

**IN THE INCOME TAX APPELLATE TRIBUNAL
RANCHI BENCH, E-Court at KOLKATA**

(Before Sri J. Sudhakar Reddy, Accountant Member)

**I.T.A. No. 38/Ran/2020
Assessment Year: 2013-14**

Ashok Kumar Malhotra.....Appellant
[PAN: ADKPM 2787 R]

Vs.

ITO, Ward-1(1), Dhanbad.....Respondent

Appearances by:

Ms. Lavanya Gadodia, A/R appeared on behalf of the Assessee.

Ms. Chinmaya, JCIT, appeared on behalf of the Revenue.

Date of concluding the hearing : December 31st, 2020

Date of pronouncing the order : January 13th, 2021

ORDER

Per J. Sudhakar Reddy, AM:

This is an appeal filed by the assessee directed against the order of the Learned Commissioner of Income Tax (Appeals), Dhanbad [hereinafter the "CIT(A)"], passed u/s. 250 of the Income Tax Act, 1961 (the 'Act'), dated 18.03.2020 for the Assessment Year 2013-14.

2. The Id. Counsel for the assessee, Ms. Lavanya Gadodia submitted that the sole issue that arises for adjudication in the appeal is whether the land sold by the assessee, by way of a registered sale deed is a capital asset as defined u/s 2 (14) of the Act. She submitted that the assessee has sold agricultural land and this fact that the asset in question is agricultural land is evident from a perusal of the registered sale deed, entries in revenue records and other documents. She pointed out that the land in question was classified as Don as is evident from the Revenue record a copy of which is filed at page 14 of the paper book as is apparent from the registered sale deed which means that the land is wet land in which paddy is grown.

2.1. On a query from the Bench, she submitted that the assessee is a senior citizen and was having income only from pension and interest from savings bank account and fixed deposits account and that he was not aware that no capital gains arises on

purchase and sale of agricultural land and hence had submitted a legally incorrect and erroneous computation to the Revenue authorities initially, on being questioned. She submitted that the law has to be applied and acquiescence is no ground for taxing a transaction which is not taxable under law. She submitted that there is no estoppel against law. She relied on a number of case laws in support of her propositions that the land is not a capital asset and hence the profits from the sale of this land cannot be taxed under the provision of the Act.

3. The ld. Sr. D/R Ms. Chinmaya on the other hand, opposed the contentions of the ld. Counsel for the assessee and submitted that the assessee has approbated and reprobated in this case. She submitted that the assessee responded to an enquiry conducted u/s 133(6) of the Act and claimed that he had incurred cost for improvement on the land for various years and computed the capital gain of ₹67,131/-. She submitted that the ld. CIT(A) has at para 4.4 onwards recorded that the land in Lapra village is 2.5 km from the jurisdiction of Khelari town which is the nearest municipality with population of 20,010 as per 2011 Census. She took this Bench to the order of the ld. CIT(A) and submitted that the land in question is not an agricultural land and hence a capital asset, the transfer of which results in capital gain subject to tax. She pointed out that the ld. CIT(A) has relied on the decision of the Hon'ble Supreme Court of India in the case of *Smt. Sarifabibi Mohmed Ibrahim vs. CIT [1993] 204 ITR 631 (SC)* and another judgements and applied the propositions of law laid down therein to the facts of this case and come to a conclusion that the land in question is agricultural land. She submitted that the asset is a residential bungalow surrounded by mango, guava and other gardens. She prayed that the order of the ld. CIT(A) be upheld.

4. In reply, Ms. Lavanya Gadodia submitted that the fact that the land is an agricultural land which is clear from the receipts in the sale deed and the sale was classified as Don land and the sale was done in acres of land and not sq. yard or sq. feet of land. She drew the attention of the Bench to pages 19 to 23 of the paper book filed, whereas photographs of the land is given and submitted that the ld. CIT(A) records the fact that there are gardens of mango, guava etc. on the land. She once again drew the attention of the Bench to the facts recorded in the Revenue records, copies of which are placed in the paper book to prove that the land in question is agricultural land and to the copies of the Indian Village Directory where it is recorded that "LAPRA" village is

located 12 kms away from “Khelari” and 60 kms away from “Ranchi”. She vehemently contended that 11.8 acres of land cannot be considered as non-agricultural land, simply because a house is located in that particular property and that a farm house cannot convert agricultural land into non-agricultural land. She prayed for relief.

5. Rival contentions heard. On a careful consideration of the facts and circumstances of the case, perusal of the papers on record and the case law cited, we hold as follows.

6. The Id. CIT(A) at the last paragraph of his order records the fact as follows:

“Rather on the basis of above discussion it proves that it is a residential bungalow surrounded by gardens of mango, guava etc.”

6.1. In the total, the land measures 11.8 acres and the residential bungalow at best would be much less than half an acre. This does take us to a conclusion that all the mango, guava and other gardens are in fact located as agricultural land. The sale deed records that the land in question is Don land. In the State of Jharkhand the cultivable land in the district is divided into classes, viz., Don and Tanr. The Don lands are the terraced low lands on which mainly rice is grown, and the Tanr are the uplands which produce a course from of rice, millets, pulses and oil-seeds. The land in question is classified as Don in the revenue records and is thus wet land in which paddy is grown. Based on these documentary evidences it is clear that the land in question which is sold, is agricultural land. The AO or the Id. CIT(A) have no evidences to controvert the documentary evidences furnished by the assessee. The assessee has submitted a copy of Indian Village Directory where the village Lapra is located 12 km away from sub-district headquarter Khelari and 60km away from the district headquarter of Ranchi and that it is a gram panchayat that has a population of 3,559 people. No evidence controverting the above facts is brought on record by the AO or the Id. CIT(A). Thus the assessee has proved that the land in question is more than a distance of 8 km from the closest municipality and that it is agricultural land as defined u/s 2(14)(iii) of the Act.

6.2. We shall now discuss the case laws on this issue:

This Bench of the Tribunal in the case of *Sanjeev Kumar Goyal vs. ITO in ITA No. 981/Kol/2019* order dated 29.11.2019 has considered various propositions on this issue and held as follows.

"Proposition 1:- The assessee claims that he land in question is situated beyond 8 Kms. of the local limits from the municipality and hence cannot be held as a capital asset when the land was recorded as agricultural land in the revenue records at all times before the sale of such land. For this proposition, he relied on the following case law:-

"(i) Khaitan Lefin Limited vs. CIT - ITA No. 200/Kol/2016 - The issue in this case is identical to the issue in the instant appeal. Hon'ble Kolkata Tribunal in Para 4 of its order held and observed as under:

4. There is no dispute that the assessee had indeed sold its land in question measuring 5.33 acres situated in village Mamidipally Mandal Saroonagar district Ranga Reddy in erstwhile Andhra Pradesh during the relevant previous year; The sole dispute in the instant lis that arises for our apt adjudication is as to whether the assessee's land sold was a capital asset or not falling within 8 Kms. of the "GHMC" u/s 2(14)(IU)(B) of the Act as applicable in the impugned Assessment Year. The taxpayer stand throughout is that its land is not a capital asset since it is situated beyond 8 Kms. distance of any municipality whereas the Revenue's case is that Mamidipally gram panchayat is adjacent to the GHMC limits. And also that it happens to be a hub of major economic activity including aviation sector. We find no merit in the latter's stand based on the lower authority's respective findings. We make it clear first of all that there is no rebuttal coming from the department that the land in question has ever been converted from agricultural to non-agricultural use at any point of time before the sale in question. The state government's revenue records strongly support the assessee's case rather than its lands are very much agricultural in nature. The Assessing Officer tried to apply "performance" test that for determination of land in issue what is required to be shown is connection with the agricultural purpose is the use and not the mere possibility of the land user by some possible future owner for agricultural objects. We see no merit in the impugned reasoning. The legislature makes it clear that agricultural lands beyond 8 Kms. from the local municipality etc.; as the Central Government may, having regard to the extent/scope for urbanisation and other consideration, specifically in the behalf...."

(ii) Naiyer Sultan v. ITO [2019] 106 taxmann.com 191 (Kol ITAT)

"7. We have considered the rival submissions on this issue and also perused the relevant material available on record. During the year under consideration, land owned jointly by both the assesseees in the present case was sold and the gain arising from the said land was claimed to be exempt on the ground that the said land being an agricultural land was not a capital asset within the meaning of section 2(14). As defined in section 2(14) "capital asset" means property of any kind held by an assessee, whether or not connected with his business or profession, but does not include, inter alia, as per clause (iii) agricultural land in India not being land situated in any area within the distance, measured aerially, not being more than 8 Kms. from the local limits of any Municipality or Cantonment Board which has a population of more than 10 lakhs. In support of this claim, a certificate issued by the concerned Tehsildar of Tiruppur was submitted by the assesseees showing that the land sold by them was located 20 Km. away from the limit of Chennai Municipal Corporation. Based on this certificate as well as the provisions of section 2(14)(iii), the claim of the assesseees for exemption was allowed by the Assessing Officer in the assessments originally completed under section 143(3)/143(1). The said assessments, however, were subsequently reopened by him after recording the reasons and a perusal of the reasons so recorded by the Assessing Officer, which are reproduced in the foregoing portion of this order, shows that the belief about the escapement of assesseees income from assessments was formed by the Assessing Officer on the basis of information received in the form of a communication from DDIT(Inv.), Chennai, which stated that the area of Chennai Metropolitan region was much larger than what was stated by the Tehsildar in his report and the land sold by the assesseees was situated at about 3 Kms. from the Chennai Metropolitan area. On the basis of the said information, the Assessing Officer entertained a belief that the gain arising from the sale of the said land was chargeable to tax and the income of the assesseees in the form of capital gains had escaped assessment. As rightly contended by the Id. Counsel for the assesseees in this regard, the location of the land from the local limits of Chennai Municipal Corporation was relevant to decide as to whether the said land was an agricultural land in India within the meaning of clause (iii) of sub-section (14) of section 2 and the distance

of the land from the Chennai Metropolitan area was not relevant in this context. The information received by the Assessing Officer regarding the location of the land being situated at about 3 Kms. from the Chennai Metropolitan area thus was vague and irrelevant to decide the issue relating to the exemption claimed by the assessee in respect of gain from the sale of their land."

(iii) *Pr. CIT vs. P. S. Raghupathy [2018] 96 taxmann.com 200 (Mad)* - In this case the assessee sold a piece of land and claimed that the land was an agricultural land recorded in Revenue records and the same was situated beyond 8 K.M from the nearest municipality. The Hon'ble Madras High Court held and observed as under:

"18. Mr. T.R. Senthil Kumar, emphatically argued that the Assessing Officer arrived at his finding based on the fact that the land in question had been classified in the records of the Sub Registrar Office as revenue land. However, as would appear from the order of the assessment itself, it was classified as agricultural land in the revenue records. Even otherwise, the learned Tribunal had looked into the relevant materials including the revenue records, as also records which indicate that the respondent assessee ran a Nursery.

19. The learned Tribunal was of the view that whether there was agricultural income or not was not relevant. No fault can be found with the reasoning of the learned Tribunal. The fact that there was loss and not income could not have made any difference to the nature and character of the land."

The SLP filed by Revenue against the aforesaid judgement of Hon'ble Madras High Court was dismissed by Hon'ble Supreme Court [2019] 102 taxmann.com 223 (SC)

(iv) *M. Vijaya v. DCIT[2014] 49 taxmann.com 26 (Hyd-ITAT)*

37. Further, we make it clear that when the land which does not fall under the provisions of section 2(14)(iii) of the IT Act and an assessee who is engaged in agricultural operations in such agricultural land and also being specified as agricultural land in Revenue records, the land is not subjected to any conversion as non-agricultural land by the assessee or any other concerned person, transfers such agricultural land as it is and where it is basis, in such circumstances, in our opinion, such transfer like the case before us cannot be considered as a transfer of capital asset or the transaction relating to sale of land was not an adventure in the nature of trade so as to tax the income arising out of this transaction as business income.

(v) *Harniks Park (P.) Ltd. vs. ITO [2014] 41 taxmann.com 109 (Hyd - ITAT)* - In this case the following observations of the Hon'ble Tribunal are relevant to this case.

"48.And as in the present case, admittedly, the agricultural land of the assessee is outside the Municipal Limits of Hyderabad Municipality and that also 8 km away from the outer limits of this Municipality, assessee's land does not come within the purview of section 2(14)(iii) either under sub clause (a) or (b) of the Act, hence the same cannot be considered as capital asset within the meaning of this section. Hence, no capital gain tax can be charged on the sale transaction of this land entered by the assessee. This is supported by the order of Kolkata Bench of this Tribunal in the case of Arijit Mitra (cited supra), Haresh V. Milani v. Jt. CIT [2008] 114 ITD 428 (Pune) and M.S. Srinivasa Naicker v. ITO [2007] 292 ITR 481/[2008] 169 Taxman 255 (Mad). By borrowing the meaning from the above section, we are not able to appreciate that the land falls within the territorial limit of any municipality without notification of Central Government as held by the Karnataka High Court in the case of Madhukumar N. (HUF) (cited supra)

50. Further, we make it clear that when the land which does not fall under the provisions of section 2(14)(iii) of the IT Act and an assessee who is engaged in agricultural operations in such agricultural land and also being specified as agricultural land in Revenue records, the land is not subjected to any conversion as non-agricultural land by the assessee or any other concerned person, transfers such agricultural land as it is and where it is basis, in such circumstances, in our opinion, such transfer like the case before us cannot be considered as a

transfer of capital asset or the transaction relating to sale of land was not an adventure in the nature of trade so as to tax the income arising out of this transaction as business income

(vi) CIT vs. Siddharth J. Desai[1982] 10 Taxman 1 (Guj) = [1983] 139 ITR 628 (Guj)

Held

1. Several factors are relevant and are weighted against each other while determining the true nature and character of the land. The major factors which are considered as having a leaning on the determination of the question are as follows:

a. whether, the land was classified in the revenue record as agricultural and whether it was subject to the payment of land revenue, but this factor alone will not be conclusive;

b. whether the land was actually or ordinarily used for agricultural purposes at or about the relevant time;

c. whether such user of the land was for a long period or whether it was of a temporary character or by way of stop-gap arrangement;

d. 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;

e. whether the permission under section 65 of the Bombay Land Revenue Code, was obtained for the non-agricultural use of the lands: if so, when and by whom; 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 past, what was the nature of the user of the said portion of the land on the material date;

f. whether the land, on the relevant date, had ceased to be put to the agricultural use: if so, whether, it was put to an alternative use; whether, such a cess or and or alternative user was of a permanent or temporary nature;

g. whether the land, though entered in revenue record, had never been actually used for agriculture; whether the owner meant or intended to use it for agricultural purposes;

h. whether the land was situate 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;

i. whether the land itself was developed by plotting and providing roads and other facilities;

j. whether there were any previous sales of portions of the land for nonagricultural use;

k. whether permission under section 63 of the Bombay Tenancy and Agricultural Lands Act, 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-agriculturist was for non-agricultural or agricultural user:

l. 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; and

m. whether the land was sold on yardage or on acreage basis.

2. Having regard to the facts and findings recorded by the Tribunal, it was obvious that not only the physical characteristics of land, in the instant case, but the user also was agricultural. Even though the land was not actually put to agricultural use since about one year prior to the sale, there was no evidence to establish that it was converted to any other use. The fact that permission under section 63 of the Bombay Tenancy and Agricultural Lands Act

was obtained by the assessee to sell the lands to the society for residential purposes would not militate against the land continuing to be agricultural on the date of its sale, as the permission was obtained only about two and a half months prior to the sale. Therefore, till the land was held by the assessee its character as agricultural land was not changed either as a result of its reclassification in the revenue records or by the actual alteration of its use. Again, there was no evidence on record to show that there was any development in the surrounding area or that the land itself was developed prior to its sale. The land was located on the outskirts of the village but it was not situate in the municipal limit. The land must, therefore, be taken as having been situate in a rural area and it continued to have an agricultural bias right up to the date of its sale. Further, there was no evidence or material on record to indicate that the price offered for the land by the society, even proceeding on the basis that "the intended user of his part was non-agricultural, would not have been offered by an agriculture who wanted to purchase the land for purely agricultural user. There being no evidence on record as regard the nature of the soil, its fertility, its suitability and adaptability for raising cash crops, the irrigation facility and such or similar factors which had a great bearing on the valuation of an agricultural land, it would be hazardous to come to the conclusion that the price offered was such that no agriculturist would have paid the same if he wanted to purchase the land for purely agricultural purposes.

3. Accordingly, the land was an agricultural land and the surplus realised on a sale thereof was not liable to be assessed to capital gains tax.

Proposition 2:- That the capital asset would not lose its character of being an agricultural land merely because the cultivation of the said land was done by a person other than the assessee.

Proposition 3:- That the characteristics of the agricultural land would not be lost even though the land was not used for agricultural purposes prior to its sale.

Proposition 4:- That the sale of land to an industrial unit, when the conversion of land takes place subsequent to the sale by the buyer, cannot lead to a conclusion that the land sold is not agricultural land.

"Khaitan Lefin Limited vs. CIT ITA No.200/Kol/2016, Judgment dated 25.01.2019 (Kol Trib.)

"4. There is no dispute that the assessee had indeed sold its land in question measuring 5.33 acres situated in village Mamidipally Mandal Saroonagar district Ranga Reddy in erstwhile Andhra Pradesh during the relevant previous year; The sole dispute in the instant lis that arises for our apt adjudication is as to whether the assessee's land sold was a capital asset or not falling within 8 Kms. of the "GHMC" u/s 2(14)(III)(B) of the Act as applicable in the impugned Assessment Year. The taxpayer stand throughout is that its land is not a capital asset since it is situated beyond 8 Kms. distance of any municipality whereas the Revenue's case is that Mamidipally gram panchayat is adjacent to the GHMC limits. And also that it happens to be a hub of major economic activity including aviation sector.

We find no merit in the latter's stand based on the lower authority's respective findings. We make it clear first of all that there is no rebuttal coming from the department that the land in question has ever been converted from agricultural to non-agricultural use at any point of time before the sale in question. The state government's revenue records strongly support the assessee's case rather than its lands are very much agricultural in nature. The Assessing Officer tried to apply "performance" test that for determination of land in issue what is required to be shown is connection with the agricultural purpose is the use and not the mere possibility of the land user by some possible future owner for agricultural objects. We see no merit in the impugned reasoning. The legislature makes it clear that agricultural lands beyond 8 Kms. from the local municipality etc.; as the Central Government may, having regard to the extent/scope for urbanisation and other consideration, specifically in the behalf...."

DCIT v. P. Ashok Kumar ITA No.1581/Mds/2010, Judgment dated 20.01.2011 (Chennai Trib.)

"6. There are good reasons given by the Id.AR for explaining that the land was not recently used for cultivation. In our considered opinion, the noncultivation of a piece of land does not lose its

character of agricultural land unless the user of the land has been specifically got changed before such sale. Likewise, the future use of this land will not disentitle the assessee from the benefit as was available to him at the time of the sale. Therefore, we reaffirm that the cumulative effect of the above mentioned facts and circumstances is that the land in question was 'agricultural land' at the time of sale and the assessee is entitled to Long Term Capital Gains thereon.

7. We have considered the rival submissions and have perused the entire records. The assessee had purchased 2.14 acres of agricultural land from one Shree Harikrishna Brick Works, Chennai, vide sale deed dated 27.9.1994 for a total consideration of' 8,10,000/-. This land was subsequently sold to a company by the name Estra IT Park Pvt. Ltd, for a total consideration of Rs.12,42,00,000/-, vide sale deed dated 24.1.2007. In the sale deed, it is mentioned in para 3 that the assessee is compelled to sell the property as at present it is not fetching any income. The issue involved before us is as to whether the land sold is agricultural land or it is to be treated as a capital asset in the terms of section 2(14) of the Act. It is true that the definition of agricultural land is not given in the Income-tax Act, but various factors contribute to ascertain the correct nature of a particular piece of land. If a land is situated within 8 kms of the municipal limits of a city even if it is recorded as agricultural land in the revenue records, it is to be treated as non-agricultural land and for that matter an Asset but in this case, the admitted fact is that this land falls beyond 8 kms from the notified limit. It is true that as per revenue records, the land has been recorded as agricultural land. It is found to be a fact that the assessee has been showing agricultural income from this very land and the same has been accepted by the Revenue as such year after year. The land was purchased by the assessee and at that time it was low lying as some mud was taken from it for making bricks etc. But admittedly after purchase, no such activity was carried out on this land. Even if we accept the contention of the Revenue that no agricultural production was done by the assessee on this land, this mere fact will not take out the land out of the nomenclature of 'agricultural land'. The assessee grows coconut on this land and the same are sold in the market and these receipts are treated as agricultural receipts by the Revenue. The assessee has also paid agricultural land tax and copies of the same were made available to the authorities. The land in question is situated in the revenue estate of a Village named Ivvappanthanaal Panchavat which is situated more than 8 kms away from the limits of Alandur Municipality. We have found that the land has been agricultural land for the past many years and has been classified as such in the records of the revenue Department. The assessee has paid kist of ' 400/- each in respect of land on 30.1.2007 regarding fasli years 1413, 1414, 1415 and 1416. It was brought on record that this land was being cultivated by one local person, namely Shri Murugan, but for assessment years 2005-06 and 2006-07, agricultural operations were carried out by him, he could not get food returns and that is why he did not admit any agricultural income in the returns filed. The report of the Tahsildar refers to non-cultivation of the land because an agricultural operation in a large scale was not carried out on this land. Hence, we hold that the land sold by the assessee is only agricultural land and not a capital asset. Therefore, no Long Term Capital Gain is attracted. Consequently, we confirm the order appealed against and dismiss the appeal of the Revenue."

Hindustan Industrial Resources Limited vs. ACIT [2009] 180 Taxman 114 (Del)

"9. Having considered the arguments advanced by the counsel for the parties, we are of the view that the assessee's contentions deserve to be upheld and the findings returned by the Income-tax Appellate Tribunal ought to be reversed. We are conscious that we are not merely reversing a finding of fact, what we are intending to do is to point out that the Tribunal's finding of fact is contrary to its own record and, therefore, is in the realm of perversity. This is so because the Tribunal clearly held that at the point of time when the assessee purchased the said land, it was agricultural land. There is no dispute with regard to this. The Tribunal also noted that the Award passed on 1-4-1992 by the District Collector (Land Acquisition), Greater Noida, Bulandshar, was a document which established beyond doubt that the land in question was agricultural land. Thus. on the date of purchase, the land in question was agricultural land and on the date of acquisition, the character of the land continued to be agricultural. When these two clear findings have been returned, it is apparent that in the transitional period. that is. between purchase and acquisition. the nature and character of the land did not change. The fact that the appellant/assessee intended to use the land for industrial purposes did not in any

wav alter the nature and character o f the land. The further fact that the appellant/assessee did not carry out anv agricultural operations did not also result in anv conversion of the agricultural land into an industrial land. It is nobody's case that the appellant/assessee carried out anv operations for setting up anv plant or machinery or of the like nature so as to lead to an inference that the nature and character of the land had been changed from agricultural to industrial. The mere fact that the appellant/assessee did not carrv out anv agricultural operation did not alter the nature and character of the land. In anv event. this discussion is not relevant in the backdrop of the clear finding given by the Tribunal that on the date of the purchase and as also on the date of acquisition. the land in question was agricultural land. Having come to such a conclusion, the Tribunal ought not to have gone into question of intention of the appellant/assessee and definitely not into the question of intention of the land acquiring authority, the latter being a wholly irrelevant consideration."

PCIT v. Heenaben Bhadresh Mehta [2018] 96 taxmann.com 164 (Guj)

"9. As observed hereinabove. the land was sold as an agricultural land and in fact. what was sold was agriculture land. What was the intention of the purchaser cannot be the determinative factor to treat the profit earned by the assessee on sale of agriculture land as business income. Similarly, merely because for whatever reason, the assessee has earned sufficient huge amount of profit also cannot be a ground to treat the profit earned by the assessee on sale of agriculture land as business income."

M. Vijaya v. DCIT [2014] 49 taxmann.com 26 (Hyd-ITAT)

37. Further, we make it clear that when the land which does not fall under the provisions of section 2(14)(iii) of the IT Act and an assessee who is engaged in agricultural operations in such agricultural land and also being specified as agricultural land in Revenue records, the land is not subjected to any conversion as non-agricultural land by the assessee or any other concerned person, transfers such agricultural land as it is and where it is basis. in such circumstances. in our opinion. such transfer like the case before us cannot be considered as a transfer of capital asset or the transaction relating to sale of land was not an adventure in the nature of trade so as to tax the income arising out of this transaction as business income.

CIT vs. Rajshibhai Meramanbhai Odedra [2014] 42 taxmann.com 497 (Guj)

"3.2 It is mainly argued on behalf of the revenue that as the agricultural land was sold in favour of non-agriculturist and as per the law prevailing in the State, there is a ban to transfer/sell agricultural land in favour of nonagriculturist without prior permission of appropriate authority and without getting the land converted into non-agriculture and therefore, the said land is to be considered as capital asset and therefore, liable to be taxed. It is not in dispute that what was sold by the assessee was an agricultural lands which were situated beyond 8 Kms of local limits of the Municipality. As rightly observed by the tribunal, merely because the land came to be sold during the year under consideration to non-agriculturist, the same will not change the characteristics of the land in the hands of the seller - assessee. It is not in dispute that at the relevant time, the lands were held/used by the assessee as agricultural land. Merely because the said land came to be sold to a non-aagriculturist. may be in breach of law prevailing in the State, character of the land would not be changed and the land still would continue as an agricultural land. At the most the sale in favour of non-agriculturist can be declared as illegal and/or invalid. There is no provision that if the agricultural land is sold in favour of non-agriculturist in breach of law prevailing in the State. it would lose its character as agricultural land and would be treated as non-agricultural land."

CIT vs. Siddharth J. Desai [1982] 10 Taxman 1 (Guj) = [1983] 139ITR 628 (Guj)

"2. Having regard to the facts and findings recorded by the Tribunal, it was obvious that not only the physical characteristics of land, in the instant case, but the user also was agricultural. Even though the land was not actually put to agricultural use since about one year prior to the sale, there was no evidence to establish that it was converted to any other use. The fact that permission under section 63 of the Bombay Tenancy and Agricultural Lands Act was obtained by the assessee to sell the lands to the society for residential purposes would not, militate

against the land continuing to be agricultural on the date of its sale, as the permission was obtained only about two and a half months prior to the sale. Therefore, till the land was held by the assessee its character as agricultural land was not changed either as a result of its re-classification in the revenue records or by the actual alteration of its use. Again, there was no evidence on record to show that there was any development in the surrounding area or that the land itself was developed prior to its sale. The land was located on the outskirts of the village but it was not situate in the municipal limit. The land must, therefore, be taken as having been situate in a rural area and it continued to have an agricultural bias right up to the date of its sale. Further, there was no evidence or material on record to indicate that the price offered for the land by the society, even proceeding on the basis that "the intended user of his part was non-agricultural, would not have been offered by an agriculture who wanted to purchase the land for purely agricultural user....."

Proposition 5:- When capital gains arising on sale of agricultural land by the coowner thereof was treated as exempt from capital gains tax then the capital gain arising to other co-owners could not be assessed to tax.

"ITO vs. Malay Kumar Mitter ITA No.307/Kol/2012, Judgment dated 23.12.2013 (Kol Trib.)

"7. We have heard the rival submissions and perused the material available on record. We find that this issue is squarely covered in favour of the assessee. The Tribunal in the hands of the co-owner of the property had held that the lands in question did not constitute 'capital asset' under section 2(14) of the Income Tax Act because Rajarhat M unicipality was not one of the notified Municipality as per the Central Government's Notification dated 28.12.1999. Hence, respectfully following the precedent, we hold that the land in question, which was transferred by the assessee, was an agricultural land and it did not fall within the ambit of 'capital asset' under section 2(14) of the Income Tax Act. Accordingly we confirm the order of I d. CIT(Appeals).

Sita Ram Sharma vs. ITO (2015) 58 taxmann.com 180 (Jaipur ITAT)

"9. We have heard the rival contentions of both the parties and perused the material available on the record. The land sold by all the brothers situated in village- Sanjhaia, Tehsil- Sanganer, district- Jaipur. In case of assessee's brother namely Shri Ram Sahay Sharma in A.Y. 2007-08 by the ITO ward 7(2) Jaipur order dated 25/03/2013 had not made any addition on account of Iona term capital gain. Further the Id CIT(A) as well as this Bench also allowed the appeal in case of Smt. Kamla Devi Sharma (supra) who also sold her land at Saniharia village to M/s Vatika Ltd. on 16/05/2006 and held that the agricultural land sold by the assessee is not capital assets as envisaged U/s 2(14) of the Act as same was sold to Vatika Ltd. within a short span of time.

The other case laws relied by the assessee is also squarely applicable.

Therefore, we hold that the land sold by all the assesseees are agricultural land and beyond 8 KMs from the municipal limits. Accordingly, we allow this ground of all the appeals."

WTO vs. Premier Polymers Pvt. Ltd. WTA No.06/Kol/2012, Judgment dated 31.05.2012 (Kol Trib.)

"4. We are unable to share the perception of the Id. D.R. Even though, there is no res judicata in tax proceedings, the principle of consistency must find its place. When the revenue authorities accept the position for one particular assessment year by not challenging relief granted to assessee in appeal, it cannot be open to them to challenge the same relief being granted in favour of the assessee by the CIT(A) in other years, or, for the purpose, in the case of other assesseees as well. Hon'ble Supreme Court, in the case of Union of India & Others -vs- Kaumudini Naravan Dalal and Another 249 ITR 219, had an occasion to consider whether it is open to revenue to accept a judgment in the case of one assessee, and appeal, against identical judgment, in the case of another assessee. Their Lordships held that such a differential treatment on the same set of facts was not permissible in law and observed that "it is not open to revenue to accept the judgment in the case of one assessee and challenge its correctness in

the case of another assessee without just cause". The same were views of Hon'ble Supreme Court in the case of Berger India Ltd. 266 ITR 99 and were also followed by the Hon'ble Delhi High Court in the case of CWT-vs- RKKR International Pvt. Ltd. 198 CTR 567 and CIT-vs- Neo Poly Pack (P) Ltd. 245 ITR 492."

10. Applying these proposition of law to the facts of this case, as the land in question is beyond 8 Kms from the nearest municipality and as the conversion of the land for agricultural land to industrial land was done after sale of land, the conclusion could only be that the asset in question is an agricultural land even if there was no agricultural activity on the same."

6.3. Coming to the argument of the ld. D/R that the assessee had computed capital gains on the sale of this land and admitted that tax is leviable, it is well settled that there is no estoppel against law.

Delhi Bench of the Tribunal in the case of *Haripal Singh vs. ACIT in ITA No. 6076/Kol/2012* order dated 07.10.2015 had on the issue of acquiescence held as follows.

"13.3. The legal position in such cases is that there is no estoppel in law. In coming to such conclusion, we draw strength from the following case laws.

14. (i) In the case of CIT vs. DKB & Co. Reported in 243 ITR 618, the Hon'ble Kerala High Court held that "It is the settled position in law that there cannot be estoppels against a statute. There is no provision in the statute which permits a compromise assessment. The above position was indicated by the Apex Court in UOI vs. Banwari Lal Agarwal (1999) 238 ITR 461. It cannot be laid down as a principle of universal application that whenever an assessment has been completed by accepting the offer of an assessee, no penalty can be imposed. It has not been so observed by the Apex ITA No.6076/Del/2012 AY 2009-10 Sh. Haripal Singh Court in Sir Shadilal Sugar and General Mills Ljtd. Vs. CIT (1987) reported in 168 ITR 705, as the Tribunal held. Its conclusion has been arrived at by a clear misappreciation of the ratio laid down in the said case."

(ii) In the case of Mayank Poddar (HUF) vs. WTO reported in 262 ITR 633 the Hon'ble Calcutta High Court has held as under.

"Even if the assessee had included the same in his return, that would not preclude the assessee from claiming the benefit of law. There cannot be any estoppel against the statute. A property, which is not otherwise taxable, cannot become taxable because of misunderstanding or wrong understanding of law by the assessee or because of his admission or on his misapprehension. If in law an item is not taxable, no amount of admission or misapprehension can make it taxable. The taxability or the authority to impose tax is independent of admission. either there can be any waiver of the right by the assessee. The Department cannot rely upon any such admission or misapprehension if it is not otherwise taxable. (Emphasis ours) This question was dealt with by this court in Bhaskar Mitter's case [1994] 73 Taxman 437, at paragraph 8 at page 442. In this decision, this court observed:

"An assessee is liable to pay tax only upon such income as can be in law included in his total income and which can be lawfully assessed under the Act. The law empowers the Income-tax Officer to assess the income of an assessee according to law and determine the tax payable thereon. In doing so, he cannot assess an assessee on an amount, which is not taxable in law, even if the same is shown by an assessee. There is no estoppel by conduct against law nor is there any waiver of the legal right as much as the legal liability to be assessed otherwise than according to the mandate of the law (sic). It is always open to an assessee to take the plea that the figure, though shown in his return of total income, is not taxable in law."

ITA No.6076/Del/2012 AY 2009-10 Sh. Haripal Singh

3). In the case of *Nirmala L Mehta vs. A Balasubramaniam, CIT and others* reported in 269 ITR p.185, the Hon'ble Bombay High Court has held as under.

"The problem arose because the petitioner in her return for the assessment year 1988-89 filed on June 30, 1988, offered the prize money of the lottery to tax rather a fundamental error of law on the part of the assessee, but that error of law once detected by the petitioner, it was urged before the Commissioner of Income Tax that the prize money earned by the Petitioner could not be taxed under the Income Tax Act, 1961. It is true that it was at a later stage that such contention was raised by the Petitioner, but the said contention was a pure question of law and the CIT ought to have entertained it on the ground of delay. There cannot be any estoppel against the statute, article 265 of the Constitution of India in unmistakable terms provides that no tax shall be levied or collected except by authority of law. Acquiescence cannot take away from a party the relief that he is entitled to where the tax is levied or collected without authority of law.

The Constitution Bench of the Supreme Court in Amalgamated Coalfields Ltd. Vs. Janapada Sabha, AIR 1961 SC 964, held thus (page 965): "It may be stated at the outset that the tax now impugned has been imposed by the local authority from March 12, 1935, and that the first occasion when its validity was attacked was in only 1957, though if the petitioners are right in their submissions their acquiescence might not itself be a ground for denying them relief. Before however we set out the points urged by the Ld. Attorney General in support of the petition, it would be convenient if we narrate briefly the history of the levy of this tax." The Supreme Court thus, held that acquiescence to an illegal tax for a long time is not a ground for denying the party the relief that he is entitled to." 14.1. Vide Circular No.5/2001-02(F.No.142/13/2010-SO-PPL) dt. 3.6.2010, the Board explained the rationalisation of the provision by insertion of S.56(2)(viii). Income shall be computed in accordance with either cash or mercantile system of accounting regularly employed by the assessee. There is no gainsaying that the department circulars are ITA No.6076/Del/2012 AY 2009-10 Sh. Haripal Singh binding on the assessee. Admittedly the assessee followed mercantile system of accounting. Under these circumstances, the interest income in question cannot be brought to tax during the year."

Mumbai Bench of the Tribunal in the case of *Khandelwal Laboratories Pvt. Ltd. vs. Department of Income Tax* in ITA No. 3721/Mum/2009 order dated 26.03.2009 held as follows.

"4. The jurisdictional High Court in I.T. Appeal No. 217 of 2001 in the case of Mr. Balkumund Acharya (Prop. Laxmi General supply Company) vs. DCIT vide judgment dated 19th Dec., 2008 at para 31,32,33 on pages 18 & 19 held as follow:

"31. Having said so, we must observe that the Apex Court and the various High Courts have ruled that the authorities under the Act are under an obligation to act in accordance with law. Tax can be collected only as provided under the Act. If any assessee, under a mistake, misconceptions or on not being properly instructed is over assessed, the authorities under the Act are required to assist him and ensure that only legitimate taxes due are collected (see S.R. Kosti v CIT (Guj) (2005) 276 ITR 165, C.P.A. Yoosuf v. I.T.O. (1970) 77 ITR 237, CIT v. Bharat General Reinsurance Co. Ltd, (1971) 81 ITR 303, CIT vs. Archana R. Dhanwate (1982) 136 ITR 355 (Bom).

32. If particular levy is not permitted under the Act, tax cannot be levied applying the doctrine of estoppel. (See Dy. Commissioner of Sales Tax vs.Sreeni Printers (1987) 67 SCC 279.

33. This Court in the case of *Nirmala L. Mehta v. A. Balasubramaniam, C.I.T. (2004) 269 ITR 1* has held that there cannot be any estoppel against the statute. Article 265 of the Constitution of India in unmistakable terms provides that no tax shall be levied or collected except by authority of law. Acquiescence cannot take away from a party the relief that he is entitled to where the tax is levied or collected without authority of law. In the case on hand, it was obligatory on the part of the Assessing Officer to apply his mind to the facts disclosed in the return and assess the assessee keeping in mind the law holding the field. "

We are of the considered opinion that the CIT(Appeals) was right in holding that the AO will not be justified if the incorrect income offered by the assessee is assessed and the assessee is made to pay tax on income which is not chargeable to tax under the provisions of the Act."

7. Thus in view of the above discussion, we uphold the contention of the Id. Counsel for the assessee Ms. Lavanya Gadodia and delete the capital gains tax levied by the AO as confirmed by the Id. cit(a) on the sale of the land in question.

8. In the result, the appeal of the assessee is allowed.

Kolkata, the 13th January, 2021.

Sd/-
[J. Sudhakar Reddy]
Accountant Member

Dated: 13.01.2021
Bidhan

Copy of the order forwarded to:

1. ***Ashok Kumar Malhotra, C-38, Kusum Vihar, P.O.-BCCL Township, Koyla Nagar, Dhanbad-826 005.***
2. ***ITO, Ward-1(1), Dhanbad.***
3. CIT(A), Dhanbad.
4. CIT-
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By order

Private Secretary
ITAT, Kolkata Benches