IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES **" C "** BENCH: BANGALORE

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER

ITA No.3295/Bang/2018
(Assessment Year: 2007-08)

Smt. G Vijay Padma,
No.206, 1st Floor, 10th D Main, 5th Cross,
1st Block, Jayanagar, Bengaluru-560 011
PAN ABCPV 8123E ….Appellant

Vs.

Income Tax Officer,
Ward 7(2)(1), Bengaluru. ……Respondent.

Assessee By:	Shri P. R. Mathad, C.A.
Revenue By:	Smt. R. Premi, JCIT (D.R)

Date of Hearing :	01.09.2020.
Date of Pronouncement :	11.09.2020.

O R D E R

PER SHRI CHANDRA POOJARI, A.M. :

This appeal by the assessee is directed against the order of Commissioner of Income Tax (Appeals), Bangalore dt.01.08.2018.

2. The assessee has raised the following grounds :

1.	The Appellant denies herself liable to be assessed to long term capital gain of Rs. 2,44,44,782/-on the sale of agricultural property as the property sold by the applellant is not capital asset with in the meaning of section 2(14) of the Income Tax Act. 1961
2.	The learned Assessing Officer failed to follow the direction and finding of the Hon'ble Tribunal that as far as section 2(14)(iii)(b) is concerned, the Municipality or Cantonment Board refered to in item (a) had to be notified by cetral Government.
3	The learned assessing officer is not justified in law in disaalowing the commission paid to brokers to arrange the buyers of Rs
	7,50,000/- and Rs 29,75,000/- paid to protect the property.
4.	The learned Assessing Officer earned in calculating interest U/s 234A, 234B of the Income Tax Act.

3. The facts of the case are that the assessee filed her Return of Income on 12.10.2007 declaring income of Rs.2,69,996. A survey was conducted under Section 133A of the Act in the assessee's business premises and Notice under Section 148 of the Act dt.27.01.2009 was issued. In response to the Notice the assessee declared total income of Rs.1,93,89,780 including capital gains of Rs.1,91,19,782. During the period under consideration the assessee sold an immovable property for a consideration of Rs.2,50,05,000 and claimed expenses of Rs.29,75,000 being compensation paid to the tenants for vacating the land and an amount of Rs.7,50,000 being commission paid. The assessee claimed exemption

of Rs.16 lakhs under Section 54F of the Act. The assessment was completed under Section 143(3) r.w.s. 147 on 23.12.2009 disallowing the claim of expenditure for vacating the tenants and also commission paid. During the first round of dispute, the Tribunal passed an order and observed that the applicability of clauses (a) and (b) of Section 2(14)(iii) has not appreciated properly by the CIT (Appeals) and set aside the order of CIT (Appeals) and referred the matter to Assessing Officer for fresh consideration. The Assessing Officer passed order under Section 143(3) r.w.s. 254 on 27.2.2015 in which he disallowed the claim of the assessee that the land was an agriculture land. He also disallowed the claim of payment of compensation amounting to Rs.29,75,000 and commission of Rs.7,50,000/-. The A.O. also disallowed the claim made under Section 54F of the Act of Rs.16 lakhs for want of evidences. The assessee filed an appeal with the CIT (Appeals) who concurred with the view taken by the Assessing Officer on the issues and dismissed the assessee's appeal. The assessee is once againg in appeal before us.

5. The learned Authorised Representative submitted that appellant owns agricultural land at Sy. No. 54/2, Akkupete Village, Kasaba Hobli, Devanalli Taluk. The appellant used this land for agricultural purpose and declared agricultural income regularly while filing her income tax return and for the assessment year 2007-08 appellant declared agricultural income of Rs. 50,000/-

(Enclosure Page No.3). During the assessment year 2007-08 the appellant sold this agricultural land. According to Ld. AR the impugned land is an agricultural land as per the provisions of section 2(14)(iii) of the Income Tax Act 1961. He drew our attention to section 2(14)(iii) (a) of the Act and submitted that as per this provision agricultural means that land in India not being land situate:

> *"in any area which is comprised within the jurisdiction of a municipality (whether known as a municipality , municipal corporation, notified area committee, town area committee, town committee or any other name) or a cantonment board and which has a population of not less than ten thousand according to the last preceding census of which the relevant figures have been published before the first day of the previous year"*

5. 1 He submitted that the population of Devanahalli is more than 10,000/ as per last censes and Devanahalli is a Municipality. However, he stated that the property if situated even just a inch away from the jurisdiction of municipality it should be treated as agricultural land. He drew our attention to the letter dated 30.08.2012 issued by the Devanahalli Municipality Offfice as per which the impugned property is situated 3 K.M. away from Devanahalli City. He also drew out attention to letter dated 25.08.2012 issued by the Public Works Ports & Inland Water Transport Department Devanahalli wherein stated that Sy. No. 54/2, 1 Acre 38 Guntas, Akkupete Village is 3 km away from Devanahalli City.

5.2 Further, he submitted that ld. Assessing Officer himself has obtained certificate from Public Works Ports & Inland Water Transport Department

Devanahalli vide letter No.AEE/PWD/D.HALLI/2008-091836 dated 26.10.2009 wherein mentioned that distance from Devanahalli town to Sy No 54/2 Akkupete village is 3 Km. According to him there is no dispute regarding this fact as the ld. assessing officer in the assessment order dated 27.02.2015 in page 6 para 6 stated that " It is unambiguous from the above that the land is situated only with in 3 Kms from Devanahalli Town and it is not more than 8 kms from the local limits of Devanahalli Municipality". Hence he submitted that as per section 2(14)((iii)(a) the above land is agricultural land and hence the sale of appellant land does not attract capital gain tax.

5.3 According to him, as per Section 2(14)(iii)(b), the land is an agricultural land in India, not being land situate in any area within such distance, not more than eight kilo meters, from the local limits of any municipality or cantonment board referred to in item (a), as the central government may, having regard to the extent of and scope for, urbanization of that area and other relevant considerations. specify in this behalf by notification in the official Gazette.

5.4 The ld. AR submitted that Devanahalli is a Municipality and it is not notified by the central government in official Gazette for capital gain tax purpose. The nearest notified city to the appellant land is Bengaluru. The appellant land is more than 20 km away from the city limits of Bengaluru. According to him the assessing

officer totally misconceived the meaning of the provisions of section 2(14)(iii)(a) & (b) of the Act as seen from his observation in page 5 para 4.r of assessment order wherein he stated that

> *" From the above it is evident and clear that all affairs relating to Local bodies are coming under the ambit of State Government and affairs of the Cantonment Board come under central government. Income Tax Act, 1961, section 2(14)(iii)(b) clearly distinguishing the Municipality and Cantonment Board with "OR" which says 'in any area with in such distance, not being more than 8 kilometres from the local limits of any Municipality or Cantonment Board referred to in item (a) as the Central Government may'. Hence the misinterpretation of the section made by the assesse is clear from the above, and it is the Cantonment Board which is notified by the Central Government and not the Municipality".*

5.5 He submitted that **a**s per the learned assessing officer Municipality need not be notified by the Central Government and State government notification is enough which is made for their administrative purpose to attract the capital gain tax.

5.6 According to ld. AR the learned Commissioner of Income Tax (Appeal) also misinterpreted the provisions of the Act which is evident from this observation in his order:

> *"The contention of the Appellant that the Municipality has to be notified by the central government is misplaced. The central government does not notify municipal corporation or municipalties. On the contrary the power of declaration of the area to be with in the Municipal Corporation or [m]unicipalities lies with the state government. So the Act is very clear that if the property in question is within 8km of a municipality it has to*

be treated as a capital asset for the purpose of calculating capital gains. The appellant has not disputed that the land falls within 3kms of Devanahalli Municipality and hence the contention that it is an agricultural land and not a capital asset as per the provision of section2(14)(iii) (b) of the Act is devoid of merit. Therefore, the contention of the appellant is rejected and the ground of appeal fails"

He submitted that the First appellate authority not properly understood the direction of the Tribunal while disposing of the appeal of the assessee and he overlooked the observation of the Tribunal where the Tribunal in its order dated 09.01.2014 in Page 11 Para 18, it was mentioned that :

"As far as Section 2(14)(iii)(b) is concerned the Municipality or Cantonment Board referred to in item(a) is concerned had to notified by Central Government".

Hence, he submitted that as per section 2(14)(iii)(b) also the land sold by the appellant is an agricultural land and the sale of agricultural land does not attract capital gain tax.

5.7 Regarding Commission paid to Brokers, it was submitted that it is well known fact that it is impossible to sell or buy property in the city like Bengaluru without the help of Brokers. They are very useful to locate the buyers and to get good price. The appellant has paid Rs. 5,00,000/- to Mr. K N Umesh & Rs.2,50,000/- to Mr. Santhosh Kumar S as commission. The commission amount is hardly 3% of the sale value of Rs 250 Lacks and it is nominal amount. They

helped appellant to locate the buyers and to get good price for appellant Property. The learned Assessing Officer has already summoned these two people and they have accepted that they have received the above money as commission from the appellant. If the receivers of commission did not file their return or filed late, how the appellant is responsible. He drew our attention to the the income tax return of above persons which is placed in page no. 89 to 95 of Paper Book

5.8 Regarding compensation paid to unauthorized occupants in the said land, it was submitted that due to non- profitability agriculture operation and difficulty in getting agricultural labourers, the assessee decided to stop cultivation during the financial year 2006-07 and decided to sell the agricultural property. At that time many unauthorizedly occupied the property and to vacate them the assesee has paid a sum of Rs. 29,75,000/- to them. According to him he has already placed necessary evidence for payment of such amount.

5.9. The Ld. AR placed reliance on the following judgements for the proposition that the expenditure incurred for the purpose of eviction and compensation paid to take the complete possession of the property are all admissible expenditure:

Mrs. June Perett Vs. ITO 298 ITR 268 (Kar)

V. Jagamohan Rao & Others Vs CIT 75 ITR 373(SC)

Sitalpur Sugar Works Ltd Vs CIT 49 ITR 160(SC)

5.10 The learned Departmental Representative relied on the order of the lower authorities.

6. We have heard the rival contentions and also considered various orders cited by the parties. The first contention of the AR is that the impugned land is an agricultural land and it is not a capital asset since it is the land covered by Section 2(14)(iii)(a) & (b) of the Act. Section 2(14) (iii) (a) of the Act covers a situation where the subject agricultural land is located within the limits of municipal corporation, notified area committee, town area committee, town committee, or cantonment committee and which has a population of not less than 10,000. Section 2(14)(iii)(b) of the Act covers the situation where the subject land is not only located within the distance of 8 kms from the local limits, which is covered by Clause (a) to section 2(14)(iii) of the Act, but also requires the fulfilment of the condition that the Central Government has issued a notification under this Clause for the purpose of including the area up to 8 kms, from the municipal limits, to render the land as a "Capital Asset. According to AR , the subject land is located within the limits of Devanahalli Municipality therefore, Clause (a) to section 2(14)[iii] of the Act is not attracted. Further contented that though it is located within 8 KM,, of the municipal limits of Devanahalli Municipality in the absence of any notification issued under Clause (b) to section 2(14)(iii) of the Act, it cannot be considered as a capital asset within the meaning

of Section 2(14)(iii)(b) of the Act also and therefore the subject land cannot be considered as a 'capital asset'. In our opinion that itself is not sufficient to hold that the land in question is an agricultural land. In our opinion, it is an agricultural land, only if the said land is subject to agricultural operation and agricultural activities is carried on in that land. There is no presumption that all land situated outside the notified area are agricultural land and there is no automatic treatment of land as an agricultural land on the ground that it is covered by section 2(14)(iii)(a) &(b) of the Act.

6.1 Now question as to whether a land is agricultural land or not is essentially a question of fact. The question has to be answered in each case having regard to the facts and circumstances of that case. There may be factors both for and against a particular point of view. We have to answer the question on a consideration of all of them, a process of evaluation and the inference has to be drawn on a cumulative consideration of all the relevant facts. It may be stated here that not all the factors or tests would be present or absent in any case and that in each case one or more of the factors may make appearance and that ultimate decision will have to be reached on a balanced consideration of the totality of the circumstances. The expression 'agricultural land' is not defined in the Act, and now, whether it is agricultural land or not has got to be determined by using the tests or methods laid down by the Courts from time to time. The Hon'ble Supreme Court in the case of Smt.

Sarifabibi Mohmed Ibrahim (204 ITR 631) has approved the decision of a Division Bench of the Hon'ble Gujarat High Court in the case of CIT vs. Siddharth J. Desai (1982) 28 CTR (Guj) 148 : (1983) 139 ITR 628 (Guj) and has laid down 13 tests or factors which are required to be considered and upon consideration of which, the question whether the land is an agricultural land or not has got to be decided or answered. We reproduce the said 13 tests as follows:

> *" 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 the land was for a long period or whether it was of a temporary character or by any of a stopgap 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 the vendee)? Whether such permission was in respect of the whole or a portion of the 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 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 situated in a developed area? Whether its physical characteristics, surrounding situation and use of the 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 the land for nonagricultural 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 agricultural 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?"

6.2 A reference could be made to the case of CWT vs. Officer-in-charge (Court of Wards) (105 ITR 138) (SC) wherein the Constitution Bench of the Hon'ble Supreme Court stated that the term 'agriculture' and 'agricultural purpose' was not defined in the Indian IT Act and that we must necessarily fall back upon the general sense in which they have been understood in common parlance. The Hon'ble Supreme Court has observed that the term 'agriculture' is thus understood as comprising within its scope the basic as well as subsequent operations in the process of agriculture and raising on the land all products which have some utility either for someone or for trade and commerce. It will be seen that the term 'agriculture' receives a wider interpretation both in regard to its operation as well as the result of the same. Nevertheless there is present all throughout the basic idea that there must be at the bottom of its cultivation of the land in the sense of tilling of the land, sowing of the seeds, planting and similar work done on the land itself

and this basic conception is essential sine qua non of any operation performed on the land constituting agricultural operation and if the basic operations are there, the rest of the operations found themselves upon the same, but if the basic operations are wanting, the subsequent operations do not acquire the characteristics of agricultural operations. The Constitution Bench of the Hon'ble Supreme Court in the aforesaid case observed that the entries in Revenue records were considered good prima facie evidence. 46. The Hon'ble Gujarat High Court in the case of Dr. Motibhai D. Patel vs. CIT (1982) 27 CTR (Guj) 238 : (1981) 127 ITR 671 (Guj) referring to the Constitution Bench of the Hon'ble Supreme Court had stated that if agricultural operations are being carried on in the land in question at the time when the land is sold and further if the entries in the Revenue records show that the land in question is agricultural land, then, a presumption arises that the land is agricultural in character and unless that presumption is rebutted by evidence led by the Revenue, it must be held that the land was agricultural in character at the time when it was sold. The Division Bench of the Hon'ble Gujarat High Court further held that there was nothing on record to show that the presumption raised from the long user of the land for agricultural purpose and also the presumption arising from the entries of the Revenue records are rebutted.

6.3 The Hon'ble Bombay High Court in the case of CWT vs. H. V. Mungale (1983) 32 CTR (Bom) 301 : (1984) 145 ITR 208 (Bom) held that the Hon'ble

Supreme Court had pointed out that the entries raised only a rebuttable presumption and some evidence would, therefore, have to be led before taxing authorities on the question of intended user of the land under consideration before the presumption could be rebutted. The Court further held that the Supreme Court had clearly pointed out that the burden to rebut the presumption would be on the Revenue. The Hon'ble Bombay High Court held that the ratio of the decision of the Supreme Court was that what is to be determined is the character of the land according to the purpose for which it was meant or set apart and can be used. It is, therefore, obvious that the assessee had abundantly proved that the subject land sold by them was agricultural land not only as classified in the Revenue records, but also it was subjected to the payment of land revenue and that it was actually and ordinarily used for agricultural purpose at the relevant time.

6.4 We may also refer to the case of CIT vs. Manilal Somnath (1977) 106 ITR 917 (Guj), wherein the Division Bench of the Hon'ble Gujarat High Court observed that the potential non-agricultural value of the land for which a purchaser may be prepared to pay a large price would not detract from its character as agricultural land on the relevant date of sale.

6.5 We may also refer to the case of Gopal C. Sharma vs. CIT (1994) 116 CTR (Bom) 377 : (1994) 209 ITR 946 (Bom), in which, the case of Smt. Sarifabibi Mohamed Ibrahim & Ors. vs. CIT (supra) was referred to and relied, amongst

other cases. In this case, the Division Bench of the Bombay High Court has stated that the price paid is not decisive to say whether the land is agricultural or not.

The argument advanced by the assessee is that the lands sold by the assessee is an agriculture land in revenue records, as such the impugned land is not a capital asset. For this purpose, the learned Authorised Representative produced copy of record of rights which is placed on record. It was also submitted by the learned Authorised Representative that the assessee has declared agriculture income from this property Bearing No.54/2, Akkupet Village, Devanahalli Taluk at Rs.50,000 in the Assessment Year 2007-08. According to learned Authorised Representative this would be a circumstance in favour of conclusion that it is an agriculture land. However, in our opinion this would raise only a prima facie presumption and that said presumption can be destroyed by other circumstances to the contrary conclusion. This legal proposition highlighted by the Hon'ble Gujarat High Court and upheld by the Hon'ble Supreme Court in the case of **Sarifabibi Mohammed Ibrahim Vs. CIT** 204 ITR 631 (SC). It is also to be seen that the question whether a particular land is agriculture land or not is basically a question of fact. As laid down by various High Courts in different judgements, a series of tests are

applied to decide whether a land is agriculture land or not. It is also to be understood that all the tests are in the nature of guidelines and have to apply depending upon the facts and circumstances of each case. In the present case, the RTC produced by the assessee does not show the crop grown by the assessee. There was no details of crops cultivated by the assessee. The column relating to mentioning the crop cultivated by the assessee were kept blank. Being so, the RTC cannot be considered as conclusive evidence to prove that the assessee's land is agriculture land is collapsed. At initial stages, the property might have been agriculture land. That is why the land is classified in the revenue records as agriculture land. That position continued in a religious manner without any further verification of the nature of the property. It is to be noted that because of urbanization, the properties being in the peripheral of the Bangalore Metropolity, real estate development has started in and around Akkupet Village, Devanahalli Taluk and a lot of commercial and private buildings are constructed. Because of the book in the real estate development, the entire adjoin land was become subject matter of transaction intend for the purpose of real estate development. In that background, we have to see whether actual cultivation has been carried out by the assessee in the said land. As we noted in earlier RTC produced by the assessee does not have any entry of crop cultivated by the assessee. Past history alone is not

the deciding factor but whether the assessee has sold agriculture land. Once upon a time, the land might have been used for agriculture land. All the parts of Devanahalli might be agriculture land in good old days. Therefore history is not the only test to be applied to decide the nature of land at the time of sale. A temporary stoppage in the agriculture activity carried out by the assessee also not go against the assessee. For one or the other reason, the assessee may not be carrying on agriculture operations for one or two years. He might be carrying agriculture operations. In such case, it is not possible of non-carrying of agriculture activity for one or two years permanently change the character of the land. In the present case, the assessee has not placed any evidence of carrying out the agriculture operations and the assessee's counsel only relied on the RTC of the revenue department. There is no evidence that the assessee has carried out agriculture activity over the property. The assessee has not claimed any expenses incurred in carrying out the agriculture operations. There is no evidence of agriculture produce having been sold. The Hon'ble Kerala High Court in the case of **Kalpetta Estates Limited Vs. CIT** 185 ITR 318 (Ker) wherein it has been held that the burden of proof that the land in question was agriculture land at the time of transfer to claim exemption was on the assessee. The facts and circumstances are to be considered as a whole and an overall view is to be taken in deciding whether the land was agriculture land. In given case, large number of

circumstances may be indicative of agriculture character but one circumstance made out where all of this are on basis, the land would be held to be non-agriculture land. In the present case, the assessee has not produced any evidence of having spent human labour in the sense of preparing the land for cultivation, tilling, sowing seeds, planting on a regular basis. The property is situated in fast developing area and access to all modern facilities. There was a real estate activity in the area where the property is situated. The assessee sold the property of 1.35 acres of agriculture land for a consideration of Rs.2,50,05,000. The sale consideration received by the assessee show that no bona fide agriculturist would pay such huge price for 1.35 Acres of land. Another fact is that the land is situated in Devanahalli Taluk in Bangalore North where there is rapid development activities and it has become a bustling suburban. The area is upcoming residential area with many private residential flats are coming up. The property sold by the assessee is in the middle of development activity being carried out by builders in and around Devanahalli Taluk on the reason of coming up of Kempe Gowda Airport in immediate vicinity. In view of the same, the sale price received by the assessee is very high which a normal agriculture land will not fetch. The price is in accordance with the development activities and changes happening in and around the land. If we consider the above fact as a whole and overall view is to be taken in deciding whether the land is agriculture land, we come to a conclusion that the

land cannot be considered as agriculture land on only the said land is not Notified under Section 214(a) & (b) of the Income Tax Act. Though the circumstances that land is classified as agriculture in revenue record and Akkupet village, Devanahalli Taluk that is not notified under the provisions of Section 214(iii)(a) & (b) of the Act still it is considered as agriculture land on the reason that no agriculture operations has been carried out by the assessee in the said land. In our opinion, the land situated on the presumption of urban area and in the municipal limit cannot be considered as agriculture land unless there was actual agriculture operations carried out by the assessee. Further it is to be seen that the income returned in her Return of Income was an agriculture income was just for name sake and does not have any proportion. At the time of sale of land, no agriculture activity was carried out by the assessee. Accordingly we hold that the property sold by the assessee is not an agricultural land and to be treated as a capital asset liable to be taxed.

7. With regard to the claim of payment of compensation to unauthorized occupants and payment of commission to Brokers, the assessee has not produced any evidence in support of the same. Similarly, the assessee has not produced supporting evidence in relation to claim of deduction under section 54F of the Act. Accordingly, these grounds of appeal are also dismissed.

8. The interest under Section 234A & 234B of the Act are consequential in nature.

9. In the result, the assessee's appeal is dismissed.

Pronounced in the open court on the date mentioned on the caption page.

Sd/-	Sd/-
(SMT. BEENA PILLAI)	**(CHANDRA POOJARI)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 11.09.2020.

*Reddy GP

Copy to

1. The appellant
2. The Respondent
3. CIT (A)
4. Pr. CIT
5. DR, ITAT, Bangalore.
6. Guard File

By order

Assistant Registrar
Income-tax Appellate Tribunal
Bangalore