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IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'A' BENCH, MUMBAI.

Before Shri B.R. Baskaran (AM) & Shri Kuldip Singh (JM)

I.T.A. No. 5147/Mum/2017 (A.Y. 2011-12)

ACIT, Circle-1 Room No. 22, B Wing Ashar I.T.Park Wagle Indl. Estate Raod No. 16Z Thane-400 604	Vs.	Ashok W. Wesavkar 11, Gagangiri Opp. Aradhana Cinema Panchpakhadi Thane West-400 602. PAN : AADPW8307P
(Appellant)		(Respondent)

Assessee by	Dr. K. Shivram & Shri RAhul Hakani
Department by	Ms. Richa Gulati
Date of Hearing	21.04.2023
Date of Pronouncement	02.05.2023

O R D E R

Per B.R.Baskaran (AM) :-

Order giving effect to the order passed by the Third Member.

1. On account of difference of opinion arising between the Members in respect of the above said appeal, following question was referred to Hon'ble Third Member for his decision:-

> "Whether on the facts and in the circumstance of the case and in law, the learned CIT(A) erred in deleting the addition of Rs. 5,33,16,625/- made on account of Long Term Capital Gains.

2. Hon'ble President has nominated Shri Rajpal Yadav, Vice President (KZ) as the Third Member for taking decision on the point of difference between the Members constituting Division bench. The Third member, vide his order dated 25.1.2023, has agreed with the view taken by Hon'ble Accountant Member and held that the land sold by the

assessee, being agricultural land not falling within the definition on the scope of capital asset, cannot be subjected to capital gain tax.

3. In view of the majority opinion, we hold that the land sold by the assessee is an agricultural land and hence the gain arising therefrom cannot be subjected to Capital gains tax.

4. In the result, appeal filed by the Revenue is dismissed.

Pronounced in the open court on 02.05.2023.

Sd/-
(KULDIP SING)
Judicial Member

Sd/-
(B.R. BASKARAN)
Accountant Member

Mumbai; Dated : 02/05/2023

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(Judicial)
4. PCIT Thane-I
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BY ORDER,

(Assistant Registrar)
ITAT, Mumbai

IN THE INCOME TAX APPELLATE TRIBUNAL,
'A' BENCH, MUMBAI

Before SHRI Rajpal Yadav, Vice-President (KZ)
(AS A THIRD MEMBER)

I.T.A. No.5147/Mum/2017
Assessment Year: 2011-2012

ACIT, Circle-1, Thane.....Appellant
-vs.-
Shri Ashok W. Wesavkar..... Respondent
11, Gagangiri,
Opp. Aradhana Cinema,
Panchpakhadi,
Thane (W) – 400602.
[PAN: AADPW8307P]

Appearances by:
Shri Brajendra Kumar Sr. AR, appeared on behalf of the appellant.
Dr. K. Shivaram & Shri Rahul Hakani, AR, appeared on behalf of the Respondent.

Date of concluding the hearing :November 10, 2022
Date of pronouncing the order :January 25, 2023

O R D E R

Per Rajpal Yadav, Vice President (As a Third member:-

This appeal was earlier heard by the Mumbai Division 'A' Bench of the Tribunal on 16.03.2022 and since there was a difference of opinion between the Learned Judicial Member and Learned Accountant Member who heard this appeal, therefore, the following question was referred to the Hon'ble President for third member nomination:

> *"Whether on the facts and in the circumstances of the case and in law, the learned CIT(A) erred in deleting the addition of Rs.5,33,16,625/- made on account of Long Term Capital Gains".*

2. Since, the Hon'ble President of the ITAT has nominated me as third member in the aforesaid case, therefore, this appeal was accordingly heard by me on 10.11.2022. At the conclusion of the hearing, the ld. DR also sought time to file written submission. His request was accepted and his written submissionswere taken on record. The ld. AR of the assessee was also given liberty to file reply to the said written submission, which was accordingly filed by him and the same has been taken on record.

3. The sole issue for determination, in this appeal, is as to whether the land sold by the assessee was an 'agricultural land' and hence, not falling within the definition of 'capital asset' as defined u/s 2(14) of the Income Tax Act (hereinafter referred to as the 'Act'), thus, the gains earned on the sale of the land are not exigible to capital gains tax.

4. The undisputed facts of the case are that the assessee, during the year, sold his land for a total consideration of Rs.5,53,67,045/- and claimed the said receipt as non-taxable claiming that the land sold by him was an 'agricultural land' and did not fall within the ambit of 'capital asset' as defined u/s 2(14)(iii) of the Act and therefore, not liable to capital gain tax. However, the Assessing Officer did not agree with the above contention of the assessee and held that the land sold by the assessee did not quality to be categorized as 'agricultural land'. He, therefore, after giving benefit of cost of acquisition of Rs.20,50,875/-, subjected to amount of Rs.5,33,16,625/- to long-term capital gain tax.

5. Being aggrieved by the said order of the Assessing Officer, the assessee preferred appeal before the CIT(A). The ld. CIT(A), vide order dated 15.05.2007, after considering the submissions of the assessee, accepted the contention of the assessee that the land sold by the

assessee was an 'agricultural land' and therefore, was not liable to be treated as a capital asset and could not be subjected to capital gains tax.

6. Being aggrieved by the above order of the CIT(A), the Revenue preferred appeal before the Tribunal which was listed before the Mumbai 'A' Bench of the Tribunal.

7. Before the Tribunal, the ld. AR of the assessee made submissions, which can be summarized in brief as under:

(i) The land, in question, was purchased by the assessee from a set of farmers on different dates during the period ranging from 1988 to 1995 who regularly undertook the agricultural activity on the said land.

(ii) In the land revenue records, as per 'Extract 7/12', the said land was recorded as agricultural land.

(iii) The Assessee has never applied for converting the land to Non-Agricultural land.

(iv) Agricultural Cess (Shet Sara) was paid. This receipts include a receipt dated 11.02.1992 which proves that the appellant was indulged in agriculturalactivities since then. The latest receipts were of the year 2008.

(v) The assessee entered into a Naukarnama (Deed of Employment) dated 21.04.2007 with one Mr. Dattamay L. Bhoir. As per the arrangement, the assessee/owner of the land hired local resident farmers who in turn carried out the farming activities and other ancillary activities on the said land. The profits from the agricultural activity were shared between the assessee and the said farmers.

(vi) The farm labourer with whom 'Naukarnama' was executed holds agricultural land in his personal capacity in a nearby village in the same Taluka Raigad. A perusal of 7/12 extract shows that since many years the farm labourer is cultivating rice. Further, it alsoproves that the farm labourer resides in the area where the impugned land issituated. This particular document proves the bona fides of the 'Naukarnama' as the farm labourer engaged is having his own agricultural land, resides in thevicinity and is regularly indulged in agricultural activities.

(vii) 7/12 extracts of two other agricultural lands held by the assesseeproves that he is regularly engaged in agricultural activities.

(viii) 'Form 6' in which mutation entries are recorded wherein it is clearlymentioned that the appellant is an agriculturist.

(ix) Assessee has disclosed agricultural income in A.Y. 2010-11 which isaccepted by the department.

8. However, the ld. Judicial Member did not agree with the contention of the assessee and held that most of the chunk of the land, in question, was a non-agricultural land and did not qualify as an 'agricultural land' and so as to exclude the same from definition and scope of the term 'capital asset' as provided u/s 2(14)(iii) of the Act. He further held that only a small portion of land, where as per the Revenue records, paddy was grown was to be treated as 'agricultural land' and accordingly, directed the Revenue to give the assessee the benefit of 'agricultural land' not falling in the definition of capital asset to the extent of 0.9 acres only out of total land sold of 11.07 acres. The main points, upon which the ld. Judicial Member based its findings, can be summarized as under:

did not support the contention of the assessee rather, corroborates physical verification report made by inspector of income tax, wherein, the land, in question, has been shown as barren land having no irrigation facilities.

(g) That the contention of the ld. AR of the assessee that 'just because land is shown as barren, it cannot be said that agricultural land had become non-agricultural in nature' was misconceived.

(h) That even perusal of the copies of the sale deed qua the land, in question, executed by the assessee i.e. sale deed dated 02.04.2010 and 25.10.2010 do not contain the fact if the land, in question, was an agricultural land and cultivable,nor any source of irrigation has been mentioned therein.

(i) The contention of the ld. AR that to purchase an agricultural land, the purchaser also needs to be an agriculturist is also not sustainable because the nature of the land, as per the copies of the sale deed, has never been recorded as 'agricultural land', rather word 'land' is mentioned in the sale deed.

(j) That the decision of the Hon'ble Bombay High Court in the case of "Wealth-Tax vs. H.V. Mungale" reported in 1982(1983) 32 CTR Bom 301 by contending that when the land is agricultural land even if not put to actual agricultural use, it may be presumed that it continues to be agricultural land, was not applicable to the facts and circumstances of the case, because when it is a proved fact on record that the major chunk of land was never put to agricultural use, except small fraction of the same, during the last about 10 years from the assessment year under consideration. The proposition mooted out by the assessee that

agricultural land even if not put to agricultural use in a particular year will retain its nature as agricultural land, was not applicable.

(k) That the ld. CIT(A) wrongly proceeded on the premise that the Land Revenue Department has held land measuring 0.98 acre out of total land of 11.7 acres as fit for cultivation, when this land was never put to use, it cannot be said that it was cultivable nor any irrigation facilities was there nor it was case of the assessee that the land was cultivable but he could not cultivate the same who has rather come up with the nokaranama and receipt for taking rent from his tenant for cultivating the entire land in question, which was vague and unambiguous.

9. The ld. Accountant Member, however decided the issue in favour of the assessee on the following points:

(a) The land was subjected to land revenue/agricultural cess. The assessee has produced the receipts of payment of land revenue and this finding has not been rebutted by the Department.

(b) That as per the land revenue records i.e. 7/12 extract, the major part of the land i.e. 9.08 acres out of 11.7 acres was shown as cultivable land (**lagvadi yogya shetra**)

(c) That even the land record also shows that even some of the cultivable lands were not cultivated during the year which are called 'Rapad' land and the other portion where the cultivation was done, '**Bhat**', which means rice, was grown.

(d) That the ld. CIT(A) has noted that vegetables and other minor millets grown on the land were not mentioned in the revenue record in Raigad District. That the DDIT/Inspector had mis-understood the word 'Ra pad' as barren land, whereas, the land records have used the word

'Lagvadi Yogya Shetra' for the land which is cultivable and **'Porkhrab – Lagvadi Ayogya'** for non-cultivable land. As per 7/12 extract, the land measuring 9.08 hectares was cultivable land. That the ld. CIT(A) noted that 'Ra pad' does not mean that the land was barren but it means 'cultivable' upon which cultivation was not done.

(e) That the ld. CIT(A) has referred to be statement of Shri Ashok Wesavkar in which he explained that the agricultural activities were done with the help of labour and subsequently the land was leased out. That the agricultural record itself mentioned 'Bhat' (Rice) as acknowledgement of agricultural activity done.

(f) That the agricultural income offered by the assessee has been accepted by the department.

(g) That the CIT(A) has noted that as per the Naukarnama the names of the persons were mentioned and the said persons have accepted that they were doing labour and agricultural activities on the land in question. The ld. CIT(A) noted that as per agreement, expenses on the agricultural activity were to be incurred by the labourer and only the profits were to be shared.

(h) That the ld. CIT(A) has further referred to the portion of the sale deed in which it was mentioned that together with all land, compound wall, constructions, trees, plants, hedges, water, watercourse, lights rights, liberties, privileges, easements and appendages whatsoever attached to the said property, which shows that the land was agricultural land.

(i) That further Shri Ashok Wesavkar stated that there were numerous trees of jamun, local desi mango, sagwan, bamboo and other trees on the land and there were nothing on record to rebut this statement.

(j) That the ld. CIT(A) has noted that as regards the comments of DDIT that agricultural income was not commensurate to the large area of the land, the caretaker and other labourer who were deployed there, used to consume the produce and only the surplus was shared.

(k) That the Ld. CIT(A) has noted that the Inspector made the physical verification much after the sale of land and the assessee was never informed about the visit. Moreover there was nothing on record to show that the land has been put to non-agricultural use.

(m) That the facts of the case was duly covered by the decision of the Hon'ble Bombay High Court in the case of "CIT vs. H.V. Mungale" (supra).

The ld. Accountant Member thereafter summed up his findings as under:

> *"To recapitulate it is undisputed that land does not fall in the area, where it will be disentitled from the category of agricultural land. The Assessing Officer's adverse inference that though land has been recorded in the land revenue record as 'agricultural land' but the land revenue has not been regularly paid stands rebutted on the basis of receipts in this regard of land revenue payment referred by learned CIT(A). That the land was barren is clearly negated from the record itself which shows that the 9.08 hectares was cultivable land out of 11.7 hectare. Hence inference that the land was not cultivable and barren is absolutely unsustainable.*

Moreover inference that no agricultural activity was done also stands rebutted from the land revenue records itself which shows that the crops were produced. Once it is amply clear that the land is agricultural land, land revenue is being paid, crops are being cultivated, no permission for non-agriculture use is there, adverse inference cannot be drawn if the produce is not commensurate with the area of land. This is duly approved by Hon'ble Bombay High Court decisions referred herein below. As reiterated by Hon'ble Bombay High Court in these decisions that lack of commensurate generation of surplus cannot be used as yardstick for the land to be non-agricultural when the land was not used for non-agricultural purposes."

10. In the written submissions, the ld. DR has mainly relied upon the decision of the Hon'ble Supreme Court in the case of "Smt. Sarifabibi Mohammed Ibrahim vs. CIT" reported in (1993) 204 ITR 631, wherein, the Hon'ble Supreme Court has laid down the following 13 tests which are required to be considered to determine as to 'whether the land in question is agricultural land or not':

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 way of a stop-gap arrangement?*

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

5) *Whether, the permission under section 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 cesser 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 non-agricultural use?*

11) *Whether permission under section 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-agriculturist 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?

The ld. DR, in his submission, has tried to convince that the land, in question, of the assessee does not satisfy the aforesaid 13 test laid down by the Hon'ble Supreme Court to qualify as 'agricultural land'. Therefore, the same is required to be treated as capital asset liable to be subjected to capital gains tax.

11. The ld. AR, on the other hand, has replied to each of the contentions of the ld. DR by way of a chart, wherein, not only the contention of the ld. DR but the counter-comments of the ld. AR/assessee have been mentioned. Therefore, it will be appropriate to reproduce comments and counter-comments as under:

Allegation of Ld DR	***Reply of Assessee***
i) The assessee purchased the land ranging from 1988 to 2007, but no agricultural income was reflected in the return of income except for AY 2010-11.	*It was explained by the Assessee in his statement on oath before CIT(A) that the assessee belongs to the family of agriculturalists. The assessee has purchased a land for cultivation only. However, the agricultural produce was utilized for self- consumption and not for sale. Thereafter, the assessee had given his land for tilling to various contract farmers by executing a nokarnama. As per the condition of nokarnama, the contract farmers will till's the land and in return the farmers will a send a portion of agriculture produce to the landowners. The assessee usually consume the agricultural produce and therefore no income as ever generated in the previous year. However, in*

	A.Y.2010-11 there is an excess agriculture produce and therefore the assessee has asked the farmers to sell the excess produced in the market and cash generated to the same is duly handed over to assessee. Therefore the assessee had shown as agriculture income in the F.Y. 2009-10. Further the assessee had paid an agriculture cess to revenue authority from 1988 to 2007 (Pg. 331-333) which proves that the assessee cultivated the agriculture crops on said land, so it cannot be said that the land is barren land.
ii) The assessee has shown agricultural income to the tune of Rs. 60,000/- in AY 2010-11 only. The return of income for AY 2010-11 was filed only after sale of land vide sale deed dated 22.04.2010 which clearly demonstrates that it was merely an afterthought.	As reiterated hereinbefore assessee earned a surplus income of Rs.60,000/- in F.Y. 2009-10 and the plot of land is sold out in F.Y. 2010-11 so it is merely a co-incidence and cannot be considered as an afterthought.
iii) The Department has conducted physical verification twice by sending inspector to the said land. It has been found and submitted by the Inspector that, "no agricultural activity has taken place at any point of time in the land in question." The land in question is situated in the hilly area having no irrigation facilities and as such no agricultural* operation can be carried out in the same."	The inspector conducted physical verification of agricultural land twice i.e., after three year from date of sale and another after seven year from date of sale. Such inspection was done in the absence of Assessee. Till date the land is agriculture land. The land was sold to Company with objects of Agriculture and holding other Agriculture lands. Thus, the observation that no agriculture activity taken place on the said land does not hold true as the decision to undertake agriculture activity on the land now vest in the hands of buyer of the land and assessee has no say in that matter.

	As regards to irrigation facilities we would like to state that the assesse is depended on monsoon for purpose of agriculture activity. Hence, absence of irrigation doesn't mean that Agricultural activity was not carried out.
iv) The nokarnama submitted by the assessee is vague and ambiguous. Further, the same does not even bear a date. It does not contain any recital of Shri Laxman Bhoir that he ever cultivated the land, nor does it mention as from which crop season he has started cultivating the land and what were the terms and conditions of making such cultivation. The absence of these significant aspects is inexplicable. All the alleged proceeds from the 'activity aggregating Rs. 60,000/- for the three years was given by Shri Bhoir purportedly in one go, that is on 29.03.2010, just days before the agreement with the purchaser. This is highly unusual, unlikely, far-fetched and against the principles of probability. Further, there is no witness to the document. Hence, it is manifest beyond an iota of doubt that the nokarnama is self-serving afterthought created post facto.	The Ld. DR. had stated that the nokarnama were vague ambiguous and undated documents which does not prove that the land was cultivated i) Nokarnama states that Assessee is cultivating land. It also states that Laxman knows about farming. [Pls see Pg 552]. Assessee had also filed 7/12 extract of agricultural land owned by Laxman. [Pg 562- 572]. Nokarnama is dated 21/4/2007. Receipt is dated 23/3/2010. [Pls refer Pg 551 and 556]. ii) There was paddy grown on the said land. If nothing was ever grown on the land then why would revenue department levy agricultural cess. iii) The Ld. DR. also states that no irrigation facilities were there on the land but failed to appreciate the fact that the farmers were dependent on monsoon for irrigation. iv) There was nothing brought on record to state that Mr Laxman Bhoir has never cultivated the land and it is just a presumption/surmise. The Ld. DR had alleged that the assessee as received Rs. 60,000 /- in one go on 29.03.2010 is highly unusual, unlikely, far-fetched and against the principles of probability. The said presumption is totally

	erroneous as the e wanted to settle the account with tiller's so that they can execute the sale of land. That is the reason the assessee received the amount on 29.03.2010.
v) The 7/12 extracts shows that the land is barren and devoid of any irrigation. This is equally a critical piece of evidence which repudiates the claim of the assessee.	***7/12 Extract - Reflection of crop cultivated on the land*** *In this report it is stated that the land in 7/12 extract is shown as barren (Pad Jamin: in Marathi).* *In this regards, we wish to submit that the impugned land is a very big land and there are several 7/12 extracts. In some "Ra. Pad" is mentioned and in some "Su-Bhat" meaning rice is mentioned. As far as mentioning of "Ra. Pad" is concerned, we wish to state that some part of the land is kept vacant for gaining fertility and only seasonal crops are cultivated depending upon monsoons. However, on 7/12 extracts where it is mentioned "Su-Bhat", rice was grown. Further, the land which has been kept barren is a cultivable land. This is proved from a close look at the 7/12 extracts. On the left hand side of the extract, it can be seen that land piece is divided into two parts viz. i) Lagvadi Yogya Shetra (cultivable land) and Potkharab (Lagvadi Ayogya) (uncultivable land). All the 7/12 extracts states that impugned land is a cultivable land.*

12. I have heard the rival contentions and gone through the record. Before proceeding further, it will be relevant to reproduce herein the relevant provisions of section 2(14)(iii) of the Act, which read as under:

"(14) "capital asset" means -

(iii) agricultural land in India, not being land situate-

(a) 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 by any other name) or a cantonment board and which has a population of not less than ten thousand ; or

(b) in any area within the distance, measured aerially,-

(I) not being more than two kilometres, from the local limits of any municipality or cantonment board referred to in item (a) and which has a population of more than ten thousand but not exceeding one lakh; or

(II) not being more than six kilometres, from the local limits of any municipality or cantonment board referred to in item (a) and which has a population of more than one lakh but not exceeding ten lakh; or

(III) not being more than eight kilometres, from the local limits of any municipality or cantonment board referred to in item (a) and which has a population of more than ten lakh.

Explanation: For the purposes of this sub-clause, "population" means the population according to the last preceding census of which the relevant figures have been published before the first day of the previous year;

13. Therefore, as per the above provisions of section 2(14)(iii) of the Act, the land, in question, should satisfy the following conditions in order to remain outside the ambit the definition of capital asset:

i) The land must be agricultural land

ii) It must be situated in an area which is comprised within the jurisdiction of a municipality and which has a population of less than 10,000 (as per last census)

iii) It must be situated in an area which is beyond 8 km from the local limits of such municipality as specified in this behalf by the Central Government in the Official Gazette.

14. There is no doubt regarding other conditions as mentioned u/s 2(14)(iii) of the Act that the land is situated in a municipality area which has population of less than 10,000 or it is situated in a area

beyond 8 kilometre of local limits of municipality. The only issue in dispute is as to whether the land in question satisfies the condition of being agricultural land or not?

15. At this stage, it will be relevant to reproduce here the relevant land status records as per land revenue records i.e. 7/12 extract :

Sr. No.	Survey No.	(PotKharab - LagvadiAyogya)	(LagvadiYogyaShetra)	Total Area	Comments Document From 2003-04 to 2010-11	
1	-2/5	0	0.1	0.1	Ra. Pad	8-9/15.4
2	-2/9	0.05	0.65	0.7	Ra. Pad	10-11/15.4
3	-2/10	0.13	1.00	1.13	Ra. Pad	13-14/15.4
4	-5/3	1.10	3.22	4.32	Ra. Pad	16-17/15.4
5	-2/11	0.12	1.27	1.39	Ra. Pad	12-13/15.4
6	-16/1	0.03	0.06	0.09	Bhat	18-19/15.4
7	-2/4	0.11	1.29	1.4	Ra. Pad	5-6/15.4
8	-1/5	0.09	0.19	0.28	Ra. Pad	3-4/15.4
9	-16/3	0.01	0.09	0.10	Bhat	20-21/15.4
10	-1/4	0.84	0.56	1.4	Ra. Pad	1-2/15.4
11	-16/4/B	0.06	0.42	0.48	Bhat	24-25/15.4
12	-18/1	0.08	0.23	0.31	Bhat	22-23/15.4
		2.62	9.08	11.7		

16. After considering the rival contentions, the written submissions and the relevant land revenue record, I am of the view that the case of

the land of the assessee satisfies the most of conditions laid down by the Hon'ble Supreme Court, as reproduced above, which can be summarized in following words:

1) The major chunk of land (9.08 acres) in the land revenue records is classified as "Lagvadi Yogya Shetra" which means cultivable land and the land is admittedly subjected to payment of land revenue.

2) The land has been recorded in the land revenue records as agricultural land and the same was never been put to any alternative use.

3) The land is ordinarily used for agricultural purposes and it is not the case of the department that it has ever been used or intended to be used for non-agricultural purposes.

4) Since the land is situated in hill area and there was no direct source of irrigation, therefore, agriculture produce, under the circumstances, cannot be in proportionate to the land area. However, that fact cannot, in any manner, be said to affect the nature of the land being an 'agricultural land'.

5) Whether any irrigation facility is available or not may be a relevant factor but is not determinable factor for the nature of the land being 'agricultural land'. Lands in hilly areas are generally dependent upon rain waters for irrigation purposes.

6) It is not the case of the Revenue that the assessee has ever applied to the concerned authorities for the change of land user.

7) Though, it has been alleged that as per the revenue records for many years that no agricultural activity has been carried out at major chunk

of the land, however, the assessee, in this respect, has explained that vegetables and other minor millets grown are not mentioned in the revenue records of the land situated in Raigad District.

7) Even if it is assumed that actual agricultural activity was carried in the major part of the land that, itself, in my view, does not change the nature of the land especially when there is no actual or intended use for some non-agricultural purpose. It has also not established that such non-cultivation or non-user of the land for certain period, was a permanent character. In my view, merely because of certain reason, whatever it may be, if an assessee cannot cultivate the land or incapacitated to do so, that will not change the nature of the land from agricultural to non-agricultural especially when there is no change of user of the land.

8) The land is not situated in a developed area. The physical characteristics surrender situations and use of the land in adjoining area, as held by the CIT(A), indicate that the land was an agricultural land.

9) The land has not been developed by plotting and providing roads and other facilities.

10) There was no previous sale of land for non-agricultural use.

11) There was no permission obtained u/s 63 of Bombay Tenancy and Agricultural Land Act for intended sale in favour of a non-agriculturist. The land has not been sold on yardage or on acreage basis.

12) The price of the land sold does not show that it was shown at a high price or that price was not proportionate to the price of the agricultural land in the area.

13) The land has been specifically mentioned in the revenue record as cultivable land and there is no mention that the land is a barren land. The vacant or fallow land does not mean that it is a barren land.

14) There is no condition prescribed under the provisions of section 2(14(iii) of the Act that active agricultural activity should be there at the relevant time of sale of the land, rather, the only condition prescribed is that it must be classified as agricultural land. Whereas, such condition of active agricultural activity has been specifically mentioned in the relevant provisions of section 54B of the Act which provides the condition for claiming deduction is that the agricultural land should be used by the assessee for agricultural purposes at least for a period of two years immediately preceding the date of transfer. However, the other conditions as required under section2(14)(iii), thatthe land should either be situated in a Municipal of population less ten thousand people or 8 kilometres from the Municipal limit are missing in section 54B. This shows that the legislature where intended that the land should be in actual and active use for agricultural purposes, it has been specifically so provided. Whereas, such a condition of active use is missing under the provisions of section 2(14)(iii), but the condition is that the land should be an agricultural land coupled with other conditions which means that the land should be rural as per the above stated laid down parameters and classified as agricultural land in revenue records and should not have been converted or intended to be converted for non-agricultural use by any actof or omission by the assessee.

17. In view of the above discussion, I hold that the land sold by the assessee being agricultural land not falling within the definition and

scope of capital asset, cannot be subjected to capital gain tax. I, therefore, agree with the view of the ld. AM.

Kolkata, the 25th January, 2023.

Sd/-
[राजपाल यादव/Rajpal Yadav]
[उपाध्यक्ष/Vice-President]

Dated: 25.01.2023.
RS

Copy of the order forwarded to:
1. ACIT, Circle-1, Thane
2. Shri Ashok W. Wesavkar
3. CIT
(A)-
4. CIT- Thane-I
5. CIT(DR),

//True copy//

By order

Assistant Registrar, Kolkata Benches

सहायक रजिस्ट्रार / Assistant Registrar
आयकर अपीलीय अधिकरण
Income Tax Appellate Tribunal
मुंबई / Mumbai

THE INCOME TAX APPELLATE TRIBUNAL
"A" Bench, Mumbai
Shri Shamim Yahya (AM) & Shri Kuldip Singh (JM)

I.T.A. No. 5147/Mum/2017 (A.Y. 2011-12)

ACIT, Circle-1 Room No. 22, B Wing Ashar IT Park Wagle Industrial Estate Road No. 16Z Thane-400 604.	Vs.	Shri Ashok W. Wesavkar 11, Gagangiri Opp. Aradhana Cinema Panchpakhadi Thane-400 602. PAN : AADPW8307P
(Appellant)		(Respondent)

Assessee by	Dr. K. Shivram & Shri Rahul Hakani
Department by	Shri Mehul Jain
Date of Hearing	16.03.2022
Date of Pronouncement	11.04.2022

As there is difference of opinion among the Members of the Bench following question is referred to Hon'ble President for Third Member nomination :-

"Whether on the facts and in the circumstances of the case and in law, the learned CIT(A) erred in deleting the addition of Rs. 5,33,16,625/- made on account of Long Term Capital Gains."

Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Per Shamim Yahaya (AM) :-

I have gone through the order of my learned brother and have given a very thoughtful consideration. Despite great effort I have not been able to persuade myself to agree to the conclusion drawn in the said order.

2. I note that this is an appeal by the Revenue against the order of learned CIT(A). In the entire order above, the only mention about the order of learned CIT(A) is that "assessee carried the matter before learned CIT(A) by way of filing the appeal who has deleted the addition by allowing the appeal." Learned CIT(A)' order is a very elaborate order and in the said order he has relied upon several orders of Hon'ble Jurisdictional High Court. Learned Counsel of the assessee has also made elaborate submission and relied upon some germane High Court decisions. These applicable Hon'ble Jurisdictional High Court decisions have not even been referred in the above said order. Hence, I am constrained to pass a separate order as under :-

The issue raised in this Revenue's appeal is "whether on the facts and in the circumstances of the case and in law, the learned CIT(A) erred in deleting the addition of Rs. 5,33,16,625/- made on account of Long Term Capital Gains".

3. The Assessing Officer in this case has noted that the assessee has earned Rs. 5,47,52,045/- as non-taxable income being profit on sale of agricultural land. The Assessing Officer noted that he has seen from the record that the land was classified in the revenue record as 'agricultural land', there is no proof of regular payment of land revenue applicable to such land. That no mention of crop on land is mentioned in 7/12 extracts. That there is no evidence of agricultural activities, income, expenses in the past. That the sale deed executed by the assessee for sale of such property has mentioned that there are no trees on the land at the time of purchase. Hence, the Assessing Officer held that the subject matter of capital gain cannot be construed as agricultural land as there was no operation in the said land. The Assessing

Officer also disputed the assessee's contention that in his case land is situated within the sub-section (b) of section 2(14)(iii) and hence the distance should be measured from Karjat Municipal Council and which was never notified as per Gazette published by Central Government. The Assessing Officer was of the opinion the whole contention of the assessee is based on the assumption that the land is agricultural and situated at an area which keeps its out of the view of capital asset as per Income Tax. Therefore the Assessing Officer referred to the provisions of section 2(14)(iii) of the Act noting as under :

> "Agricultural land not being land situate-
>
> (a) in any area which is comprised within the jurisdiction of municipality (whether known as municipality, municipal corporation, notified area committee, town area committee, town committee, or by 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]
>
> (b) in any area within such distance, not being more than eight kilometers, 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 gazzatte."

4. After noting as above the Assessing Officer observed that now the moot question is whether the land sold by the assessee was agricultural or not. He observed that on perusal of 7/12 extracts of the said land it is seen that the land is shown as barren. After noting that he observed that 'as it is clear from 7/12 extracts that the land is devoid of any irrigation facility'. Thereafter he referred to the Naukarnama produced by the assessee. The Assessing Officer disputed the veracity of Naukarnama by observing that there is no name of farmer to whom land was given for agriculture purpose. That also no details for the person who witnessed the said Naukarnama. That the assessee failed to substantiate in support of any agricultural activity. He noted that the said land has been sold to two different parties. That from inspection of sale agreement and sale deed it is seen that the land in 'non agricultural'. Hence, holding that the land was non-agricultural in nature. He computed long term capital gain thereon.

5. Upon assessee's appeal learned CIT(A) noted that the land in question have other co-owners namely Pallavi Wesavkar, Trupti Wesavkar and Swati Wesavkar, who are the family members of the assessee. That Pallavi Wesavkar, daughter of the assessee is assessed with different Assessing Officer. That on perusal of her case, it was seen that the DCIT, Circle-3 in that case has finalized her case on 30.3.2014 on the basis of the report of DDIT dated 22.2.2013. However, he noted that in the case of the assessee i.e. Ashok Wesavkar the Assessing Officer has not discussed this report. Thereafter learned CIT(A) reproduced report of DDIT mentioned by him. He noted that 'findings of the DDIT based on which DCIT, Circle-3, Thane has arrived at a conclusion that the said land was not an agricultural land. He summarised the same in his order.

6. Thereafter learned CIT(A) reproduced the submission of assessee in great detail. Learned CIT(A) referred the provisions of Act in this regard. Thereafter he examined the issue whether location of the land falls within the definition of capital asset as defined in section 2(14)(iii) of the Act. After discussion he finally came to the conclusion that the Assessing Officer has rightly held that in the case of Ashok Wesavkar has accepted the contention of the assessee that as far as conditions laid down in section 2(14)(iii) are concerned the land in question is not a capital asset.

7. Thereafter learned CIT(A) referred to various case laws including that from Hon'ble Apex Court & Hon'ble Jurisdictional High Court :-

- CWT Vs. Officer-in-charge (Court of Wards) 105 ITR 133 (SC)(order dated 6.8.1976)
- CIT Vs. Siddharth J. Desai (139 ITR 628)(order dated 16.3.1982)
- CIT Vs. V. A. Trivedi [1988] 172 ITR 95, Bom (order dated 18.01.1987)
- Smt. Sarifabibi Mohmed Ibrahim Vs. CIT [1993] 204 ITR 631/70 (order dated 14.09.1993)
- Gopal C. Sharma Vs. CIT[1994] 209 ITR 946, Bombay High Court

(order dated 11.10.1993)

- CIT Vs. Minguel Chandra Pai [2006] 282 ITR 618, Bom (order dated 23.03.2005)
- CIT Vs. Smt. Debbie Alemao [2011] 331 ITR 59, Bombay High Court (order dated 09.09.2010)
- Shankar Dalai Vs. CIT, Bombay High Court, Tax Appeal No.1 of 2015 (80taxman.com 41), order dated March 23, 2017)
- Ranchhodbhai Bhaijibhai Patel Vs. CIT [1971] 81 ITR 446 (Guj)
- CIT Vs. Shri Sumit Shukla ITA No. 23/2015 Madhya Pradesh High Court (order dated 04.01.2016)
- CIT Vs. Gopal Narayan Kasat 328 ITR 556 (Bom) (order dated 05.11.2009)
- CIT Vs. Abdul Rehiman (49 SOT 267), ITAT Cochin (Order dated 21.10.2011)
- G K Properties Vs. ITO 55 SOT 86, ITAT Hyderabad (order dated 31.08.2012)
- Abhijeet Subhash Gaiwad Vs. DCIT 60 TAXMAN.COM, ITAT Pune (order dated 27.05.2015)
- Mahaveer Enterprises Vs. Union Of India 220,244 ITR 789,143 CTR, 252, High Court of Rajashtan (order dated 30.04.1997)
- Hemchand Hirachand Shah Vs. CIT Appeal no. ITR-5 [1979]

8. Thereafter he referred to statement recorded of Shri Ashok Wesavkar on oath under section 131 of the Act dated 9.5.2017. Learned CIT(A) observed that the Assessing Officer has mentioned that the land was classified as agricultural land in the revenue records. However there was no proof of regular payment of land revenue. That the DDIT/DCIT, Circle-3 has mentioned that the land is barren (Pad-Jamin) on hilly area. Learned CIT(A) referred to 7/12 extracts and noted that in the said details the land which can be used for cultivation (lagvadi yogay shetra) and the land which is not cultivable (lagvadi ayogay shetra) was mentioned. He duly referred the land revenue records and also gave the details of the areas which were put under cultivation and the

type of agricultural produce from the land. The summary of the land owned by the assessee was as under :-

Sr. No	Survey. No.	(Pot Kharab - Lagvadi Ayogya)	(Lagvadi Yogya Shetra)	Total Area	Comments From 2003-04 to 2010-11	Document no.
1	-2/5	0	0.1	0.1	Ra. Pad	8-9/15.4
2	-2/9	0.05	0.65	0.7	Ra. Pad	10-11/15.4
3	-2/10	0.13	1.00	1.13	Ra. Pad	13-14/15.4
4	-5/3	1.10	3.22	4.32	Ra. Pad	16-17/15.4
5	-2/11	0.12	1.27	1.39	Ra. Pad	12-13/15.4
6	-16/1	0.03	0.06	0.09	Bhat	18-19/15.4
7	-2/4	0.11	1.29	1.4	Ra, Pad	5-6/15.4
8	-1/5	0.09	0.19	0.28	Ra. Pad	3-4/15.4
9	-16/3	0.01	0.09	0.10	Bhat	20-21/15.4
10	-1/4	0.84	0,56	1.4	Ra. Pad	1-2/15.4
11	-16/4/B	0,06	0.42	0.48	Bhat	24-25/15.4
12	-18/1	0.08	0.23	0.31	Bhat	22-23/15.4
		2.62	9.08	11.7		

9. From the said details he observed that out of 11.7 hectares of land, land measuring 9.08 hectares was cultivable land and 2.62 hectares was the land which is not capable for cultivation. He noted that the land records also shows that even some of the cultivable lands were not cultivated during the year which are called 'Rapad' land and the other portion where the cultivation was done 'Bhat' which means rice was grown is mentioned. He noted that it was explained that the vegetables and other minor millets grown on the land is not mentioned in the revenue records in Raigad District. Learned CIT(A) also gave a finding that the assessee also submitted copies of the land revenue paid showing that the land revenue was regularly paid. In these facts learned CIT(A) rejected the Assessing Officer's contention that the assessee has not paid land revenue is incorrect. He further rejected the observation of DDIT/DCIT that the

entire land is barren land being hilly also incorrect. He observed that the DDIT has understood the word "Ra Pad" as barren land, whereas the land records have used word "Lagvadi Yogya Shetra" for land which is cultivable and "PotKharab - Lagvadi Ayogya". Even Ra Pad is mentioned for land portion which are cultivable, meaning that Ra Pad land is not barren land but land on which cultivation was not done. The land records also show that there was cultivation of rice.

10. On the basis of above observations, learned CIT(A) held that the land fulfils the criteria that it is classified in the revenue records as agricultural land and land revenue was also duly paid are satisfied. Thereafter learned CIT(A) addressed the proposition that whether the land was actually or ordinarily used for agricultural purposes at or about the relevant time. In this regard he referred to the following case laws :-

i. Hon'ble Supreme Court in CWT Vs Officer's-in-charge (court of Wards)(1976)105 ITR 133 order dated 06.08.1976 held that

> 12. ——————"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, which will only affect its valuation as part of 'asset', but its actual condition and intended user which has to be seen for purposes of exemption from wealth-tax... If there is neither anything in its condition, nor anything in evidence to indicate the intention of its owners or possessors to connect it with an agricultural purpose, the land could not be agricultural land for the purposes of earning an exemption under the Act." Entries in revenue records are, however, good prima facie evidence.

The Hon'ble Jurisdictional High Court of Mumbai in the case of Gopal C Sharma 209 ITR 946(1994) held as under.

> 14. 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."

11. Learned CIT(A) observed that in the assessment order the Assessing Officer has held that the assessee was not doing any agricultural activities. He observed that this was based on wrong conclusion. He referred to the observations earlier made by him regarding cultivable and non-cultivable land. He also referred to Shri Wesavkar statement which also explained the agricultural activities done with the help of labour and subsequently by leasing the land. He also rebutted the Assessing Officer's observation that as per sale deed, it is mentioned that there are no trees. He referred the following portion of the deed :-

"Together with all land, compound wall, constructions, trees, plants, hedges, water, watercourse, lights, rights, liberties, privileges, easements and appendages whatsoever to the Said Property belonging or pertaining to or usually held or enjoyed therewith on reputed to belong or be appurtenant thereto shall be sold to the Purchasers.

Vendor shall not reserve any rights with him regarding water, trees, stone, easmentary rights, timber, and the Purchasers shall have all the ownership rights to use the Said Property."

12. He observed that the Assessing Officer has misunderstood the sale agreement which clearly mentions that the trees on the land will be property of the purchaser with the land. That Shri Ashok Wesavkar also stated that there are numerous trees of Jamun, local desi mango, sagwan, bamboo and other trees. Regarding the findings of the AO that assessee has never shown any agricultural income learned CIT(A) referred to the return of income which was also reflected in the bank account wherein agricultural income was offered and accepted by Department. Learned CIT(A) further observed that before the Naukarnama when the assessee was doing agricultural activity himself with the labourers. That there were more expenses than the income and the agricultural produce was used for self consumption by assessee and the labour. He observed that the Assessing Officer's finding that in the Naukarnama there was no name of the farmer is factually wrong. He noted that Naukarnama dated 21.4.2007 clearly mentioned the name of

Dattarya Laxman Bhoir a farm labourer who also had agricultural land in the neighboring village and the assessee had given the land to him for tilling and crop sharing. He also noted that as the land size was big and there are other Naukarnam's namely with Shir Chandrashekhar Joshi and with Balu Hiru Taule, who are the agriculturists and holding land in the neighboring areas. He noted that even the DDIT has mentioned in his report that an agreement was entered with Shri Joshi by one of the family member. He noted that it was submitted that mainly the rice were grown on the land in rainy seasons and vegetables after that. That the tenant was also taking care of the trees, which were grown there. Regarding expenses, it has been mentioned that the expenses were to be incurred by the laborer as per clause 11 of the agreement. Regarding comments of the DDIT that agricultural income is not commensurate to the large area of the land he referred to the explanation that agricultural produce was used by the caretaker and other labourer who were deployed there and only the surplus was shared. He also noted the submission that the assessee was never informed about the inspector who in any case had visited the place much after the land sold by the assessee and the findings were never confronted to the assessee. He also noted that it is not known, which part of the land was visited and photographed. Thereafter learned CIT(A) referred to the decision of Hon'ble Jurisdictional High Court in the case of Minguel Chandra Pai and the Smt. Debbie Alemo and observed as under :-

> "Bombay High Court in Mingule Chandra Pai (2005) and Smt Debbie Alemo (2010) reiterated that the land in question was shown in agricultural records as agricultural land and no permission was taken for non-agricultural use by the assessee. Further if an agricultural operation does not result in generation of surplus that cannot be a ground to say the land was not used for agricultural purposes. In Subhash Gaikwad, ITAT Pune treated the land as non-agricultural because the assessee had himself computed the capital gains and had admitted that no agricultural operations were done on fallow land. In this background ITAT Pune held that just because the land is assessed in land revenue records as agricultural land, is not decisive to determine the nature of land being agricultural land. In the case of Shankar Dakai, Bombay High Court followed its decision in Mingule Pai and Debbie Alemo and stated that merely because the assessee could not produce or could not utilize the land fully by employing labours or give the crops statement, should not have been criteria specifically when the assessee and

the owner of the land have been using the products for their personal consumption. Therefore after Sarifabibi case, various factors have to be seen which include not only the status of the land in the revenue record but also whether the land was actually used for agricultural purposes. The ratio of law laid down in Court of Wards by Supreme Court that what is really is required to be shown is the connection with the agricultural purpose and user and not the mere possibility of the user of the land for an agricultural purpose has been explained by various courts on the facts of the case. The crux of the findings is that the land should be used for the purpose of agriculture and if an agricultural operation does not result in generation of surplus that cannot be a ground to say that the land was not used for the agricultural purpose.

x. Applying the above principles on the facts of the case, regarding the test whether the land was actually or ordinarily used for agricultural purposes at or about the relevant time, it is seen that the assessee has submitted documentary evidence in the form of land revenue records, the copy of Naukarnama, the return of income and the bank statement to show that the land was used for agricultural purposes. In his statement also he explained that on the land, rice was grown in rainy season and minor millets and vegetables were grown after rainy season depending upon the moisture available in soil and the availability of water from the "Gurcharan Well". There were also numerous trees including those of Jamun and local mangoes. In his statement, Sh Wesavkar explained that in the agricultural activities, there was more expenditure than the income, when he was doing it with the help of local labourers. Later on the same was given on Naukarnama, so that the locals who are also agriculturist can grow some crop and take care of the land and the surplus is shared with the assessee. Though the land area was very large but keeping the constraints explained by Sh. Wesavkar, the produce was mainly for self consumption, use of labour or for seeds in the next season. He also explained the problems in leasing the land for tilling as there are chances that the tiller can claim ownership rights as per Kul-kaida laws. In view of discussion above, as the assessee and the tenant on the land were producing for self consumption and the surplus was shared, just because the produce and agricultural income was not commensurate with the area of the land, it should not go against the assessee in deciding that the land was not agricultural land.

The details given above show that the land fulfils the second criteria that the land was used for agricultural purposes."

13. Thereafter learned CIT(A) answered the question whether such user of the land was for a long period or whether it was a temporary character or by way of a stop-gap arrangement. He referred to several case laws and from the same he observed that as in this case land was held by the assessee for a long period and this was one of the sole incidences of sale of land and there are no frequent transaction of sale and purchase of land. Hence, the

circumstances in which the land which was sold, shows that the assessee fulfills the criteria of sale of agricultural land. He also observed that the said land was never used for non-agricultural purpose as permission under section 65 of the Bombay Land Revenue Code is required for non-agricultural use of land. Learned CIT(A) noted that the Assessing Officer has mentioned that in the sale agreement and index II, the land is shown as non-agriculture. However he gave a finding that on going through the agreement it is clearly mentioned that the land is an agricultural land. That further in Maharashtra only the agriculturist can acquire agricultural land and therefore while purchasing the company was required to give a certificate that it was owning agricultural land which is part of the agreement on page 207-209 of the paper book dated 9.5.2015. in this regard learned CIT(A) referred as under :-

> "On Page no. 209 the Tehsildar in letter dated 15.03.2010 has certified as under:
>
> LAND HOLDING CERTIFICATE FOR AGRICULTURAL LAND
>
> This is to certify that M/s. Mayank Land Private Limited situated at Navi Mumbai is owning and enjoying 00-40-00 Ha of agricultural land in (Survey No) Khasara No. 20/18 in Village ; Devalamphi, Tehsil (Taluka): Khandwa, Dist: East Nimad, State : Madhya Pradesh.
>
> This certificate is issued for the purpose of land registration.
>
> Place: Khandwa
> Date: 15.03.2010 Patwari Tehsildar"

14. Learned CIT(A) also observed main objective of the purchasing company was also inclusive of engagement into agricultural activity. He observed that in this case neither the assessee nor the buyer has converted the land into non-agricultural use before or after the sale. That the land was sold in acres and not in square yards. He repeated that Maharashtra Government Laws do not permit purchase of agriculture land by a non-agriculturist and the company has purchased agricultural land with the intention of agricultural and allied activities with the prior approval of the

collector. Thereafter learned CIT(A) referred several other proposition which according to him whether an agriculturist would purchase the land from 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. After discussing the above he concluded as under :-

> "From the discussion above, it is seen that the land sold by the assessee fulfils almost all the criteria laid by the Supreme Court for being treated as agricultural land. The Assessing Officer had treated the land as non-agricultural land mainly on the basis of second criteria that the land was not put to agricultural use and that it was sold to a company, which may use it for non-agriculture purpose in future. Some of the findings of the AO, like non payment of land revenue, no mention of crop on 7/12 extract, no trees on land and there being no name on Naukarnama are not found to be factually correct. The 7/12 extracts is available on public domain and can be viewed by any one by putting survey number at the website of Maharashtra Government, in which all the records are available online. The records show the type of land, location of land, agricultural produce etc,. In other family member's case, in respect of same land, the other DCIT finalised the assessment based on the report of DDIT and the grievance of the assessee is that findings of the enquiry were never confronted to him. The view of the DDIT on definition of capital asset as defined in 2(14)(iii) is not correct, though the AO in the case of the assessee has not taken that view. Further the agriculture land in Maharashtra cannot be sold to non-agricultural company. The purchasing company had to give a certificate that it owns agricultural land and was purchasing agricultural land mainly for the purpose of agricultural and allied activities. Though I agree with the view of the DDIT that agricultural income shown by the assessee was not commensurate with the size of the land but in numerous decisions discussed above, including the latest decision of Bombay High Court in case of Shankar Dalai, it is held that if the land is used for agriculture and the produce is sufficient for self consumption, it should be treated as agricultural land. If an agricultural operation does not result in generation of surplus that cannot be a ground to say that the land was not used for the agricultural purpose. These decisions have to be respectfully followed while deciding a complex issue like this. Probably while giving these decisions, Courts have the background of the farmers committing suicide and the crisis faced by the agrarian community on one hand and the rampant misuse of showing bogus agricultural income on the other hand. It cannot be denied that due to non-taxability of agricultural income there are large number of cases who without doing real agriculture inflate the agricultural income. It was in this background, the Courts have held that to decide whether the land is agricultural or not is a complex matter and laid down various criteria. The Courts have been tough with cases where there are no agricultural operations at all or the land was converted to non-agricultural use or the intention was to deal in agricultural lands. Sh. Wesavkar could satisfy that

the land was purchased with intention of doing agriculture. In fact as stated, he himself for numerous years with hired labour did agricultural activity and subsequently because of his increasing age, did so by giving land on tilling to locals. He also explained the problems faced by him including labour and water problems because of which produce was only sufficient for self consumption and for use of labour and seeds. The land records also indicate and corroborate these facts. In fact, the statement of the AO that the agricultural income was not commensurate to the large area of the land, gives a silent unintended approval of the fact that there were agricultural activity. As far as the other tests are concerned, the land is located in green zone, never converted to non-agricultural use and was not located in any area which could be commercial in the near future. Even after 7 years of sale, there is no development in the area and even for construction of house permission of the collector is required. Further the assessee is not into business of land dealing and the land was held by the assessee and his family for more than 20 years. Under such circumstances, it would not be appropriate to treat the land as non-agricultural land and levy capital gains. Therefore the addition made by the AO is deleted."

15. Against this order the Revenue is in appeal before ITAT.

16. Both the parties have been heard and the records perused. Learned Departmental Representative relied upon the order of the Assessing Officer. He submitted that the assessee has shown agricultural income in A.Y. 2010-11 after sale of land for an amount of Rs. 60,000/-. Hence there was no agricultural income. That 90% of the land is devoid of irrigation facility. That Naukarnama cannot be relied upon.

17. Per contra learned Counsel of the assessee relied upon the order of learned CIT(A). Learned counsel made following written submissions :-

"Fact of the Case: -

1 Assessee is a professional architect and is a proprietor of M/s. Ashok Wesavkar & Co. The Assessee derives income under the heads business or profession. Capital Gains and Income from other sources. During the year under review the assessee has e-filed his return of income on 24-09-2011 declaring total income of Rs. 54,59,860/- after claiming Rs. 1.00.000/- as deduction under chapter VI-A. Also the assessee had earned Rs. 5,47,52,045/- as Non-Taxable Income being Profit on sale of Agricultural Land.

Computation of Income, Audited Balance Sheet and Tax Audit Report. [Pg 1-21]

Assessee had purchased agricultural property at Vengaon on various dates from:

Sr. No.	Date	Seller	Survey No.
1.	17.11.1994	Lax man Wadekar	Old Survey No. 57, Hissa No. 4 New Survey No. 1/4
2.	5.1.1989	Parsharam Vaidya	Old Survey No. 57. HissaNo. 5 New Survey No. 1/5
3.	15.11.1994	Laxman Wadekar	Old Survey No. 44, Hissa No. 4 New Survey No. 2/4
4.	30.11.1988	SudhirV Vaid	Old Survey No. 44, Hissa No. 5 New Survey No. 2/5
5.	2.7.1991	Bhagwan Vaidya	Old Survey No. 44, Hissa No. 9 New Survey No.2/9 Old Survey No. 44, Hissa No. 11 New Survey No. 2/11
6.	30.11.1988	Shivram S. Vaid	Old Survey No. 44, Hissa No. 10 New Survey No. 2/10
7.	5.1.1989	Parsharam Vaidya	Old Survey No. 29, Hissa No. 3 New Survey No. 5/3
8.	30.11.1988	Shivram S. Vaid	Old Survey No. 32, Hissa No. 1 New Survey No. 16/1 Old Survey No. 32, Hissa No. 3 New Survey No. 16/3 Old Survey No. 34, Hissa No. 1 New Survey No. 18/1
9.	8.5.2007	Chindhu Palkar Vitthal P.Palkar	Old Survey No. 32, Hissa No. 4B New Survey No. 16/4B

Copy of purchase agreement (page No. 86-182)

3. During the year under review the assessee had sold all the aforesaid property to M/s. Mayank Land Pvt. Ltd on 22.4.2010 for a sale consideration of Rs. 5,39,67,0457- and Laxman Vaidya on 25.10.2010 for Rs. 14,00,000/-. [Copy of Sale Deeds Pg 183-248 , Translated copy Pg 334 -345]

4. The assessee vide submission before AO dated 26.02,2014 [Pg 24-42] and 14.3.2014 [Pg 43-46] has filed detailed submissions with documentary evidence to show that the land is agricultural land, agricultural activities were carried on and further same is not situated within the specified area as per Section 2(14) of the Act and hence, not a capital asset.

5. The AO completed the assessment u/s. 143(3) by adding profit on sale of agricultural land amounting to Rs. 5,33,16,625/- under the head income from capital gains.

6. Written submission before CIT(A) dated;
11.5.2015 [Pg 47-62]
25.2.2016 [Pg 63-65]
15.4.2017 [Pg 66-79]
4.5.2017 [Pg 66-79]

7. CIT(A) recorded statement of assessee on oath on 9/5/2017 (Para 10 Pg. 34 of CIT(A) order)

8. CIT(A) considered the report of DDJT dt. 22/2/2013 which report was considered by A.O. of CO-owner Pallavi Wesavkar (Para 6.2 Pg. 3 of C1T(A) order)

9. CIT(A) allowed the appeal the assessee.

Propositions

I The impugned land is an agricultural land

1. As per provisions *of* Section 2(14)(iii), a piece of land should satisfy following conditions in order to remain outside the ambit of definition of capital asset:

- The land must be agricultural land
- It must be situated in an area which is comprised within the jurisdiction of a municipality and which has a population of less than 10,000 (as per last census)
- It must be situated in an area which is beyond 8 Km from the local limits of such municipality as specified in this behalf by the Central Government in the Official Gazette

2. The said property was purchased by Assessee from a set of farmers who regularly undertook the agricultural activities on the said land.

3. "Naukarnama' dated 21.04.2007 between Assessee and Mr. Dattamay L. Bhoir, (Pg. No. 249, 253 & 546-556)

4. As per this arrangement, the owners of agricultural land hire local resident farmers, who in turn carry out the farming activities of growing crops and other ancillary activities on the said land. After selling the resultant agricultural produce in the open market and meeting all the incidental expenditure, the residual income accrued to the farmers is then shared between the owners of the land and the farmers.

5. In the Revenue Records, as per Extract 7/12 (Refer Paper Book Pg No. 314-322), the said land is recorded as Agricultural Land.

6. The Assessee has never applied for converting the land to Non-Agricultural Land.

7. Agricultural Cess (Shet Sara) paid is attached herewith as (Pg. 331-333 & English Transaction 559-562). This receipts include a receipt dated 11.02.1992 which proves that the appellant was indulged in agricultural activities since then. The latest receipts are of the year 2008.

8. The farm labourer with whom 'Naukarnama' was executed holds agricultural land in his personal capacity in a nearby village in the same Taluka Raigad. A perusal of 7/12 extract (Pg. No. 346-357 & 562-572) shows that since many years the farm labourer is cultivating rice. Further, it also proves that the farm labourer resides in the area where the impugned land is situated. This particular document proves the bona fides of the 'Naukarnama' as the farm labourer engaged is having his own agricultural land, resides in the vicinity and is regularly indulged in agricultural activities.

9. 7/12 extracts of two other agricultural lands held by the assessee proves that he is regularly engaged in agricultural activities. (Pg. No. 358-359 & English Transaction 573-576)

10. 'Form 6' in which mutation entries are recorded wherein it is clearly mentioned that the appellant is an agriculturist. (Pg. No. 360-374 & English Transaction 577-580)

11. Assessee has disclosed agricultural income in A.Y. 2010-11 which is accepted by the department. (Pg. No. 287-311)

12. Assessing officer observation are incorrect ay under :-

Assessing Officer's observation	Assessee's contention
No agricultural activity was undertaken on the said land	i) This observation made by the AO is completely erroneous because of the fact that the assessee was cultivating rice on the said land. ii) Also he had duly disclosed agricultural income for previous year relevant to AY 2010-11 in his Return of Income (Refer Paper Book Pg. No. 287-311) . iii) He had regularly paid Agricultural tax duly levied by Gram Panchayat on the agricultural produce. (Pg. 331-333) iv) The fact that the said land was given for tilling which is duly corroborated by a valid Naukarnama (Pg. 546-556) proves beyond doubt that agricultural activity was carried on the said land. The assessee had also derived agricultural income as evidenced from Bank Statement of

	Account no. 501 at the Parsik Janta Sahakari Bank Ltd.
7/12 Extract shows the land as barren	The Ld.AO erred in inferring the fact that the land was barren as per 7/12 Extract without appreciating the fact that the land has to be kept barren mandatorily for a certain period or else it looses its fertility. In the instant case rice was grown on the said land for 3 months every year during monsoon and post harvesting the land was kept barren.
The stamp duty levied by the Collector of Stamps for the said land was as per the rates applicable to Non-Agricultural land	The Ld.AO without applying his mind and relying purely on a presumption, inferred that the stamp duty paid on such transfer of land was as per rates levied on transfer of non-agricultural land. There was no corroborative evidence for such assumption. The Ld. AO failed to acknowledge the fact that the stamp duty was paid on rates leviable to agricultural land.
Sale of land to non-agriculturist company.	The Ld.AO wrongly inferred the fact that the purchaser of land was to a non-agriculturist without appreciating the fact that an agricultural land can never be sold to a non-agriculturist. The purchaser is an agriculturist and was holding agricultural land in Madhya Pradesh prior to purchase of said land. (Refer Paper Book Pg. No. 312-313) Also as per MOA, object is to purchase and sell agricultural land. (Pg. 375-399) (Pg. 381 Clause 59)
Intention of the seller as well as buyer	The Ld. AO wrongly inferred that the intention of the buyer and seller was to do trading activity on the said land and no agricultural activities was ever carried on nor the buyer intends to do it in the future. Such an inference is totally based on presumption and there is no corroborative evidence to support the same. Also the said land as per the latest 7/12 extract submitted to CIT(A) it is still an agricultural land. That means after a span of more than 4 years, the character of the land is not changed from agricultural to non-agricultural. (Refer Paper Book Pg. No. 314-322) .

13. The AO disregarded the Naukarnama by holding that the same is an afterthought of the assessee to get immunity from Capital gains tax. In this

regard, it is submitted that Naukarnama was prepared in 2007 well before sale in the year 2010, so it cannot be said that the same was just an afterthought of the assessee.

14. AO, held that as per 7/12 it is Rapad - means barren. The AO has misapprehended the same as Non-agricultural land. Just because it was kept barren, it cannot be said that the agricultural land had become non-agricultural in nature.
Infact the land is shown as cultivable land [Chart on Pg. 37 of CIT(A) order.]

15. To purchase an Agricultural land, the purchaser itself needs to be an Agriculturalist. This requirement is fulfilled, as evidenced from the fact that even the said purchaser, M/s. Mayank Land Private Ltd. . is also an agriculturalist and already in possession of agricultural land in Madhya Pradesh.

16. Purchase deed dated 22.04.2010 (Refer Paper Book Pg. No. 86-182), between Assessee and M/s. Mayank Land Pvt. Ltd., the intention of the purchaser of land to utilize it for agricultural purposes, is clearly mentioned on Page 3, Para (b) and further, as per para (c) if the purchaser wishes to utilize the said property for Non-agricultural purpose, then the same is to be done at its own cost and risk by obtaining requisite approvals.

17. A chart showing findings of the investigation report and its rebuttal. (Pg. No. 400 - 402)

18. Thus, from the above factual and legal submissions and documentary evidence, it is amply clear that said Land is agricultural land for the purpose of Section 2(14)(iii) of the Act.

19. CIT Vs. H. V. Mungale (1984) 145 ITR 208(Bom.)(HC) (Refer Paper Book Pg. No. 429-433), wherein it was observed as under:

> "It is well established Hint in a given case agricultural land may or may not yield agricultural income. If there is land which was once cultivated or rut t to agricultural use hit t is now fallow or barren, it would not merely by reason of such fact cease to be agricultural land. Conversely what is potently non-agricultural land may in extraordinary circumstances he used for a purpose to which agricultural land is usually put and may, therefore, yield agricultural income. However, merely by reason of the yield, it cannot he designated as agricultural land. Again, when' the land is being assessed as agricultural land, then, normally, although it is not being put to actual agricultural use, it may be presumed that it continues to be agricultural land, unless it can be shown that it has been in fact put to some non-agricultural use, or there is some relevant circumstances to indicate that it cannot be properly regarded as agricultural hind. It is also well settled Hint entries in revenue records are good prime facie evidence with regard to the character of the land and the purpose for which it is intended to be

used and the burden is on the revenue to rebut this presumption. That apart, while determining the character or the nature of the hind, it must necessarily he taken into account that the land which is recorded ns agricultural land in the revenue papers cannot be used for non-agricultural purposes by the owner, unless the land is allowed to be converted to non-agricultural purposes by appropriate authorities.

In view of the facts and findings recorded by the Tribunal in the instant case, it was obvious that the land was used for agriculture till 1963 and had been so recorded in the revenue records and was also assessed as agricultural land. Again, no evidence had been led on behalf of the revenue to rebut this presumption. Consequently, merely because the land remained fallow after 1963, it did not cease to be agricultural land."

20. CIT v. Smt. Dcbbie Alemao (2011) 331 ITR 59 (Bom.)(HC), (Pg. No. 586 -589) wherein on identical facts, the Hon. Court has held that the transferred land is an agricultural land, not subject to capital gains tax liability.

Facts of the above mentioned case:

i. The land sold was mentioned in the revenue records as agricultural land;

ii. It was argued on behalf of the revenue that the land was not actually used for agriculture in as much as no agricultural income was derived from the land and was not shown in the Income-tax return. In reply, the assessee contended that that there were some coconut-trees in the land, but the agricultural income was just enough to maintain the land and there was no actual surplus. Hence, no agricultural income was shown by the assessee.

Held
The Hon. Court held that:

i. If the agricultural operation does result into generation of surplus that cannot be a ground to say that the land was not used for the agricultural purpose.

ii. It is not disputed that the land shown in revenue records to be used for agricultural purposes and no permission was ever obtained for non-agricultural use. Relevant section of Land Revenue Code prescribes that no land used for agriculture shall be used for any non agricultural purpose and no land assessed for one non-agricultural purpose shall be used for any other non-agricultural purpose except with the permission of the Collector. Permission for non-agricultural use was first time obtained by the purchaser after it purchased the land.

iii. Thus, the findings recorded by the authorities below that the land was used for the purpose of agriculture are based on appreciation of evidence and application of correct principles of law.

Facts of the case at hand

i. The land is shown as agricultural land in revenue records;
ii. There is a positive agricultural income shown in the Income-tax return;
iii. There is a valid naukarnama executed which proves that agricultural activities were carried on the subject land,
iv. The purchaser is an agriculturist company and was holding agricultural land prior to purchase of subject land.
v. As per the latest 7/12 extract, the subject land is still an agricultural land that means even after a span of more than 4 years, the character of the land has not changed.

Comparison and conclusion

On comparing the facts of the case law and our case, it is evident that our case is more stronger as there is a positive agricultural income as well as a valid document - Naukarnama being executed for carrying agricultural activities. Further, the subject land in the case at hand has still not converted into non-agricultural land which is evident from the latest 7/12 extracts which also proves that the usage of the land was always agricultural. Further, the revenue records clearly indicate that the land is agricultural land.

21. In addition to the above discussed case, reliance is placed on the case of CIT v. Minguel Chandra Pais (2006) 282 ITR 618 (Bom.)(HC) (Pg. No. 466-471) which also affirms the above views.

In PCIT v. Anthony John Pereira (2020) 425 ITR 134 (Bom.)(HC) (Pg. No. 581-585) Agricultural land in a Village within Municipality. Village having population less than specified ten thousand. Land was agricultural Profits from sale of land is exempt

22. CIT v. Siddharth J. Desai (1983) 139 ITR 628 (Guj.) (HC) [Decision affirmed by Supreme Court in Smt. Sarifabibi Mohmed Ibrahim v. CIT (1993) 204 ITR 631(501

Facts of the case

On 18-8-1965, the assessee had purchased a piece of agricultural land which was situated in an area not included in the municipal limits. There was not any development in the surrounding area indicating any potentiality for the development of the land. For the period of three years immediately after its purchase, agricultural activity was carried on in the land. At or about the time of its subsequent sale, the land was not actually put to agricultural use. All the while, however, the land continued to be listed in the revenue record and it was assessed to land revenue. On 22-11-1968, the assessee obtained permission of the competent authority under section 63 of the Bombay Tenancy and Agricultural Lands Act, 1948, for the sale of the land to a co-operative housing society. On 1-2-1969, the assessee sold the land to the society. On 5-2-1969, the society obtained the permission for non-agriculture use of the land, under section 65 of the Bombay Land

Revenue Code, 1869, from the competent authority. The assessee claimed that the surplus realized by him on the sale of land was not liable to be taxed as capital gains as the land in question was agricultural land.

Held by the High Court

1. Several factors are relevant and mi- 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 arc 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 cessor 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 far 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 oilier facilities;
   j. whether there were any previous sales of portions of the land for non-agricultural 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 hind 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 tin' 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 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, he 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 fry 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 laud and the surplus realised on a sale thereof was not liable to be assessed to capital gains tax.

Facts of the case at hand

Sir, all the questions framed by the Hon'ble High Court are factually answered as under

a. The land was classified as an agricultural land in the revenue records and was subject to payment of land revenue;
b. The land was used for cultivating rice at or about the relevant time; c. The user of land was for a long period of time;
d. The appellant had earned income from agricultural activities amounting to Rs. 60,000/- in the previous relevant to AY 2010-11;
e. No permission is obtained even till today u/s 65 of the Bombay Land Revenue Code for non-agricultural use of the land;
f. The land on the relevant date was used for agricultural purposes which has resulted into income of Rs. 60000/- in the previous year relevant to AY 2010-11; further it has never been put to any alternative use till today;

g. The land was used for agricultural purpose and the land always remained cultivable (refer 7/12 extracts);
h. The land is situated in village Dhakte Vengaon which is not a developed area and the adjacent lands are also not used for non-agricultural purposes;
i. The land is not developed and the user of the land as per revenue records till today remains agricultural;
j. No permission u/s 63 of the Bombay Tenancy and Agricultural Lands Act has been obtained as the sale is in favour of an agriculturist company;
l. The subject land is purchased by an agriculturist company and till today the nature of land has been changed u/s 65 of the Bombay land Revenue Code;
m. The land is sold on hectare basis.

Applicability of the case law

The facts in the abovementioned case law and that of the appellant are identical in as much as for both the lands, there is an agricultural activity before the transfer of the said land, even though quantitatively, the yield was not much. The nature of exploitation of the land would indicate not only its physical characteristics but also the user is agricultural. There is no conversion of land into non-agricultural use by the vendor. In fact in the facts of the above mentioned case law, the vendee had obtained permission for non- agricultural use, however in the instant case no such permission is obtained by the vendee. Further, no development activity is undertaken in the adjacent area. Hence, applying the said ratio laid down as well as in view of the factual answers to the questions framed by the Hon. Gujarat High Court, the subject land cannot be considered as a capital asset for capital gains tax liability.

23. Shankar Dalai vs. CIT (2017) 80 taxmann.com 41/247 Taxman 170 (Bom.)(HC) (Pg. No. 491-501)

Facts are similar. Decision is squarely applicable.

II The agricultural land is not a capital asset as it does not fall either in 2(14)(iiia) or (iiib)

1. It is submitted that the impugned land falls under the jurisdiction of Gram Panchayat of Vengaon. The Sarpanch of Group Gram Panchayat, Vengaon has issued a certificate dated 30.07.2010 (Refer Paper Book Pg. No. 323 & 557-558), whereby it has been categorically noted that land is under jurisdiction of Gram Panchayat and population per census 2011 is 2700.

As per the Ministry of Home Affairs, Government of India, the census of the year 2011 is provisional in nature, yet to be finalized and published. Therefore, according to the applicable "last preceding census", being the year 2001, the population of Vengaon was 2,590. (Pg.No. 324)

Also, the Road Development Map 2001-2021 of Karjat Taluka - the village of Vengaon is depicted as an area having a population of less than 10,000 according to census of 2001.

2. As mentioned above, the property falls under the jurisdiction of Group Gram Panchayat. It does not fall under the jurisdiction of any municipality which is notified by the Central Government vide Notification No. [SO 9447] dated 06.01.1994 (Refer Paper Book Pg. No. 325-328).

3. Now, the nearest notified Municipal Corporation is Ulhasnagar and area upto 8 Km from the limits of the corporation in all direction. It is submitted that Ulhasnagar is at a distance of 54 Km from the property situated in Vengaon. This facts is supported by the letter dated 22.02.2012 from Public Works Department (PWD), Alibag (Refer Paper Book Pg. No. 329 & 542-543).

4. The AO has observed that as per the letter dated 07.07.2010 received from Dy. Engineer, PWD, Karjat, the distance of Dhakte Vengaon from the Municipal limits of Karjat Municipality is 1 Km and Karjat was notified Municipal Council in 1992 by the Govt. of Maharashtra. However, the AO has failed to observe the even though the distance between Karjat Municipality and the land is 1 Km, it still does not come within the jurisdiction of Karjat Municipality.

5. In fact, Karjat Municipal Corporation (Karjat Nagar Parishad) vide its letter dated 30.07.2010 (Refer Paper Book Pg. No. 330, 544-545), has categorically mentioned that the said property situated in Vc-ngaon Village does not fall within its jurisdiction.

6. In view of the above, the said agricultural land is not situated within the jurisdiction of municipality as required by the provisions of Section 2(14)(iii) of the Act.

7. Further, assuming without accepting, that the said land is situated within the jurisdiction of Karjat Municipality, still the AO would not succeed in his contention since the Karjat Municipality is not notified by the Central Government in the Notification No. 9447 dated 06.01.1994 in the Official Gazette. As rightly held by the Honb'le Tribunal in case of Srinivas Pandit (HUF) V. ITO (2010) 39 SOT 350 (Hyd.)(Trib.) (Refer Paper Book Pg. No. 448-451), as under:

> "12. In this case also admittedly, the entire transactions was made through Rajendra Nagar Revenue Authorities and not through Hyderabad Revenue Authorities. Therefore, as found by the Co-ordinate Bench of the Tribunal in the case of Capital Local Area Bank Ltd. (supra), the jurisdictional Municipality is Rajendra Nagar Municipality and not the Hyderabad Municipality. Since Rajendra Nagar Municipality is not admittedly notified by the Central Government, the agricultural land in question cannot he treated as capital asset by taking the distance from the limits of Hyderabad Municipality. By respectfully following decisions of the Co-ordinate Bench cited supra, we hold that the land in question cannot be treated as capital asset within the meaning of section 2(14)(iii)(b) of the Income-tax Act. Accordingly, Orders of the lower authorities are set aside."

III. Order passed by CIT(A) is based on the facts and considering the statements on oath of the assessee. (CIT(A) Pg. 34-36 Para 10) Department has not contradicted the facts recorded by the CIT(A).

In view of the above submissions, it is prayed that appeal of the department may be dismissed."

18. Upon careful consideration I note that the case of the Assessing Officer in this case is that though the land has been classified as 'agricultural land' as per the revenue record but there is no proof of payment of land revenue. Further the Assessing Officer observed that there is no mention of crop on land as mentioned in 7/12 extracts. Further the Assessing Officer observed that there is no evidence of agricultural activities, income expenses etc. That a perusal of 7/12 extracts shows that land is shown as barren. That it is devoid of any irrigation facilities. The Assessing Officer also disputed the veracity of Naukarnama. That from the sale agreement it is seen that the land is non-agricultural. That the sale deed executed by the assessee for sale of such property has mentioned that there are no trees on the land at the time of purchase. These are the adverse inferences drawn by the Assessing Officer for holding that the land was non-agricultural. However, learned CIT(A) in this regard has referred to the report of DDIT not in the case of assessee but in the case of co-owners regarding the same land wherein other adverse inference were mentioned. The learned CIT(A) has proceeded to rebut the adverse inference in said report in great detail.

19. As regards the issue of payment land revenue is concerned, learned CIT(A) gave finding that the assessee has submitted copies of land revenue paid as per page No. 1 to 3 of letter dated 4.5.2017 showing that the land revenue was regularly paid. This finding of learned CIT(A) has not been rebutted by the revenue. In the said letter the assessee has submitted to the learned CIT(A) receipts of Agricultural Cess (Shet Sara) paid attached as Annexure-1. The said included receipt dated 11.2.2002 for proposition that the assessee was engaged in agricultural activity since then and the latest receipt was for the year 2008. Hence adverse inference of the Assessing

Officer that the land revenue was not paid regularly for agricultural land stands rebutted.

20. As regards the observation that the land is barren (Pad-Jamin) on hilly area learned CIT(A) referred to details from land records which shows the area of land which can be used for cultivation (lagvadi yogya shetra) and the land which is not cultivable (lagvadi ayogya shetra). From the reference to the land revenue records the areas which were put under cultivation and the type of agricultural produce from the land were also identified. The summary of the land records in this case which may be reproduced as under:

Sr. No	Survey. No.	(Pot Kharab - Lagvadi Ayogya)	(Lagvadi Yogya Shetra)	Total Area	Comments From 2003-04 to 2010-11	Document no.
1	-2/5	0	0.1	0.1	Ra. Pad	8-9/15.4
2	-2/9	0.05	0.65	0.7	Ra. Pad	10-11/15.4
3	-2/10	0.13	1.00	1.13	Ra. Pad	13-14/15.4
4	-5/3	1.10	3.22	4.32	Ra. Pad	16-17/15.4
5	-2/11	0.12	1.27	1.39	Ra. Pad	12-13/15.4
6	-16/1	0.03	0.06	0.09	Bhat	18-19/15.4
7	-2/4	0.11	1.29	1.4	Ra, Pad	5-6/15.4
8	-1/5	0.09	0.19	0.28	Ra. Pad	3-4/15.4
9	-16/3	0.01	0.09	0.10	Bhat	20-21/15.4
10	-1/4	0.84	0,56	1.4	Ra. Pad	1-2/15.4
11	-16/4/B	0,06	0.42	0.48	Bhat	24-25/15.4
12	-18/1	0.08	0.23	0.31	Bhat	22-23/15.4
		2.62	9.08	11.7		

21. From the above learned CIT(A) has given a finding that out of 11.7 hectares of land, land measuring 9.08 hectares was cultivable land and 2.62 hectares was the land which was not capable for cultivation. The land records also show that even some of the cultivable lands were not cultivated during the

year which are called 'Rapad' land and the other portion where the cultivation was done 'Bhat' which means rice was grown. In this regard learned CIT(A) noted that vegetables and other minor millets grown on the land is not mentioned in the revenue record in Raigad district. Hence, learned CIT(A) rejected the DDIT's contention that land is barren. He noted that the DDIT has understood the word 'Ra Pad' as barren land whereas the land records have used word 'Lagvadi Yogya Shetra' for the land which is cultivable and 'Porkhrab – Lagvadi Ayogya' for non-cultivable land. This makes it amply clear that land measuring 9.08 hectares was cultivable land and 2.62 hectares was not capable for cultivation. Learned CIT(A) also noted that even 'Ra Pad' portion of land which are not barren land but land on which cultivation was not done. Thus the adverse inference that land was barren stands rebutted from the land record itself. I note that nothing is on record to rebut this cogent finding.

22. As regards theAssessing Officer's observation the assessee was not doing any agricultural activities, the same has been negated by learned CIT(A). In this regard learned CIT(A) has referred to the statement of Shri Wesavkar in which he explained the agricultural activities done with the help of labour and subsequently by leasing the land. Moreover, the record itself mentioned 'Bhat' (Rice) as acknowledgment of agricultural activity done. As regards the Assessing Officer's observation that the assessee has never shown any agricultural income it is noted that the learned CIT(A) referred to the return of income which was also reflected in the bank account wherein agricultural income was offered and the said income has been accepted by the Department. Moreover, when the land record itself mentioned about the agriculture produce, adverse inference in this regard is not justified.

23. As regards the adverse inference in Naukarnama that the names were not given learned CIT(A) has given finding that the said aspect noted was factually wrong. That the names are duly mentioned and the said persons have accepted that they were doing labour and agricultural activities. As regards

expenses learned CIT(A) noted that as per Clause-11 of the Agreement, expenses were to be incurred by the labourer. Hence there is no question of assessee accounting for the expenses.

24. Further learned CIT(A) has referred to the portion of sale deed from which he has rebutted the Assessing Officer's observation that as per the sale deed it is mentioned that there are no trees. In this regard following portion of sale deed are germane :-

> "Together with all land, compound wall, constructions, trees, plants, hedges, water, watercourse, lights, rights, liberties, privileges, easements and appendages whatsoever to the Said Property belonging or pertaining to or usually held or enjoyed therewith on reputed to belong or be appurtenant thereto shall be sold to the Purchasers.
>
> Vendor shall not reserve any rights with him regarding water, trees, stone, easmentary rights, timber, and the Purchasers shall have all the ownership rights to use the Said Property."

From the statement of Shri Ashok Wesavkar he has stated that there are numerous trees of Jamun, local desi mango, sagwan, bamboo and other trees. Nothing is on record to rebut these findings.

25. As regards the comments of the DDIT that agricultural income is not commensurate to the large area of the land learned CIT(A) has noted that the caretaker and other laborer who were deployed there used to consume the produce and only the surplus was shared.

26. As regards the adverse inference drawn with regard to visit of Inspector noted by the DDIT, learned CIT(A) has noted that the assessee submitted that he was never informed about the inspector's visit. Moreover, the visit took place much after the sale of land sold. Thus all the inference by the learned DDIT stand rebutted. Moreover there is nothing on record to show that the land has been put to non-agricultural use. This is also not the case that permission from the necessary authority has been obtained for non-agricultural purposes.

27. To recapitulate it is undisputed that land does not fall in the area, where it will be disentitled from the category of agricultural land. The Assessing Officer's adverse inference that though land has been recorded in the land revenue record as 'agricultural land' but the land revenue has not been regularly paid stands rebutted on the basis of receipts in this regard of land revenue payment referred by learned CIT(A). That the land was barren is clearly negated from the record itself which shows that the 9.08 hectares was cultivable land out of 11.7 hectare. Hence inference that the land was not cultivable and barren is absolutely unsustainable. Moreover inference that no agricultural activity was done also stands rebutted from the land revenue records itself which shows that the crops were produced. Once it is amply clear that the land is agricultural land, land revenue is being paid, crops are being cultivated, no permission for non-agriculture use is there, adverse inference cannot be drawn if the produce is not commensurate with the area of land. This is duly approved by Hon'ble Bombay High Court decisions referred herein below. As reiterated by Hon'ble Bombay High Court in these decisions that lack of commensurate generation of surplus cannot be used as yardstick for the land to be non-agricultural when the land was not used for non-agricultural purposes.

28. The case laws from Hon'ble Jurisdictional High Court in the case of CIT Vs. H. V. Mungale (1984) 145 ITR 208(Bom.)(HC) is duly applicable on the facts of the present case supports the case of the assessee. The exposition from Hon'ble High Court read as under :

> "It is well established Hint in a given case agricultural land may or may not yield agricultural income. If there is land which was once cultivated or rut t to agricultural use hit t is now fallow or barren, it would not merely by reason of such fact cease to be agricultural land. Conversely what is potently non-agricultural land may in extraordinary circumstances he used for a purpose to which agricultural land is usually put and may, therefore, yield agricultural income. However, merely by reason of the yield, it cannot he designated as agricultural land. Again, when the land is being assessed as agricultural land, then, normally, although it is not being put to actual agricultural use, it may be presumed that it continues

to be agricultural land, unless it can be shown that it has been in fact put to some non-agricultural use, or there is some relevant circumstances to indicate that it cannot be properly regarded as agricultural hind. It is also well settled Hint entrics in revenue records are good prime facie evidence with regard to the character of the land and the purpose for which it is intendcd to be used and the burden is on the revenue to rebut this presumption. That apart, while determining the character or the nature of the hind, it must necessarily he taken into account that the land which is recorded ns agricultural land in the revenue papers cannot be used for non-agricultural purposes by the owner, unless the land is allowed to be converted to non-agricultural purposes by appropriate authorities.

In view of the facts and findings recorded by the Tribunal in the instant case, it was obvious that the land was used for agriculture till 1963 and had been so recorded in the revenue records and was also assessed as agricultural land. Again, no evidence had been led on behalf of the revenue to rebut this presumption. Consequently, merely because the land remained fallow after 1963, it did not cease to be agricultural land."

29. Further in the case of CIT v. Smt. Debbie Alemao (2011) 331 ITR 59 (Bom.)(HC) wherein on identical facts, the Hon. Court has held that the transferred land is an agricultural land, not subject to capital gains tax liability.

Facts of the above mentioned case:

i. The land sold was mentioned in the revenue records as agricultural land;

ii. It was argued on behalf of the revenue that the land was not actually used for agriculture in as much as no agricultural income was derived from the land and was not shown in the Income-tax return. In reply, the assessee contended that that there were some coconut-trees in the land, but the agricultural income was just enough to maintain the land and there was no actual surplus. Hence, no agricultural income was shown by the assessee.

Held
The Hon. Court held that:

i. If the agricultural operation does result into generation of surplus that cannot be a ground to say that the land was not used for the agricultural purpose.

ii. It is not disputed that the land shown in revenue records to be used for agricultural purposes and no permission was ever obtained for non-agricultural use. Relevant section of Land Revenue Code prescribes that no land used for agriculture shall be used for any non agricultural purpose and no land assessed for one non-agricultural purpose shall be used for any

other non-agricultural purpose except with the permission of the Collector. Permission for non-agricultural use was first time obtained by the purchaser after it purchased the land.

iii. Thus, the findings recorded by the authorities below that the land was used for the purpose of agriculture are based on appreciation of evidence and application of correct principles of law."

30. In my considered opinion ratio from aforementioned Hon'ble Bombay High Court decisions are squarely applicable on the facts of the present case.

31. In the background of the aforesaid discussion and precedent I do not find any infirmity in the order of learned CIT(A). Hence I uphold the same.

32. In the result, appeal by Revenue stands dismissed.

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 11/04/2022

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

BY ORDER,

//True Copy//

(Assistant Registrar)
ITAT, Mumbai

PS

IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "A", MUMBAI

BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER
AND
SHRI KULDIP SINGH, JUDICIAL MEMBER

ITA No.5147/M/2017
Assessment Year: 2011-12

Asst. Commissioner of Income Tax, Circle-1, Room No.22, B-Wing, Ashar IT Park, Wagle Industrial Estate, Road No.16Z, Thane – 400 604	Vs.	Shri Ashok W. Wesavkar, 11, Gagangiri, Opp. Aradhana Cinema, Panchpakhadi, Thane – 400 602 **PAN: AADPW8307P**
(Appellant)		(Respondent)

Present for:
Assessee by : Dr. K. Shivram, A.R. &
Shri Rahul Hakani, A.R.

Revenue by : Shri Mehul Jain, D.R.

Date of Hearing : 16.03.2022
Date of Pronouncement : .2022

O R D E R

Per Kuldip Singh, Judicial Member:

The appellant, Shri Ashok W. Wesavkar (hereinafter referred to as 'the assessee') by filing the present appeal, sought to set aside the impugned order dated 15.05.2017 passed by Commissioner of Income Tax (Appeals), Nasik (camp-office-Thane) [hereinafter referred to as the CIT(A)] qua the assessment year 2011-12 on the grounds inter alia that :-

"1. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs.5,33,16,625/- made on account of Long Term Capital Gains.

2. Whether on the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in coming to conclusion, by referring the order of the DCIT Circle-3, Thane in the case of one of the co-owner, that the impugned land was agricultural land despite referring to the actual verification (spot visit) of the land by the Inspector of the DDIT which also included the photograph of the land showing that the land was barren where no agricultural activity has taken place at any point of time.

3. Whether on the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in granting above relief to the assessee without appreciating the fact that the land under consideration is situated on hilly area devoid of any irrigation facilities and where no agricultural operation is possible.

4. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in granting above relief to the assessee without appreciating the fact that the status of the land under consideration has always been padd since beginning which means no agricultural activities have been carried out on the said land.

5. The order of the CIT(A) may be vacated and that of the Assessing Officer may be restored.

6. The assessee craves leave to add, amend, alter or delete any ground of appeal."

2. Briefly stated facts necessary for adjudication of the controversy at hand are : the assessee is an architect and a proprietor of M/s. Ashok Wesavkar & Co. and has declared his income during the year under consideration from business and profession to the tune of Rs.26,95,576/-. The assessee has also

claimed his income under the head "Income from other sources" in the form of bank interest to the tune of Rs.28,52,776/-. After claiming deduction under chapter VIA for Rs.1,00,000/- claimed his total income at Rs.54,59,860/-.

3. During scrutiny proceedings the Assessing Officer (AO) noticed that the assessee has earned Rs.5,47,52,045/- as non taxable income being profit on sale of agricultural land. Declining the plea taken by the assessee that "sale of agricultural land is non taxable" AO taken the view that the land in question was not agriculture in nature as agricultural activities have never been carried out and as such it is "capital assets" and requires to be taxed accordingly and thereby computed the total cost of acquisition and working of long term capital gain (LTCG) as under:

Sl. No.	Survey No.	FY in which land was purchased	Purchase amount	Indexation	Cost of acquisition
1	Survey No. 1/4, Hissa No.4	1994-95	1,12,000	1,12,000X711/259	3,07,459
2	Survey No. 1/5, Hissa No. 5	1988-89	18,500	18,500X711/161	81,699
3	Survey No. 2/4 Hissa No. 4	1994-95	75,500	75,500X711/259	2,07,261
4	Survey No. 2/5 Hissa No. 5	1991-92	3,750	3,750X711/161	16,561
5	Survey No. 2/9 and 2/11 Hissa No. 9 and 11	1991-92	1,13,000	1,13,000X711/199	4,03,734

4. Accordingly, the AO made an addition of Rs.5,33,16,625/- and framed the assessment under section 143(3) of the Income Tax Act, 1961 (for short 'the Act').

5. Assessee carried the matter before the Ld. CIT(A) by way of filing the appeal who has deleted the addition by allowing the appeal. Feeling aggrieved from the impugned order, Revenue has come up before the Tribunal by way of filing the present appeal.

6. We have heard the Ld. Authorised Representatives of the parties to the appeal, perused the orders passed by the Ld. Lower Revenue Authorities and documents available on record in the light of the facts and circumstances of the case and law applicable thereto.

7. Undisputedly, the assessee being the owner of the land in question having been purchased at different times from 1988 to 2007 sold the same to Mayank Land Pvt. Ltd. and Laxman Vaidya on 22.04.2010 and 25.10.2010 (during the year under assessment) for Rs.5,39,67,045/- and Rs.14,00,000/- respectively.

8. It is also not in dispute that the assessee has claimed the land in question to be an agricultural land being not situated within the specified area as per section 2(40) of the Act, hence not a capital asset. It is also not in dispute that in A.Y. 2010-11 only assessee

has shown agricultural income of the land in question to the tune of Rs.60,000/- and prior to it, it was shown as barren (padd-jamin in hill area) land. It is also not in dispute that the assessee filed return of income for the year under consideration claiming agricultural income of Rs.60,000/- only after sale of land vide sale deed dated 22.04.2010.

9. In the backdrop of the aforesaid facts and circumstances of the case the sole question arises for determination in this case is:

> ***"As to whether the land in question sold by the assessee for a total consideration of Rs.5,53,67,045/- (5,39,67,045/- + Rs.14,00,000/-) during the year under consideration was an agricultural land and does not fall within the ambit of "capital assets" under the provisions contained under section 2(14)(iii) of the Act, and ineligible for LTCG"?***

10. Challenging the impugned order passed by the Ld. CIT(A) the Ld. D.R. for the Revenue contended inter alia; that the Ld. CIT(A) has decided the issue by claiming parity with the land of co-owner on the basis of order passed by DCIT, Circle-3, Thane, in contravention to the report filed by inspector who has reported that "no agricultural activity has taken place at any point of time in the land in question on the basis of his physical verification"; that land in question is situated on the hill area having no irrigation facilities and as such no agricultural operation can be carried out in the same; that apart from nokarnama no evidence has been produced by the assessee, which also does not contain the name of the cultivators;

that the nature of the land in question has always been "Padd" and no agricultural activities have ever been carried on the same.

11. However, on the other hand, the Ld. A.R. for the assessee to repel the arguments addressed by the Ld. D.R. for the Revenue relied upon the order passed by the Ld. CIT(A) and contended inter alia that as per nokarnama the land remained under cultivation in the hands of cultivators; that land revenue was being paid by the assessee which shows that the land was cultivable; that land in question is situated within the jurisdiction of gram panchayat as per certificate issued by Sarpanch, gram panchayat Vengaon and as per certificate issued by Chief Officer, Karjat Municipalika available at **page 558 & 545** respectively in the paper book; that assessee has duly claimed the agricultural income of the land in question for A.Y. 2010-11 to the tune of Rs.60,000/-.

12. Before proceeding further to decide the issue in question we would like to extract the provisions contained under section 2(14)(iii) of the Act which are as under:

> ***"(14) "capital asset" means—***
>
> .....
>
> ***(iii) agricultural land in India, not being land situate—***
>
> ***(a) 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 by any other name) or a***

cantonment board and which has a population of not less than ten thousand; or

(b) in any area within the distance, measured aerially,—

(I) not being more than two kilometres, from the local limits of any municipality or cantonment board referred to in item (a) and which has a population of more than ten thousand but not exceeding one lakh; or

(II) not being more than six kilometres, from the local limits of any municipality or cantonment board referred to in item (a) and which has a population of more than one lakh but not exceeding ten lakh; or

(III) not being more than eight kilometres, from the local limits of any municipality or cantonment board referred to in item (a) and which has a population of more than ten lakh.

Explanation.—For the purposes of this sub-clause, "population" means the population according to the last preceding census of which the relevant figures have been published before the first day of the previous year;]"

13. In order to treat any piece of land as an agricultural land, the assessee needs to satisfy the conditions laid down under section 2(14)(iii) of the Act inter alia; that the land must be agricultural land; that it must be situated in an area which is comprised within the jurisdiction of municipalities having population of less than 10,000 (as per last senses); and that the land must be situated in an area which is beyond 8 km from the local area of such municipality as specified in this behalf by the central government in the official gazette.

14. The Ld. D.R. for the Revenue vehemently contended that the land in question has never been an agricultural land as per physical verification made by inspector of Income Tax Department [who has reported that the land was barren (padd-jamin in hill area) and no agricultural activity ever taken place on such land]. We have perused the physical verification report given by inspector V.N. Kamalapure vide letter dated 27.10.2020 written to DDIT (Inv.) wherein it is recorded that "the land was verified in the presence of Shri Sadashiv Govind Bagade and Shri Baliram Mundhe who have identified the land being earlier owned by Wesavkar family and having been sold to Reliance group of companies". It is categorically mentioned in the report that "no agricultural activities were ever carried out on the land and agricultural activities are not possible it being a hill area."

15. The Ld. A.R. for the assessee tried to rebut the physical verification report given by inspector only on the grounds inter alia that inspector has made physical verification in the absence of the assessee; that inspector visited the land after six years from the date of sale and; that assessee has paid agricultural cess and also executed nokarnama and has cultivated and sold certain agricultural commodities.

16. We are of the considered view that when the physical verification report given by the inspector contains survey numbers and physical verification report made in the presence of Shri Sadashiv Govind Bagade and Shri Baliram Mundhe, which fact has not been controverted by the assessee if they are having any clash of interest with the assessee, the same is a vital piece of evidence to decide the issue in controversy.

17. When the facts contained in the physical verification report of the inspector are examined in the light of the nokarnama relied upon by the assessee allegedly entered into between assessee and one Shri Laxman Dattaram Bhoir, available at page 546 to 555, it is proved on record that the same is vague and ambiguous document whereas the physical verification report is factual one. Even the nokarnama is a document without consideration and does not contain any recital if Shri Laxman Dattaram Bhoir, has ever cultivated the land, nor it mentioned in the nokarnama as to from which crop season he has started cultivating the land and what would be the terms and conditions of making such cultivation.

18. It is also one of the contentions of the Assessee that he has received Rs.60,000/- from Shri Laxman Dattaram Bhoir for three years @ Rs.20,000/- per year as rent for cultivating the land. But it is very surprising as to how the receipt relied upon by the assessee

available at page 550 & 556 of the paper book can be treated as rent receipt for cultivating the land. Nokarnama as well as receipts for receiving Rs.60,000/- by the assessee from Shri Laxman Dattaram Bhoir are vague, ambiguous and undated documents which do not convey if Shri Laxman Dattaram Bhoir has ever cultivated the land in question as a tenant of the assessee.

19. Moreover, it is admitted fact that the assessee has purchased this land and it was under his possession from 1988 to 2007 and has never claimed any agricultural income from the same but all of a sudden in 2010-11, that too after sale of land claimed Rs.60,000/- as agricultural income. Proposition mooted out by the assessee that he has earned Rs.60,000/- as agricultural income by renting the land to some Shri Laxman Dattaram Bhoir is discussed in detail in preceding paras and has made such claim on the basis of self serving documents which are vague, ambiguous and undated one.

20. We have perused the summary of land, prepared on the basis of land survey report i.e. 7/12 extracts, owned by the assessee in the tabulated form at page 37 of the assessment order passed by the AO. For ready perusal the same is extracted as under:

Sr.No	Survey No.	(PotKharab - Lagvadi Ayogya)	(Lagvadi Yogya Shetra)	Total Area	Comments From 2003-04 to 201 0-11	Document no.
1	-2/5	0	0.1	0.1	Ra. Pad	8-9/15.4
2	-2/9	0.05	0.65	0.7	Ra. Pad	10-11/15.4
3	-2/10	0.13	1.00	1.13	Ra. Pad	13-14/15.4
4	-5/3	1.10	3.22	4.32	Ra. Pad	16-17/15.4
5	-2/11	0.12	1.27	1.39	Ra. Pad	12-13/15.4
6	-16/1	0.03	0.06	0.09	Bhat	18-19/15.4
7	-2/4	0.11	1.29	1.4	Ra, Pad	5-6/15.4
8	-1/5	0.09	0.19	0.28	Ra. Pad	3-4/15.4
9	-16/3	0.01	0.09	0.10	Bhat	20-21/15.4
10	-1/4	0.84	0.56	1.4	Ra, Pad	1-2/15.4
11	-16/4/B	0.06	0.42	0.48	Bhat	24-25/15.4
12	-18/1	0.08	0.23	0.31	Bhat	22-23/15.4
		2.62	9.08	11.7		

21. Aforesaid table duly showing the nature of the land in question being cultivable or non cultivable goes to prove that from A.Y. 2003-04 to A.Y. 2010-11 only minuscule area i.e. less than one acre (0.98 acre) out of total land in question of 11.7 acre was under cultivation for cultivating paddy crop. We are of the considered view that when only fraction of land in question remained under cultivation from A.Y. 2003-04 to 2010-11 the entire land which was barren one (padd-jamin in hill area) cannot be treated as "agricultural land" to take it out of the purview of

"capital asset" as defined in section 2(14) of the Act. So when the contentions raised by the assessee are further examined in the light of the revenue record and physical verification report given by inspector of Income Tax it shows a fraction of land under cultivation for the last about 10 years before the year under assessment, the same cannot be treated as "agricultural land".

22. When we further examine the contentions raised by the assessee that the land in question is an agricultural land as per nokarnama and income tax returns filed by him qua the year under consideration, in the light of the survey report i.e. 7/12 extracts of the land in question, substantive portion of the land in question is recorded as barren. Survey report is prepared by the Revenue Department after every six months on the basis of physical verification by the revenue officials, to which presumption of truth is attached unless rebutted. The assessee has failed to rebut the presumption attached to the survey report 7/12 with the support of nokarnama and income tax returns showing agricultural income. Rather survey report is further got corroborated with the physical verification made by inspector of Income Tax finding the land in question as a barren land having no irrigation facilities.

23. The contentions raised by the Ld. A.R. for the assessee that "just because land is shown as barren, it cannot be said that

agricultural land had become non agricultural in nature" is misconceived for the reasons given in the preceding paras that agriculture record is prepared on the basis of physical verification by the Revenue Authorities and which got duly corroborated from the physical verification report prepared by inspector of Income Tax.

24. No doubt assessee has proved facts on record that land in question is located beyond 8 km from the local area of municipality which has population of less than 10,000, but when the land has never been put to cultivation it is difficult to treat it as agricultural land. From the nokarnama, acknowledgment/receipt for receiving Rs.60,000/- by the assessee from Shri Laxman Dattaram Bhoir it can be safely inferred that these are self serving documents prepared to discredit the physical verification report given by the inspector of Income Tax Department and revenue record prepared per semester on physical verification basis

25. Even perusal of the copies of the sale deed qua the land in question executed by the assessee viz. sale deeds dated 02.04.2010 & 25.10.2010 available at page 334 to 345 do not contain the fact if the land in question is an agricultural land and cultivable nor any source of irrigation has been mentioned therein. In these circumstances, it is difficult to believe as to how the assessee was

cultivating paddy crop in the land in question which is a water intensive crop.

26. Assessee's contention that to purchase an agricultural land the purchaser also needs to be an agriculturist is also not sustainable because nature of the land as per copies of the sale deed made available on the file has never been recorded as "agricultural land", rather word "land" is mentioned in the sale deed made available on pages 334 to 345 of the paper book.

27. The Ld. A.R. for the assessee to support his arguments relied upon the decision rendered by Hon'ble Bombay High Court in case of Wealth-Tax vs. H.V. Mungale reported as 1982(1983) 32 CTR Bom 301, 1984 145 ITR 208 Bom, 1983 12 TAXMAN 201 Bom and contended that when the land is agricultural land even if not put to actual agricultural use it may be presumed that it continues to be agricultural land. Operative part of the findings returned by Hon'ble Bombay High Court is as under:

> ***"15. We may also refer to a Division Bench decision of this court in Wealth-tax Reference No. 5 of 1964, decided on 4th December, 1973, by Vimadalal and Desai JJ., in CWT v. Podar Mills Ltd. One of the questions which fell for consideration before the Division Bench was whether the lands held by the assessee at Ghatkopar were agricultural lands within the meaning of s. 2(e)(1)(i) of the W.T. Act. On the facts of that case, the lands were held to be agricultural lands. What we are concerned with is the proposition which was set out by the Division Bench after reference to the several cases. The Division Bench has***

made the following observations: "In a given case agricultural land may or may not yield agricultural income. It there is land which was once cultivated or put to agricultural use but it now fallow of barren, it would not merely by reason of such fact cease to be agricultural land. Conversely what is patently non-agricultural land may in extraordinary circumstances be use for a purpose to which agricultural land is usually put and may, therefore, yield agricultural income. However, merely by reason of the yield it cannot be designated as agricultural land".

16. In the same decision it was pointed out by the Division Bench that: "...where the land is being assessed as agricultural land, then, normally, although it is not being put to actual agricultural use, it may be presumed that it contains to be agricultural land, unless it can be shown that it has been in fact put to some non-agricultural use, or there is some for any other non-agricultural purpose except with the permission of the Collector. Sec. 32 of the Goa, Daman and Diu Land Revenue Code prescribes the procedure for conversion of use of land from one purpose Jo another including conversion from agricultural purpose to non-agricultural purpose."

28. We have perused the judgment rendered by the Hon'ble Bombay High Court which is not applicable to the facts and circumstances of the case because when it is proved fact on record that the major chunk of land was never put to agricultural use, except small fraction of the same, during the last about 10 years, from the year under assessment, the proposition mooted out by the assessee that agriculture land even if not put to agricultural use in particular year will retain its nature as agricultural land is not sustainable.

29. The Ld. CIT(A) proceeded on the premise that the Land Revenue Department has held land measuring 0.98 acre out of total land of 11.7 acres as fit for cultivation, but we are of the considered view that when this land was never put to use it cannot be said that it was cultivable nor any irrigation facilities was there nor it was case of the assessee that the land was cultivable but he could not cultivate the same who has rather come up with the nokaranama and receipt for taking rent from his tenant for cultivating the entire land in question which issue has already been discussed in the preceding para.

30. So the judgment relied upon by the assessee in case of CIT vs. H.V. Mungale (supra) is not applicable to the facts and circumstances of the case.

31. In view of what has been discussed above, the question framed for determination is answered in negative against the assessee, hence we are of the considered view that the Ld. CIT(A) has erred in treating the entire land in question as agricultural land without marshalling the facts. Because only fraction of land in question i.e. less than one acre (0.98 acre) comprised in survey No.16/1 (0.09), 16/3 (0.10), 16/4/B (0.48) and 18/1 (0.31) was put to agriculture use out of total land measuring 11.7 acre. So we direct the AO to extend the benefit to the assessee by treating the

land measuring 0.98 acre as the agricultural land for the purpose of deductions claimed by the assessee and remaining lands which have never been used as the agricultural land are to be treated as "capital assets". Consequently appeal filed by the Revenue is partly allowed.

Order pronounced in the open court on .2022.

Sd/-

(SHAMIM YAHYA)
ACCOUNTANT MEMBER

(KULDIP SINGH)
JUDICIAL MEMBER

Mumbai, Dated: .2022.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.