Income Tax Appellate Tribunal - Hyderabad
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M/S. Harniks Park P. Ltd, ... vs Assessee on 27 September, 2013
IN THE INCOME TAX APPELLATE TRIBUNAL

HYDERABAD BENCH 'A', HYDERABAD

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER and SMT. ASHA VIJAYARAGHAVAN, JUDICIAL MEMBER

ITA No. 954/Hyd/2011

Assessment year 2006-07

M/s. Harniks Park (P) Ltd. Vs. The Income Tax Officer Hyderabad Ward-2(2) PAN: AAACH8766M Hyderabad Appellant Respondent

Appellant by: Sri S. Rama Rao

Respondent by: Sri Amlan Tripathy

Date of hearing: 26.08.2013

Date of pronouncement: 27.09.2013

ORDER

PER CHANDRA POOJARI, AM:

This appeal by the assessee is directed against the order of the CIT(A)-III, Hyderabad dated 11.3.2011.

2. The assessee raised the following grounds of appeal:

1. The order of the learned CIT(A) is erroneous both on facts and in law.

2. The learned CIT(A) erred in confirming the action of the Assessing Officer in treating the amount of Rs. 2,83,175/- as the income from other sources when the said amount represents income from

agriculture.

3. The learned CIT(A) erred in confirming the order of assessment in treating the amount of Rs.

2,83,175/- as the income from other sources

without considering the explanations and the evidences submitted by the appellant herein.

4. The learned CIT(A) erred in confirming the action of the Assessing Officer in taxing the gain on sale of agricultural land of Rs. 2,41,02,690/- as income from business.

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5. The learned CIT(A) ought to have seen that the appellant held the agricultural lands as

investments and the income derived from the

sale of agricultural lands cannot be considered as business income. The learned CIT(A) ought to have considered the fact that the said

agricultural land is not a capital asset within the meaning of sec. 2(14) of the I.T. Act.

6. The learned CIT(A) ought to have accepted the plea of the appellant that the amount of Rs. 2,41,02,690 is derived on sale of agricultural lands is exempt from tax.

3. Brief facts of the issue are that the assessee company has filed its return of income for the A.Y. 2006-07 on 6.11.2006 showing loss of Rs. 3,93,288, after claiming exemption for an amount of Rs. 2,42,92,865 shown as agricultural income. During the assessment proceedings, from the profit & loss account filed by the assessee for this assessment year, the AO noticed that it has shown agricultural income at Rs. 2,46,85,865, other income at Rs. 1,45,930 and profit from sale of land at Rs. 43,13,600. From the aggregate of these three amounts at Rs. 2,88,45,395, after claiming deduction for expenses at Rs. 46,08,000, the assessee has shown profit of Rs. 2,42,37,395. Further, from the break-up Rs. 2,43,85,865 shown in schedule-I, the AO noticed that a sum of Rs. 2,83,175 is shown as agricultural income and the balance amount of Rs. 2,41,02,690 is shown as pertaining to profit on sale of agricultural land. The AO, thus, noticed that the assessee has claimed exemption u/s. 10 in respect of profit on sale of agricultural lands. According to the AO, as per the decision of the Hon'ble Supreme Court in Union of India vs. S. Mutyam Reddy (240 ITR 341), the said profit on sale of land was not agricultural income, when confronted by him in this regard, the assessee during the assessment proceedings, has submitted that the said land being agricultural lands are not capital assets and hence the 3 ITA No. 954/Hyd/2011

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income derived from sale of such lands is not subject to capital gains tax. The assessee has further submitted that the company was doing agricultural activities, but due to some unavoidable reasons they have sold the lands.

4. After referring to Memorandum of Association of the assessee company, the AO noted that the main objective of the company was to develop land into agricultural farm houses with recreational facilities like all types of games and club facilities. He further noted that the company intends to develop the lands for commercial purpose. He noticed that the assessee has claimed meagre amount of Rs. 93,000/- towards agricultural expenditure, but has claimed substantial amount of Rs. 9,04,021/- towards land development expenditure. Further, referring to Director's Report for this year, under which it is, mentioned that during the year under review, the company has taken up the business of infrastructure development i.e., purchase and sale of real estate and made a small beginning, he noted that, it shows the business motive of the assessee company. He was thus of the view that such sale of lands made by the assessee during the previous year comes under the purview of business activity.

5. The assessee has submitted that the land is situated at a distance of more than 8 km from the municipal limits of Shankerpally Mandal. As noted by the AO, it has sold lands of 35.29 acres to various software companies. For determining the character of such lands, after applying various tests as laid down in the decision of the Hon'ble Supreme Court in the case of Smt. Sarifabibi, Mohd. Ibrihim and others vs. CIT

(1993) 204 ITR 631, he noted that though said lands of the assessee were classified as agricultural land in the revenue records, the assessee has not filed any evidence of payment of land revenue. It has not furnished any details regarding use of land for agricultural purpose. He further 4 ITA No. 954/Hyd/2011

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mentioned that in the 'Pahani' copy furnished by the assessee there are no details of crops grown etc. The agricultural income shown at Rs. 2,83,175 is very meagre when compared to the total land area. The assessee has not furnished any details including evidences for the claim of agricultural expenses made at Rs. 93,000. It has not furnished any proof for sale of agricultural produce. In absence of such details and further evidences in that regard, he noted, the claim of the assessee regarding use of such land for agricultural purpose cannot be accepted. Further, referring to the huge amount of Rs. 9,04,021/- claimed towards land development expenses and an amount of Rs. 6,55,000 claimed towards administrative expenses, he noted that, it indicates the main activity of the assessee as 'commercial' rather than agricultural. In this context, he further mentioned that the said land in case of the assessee, is located about 6 km from Ocean Park, which is a commercially developed area.

6. In the above context, the AO further referred to the enquiry report furnished by his Inspector of Income Tax, wherein he has mentioned that the entire area is under real estate boom. The main objective of the parties is for doing real estate business and the assessee's intention is also for doing real estate business. Further, referring to the sale deeds in respect of those lands, the AO noted that such lands have been sold for non-agricultural purposes. Furnishing the list of those software companies, which have purchased lands from the assessee, he noted that such lands have been purchased by those companies to develop software technology park and for engaging in activities relating to software development.

7. With these observations and further referring to the said Director's Report, wherein it is stated that the company has taken up business of infrastructure development during the year, the AO 5 ITA No. 954/Hyd/2011

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concluded that the assessee was doing business and was not involved in agricultural activities. He further stated that such land held by the assessee are commercial in nature than agricultural lands. Lastly, stating that the assessee was involved in real estate business, he held that the income derived by the assessee from sale of such lands, shall be treated as income from business. With these observations, he completed the assessment in the case of the assessee for this assessment year, on a total income of Rs. 2,38,99,577/-, vide his order dated 30.12.2008 passed u/s.143(3) of the Act. The assessee's main contention is that the AO was not justified in taxing the profit on sale of such lands treating the same as income from business.

8. On appeal, the CIT(A) confirmed the order of the Assessing Officer though the assessee submitted that it has purchased agricultural lands since the year 1997. It has purchased further lands subsequently and was carrying on agricultural activities on such lands. It is further submitted that such lands are located in the village Janwada, are beyond 8 km from the limit of nearest Municipality. It was further submitted that the population of the said village was less than 10,000. Under the circumstance, the said lands do not constitute capital asset. Stating that the assessee was deriving agricultural income from the said lands, it has been submitted that the income arising from profit from sale of such lands made during the previous year, is exempt from tax. It is stated that the same cannot be treated as business income in the hands of the assessee.

9. From perusal of assessment records of earlier years, the CIT(A) found that the assessee has filed returns of income for A.Ys. 1998-99, 1999-2000 and 2000-01 on 27.11.2000. In the return filed for Asst. Year 1998-99, the assessee, under fixed assets, has shown land at Rs. 5,41,250 and has shown agricultural income of 6 ITA No. 954/Hyd/2011

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Rs. 68,500/-. In the said return filed for A.Y. 1999-2000, under fixed assets, value of land and development was shown at Rs. 18,87,050 and agricultural income was shown at Rs. 1,48,000. In the return filed for A.Y. 2000-01, agricultural income was shown at Rs. 2,65,00/- and profit on sale of agricultural land was shown at Rs. 1,16,150/-. Under fixed assets, value of land and development was shown at Rs. 25,28,200/-. As per schedule C, relating to fixed assets filed with the return, additions are shown at Rs. 9,00,000/- and deductions are shown at Rs. 2,58,850/-. The CIT(A) observed that, from this, it shows, the assessee has started disposing of land for the first time during the previous year 1999-2000. Further, in none of the above returns filed, the assessee has shown any amount towards agricultural expenses. Further, from such description showing as 'land and development', it shows that the assessee was making developmental works on such lands purchased by it. For the Asst. Year 2001-02, it filed return of income on 12.10.2001. It has shown agricultural income at Rs. 7,48,230 without any details. It has shown agricultural expenses at Rs. 1,81,885, without giving details in the return. For the A.Y. 2002-03, it has filed return of income showing agricultural income at Rs. 6,81,297 and other income of Rs. 94,500/-. Meagre amount of Rs. 97,060 was shown as agricultural expenses. However, no details of the same have been furnished. In the return filed for A.Y. 2003-04, the assessee has shown agricultural income at Rs. 5,91,331 and meagre amount of Rs. 1,67,110 towards agricultural expenses. Further during this year, the assessee has shown additions of Rs. 84,840 under land and development. In the return filed for A.Y. 2004-05, the assessee has shown agricultural income at Rs. 5,98,080 without any details. It has shown agricultural expenses at Rs. 1,63,750. For the A.Y. 2005-06, the assessee has filed return of income on 30.10.2005 showing a sum of Rs. 5,66,350/- towards agricultural income and 7 ITA No. 954/Hyd/2011

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sum of Rs. 1,81,350 towards agricultural expenses. The value of land and development, under fixed assets, was shown at Rs. 26,13,040/-. As seen from the above returns, the assessee has never furnished any details regarding such agricultural income. It has not furnished any details or break-up with regard to such expenses claimed towards agricultural expenses.

10. From the above, and after carefully going through the Memorandum of Association of the above company, the CIT(A) observed that the primary intention of the assessee company was commercial exploitation of land purchased by it. Though in the Memorandum of Association, there is reference to purchasing land for agricultural activity, the same was not the real objective. The actual intention of the assessee was to purchase land, to make some development works thereon and to sale the same later at a higher price. As seen from the returns filed for the earlier assessment years, the assessee has carried out developmental works on such lands, shown under land development.

11. Further, from the documents filed by the assessee, the CIT(A) observed that those lands, though stated to be agricultural lands, are dry lands. Under the circumstance, it cannot be said that it was the objective of the assessee to carry on agricultural activities on such lands. Even though it is stated that such lands have been sold after 5-6 years, it is apt to mention here that the assessee has waited for some time so as to enable him get a much higher price, when the price of the land is increasing year after year. Further as noted above, the

assessee has also sold land in an earlier year.

12. As regards, reference by the assessee to the said GO. MS. No. 111 is concerned, the same, in the view of the CIT(A), has no relevance in this case. The assessee submitted that as per the said 8 ITA No. 954/Hyd/2011

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GO, there is restriction on land use, in respect of lands situated in that locality and surrounding villages. However, it may be noted that as pointed out by the Inspector of Income Tax in his enquiry report dated 30.12.2008, he noticed, boom in real estate activity in that area. The assessee has remained silent with reference to this observation of the Inspector. Further, the Inspector has pointed out that the land of the assessee is about 6 Km from Ocean Park which commercially developed area. No submission has been made with reference to this observation of the Inspector. Under this circumstance, reference made by the assessee to the said GO has no relevance in this case.

13. The CIT(A) observed that the assessee has contended that, it was carrying on agricultural activities on those lands during different years and has shown income from the same in the returns filed by it. Even though the assessee has shown different amounts towards agricultural income in different years, the same, in the view of CIT(A), does not necessarily prove that the assessee was actually engaged in agricultural activities on such lands. The AO, who has passed the assessment order, has clearly pointed out that the assessee could not furnish any evidence to prove agricultural operation on such lands. The present AO in his is remand report, while referring to the same, has also pointed out that earning of agricultural income in the hands of the assessee is not proved. Though the assessee has submitted that expenses incurred on cultivation and amounts received from sale of agricultural produce, are recorded in the books, the fact remains that no evidence has been produced to conclusively prove that the assessee was actually engaged in agricultural operation on those lands. Further, though in this context, the assessee has referred to Pahanis, as noted by the AO, the same do not indicate the details of crop grown etc. Under the circumstance, the CIT(A) observed that there is no conclusive proof regarding carrying on 9 ITA No. 954/Hyd/2011

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agricultural activities on those lands, notwithstanding disclosure of various amounts towards agricultural income as shown in those returns filed for different assessment years. Further, though in support of agricultural income, the assessee has referred to the said certificate dated 25.02.2009 issued by the VRO, it is stated that in that letter the said authority has merely certified what was stated by the villagers. The VRO himself has not certified that the assessee has actually carried on agricultural operation on those lands sold by him. Further, though in his report dated 30.12.2008, the concerned Inspector has mentioned regarding income from Sweet Corn and some vegetables during F.Y 2005-06, he has not stated that the assessee itself has carried on agricultural operation on that land. Lastly, as may be seen, the assessee has submitted that it has got income from sale of Cucumber, Tomato and Red Pumpkin grown on such lands. It is difficult to believe that the assessee has actually purchased such lands at high investment for growing the same. In any case, no evidence has been filed to conclusively prove growing of such crops by the assessee on the said land. Under the circumstance the CIT(A) observed that the claim of the assessee for cultivating the said land itself, cannot be accepted. The CIT(A) observed that, though the said land sold by the assessee at Janwada village, is stated to be agricultural lands, having regard to the circumstances of the case, the fact of engaging in real estate business during the previous year and keeping in mind the sole intention of the assessee of earning profit from sale of those lands, purchased a few years back, the CIT(A) was of the opinion that the transactions of such sales carried on by the assessee on those lands admeasuring 37.09 acres, have to be considered as business

transactions. Further, in absence of any reply furnished by the assessee for the reason for selling those lands during the previous year, it dearly shows, it was only the business motive on the part 10 ITA No. 954/Hyd/2011

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of the assessee behind such sale. Hence, those transactions have to be considered as business transactions. In fact, keeping in mind the real intention of the assessee of deriving income from commercial exploitation of such lands purchased a few years back, subsequent incurring of expenses on land development on the same, and having regard to the nine number of transactions i.e., a series of sale transactions made by it and relying on the decision of Hon'ble Supreme Court in the case of G. Venkataswamy Naidu & Co. vs. CIT (1959) 35 ITR 594 and the decision of Hon'ble Bombay High Court in DCIT vs. Gopal Ramnarayan Kasat (2010) 328 ITR 556, wherein the Hon'ble High Court upheld the taxing of the profit as business income, rejecting the contention of the assessee regarding agricultural land and further having regard to commencement of business in real estate made by the assessee during the previous year as admitted in the 10th annual report for this year, the CIT(A) observed that the said sale transactions in respect of 37.09 acres of land made to those software companies, have to be treated as business transactions carried on by the assessee during the previous year. Therefore, the AO was justified in treating the said sale transactions made by the assessee during the previous year as business transactions in real estate. Hence, he was justified in taxing the profit earned from the said sale of lands admeasuring 37.09 acres, treating the same as business profit. Thus, he confirmed the taxing an amount of Rs. 2,38,99,577/- as per the profit & loss account filed in this case, as business income. Accordingly, he confirmed the order of the AO in treating Rs. 2,83,175 as income from other sources and Rs. 2,41,02,690 as income from business. Against this, the assessee is in appeal before us.

14. The AR submitted that the assessee has treated the agricultural land as fixed asset and income declared by the assessee has been exempted by the Department in earlier 11 ITA No. 954/Hyd/2011

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assessment year and he drew our attention to the copies of the returns of income from A.Ys. 1998-99 to 2006-07. He also submitted that the order of the CIT(A) is erroneous in law as well as on facts of the case. The CIT(A) ought to have accepted the contention of the assessee that the land purchased was agriculture land as the same was purchased in acres and not in square yards. The CIT(A) ought to have taken into consideration the fact that the assessee sold the land measuring 35.29 acres to various software companies. The lands were held by assessee as an asset from the date of purchase till the date of sale and not as stock in trade. The conclusion of the CIT(A) that the intention of the assessee in acquiring the property was for trading is erroneous in the absence of any supporting evidence. The land was sold in acreage and if the assessee had any intention to carryon real estate business in respect of that land it would have obtained permission from the concerned authorities for making the same into plots. The claim of the assessee that the land was agriculture in nature was supported by Revenue Records issued by State Revenue Authorities. The agricultural land was purchased as an asset and the same was supported by the entry in balance sheet submitted by the assessee for earlier years. There was unexpected spurt in the prices of lands in and around twin cities and therefore the assessee sold away the agricultural land for a good price and that itself should not be a ground for the assessing officer to arrive at the conclusion that the assessee made an adventure in trade. All the relevant facts lead to a proper conclusion that the assessee did not involve in adventure in trade as there was no supporting evidence.

15. The AR submitted that the conclusion of the CIT(A) that the land involved in the transaction was not agriculture land was erroneous and, therefore, the same may be quashed. The AR submitted that the sale of agriculture land cannot be 12 ITA No. 954/Hyd/2011

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considered as adventure in trade. Further, he submitted that the resultant profit cannot be considered as business profit assessable under the head profits and gains of business. The AR submitted that the CIT(A) ought to have considered the sale transaction as sale of capital asset liable for tax u/s. 45 instead of treating the same as business transaction liable for taxation u/s. 28. The CIT(A) also ought not to have sustained the addition of Rs. 2,83,175 as income from other sources when the said amount represents income from agriculture.

16. The AR further submitted that the assessee has declared agricultural income. The property has been treated as fixed asset in its Balance Sheet for A.Ys. 1997-98 to A.Y. 2005-06. The land was put to agricultural operations. These lands were purchased and sold by the assessee as furnished by the AR is as follows:

Statement showing the details of Land Purchases by the assessee

S. No. Date of Sy. Extent Purchase Registration Total Registration No. (Acres) Amount Charges Value (Rs.) (Rs.) (Rs.)

1. 7.10.1998 271 4.29 225000 40213 265213 6.10.1998 271 5.05 243223 38220 281443

2. 7.10.1998 273 1.03 50000 9787 59787 6.10.1998 273 8.23 425000 63000 488000

3. 11.3.1997 277 1.10 34483 6897 41380 4.5.1999 277 5.13 200000 50000 250000

4. 4.5.1999 279 5.00 200000 20000 220000 4.5.1999 279 0.33 33000 6500 39500 4.5.1999 279 2.22 102000 15000 117000

5. 6.10.1997 281 21.4 70500 14000 84500 6.10.1998 281 2.10 106777 16780 123557

6. 11.3.1997 280 0.37 25517 5103 30620 5.3.1997 280 0.29 21642 2640 24282

7. 6.5.1999 282 2.30 115000 1500 130000 5.5.1999 282 3.00 125000 15000 140000

8. 5.3.1997 277 0.38 28358 3460 31818 5.9.2002 277 1.08 76000 8840 84840 48.24 2081500 330440 2411940

Land Development charges 201100 Balance as per Balance 2613040 Sheet as at 31.3.2005

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Statement showing the sale of agricultural land during the A.Y. 2006-07

S. Date Name of the party Sy. Extent Sale price No. No. (Acres) (Rs.)

1. 7.6.2005 Kamalika Info Pvt. Ltd. 271 1.34 1295000

2. 7.6.2005 Kamalika Info Pvt. Ltd. 281 23.24 2520000

3. 7.6.2005 Vinuga Technologies Pvt. Ltd. 282 5.30 4025000

4. 7.6.2005 Manvita Info Pvt. Ltd. 281 1.00 700000

5. 7.6.2005 Manvita Info Pvt. Ltd. 280 1.26 1155000

6. 17.6.2005 Sarmista Info Pvt. Ltd. 273 6.00 4200000

7. 17.6.2005 Dyuthi Technologies Pvt. Ltd. 277 1.00 700000

8. 7.6.2005 Divija Technologies Pvt. Ltd. 279 8.15 5862500

9. 7.6.2005 Achala Technologies Pvt. Ltd. 271 8.00 5600000 Total 35.29 26057500

17. All the land was situated at Janwada village, Shankarpalli Mandal. The land was sold on 7.6.2005 vide 9 Sale Deeds. Till then it was treated as a fixed asset and the AR drew our attention to the copies of financial statement for A.Y. 1997-98 to A.Y. 2005-

06. According to the AR, even if the assessee is in real estate business, sale of the impugned agricultural land held by the assessee is capital asset and sale of that land cannot be construed as business transaction carried on by the assessee so as to tax the same under the head 'business income'. He submitted that the assessee is not precluded from holding agricultural land as capital asset and sell the same as capital asset. For this purpose, he relied on the order of the Tribunal in the case of M/s. SSPDL Ltd. vs. DCIT, in ITA No. 976/Hyd/2012 dated 5.4.2013 specifically on para 32 which is as under:

"32. We have to see the intention of the assessee at the time of acquiring the asset. The intention of he assessee herein is to construct a building for setting up of its corporate office and it was always a fixed asset and not a stock-in-trade. Even if the assessee is in the business of real estate, the property acquired by the assessee for the purpose of setting up of a corporate office cannot be construed as a trading asset. The profit realised by sale of current assets in the line of trading is income from business. On the other hand, if the assessee sells a capital asset as an investor it is income from capital gain. The dominant or even the sole intention to resell is a relevant factor and raises a 14 ITA No. 954/Hyd/2011

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strong presumption but by itself is not conclusive proof of trading. The intention to resell would, in conjunction with the conduct of the assessee and other

circumstances, point to the business character of the transaction. Profit made by sale of capital asset always income from capital gain. One has to see whether the asset held by the assessee as an investment or as a trading asset. Realisation of capital asset is always income from capital gain."

18. Further he relied on the order of the Tribunal in the case of T. Veerender vs. Addl. CIT & Anr in ITA Nos. 550 & 551/Hyd/2012 dated 4.7.2013 to treat the sale of agricultural land as not liable for tax.

19. The DR relied on the judgement of Supreme Court in the case of Sarifabibi Mohmed Ibrahim vs. CIT (204/631) (SC), G. Venkataswami Naidu & Co. vs. CIT(A) (35 ITR 594) (SC), Tushar Tanna vs. CIT (284 ITR 453) (Bom) and DCIT vs. Gopal Ramnarayan Kasat (328 ITR 556) (Bom).

20. We have heard both the parties and perused the material on record. It is an admitted fact that the land was held by the assessee as a capital asset from the date of purchase till the date of sale. This is evidenced by the entries reflected in the Balance Sheet of the assessee company. The assessee's contention is that it is intended to retain the agricultural land acquired as a capital asset. The assessee never treated the land as stock in trade. The assessee reflected the same in the Balance Sheet as a fixed asset. The assessee carried on agricultural operations for which the assessee claimed income as well as expenditure. The agricultural activity carried on by the assessee was confirmed by the Inspector in the course of assessment proceedings as well as during Remand Proceedings by the CIT(A). According to the Revenue authorities, this was only a stop gap arrangement. This agricultural land is situated beyond 25 km from the municipal limits. The Assessee 15 ITA No. 954/Hyd/2011

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has not taken any permission from the Government for making plots, as the assessee company never had any intention to make the land into plots and carry on real estate business in respect of the land. Thus, the assessee never created an asset as stock in trade but treated it as capital asset (agricultural land). The assessee has sold land admeasuring 35.29 acres. The same is reflected under the head fixed assets in the Balance Sheet in various financial years. Copies of Sale Deeds of the above said land are brought on record by the assessee to prove the fact that the land held/sold by the assessee is agricultural land.

21. The AR submitted that the sale transaction effected by the assessee in respect of the above agriculture land constituted only sale of agriculture land, and by no stretch of imagination it can be treated as adventure in trade and so as to treat the same as 'business transaction' for the following reasons:

i) Purchase and holding of land for a period and subsequent sale thereof itself cannot be an indicator to hold that the intention of the assessee was to carry on business with those assets. The intention cannot be presumed unless supported by evidence. In this case the treatment given by the assessee for this asset in the account books clearly indicate that the intention of the assessee is to hold the same as capital asset to have good returns from the same.

ii) The assessee held land for considerable time. The asset acquired was agriculture land as per the evidence brought on record. It was sold in the A.Y. 2006-07. Thus, the assessee held the agriculture land for about 10 years. During that period the assessee carried on regular agricultural operations in the land. In the light of favourable market conditions the assessee thought it good to sell the 16 ITA No. 954/Hyd/2011

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asset to realize a good amount. Realization of better price in a booming market cannot be considered as an adventure in trade

iii) The expression adventure in the nature of trade occurs in the definition of business under section 2(13) but the expression adventure in the nature of trade has not been defined in the Act. It may be pertinent to mention here that a specific transaction partake the character of business or an adventure in the nature of trade or realization of capital asset or a mere conversion of asset has to be decided depending upon facts of each case.

iv) In deciding as to whether a particular transaction is an adventure in the nature of trade, the Assessing Officer must consider all the relevant and proved facts and circumstances. Realization of investments consisting of purchase of agricultural land and resale, though profitable are clearly outside the domain of adventure in the nature of trade.

v) The assessee treated the assets as investment in agricultural land. Therefore disposal of the same would not convert, what was a capital accretion, to an adventure in the nature of trade. To make it more clear, sale of agricultural land by the assessee and realisation of good price would not alter the basic nature and characteristic of the transaction. In the case of the assessee, land was acquired by the assessee and reflected in the balance-sheets of the concern as fixed- assets. The assessee never treated the land as stock-in-trade and reflected in profit and loss account (closing stock). There was no element of trade attached to the activity of the assessee in purchase and sale of the land. A continuous 17 ITA No. 954/Hyd/2011

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business requires more activity and greater organization. This is absent in the transaction of sale of land by the assessee. Therefore, although there is profit in the transaction the transaction cannot be characterized as an adventure in the nature of trade.

vi) Whether a transaction in respect of an asset is capital or business income being adventure in the nature of trade depends on the facts and circumstances of the case. There are many factors like frequency of transactions, period of holding, intention for resale etc, which determine whether the gain arising of a transaction is in the process of realisation of investment or in the course of business. The mere fact that the person has purchased a land and subsequently sold it, giving rise to a substantial profit cannot change the character of the transaction. It is the general human tendency to earn profit out of capital asset. No one invests to incur a loss. If the market condition suddenly goes up or down, it is always the tendency of a person to take a quick decision so that the realization on the investment is maximum or the loss is minimum.

vii) As already mentioned the assessee company carried on regular agricultural operations in the said agriculture land. In that process the assessee company itself involved in the primary operation such as ploughing, tilling, sowing, watering etc. The assessee has produced before the lower authorities the documents of purchase, sale bills for agricultural produce and expenditure bills.

viii) By selling the above agriculture produce the assessee earned agriculture receipts which were brought into the account books of the assessee. In the process of carrying on the 18 ITA No. 954/Hyd/2011

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agriculture operations the assessee used to incur expenditure and the same is also brought into the account books. Separate account books were maintained for the operations of the agriculture land and to arrive at the agriculture income derived. Such details of receipts of sale of agriculture produce and expenditure incurred for agriculture transactions are furnished by the assessee before the lower authorities.

22. From the above, it is clear that:

a) The assessee purchased agriculture land now under consideration situated beyond 8 km from the municipal limits.

b) The assessee treated the same as fixed asset in their books along with other agriculture land which was already acquired by them in the earlier years.

c) The land was identified as agriculture land in the revenue records.

d) The assessee carried on agricultural operations in the land.

e) The assessee did not carry on any commercial activity with reference to that land such as getting of approval for converting into sites, plotting of the same into sites etc. Thus, the character of the land i.e., agriculture nature was continuing till the same was sold by the assessee company.

f) Because of favourable market conditions the assessee sold the land and the same fetched them a good price.

23. Therefore, in the present case there is no dispute regarding the fact that the assessees acquired agricultural land. There is 19 ITA No. 954/Hyd/2011

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also no dispute that there was agricultural operation in this land before sale of this land.

24. The Assessing Officer was of the opinion that the amount received on sale of this agricultural property is nothing but on account of adventure in the nature of trade and the same was brought into income from business. In this case, the assessee held the land always as investment and not at all converted into stock-in-trade. The character of the land in the hands of the assessees has not changed. There is no material on record to show that the assessee carried on activities of buying and selling of land in a systematic manner so as to justify the action of the AO in treating the activities of the assessee as adventure in the nature of trade. The land was sold by the assessees in acreage and not by making plots.

25. Now the question as to whether a land is agricultural land or not is essentially a question of fact. The question has to be answered in each case having regard to the facts and circumstances of that case. There may be factors both for and against a particular point of view. We have to answer the question on a consideration of all of them, a process of evaluation and the inference has to be drawn on a cumulative consideration of all the relevant facts. It may be stated here that not all the factors or tests would be present or absent in any case and that in each case one or more of the factors may make appearance and that ultimate decision will have to be reached on a balanced consideration of the totality of the circumstances.

26. The expression 'agricultural land' is not defined in the Act, and now, whether it is agricultural land or not has to be determined by using the tests or methods laid down by the Courts from time to time.

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27. The Hon'ble Supreme Court in the case of Smt. Sarifabibi Mohmed Ibrahim (204 ITR 631) has approved the decision of a Division Bench of the Hon'ble Gujarat High Court in the case of CIT vs. Siddharth J. Desai (1982) 28 CTR (Guj) 148 : (1983) 139 ITR 628 (Guj) and has laid down 13 tests or factors which are required to be considered and upon consideration of which, the question whether the land is an agricultural land or not has to be decided or answered. We reproduce the said 13 tests as follows:

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 any of a stopgap arrangement?

4. Whether the income derived from the agricultural operations carried on in the land bore any

rational proportion to the investment made in purchasing the land?

5. Whether, the permission under s. 65 of the Bombay Land Revenue Code was obtained for

the non-agricultural use of the land? If so, when and by whom (the vendor or the vendee)?

Whether such permission was in respect of the whole or a portion of the land? If the permission was in respect of a portion of the land and if it was obtained in the past, what was the nature of the user of the said portion of the land on the material date?

6. Whether the land, on the relevant date, had ceased to be put to agricultural use? If so, whether it was put to an alternative use?

Whether such lesser and/or alternative user was of a permanent or temporary nature?

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7. Whether the land, though entered in Revenue records, had never been actually used for

agriculture, that is, it had never been ploughed or tilled? Whether the owner meant or intended to use it for agricultural purposes?

8. Whether the land was situated in a developed area? Whether its physical characteristics,

surrounding situation and use of the land in the adjoining area were such as would indicate that the land was agricultural?

9. Whether the land itself was developed by plotting and providing roads and other facilities?

10. Whether there were any previous sales of portions of the land for non-agricultural use?

11. Whether permission under s. 63 of the Bombay Tenancy and Agricultural Land Act, 1948, was obtained because the sale or intended sale was in favour of a non-agriculturist? If so, whether the sale or intended sale to such non-agriculturists was for non-agricultural or agricultural user?

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

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

28. In the present case, the assessee's lands were classified as agricultural land in the Revenue Records, the fact of which was also confirmed in the Assessing Officer. As held by the Apex Court, when the land is assessed to the land revenue as agricultural land under State Revenue Law, it is certainly a relevant factor but not conclusive. The land was already classified as agricultural land in the Revenue Records and the assessee carried on agricultural activities in the said land, which was 22 ITA No. 954/Hyd/2011

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confirmed by the VRO, Janwada. The certificate issued by the VRO, Janwada Village mentioned that the lands in question were used for agricultural activities and also mentioned the details of crops grown on the said lands. The assessee also earned income from agricultural operations since A.Y. 1998-99. From this it is clear that the land was actually used for agricultural purposes at the relevant time. The revenue earned from agricultural operations was reflected in the return of income filed before the Department. In the assessment order it was stated that as per the report of the Inspect of Income-tax, presently there was no agricultural activities on the lands held by the assessee. Therefore, it is not established that the land was used for agricultural purposes for a long period. The AR submitted that the contents of the Inspector's report were not confronted to the assessee and the land development expenditure incurred was not related to the land that was sold. The AR submitted that it is not correct to hold that the assessee has not used the land for agricultural purposes. The income from the agricultural operations is in rational proportion to the investment made at the time of purchase. Administrative expenditure is necessary to be incurred to run a company on the basis of which it cannot be concluded that the main activity is commercial rather than agricultural when the company really carried out the agricultural operations and earned income thereon. Since the intention of the company is not to use the agricultural land for non-agricultural purposes, there is no question of taking of any permission for conversion of the land.

29. The company carried on agricultural operations in the land for the last several years. The owner intended to use it for agricultural purposes only and the intention of the owner is fulfilled since the agricultural activities generated income. The land was situated in a rural area wherein lot of agricultural activities are being carried on. According to GO MS No. 111 23 ITA No. 954/Hyd/2011

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several restrictions were placed with a view to continue the lands to agricultural operations only. The photograph of the agricultural lands showing the physical characteristics of the land was also filed by the assessee before the lower authorities. No development of the land was done by making plots and providing roads and other facilities. It is wrong to conclude that work has been done aiming to plotting, developing infrastructure because the land development was done in other land. There were no previous sale of the portions of the land for non-agricultural use. The land was sold only as agricultural lands as the time of sale and agricultural operations were continued as on the date of sale. The land was sold on acreage basis only. The land was sold at prevailing market prices only. GO MS No. 111 prohibits/restricts real estate activity in that area.

30. Part of the assessee's main object is referred as one reason to disallow the claim of the assessee. But in fact the part of the object which is not taken up is only referred. The other part of the main object "to purchase

agricultural land and carry on agricultural activities and sell the agricultural proceeds" which is actually taken up is not referred. The assessment order referred about the buyers and not considered at all the real situation at all and the contents of GO MS No. 111. Non production of evidence for agricultural expenditure which was actually incurred does not make an agricultural land a non-agricultural one. The land development expenditure incurred in a land other than the land that was sold. The evidence for receipt of agricultural income is on record. Simply because income was less "one cannot make an agricultural income as a business income". What has to be seen here is whether the income was received on agricultural activity or not instead of seeing the ratio. Administrative expenditure is inevitable in running a company. Meeting of expenditure which is 24 ITA No. 954/Hyd/2011

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inevitable will not prove the commercial activities of any assessee. It was submitted by the AR that the contents of the paper advertisement and report of the Inspector were not in the knowledge of the assessee at any point of time. It is wrong to say that the activities of the assessee, which are agricultural in fact, confirm to the commercial nature. In view of the above, we are of the opinion that the judgement of Supreme Court in the case of Smt. Sarifabibi Mohamed Ibrahim & Ors. (cited supra) supports the case of the assessee rather than against the assessee.

31. A reference could be made to the case of CWT vs. Officer-in- charge (Court of Wards) (105 ITR 138) (SC) wherein the Constitution Bench of the Hon'ble Supreme Court stated that the term 'agriculture' and 'agricultural purpose' was not defined in the Indian IT Act and that we must necessarily fall back upon the general sense in which they have been understood in common parlance. The Hon'ble Supreme Court has observed that the term 'agriculture' is thus understood as comprising within its scope the basic as well as subsequent operations in the process of agriculture and raising on the land all products which have some utility either for someone or for trade and commerce. It will be seen that the term 'agriculture' receives a wider interpretation both in regard to its operation as well as the result of the same. Nevertheless there is present all throughout the basic idea that there must be at the bottom of its cultivation of the land in the sense of tilling of the land, sowing of the seeds, planting and similar work done on the land itself and this basic conception is essential sine qua non of any operation performed on the land constituting agricultural operation and if the basic operations are there, the rest of the operations found themselves upon the same, but if the basic operations are wanting, the subsequent operations do not acquire the characteristics of agricultural operations. The 25 ITA No. 954/Hyd/2011

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Constitution Bench of the Hon'ble Supreme Court in the aforesaid case observed that the entries in Revenue records were considered good prima facie evidence.

32. The Hon'ble Gujarat High Court in the case of Dr. Motibhai D. Patel vs. CIT (1982) 27 CTR (Guj) 238 : (1981) 127 ITR 671 (Guj) referring to the Constitution Bench of the Hon'ble Supreme Court had stated that if agricultural operations are being carried on in the land in question at the time when the land is sold and further if the entries in the Revenue records show that the land in question is agricultural land, then, a presumption arises that the land is agricultural in character and unless that presumption is rebutted by evidence led by the Revenue, it must be held that the land was agricultural in character at the time when it was sold. The Division Bench of the Hon'ble Gujarat High Court further held that there was nothing on record to show that the presumption rose from the long user of the land for agricultural purpose and also the presumption arising from the entries of the Revenue records are rebutted.

33. The Hon'ble Bombay High Court in the case of CWT vs. H. V. Mungale (1983) 32 CTR (Bom) 301 : (1984) 145 ITR 208 (Bom) held that the Hon'ble Supreme Court had pointed out that the entries raised only a rebuttable presumption and some evidence would, therefore, have to be led before taxing authorities on the question of intended user of the land under consideration before the presumption could be rebutted. The Court further held that the Supreme Court had clearly pointed out that the burden to rebut the presumption would be on the Revenue. The Hon'ble Bombay High Court held that the ratio of the decision of the Supreme Court was that what is to be determined is the character of the land according to the purpose for which it was meant or set apart and can be used. It is, therefore, obvious that the assessee 26 ITA No. 954/Hyd/2011

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had abundantly proved that the subject land sold by them was agricultural land not only as classified in the Revenue records, but also it was subjected to the payment of land revenue and that it was actually and ordinarily used for agricultural purpose at the relevant time.

34. We may also refer to the case of CIT vs. Manilal Somnath (1977) 106 ITR 917 (Guj), wherein the Division Bench of the Hon'ble Gujarat High Court observed that the potential non- agricultural value of the land for which a purchaser may be prepared to pay a large price would not detract from its character as agricultural land on the relevant date of sale.

35. We may also refer to the case of Gopal C. Sharma vs. CIT (1994) 116 CTR (Bom) 377 : (1994) 209 ITR 946 (Bom), in which, the case of Smt. Sarifabibi Mohamed Ibrahim & Ors. vs. CIT (supra) was referred to and relied, amongst other cases. In this case, the Division Bench of the Bombay High Court has stated that the profit motive of the assessee selling the land without anything more by itself can never be decisive for determination of the issue as to whether the transaction amounted to an adventure in the nature of trade. In other words, the price paid is not decisive to say whether the land is agricultural or not.

36. We may refer to a judgment of the Hon'ble Madras High Court in the case of CWT vs. E. Udayakumar (2006) 284 ITR 511 (Mad) where the Hon'ble Madras High Court has referred to the decision of the Hon'ble Punjab & Haryana High Court in the case of CIT vs. Smt. Savita Rani (2004) 186 CTR (P&H) 240 : (2004) 270 ITR 40 (P&H) and has observed and held as under :

"8. It is well settled in the case of CIT vs. Smt. Savita Rani (2004) 186 CTR (P&H) 240 : (2004) 270 ITR 40 (P&H), wherein it is held that the land being located in a commercial area or the land having been partially 27 ITA No. 954/Hyd/2011

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utilised for non-agricultural purposes or that the vendees had also purchased it for non-agricultural purposes, were totally irrelevant consideration for the purposes of application of s. 54B.

9. In the abovesaid case, the assessee an individual sold 15 karnals, 18 marlas of land out of her share in 23 karnals, 17 marlas land during the financial year 1990-91, relevant to the asst. yr. 1991-92, the sale was effected by three registered sale deeds. While filing her return of income, she claimed exemption from levy of capital gains under s. 54B of the Act on the ground that the land sold by her was agricultural land and the sale proceeds were invested in the purchase of agricultural land within two years. The AO rejected the claim of the assessee holding that the land sold by the assessee was not agricultural land and this was upheld by the CIT(A). On further appeal, the Tribunal accepted the claim of the assessee holding that the transaction in

question duly fulfilled the conditions specified for relief. On further appeal to the High Court, the Punjab & Haryana High Court found that the finding that the land had been used for agricultural purposes was based on cogent and relevant material. The Revenue record supported the claim. Even the records of the IT Department showed that the assessee had declared agricultural income from this land in her returns for the preceding two years. The land being located in commercial area or the land having been partially utilised for non-agricultural purposes or that the vendees had also purchased it for nonagricultural purposes, were totally irrelevant consideration for the purposes of application of s. 54B.

10. It is seen from the aforesaid decision that the agricultural land sold by the assessee with an intent to purchase another land within two years had also been permitted to claim exemption under s. 54B of the IT Act, 1961. In the instant case, even though there was no sale as such, the assessee owned agricultural land within the limits of Tirunelveli Corporation and he had not put up any construction thereon, the assessee is entitled to claim exemption from the WT Act for the assessment of wealth-tax. That the land in question is adjacent to the hospital is totally irrelevant." 28 ITA No. 954/Hyd/2011

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37. Adverting to the facts of the present case, the land in question is classified in the Revenue records as agricultural land and there is no dispute regarding this issue and actual cultivation has been carried on this land and income was declared from this land in the return of income filed by the assessee for the earlier years as agricultural income. It is also an admitted fact that the AO has not brought on record any evidence to show that the agricultural land was used for non-agricultural purposes and the assessee has not put the land to any purposes other than agricultural purposes. It is also an admitted fact that neither the impugned property nor the surrounding areas were subject to any developmental activities at the relevant point of time of sale of the land.

38. The provisions of Andhra Pradesh Agricultural Land (conversion for non-agricultural purposes) Act, 2006 also prescribed the procedure for conversion of agricultural land into non-agricultural land. Being so, whenever the agricultural land to be treated as non-agricultural land, the same has to be converted in accordance with the provisions of Andhra Pradesh Agricultural Land (conversion for non-agricultural purposes) Act, 2006. If by a Government Notification, the nature and character of land changes from agriculture into non-agriculture then there is no question of conversion of this land for non-agricultural purposes by the Revenue authorities concerned. To our understanding nature of land cannot be changed by any State Government notification and the land owners are required to apply to the concerned Revenue authorities for the purpose of conversion of the agricultural land into non-agricultural land and there is no automatic conversion per se by State Government notification.

39. It is also an admitted position that mere inclusion or proximity of land to any Special zone without any infrastructure 29 ITA No. 954/Hyd/2011

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development thereupon or without establishing and proving that the land was put into use for non-agricultural purposes by the assessee does not and cannot convert the agricultural land into non-agricultural land. In the instant case, at the relevant point of sale of the land in question, the surrounding area was totally undeveloped and except mere future possibility to put the land into use for non-agricultural purposes would not change the character of the agricultural land into non-agricultural land at the relevant point of time when the land was sold by the assessee. It is also an admitted position that the assessee had not applied for conversion of the land in question into non-agricultural purposes and no such permissions were obtained from the concerned

authority. In the Revenue records, the land is classified as agricultural land and has not been changed from agricultural land to non-agricultural land at the relevant point of time when the land was sold by the assessee. It is also not in dispute that there was no activity undertaken by the assessee of developing the land by plotting and providing roads and other facilities and there was no intention also on the part of the assessees herein to put the same for non-agricultural purposes at time of their ownership that land. No such finding has been given by the Department. No material or evidence in support of the fact that the assessees have put the land in use for non-agricultural purposes has been brought on record. At the relevant point of time the land was used for agricultural purposes only and nothing is brought on record to show that the land was put in use for non-agricultural purposes by the assessee. In view of the decision of the Hon'ble High Court in the case of Gopal C. Sharma vs. CIT (209 ITR 946) (Bom), it is also clear that the profit motive of the assessee in selling the land without anything more by itself can never be decisive to say that the assessee used the land for non-agricultural purposes. We may also refer to a decision of the Hon'ble Supreme Court in the case of 30 ITA No. 954/Hyd/2011

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N. Srinivasa Rao vs. Special Court (2006) 4 SCC 214 where it was observed that the fact that agricultural land in question is included in urban area without more, held not enough to conclude that the user of the same had been altered with passage of time. Thus, the fact that the land in question in the instant case is bought by Developer cannot be a determining factor by itself to say that the land was converted into use for non-agricultural purposes.

40. Recently the Karnataka High Court in the case of CIT vs. Madhukumar N. (HUF) (2012) 78 DTR (Kar) 391 held as follows: "9. An agricultural land in India is not a capital asset but becomes a capital asset if it is the land located under Section 2(14)(iii)(a) & (b) of the Act, Section 2(14) (iii) (a) of the Act covers a situation where the subject agricultural land is located within the limits of municipal corporation, notified area committee, town area committee, town committee, or cantonment committee and which has a population of not less than 10,000.

10. Section 2(14)(m)(b) of the Act covers the situation where the subject land is not only located within the distance of 8 kms from the local limits, which is covered by Clause (a) to section 2(14)(iii) of the Act, but also requires the fulfilment of the condition that the Central Government has issued a notification under this Clause for the purpose of including the area up to 8 kms, from the municipal limits, to render the land as a "Capital Asset.

11. In the present case, it is not in dispute that the subject land is not located within the limits of Dasarahalli City Municipal Council therefore, Clause (a) to section 2(14)[iii] of the Act is not attracted.

12. However, though it is contended that it is located within 8 knits,, within the municipal limits of Dasarahalli City Municipal Council in the absence of any notification issued under Clause (b) to section 2(14)(iii) of the Act, it cannot be looked in as a capital asset within the meaning of Section 2(14)(iii)(b) of the Act also and therefore though the Tribunal may not 31 ITA No. 954/Hyd/2011

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have spelt out the reason as to why the subject land cannot be considered as a 'capital asset' be giving this very reason, we find the conclusion arrived at by the Tribunal is nevertheless the correct conclusion."

41. Further the Kolkata Bench of the Tribunal in the case of DCIT vs. Arijit Mitra (48 SOT 544) (Kol) held as follows: "7. From the above, it is clear that agricultural land situated in areas lying within a distance not exceeding 8 km from the local limits of such Municipalities or Cantonment Boards are covered by the amended definitions of 'capital asset', if such areas are, having regard to the extent of and scope for their urbanization and other relevant considerations, is notified by the Central Government in this behalf. Central Government in exercise of such powers has issued the above notification, as amended latest by Notification No. 11186 dated 28.12.1999 clearly clarifies that agricultural land situation in rural areas, areas outside the Municipality or cantonment board etc., having a population of not less than 10,000 and also beyond the distance notified by Central Government from local limits i.e. the outer limits of any such municipality or cantonment board etc., still continues to be excluded from the definition of 'capital asset'. Accordingly, in view of sub-clause (b) of section 2(14)(iii) of the Act even under the amended definition of expression 'capital asset', the agricultural land situated in rural areas continues to be excluded from that definition. And as in the present case, admittedly, the agricultural land of the assessee is outside the Municipal Limits of Rajarhat Municipality and that also 2.5 KM away from the outer limits of the said Municipality, assessee's land does not come within the purview of section 2(14)(iii) either under sub clause (a) or (b) of the Act, hence the same cannot be considered as capital asset within the meaning of this section. Hence, no capital gain tax can be charged on the sale transaction of this land entered by the assessee. Accordingly, we quash the assessment order qua charging of capital gains on very jurisdiction of the issue is quashed. The cross objection of the assessee is allowed."

42. It was held in the case of CIT vs. Manilal Somnath (106 ITR 917) as follows:

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"Under the Income-tax Act of 1961, agricultural lend situated in India was excluded from the definition of " capital asset" and any gain from the sale thereof was not to be included in the total income of an assessee tinder the head "capital gains". In order to determine whether a particular land is agricultural land or not one has to first find out if it is being put to any use. If it is used for agricultural purposes there is a presumption that it is agricultural land. If it is used for non- agricultural purposes the presumption is that it is non-agricultural land. This presumption arising from actual use can be rebutted by the presence of other factors. There may be cases where land which is admittedly non-agricultural is used temporarily for agricultural purposes. The determination of the question would, therefore, depend on the facts of each case. 'The assessee, Hindu, undivided family, had obtained some land on a partition in 1939. From that time, up to the time of its sale, agricultural operations were carried on in the land. There was no regular road to the land and it was with the aid of a tractor that agricultural operations were being carried on. The land was included within a draft town planning scheme. The assessee got permission of the Collector to sell the land for residential purposes and sold it. On the question whether the land was agricultural land:

Held, that what had to be considered is not what the purchaser did with the land or the purchaser was supposed to do with the land, but what was the character of the land at the time when the sale took place. The fact that the land was within municipal limits or that it was included within a proposed town planning scheme was not by itself sufficient to rebut the presumption arising from actual use of the land. The land had been used for agricultural purposes for a long time and nothing had happened till the date of the sale to change that character of the land. The potential non- agricultural value of the land for which a purchaser may be prepared to pay a large price would not detract from its character as agricultural land at the date of the sale. The land in question was, therefore, agricultural land.

43. Further the word "Capital Asset" is defined in Section 2(14) to mean property of any kind held by an assessee, whether or not connected with his business or profession, but does not include- 33 ITA No. 954/Hyd/2011

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

(a) in any area which is comprised within the jurisdiction of a municipality (whether known as a municipality, municipal corporation, notified area committee, town area committee, town

committee, or by any other name) or a

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

urbanization of that area and other relevant considerations, specify in this behalf by

notification in the Official Gazette;

44. It is very clear from the above that the gain on sale of an agricultural land would be exigible to tax only when the land transferred is located within the jurisdiction of a municipality. The fact that all the expressions enlisted after the word municipality are placed within the brackets starting with the words 'whether known as' clearly indicates that such expressions are used to denote a municipality only, irrespective of the name by which such municipality is called. This fact is further substantiated by the provisions contained under clause (b) wherein it has been clearly provided that the authority referred to in clause (a) was only municipality.

45. We also perused the meaning of the term local authority as referred in section 10(20) of the Act.

(20) the income of a local authority which is chargeable under the head "Income from house property", "Capital gains" or "Income from other sources" or from a trade or 34 ITA No. 954/Hyd/2011

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business carried on by it which accrues or arises from the supply of a commodity or service [(not being water or electricity) within its own jurisdictional area or from the supply of water or electricity within or outside its own jurisdictional area].

[Explanation. - For the purposes of this clause, the expression "local authority" means -

(i) Panchayat as referred to in clause (d) of article 243 of the Constitution; or

(ii) Municipality as referred to in clause (e) of article 243P of the Constitution; or

(iii) Municipal Committee and District Board, legally entitled to, or entrusted by the Government with, the control or management of a Municipal or local fund; or

(iv) Cantonment Board as defined in section 3 of the Cantonments Act, 1924 (2 of 1924);

46. It is also evident from the Memorandum explaining the provisions of Finance Act, 1970, whereby s. 2(14) was amended so as to include the agricultural land located within the jurisdiction of a municipality in the definition of the expression 'Capital Asset'. The relevant portion of the said memorandum is reproduced hereunder:

"30. ... The Finance Act, 1970 has, accordingly, amended the relevant provisions of the Income-tax Act so as to bring within the scope of taxation capital gains arising from the transfer of agricultural land situated in certain areas. For this purpose, the definition of the term "capital asset" in section 2(14) has been amended so as to exclude from its scope only agricultural land in India which is not situate in any area comprised within the jurisdiction of a municipality or cantonment board and which has a population of not less than ten thousand persons according to the last preceding census for which the relevant figures have been published before the first day of the previous year. The Central Government has been authorised to notify in the Official Gazette any area outside the limits of any municipality or cantonment board having a population of not less than ten thousand up to a maximum 35 ITA No. 954/Hyd/2011

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distance of 8 kilometres from such limits, for the purposes of this provision. Such notification will be issued by the Central Government, having regard to the extent of, and scope for, urbanisation of such area, and, when any such area is notified by the Central Government, agricultural land situated within such area will stand included within the term "capital asset". 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 any such municipality or cantonment board, will continue to be excluded from the term "capital asset".

47. Further it is nobody's case that the property falls within any area which is comprised within the jurisdiction of a municipality or cantonment board or which has a population of not less than 10,000 according to the last preceding Census of which the relevant figures have been published before the first day of the previous year. In other words, the land does not fall in sub-clause (a) of section 2(14)(iii) of the Act as the land is outside of any municipality including GHMC. Further we have to see whether the land falls in clause (b) of section 2(14)(iii). This section prescribes that any area within such distance, not being more than 8 km from the local limit of any municipality or cantonment board as referred to in sub-clause (a) of section 2(14)(iii) of the Act, 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.

48. We have carefully gone through the notification issued by the Central Government u/s. 2(1A)(c) proviso (ii)(B) and 2(14)(3b) vide No. 9447 (F. No. 164/(3)/87/ITA-I) dated 6th January, 1994 as amended by notification No. 11186 dated 28th December, 1999. In the schedule annexed to the notification dated 6.1.1994, Entry No. 17 is relating to Hyderabad wherein 36 ITA No. 954/Hyd/2011

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mentioned that the areas up to a distance of 8 km from the municipal limits in all directions. In the notification 11186 dated 28.12.1999 there is no entry relating to Hyderabad. It is clear from these notifications that agricultural land situated in areas lying within a distance not exceeding 8 km from the local limits of Hyderabad Municipality (GHMC) is covered by the amended definitions of 'capital asset'. Central Government in exercise of such powers has issued the above notification, as amended latest by Notification No. 11186 dated 28.12.1999 clearly clarifies that agricultural land situated in rural areas, areas outside the Municipality or cantonment board etc., having a population of not less than 10,000 and also beyond the distance notified by Central Government from local limits i.e. the outer limits of any such municipality or cantonment board etc., still continues to be excluded from the definition of 'capital asset'. Accordingly, in view of sub-clause (b) of section 2(14)(iii) of the Act even under the amended definition of expression 'capital asset', the agricultural land situated in rural areas continues to be excluded from that definition. And as in the present case, admittedly, the agricultural land of the assessee is outside the Municipal Limits of Hyderabad Municipality and that also 8 km away from the outer limits of this Municipality, assessee's land does not come within the purview of section 2(14)(iii) either under sub clause (a) or (b) of the Act, hence the same cannot be considered as capital asset within the meaning of this section. Hence, no capital gain tax can be charged on the sale transaction of this land entered by the assessee. This is supported by the order of Kolkata Bench of this Tribunal in the case of Arijit Mitra (cited supra), Harish V. Milani (supra) and M.S. Srinivas Naicker vs. ITO (292 ITR 481) (Mad). By borrowing the meaning from the above section, we are not able to appreciate that the land falls within the territorial limit of any municipality without notification of Central Government as held by the 37 ITA No. 954/Hyd/2011

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Karnataka High Court in the case of Madhukumar N. (HUF) (cited supra).

49. From the facts and circumstances of the case, as narrated before us, it is important to note that what was the intention of the assessees at the time of acquiring the land or interval action by the assessee between the period from purchase and sale of the land and the relevant improvement/development taken place during this time is relevant for deciding the issue whether transaction was in the nature of trade. Though intention subsequently formed may be taken into account, it is the intention at the inception is crucial. One of the essential elements in an adventure of the trade is the intention to trade; that intention must be present at the time of purchase. The mere circumstances that a property is purchased in the hope that when sold later on it would leave a margin of profit, would not be sufficient to show, an intention to trade at the inception. In a case where the purchase has been made solely and exclusively with the intention to resell at a profit and the purchaser has no intention of holding the property for himself or otherwise enjoying or using it, the presence of such an intention is a relevant factor and unless it is offset by the presence of other factors it would raise as strong presumption that the transaction is an adventure in the nature of trade. Even so, the presumption is not conclusive and it is conceivable that, on considering all the facts and circumstances in the case, the court may, despite the said initial intention, be inclined to hold that the transaction was not an adventure in the nature of trade. The presumption may be rebutted. In the present case, considering the facts and circumstances of the case it cannot be considered as an adventure in the nature of trade. The intention of the assessee from the inception was to carry on agricultural operations and even there was no intention to sell the land in future at that point of time. It was due to the boom in real estate market came into 38 ITA No. 954/Hyd/2011

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picture at a later stage, the assessee has sold the land. Merely because of the fact that the land was sold for profit, it cannot be held that income arising from the sale of land was taxable as profit arising from the

adventure in the nature of trade. The period of holding should not suggest that the activity was an adventure in the nature of trade.

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

51. Accordingly, we are of the opinion that the agricultural income declared by the assessee from agricultural operations on the land at Rs. 2,83,175 as well as the income of Rs. 2,41,02,690 arising out of sale of agricultural land are to be treated as agricultural income and exempted from Income-tax. Accordingly, the grounds taken by the assessee are allowed.

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

Order pronounced in the open court on 27th September, 2013.

Sd/- Sd/-

(ASHA VIJAYARAGHAVAN) (CHANDRA POOJARI) JUDICIAL MEMBER ACCOUNTANT MEMBER
Hyderabad, dated the 27th September, 2013

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Copy forwarded to:

1. M/s. Harniks Park (P) Ltd., c/o. Sri S. Rama Rao, Advocate, Flat No. 102, Shriya's Residency, Road No. 9, Himayathnagar, Hyderabad.

2. The Income Tax Officer, Ward-2(2), Hyderabad.

3. The CIT(A)-III, Hyderabad.

4. The CIT-II, Hyderabad.

5. The DR - A Bench, ITAT, Hyderabad.

Tprao