot and Housing Pvt. Ltd., the assessee therein had furnished evidences before the AO and addition was made on the ground that there were self made vouchers. Accordingly, the Id. DR submitted that there is no parity of facts between the assessee's case and that of M/s Jubilee Plot and Housing Pvt. Ltd. and hence the assessee could not draw support from the said decision.

23. The Id. counsel for the assessee submitted that the assessing officer has made the impugned addition by following the assessment order passed in the case of M/s Jubilee Plot and Housing Pvt. Ltd. The addition so made in the hands of above said assessee has been deleted by the Ld CIT(A) and his order has since been approved by the Tribunal vide its order dated 21.6.2013 passed in ITA No.1097/Mds/2011 and ITA No.1315/Mds/2011 relating to assessment years 2007-08 and 2008-09 respectively. Accordingly, the Id. AR submitted that there was no basis or material with the AO to make the impugned disallowance and accordingly prayed that the order of Id. CIT(A) on this issue should be upheld.

24. We have heard the rival contentions on this issue and perused the record. The fact remains that the assessee has developed the land, i.e., he has laid roads, divided the land into various plots after leveling etc. It is in the common knowledge of everybody that the assessee should have incurred huge expenditure, without which he could not have sold the plots. We further notice that the AO has followed the method adopted in the case of M/s Jubilee Plot and Housing Pvt. Ltd. for computing the disallowance i.e. the AO allowed only 43.06 % of the total receipts as development expenses, meaning thereby the assessing officer has accepted the expenditure claim to the tune of about 57% only. There should not be any dispute that the quantum of development expenses would vary from place to place and the same would depend upon various factors, like characteristics of the land i.e., whether they are plain or not, its depth from the road level, extent of the land, size and pattern of land, its location, number of plots to be carved out, width and length of the roads etc. Accordingly, we are of the view that the AO was not right in following the assessment order in the case of M/s Jubilee Plot and Housing Pvt Ltd, without bringing any material on record to show that there was parity of facts between the assessee's land and the land developed by M/s Jubilee Plot and Housing Pvt. Ltd. Further as contended by Ld A.R, the assessing officer did not bring any other material to support his view. Hence, we are not able to approve the method adopted by the AO for working out the disallowance.

25. At the same time, the Id. DR has pointed out that M/s Jubilee Plot and Housing Pvt. Ltd. has furnished vouchers before the AO, whereas in the instant case, the assessee has failed to produce vouchers before the AO.

26. Under these set of facts, we are of the view that the Id CIT(A) was not correct in deleting the entire amount of disallowance by simply

following the decision in the case of M/s Jubilee Plot and Housing Pvt. Ltd. Since there is failure on the part of the assessee also, we are of the view some disallowance is called for in order to cover up the deficiencies, if any and also to put this issue at rest. Accordingly, we are of the view this issue would meet the ends of justice, if the disallowance is restricted to a lump sum of Rs.50.00 lakhs in order to cover up the deficiencies, if any. We order accordingly.

27. In the result, the appeal filed by the assessee is allowed and the appeal of the revenue is partly allowed.

The above order was pronounced in the open court on Mar, 2015.

घोषणा खुले न्यायालय में दिनांक: 11th March, 2015 को की गई।

sd/-

(विकास अवस्थी)

(VikasAwasthy)

न्यायिक सदस्य/Judicial Member
चेन्नई/Chennai,

दिनांक/Dated, 11th March, 2015.

SRL:

sd/-

(बी.आर. बास्करन)

(B.R. Baskaran)

लेखा सदस्य/Accountant Member

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)-V, Chennai-34
4. आयकर आयुक्त/CIT, Chennai-III, Chennai-34
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF.