* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ **ITA Nos. 429/2011, 430/2011 and 431/2011**

% Date of Decision: 24.02.2011

1. ITA No. 429/2011

M/S. VARDAN BUILDCON .... APPELLANT

Through : Mr. R.Santhanam and Mr. A.P.Sinha, Advocates.

Versus

ASSTT. COMMISSIONER OF INCOME TAX
CIRCLE-27(1), CENTRAL REVENUE BUILDING, I.P. .... RESPONDENT
ESTATE, NEW DELHI
.

Through : Ms. Suruchi Aggarwal, Advocate.

AND

2. ITA No. 430/2011

M/S. TARINI DEVELOPERS .... APPELLANT

Through : Mr. R.Santhanam and Mr. A.P.Sinha, Advocates.

Versus

ADDL. CIT, RANGE 27, CENTRAL REVENUE
BUILDING, I.P. ESTATE, NEW DELHI. .... RESPONDENT

Through : Ms. Suruchi Aggarwal, Advocate.

AND

3. ITA No. 431/2011

M/S. MALIKA DEVELOPERS .... APPELLANT
Through : Mr. R.Santhanam and Mr. A.P.Sinha, Advocates.

Versus

ASSTT. COMMISSIONER OF INCOME TAX
CIRCLE-27(1), CENTRAL REVENUE BUILDING, I.P. ESTATE, NEW DELHI. .... RESPONDENT
Through : Ms. Suruchi Aggarwal, Advocate.

CORAM:
HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE M.L. MEHTA

1. Whether reporters of Local papers may be allowed to see the judgment? No.
2. To be referred to the reporter or not? No.
3. Whether the judgment should be reported in the Digest? No.

A.K. SIKRI, J. (ORAL)
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1. All these three appeals arise out of the common order dated 27th August, 2010 passed by the Income Tax Appellate Tribunal (in short 'ITAT') in three appeals which were preferred by these appellants/appeals. The three appellants are the partnership firms which are sister concerns. A partnership was entered into in respect of all three concerns, on the same date, with one

partner as common partner. It is also an admitted case that as per the partnership deed, all these three firms were to do business of real estate developers, building, construction and sale and purchase of property or any other business which the partners mutually decide from time to time. For the assessment year 2006-07, the partnership firms in their return showed the business loss, and at the same time income from agriculture on the purchase and sale of the agriculture land. The Assessing Officer took a view that agriculture income, as shown by appellants, was in fact, business income, and accordingly, taxed the same as business income at the hands of the assessees. The assessee preferred an appeal before the CIT(A) which was dismissed upholding the findings of the Assessing Officer. Further, appeal to the ITAT has met the same fate as Tribunal vide impugned order has upheld the findings of the CIT(A) as well as Assessing Officer thereby returning the finding and holding that income in question from the purchase and sale of the land was business income as the main business of these firms was that of real estate as well as sale and purchase of property.

2. Learned counsel for the appellant, at the outset submitted that it was a mistake on the part of the assessee to show the aforesaid income as agricultural income. It is thus conceded that income from the sale of the land was not agricultural income. It is however, sought to argue that the purchase of land in question was an investment by the assessee and that the sale of the land as capital profit was arrived at and therefore it was not accessible to tax. It is further argued that though, the partnership deed was entered into, no business was at all commenced till date, and therefore, the aforesaid transaction entered into by the assessee could not be treated as business income. It is further submitted that the findings of the authorities below are totally perverse. At the end, another submission was that though the Tribunal took note of various arguments advanced by the appellant in paragraph 6 of the impugned order, it has not dealt with those arguments. After giving thought to the considerations to the aforesaid submission and going through the orders of the authorities below, we do not find any justice or merit in any of the aforesaid contention.

3. The order of the Tribunal would reveal that it discussed the findings arrived at by the Assessing Officer and thereafter by the CIT(A). The relevant portion of the order of the CIT(A), as reproduced by the Tribunal, the CIT(A) had listed below the following undisputed facts:-

> "4. The one and only one ground of appeal challenging the merit of AO's decision of treating the claimed 'agricultural income' as 'business income' has to be decided. It is seen that the AO has made a thorough discussion on this issue in the assessment order, which is not being repeated here for the sake of brevity. The appellant has submitted copies of all submissions made before the AO. A careful perusal of materials on records shows following undisputed facts in the present case:-
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> i) The assessee, firm, came into existence on 07.12.2004 with the objective of real estate developers, building construction and sale & purchase of property.
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> ii) The assessee had sold agricultural land in the relevant year. The land was purchased in FY 2004-05. Thereafter, the improvement cost (consisting of price of wire, sheets, building materials and labour charges) of Rs.21,54,075/- was incurred in FY 2005-06.
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> iii) No agricultural operation on the land acquired by the appellant has been carried out during the relevant period, which is evident from the fact that no expenditure and or receipts are shown in the books of accounts though the details (khasra/khatuni) submitted during the appellate

proceedings showed the agricultural crop on the land.

iv) The clause 02 of partnership deed shows that the business had already commenced even prior to the relevant period. The clause 02 is extracted for proper appreciation of facts:

"That the business of firm shall be deemed to have commenced from the date of execution of this deed."

The word used is "SHALL" and not "MAY". The one and only one inference can be drawn from this clause is that the business of the appellant firm has commenced from the date of execution of the deed.

v) The clause 04 of partnership deed is extracted for proper appreciation of facts:

"That the firm shall do the business of real estate developers & building construction and sale & purchase of property or any other business or businesses which the parties hereto may mutually decide from time to time."

The word used is "SHALL" and not "MAY". Thus the sale and purchase of property is one of the business activities of the appellant, firm. No inference other than this can be drawn from this clause. Here, the appellant has not been debarred from trading of any specific kind of land.

vi) The investment in the land has been done wholly and exclusively from the borrowed fund.

vii) In general, the enhancement in market price of agricultural land cannot be 2.5 times to the cost of acquisition including the improvement cost within the span of 14 months. This can happen only when the commercial angle is involved.

viii) The appellant has bought different plots and technically merged into one before sale.

ix) The assessee has shown business loss in the return of income for relevant AY."

4. Thereafter the CIT(A) highlighted these facts which emerged from record:-

"5. ...

(a) when what is done is not merely a realization or a change of investment but an act done in what is truly the carrying on of a business, the amount recovered as appreciation will be assessable as business profit as held in the case of Rajabahadur Vishweshwara Singh V. CIT reported in (1961) 41 ITR 685 (SC). In such a situation what is to be found out for such determination is whether at the time of purchasing a particular land, the assessee had an intention to sell it subsequently at a profit or only to make an investment. The presence of commercial motive is a primary legal requisite of trade. This commercial motive is established by the fact that the appellant bought land out of borrowed fund as its own fund was quite meager. Purchase and sale as a business deal is another requisite. An intention to make profit normally inspires trade and commerce.

(b) In this case, the appellant along with its other two sister concerns (one of the individual partner is common in all three firms/concerns. The second partner is closed hold company) bought land from borrowings. All these three concerns started buying land within adjoining area within 15 days from their existence. The investment from capital of the appellant is NIL. Thus it is clear that the appellant had an intention to sell them subsequently at a profit at the time of purchasing the land and that is why it has commenced the business with borrowed funds and thereafter it had incurred development expenses

on the land so that the subsequent sale of this land may fetch commercial profit. This commercial motive is established by the fact that the appellant bought and sold after holding them for a period of 14 months. Therefore, the appellant has carried out its activity in systematic way to earn business profit. This activity has resulted sale consideration @ 250% of total cost (acquisition & development cost). This profit therefore, is nothing but profit derived from business and profession only. Such an intention is clearly discernible from the gamut of facts and circumstances in the present case as the assessee is engaged in the business of real estate developers, building construction and sale & purchase of property. This inference is buttressed by the ratio laid down by the Hon'ble Supreme Court in case of Delhousie Investment Trust Co. Ltd. v. CIT reported in 68 ITR 486 at page 490 & 491 held that where shares were actually sold at a very high profit leads to the inference that the purchases and sales were an adventure in the nature of trade. If this analogy is applied to the case of the appellant, it is absolutely clear that the appellant is engaged in business of land dealings, what to say adventure in the nature of trade.

(c) Regarding the ground of the appellant that assessee held the impugned land on 'investment a/c' and not as 'trading asset', it may be mentioned that such a submission on part of the appellant has no merit because what is to be seen is the real nature and effect of such transactions, which is subject matter of dispute between the assessee and the AO. The nature and transaction, intention etc, are to be seen to determine whether a transaction carried on by an assessee is in nature of investment or business activity. As mentioned hereinbefore, if the relevant criterion as contained in the Act and enunciated by the highest Court of the land from time to time are applied to the facts of the present case, they lead to one and only one conclusion that all land transactions

were carried out by the appellant with the intent and purpose of deriving highest instant income and not with the intention of a long term investment and that is why adjoining land admeasuring 126 kanal 121 marla were bought and developed together before finalizing sale. Further, it is worth mentioning here that the appellant along with its two sister concerns, namely, M/s Malika Developers and M/s Vardan Buidcon having the same office address at A-10-C Mansarovar Garden, New Delhi bought land in aggregate approximately 400 kanal either in the same mustatile number or adjoining numbers. All these three sister concerns came into existence on the same day having same office address and common business interest bought land in bulk at the same place during same period and thereafter they developed and sold the land together to M/s Orient Craft Infrastructure Ltd. All these facts cannot be termed as coincidence. They basically design their business together though not on the record but in practice and that is why these three inter related concerns bought land with such systematic objective, which have allowed them to merge/consolidate the land in technical manner so that it may fetch considerable profit. Therefore, they have achieved their business objective. Reliance is placed on the ratio reported in AIR 195 SC 513, 532 investment in such a designed way cannot be done at all specifically in land."

4. To summarize the aforesaid factual position which emerges on record, we may note that all the three firms came into existence on the same date with the objective of carrying out the business of real estate developers and building constructions, sale and purchase of property within fifteen days of the forming of the partnership. These

three firms, with common partners, started purchasing the agricultural land in question which was purchased from numerous villagers. After the purchase of the said land in small fragments, the entire land was consolidated and improved. There were improvement costs of ₹21,51,075/- incurred upon the said land in financial year 2005-06. For the purchase of this land, no capital was contributed by the partners, instead, money was borrowed and the land was purchased. This itself would show that the land could not have been purchased for the purpose of investments. The intention of the assessee further became clear when the land after developing, as aforesaid, was sold within the span of fourteen months, that too at a price which was 2.5 times of the cost of acquisition of land. From the above, it becomes crystal clear that the intention was to purchase the land and sell the same as business activity. Thus, it cannot be said that the business had not commenced, more so, when in the return itself the loss under the head 'business from income' was shown and insofar as this amendment is concerned, the assessee made an endeavor to exhibit the same as agricultural income.

6. We also find that the arguments which are taken note of by the Tribunal in para 6 of the order are dealt with in paras 10 onwards. After discussing the legal position about the strength of case law which is dealt in para 13, the same is applied to the facts of the present case, by the Tribunal in following manner.

> "Now we examine the present case on the basis of above expositions made by the Hon'ble Apex Court (i) Whether the purchaser was a trader and the purchase of the commodity and its resale were allied to his usual trade or business or incidental to it - the assessee's firms had its objects of dealing in lands and thus it was the usual trade and business of the assessee; (ii) the nature and quantity of the commodity purchased and resold, the assessee has purchased several number of plots and spent expenditure for development and sold the same in a consolidated manner. The assessee has no other business or any act; (iii) any act subsequent to the purchase to improve the quality of the commodity purchased and thereby making it a more ready resalable – After purchases the lands were developed/fenced and consolidated. Assessee's had purchased the nearby plots, consolidate them and spent considerable amount which the assessee's claim to be on fencing job to secure the same. Thus, the activity considerably improved the quality of land & prospect of its purchase by a builder for development activity; (iv) any act prior to the purchase showing a design or purpose – all the three firms came into existence on the same day and operated the same office; partners were common and have a inter-dependent relationship; all the purchases were made through a common agent; a common person was authroised to act on behalf of the assessee and sale were made in a considerable manner to a one party; (v) the incident associated with the purchase and resale; the similarity of the transactions to operations usually associated with trade or business -

> The lands though classified as agriculture were located approximately 15 KM from Gurgaon Committee. Gurgaon falls in NCR. Purchase of land near by this area and its development is a common activity necessity of builders. Thus we find that the facts and circumstances in present cases do fulfill the criteria expounded by the Hon'ble Apex court for treating the transaction as adventure in the nature of trade.

7. These are pure findings of facts arrived at after due analysis of the factual position which emerged on the records. We do not find any perversity therein. These appeals, are thus, bereft of any merit. Hence, no question of law arises, much less substantial question of law. The present appeals, as well as all the pending applications, are accordingly, dismissed.

A.K. SIKRI, J.

FEBRUARY 24, 2011 M.L. MEHTA, J.

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