

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCH ' A '**

**BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER AND
SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER**

I.T. A. No.708/Bang/2011
(Assessment Year : 2007-08)

Dy. Commissioner of Income Tax,
Circle 5(1), Bangalore.

.... Appellant.

Vs.

Shri B. Sudhakar Pai,
No.C-4, 1st Floor, Unity Buildings,
J.C. Road, Bangalore-560 002.
PAN AEGPP 8284 B

..... Respondent.

Appellant By : Dr.P.K. Srihari, Addl. CIT (D.R.)
Respondent By : Shri S. Venkatesan, C.A.

Date of Hearing : 17.05.2016.

Date of Pronouncement : 30.6.2016.

O R D E R

Per Shri Vijay Pal Rao, J.M. :

This appeal by the revenue is directed against the order dated 22/2/2011 of CIT(appeals) for the assessment year 2007-08. The revenue has raised the following grounds:

"1. The order of the CIT (Appeals) is contrary to the facts of the case.

2. *The CIT (Appeals) has erred in holding the lands sold as agricultural lands when the lands have been sold as industrially converted land.*
3. *The CIT (Appeals) erred on relying on the decision of the Madras High Court is the same is distinguishable from the present case.*
4. *For these and such other grounds that may be urged at the time of hearing of the appeal, the order of the learned CIT (Appeals) may be set aside and that the order of the Assessing Officer may be restored.”*

2. The brief facts leading to the controversy are that the assessee has been buying and selling immovable properties. The assessee claimed the gain on sale of agricultural lands exempt from tax as per the provisions of section 2(14) of the income tax act. During the course of assessment proceedings the AO examined the said issue and found that the properties have been converted from agricultural land to non-agricultural lands for a non-agricultural use prior to the sale by the assessee. Thus, the AO noted that as on the date of sale, the properties were capital asset as per the definition under section 2(14) of the income tax act. The AO was of the view that the sale proceeds and gain thereon are required to be treated under the head capital gain. Accordingly, the AO brought to tax the long term capital gain and short term capital gain arising from the sale transaction of the lands in question. The assessee challenged the action of the AO before the CIT (appeals) and contended

that though the land were converted from agricultural to non-agricultural (industrial) purpose, the lands have not been utilised for industrial purpose till the date of sale and continuous to be in agriculture use. In support of his contention, the assessee submitted a letter issued by the Secretary, T-Begur Village Panchayat, Nelamengala Taluk dated 2/12/2009 to the effect that the lands in question was situated about 12 km away from Nelamengala nearest town having population of more than 10,000. The assessee also furnished revenue record to show that the land in question were used for agricultural purposes till the date of sale. The CIT(appeals) accepted the contention and claim of the assessee on the ground that at the time of sale lands in question is continued to be agricultural land as evidenced by the revenue record. Accordingly, the CIT(appeals) has held that the AO was not justified in treating the lands in question as capital asset and gain arising on sale as capital gain and the addition made by the AO was deleted.

3. Before us the learned DR has submitted that the assessee is in the activity of purchase and sale of immovable properties including agricultural lands. The assessee got converted the land from agricultural

to non-agricultural industrial purpose vide office memorandum dated 29/04/2005. Thus, undisputedly prior to sale of the land in question the assessee converted the land from agriculture for non-agriculture use and therefore, on the date of sale the lands in question were non-agricultural lands. The Learned DR has contended that the intention of the assessee was clear to convert the land from agricultural to non-agricultural purpose that it is only for re-sale of the land in question. It was converted to non-agricultural industrial purpose. The Learned departmental representative has submitted that the conversion of land from agriculture to non-agriculture industrial purpose was done as per the specific condition of the agreement dated 1/04/2005 and therefore, the conversion of the land from agricultural to non-agriculture was with the intention to sell the land for non-agricultural use. He has relied upon the order of the assessing officer.

4. On the other hand, the Learned AR of the assessee has submitted that though the lands were converted from agriculture to non-agriculture however, the same continued to be agricultural lands as the assessee was using the same for agriculture purpose. The assessing officer has

accepted the agriculture income offered by the assessee from agricultural operations therefore, the AO accepted the lands in question as agricultural land for the purpose of assessing the income offered by the assessing. Since the lands were continued to be agricultural land on the date of transfer/sale, it will not lose its character of agriculture land merely because the lands were converted into non-agricultural use. The purpose for which the purchaser has purchased the lands is irrelevant when the assessee intended to use the land and actually used the lands in question for agriculture purpose till the date of sale, then it will remain agricultural land for the purpose of the meaning of capital assets as per the provisions of section 2(14) of the income tax act. In support of his contention he has relied upon the following decisions:

- i. M.S. Srinivasa Naicker & Others Vs. ITO 292 ITR 481 (Mad).
- ii. Hindustan Industrial Resources Ltd Vs. ACIT 180 taxman 114 (Delhi)
- iii. Order dated 28/11/2006 in case of H S Vijay Kumar Vs. CIT in ITA No.108/Bangalore/2005.
- iv. Order dt.13/06/2040 in case of Sri M.R. Seetharam Vs. ACIT in ITA No.1654/Bang/2012 and C.O. No.43/Bang/2014.
- v. Order dt.12/11/2013 in case of Shri Alampalli Sathyanarayana Vs. ITO in ITA No. 21/Bang/2013.

5. We have considered the rival submissions as well as relevant material on record. There is no dispute that the assessee is engaged in the activity of purchase and sale of immovable properties including agricultural lands. Even otherwise the assessee is a chartered accountant by profession and therefore, is not an agriculturist. During the year under consideration, the assessee sold various agricultural lands after conversion from agriculture to non-agricultural industrial use. The details of the sales of properties, date of conversion are given by the CIT(appeals) at page 4 of the impugned order as under:

Date of Sale	Extent of land		Date of Conversion	Date of purchase
18.07.2006 (Mr. Sunil Pai)	Survey No.	Acre	Malonagathihally	13.5.2005
	7	0.30	10.07.2006	
	80/1	0.25		
	80/2	0.23		
	80/3	1.12		
	80/4	1.34		
	80/5	0.29		
	85/2	1.40		
	120/3	0.20		
	120/4	0.20		
	81 11P-10	1.00		
	81 11P-13	1.00		
	Rs. 80,00,000 Sale Consideration			
3.2.2006	7	1.10	Byranahalli	16.07.1999

(Mr. Ashok Pai)			28.4.2005 29.04.2008	03.07.1999 03.07.1999
	84	2.40		
	Re-Sy.No.84	1.14		
	(Rs.35,80,000) Sale consideration			
Date of Sale	Extent of land	Acre Guntas	Date of Conversion	Date of purchase.
24.07.2007	Survey No. 81/P 16 (Old 81)	1.00	Byranahalli	12.09.2006
(Mr. Sunil Pai)	(Rs.4,50,000)			
	Sale consideration			
18.07.2006	85/2	0.22		
	Rs.4,40,000/- Sale consideration.		Byranahalli 10.07.2006	09.09.1999

It is clear from the details reproduced above that the first lot of lands was purchased by the assessee on 13/05/2005 and thereafter converted from agriculture to non-agriculture industrial use on 10/07/2006, and immediately thereafter sold on 18/07/2006. The intention and purpose of purchase of the lands on 13/05/2005 is clear from its period of holding which is about one year and further the lands were converted from agriculture to non-agricultural industrial use just 8 days prior to the sale.

Even otherwise, when the assessee is engaged in the purchase and sale of the agricultural lands then the intention and purpose of purchase of the agricultural land by the assessee never be for carrying out the agricultural operations but it was only for resale of the same. While completing the assessment under section 143(3) the AO had made the following additions:

(i) Long term capital gain of Rs. 36, 70, 000/-

(ii) Short term capital gain of Rs. 64, 67, 011/-

The above addition clearly shows that the short term capital was almost double the amount of long term capital gain and therefore, the holding period of the lands was less than 3 years in majority of the cases. We further note that the lands in question were sold in terms of the agreement of sale dated 1/04/2005. There was a condition under clause 3 of the agreement that the buyer would buy the property only if the Seller would convert the property into non-agricultural i.e. industrial. For ready reference we reproduce clause 3 of the agreement as under:

“3. The Buyer insisted to buy the property only if the seller get the property converted into non-agriculture i.e. industrial. In case the seller converts the entire agricultural land into industrial land within 24 months from the date of execution of this agreement, the buyer shall pay the

entire sale consideration as agreed about. However, if any of the part of agricultural land left without conversion on the date of sale deed, the sale of such agricultural land shall be sold as agricultural land only. The sale of agricultural land shall be with a prior condition that the non-converted portion also will get the converted as industrial by the seller within a period of six months from the date of execution of sale deed.”

There is no denial of the fact that the lands in question were got converted from agriculture to non-agricultural industrial use to satisfy the condition of the agreement for sale and therefore, the very intention of conversion was to sell the properties for non-agricultural use. The term capital asset has been define under section 2(14) of the income tax act however, agricultural land has been excluded from the meaning of capital asset provided under section 2(14) of the Act. The term “agricultural land” is not defined under the income tax act and therefore, in order to ascertain whether the land in question can be considered as agricultural land for the purpose of section 2(14) of the act the criteria laid down by the judicial precedents of Hon’ble High Courts and Supreme Court are to be taken into account. The meaning of the expression “agricultural land” was considered first time by the Hon'ble Supreme Court in case of CIT versus Raja Binoy Kumar Sahas Roy Kumar Sahas Roy 32 ITR 466. The constitution bench of Hon’ble Supreme Court has

considered the meaning of the expression “agricultural land” which was again considered by the Hon’ble Supreme Court in case of **Smt.**

Sarifabibi Mohmed Ibrahim Vs. CIT 204 ITR 631 as under :

“On an appeal, a Constitution Bench of this Court held that:

*Inasmuch as agricultural land is exempted from the purview of the definition of the expression “assets”, it is “impossible to adopt so wide a test as would obviously defeat the purpose of the exemption given”. The idea behind exempting the agricultural land is to encourage cultivation of land and the agricultural operations. “ In other words this exemption had to be necessarily given a more restricted meaning than the very wide ambit given to it by the Full Bench of the Andhra Pradesh High Court”. (b) What is really required to be shown is the connection with an agricultural purpose and user and not the mere possibility of user of land, by some possible future owner or possessor, for an agricultural purpose, It is not the mere potentiality, but its actual condition and intended user, which have to be seen for purposes of exemption. (emphasis * added). (c) “The person claiming an exemption of any property of his from the scope of his assets must satisfy the conditions of the exemption.” (d) “ The determination of the character of land, according to the purpose for which it is meant or set apart and can be used, is a matter which ought to be determined on the facts of each particular case.” (e) The fact the land is assessed to land revenue as agricultural land under the State revenue law is certainly a relevant fact but it is not conclusive.”*

In the said case the Hon’ble Supreme Court has held that land is assessed to land revenue as an agricultural land, is not a conclusive fact and the question is to be decided by considering various factors including

whether the land is used for cultivation and agricultural operations. The actual use and the intended use of land has to be seen for the purpose of exemption. The Hon'ble Supreme Court has also considered the decision of Hon'ble Bombay High Court in case of CIT versus V.A Trivedi 172 ITR 95 at page no. 6 41 in case of **Smt. Sarifabibi Mohmed Ibrahim** (supra)as under:

“ The Bench observed that to ascertain the true character and the nature of the land, it must be seen whether it has been put to use for agricultural purposes for a reasonable span of time prior to the relevant date and further whether on the relevant date the land was intended to be put to use for agricultural purposes for a reasonable span of time in the future. Examining the facts of the case from the said point of view, the Bench held that the agreement entered into by the assessee with the housing society is the crucial circumstance, since it showed that the assessee agreed to sell the land to a housing society admittedly for utilization for non-agricultural purposes. The sale deeds were executed four months after the agreement of sale and even if any agricultural operations were carried on within the said span of four months-the Bench held –it was evidently in the nature of a stop-gap arrangement. On the date the land was sold, the Bench held, the land was no longer agricultural land which is evident from the fact that the assessee had obtained permission even in August, 1966, to convert the said land to non-agricultural purposes.”

6. The criteria laid down by the Hon'ble Bombay High Court in case of V. A Trivedi (supra) for ascertaining the true character and the nature of the land is that whether it has been put to use for agriculture purposes

for a reasonable span of time prior to relevant date and the further, the land was intended to put to use for agriculture purpose for a reasonable span of time in future. In the said case before Hon'ble High Court the assessee agreed to sell the land to Housing Society and the Hon'ble High Court has observed that the sale was for utilisation of the land for non-agricultural purposes and accordingly held that the land was no longer agricultural land, when the assessee had obtained permission to convert the said land to non-agriculture land prior to sale. After considering the various criteria and principles as laid down in the earlier decisions, the Hon'ble Supreme Court in case of **Smt. Sarifabibi Mohmed Ibrahim** held as under:

“ Now, we may consider the various circumstances appearing for and against the appellant's case. The facts in their favour are: the land being registered as agricultural land in the revenue records; payment of land revenue in respect thereof till the year 1968-69; absence of any evidence that it was put to any non-agricultural use by the appellants; that the land was actually cultivated till and including the agricultural year 1964-65; that there were agricultural lands abutting the said land and that the appellants had no other source of income except the income from the said land. As against the above facts, the facts appearing against their case are: the land was situated within the municipal limits-it was situated at a distance of one kilometer from the Surat railway station; the land was not being cultivated from the year 1965-66, until it was sold in 1969; the appellants had entered into an agreement with a housing co-operative society to sell the said land for avowed non-agricultural

purposes, namely, construction of house; they had applied in June, 1968, and March, 1968, for permission to sell the said land for non-agricultural purposes under section 63 of the Bombay Tenancy and Agricultural Lands Act and obtained the same on April 22, 1969; soon after obtaining the said permission they executed sale deeds in the following month, i.e., in May, 1969; the land was sold at the rate of Rs. 23 per Sq. yard and the purchaser-society commenced construction operations within three days of the purchase. What is the inference that flows from a cumulative consideration of all the aforesaid contending facts? This question has to be answered keeping in mind the criteria evolved in the Begumpet Palace case (1976) 105 ITR 133 (SC) set out herein before. In our opinion, the entering into the agreement to sell the land for housing purposes, the applying and obtaining the permission to sell the land for non-agricultural purposes under section 63 of the Bombay Tenancy and Agricultural Lands Act and its sale soon thereafter and the fact that the land was not cultivated for a period of four years prior to its sale coupled with its location, and the price at which it was sold, do outweigh the circumstances appearing in favour of the appellants' case. The aforesaid facts do establish that the land was not an agricultural land when it was sold. The appellants had no intention to bring it under cultivation at any time after 1965-66-certainly not after they entered into the agreement to sell the same to a housing co-operative society. Though formal permission under section 65 of the Land Revenue Code was not obtained by the appellants, yet their intention is clear from the fact of their application for permission to sell it for a non-agricultural purpose under section 63 of the Bombay Tenancy and Agricultural Lands Act.

We are, therefore, of the opinion that the High Court was right in holding that the said land was not an agricultural land at the time of its sale and that the income arising from its sale was not exempt from capital gains tax. The appeals accordingly fail and are dismissed No costs."

7. The Hon'ble Supreme Court, while holding that the land was not an agricultural land, taken note of the fact that the assessee entered into an

agreement to sell the land for housing purposes by applying and obtaining the permission to sell the land for non-agricultural purpose and its sale soon after.

8. In a subsequent decision in the case of Gopal C. Sharma Vs. CIT 209 ITR 946 the Hon'ble Bombay High Court has again considered this aspect of agricultural land and has observed at pages 956-957 as under:

“ The expression “ agricultural land” is not defined under the Income Tax Act, 1961. The question as to whether the land in question was liable to be considered as agricultural land for purposes of income-tax is liable to be decided with reference to the criteria laid down by judicial decisions of the Supreme Court and High Courts. The underlying object of the Act to exempt “ agricultural income” from income-tax is to encourage actual cultivation or de facto agricultural operations. Actual user of the land for agricultural purposes or absence thereof at the relevant time is undoubtedly one of the crucial tests for the determination of the issue. It is well settled that the nature and character of the land may undergo a change depending upon its situation, growth of the locality or zone in which it is situated and its potentiality. According to recent decisions of the Supreme Court, the fact that the land is sold or transferred to a non-agriculturist for a non-agricultural purposes or that it is likely to be used for non-agricultural purposes in the remote past or it continues to be assessed to land revenue on the footing of agricultural land is not decisive.”

The Hon'ble High Court has decided the issue of agricultural land at pages 963 and 964 as under :

“ In our opinion, the principles laid down by the Supreme Court in the case of Smt. Sarifabibi Mohamed Ibrahim V. CIT (1993) 204 ITR 631 and

by this court in Trivedi's case (1988) 172 ITR 95 do emphasize the factor of non-user of the land for cultivation for a reasonable span of time prior to the date of transfer as a crucial factor for determination of the issue. Applying the ratio of the Supreme Court judgment in Sarifabibi's Case (1993) 204 ITR 631 to the facts of the case, we hold that the reference lands could not be considered as "agricultural lands" on the date of transfer.

The Appellant Assistant Commissioner and the Tribunal were more than justified in highlighting the fact that the reference lands were situate in a heavy industrial zone and that the said lands were not in fact used or intended to be used for agricultural purposes at the relevant time since several years. The Appellate Assistant Commissioner also recorded a finding of fact based on relevant evidence that at least 10 acres of the land out of 25 acres was in fact used for non-agricultural purposes by Larsen and Toubro Limited since the year 1960, i.e., for seven years prior to the date of transfer of the land. If the relevant tests laid down by the Supreme Court in Sarifabibi's case (1988) 172 ITR 95 are to be applied to this case as they ought to be, it would become obvious that the finding of fact arrived at by the Income-tax Officer, the Appellate Assistant Commissioner and the Tribunal cannot be characterized as perverse or unsupported by evidence or erroneous in law. It is not possible to accept the submission made by learned counsel for the assessee that the authorities below did not apply the correct test or misdirected themselves in law or that the finding of fact arrived by the Tribunal was not supported by evidence.

In view of the above discussion we do not think it necessary to refer to the other authorities cited at the Bar. We uphold the finding of the Income-tax Appellate Tribunal to the effect that the reference lands were not agricultural lands."

Thus, it is settled proposition of law that merely showing the land as agriculture in the land record and the use for agriculture purpose in remote past are not the decisive factors but the future use of the land for

non-agricultural purpose would change the character of the land from agriculture to non-agricultural at the time of sale. The scheme and object of exempting agricultural land from the definition of capital asset is to encourage cultivation of land and agricultural operations. Therefore, for the purpose of granting exemption, a restricted meaning has to be given to the expression "agricultural land" as contemplated under section 2(14) (iiib) of the act. In the case in hand, the purchase and sale of land within a short span of period is not in dispute and further, the assessee got converted the land in question from agriculture to non-agricultural industrial purpose with the sole purpose and intent to sell the land for industrial purpose. When the land was already converted from agriculture to non-agricultural industrial use then merely it was wrongly shown in the revenue record as agricultural land would not change the actual fact of conversion from agriculture to non-agriculture purpose. Since the assessee has claimed to have some ancestral agricultural land which is not subject matter of the dispute in this case therefore, offering agriculture income and acceptance of the same wouldn't not change the character of the land in question at the time of sale. Considering the fact

that the land in question were held by the assessee for a very short period of time and the intended future use is undisputedly for non-agriculture industrial purpose as the land was sold to the purchaser with the condition for non-agricultural use clearly established that the assessee did not intend to use the land in question for agriculture purpose in the past as well as in future. Applying the test as laid down by the various judgements of Hon'ble Supreme Court as well as Hon'ble High Court as discussed above we have no hesitation to hold that the land in question does not fall under the exclusion clause (iii) of section 2(14) of the income tax act. As regards the decisions relied upon by the Learned AR of the assessee in our view the same are not applicable in the peculiar facts of the case on hand as well as in view of the Judgements of Hon'ble Supreme Court as discussed above. Accordingly, we set aside the impugned order of the CIT (A) and restore the order of the A.O.

In the result, the appeal of the revenue is allowed.
Order pronounced in the open court on the 30th day of June, 2016.

Sd/-
(INTURI RAMA RAO)
Accountant Member

Sd/-
(VIJAY PAL RAO)
Judicial Member

*Reddy gp

Copy to :

1. Appellant
2. Respondent
3. C.I.T.
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard File.

By Order

Asst. Registrar, ITAT, Bangalore