**THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment delivered on: 07.03.2013

**+ ITA 569/2012**

**COMMISSIONER OF INCOME TAX, DELHI** ... Appellant

versus

**DELHI APARTMENTS PVT LTD** ... Respondent

**Advocates who appeared in this case:**

For the Appellant : Mr N. P. Sahni with Mr Ruchesh Sinha
For the Respondent : Mr A. Sharma with Mr Manu K. Giri

**CORAM:-**
**HON'BLE MR JUSTICE BADAR DURREZ AHMED**
**HON'BLE MR JUSTICE R.V.EASWAR**

**JUDGMENT**

**BADAR DURREZ AHMED, J (ORAL)**

1. This appeal by the revenue under Section 260A of the Income Tax Act, 1961 is directed against the order dated 23.12.2011 passed by the Income Tax Appellate Tribunal in ITA 2320/Del/2010 in respect of the assessment year 2006-07.

2. Essentially, the revenue has proposed the following questions as substantial questions of law:-

"(1) Whether on the facts and circumstances of case, the Income Tax Appellate Tribunal was correct in law in deleting the addition of ₹ 16,93,42,000/- by holding that the advance received of by the assessee for the sale of lands is not taxable in the instant assessment year?

(2) Whether on the facts and circumstances of case, the Income Tax Appellate Tribunal was correct in law in deleting the addition of ₹ 3,07,82,342/- by holding that profits from the sale of lands is not taxable under the head profits and gains of business or profession vis-à-vis capital gain taken by the Assessing Officer?"

3. Insofar as the first proposed question is concerned, we find that certain properties were purchased between 08.02.2005 and 25.08.2005. The total purchase price of these properties, which were situated in village Kapashera, came to ₹ 1,06,58,000/-. This land was sold in its entirety to one A.B. Tower Private Limited for a consideration of Rs 18 crores by virtue of a sale deed dated 04.09.2006, which falls in the succeeding year. However, an advance had been received of ₹ 5 crores during the year under consideration, i.e., the financial year ending 31.03.2006. The Assessing officer regarded the receipt of advance as finalization of the transaction and subjected the entire consideration amount of ₹ 18 crores (minus the cost price) to tax in this assessment year, i.e., assessment year 2006-07.

4. Consequently, the Assessing Officer made an addition of ₹ 16,93,42,000/- on this account. The said addition was deleted by the Commissioner of Income Tax (Appeals) and the deletion was confirmed by the Tribunal by virtue of the impugned order. The Tribunal came to the conclusion that there was no agreement to sell between the parties in the year in question and the only document which pertained to the transfer of property was the sale deed dated 04.09.2006 which was executed in the subsequent year. The Tribunal further held that there was no transfer of possession in the year in question. In these circumstances, the Tribunal felt that the sum of ₹ 5 crores was only a receipt by of advance which had been received by the assessee and no transaction stood concluded in the year in question. Consequently, the Tribunal confirmed the deletion of said addition of ₹ 16,93,42,000/-.

5. Having heard the counsel for the parties, we are in agreement with the stand and approach adopted by the Tribunal. There was no evidence of any confirmed transaction in the year in question. As such, the addition could not have been made on the ground that the transaction had been concluded. We may also point out that in the subsequent year, the entire amount has been offered for taxation and has been subjected to tax. The Tribunal concluded its discussion on this aspect as under:-

> "The facts of this case are clearly distinguishable. No agreement has been signed in this year. The possession

> has also not been delivered in this year. The twin conditions of execution of written agreement and handing over of the possession have to be cumulatively satisfied in order to bring the case within the ambit of section 2(47)(v) read with section 53A of the Transfer of Property Act. None of these conditions are satisfied. Therefore, it is held that the property has not been transferred in this year. It has also not been sold in this year. Since the transaction of transfer has not taken place in this year, nothing can be brought to tax as business income in this year. In this view of the matter, the money received is only an advance, which will get taxed as and when the transaction actually takes place. This happened in the immediately succeeding year. Thus, ground no. 2 is dismissed."

Therefore, no question of law arises for our consideration insofar as this issue is concerned.

6. As regards the second proposed question, the facts are that the respondent/ assessee had purchased the land in question sometime in 1994-96. Since then, the respondent/ assessee had shown the said land in its balance sheet as a fixed asset. The same had been consistently shown as such by the respondent/ assessee in all the years including the assessment year 2006-07. Two portions out of the said land were sold in the year in question. The respondent/ assessee had claimed that the sale proceeds were not part of its business income but, being sales of its fixed assets resulted in long term capital gain of ₹ 3,07,82,342/-. The Assessing Officer did not agree with this and taxed the entire amount as part of the assessee's business income. Consequently, the Assessing

Officer made an addition of the said sum of ₹ 3,07,82,342/- by holding it as profit on sale of land which was taxable under the head 'profits and gains of business or profession' and not by way of capital gains. The Commissioner of Income Tax (Appeals) deleted the said addition and the said deletion has been confirmed by the Tribunal by virtue of the impugned order.

7. The Tribunal considered the arguments raised on behalf of the parties and after examining the case law on the subject, observed that an assessee could hold lands either for business or as an investment and there was no bar on an assessee in undertaking, along with his business of sale-purchase of land, also an investment in land. In these circumstances, the Tribunal held that the assessee could very well be a trader in land as well as an investor in land simultaneously, depending on what his intention was and how he treated the asset in question. The Tribunal returned a finding that in the present case, the land was purchased and was shown as an asset in the balance sheet and that the land had also been used for agricultural purposes. It also noted the fact that the land had been held for a long period of time, the same having been purchased in 1994-96. The Tribunal was also conscious of the fact that there was no evidence that borrowed capital had been used for the purchase. All these circumstances, led the Tribunal to the inference that the land was held as an asset and, therefore, the assessee had appropriately offered it for taxation under the head 'capital gains'. We do not find any perversity in these findings and, therefore, there is no cause for interference with the

same. No substantial question of law arises for our consideration even in respect of this proposed issue. No other aspect was argued before us.

The appeal is dismissed.

**BADAR DURREZ AHMED, J**

**R.V.EASWAR, J**

**MARCH 07, 2013**
**SR**