आयकर अपीलीय अधिकरण "G" न्यायपीठ मुंबई में।

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

BEFORE SHRI JOGINDER SINGH, VICE PRESIDENT
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A. No.2451/Mum/2018

(**निर्धारण वर्ष /** Assessment Year : 2014-15)

Shamji Manekji Shah 5, Ground Floor, Jitendra Co-operative Housing Society Hariniwas, M.G.Road, Naupada, Thane(West), Mumbai-400602	**बनाम**/ v.	Deputy Commissioner of Income-tax , Circle-3 Room No. 2, 'B' Wing, 6th Floor, Ashar IT Park, Road No. 16Z, Wagale Estate, Thane(West)-400604
स्थायी लेखा सं./ PAN:ACAPS4243H		
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Assessee by:	Dr. K Shivaram, Sr. Advocate & Ms. Neelam C. Jadhav
Revenue by :	Shri. Chaudhary Arun Kumar Singh

सुनवाई की तारीख **/Date of Hearing : 17.10.2018**
घोषणा की तारीख **/Date of Pronouncement :16 .11.2018**

आदेश / ORDER

PER RAMIT KOCHAR, Accountant Member:

This appeal, filed by assessee, being ITA No. 2451/Mum/2018, is directed against appellate order dated 27.02.2018 passed by learned Commissioner of Income Tax (Appeals)-2, Thane (hereinafter called "the CIT(A)"), for assessment year 2014-15, the appellate proceedings had arisen before learned CIT(A) from assessment order dated 22.12.2016 passed by learned Assessing Officer (hereinafter called "the AO") u/s 143(3) of the Income-tax Act, 1961 (hereinafter called "the Act") for AY 2014-15.

2. The grounds of appeal raised by the assessee in the memo of appeal filed with the Income-Tax Appellate Tribunal, Mumbai (hereinafter called "the tribunal") read as under:-

"I. Natural Justice
1. The learned CIT [A] erred in confirming the order of the Assessing Officer who has passed order without providing copies of documents received from the District Collector, Thane in response to letter dt. 11/11/2016 and also not giving an opportunity for cross examination of the said documents was given, hence the order confirmed by the CIT(A) is bad in law and liable to be quashed.

II. Violation of Rule 46A - Additional evidence filed during appellate proceedings, rejected by the CIT(A)
2. The Learned CIT(A) erred in not accepting the Additional evidence filed by the Appellant during the appellate proceedings in the form of certificates issued by the various authorities showing the land was agricultural land. As the said evidences were not available at the time assessment and the assessing officer has not given a reasonable opportunity, hence, additional evidence may be accepted and addition confirmed by the C1T(A) may be deleted.

Without prejudice to above,
III. Sale of Agricultural Land treated as Capital Assets u/s.2(14) and taxed as Short Term Capital Gain of Rs.3,98,84,086/-
3. The Learned CIT(A) erred in taxing Rs.3,98,84,086/- received against the sale of agricultural land as a capital gain by treating the same land as Capital Assets, without appreciating that, the said land was an agricultural land which was in village and the agricultural operations were carried but on the said land till the date of sale which is evident from 7/12 extract of Land Revenue, hence the consideration received may be treated as exempt income under section 10 of the Act.

4. The Learned CIT[A] failed to appreciate that; the appellant has sold land as agricultural land and the said land was converted in to Non Agricultural land by the buyer after the sale. Exemption u/s.10 cannot be denied to the appellant.

IV. Without prejudice to above, Income earned from sale of Agricultural Land is a Long Term Capital Gain as the same was held more than 36 months

5. On the facts and circumstance of the case, the date of purchase of said agricultural land was 23.12.2008(sic. 23.9.2008) and said land was sold on 29/10/2013, the period of holding of said agricultural land was more than thirty six months; hence, the gain earned by the appellant if it is held to be taxable, then said amount may taxed as Long Term Capital Gain with indexation

.

6. The appellant craves leave to add, amend, alter or delete any of the above grounds of appeal."

3. The brief facts of the case are that the assessee is engaged in the business of supplying building material. The case of the assessee was selected by Revenue for framing an scrutiny assessment u/s. 143(3) r.w.s. 143(2) of the 1961 Act. During the course of assessment proceedings from the computation of income filed by the assessee , it was observed by the AO that the assessee has claimed deduction u/s. 10 of the 1961 Act of an amount of Rs. 3,98,84,086/- with respect to gains arising from sale of agricultural land situated at village Khardi, Taluka: Shahapur admeasuring 5.22 acres. The assessee was asked to submit relevant documentary evidences with respect to the aforesaid sale transaction of land on which exemption was claimed. The assessee submitted copies of purchase agreement and sale deed in respect of the plot of land under consideration. The AO observed from the copy of 7/12 extract appended and forming part of the sale deed executed on 31.10.2013 as well from 7/12 extract appended and forming part of the purchase deed executed on 16.10.2012 with the previous owner that the land in question was never used by the assessee for agricultural activities as no actual cultivation was ever carried out by assessee as well as even by the previous owner from whom the land was purchased by the assessee. The AO also observed that the current purchaser who purchased the plot of land from the assessee has also not purchased the land for agricultural purposes but for real estate development. The AO observed that the assessee has sold the aforesaid land by not valuing the same based on agricultural yield but for real estate development. The AO also observed that the process for converting the said land into a non-agricultural land, was initiated way before the sale

agreement was executed by the assessee on 31.10.2013 as could be seen from the clearance certificate issued by Forest Department dated 25.10.2013 and Executive Engineer, Bhatsa Canal Division no. 1, Tal Shahapur dated 07.10.2013. The assessee was asked by the AO to explain the same . The assessee submitted that the land in question is an agricultural land keeping in view provisions of Section 2(14) of the 1961 Act. It referred to amended provisions of Section 2(14) which were amended by Finance Act,1970 wherein CBDT clarified by Memorandum vide para 30 of Circular 45 dated 02.09.1970 (79 ITR(ST)33) as under:

> *' Agricultural Land situated in rural areas i.e. areas outside any municipality or cantonment Board having a population of not less than ten thousand and also beyond the distance notified by the Central Government from the limits of such municipality or cantonment board will continue to be excluded from the Capital Asset.'*

Thus, it was clamed that there is no capital gains earned by the assessee which could be subjected to income-tax. The assessee submitted that he had entered into an agreement for purchase of land on 23.09.2008 for consideration of Rs. 12,00,000/- out of which sum of Rs. 11,000/- was paid as well stamp duty of Rs. 18,000/- and registration fee of Rs. 12,000/- was also paid on sale agreement which is evident from Index No. 2. It was explained that irrevocable power of attorney was executed on 23.09.2008 in favour of the assessee by Mr. Shankar Tukaram and the said document was registered with Registrar of Stamp Duty. The assessee relied upon provisions of Section 53A of Transfer of Property Act, 1882 to contend that property stood transferred in favour of the assessee on 23.09.2008. The assessee submitted that the said agricultural land is situated in Khardi Village, a rural area managed by Gram Panchayat . It was submitted that a nearest Taluka is Shahpur which is governed by Panchayat Samiti under Panchayat Act and does not fall under Municipality or Cantonment Board. Thus, it was submitted that agricultural land falls outside the purview of Section 2(14)(iii)(a) of the 1961 Act and hence

sale of land could not attract capital gains. The assessee relied upon following case laws to support its contentions:

a) CIT v. Tata Services Private Limited 122 ITR 594(Bom. HC)
b) ITO v. P.Venkataramana (1993) 46 ITD 484(Hyd.trib)
c) ITO v. Surjan Singh (1983) 3 ITD 438(Del.-trib.)
d) K.Parmeshwaran v. ITO (1979) TTJ (Mad-trib.)

The assessee relied upon provisions of Section 10(37) and section 54B of the 1961 Act to contend that no capital gain is exigible in the instant case. The assessee submitted that at the time of its sale by the assessee on 31.10.2013 , the land was an agricultural land which can be seen from 7/12 extract and sale agreement. The assessee relied upon decision of Hon'ble Gujarat High Court in the case of CIT v. Manilal Somnath (1977) 106 ITR 917(Guj). The assessee submitted that it is the buyer who obtained the permission for converting agricultural land into non-agricultural land and it is the buyer Mr. Sachin S. Lodha who made an application for conversion of land on 02.08.2014 whereas the property was sold on 31.10.2013 . It was submitted that conversion order was passed by District Collector , Thane on 11.11.2014. It was submitted that the assessee only obtained clarification from Forest Department whether land is under forest area. The assessee submitted that it obtained clarification from Town Planning Department as to whether any proposal for development of that land by Government is on anvil. The assessee submitted that in the revenue records , land is agricultural and never sought to be used for non agricultural purpose by the assessee till it was sold by the assessee and hence the same is to be treated as agricultural land , even though no agricultural income was shown by the assessee in the return of income filed with the Revenue and hence no capital gains was chargeable to tax on the said land. The assessee relied upon judgment of Hon'ble Bombay High Court in the case of CIT v. Smt. Debbie Alemao reported in (2011) 331 ITR 59(Bom. HC) . The AO rejected the contentions of the assessee and observed that the said land was not used for any cultivation activity since the past

and till the date of its sale. The AO observed from the copy of 7/12 extract pertaining to the said land issued on 23.08.2008 by Talathi, Village: Khardi, clearly show that the crop cultivated by Shri. Shankar Tukaram Shipayi , the seller of the land from whom the assessee purchased the land as 'grass'. Similarly, the copy of 7/12 extract issued on 26.07.2013 by Talathi , Village Khardi appended to and forming part of the sale deed executed by the assessee(seller) with Shri Swapnil S. Shende and Shri Sachin S Lodha shows the crop grown as 'grass'. Thus, the AO observed that the land was not under cultivation during any time during the relevant period. The AO observed that grass grows spontaneously on a vacant land , thus it cannot be said that the land was used for agricultural purposes. The assessee however claimed that he is growing grass, rice and plantations on the said land. But the AO observed that the assessee has not submitted any documentary evidences to show that cultivation activity was carried on the said land by the assessee such as proof of purchase of seeds, fertilizers, equipments purchases/maintained, electricity bill etc. . The AO also observed that the assessee has not shown any agricultural income from the said land for FY 2013-14 . The contention of the assessee that there was no surplus from the said agricultural income which was earned by the assessee was also rejected by the AO on the grounds that it is hard to believe that during the last three years from FY 2011-12 to 2013-14, the assessee did not earn any surplus from agricultural activities as the assessee did not showed any agricultural income for all these three years. The assessee relied upon judgment of Hon'ble Gujarat High Court in the case of CIT v. Manilal Somnath (1977) 106 ITR 917(Guj.). The AO observed that the onus is on the assessee to prove veracity and allowability of the claim . It was observed by the AO that onus is on the assessee to prove that the said land was actually used for the agricultural purposes. The AO observed that the assessee has not produced any documents to prove that the land in question was used for agricultural purposes. The AO also observed that the assessee has before the sale of the land in question to Shri Swapnil Shende and Shri

Sachin Lodha , initiated the procedure required to obtain the documents required for acquiring permission for conversion of the said land to Non-agricultural purposes . The AO observed that the assessee has obtained following documents before the date of sale of land on 31.10.2013 , as under:-

> *a) Zone Certificate issued by the Asstt. Director, Town Planning, Thane dated 23/08/2013 issued on the request of the assessee, wherein it has been mentioned that the said land has not been acquired or earmarked for any regional development.*
>
> *b) Clearance Certificate dated 25/10/2013 issued by the Forest Department to the effect that the said land has not been acquired or designated as Forest land.*
>
> *c) No Objection Certificate dated 07/10/2013 issued by the Executive Engineer, Bhatsa Dam Division No 1 to the effect that the said land did not fall within the catchment area of Bhatsa Dam.*

The AO during the course of assessment proceedings also obtained copies of aforesaid mandatory documents along with applications dated 27.12.2013 and revised application dated 02.08.2014 filed from the office of District Collector, Thane in connection with the conversion of said land from agricultural land to the land for 'Non-agricultural' purposes and as per AO these documents go on to show that this land was never used by the assessee for agricultural purpose and the assessee always had intention of selling it for commercial development. The AO also observed that the persons to whom the assessee sold the land have also taken the land to develop for commercial purposes. The AO relied upon decision of Hon'ble Supreme Courts in the case of Sarifabibi Mohammed Ibrahim and others v. CIT 204 ITR 631(SC) and decisions of Hon'ble Bombay High Court in the case of Gopal C.Sharma v. CIT 209 ITR 946(Bom.) and Fazalbhoy Investments Co. Limited v. CIT 176 ITR 523(Bom.). Thus, the AO made additions to the income of the assessee to the tune of Rs. 3,98,84,086/- towards short term capital gain on sale of land wherein the assessee was denied exemption on

gains arising from sale of agricultural land, by holding as under vide assessment order dated 22.12.2016 passed u/s 143(3) of the 1961 Act:-

> *" a). No agricultural activity was carried out by the assessee neither anytime in the past or even in the recent period upto the actual date of sale transaction. Therefore the land in question cannot be considered as an agricultural land and the sale proceeds received on sale of such land is to be taxed under Capital Gain.*
>
> *b) While purchasing the said plot of land, the assessee was in complete knowledge of the potential commercial value of the said land and had no intention of ever using the said plot of land for agricultural purposes.*
>
> *c) The land in question was sold to the persons for development purpose and not for agricultural activity.*
>
> *d) The procedure for conversion of the said land from agricultural land (as per revenue records) to non-agricultural land had begun much before the actual date of sale of the said land as is proved from the assessee had initiated the process of Obtaining various No-Objections and Clearance from various Authorities, mandatory for applying for permission to convert the land for Non-Agricultural purposes, much before the actual date of sale.*
>
> *8. In view of the above, the contention of the assessee to treat the sale consideration on sale of the said land as receipts on sale of 'agricultural land' and therefore exempt from being treated as a 'capital assets' not liable to be taxed under the head 'Capital Gain' cannot be acceded to and is therefore rejected.*
>
> *9. In the assessee's case , the said land was acquired vide purchase agreement executed on 16/10/2012 and the same was sold as on 31/10/2013. Thus, on the basis of the holding period of the said land, the assessee is taken to have earned Short Term Capital Gain and is taxed accordingly. Therefore, the exemption claimed by the assessee u/s 10(37)(ii) of the Income-tax Act,1961 for an amount of Rs. 3,98,84,086/- is disallowed and the same is taxed as Short Term Capital Gain of the assessee...."*

4. Aggrieved by the assessment order dated 22.12.2016 framed by the AO u/s 143(3) of the 1961 Act, the assessee filed first appeal before the Ld. CIT(A). The assessee reiterated its submissions before learned CIT(A) as were made before the AO which are not repeated. The assessee

also submitted before learned CIT(A) that the said land was sold by the assessee for Rs.4,10,00,000/- to the developer Mr. Sachin Lodha , as against market value of Rs. 3,43,43,000/- . It was submitted that the buyer imposed the condition that clearances/NOC from forest department be obtained by the assessee that land does not fall within forest area, certificate from town area planning department be also obtained by the assessee that the land does not fall under town area development scheme and Bhatsa Dam division that the land does not fall under dam catchment area be also obtained prior to sale of land. Thus, accordingly the assessee obtained the aforesaid clearances from relevant authorities before the sale of the aforesaid land. It was submitted by the assessee before learned CIT(A) that permission for conversion of land into non agricultural purposes was applied by the buyer which was issued by the office of District Collector, Thane on 11.11.2014 .The assessee claimed that in sale deed it was inadvertently mentioned the value as open plot instead of agricultural land , thereby valuing land at Rs. 3,43,43,000/- and accordingly stamp duty was determined to be payable at Rs. 16,40,010/-. The assessee filed as additional evidences before learned CIT(A) (a) letter from Sub-Registrar dated 17.01.2018 , (b)copy of an affidavit dated 25.01.2017 of Mr Vijay Shankar Son of Mr. Shankar Tukaram , land owner , for carrying out agricultural activities on the said land ,(c) certificate dated 06.01.2017 from Shahpur Agricultural produce committee certifying that grass is an agricultural product, (d) certificate dated 19.04.2017 from Tehsildar certifying that the land under dispute was an agricultural land , (e) certificate dated 17.01.2018 from Sub-Registrar stamp confirming that the land was an agricultural land and (e) Xerox copy of the letter dated 23.02.2018 from Mr. Sachin Lodha, buyer stating he had requested the assessee to obtain mandatory certificates from relevant authorities required for conversion of agricultural land into non-agricultural purposes. These aforesaid documents were filed by assessee as an additional evidences before learned CIT(A) under Rule 46A of the Income-tax Rules, 1962 and prayer was made by the assessee before

learned CIT(A) to admit the same and adjudicate on merits. The learned CIT(A) in order to prove genuineness of the claim of exemption filed by the assessee, directed the assessee to produce credible evidences to support its contentions of cultivation of land and other facts and also directed the assessee to produce concerned persons before learned CIT(A) who have issued certificates certifying that the land under cultivation was an agricultural land. The assessee did not furnish any credible evidences which could prove that land under cultivation was an agricultural land nor the assessee produced these parties who had issued certificates, affidavits and letters regarding claim that the land was an agricultural land . The Learned CIT(A) rejected the contentions of the assessee and refused to admit additional evidences on the grounds that it did not satisfy the conditions prescribed under Rule 46A of the Income-tax Rules, 1962. The Ld. CIT(A) dismissed the appeal of the assessee by holding as under, vide appellate order dated 27.02.2018:-

> " *4. Aggrieved with the disallowance of claim of Rs. 3,98,84,086/-, the appellant preferred the present appeal and raised the above grounds of appeal. During the course of appellate proceedings, the Ld. AR of the appellant, by and large, reiterated the same submissions/ arguments, as had been made before the AO, during the course of assessment proceedings. During the course of appellate proceedings the Ld. AR admitted the fact that the land under dispute was never cultivated by the appellant and accordingly in the return of income the income from agriculture was not declared. The Ld. AR contended that the appellant had purchased land on 23.12.2008 for total consideration of Rs. 12,00,000/-, by giving an advance of Rs. 11,000/- in cash on 8.6.2008, Rs. 1,00,000/- on 17.6.2008 vide cheque no. 032687 and Rs. 9,89,000/- on 17.10.2008 vide cheque no. 034075 and irrevocable power of attorney was obtained. Subsequently on payment of balance amount of Rs. 1,00,000/- in cash on 16.10.2012, the land was finally got registered and handed over to the appellant on the same date.*
>
> *4.1 It is further clarified that the appellant is in retail business of steel and cement on small scale and filing the return of income u/s 44AD of the Act, under presumptive scheme, therefore, had not maintained books / P&L a/c /*

Balance sheets, however the copies of statements of income computation / ITRs are filed for AY 2008-09 to AY 2013-14. It is claimed that the land was sold on 29.10.2013, for total consideration of Rs. 4,10,00,000/-, to developer Mr. Sachin Lodha, as against market value of Rs. 3,43,43,000/-. For selling the land, it is claimed that the developer / buyer put the condition for obtaining clearance / NOC from forest department (that land does not fall in the forest department), town area planning department (that land does not fall under town area development scheme) and Bhatsa Dam Division (that land does not fall under dam catchment area) and accordingly the same were obtained by the appellant before sale of the land. The Ld. AR claimed that the permission for conversion of land into NA was applied by the buyer and the same was also issued by the District Collector, Thane. It is also claimed that in the sale deed it was inadvertently mentioned that it is values as open plot instead of agricultural land, thereby valued the land for stamp duty at Rs. 3,43,43,000/- and accordingly determined stamp duty of Rs.16,40,010/-. In support of this claim he had filed letter dated 17.1.2018 from Sub-registrar. In support of agriculture land the Ld. AR also filed Xerox copies of affidavit dated 25.1.2017 of Mr. Vijay Shankar, son of Shankar Tukaram, land owner, for carrying out the agricultural activities on the said land, certificate dated 6.1.2017 from Shahapur Agriculture produce committee to certify that grass is an agriculture product, certificate dated 19.4,2017 from Tehsildar certifying that the land under dispute was an agricultural land, certificate dated 17.1.2008 from Sub-registrar stamp confirming that the land was an agricultural land and xerox copy of letter dated 23.2.2018 from Sachin Lodha, buyer, stating that he had requested to obtain the above certificates and accordingly requested to admit the same under rule 46A of the IT Rule, 1962.

4.2 In order to ascertain the genuineness of above claim, vide order sheet noting dated 16.2.2018, the Ld. AR. was requested to furnish credible documents regarding cultivation of land and other facts and was also requested to produce the concerned persons who have issued various certificates, certifying the fact that the land under dispute is an agricultural land. In compliance the Ld. AR neither could furnish any credible evidences which could establish the fact that the land under dispute is an agricultural land nor could produce these persons who had issued various certificates / letters / affidavits regarding their claim that the land was an agricultural land. It is further noticed that

during the course of assessment proceedings, the appellant was given ample opportunities of being heard to justify the claim of agricultural land, but squarely failed to establish the same. The provision of Rule 46A, inter-alia, read as under:-

"(1) The Appellant shall not be entitled to produce before the Commissioner (Appeals), any evidence, whether oral or documentary, other than the evidence produced by him during the course of proceedings before the Assessing Officer, except in the following-circumstances, namely:-

(a) Where the assessing officer has refused to admit evidence which ought to have been admitted; or

(b) Where the appellant was prevented by the sufficient cause from producing the evidence which he was called upon to produce by the assessing officer; or

(c) Where the appellant was prevented by the sufficient cause from producing before the assessing officer any evidence which is relevant to any ground of appeal; or

(d) Where the assessing officer has made the order appealed against without giving sufficient opportunity to the appellant to adduce evidence relevant to any ground of appeal.

(2) No evidences shall be admitted under sub-rule (1) unless the Commissioner (Appeals) records in writing the reasons for its admission. "

4.3 From the above facts it is seen that the appellant's case does not fall under any of above conditions, laid in the Rule 46A of the IT Rules 1962 and the appellant has also not brought any material on record to establish any ,of the above circumstances to establish his claim, hence not admissible, therefore, rejected. The Ld. AR trying to mislead / twist the facts of open land, which is having potentiality of developing into non-agricultural land and accordingly the same was sold to developer for the purpose of development and not for the agricultural purpose. The Ld. AR initially claimed that the grass grown spontaneously is also an agricultural produce, as per letter issued by agricultural produce market committee, Shahapur and during appellate proceedings it is further claimed that the land under dispute was put for cultivation for various crops, such as Rice, Grass and plantation, with the help of— workers, by use of water, seeds, fertilizer, etc. and the produce was almost equal to cost of cultivation, therefore, income from agriculture was not

declared in the returns of income filed with the department. The Ld. AR could not bring any evidence on record, in respect of above claims and also could not explain the reasons for contradictions at assessment stage vis-a-vis at appellate stage. These contentions of the appellant are nothing but fabricated for claiming benefit of agricultural land. As per above details it is seen that the appellant had sold the land for Rs. 4.10 crores (29.10.2013) i.e. 34.17 times of cost i.e. Rs. 12 lacs (16.10.2012), thereby earned huge profit of Rs. 3.98 crores by investing meager amount of Rs. 12 lacs, within a span of no times. On the other hand the poor farmer was paid only Rs. 12 lacs for the said land.

5. I have carefully considered the facts of the case, the findings of the AO, submissions of the Ld. AR and material placed on record. From the facts of the case it is noticed that the appellant derives income from supply of building material and rental income from three properties. During the year under appeal, the appellant had sold a land admeasuring 5.22 Acres on 31.10.2013, situated at Shahapur, Dist. Thane, for total consideration of Rs. 4,10,00,000/-, as against market value for stamp duty of Rs. 3,43,43,000/-. The same was claimed to have been purchased for total consideration of Rs. 12 lacs on 23.9.2008, after paying part payment, by obtaining the irrevocable power of attorney. This land was finally registered on 16.2.2012 when the balance amount of sales consideration of Rs. 1 lac was paid. As per registered document (Sale deed) dated 16.2.2012, the market value vis-a-vis actual sale consideration, on the date of registration was Rs. 12 lacs. The possession was also handed over to the appellant after registering of the said land.

5.1 The appellant had determined the short term capital gain of Rs. 3,98,84,086/- (Rs. 4,10,00,000 - Rs. 11,15,914/-) and the same was claimed as exempt u/s. 10(37) of the I.T. Act, in the statement of income, filed along with the return of income. In order to ascertain the genuineness of the claim of exemption of Rs. 3.99 crores, the AO resorted to call for relevant details from the appellant i.e. Purchase-deed, Sale-deed, copy of 7/12 Extract, confirmation from the District Collector regarding conversion of land into N.A. land, various correspondences made by the appellant for converting the land into N.A., etc. On perusal of these details / documents, the AO observed that the land was purchased, by way of purchase agreement dated 23.9.2008, for total consideration of Rs. 12,00,000/-. Out of that, the appellant

had paid an amount of Rs. 11,000/-, against the sale consideration, Rs. 48,000/- against stamp duty and Rs. 12,000/- against registration charges. The appellant also obtained irrevocable power of Attorney dated 23.9.2008 from the seller Shri Shankar Tukaram, which was also registered on the same date. Meantime, the appellant tried to find seller and accordingly entered into an understanding for the sale of the said land to the developer / builder namely Shri Swapnil Shende and Sachin Lodha. In order to buy the said land for development, the buyer asked the appellant to obtain various clarifications / clearances from the Forest Department, Town Planning, Executive Engineer, Bhatsa Dam Division No. 1, that the land under dispute is not in forest area, does not fall in the development zone and also does not fall in the catchment area of the Bhatsa Dam, so that the same can be used for the construction / development. The buyer also asked the appellant to apply for NA. As per the understanding between the appellant and the buyer, the appellant obtained clearance from the Asstt. Director, Town Planning on 23.8.2013, Clearance Certificate dated 25.10.2013 from Forest Department and No objection Certificate dated 17.10.2013 from Executive Engineer, Bhatsa Division No. 1, before selling the land to the developer.

5.2 It is further noticed that the application filed by the appellant in the office of the Collector, for converting land use to non-agricultural land, was also processed and was given understanding that in view of the certificates, the land under dispute will be converted into N.A. Accordingly, the land under dispute was sold to Shri Swapnil Shende and Sachin Lodha on 31.10.2013, for total consideration of Rs. 4,10,00,000/-, as against the market value of Rs. 3,43,43,000/-, on which stamp duty of Rs. 16,40,000/- was also paid on 29.10.2013. It is pertinent to mention here that on 16.10.2012, the land under dispute was registered in the name of appellant, in view of the above irrevocable power of Attorney dated 23.9.2008, obtained from the original owner i.e. Shri Shankar Tukaram, by paying the differential amount of stamp duty of Rs. 100/- and registration charges of Rs. 780/-, as the appellant had already paid the stamp duty of Rs. 48,000/- and registration charges of Rs. 12,660/- on 23.9.2008, by paying the part sale consideration. It is further noticed that the market value for stamp duty purpose and sale consideration on both dates i.e. 23.9.2008 (on which the sale agreement was executed / registered) and on 16.10.2012 (the date on which the sale-deed was

registered), remained same i.e. Rs. 12,00,000/- only, being barren land. It is seen that within a span of one year i.e. on 29.10.2013, the land under dispute was sold for Rs. 4,10,00,000/-, as against the market value of Rs. 3,43,43,000/-, clearly establish that at the time of sale the land was NA. It is surprised to note that as how come the valuation of land, under dispute, could be increased from Rs. 12,00,000/- on 16.10.2012 to Rs. 3,43,43,000/- on 29.10.2013, i.e. within span of one year without the change of land use. From these facts, it is evident clear that the use of land was changed to NA due to which the market value / value determined by the Stamp duty Officer was increased from Rs. 12,00,000/- on 16.10.2012 to Rs. 3,43,43,000/- on 29.10.2013. This clearly indicates the fact that the land under dispute was not an agricultural land, when it was sold i.e. on 29.10.2013, by the appellant.

5.3 From the facts of the case it is seen that the appellant is engaged in the business of supply of building material and has never engaged in the business of agricultural activities. As per 7/12 Extract, obtained from the revenue department, it is seen that the crop grown in the said land reflected as 'grass' and not mentioned any other crops name. From these facts it is crystal clear that the land under dispute was pardi land (barren land) on which the grass was spontaneously grown up, in the rainy season, without carrying out any agricultural activities. It is further noticed that the appellant had not carried out any agricultural activities accordingly had not declared any agricultural income, in the return of income, right from the date of purchase till the date of sale. It is surprised to note that the poor farmer could get consideration of Rs. 12,00,000/- only and within a span of few months, the appellant had harvested the huge profit of Rs. 3,98,84,086/- i.e. 34.17 times of the purchase price and still avoiding the payment of tax, by fabricating the claim of agricultural land, in-spite of the fact that the same was never cultivated and was never intended to be used for agricultural purposes.

5.4 In view of the change of stand by the AR, that paddy & other crops were cultivated, during appellate proceedings the appellant was required to furnish documentary evidences regarding labor expenses, seed expenses, fertilizer expenses, cultivation expenses, harvesting expenses, marketing expenses, sales bills along with name and address of the person who had cultivated the land and produce them for verification. In compliance, the appellant could not furnish these documents and merely

stated that the land under dispute was never cultivated but was located in rural area, therefore, liable to be treated as agricultural land. As regard the request for cross verifying the District Collector, Thane, for supplying various correspondences /documents / NA certificates, etc. to AO is concerned it was explained that the said documents are available in the public domain and relate to sale of your land and the same were in the knowledge of the appellant, therefore, the AO has not used the same in the back of the appellant. The Ld. AR accordingly withdrew the claim of cross verification of District Collector, Thane. As regard the claim of stamp duty and registration charged of Rs. 60,660/- against purchase of land on 23.9.2008 is concerned, the same appears to be in order, and liable to be accepted. The AO is directed accordingly. As regard the claim of taxability of STCG of Rs. 3,98,84,086/- as LTCG is concerned, the same is not tenable in view of the fact that on 23.9.2008, the agreement to purchase the land, under dispute, was entered into by giving part advances against purchase consideration and balance amount was paid when the land was registered on 16.10.2012 and the possession was handed also over. Within a span of almost 1 year the land was sold on 29.10.2013, therefore, the claim of LTCG is rejected. Moreover, the appellant himself has offered the said gain in the computation of income, for the relevant year, as STCG and claimed exemption u/s 10 (37) of the Act, therefore, the same is also rejected.

5.5 From the facts of the case it is inferred that the appellant, immediately after purchase of land on 16.10.2012, initiated the process of converting land used to NA and accordingly obtained various clearance certificates i.e. from Forest Department on 25.10.2013, Town Planning Department on 23.8.2013 and NOC from Executive Engineer, Bhatsa Dam Division No. 1 on 7.10.2013 and also applied for conversion of land used to NA, in the office of the Collector, as stated here in above, by the AO in the assessment order. It is pertinent to mention here that the Hon'ble Supreme Court in the case of Sarifabibi Mohammed Ibrahim & Others vs. CIT 204 ITR 631 inter-alia, held that entering into the agreement to sell the land, which was not cultivated for four years prior to sale coupled with its location and price to which it was sold, establish that the land was not an agricultural land when it was sold, as the assessee had no intention to bring it at cultivation, at any time.

5.6 In the case of appellant it is crystal clear that the land under dispute was registered as an open land, for

development purpose, accordingly the market value of the said land was determined at Rs. 3,43,43,000/- (actual sale consideration Rs. 4,10,00,000/-), as against the meager purchase price of Rs, 12,00,000/- only. It is further held that the price at which the said land was sold had appreciated multiple times, within a span of few months, itself indicates the land falls within the purview of taxable gain. It is pertinent to mention here that the crop sold as 'grass' in 7/12 Extract, will not classify the same as agricultural land, in view of the above facts. Keeping in mind the various factors such as holding periods, intention of purchase and sales, etc, in my considered view, the appellant had carried out trading of adventure in nature, for harvesting maximum profit and not for the investment in the land for agricultural purposes. In this regard, the reliance is placed on the ratio laid down in the following cases:-

A CIT Vs Subramaniam Vadivel (TS-206-ITAT) (2013) (CHNY)

"Land even if situated outside municipal limits or in remote villages, constitutes capital asset absent any agricultural operations; Sale consideration, thus taxable as capital gains; Mere bifurcation of land in revenue records as 'agricultural' would not make it so; Agricultural history of land is not the only test to be applied to decide the character at the time of sale; Lands must be utilized for economical agricultural activities and should generate meaningful income; ; Distinguished co-ordinate bench ruling in Pallava Resorts: Chennai ITAT

Raja J Rameswar Rao Vs CIT(SC) 42 ITR 179

When a person acquires land with a view to selling it later after developing it, he is carrying on an activity resulting in profit, and the activity can only be described as a business ventures. "

Smt. Parvathi Devi & Ors. Vs CIT(AP) 164 ITR 675

"The extent of the land that had been purchased was about 10 acres. It was purchased by four persons joining together. The land which had been purchased had already been converted into non-agricultural land. It would, therefore, be reasonable to conclude that the land must have been purchased not as agricultural land nor as house sites, but for only trading purposes..... The character of the land was such that it could not be used as agricultural land nor could it be put to any other use, except as house sites. In view of the facts of instant case, it was impossible

to say that the property in question had been purchased for personal use or possession or for enjoyment or for investment. Considering all these facts, there was no hesitation in holding that the of land in question had been made not as an investment, but clearly for the purpose of trading in the land. It was accordingly held that the transaction was an adventure in the nature of trade.

CIT Vs. Raja Benoy Kumar Sahas Roy [1957] 32 ITR 466 (SC).

The Hon'ble SC clearly laid down that the term 'agriculture' cannot be dissociated from the primary significance i.e. cultivation of the land. Cultivation of the land is an essential ingredient for denoting that there is agriculture. Cultivation of the land means tilling of the land, sowing of the seeds, planting, and similar operations of the land.

Smt. Sarifabibi M. Ibrahim vs. CIT[193] 70 Taxman 301 SC —" whether a land is an agriculture land or not is essentially a question of fact. Several tests have been evolved in the decision of the SC and the High Court, but all of them are more in the nature of guidelines. The question has to be answered in each case having regard to the facts and circumstances of that case ....The inference has to be drawn on cumulative consideration of all the relevant facts. " In this decision, the Hon'ble SC has held that "the HC was right in holding that the said land was not an agricultural land at the time of its sale and that the income arising from its sale was not exempt from the capital gain". While giving its decision Hon'ble SC has referred to various judgments on the issue viz. CIT K Siddharth J. Desai [1983] 139 ITR 628 (Guj.), CIT vs. Raja Benoy Kumar Sahas Roy [1957] 32 ITR 466 (SC), CWT vs. Officer-in-charge (Court of wards) [1976] 105 ITR 133 (SC), T. Sarojini Devi Vs. T. Sri Krishna AIR 1944 Mad. 401 and CIT vs. V.A. Trivedi [1988] 172 ITR 95 (Bom.).

CWT vs. Officer-in-charge (court of wards) [1976] 105 ITR 133 (SC) popularly known as Begumpet Palace case-In this case., the Constitution Bench of the S. C., inter-alia, held that;

"(a) ....The idea behind exempting the agricultural land is to encourage cultivation of land and the agricultural operatlons. In the other words this exemption had to be necessarily given a more restricted meaning than the very wide ambit given to it by the Full Bench of the Andhra Pradesh High Court

(b) What is really required to be shown is the connection with an agricultural purpose and user and not the mere possibility of use of land by some possible future owner or possessor, for an agricultural purpose. It is not the mere potentiality but its actual condition and intended user which as to be seen for purpose of exemption,

(c) The person claiming an exemption of any property of his from the scope of his assets must satisfy the conditions of the exemption,

(d) The determination of the character of land, according to the purpose for which it is meant or set apart and can be used, is a matter which ought to be determined on the facts of each particular case,

(e) The fact that the land is assessed to the Land Revenue as agricultural land under the State Revenue Law is certainly a relevant fact but it is not conclusive. "

The Gujarat High Court in CIT Vs Siddharth J Desai (1983) 139 ITR 628, reviewed the several earlier decisions of the Gujarat High Court as well as the decision of the S. C. in Begumpet Place's case and has evolved the following 13 factors;

"(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 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? 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, has ceased to be put to agricultural use? If so, whether it was put to

an alternative use? Whether such ceaser and / or alternative user was of permanent or temporary nature?

(7) Whether the land, though entered into 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 land 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 was any previous sales of portions of land for non-agricultural use?

11) Whether permission u/s 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?

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

(13) Whether an agriculturist would purchase the land for agricultural purpose at the price at which the land was sold and whether the owner would have ever sold the land valuing it as a property yielding agricultural produce on the basis of its yield.

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

CIT V. VA Trivedi (1998)-l72 ITR 95, a Division Bench of the Bombay High Court observed-that to ascertain the true character and the nature of the land, it must be seen whether the land has been put to use for agricultural purposes for a reasonable span of time prior to the relevant date and further whether on the relevant date the land was intended to be put to use for agricultural purpose for a reasonable span of time in the future.

Hemachand Hirachand Shah Vs CIT (1994) 206 ITR 55 (Guj.) - held that the assessee who claimed to be an agriculturist, had entered into a series of transactions of purchase and sale of lands. The AO found that the purchase and sale of those lands by the assessee was part of an organized business activity and profit arising from sale of such lands was to be treated as taxable income. It was held by the High Court as under:

"The explanation offered by the assessee for disposing of the lands soon after his purchase were just not acceptable. The explanation of the assessee in most of the cases was that the lands were dabhada lands, on which considerable expenditure would have to be incurred in order to develop them and make them fit for agricultural operations. The assessee who professed to be an agriculturist was aware of the nature and character of the land he was purchasing particularly when he professed to purchase the said lands for the purpose of agriculture. One could not accept a situation, where such agriculturist would purchase a land for the purpose of agriculture, on an assumption or an observation that it would be fit for agriculture, and immediately after the purchase, arrived at a conclusion that it would be uneconomical to develop the same for agriculture and would, therefore, be required to dispose of the same. The assessee was found to entered into a series of transactions of purchase and sale, and in each case the sale was within a reasonably short time of the purchase. Thus, the very fact that large number of such transactions were entered into within a reasonably short period of time showed that it was an organized business activity on the part of the assessee.

On a totality of the assessment of the fact and circumstances of the case and on the material on record, the conclusion arrived at by the Tribunal was correct. The assessee, was at least so far as the transactions in question were concerned, carrying on business or an adventure in the nature of trade, and that, therefore, the profit which accrued from such transactions would be taxable as business income.

Badrilal Bholaram Vs CIT (MP) 139 ITR 207

CIT Vs B Narasimha Reddy (Karnataka) 150ITR 347

CIT Vs M Krishna Rao (AP) 120 ITR 101 - Land purchased had potentiality of being developed into building site - No agricultural operations were carried out on land by the assessee -Adventure in the nature of trade.

5.7 In view of the above discussion, in my considered view, the AO has rightly assessed the gain from the sale of open land as STCG, therefore, sustained. The AO, however, is directed to allow the claim of expense of Rs. 60,660/-, against stamp duty and registration charges, incurred against purchase of land. All the grounds of appeal are decided accordingly.

In result the appeal is partly allowed."

5. Aggrieved by the appellate order dated 27.02.2018 passed by learned CIT(A), the assessee has come in an appeal before the tribunal. The Ld. Senior Counsel for the assessee submitted at the outset that the AO has obtained certain documents directly from the office of District Collector , Thane at the back of the assessee which were never confronted to the assessee before prejudicing the assessee by disallowing the claim of exemption claimed by the assessee from income-tax on gains arising from sale of land wherein the assessee on the grounds that the said land was an agricultural land which was used for agricultural purposes claimed the exemption which stood disallowed by authorities below while the assessee never got chance to rebut the said documents obtained by the AO at the back of the assessee. The Ld. Senior Counsel for the assessee also contended that additional evidences were filed by the assessee before learned CIT(A) for the first time which goes to the root of the matter while the Ld. CIT(A) erred in refusing to admit the same. It was , however, fairly pleaded by the Ld. Senior Counsel for the assessee that onus is on the assessee to prove that the land was used for the purposes of agriculture wherein no income-tax on capital gains is payable on the sale of land and it was prayed by learned counsel for the assessee that if one more opportunity is granted to the assessee , then the assessee will be able to prove by cogent evidences/explanations that the said land was used by the assessee for agricultural purposes before its sale and hence no capital gain tax is exigible on the said gains, which can then be verified by the AO . It was prayed that directions may be issued to AO to furnish all the documents to the assessee which were obtained by the AO directly from the office of District Collector, Thane if AO intends to rely on the

said documents to prejudice the assessee. It was also prayed by ld. Senior counsel of the assessee that the AO be directed to admit additional evidences filed by the assessee before learned CIT(A). The assessee has filed paper book consisting of 183 pages . Our attention was also drawn to page 135 and 136 of paper book wherein Certificate(incl. English translation) dated 20.06.2016 of Grampanchayat, Khardi is placed wherein it is certified that the population of Khardi is 5593. . Our attention was also drawn to page 137 and 138 of paper book wherein Certificate(incl. English translation) dated 22.07.2016 of Grampanchayat, Khardi is placed wherein it is certified that the distance of Taluka place Shahpur is 20 K.M. from Khardi Grampanchayat. Our attention was also drawn to relevant paras of Ld. CIT(A) appellate order to contend that Ld. CIT(A) rejected the additional evidences filed by the assessee. The assessee has also filed written submissions before the tribunal which is also taken on record.

6. The Ld. DR on the other hand submitted that matter can be set aside and restored to the file of AO for denovo determination of the issue on merits in accordance with law . The learned DR would rely on the appellate order passed by learned CIT(A).

7. We have considered rival contentions and perused the material on record including orders of authorities below and paper book filed by the assessee. We have observed that the assessee is engaged in the business of building material . The case of the assessee was selected by Revenue for framing scrutiny assessment u/s 143(3) read with Section 143(2) of the 1961 Act. During the impugned assessment year under consideration, the assessee sold an plot of land situated at village Khardi, Taluka: Shahapur admeasuring 5.22 acres for Rs. 4,10,00,000/- to Mr Swapnil Shende and Mr Sachin Lodha and claim is made by the assessee that the said land is an agricultural land which was used for agricultural purposes by the assessee on which gains of Rs. 3,98,84,086/- have arisen on its sale on 31.10.2013 and the gains

arising from sale of aforesaid land to the tune of Rs. 3,98,84,086/- were claimed to be an exempt income from income-tax keeping in view provisions of Section 10 of the 1961 Act. The assessee claimed that the said land was used for agricultural purposes wherein rice, grass and plantation were grown before it was sold by the assessee on 31.10.2013 and consequently the said land shall not be a capital asset as defined u/s 2(14) of the 1961 Act and falls under the exceptions provided under Section 2(14)(iii)(a) of the 1961 Act , as it is claimed by the assessee that the said land did not fall under municipality or cantonment board and is situated at a distance of 20 km from Taluka place Shahpur and the population of Grampanchayat Khardi is 5593. The claim was made by the assessee that the said land is situated in Khardi Village , a rural area managed by Gram Panchayat. It was claimed that nearest Taluka is Shahpur which is governed by Panchayat Samiti under Panchayat Act and does not fall under Municipality or Cantonment Board. The assessee claimed that CBDT circular no. 45 dated 02.09.1970 (79 ITR(St.) 33) is applicable and since agricultural land is situated in rural areas i..e outside any municipality or cantonment board having a population of not less than ten thousand and beyond the distance notified by the Central Government from the limits of such municipality or cantonment board , the land will continue to be excluded from the definition of capital asset. The assessee filed copies of purchase deed dated 23.09.2008 and sale deed dated 31.10.2013 with respect to the aforesaid land and claim was made by the assessee that the said land was purchased by the assessee on 23.09.2008 and sold on 31.10.2013 and hence period of holding of said land by the assessee before sale was more than thirty six months. The irrevocable power of attorney dated 23.09.2008 executed by seller namely Mr Shankar Tukaram in favour of the assessee was produced. It was claimed that the assessee had already made payment of Rs. 11,00,000/- to seller Mr Shankar Tukaram on or around the time of execution of aforesaid registered purchase agreement and irrevocable power of attorney both dated 23.09.2008 by seller Mr Shankar Tukaram in favour of the assessee ,

out of total consideration of Rs. 12,00,000/- towards the said land , while balance amount of Rs. 1,00,000/- was paid by the assessee to said Mr Shankar Tukaram on 16.10.2012 in cash when final registered purchase deed with respect to aforesaid land was executed in favour of the assessee by the seller . It is claimed by the assessee that the stamp duty of Rs. 48,000/- and registration fee of Rs. 12,660/- was also paid by the assessee at the time when registered purchase agreement and irrevocable power of attorney was executed in favour of the assessee by the seller Mr Shankar Tukaram on 23-09-2008. It is also claimed that only differential stamp duty of Rs.100/- and registration charges of Rs. 780/- was paid by the assessee when the purchase deed was finally registered on 16.10.2012 in favour of the assessee by the seller, Mr Shankar Tukaram. The provisions of Section 53A of the Transfer of Property Act,1882 was invoked by the assessee to contend that the land was transferred to the assessee on 23.09.2008 as contemplated u/s 2(47) of the 1961 Act , as part payments were already made by the assessee to the seller namely Mr Shankar Tukaram on or around 23-09-2008 to the tune of Rs.11 lacs out of total consideration of Rs. 12 lacs , which was further supported by handing over of the possession of the plot of land by Mr Shankar Tukaram, the seller in favour of the assessee and consequently the transfer of property as is contemplated u/s 2(47)(v) of the 1961 Act stood completed. The assessee has also claimed that in the sale deed executed by the assessee in favour of Mr Swapnil Shende and Mr Sachin Lodha for Rs. 4,10,00,000/- on 31.10.2013, the Sub-registrar inadvertently mentioned its value as open plot instead of agricultural land, thereby valuing the land for stamp duty purposes at Rs. 3,43,43,000/- and accordingly computed stamp duty of Rs. 16,40,010/- . The said land was sold by the assessee on 31.10.2013 to Mr Swapnil Shende and Mr Sachin Lodha for actual consideration of Rs. 4,10,00,000/-. As we see later in this order , the assessee brought on record before learned CIT(A) , letter dated 17.01.2018 from Sub-Registrar certifying that the land was an agricultural land and also other evidences to substantiate its aforesaid contentions but learned

CIT(A) refused to admit additional evidences citing bar as is contained in Rule 46A of the Income-tax Rules, 1962. The Revenue disputed the contentions of the assessee by holding that the assessee is not entitled for exemption from capital gains from the sale of said land . Further , the Revenue held that the gains arising from sale of the said land are short term capital gains as the period for which the asset was held by the assessee is to be reckoned from the date when final purchase deed was executed on 16.10.2012 by seller, Mr Shankar Tukaram in favour of the assessee and not from the date when initial registered purchase agreement and power of attorney was executed by the seller , Mr Shankar Tukaram on 23.09.2008 in favour of the assessee. It is undisputed that the assessee sold the aforesaid land on 31.10.2013 to the buyers namely Mr. Swapnil Shende and Shri Sachin Lodha. The Revenue has contemplated that the said land was not used for the purposes of agriculture during the entire period when the said land was held by the assessee , relying on 7/12 extracts dated 23.08.2008 issued by Talathi , village Khadrdi appended to and forming part of purchase deed dated 23.09.2008 and as well 7/12 extract issued on 26.07.2013 by Talathi , Village Kardi appended to and forming part of sale deed dated 31.10.2013 filed by the assessee with respect to said land which showed the said land on which grass was grown. The Revenue has observed that grass grows spontaneously on vacant land for which no agricultural operations are required to be carried on and hence it cannot be said that the said land was used for agricultural purposes. The authorities below have also observed that during the period of three years beginning with assessment year(s) 2012-13 to 2014-15 the assessee did not show any income from agriculture in the return of income filed by the assessee with Revenue which as per Revenue is an strong indicator that no agricultural activities whatsoever were carried on by the assessee on the said land. The assessee is claiming that it grew grass, rice and plantation on the said land which is disputed by Revenue , as also that the assessee did not produce any documentary evidences to show that cultivation activities were carried on by him on

the said land as no invoices for purchase of seeds, fertilizers, equipments, electricity bills etc were produced. The claim of the assessee that it did not had any surplus from agricultural activities and hence it was not shown in the return of income filed with the Revenue for the impugned assessment year were also rejected by the authorities below on the grounds that it is not probable that for continuous three years in a row from AY 2012-13 to 2014-15, there was no surplus. The authorities below have also observed that when the land was held by the assessee , then during that period itself the process was started for conversion of land from agricultural purposes to 'Non Agricultural' purposes by the assessee and several clearances were applied for and obtained by the assessee in connection with development of land for commercial purposes even prior to sale of the aforesaid land on 31.10.2013 to the buyers namely Mr Swapnil Shende and Mr. Sachin Lodha, such as clearance from Forest Department dated 25.10.2013 that the land does not fall within forest area, Clearance dated 07.10.2013 as to the land does not fall within catchment area of Bhatsa Canal division and NOC from Town Planning Department dated 23.08.2013 that there is no proposal for development of that land by Government , which all were obtained prior to sale of land by the assessee on 31.10.2013 . The assessee had explained that these clearances were obtained as the buyers namely Mr Swapnil Shende and Mr Sachin Lodha insisted for the said clearances before buying the said land from the assessee. However, it is undisputed that an application for conversion of land from Agricultural to 'Non-agricultural' purposes were made by the buyers, Mr Sachin Lodha to the office of District Collector, Thane which was made post sale of aforesaid land by the assessee on 31.10.2013 to said Mr Swapnil Shende and Mr Sachin Lodha. The said application for conversion of land to 'Non Agricultural' purposes was made by Mr Sachin Lodha on 27.12.2013 which was later revised on 02.08.2014 by the said Buyers Mr Sachin Lodha and the approval was granted by District Collector, Thane on 11.11.2014 converting land to Non-agricultural purposes. Based on the above

factual matrix of the case , the authorities below have come to conclusion that the land was never used by the assessee for agricultural purposes but it was a barren land on which spontaneous grass was grown which cannot be categorised as a land which was used for agricultural activities while the assessee has bought and sold the said land for commercial development purposes to earn profit on the sale of land . It was concluded by the authorities below that the intention of the assessee at the time of buying the land as well selling the land was always to make profits from the sale of land as the assessee was fully aware of the commercial value of the said plot of land. The authorities below have also come to the conclusion that the buyer Mr Swapnil Shende and Mr Sachin Lodha also bought aforesaid land for commercial development purposes and not for the purpose of carrying on agricultural activities on the said land. The authorities below also observed that registered purchase agreement for transfer of land in favour of the assessee was finally executed by the seller, Mr Shankar Tukaram on 16.10.2012 and the Revenue did not accepted the initial registered purchase agreements and irrevocable power of attorney both dated 23.09.2008 executed by seller, Mr Shankar Tukaram in favour of the assessee. The land was undisputedly sold by the assessee on 31.10.2013 to Mr Swapnil Shende and Mr Sachin Lodha. Based on the above factual matrix of the case, it was held by authorities below that the said land was held by the assessee for not more than thirty-six months before being sold and the gains arising there from are short term capital gains. Further , it was held that the assessee is not entitled for exemption from income-tax on the ground that the aforesaid land was not an agricultural land and was not used for agricultural purposes. Undisputedly, the buyer Mr Sachin Lodha applied with District Collector , Thane for conversion of the aforesaid land from 'Agricultural' purposes land to 'Non Agricultural' purposes land . The said application was filed by the buyer, Mr Sachin Lodha on 27.12.2013 which was later revised on 02.08.2014 by the said buyer. The approval was finally granted on 11.11.2014 by the office of District

Collector,Thane converting the aforesaid land for 'Non-Agricultural' purposes . The AO had obtained documents directly from the office of District Collector, Thane which were connected with the making of an application along with all appended documents for seeking conversion of said land to 'Non-Agricultural' purposes by the new buyer but the copies of the aforesaid documents so directly obtained by the AO directly from the office of District Collector, Thane were not given to the assessee for rebuttal. While arriving at the decision to disallow the claim of the assessee, one of the factor considered by authorities below for disallowance of the claim of the assessee for exemption from tax on gains arising from sale of aforesaid land were the documents which were obtained directly by the AO from District Collector, Thane although learned CIT(A) has observed that these documents are merely permissions obtained by the assessee from the concerned authorities before selling the land on 31.10.2013 , such as clearance from forest department, town planner and Bhatsa canal division which documents in any case were in the possession of the assessee as the assessee itself had obtained these permissions from relevant government authorities . It is fundamental principle of natural justice as enshrined in doctrine of audi alteram partem that no body should be condemned unheard. If the Revenue wants to rely on certain documents which were obtained at the back of the assessee directly from certain persons/authorities to prejudice assessee, the copies of said relied upon documents are to be forwarded/furnished to the assessee for rebuttal before any prejudice is caused to the assessee by relying on those documents. The assessee in order to substantiate its contentions that the said land was used for agricultural purposes has submitted additional evidences before learned CIT(A), as under:

a) Letter from Sub-Registrar dated 17th January 2018

b) Copy of affidavit dated 25.01.2017 of Mr Vijay Shankar Son of Mr Shankar Tukaram, owner of land from whom the assessee

purchased the land, averring that agricultural activities were carried out on the said land.

c) Certificate dated 06.01.2017 from Shahpur Agricultural Produce Committee to certify that grass is an agricultural product

d) Certificate dated 19.04.2017 from Tehsildar certifying that the land under dispute was an agricultural land.

e) Certificate dated 17.01.2018 from Sub-Registrar stamp confirming that the land was an agricultural land.

f) Xerox copy of the letter dated 23.02.2018 from Mr. Sachin Lodha , buyer of the land stating that he requested the assessee to obtain mandatory certificates required for conversion of agricultural land into 'Non Agricultural' purposes.

The learned CIT(A) did not admitted aforesaid additional evidences filed by the assessee during appellate proceedings citing bar as contained in Rule 46A of the 1962 Rules. The assessee on being asked by learned CIT(A) did not produce these parties before learned CIT(A) for their cross examination. In our considered view , these additional evidences filed by the assessee with learned CIT(A) for the first time are produced by the assessee to substantiate its case that the land sold was an agricultural land used for agricultural purposes when the said land was held by the assessee and in our considered view these additional evidences have an important bearing on the outcome of the assessee's claim that land sold was an agricultural land, the learned CIT(A) ought to have admitted these additional evidences in the interest of substantial justice vis-a-vis technicalities. More-so, the powers of learned CIT(A) is co-terminus with the powers of the AO. We, thus, in exercise of our powers direct admission of these additional evidences filed by the assessee to be evaluated on merits in accordance with law because wherever technicalities are pitted against substantial justice, the Courts will lean towards the cause which advances justice. We clarify that we have not

commented on the merits of these additional evidences to arrive at the decision whether or not the land was an agricultural land , or whether or not the said land was used for agricultural purposes. Further, these additional evidences have so-far not stood the test of verification by the authorities below as they were un-admitted at the threshold itself by learned CIT(A). The assessee is seeking to claim exemption from income-tax on gains on sale of land on the grounds that land sold was an agricultural land used by the assessee for agricultural purposes and hence the onus is on the assessee to prove that its case fall strictly within conditions stipulated within taxing statute of 1961 for seeking exemption from income-tax before any claim for exemption can be granted to the assessee. At this stage , we are reminded of the recent decision of the Constitutional Bench of Hon'ble Supreme Court in the case of Commissioner of Customs (Imports), Mumbai v. Dilip Kumar & Company & Ors. in Civil Appeal No. 3327 of 2007 decided on 30th July 2018, wherein the Constitutional Bench held in favour of Revenue by holding as under:

> *"52.To sum up, we answer the reference holding as under*
>
> *(1) Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification.*
>
> *(2) When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the revenue.*
>
> *(3) The ratio in Sun Export case (supra) is not correct and all the decisions which took similar view as in Sun Export Case (supra) stands overruled."*

Thus, since the assessee is seeking exemption from income-tax on the gains arising from the sale of aforesaid land claiming the same to be agricultural land used for agricultural purposes by the assessee during the period when it was held by the assessee, the onus is on the assessee

to prove that his case strictly comes within the parameters of the exemption clauses as are contained in the 1961 Act which are to be strictly construed. It is also well established rule of evidence as enshrined in Section 114(g) of the Indian Evidence Act, 1872 that the evidences which could be and is not produced would , if produced , be unfavourable to the person who withholds it. It is incumbent on the assessee to produce all cogent evidences to substantiate and prove its case that gains arising from sale of land are exempt from income-tax. Further, we are also reminded at this stage of landmark decision of Hon'ble Supreme Court decision in the case of CIT v. Raja Benoy Kumar Sahas Roy reported in AIR 1957 SC 768 (1957) 32 ITR 466(SC) , wherein Hon'ble Apex Court held as under:

"It appears from the above survey that there has been a divergence of opinion amongst the various Courts not only in regard to the connotation of the terms "agriculture" and "agricultural purposes" but also in regard to the nature of forestry operations performed in the forest which can be styled agricultural operations so as to constitute the "land used for agricultural purposes" within the definition of agricultural income as given both in the Indian Income-tax Act and in the several Agricultural Income-tax Acts passed by the various States.

It may be noted at the outset that the definition of "agricultural income" given in section 2(1) of the Indian Income-tax Act is in identical terms with the definitions of that term as given in the various Agricultural Income-tax Acts passed by the several States. It will be idle therefore to treat "Taxes on Agricultural Income" which fall within the legislative competence of the State Legislature as having no relation at all to the corresponding provisions of the Indian Income-tax Act. Once it is determined that the income in question is derived from land used for agricultural purposes by agriculture, it would be agricultural income and as such exempt from tax under section 4(3)(viii) of the Indian Income-tax Act and would fall within the purview of the relevant provisions of the several Agricultural Income-tax Acts passed by the various States. The result of this determination would be that the assessee would not be liable to assessment under the Indian Income-tax Act but he would have to pay the agricultural income-tax which would be levied upon him under the relative Agricultural Income-tax Acts. The only enquiry which would therefore be relevant is whether the income in question is agricultural income within the terms of the definition thereof and that would have to be determined in each case by the Court having regard to the facts and circumstances of the particular case before it.

In order that an income derived by the assessee should fall within the definition of agricultural income two conditions are necessary to be satisfied and they are : (i) that the land from which it is derived should be used for agricultural purposes and is either assessed for land revenue in the taxable territories or is subject to local rates assessed and collected by the officers of the Government as such ; and (ii) that the income should be derived from such land by agriculture or by one or the other of the operations described in clauses (ii) and (iii) of section 2(1)(b) of the Indian Income-tax Act.

It was at one time thought that the assessment of the land to land revenue in the taxable territories was intended to exempt the income derived from that land from liability for payment of income-tax altogether and that theory was based on the assumption that an assessee who was subject to payment of land revenue should not further be subjected to the payment of income-tax, because if he was so subjected he would be liable to pay double taxation.

It is interesting to note at this stage the genesis of the provision exempting agricultural income derived from the lands assessed to land revenue as understood by the Courts. Viswanatha Sastri, J., in this context observed in Commissioner of Income-tax, Madras v. Sundara Mudaliar [1950] 18 ITR 259 at page 270 :

> *"I shall briefly advert to the genesis of the provision exempting agricultural income derived from lands assessed to land revenue, as I consider that the subject-matter with which the legislature was dealing, and the facts existing at the time with respect to which the legislation was made, are legitimate topics for consideration in ascertaining the object and scope of the exemption from income-tax conferred on agricultural income. This exemption, it would be noticed, has been a persistent feature of the income-tax legislation of this country from 1867 onwards, and nothing like it is found in the English Income Tax Acts. Even at a time when there was no provision like section 100 of the Goverment of India Act, 1935, with Federal and Provincial Lists and there was no incompetency on the part of the Central Legislature to levy a tax on agricultural income, the Income-tax Acts passed from time to time by the Central Legislature including the existing Act of 1922, exempted from income-tax the agricultural income of lands assessed to public revenue. This exemption was granted for no other reason than the justice and equity of exempting from further burden income which had already paid its toll to the State in the shape of land revenue either as a permanently fixed peishkush under Regulation No. XXV of 1802 or as an assessment periodically fixed under the ryotwari settlement. Under what may be called the common law in India, the State had the immemorial prerogative right to collect a share of the produce of the land from its owner, the latter having the full right to the enjoyment of the land and its produce,*

subject only to the aforesaid contribution to the State. Land revenue is collected annually from the proprietor of the land and is presumably exigible from the income of the land. Cash payment in lieu of a share of the produce due to the State was substituted long ago to facilitate collection of revenue. Income derived from the produce of the land having been subjected to the payment of the annual land revenue, it was thought inequitable to subject the same income again to annual income-tax. Hence the exemption of the agricultural income of assessed lands or lands whose revenue had been remitted either in whole or in part, as in the case of inams. Mines, minerals, and quarries having been reserved by the State, at any rate in respect of lands other than those comprised in a permanently settled estate, income derived from such sources was not exempted from income-tax. The revenue assessment was based on the quality of the soil and the income derived from the produce of the lands, and therefore the exemption from income-tax was limited to agricultural income derived from assessed lands. Such is the reason for exemption from income-tax of agricultural income".

Whatever may have been the genesis of the exemption of agricultural income from income-tax, the liability to pay land revenue or fixed peishkush under Regulation XXV of 1802 was not considered by Rankin, J., as a deterrent against the levy of income-tax in appropriate cases, even on certain classes of income derived from the permanently settled estates, if that was the clear intention of the legislature. The learned Judge observed in Emperor v. Probhat Chandra Barua [1924] ILR 51 Cal. 504:

"Some reference was made at the bar to the practice of the Revenue Authorities since 1886 as regards fisheries in permanently settled estates, but there is no agreement as to what that practice—if there be a practice—has been. Assuming that it would have been open to us to place some degree of reliance upon an interpretation settled by practice as contemporanea expositio we are in fact without any such assistance".

"Some reference was also made to what has been called a 'presumption against double taxation'. In Manindra Chandra Nandi v. Secretary of State [1907] ILR 34 Cal. 257, royalties from a coal mine were held liable both to cess under the Cess Act, 1880, and to income-tax under the Act of 1886, but it was said that, 'it may be conceded that Courts always look with disfavour upon double taxation, and statutes will be construed, if possible, to avoid double taxes.' Reference was made to certain dicta of American Courts and to the English case of Carr v. Fowle [1893] 1 QB 251. But the only observation in this case was to the effect that the statute presumably did not intend that a vicar should in effect pay the same tax (land tax) twice on the same hereditament. This is plain enough. Thus the income-tax is one tax, and income assessed under one schedule cannot be

> *assessed all over again under another. That there is any legal presumption of a general character against 'double taxation' in any wider sense is a proposition to which I respectfully demur as a principle for the construction of a modern statute. In Manindra Chandra Nandi's case (supra)it did not avail to cut down clear, though absolutely general, language".*

This view of Rankin, J., was upheld by the Privy Council in Probhat Chandra Barua v. King Emperor [1930] LR 57 IA 228 In the later case of Yuvarajah of Pittapuram v. Commissioner of Income-tax, Madras [1949] 17 ITR 445, the Privy Council held that the imposition of income-tax in respect of income derived from the permanently settled estate would not be a breach of the Madras Permanent Settlement Regulation No. XXV of 1802. The assessment of land to land revenue or its being subject to local rates assessed and collected by the officers of the Government as such is merely an indication that the land is an agricultural land as distinguished from land which can be used for agricultural purposes but carries the matter no further.

We have, therefore, to consider when it can be said that the land is used for agricultural purposes or agricultural operations are performed on it. Agriculture is the basic idea underlying the expressions "agricultural purposes" and "agricultural operations" and it is pertinent therefore to enquire what is the connotation of the term "agriculture". ***As we have noted above, the primary sense in which the term agriculture is understood is agar—field and cultra—cultivation, i.e., the cultivation of the field, and if the term is understood only in that sense agriculture would be restricted only to cultivation of the land in the strict sense of the term meaning thereby, tilling of the land, sowing of the seeds, planting and similar operations on the land. They would be the basic operations and would require the expenditure of human skill and labour upon the land itself. There are however other operations which have got to be resorted to by the agriculturist and which are absolutely necessary for the purpose of effectively raising the produce from the land. They are operations to be performed after the produce sprouts from the land, e.g, weeding, digging the soil around the growth, removal of undesirable undergrowths and all operations which foster the growth and preserve the same not only from insects and pests but also from depredation from outside, tending, pruning, cutting, harvesting, and rendering the produce fit for the market. The latter would all be agricultural operations when taken in conjunction with the basic operations above described, and it would be futile to urge that they are not agricultural operations at all. But even though these subsequent operations may be assimilated to agricultural operations, when they are in***

conjunction with these basic operations could it be said that even though they are divorced from these basic operations they would nevertheless enjoy the characteristic of agricultural operations ? Can one eliminate these basic operations altogether and say that even if these basic operations are not performed in a given case the mere performance of these subsequent operations would be tantamount to the performance of agricultural operations on the land so as to constitute the income derived by the assessee therefrom agricultural income within the definition of that term?

We are of opinion that the mere performance of these subsequent operations on the products of the land, where such products have not been raised on the land by the performance of the basic operations which we have described above would not be enough to characterize them as agricultural operations. In order to invest them with the character of agricultural operations, these subsequent operations must necessarily be in conjunction with and a continuation of the basic operations which are the effective cause of the products being raised from the land. It is only if the products are raised from the land by the performance of these basic operations that the subsequent operations attach themselves to the products of the land and acquire the characteristic of agricultural operations*. The cultivation of the land does not comprise merely of raising the products of the land in the narrower sense of the term like tilling of the land, sowing of the seeds, planting, and similar work done on the land but also includes the subsequent operations set out above all of which operations, basic as well as subsequent, form one integrated activity of the agriculturist and the term "agriculture" has got to be understood as connoting this integrated activity of the agriculturist. One cannot dissociate the basic operations from the subsequent operations and say that the subsequent operations, even though they are divorced from the basic operations can constitute agricultural operations by themselves. **If this intregated activity which constitutes agriculture is undertaken and performed in regard to any land that land can be said to have been used for "agricultural purposes" and the income derived therefrom can be said to be "agricultural income" derived from the land by agriculture.***

In considering the connotation of the term "agriculture" we have so far thought of cultivation of land in the wider sense as comprising within its scope the basic as well as the subsequent operations described above, regardless of the nature of the products raised on the land. These products may be grain or vegetables or fruits which are necessary for the

sustenance of human beings including plantations and groves, or ***grass or pasture for consumption of beasts*** *or articles of luxury such as betel, coffee, tea, spices, tobacco etc., or commercial crops like cotton, flax, jute, hemp, indigo etc.* ***All these are products raised from the land and the term "agriculture" cannot be confined merely to the production of grain and food products for human beings*** *and beasts as was sought to be done by Bhashyam Ayyangar, J., in Murugesa Chetti v. Chinnathambi Gounden & Others [1901] ILR 24 Mad. 421, 423, or Sadasiva Ayyar, J., in Raja of Venkatagiri v. Ayyappa Reddi [1915] ILR 38 Mad. 738, but must be understood as comprising all the products of the land which have some utility either for consumption or for trade and commerce and would also include forest products such as timber, sal and piyasal trees, casuarina plantations, tendu leaves, horra nuts etc.*

The question still remains whether there is any warrant for the further extension of the term "agriculture" to all activities in relation to the land or having connection with the land including breeding and rearing of live-stock, dairy-farming, butter and cheese-making, poultry-farming, etc. This extension is based on the dictionary meanings of the term and the definitions of "agriculture" collated in Wharton's Law Lexicon, as also the dicta of Lord Cullen and Lord Wright in Lean & Dickinson v. Ball [1925] 10 Tax Cas. 341and Lord Glanely v. Wightman [1933] AC 618quoted above.

Derbyshire, C.J., in Moolji Sicka & Co., In re [1939] 7 ITR 493 treated tendu plants growing on the soil as part of the soil and therefore considered the pruning of the shrub as cultivation of the soil in a legal and technical sense and this extension of the term "agricultural" was also approved by Viswanatha Sastri, J., in Commissioner of Income-tax v. K.E. Sundara Mudaliar & Others [1950] 18 ITR 259. We are however of opinion that the mere fact that an activity has some connection with or is in some way dependent on land is not sufficient to bring it within the scope of the term and such extension of the term "agriculture" is unwarranted. The term "agriculture" cannot be dissociated from the primary significance thereof which is that of cultivation of the land and even though it can be extended in the manner we have stated before both in regard to the process of agriculture and the products which are raised upon the land, there is no warrant at all for extending it to all activities which have relation to the land or are in any way connected with the land. The use of the word agriculture in regard to such activities would certainly be a distortion of the term.

A critical examination of the definition of "agricultural income" as given in section 2(1) of the Indian Income-tax Act and the relevant provisions of the several Agricultural Income-tax Acts of the various States also lends support to this position. In the first instance, it is defined as rent or revenue derived from land which is used for agricultural purposes ; and it is next defined as income derived from such land by agriculture or by the activities described in clauses (ii) and (iii) of section 2(1)(b) of the Act.

These activities are postulated to be performed by the cultivator or receiver of rent-in kind of such land in regard to the products raised or received by him which necessarily means the produce raised on the land either by himself or by the actual cultivator of the land who pays such rent-in-kind to him. If produce raised or received by the cultivator or receiver of rent-in-kind is thus made the subject-matter of clauses (ii) and (iii) in section 2(1)(b) of the Act, the term "agriculture" used in clause (i) of section 2(1)(b) must also be similarly restricted to the performance of the basic operations on the land and there its no scope for reading the term "agriculture" in the still wider sense indicated above.

If the term "agriculture" is thus understood as comprising within its scope the basic as well as subsequent operations in the process of agriculture and the raising on the land of products which have some utility either for consumption or for trade and commerce, it will be seen that the term "agriculture" receives a wider interpretation both in regard to its operations as well as the results of the same. Nevertheless there is present all throughout the basic idea that there must be at the bottom of it cultivation of land in the sense of tilling of the land, sowing of the seeds, planting, and similar work done on the land itself. This basic conception is the essential sine qua non of any operation performed on the land constituting agricultural operation. If the basic operations are there, the rest of the operations found themselves upon the same. But if these basic operations are wanting the subsequent operations do not acquire the characteristic of agricultural operations.

All these operations no doubt require the expenditure of human labour and skill but the human labour and skill spent in the performance of the basic operations only can be said to have been spent upon the land. The human labour and skill spent in the performance of subsequent operations cannot be said to have been spent on the land itself, though it may have the effect of preserving, fostering and regenerating the products of the land.

This distinction is not so important in cases where the agriculturist performs these operations as a part of his integrated activity in cultivation of the land. Where, however, the products of the land are of spontaneous growth, unassisted by human skill and labour, and human skill and labour are spent merely in fostering the growth, preservation and regeneration of such products of land, the question falls to be considered whether these subsequent operations performed by the agriculturist are agricultural operations and enjoy the characteristic of agricultural operations.

It is agreed on all hands that products which grow wild on the land or are of spontaneous growth not involving any human labour or skill upon the land are not products of agriculture and the income derived therefrom is not agricultural income. There is no process of agriculture involved in the raising of these products from the land.

There are no agricultural operations performed by the assessee in respect of the same, and the only work which the assessee performs here is that of collecting the produce and consuming and marketing the same. No agricultural operations have been performed and there is no question at all of the income derived therefrom being agricultural income within the definition given in section 2(1) of the Indian Income-tax Act. Where, however, the assessee performs subsequent operations on these products of land which are of wild or spontaneous growth, the nature of those operations would have to be determined in the light of the principles enunciated above.

Applying these principles to the facts of the present case, we no doubt start with the finding that the forest in question was of spontaneous growth. If there were no other facts found, that would entail the conclusion that the income is not agricultural income. But then, it has also been found by the Tribunal that the forest is more than 150 years old, though portions of the forest have from time to time been denuded, that is to say, trees have completely fallen and the proprietors have planted fresh trees in those areas, and they have performed operations for the purpose of nursing the trees planted by them. It cannot be denied that so far as those trees are concerned, the income derived therefrom would be agricultural income. In view of the fact that the forest is more than 150 years old, the areas which had thus become denuded and replanted cannot be considered to be negligible. The position therefore is that the whole of the income derived from the forest cannot be treated as non-agricultural income. If the enquiry had been directed on proper lines, it would have been possible for the Income-tax authorities to ascertain how much of the income is attributable to forest of spontaneous growth and how much to trees planted by the proprietors. But no such enquiry had been directed, and in view of the long lapse of time, we do not consider it desirable to direct any such enquiry now. The expenditure shown by the assessee for the maintenance of the forest is about Rs. 17,000 as against a total income of about Rs. 51,000. Having regard to the magnitude of this figure, we think that a substantial portion of the income must have been derived from trees planted by the proprietors themselves. As no attempt has been made by the Department to establish which portion of the income is attributable to forest of spontaneous growth, there are no materials on which we could say that the judgment of the Court below is wrong."

The Ld. Senior Counsel for the assessee has fairly pleaded that one more opportunity be provided to the assessee and the assessee will appear before the authorities below and file all necessary cogent evidences to prove that the said land was an agricultural land used by the assessee for agricultural purposes and the assessee is entitled for

exemption from income-tax on the gains which arose on sale of the said land . Thus , with the observations as made by us in this order , we are setting aside and restoring this matter back to the file of AO for denovo framing of an assessment by afresh determination of the issue on merits in accordance with law. The assessee is directed to produce all necessary cogent evidences/explanations before the AO in set aside proceedings to substantiate its claim of exemption . The AO shall admit all relevant evidences/explanations submitted by the assessee in support of its contentions in its defence which shall be evaluated by the AO on merits in accordance with law. The AO if wishes to rely on any documents/evidences collected at the back of the assessee to prejudice assessee shall forward/furnish copy of such documents to the assessee for rebuttal. We reiterate that the assessee is seeking to claim exemption from income tax on gains arisen from sale of land on the ground that the land was an agricultural land used for agricultural purposes by the assessee and the onus is on the assessee to prove that its case strictly falls under exemption provisions as are contained in the 1961 Act. Thus, the appeal filed by the assessee is allowed for statistical purposes. We order accordingly.

8. In the result appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open court on 16.11.2018.

आदेश की घोषणा खुले न्यायालय में दिनांकः 16.11.2018 को की गई

Sd/-	Sd/-
(JOGINDER SINGH)	(RAMIT KOCHAR)
VICE PRESIDENT	ACCOUNTANT MEMBER

Mumbai, dated: 16.10.2018

Nishant Verma
Sr. Private Secretary

copy to…

1. The appellant
2. The Respondent
3. The CIT(A) – Concerned, Mumbai
4. The CIT- Concerned, Mumbai
5. The DR Bench,
6. Master File

// Tue copy//

BY ORDER

DY/ASSTT. REGISTRAR
ITAT, MUMBAI