IN THE INCOME TAX APPELLATE TRIBUNAL
JODHPUR BENCH, JODHPUR

BEFORE SHRI HARI OM MARATHA, JUDICIAL MEMBER AND
SHRI N.K.SAINI, ACCOUNTANT MEMBER

ITA No. 362/JU/2010
Assessment Year: 2007-08

Smt. Supriya Kanwar C/o Ashapurna Buildcon Ltd Jodhpur PAN No. AIPPK 8926 N (Appellant)	Vs.	The I.T.O Ward -1(3) Jodhpur (Respondent)

Assessee by : Shri U.C. Jain
Department by : Dr. Deepak Sehgal, CIT-DR

Date of Hearing : 20.03.2014
Date of Pronouncement : 13.05.2014

ORDER u/s 255(4)

PER HARI OM MARATHA, J.M.

The difference of opinion between the ld. A.M and the ld. J.M. was regarding the nature of piece of land sold. As per the ld. J.M. this land was agricultural one and not a 'capital asset'. The ld. A.M. has taken a different view and has held this land sold as a 'capital asset'. The ld. Third Member has agreed with the view of the ld. J.M. and, therefore, in majority view the piece of land sold is not a 'capital asset'.

Hence, according to the opinion of majority of the Members of the Appellate Tribunal, we answer this ground [issue] in the favour of the assessee. As a result, the appeal of the assessee stands allowed.

Order Pronounced in the Court on 13th May, 2014.

Sd/-

(N.K.SAINI)
ACCOUNTANT MEMBER

Sd/-

[HARI OM MARATHA]
JUDICIAL MEMBER

Dated : 13th May, 2014

VL/-

Copy to:

- *The Appellant*
- *The Respondent*
- *The CIT*
- *The CIT(A)*
- *The DR*

By Order

Assistant Registrar
ITAT, Jodhpur

IN THE INCOME TAX APPELLATE TRIBUNAL
Jodhpur Bench, Jodhpur

Before Shri D. Manmohan, Vice President
(As Third Member)

ITA No. 362/JU/2010
(Assessment Year: 2007-08)

Smt. Supriya Kanwar C/o. Ashapurna Buildcon Ltd. Jodhpur	Vs.	Income Tax Officer, Ward-1(3) Jodhpur

PAN - AIPPK8926N

Appellant **Respondent**

Appellant by: Shri K. Sampath
Respondent by: Dr. Deepak Sehgal

Date of Hearing: 20.03.2014

ORDER

Per D. Manmohan, V.P.

On account of difference of opinion between Hon'ble Judicial Member and the Hon'ble Accountant Member, the Hon'ble President was pleased to nominate me as Third Member in the instant case with a direction to resolve the issue, if necessary, by framing the point of difference to bring out the controversy appropriately and to render decision on those question(s).

2. The assessee herein purchased certain agricultural land and sold in the previous year relevant to assessment year under consideration. The case of the assessee was that the income arises from the transaction of agricultural land and hence it is exempt under section 10(1) r.w.s. 2(1A)(a) of the Act. Even otherwise the income arising therefrom is not assessable to capital gains tax in view of the provisions of section 2(14)(iii)(a)(b). On the other hand, the case of the Revenue is that it was an adventure in the nature of trade and the income from the impugned land is business income. The AO as well as the CIT(A) were of the opinion that the amount received by the assessee on sale of the impugned land deserves to be treated as profit from adventure in the nature of trade and assessable as business income. When the case was heard by the Division Bench at ITAT Jodhpur, the

learned Judicial Member observed that (a) the impugned land was purchased on 7th February, 2006 and it was sold on 23.03.2007, (b) the land is situated beyond the prescribed municipal limits (beyond 8 kms from the municipal limits) in a village of Alwar District, Rajasthan, and (c) it being agricultural land the sale proceeds thereon are not assessable to tax as business income. The learned Judicial Member recorded that the impugned land was purchased and sold alongwith standing crops and the Department accepted the return of income wherein agricultural income on sale of standing crops was shown. He has also taken into consideration the plea of the assessee that at no point of time the assessee sought for conversion of land use by making an application with the respective authorities. Though the assessee was dealing in sale and purchase of plots in urban areas, so far as this land is concerned, the intention was not to convert into plots and in fact the agricultural land with standing crops was sold to single party, i.e. Vedic Village Developers Pvt. Ltd.

3. The learned Judicial Member observed that the assessee purchased five pieces of agricultural land adjoining each other through different sale deeds and the land was registered on different dates from – 7th February, 2006 to 5th April, 2006. The assessee showed the purchase of agricultural land as 'fixed asset'. In the preceding year the assessee earned ₹70,000/- on sale of crops which was shown as agricultural income in the return filed by the assessee, which was accepted by the Revenue. In this year ₹22,000/- was declared on sale of standing crop and accepted by the AO. In fact, another crop was standing at the time of sale which was passed on to the purchaser of the land and hence no agricultural income from this crop was shown in the return as the land was sold along with the crop though the same was declared for rate purposes, for computing tax liability. If the intention of the assessee was to carry on an adventure in the nature of trade she would have applied for conversion of land use and drawn up the requisite plotting scheme, engaged professional architects for preparing site plan approval and would have commenced preliminary development works whereas no such activity was undertaken by the assessee which shows that the intention of the assessee at the time of purchase of land was only to

retain the land and it was not purchased for the purpose of resale as an adventure in the nature of trade. He also observed that undoubtedly the land is situated beyond 8 kms from the municipal limit and hence the land has to be considered as agricultural land. So long as the land is capable of agricultural operations, the sale of agricultural land by itself would not make it business income. He also relied upon several precedents apart from analysing the facts of the case to come to the conclusion that the impugned land is Barani land admeasuring only seven Bighas with standing crop which in itself prove that it was not purchased with an intention to utilise the land for any other purpose. He thus concluded that the impugned land is out of the purview of the definition of "capital assets" and hence income therefrom cannot be assessed to tax by treating it as adventure in the nature of trade.

4. The learned Accountant Member was not agreeable with the view taken by the learned Judicial Member. Having regard to the peculiar factual matrix of the case, which was highlighted in his order, he concluded that the assessee sold the land to make profit. He observed that the assessee was not having any agricultural background since she was deriving income by way of salary from Ashapurna Buildcon Ltd. She purchased five pieces of contiguous agricultural land from five different persons. Some amount was spent on levelling the land and also on fencing the land. The land was purchased alongwith standing crop and the said standing crop was sold in the earlier year. It was claimed that two crops were raised in this year and the first crop was sold resulting in agricultural income. The learned Accountant Member stressed upon the fact that both the lower authorities have given concurrent findings that the transactions of purchase and sale of agricultural land constitute adventure in the nature of trade mainly on account of the fact that the assessee never intended to carry on agricultural operations on the land; the lands were neither irrigated nor any tube well facility was available earlier or installed by the assessee and in fact they were sold within a period of 12 to 13 months of purchase deriving a huge return of 558 percent. He also observed that the land is situated at a distance of more than 500 kms from the place where the assessee usually

resides and therefore he drew a conclusion that these lands were not purchased for the purpose of cultivation. Since she was engaged in the business of real estate development the impugned purchase was with the full knowledge that the values are likely to appreciate rapidly as these fall within the new town of National Capital Region (NCR), the global city, on national highway No. 8. He also observed that the investment was made out of borrowed funds.

5. The case of the assessee was that no step has been taken to change the character of the land and hence it continued to remain as agricultural land till the date of sale to Vedic Village Developers Pvt. Ltd. and the assessee did not make any effort to locate the buyer and because of the attractive price which was offered by Vedic Village Developers Pvt. Ltd. the assessee was persuaded to sell the land.

6. The learned Accountant Member referred to the decision in the case of G. Venkataswami Naidu & Co. vs. CIT 35 ITR 594 (SC) and other decisions on similar lines to draw a conclusion that if an assessee has not carried on any agricultural operation it would reflect that he is not interested in obtaining any return from these lands and on sale thereof it can very well be considered as adventure in the nature of trade.

7. The learned Accountant Member observed that the assessee had not earned any income out of her labour as she was staying in Jodhpur. The land was also not given to any other person for cultivation. She does not have any past record of carrying on agricultural operations. Though some of her relatives, one step removed, may be carrying on agricultural activities, in the instant case the land is situated on the border of Rajasthan and it has been characterised as NCR since 1985, i.e. prior to the date of purchase and a global city was expected to come up in the vicinity which gives great opportunities of making profit. The fact that the assessee borrowed funds to make investment and sold at a very high price, i.e. 6 times more than the purchase price also shows that it was an adventure in the nature of trade. He thus concluded that the entries in the books of account is not really material and at any rate not conclusive of the matter and if overall

circumstances are taken into consideration it gives a clear view of the assessee of making higher profit, in which event no distinction can be made between agricultural land and non-agricultural land in the case of a dealer in land. In other words, the learned Accountant Member was of the opinion that the assessce was a dealer in land and the intention was to make more profit though in the books a different nomenclature was given to it.

8. With regard to the pleas of the assessee that some expenditure was incurred on levelling and fencing, the learned Accountant Member observed that the expenditure was too small compared to the investment. The case of the assessee was that the lands were levelled to conserve water and fencing was done to avoid entry of stray cattle, etc. whereas the case of the Revenue was that the lands were situated at a distance of more than 500 kms from the place where the assessee usually resides, coupled with the fact that she had no experience of agricultural activities and therefore mere incurring of expenditure on levelling and fencing could not lead to the inference that the assessee had carried on substantial activity to make the land more suitable for the purpose of agricultural operations. In fact expenditure of about ₹20,000/- and gross receipt of about ₹30,000/- from agricultural operations, in this year, do not lead to a conclusion that the intention of the assessee was to either make the land suitable for agricultural operations or to carry on activity in future. He thus concluded that the lands were not intended to carry on agricultural operations.

9. The next question is whether the assessee is a dealer in land since she was an employee Director of a company which is engaged in real estate development. In this regard the learned Accountant Member observed that no attempt was made by the assessee to install facilities for irrigating the land and borrowed funds were utilised for purchasing various pieces of land. The assessee is otherwise engaged in the business of real estate and hence the impugned purchases were not with the intention of carrying on agricultural operations which is evident from the fact that the lands fall in the NCR and a global city was coming up in the area and the gap between the purchase and sale was about one year. In his opinion the issuc, as to

whether it was purchased as agricultural land or with an intention to carry on adventure in the nature of trade depends upon the facts of each case and inferences have to be drawn depending upon the circumstances that culminated into the deal. He thus concluded that stress has to attached to the circumstances of the case rather than going by the broader principles laid down by various courts. He thus concluded that the surplus income on sale of land is taxable as business income.

10. There was a difference of opinion even with regard to the point of difference that arises out of the order passed by the respective Members. The learned Judicial Member framed the following question of law: -

> *"Whether, on the facts and circumstances of the case, solitary transaction of purchase and sale of the same agricultural land with standing crops situated beyond the prescribed Municipal limits, amounts to adventure in the nature of trade?"*

On the other hand, the learned Accountant Member framed the following question: -

> *"Whether on the facts and circumstances of the case and in law, the transactions of purchase and sale of five pieces of agricultural land with standing crop, by way of separate conveyance deeds, beyond the prescribed distance from any municipal council, amount to transactions on capital account or adventure in the nature of trade?"*

The questions were forwarded to the Hon'ble President to eable him to consider the matter appropriately and to place the points of difference before Third Member.

11. Though the case was originally posted for hearing on 20th March, 2014 (as has been permitted by the Hon'ble President) for reframing the questions, I have posted the matter on 20.03.2014 by informing both the parties and accordingly the matter was heard on the preliminary issue. Upon hearing both the parties and with the consent of the learned CIT-DR as well as the learned counsel for the assessee the following questions were taken up/reframed, to bring out the difference of opinion expressed by the Members: -

> "1. Whether on the facts and in the circumstances of the case and in law, the transactions of purchase and sale of five pieces of agricultural land with standing crop, by way of separate

conveyance deeds, beyond the prescribed distance from any municipal council, amounts to transactions on capital account or adventure in the nature of trade?

2. Whether the surplus arising on sale of impugned agricultural land gives rise to agricultural income within the meaning of section 2(1A) read with Explanation (1)/Section 2(14)(iii)(a) and (b) and consequentially exempt under section 10(1) of the Act, irrespective of the findings as to whether the impugned transaction is on capital account or an adventure in the nature of trade?"

12. The case was accordingly posted for hearing on 20th March, 2014. The learned counsel for the assessee submitted that the land was situated beyond the prescribed municipal limit and it was also recorded as agricultural land in the Revenue records. In fact the assessee purchased the agricultural land with standing crops thereon and income on sale of the standing crops was shown as agricultural income in the immediately preceding year, which was accepted by the tax authorities. Even in the year of sale of land the first standing crop was sold by the assessee and income therefrom was shown as agricultural income and the AO having accepted the nature of income it cannot now be said that it is not agricultural land and the assessee intended to earn business income thereon. He also submitted that the land being agricultural in nature sale thereof gives rise to agricultural income within the meaning of section 2(1A) read with Explanation 1/2(14)(iii)/10(1) of the Act. Explanation 1 to Section 2(1A) defines 'agricultural income', which includes revenue derived from land situated in India and used for agricultural purpose. It is well settled that transaction of sale of land and income received therefrom has to be considered as 'revenue derived from land' and consequently 'agricultural income'. Explanation to section 2(1A) was introduced to exclude the income from sale of certain agricultural lands, as specified in section 2(14)(iii) i.e., agricultural land situated within the municipal limits. Per contra, income earned on sale of agricultural land situated beyond eight kilometres from the local limit of any municipality cannot be treated as 'capital asset' and such income deserves to be considered as revenue derived from land used for

agricultural purposes. Relevant portions of section 2(14)(iii) are extracted for ready reference: -

> *(a) in any area which is comprised within the jurisdiction of a municipality (whether known as a municipality, municipal corporation, notified area committee, town area committee, town committee, or by any other name) or a cantonment board and which has a population of not less than ten thousand according to the last preceding census of which the relevant figures have been published before the first day of the previous year; or*
>
> *(b) in any area within such distance, not being more than eight kilometres, from the local limits of any municipality or cantonment board referred to in item (a), as the Central Government may, having regard to the extent of, and scope for, urbanisation of that area and other relevant considerations, specify in this behalf by notification in the Official Gazette."*

The learned counsel for the assessee, therefore, submitted that only such land which falls within the description of agricultural land under section 2(14)(iii), upon sale thereof, gives rise to income which cannot be considered as agricultural income within the meaning of section 2(1A) whereas upon sale of agricultural land which is situated beyond eight kilometres from the local limits of any municipality, the sale proceeds thereof has to be considered as 'agricultural income', in which event section 10(1) comes into play, i.e. whether it is on capital account or revenue account, agricultural income cannot be included in the total income. It was also submitted that the assessee has also included the impugned sale proceeds for rate purposes. It was thus contended that there is no difference of opinion, in the orders passed by the learned Judicial Member and the learned Accountant Member, on this aspect, i.e. (a) the fact that it is agricultural land situated beyond eight kilometres from the local limits of the municipality, (b) at the time of purchase as well as at the time of sale it was shown as agricultural land in the Revenue records and no application was made for conversion of the land for non-agricultural use, and (c) the assessee sold standing crops and offered it as agricultural income. In the light of these undisputed facts the answer to other question is of academic importance since irrespective of the decision as to whether it was on capital account or not the sale proceeds are liable to be treated as agricultural income. In the alternative it was

contended that it is not a 'capital asset', within the meaning of section 2(14) of the Act, and thus the sale proceeds cannot be assessed to tax either under the head capital gains or as business profit.

13. On the other hand the learned CIT-DR strongly relied upon the order passed by the learned Accountant Member and submitted that whether the transaction is an adventure in the nature of trade or not essentially depends on various facts and it is a mixed question of facts and law and the metaphor "one swallow does not make a summer" cannot be extended to a single trade transaction, as observed by the Apex Court in the case of Venkataswami Naidu & Co. 35 ITR 594. His main contention was that the assessee knew, at the time of purchase, that the land falls in the NCR zone and the surrounding circumstances, as stated by the learned Accountant Member, would highlight that the transaction was with an intention to make maximum profit and hence it may be treated as an adventure in the nature of trade.

14. I have carefully considered the submissions of the learned counsel for the assessee as well as the learned CIT-DR. I have also carefully perused the record as well as the decisions cited before me. It may be noticed that both the parties relied upon the decisions referred to by the Members in their respective orders in support of their contentions. The issue as to whether a particular transaction amounts to mere sale of investment or an adventure in the nature of trade was subject matter of several judicial decisions and the Apex Court have time and again observed that no principle can be evolved which would govern the decision of all cases in which the character of the impugned transaction falls to be considered. In the case of Venkataswami Naidu & Co. 35 ITR 594 the court observed that even an isolated transaction can satisfy the description of adventure in the nature of trade and metaphorically observed that a single plunge in the waters of trade may partake of the character of an adventure in the nature of trade but at the same time cautioned that the 'single plunge must be in the waters of trade'. The Hon'ble court observed that it is impossible to evolve any formula which can be applied in determining the character of isolated

transactions; if a person invests money in land intending to hold it, enjoys its income for some time, and then sells it at a profit, it would be a clear case of capital accretion and not profit derived from an adventure in the nature of trade. Merely because it is sold at a profit it cannot be assumed that it is an adventure in the nature of trade unless other characters of such transaction support such stand. In deciding the character of such transaction several factors are treated as relevant – Was the purchaser a trader and were the purchase of the commodity and its resale allied to his usual trade or business or incidental to it? Did the purchaser, by any act subsequent to the purchase, improve the quality of the land and thereby made it more readily resaleable? What were the incidents associated with the purchase and resale? – etc. will have to be taken into consideration and a holistic view has to be taken. Though, in the facts of the case the court observed that the transaction in question is an adventure in the nature of trade but the decision was rendered by taking into consideration the contentions of the Revenue, i.e. there was series of transactions undertaken by the assessee who was in a position to influence the mills to purchase his properties and hence they have not done anything to develop the property; the assessee just allowed the property to remain unutilized. These factors were taken into consideration to come to the conclusion that it was an adventure in the nature of trade. The Apex Court as well as various High Courts have reiterated the basic principle and observed that it is impossible to evolve any formula which can be applied in determining the character of an isolated transaction and a holistic view has to be taken, by taking into consideration the circumstances of the case.

15. If it is not considered as an adventure in the nature of trade the next issue that arises for consideration is whether sale of agricultural land gives rise to 'agricultural income' or it is assessable to tax under the head 'capital gains'. Admittedly, the expression "agricultural income" is not comprehensively defined in the Income Tax Act, though it was explained, under section 2(1A), that any revenue derived from land, which is situated in India, can be considered as agricultural income. Section 2(14) of the Act defines capital asset, which was substituted by Finance Act, 1970 and

thereafter in 1989 whereby only such agricultural land which is located within eight kilometres from the municipal limit should be treated as capital asset. In other words, agricultural land situated beyond eight kilometres from the nearest municipal limit cannot be treated as capital asset and sale proceeds thereof may be treated as revenue derived from land which is situated in India and is used for agricultural purposes. The Apex Court in the case of Singhai Rakesh Kumar vs. Union of India 247 ITR 150 explained the meaning of the expression 'agricultural income' as well as the expression 'capital asset'. In the said case the issue was whether the profit arising out of sale of agricultural land gives rise to capital gains, within the meaning of Income Tax Act, 1961. A writ petition was filed by the assessee asking the High Court to declare as unconstitutional the Explanation to clause (1A) & sub clause (iii) of clause (14) of section 2 of Income Tax Act, 1961 to declare that capital gains arising from sale of agricultural land within the municipal area were not liable to capital gain tax under the Income Tax Act, 1961. The Hon'ble High Court of Madhya Pradesh having dismissed the writ petition the matter came up before the Hon'ble Supreme Court. The Apex Court observed that the Parliament is empowered to legislate to say what "agricultural income" means. What Parliament says in this regard is that the meaning given under Income-tax Act should be taken as the correct meaning of the expression 'agricultural income' and in regard to such agricultural income the state may legislate. In the aforementioned case the court observed that the land being situated within the municipal limits income arising from transfer of agricultural land falls within the terms of items (a) and (b) of sub-clause (iii) of clause 14 of section 2 and falls outside the ambit of revenue derived from land, therefore, outside the ambit of 'agricultural income' and consequently liable to capital gain tax under section 45 of the Act. The learned counsel for the assessee placed reliance upon the aforecited decision to submit that the impugned land sold by the assessee was situated beyond eight kilometres from the nearest municipal limit and hence the income arising from transfer of agricultural land falls within the ambit of revenue derived from land and, therefore, has to be

treated as agricultural income in which event it has to be considered for rate purposes only.

16. The Hon'ble Bombay High Court in the case of Gopal C. Sharma 209 ITR 946, on the other hand, observed that the expression 'agricultural land' is not defined in the Income Tax Act and, going by the intention of the Legislature, i.e. encouraging cultivation, sale of agricultural land gives rise to capital gains. It may be noticed that the court was not concerned with the case of agricultural land situated outside the municipal limits and had not specifically dealt with the provisions of section 2(1A) r.w.s. 2(14)(iii) (a) and (b). On the contrary, the Apex Court in the case of Singhai Rakesh Kumar (supra) observed that agricultural land situated within eight kilometers from the municipal limit, upon sale thereof, is liable to tax and underlined the principle that definition given under Income Tax Act has to be taken as correct. Thus it has to be inferred that land situated beyond eight kilometers from the municipal limits has to be excluded from the expression 'capital asset', consequently upon sale of such land, it has to be treated as agricultural income.

17. The fact that the land was failing outside the municipal limit was never disputed by both the Members and in fact a specific ground was raised before the Tribunal that the revenue received on sale of land is exempt under section 2(1A) of the Act. The learned counsel filed a detailed written submission wherein he pointed out that the assessee treated the sale proceeds as agricultural income under section 10(1) and offered the same for rate purpose. On an appeal the CIT(A) observed that the income which results from sale of agricultural land is not agricultural income as per sec. 2(1A) of the Act overlooking a specific ground before him that income arising on transfer of agricultural land used for cultivation (subject to land revenue and located beyond eight kilometers of municipal limits) cannot be assessed to tax under the Income Tax Act, 1961. The learned counsel referred to the amendments brought out by the Finance Act, 1970 and by the Finance Act, 1989 with retrospective effect to highlight that the intention of the Legislature was to tax income from transfer of agricultural land

situated in the specified area only and cautiously excluded such land from the scope of agricultural income. He also relied upon the decision of the Hon'ble Bombay High Court in the case of Manubhai A. Sheth vs. Income Tax Officer 128 ITR 87 in support of his contention that profits or gains on sale of agricultural land will be revenue within the meaning of section 2(1) (now 2(1A) of the Act). This principle was reiterated by the Hon'ble Bombay High Court in the case reported in 208 ITR 98. By virtue of the amendments to section 2(14)(iii) of the Act, only agricultural land situated within the municipal limits gets excluded from the definition of agricultural land. Per contra, agricultural land situated outside the municipal limits, upon sale, gives rise to agricultural income only.

18. Having carefully considered this issue I am of the firm view that the impugned land cannot be treated as capital asset since it is situated beyond eight kilometers from the municipal limits and it was purchased as agricultural land and sold accordingly without making any changes such as conversion in the land records, plotting of land, etc. In fact the learned counsel for the assessee stated that even at the time of purchase of the land it cannot be inferred that the assessee intended to make enormous profit by selling the land within a short span. He also submitted that National Capital Region master plan was prepared in 2002 and notified in 2010 and it was to come into effect from 2031 whereas the land was purchased in 2006 by which time even the master plan was not notified. It is also not in dispute that the assessee earned agricultural income in the immediately preceding year on sale of standing crop and the same was offered as agricultural income. The AO accepted the same for rate purposes. Similarly, for the year under consideration, i.e. year of sale of land, the assessee earned agricultural income for the first part of the year which was also offered for rate purpose and accepted by the Revenue. There is nothing on record to suggest that the assessee has done any act to convert the land for non-agricultural use. It is not even the case of the Revenue that the assessee advertised for sale of the land. The case of the assessee, on the other hand, was that the Vedic Village Developers Pvt. Ltd. offered tempting price and the assessee decided to take the benefit out of it though there was no intention to carry on trade. The

learned Accountant Member observed that the land was situated within the land already acquired by the Vedic Village Developers Pvt. Ltd. At the time of hearing, the learned counsel for the assessee submitted that it is a concocted fact and it was never admitted by the assessee. It is not even the case of the Revenue that the land purchased by the assessee is situated within the land acquired by the Vedic Village Developers Pvt. Ltd. It cannot thus be inferred that the assessee purchased the land with an intention to convert the same for non-agricultural purposes. It is thus clear that it is a case of sale of agricultural land and the land being situated beyond eight kilometres from the municipal limit, it cannot be subjected to tax under the Income Tax Act either as business income or capital gains. Though the Hon'ble Kerala High Court in the case of T.K. Sarala Devi 167 ITR 136 and the Hon'ble High Court of Punjab and Haryana in the case of Tula Ram 199 ITR 450 dissented from the decision of the Hon'ble Bombay High Court in the case of Manubhai A. Sheth (supra), in the light of the latest decision of the Apex Court in the case of Singhai Rakesh Kumar vs. Union of India 247 ITR 150, which in my opinion clarifies the issue subsequently, the only interpretation permissible is that the land situated outside the municipal limits stands excluded from the expression 'capital asset' from the inception and the sale proceeds have to be treated as revenue received from agricultural land. At any rate, the view taken by the Hon'ble Bombay High Court, in my opinion, can be said to be an appropriate view, on an analysis of provisions of section 2(1A)/2(14)(iii) (a) & (b)/10(1). When two views are possible a view which is in favour of the assessee has to be taken in the light of the decision of the Apex Court in the case of Vegetable Products Ltd. 88 ITR 192. Under these circumstances I answer question No. 2 in the affirmative by holding that the surplus arising on sale of the impugned agricultural land gives rise to agricultural income and not assessable to tax. Thus the view of the learned Judicial Member, on this issue, reflects the correct legal position.

19. In the light of the above findings, though it is not necessary to consider the other aspect arising out of question No. 1, for the sake of completeness I proceed to discuss the facts necessary for disposed of the said issue. It is not in dispute that the assessee purchased the land with

standing crops thereon and it was shown in the Khasra Girdawari records as a land cultivated throughout the period of holding by the assessee. No efforts have been taken by the assessee to change the nature of land. Income from the standing crops was offered for rate purpose as agricultural income. It is not in dispute that the transaction of purchase and sale of agricultural land is not part of a regular business activity of the assessee and it cannot also be treated as expansion of regular business of the assessee. It was an isolated transaction of purchase of agricultural land and sale thereof within a period of 13 months. Though the land is situated in the National Capital Region and there was a plan to develop Shahajanpur – Nimrana area of Alwer district as a global city but the fact remains that the master plan was finalised in the year 2010 and as per the master plan the area will be developed by the year 2031. The case of the assessee is that if the assessee's intention was to carry on an adventure in the nature of trade she has to wait at least till the master plan is finalised as otherwise she cannot expect substantial profit. On the contrary, the land was sold within a short span, seizing the opportunity of offer of better price which shows that the assessee intended to purchase the land as an investment only. It was also submitted by the learned counsel that the land was covered in NCR area since 1985 and hence this fact, in isolation, can never be considered as a key factor to decide the intention of the assessee since it is a long term project. At any rate, the government policy and the concrete master plan of 2031 was notified in the year 2010, which is a date falling after the sale of the agricultural land and hence it was contended on behalf of the assessee that any inference taken by such fact would be improper since the date of purchase of the land and the date of sale can at best be taken into consideration in appreciating the intention of the purchase of the land. The Apex Court in the case of G. Venkataswami Naidu & Co. vs. CIT 35 ITR 594, which in turn was followed by various other courts, observed that merely because a property was sold for a profit it cannot be assumed that it is an adventure in the nature of trade. It is not a case that the purchaser, subsequent to the purchase, tried to improve the quality of the land thereby making it more readily saleable. No single plunge in the waters may partake

of the character of an adventure in the nature of trade but the emphasis is given to the fact that the single plunge must be in the waters of trade, i.e. the intention of the assessee should be treated as paramount to consider as to whether it was a sale of agriculture land simplicitor or it was an adventure in the nature of trade. The learned Judicial Member rightly observed that the land was actually cultivated throughout the period of holding by the assessee, which is evident from the fact that the agricultural income was offered for rate purpose and accepted by the Revenue. It is, therefore, difficult to appreciate the observation of the learned Accountant Member that the assessee did not take any active step to get returns from the land. The learned Accountant Member has given emphasis to the fact that the assessee sold the land within a short span out of free will. In my considered opinion whether the land was sold out of compulsion or out of free will, will not alter the character of the transaction. Every assessee would like to make profit on a transaction, given an opportunity. In the instant case the assessee purchased the land with standing crops but ultimately sold the land tempted by the offer made by the Vedic Village Developers Pvt. Ltd. but mere sale of land on a profit cannot be a factor to conclude that the intention of the assessee was to carry on an adventure in the nature of trade. In other words, the subsequent making of profit cannot be a decisive factor. Thus, taking a holistic view of the matter, I am of the view that the learned Judicial Member had correctly come to the conclusion that the transaction was not an adventure in the nature of trade. The learned Judicial Member rightly observed that the impugned land will not fall within the purview of capital asset, being the land situated beyond the prescribed municipal limits and thus the sale proceeds thereof are not assessable to tax. For the above reasons question No. 1 is answered accordingly.

20. The Registry of the Tribunal is directed to list this matter before the Division Bench for passing of orders in accordance with majority view.

Sd/-
(D. Manmohan)
Vice President

Mumbai, Dated: 29th April, 2014