

IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN
BEFORE S/SHRI CHANDRA POOJARI, AM & GEORGE GEORGE K., JM

I.T.A. Nos.494 to 497/Coch/2018
Assessment Years : 2011-12- 2014-15

The Assistant Commissioner of Income-tax, Central Circle, Thrissur.	Vs.	Shri Arun Majeed, S/o Dr. P.H. Abdul Majeed, "Palak", Temple Lane, Veliyannur, Thrissur-680 021. [PAN: ADOPA 9351R]
(Revenue-Appellant)		(Assessee-Respondent)

Revenue by	Shri Alok Nath Mitra, CIT(DR)
Assessee by	Shri Jose Kappen, CA

Date of hearing	17/01/2019
Date of pronouncement	06/02/2019

ORDER

Per CHANDRA POOJARI, AM:

These appeals filed by the Revenue are directed against the common order of the CIT(A)-III, Kochi dated 27/04/2016 and pertain to the assessment years 2011-12 to 2014-15.

2. Since the issues involved in these appeals are common, they were heard together and are being disposed of by this common order.

3. The Revenue has raised the following grounds:

1. The CIT(A) erred in treating the profit on the land transactions to be assessed under the Head "Capital Gains" instead of the income under the head "Business".

2. The CIT(A) has overlooked the fact that the assessee has found a coterie with some friends and relatives and engaged in purchasing and selling of properties, from which it can reasonably be held that, he is actively engaged in real estate business.

4. The facts of the case are that the assessee is running a medical shop, viz. M/s. West fort Sevana Pharma and is also a partner in certain other medical shops under the trade name "Sevana". There was a search u/s. 132 of the Act in the residential and business premises of the assessee on 18/12/2013. In response to the notice u/s. 153A of the Act, the assessee filed the returns of income for the assessment year 2011-12 to 2014-14. The Assessing Officer completed the assessments u/s. 143(3) r.w.s. 153A of the Act on 31/03/2016 by making various additions. While completing the assessments in these assessment years, the Assessing Officer treated the income from sale of landed property as income under the head business as against the claim of the assessee as income from capital gain.

5. Against this, the assessee went in appeal before the CIT(A). The CIT(A) partly allowed the appeals of the assessee. The CIT(A) held that income from sale of landed property is to be assessed as income from capital gain instead of income under the head business income proposed by the Assessing Officer.

Regarding the capital gain, the details relating to each assessment year are as follows:

Assessment Year : 2011-12

Property at Cheranellur

Sale consideration : Rs.1,86,282,280/-

Less: purchase cost Rs. 63,82,291/-

Profit Rs.1,22,99,898/-

Addition: Rs.1,22,99,989/-

Assessment Year : 2012-13

Property at Ayyanthole and Nadathara

Ayyanthole

Nadathara

Sale Consideration Rs.4,72,59,120/-

Rs.94,70,000/-

Less purchase cost Rs.1,61,44,789/-

Rs.17,19,750/-

Profit Rs.3,11,14,331/-

Rs.77,50,250/-

Addition : Rs.3,88,64,581/-

Assessment Year : 2013-14

Profit from land sale at Ayyanthole, Nadathara & Mulankunathukavu

	Sale consideration	Purchase value	Incidental charges to property purchase	Profit
AYYANTHOLE-1	77711960	262551312		51160648
AYYANTHOLE-2	2996240	1089928		1906312

AYYANTHOLE-3	41190451	14869879		26320572
NADATHARA	26980000	0		26980000
M.K. KAVU	5000000	4720200	27500	252300
	TOTAL			<u>106619832</u>

Addition:Rs10,66,19,832/-

Assessment Year : 2014-15

Property at Ayyanthole

	Sale consideration	Purchase cost	Profit
AYYANTHOLE LAND	30892839	11152409	<u>1,97,40,430</u>

Addition : 1,97,40,430/-

6. The assessee declared the above income under the head capital gain. The Assessing Officer treated the same as income from business. The Assessing Officer noticed that the assessee has undertaken buying and selling of landed property with a view to earn profit which can only be treated as "adventure in the nature of trade". He also relied on the judgment of the Supreme Court in the case of G. Venkataswami Naidu & Co. vs. CIT (35 ITR 594) wherein it was held that "just as the conduct of the purchaser subsequent to the purchase of a commodity in improving or converting it so as to make it more readily resalable is a relevant factor in determining the character of the transaction, so would his conduct prior to the purchase be relevant if it shows a design and a purpose". He also relied on the judgment of the Supreme Court in the case of Smt. Indramani Bai Vs. Additional Commissioner of Income Tax (1993) 200 ITR 594 wherein it was held that the act of purchasing a piece of land and shortly

converting them into 4 plots and selling them individually constitute an adventure in nature of trade. In this case on reference the H C had held that the intention of the assessee even when they purchased the land was to resell the same and not to make an investment. The Supreme Court upheld the decision of the HC.

7. On appeal, the CIT(A) observed that the assessee had sold only five properties for the last seven years. It was also observed that there were no property sale or purchase prior to or after the search period and all the properties sold were purchased for long term investment and not for resale, but due to unforeseen financial problems, the assessee had to dispose off the properties.

7.1 Before the CIT(A) it was contended that the sale and purchase of land was neither incidental nor allied to medicine business. It was contended that the sale and purchase of properties were not frequent which was evidenced by the fact that after 2007, the next property sale happened in 2012. There were no external borrowings but only the family funds were utilized for investing in landed property and the holding period of land is substantially long and the assessee never treated the land as stock-in-trade. The assessee further contended that even during the course of search at the residential and business

premises of the assessee, no material was found or seized, which could suggest that:

- a) The assessee had advertised for sale of properties.
- b) The assessee had prepared or submitted developmental plan to the authorities for a permit for development of the property.
- c) The assessee had done activities such as plotting, consolidation, laying road, preparation of development plans, obtaining permits for filling, excavation etc., preparation of project reports for external financing, which are normally associated with real estate business.

7.2 It was also contended that no expenses for improvement were claimed in respect of Ayyanthole (New) property and Nadathara property, which constituted about 90% of sale value of all property transactions during the search assessment period. In case of Ayyanthole (old) property and M.G. Kavu property expenditure of Rs.12.03 lakhs and Rs.1.80 lakhs were incurred on account of construction of compound wall and fencing for protection of the property. The assessee further contended that improvement to the other property i.e., Vaduthala property was to make it enjoyable, however, the same were disposed off in distress even before completion of development work.

7.3 It was contended that the judicial pronouncements relied upon by the Assessing Officer are not applicable in the case of the assessee as facts and circumstances are entirely different. In the case of G. Venkataswamy Naidu and Co., four contiguous plots of land adjacent to the place where the mills of the company managed by the firm were situated and these plots were purchased by

the assessee knowing that it will be able to sell these land to the managed company whenever it thought it profitable to do so, and on the basis of these facts, it was held that the transaction in question was an adventure in the nature of trade, whereas in the present case, the facts are completely different. In the case of Smt. Indiramani Bai, soon after the purchase of land, she carved it into plots and sold them within a few months which established that the intention of the assessee even when they purchased the land, was to resell the same and hence, was held to be an adventure in the nature of trade. Since the facts were completely different, the ratio laid in the case of Smt. Indiramani Bai cannot be applied to the instant case. In view of the above, it was submitted that it cannot be held that the assessee undertook an adventure in the nature of trade and he had correctly offered his income from sale of properties as income from capital gains. To support his contention, the assessee placed reliance on the following judicial pronouncements:

- a) CIT vs. A. Mohammed Mohideen (1989) 176 ITR 393 (Mad)
- b) R. Vasanthi Ram Narayan vs. DCIT (ITA 1802&1803/MDS/2015, order dated 18.12.2015.
- c) D.S. Virani and Others vs. CIT (1973) 90 ITR 255 (Guj).
- d) Ashwin Ramesh Mansharamani vs. IT (2004) 1 SOT 10 (Mumbai).
- e) Sri. Hiteshkumar Ashok Kumar Vaswani vs. JCIT (2017) Taxcorp (AT) 57096 (ITAT, Ahmedabad).
- f) Jayanthibhai D. Panchal vs.DCIT (IT(SS)A No.89 to 94/ahd/2010 order dated 04/01/2013.
- g) Tulla Veerender Vs. Addl. CIT (2013) 36 taxmann.com 545 (Hyderabad –Trib.)

Apart from the above, the assessee also placed reliance on the CBDT Circular No. 6/2016 dated 29/02/2016 wherein it was held as under:

"In respect of listed shares and securities held for a period of more than 12 months immediately preceding the date of its transfer, if the assessee desires to treat the income arising from the transfer thereof as Capital Gain, the same shall not be put to dispute by the Assessing Officer. However, this stand, once taken by the assessee in a particular Assessment Year, shall remain applicable in subsequent Assessment Years also and the taxpayers shall not be allowed to adopt a different/contrary stand in this regard in subsequent years."

7.4 It was submitted that the above Circular is relevant to the instant case also, as the Circular has laid down a basis for treating a particular transaction in a particular manner. The CIT(A) observed that the assessee had consistently disclosed its profits from sale of land as capital gains and therefore, the Assessing Officer should not have changed the head of income in the absence of any apparent and strong reasons. It was contended before the CIT(A) that the assessments u/s. 143(3) were completed for AY 2008-09 and 2009-10 and in the assessments so concluded, income declared under the head 'capital gains' on land transaction was accepted by the Assessing Officer.

7.5 On the basis of the submissions of the assessee and the judicial pronouncements relied on by the assessee, the CIT(A) did not find any reason as to why the land transactions undertaken by the assessee should be treated as adventure in the nature of trade. The CIT(A) was of the opinion that since the

assessee had consistently disclosed the income from sale of land as capital gains, the same should have been accepted by the Assessing Officer. Accordingly, he directed the Assessing Officer to treat the income from sale of land as capital gains instead of income from business.

8. Against this finding of the CIT(A), the Revenue is in appeal before us for all the assessment years.

8.1 The Ld. DR strongly relied on the order of the Assessing Officer and submitted that the assessee's income earned from the sale of landed property should be considered as business income of the assessee.

9. On the other hand, the Ld. AR submitted that in G. Venkataswami Naidu & Co., vs. Commissioner of Income Tax cited supra, the Supreme Court observed that "Just as the conduct of the purchaser subsequent to the purchase of a commodity in improving or converting it so as to make it more readily resalable is a relevant factor in determining the character of the transaction, so would his conduct prior to the purchase be relevant if it shows a design and a purpose". It was submitted that in the case of Smt. Indramani Bai Vs. Additional Commissioner of Income Tax (1993) 200 ITR 594, the Supreme Court held that the act of purchasing a piece of land and shortly converting them into 4 plots and selling them individually constitute an adventure in nature of trade. In this

case on reference the HC had held that the intention of the assessee even when they purchased the land was to resell the same and not to make an investment. The Supreme Court upheld the decision of the HC.

9.1 In view of the above, it was submitted that the assessee's transaction in land is held as 'adventure in the nature of trade' and is to be assessed under the head Income from Business/Profession. It was submitted that at the time of finalizing the assessment, the Assessing Officer had not brought any material on record to controvert the facts pointed out by the assessee in the reply to the pre assessment proposal. While completing the assessment, it was submitted that the Assessing Officer treated the property transactions as "adventure in the nature of trade" to be included under the head "business". According to the Ld. AR, the reason cited by the Assessing officer for this finding is that "For an adventure it is not necessary that there should be a series of transactions i.e., both purchases and sales". According to the Assessing Officer, a single transaction of purchase and sale may be outside the assessee's line of business, but can constitute an "adventure in the nature of trade". In support of this contention, the Assessing Officer relied on the judgments of the Apex Court in the case of G. Venkataswami Naidu & Co., vs. Commissioner of Income Tax and Smt. Indramani Bai vs. Additional Commissioner of Income Tax. It was submitted that these decisions are not applicable on the facts and circumstances of the present case, as explained below:-

a) The facts are different in the case of G. Venkataswami Naidu & Co and in the present case. In the case of G. Venkataswami Naidu & Co, four contiguous plots of land adjacent to the place where the mills of the company managed by the firm were situated and these plots were purchased by the assessee knowing that it will be able to sell these lands to the managed company whenever it thought it profitable so to do; and under these facts it was held that the transaction in question was an adventure in the nature of trade, whereas in the present case, there is no such situation and the facts are totally different and hence, the ratio laid in the case of G, Venkataswami Naidu & Co. (supra) is not applicable to the present case.

b) In the case of Smt. Indiamani Bai (supra), soon after the purchase of land, the assessee carved it into plots and sold them within a few months which Officer took the stand that all the property transactions undertaken by the assessee are with profit motive and even an isolated transaction with profit motive satisfy the description of an "adventure in the nature of trade". In the case of the assessee, all the properties which were sold during the above assessment years were purchased as long term investment and not for resale, But due to problems unforeseen, the assessee has to dispose-off the properties, as explained below:-

Sl. No.	Description	Purpose of Acquisition & Reason for disposal
1.	Ayyanthole Property	The property at Ayyanthole was purchased in the year 2007 with the intention of starting a neuro psychiatric hospital. (Due to density of population and small extent of land the respondent has to drop the idea). The respondent purchased the property. After the purchase of the property, the respondent have incurred heavy losses in share business and have to repay certain liabilities. Further, the respondent has to find resources for the expansion of medicine business. Due to this reason, this property was sold in 2011 in distress at the terms dictated by the buyer.
2.	Nadathara Property	This property was purchased in the year 2007 with the intention of long term investment. In the year 2012, the property was sold to mobilize resources for the expansion of medicine business and repayment of liabilities.
3.	M.G. Kavu Property	This property was purchased in the year 2010 with the intention of long term investment and enjoyment of the property. In order to mobilize funds for the medicine business and pay off liabilities, this property was also sold in the year 2012.

9.2 It was submitted that from the facts of the present case, it was important to note that;

- a) The assessee was doing medicine business. The purchase and sale of properties are not allied to it or incidental to it.
- b) The scale of activity is not substantial and the transactions are not frequent. After the sale of a property in 2007, the next sale happened only in 2011.

c) There were no external borrowings for investment in properties but used only family funds.

d) The holding period of the properties are very long.

e) The time of the assessee, devoted to the property transactions was very small and the livelihood of the assessee is the medicine business. Since 2005, the entire time, energy and mind of the respondent was focused only for building up medicine business under the trade name "Sevana".

f) The assessee had sufficient funds at the time of purchase of the properties and the entire cost was paid at the time of purchasing the property itself.

g) The assessee had never treated the properties as stock in trade. Further, even after an extensive search in the residential and business premises of the respondent, no material was seized or found which even remotely suggest that:-

a) The assessee had advertised for sale of properties.

b) The assessee had prepared or submitted developmental plan to the authorities for a permit for development of the property.

c) The assessee had done activities such as plotting, consolidation, laying roads, preparation of development plans, obtaining permits for filling, excavation, etc., preparation of project reports for external financing etc., which are normally associated with real estate business.

9.3 It was also submitted that no expenses of improvement were claimed in respect of Ayyanthole property and Nadathara property. In the case of M.G Kavu property, improvement expenditure of 1.80 lakhs alone (sale value of Rs. 50 lakhs) was incurred on account of construction of compound wall and fencing for protection of the property. It was submitted that the only intention while purchasing all the properties was long term investment and enjoyment. But due to problems unforeseen, the assessee had to dispose off certain properties. It was submitted that various courts have held that, "if a person invests money in land intending to hold it for some time and then sells it at a profit, it is clear case of capital accretion and not a profit derived from an adventure in the nature of trade. The test of initial intention to resell distinguishes the adventures in the nature of trade from the transactions of investment. The presence of such an intention is a relevant factor in deciding the issue". In the case of the assessee, there was no such intention of resale at all, at the time of purchase of properties and the Assessing Officer had also not proved the same with facts and records or even alleged the same, while treating the gains on sale of properties as business income. The Ld. AR submitted that while purchasing the

properties, the intention of the assessee was not to carry on a business as an estate developer or a builder. For an investor, the steps taken by him to maximize his gain on sale of investment would not render such gain to be looked upon as business profit. The intent to maximize the gain on sale of investment in land cannot by itself reflect any intention of making business profits unless the other factors of the case demonstrates so. In the assessee's case, there was no material brought on record which suggested that the intention at the time of purchase of property by the assessee was to make profit in the near future.

9.4 It was submitted that the CIT(A) allowed the assessee's ground as under:-

"On the basis of the facts and circumstances of this case and judicial pronouncements discussed above, I do not find any reason, as to why the land transactions undertaken by the appellant should be treated as adventure in the nature of trade. In my opinion, since the appellant has consistently disclosed the income from sale of land as Capital Gains, the same should have been accepted by the AO. In view of the above discussion, the AO is directed to treat the income from sale of land as Capital Gains and not as income from adventure in the nature of trade".

9.5 It was submitted that the case of the assessee was fully covered by the recent decision of the Hon'ble High Court of Kerala in the case of Principal Commissioner of Income Tax vs. John Poomkudy [(2018) 409 1TR 149 (Ker)]. In this case, the assessee acquired properties between 1992-93 to 1997-98 and also in 2006-07. These properties together were sold in the Asst. Year 2008-09

to a group of builders. According to the Assessing Officer, the purchases were made with an intention of indulging in sale of such land and the sale generated a huge profit. The Assessing Officer treated it as adventure in the nature of trade. The CIT(A) found that there was absolutely no evidence brought o record by the Assessing Officer to establish that the assessee was engaged in real estate trade and hence there could be no assessment made on that count treating the transaction as regular business of the assessee. The revenue filed appeal before High Court and relied on the decision of the Supreme Court in the case of G. Venkataswami Naidu & Co. vs. CIT (1959) 35 ITR 594. The High Court distinguished the decision and held that "It is an admitted fact that the assessee had not derived any income from the lands and also not made any improvements in the land. However, there can be no adventure in the nature of trade found, since the assessee had not identified the seller long prior and had not purchased the land holdings with a definite and sole intention to sell it. That is, the sale for profit being the intention it is distinguished from an adventure in the nature of trade by the fact that the assessee intended to hold the property and there was no specific sale in contemplation at the time of purchases. On sufficient profits being received the assessee eventually sold the property, which results in an accretion to capital; for which if there is liability to tax on capital gains that would have to be satisfied. As noticed by the Supreme Court, though there was an intention to derive profit on sale of such properties purchased as an investment, the assessee from the circumstances also, was willing to hold it so that the

eventual purchase gives him sufficient profit. This alone would take it out of the definition of adventure in the nature of trade and the solitary instance of sale alone cannot characterize the transaction as an adventure in the nature of trade. The Ld. AR elaborately relied on the above order and reproduced relevant portions of the same:

"For the Assessment Year 2008-09, the assessee received certain sums on sale of certain properties which the assessee claimed exempt from capital gains tax on the ground that the land was agricultural land. The Assessing Officer found that the properties were acquired between the years 1992-93 to 1997-98 and there was a solitary purchase in 2006-07, and these were together sold in the previous year relevant to the assessment year 2008-09 to a group of builders. He was of the view that the purchases were made with an intention of carrying out sale of such land, that was effected in the previous year relevant to the assessment year 2008-09 after holding the lands for about 12-15 years, that the purchases made were for a total consideration of Rs. 48 lakhs which on sale generated a profit and the total sale consideration being Rs. 24 crores in the assessment year 2008-09, that the purchases were an adventure in the nature of trade even though in one solitary sale transaction. The Commissioner (Appeals), however, found that there was no evidence brought on record by the Assessing Officer to establish that the assessee was engaged in continuous real estate trade, that the assessee had held the properties and had entered into an agreement for sale with one individual, whose assignee was a builder to whom the sale was made. He held that there was no adventure in the nature of trade in the transaction of the assessee and hence, there could be no assessment made on that count treating the transaction as a regular business of the assessee ". Page No. 149 of ITR)

"There had not even examined whether the properties purchased were lying contiguously or there was any connection between the intended purchaser of the lands which would have resulted in the assessee having specifically anticipated the sale transaction ". (Page No. 150)

"There could be no adventure in the nature of trade since the assessee had not identified the seller long prior and had not purchased the land holdings with a definite and sole intention to sell it" . (Page No. 150)

"Reliance is also placed on the decision of the Hon 'ble Supreme Court in G. Venkataswami Naidu and Co. V. CIT [1959] 35 ITR 594 (SC)". (Page No. 151)

"The Supreme Court distinguished an investment from an adventure in the nature of trade as under:- (page 609 of 35 ITR)." (Page No. 154)

"Cases of realization of investments consisting of purchase and resale, though profitable, are clearly outside the domain of adventures in the nature of trade. In deciding the character of such transactions several factors are treated as relevant.

Was the purchaser a trader and were the purchase of the commodity and its resale allied to his usual trade or business or incidental to it? ". (Page No. 154)

Did the purchaser by any act subsequent to the purchase improve the quality of the commodity purchased and thereby made it more readily resalable?.

"the Assessing Officer has not examined whether the properties purchased were lying contiguously or there was any connection between the intended purchaser in the agreement, the respondent-assessee and the ultimate purchaser of the lands which would result in the assessee having specifically anticipated the sale transaction". (Page No. 155)

"However, there can be no adventure in the nature of trade found, since the assessee had not identified the seller long prior and had not purchased the land holdings with a definite and sole intention to sell it". (Page No. 156)

"As noticed by the Hon'ble Supreme Court, though there was an intention to derive profit on sale of such properties purchased as an investment, the assessee from the circumstances also, was willing to hold it so that the eventual purchase gives him sufficient profit. This alone would take it out of the definition of adventure in the nature of trade and the solitary instance of sale alone cannot characterize the transaction as an adventure in the nature of trade". (Page No. 156)

9.6 It was submitted that the case of the assessee was also covered by the recent decisions, as given below:-

i. Principal CIT vs. Rungta Properties Ltd. (2018) 403 ITR 234 (Cal.)

It is held that the gain from transactions of sale of flats are not adventure in nature of trade, since no material has been brought to the notice that it had carried the business of property development.

G.Venkataswami Naidu & Co. Vs CIT case applied (1959) 35 ITR 594 (SC)

ii. CIT vs. Surjeet Kaur ITA 383 of 200 (Cal.)

Applied G. Venkataswami Naidu case.

(i) There is substantial gap of time between purchase and sale, (ii) the assessee is not a property dealer and (iii) only a portion of the property is sold. Therefore it is held that, it is not adventure in nature of trade.

9.7 On the facts and circumstances of the present case, the Ld. AR relied on the following judicial pronouncements:-

a) CIT vs. A.Mohammcd Mohideen 1(1989) 176 ITR 393 (Mad.)

It was submitted that in this case, it was held that if a land owner developed his land, expended money in laying roads, converted the same to housing sites, with an intention of getting better price on sale of the land and sold the plots to various persons which resulted in surplus, it could hardly be said that the transaction was anything more than a realization of a capital

investment. The Madras High Court further observed that, "in order to hold that an activity is in the nature of adventure in the nature of trade, there must be positive material to prove that the assessee intended to trade in such an activity. In the absence of evidence, the sale of immovable property constituting land could rise only to capital gains ".

b) R.Vasanthi Ram Narayan vs. DC1T (ITA 1802 & 1803/MDS/2015, order dated 18.012.2015)

In this case, the assessee purchased 82 units of agricultural land in the year 1999 and sold the same in plots in the Asst. Years 2008-09, 2009-10 and 2011-12. The Assessee offered long term capital gain on sale of these plots. According to the Assessing Officer, the assessee converted the lands into various housing plots after obtaining approval from the Chennai Metropolitan Development Authority and since, the activities of the assessee in converting the landed property into housing plots after obtaining necessary approval and thereafter selling the same to different persons would amount to adventure in the nature of trade and the profit on sale of land was to be assessed as income from business. The Assessing officer also relied on the judgments of the Apex Court in Raja J Rameswar Rao V CIT (42 ITR 179), Indramani Bai & Another vs. Addl CIT (200 ITR 594) and in G. Venkataswami Naidu & Co. vs. CIT (35 ITR 594). On appeal filed by the Assessee, the CIT (A) allowed the claim of the assessee. On appeal by the Dept. before ITAT, the Tribunal held that "to consider the transaction as

business transaction, the intention of the assessee at the time of acquisition of the property has to be considered. It is a well settled principle of law that the assessee can have two portfolios one is for investment and another is for trading. If the intention of the assessee at the time of acquisition of the property is to trade in land, then naturally the profit on sale of such land has to be treated as profit from business. If the assessee has no such intension at the time of acquisition of the land and it was intended to be kept as investment, then naturally at the time of sale of land, the profit has to be treated as capital gain. Therefore, the CIT (Appeals) has rightly found that the profit on sale of the land has to be treated as long term capital gain. This Tribunal do not find any reason to interfere with the order of the lower authority and accordingly, the same is confirmed as long term capital gain."

c) D.S Virani and Others vs. CIT (1973) 90 ITR 255 (Guj.)

It was submitted that in this case, the assessee purchased land on the outskirts of the city of Rajkot for a price of Rs. 10,000 in 1951. In October 1959, the assessee entered into an agreement for sale of the land at the price of Rs.1/ square yard and there after executed sale documents. The Assessing Officer took the view that the transaction of the purchase and sale of land was adventure in the nature of trade and the surplus realized on the sale of land was business profit and not capital gain. The Appellate Asst. Commissioner agreed with the contention of the assessee that the

transaction was an investment and on sale, the assessee realized the enhanced value of this investment and the surplus realized was capital gain and not business income. The Tribunal took the view that the transaction of purchase and sale of land affected by the assessee was an adventure in the nature of trade and the surplus realized by each was business profit. On appeal, the High Court held " it is now well settled that the burden lies on the revenue to establish that the profit earned in a transaction is within the taxing provision and it would, therefore, be for the revenue to show that the transaction is an adventure in the nature of trade". "Vide speeches of Lord Carmont and Lord Russell in Commissioners of Inland Revenue v. Reinhold, G. Venkatswami Naidu and Company's case and Saroj Kumar Mazumdar's case. Each case must be determined on the total impression created on the mind of the court by all the facts and circumstances disclosed in that particular case. If for instance a transaction is related to the business normally carried on by the assessee, though not directly part of it, an intension to engage in an adventure in the nature of trade may be readily inferred; there would be no difficulty in such a case in concluding that it is a trading transaction. But, where it is not related to the business of the assessee, there would have to be clear and positive evidence of facts and circumstances to show that the transaction was an adventure in nature of trade. The nature of the commodity which forms the subject-matter of the transaction may also throw light on the true legal character of the

transaction. If the commodity is a commercial commodity, the transaction may lend itself more easily to the inference that it is an adventure in nature of trade than in a case where the commodity is not a commercial commodity. So far as land is concerned, it is now clear from the decisions of the Supreme Court in G .Venkataswami Naidu and Company's case and Janki Ram Bahadur Ram's case that land is not commercial commodity. It is also now well settled that merely because the original purchase was made with intension to resell, if an enhanced price could be obtained, is by itself not enough to raise the inference that transaction is an adventure in the nature of trade We are of the view that the three assesses purchased their respective 1/4th shares in the land by way of investment and even if they hoped to be able to make profit by selling a large part of it, if a suitable opportunity came, that would not make the transaction any the less a transaction by way of realization of the enhanced value of the investment. The Tribunal was, therefore, in error in taking the view that the transaction of purchase and sale of his 1/4' share in the land by each of the three assesses was an adventure in the nature of trade. "

d) Ashwin Ramesh Mansharamani Vs. ITO (2004) 1 SOT 10 (Mumbai)

It was submitted that in this case, the seller of a plot o fland (out of 15 plots purchased, one plot sold during the relevant year) was a partner in firm whose business consisted of real estate development and according to the Assessing Officer, the business carried on by the firm was tantamount to

business carried on by the partner and therefore, the assessee was involved in real estate business. According to the Assessing Officer, the assessee acquired the land with the intention to trade and the Assessing Officer relied on the judgments of Apex Court in the case of G. Venkataswami Naidu & Co. Vs. CIT [(1959) 35 ITR 594], Saroj Kumar Mazumdar Vs. CIT [(1959) 37 ITR 242] and Raja J. Rameswar Rao Vs. CIT [(1961) 42 ITR 179]. In this case, the Hon'ble Tribunal held that there was no bar on buying properties as investment even if the assessee himself was engaged in the business in properties and therefore, it was essential to establish that the property in question was purchased for the purpose of dealing in property. The Tribunal further held that the profit earned by the assessee on the sale of plot was long term capital gain.

e) Sri Hiteskumar Ashok Kumar Vaswani vs. JCIT (2017) Taxcorp (AT) 57096 (ITAT-Ahmedabad)

It was submitted that in this case, the assessee owned 44 plots of land and out of which a plot was sold during the Asst. Year 2011-12. According to the Assessing Officer, by any stretch of imagination this was a huge holding for any individual who had invested in land only as an investment. The Assessing Officer further found that all the plots of land which had been sold were purchased as agricultural land and then the use for the same was got converted into non agricultural before selling. The Assessing Officer further observed that the assessee had not shown any agricultural income for the

investment of Rs. 6.64 crores in land. The Assessing Officer further observed that the important factor that indicated that the sale and purchase of land was an adventure in the nature of trade was the fact that majority of investment in land was made from borrowed funds. The Assessing Officer further observed that all the plots were sold to real estate concern viz. Vences Townships (India) LLP where the assessee's father and uncle were partners. On these grounds, the Assessing Officer held that the motive behind sale and purchase of land was only to earn business profit. The Tribunal held that in the present case, the land was declared as Capital Investments and the assessee sold only a few plots during the year as against the large portfolio of Investment in land. The Tribunal further observed that the usage of borrowed funds no doubt gave some impression on the intention to acquire the land for trading purpose, however at the same time, such act of usage of borrowed funds by itself was not sufficient to substitute the declared intention of the assessee and alter the character of the asset substantially. The Tribunal further observed that the act of conversion of the land into non agricultural land prior to its sale can only be with a view to maximize the gain on sale of property by a prudent investor for which he cannot be faulted. The Tribunal further observed that factum of the sale of land to a developer after conversion had also no advance inference, since what is relevant to determine the issue is the intention at the time of acquisition of the asset and not when the asset is proposed to be

sold and the element of borrowed funds in the acquisition of asset do not alter the aforesaid intention. The Tribunal further observed that there is no substantive and systematic course of activity or conduct with set purpose and the department had also not brought any material on this aspect. The Tribunal further held that Sec. 2(14) of the Act stipulates that property can be Capital Asset even if connected with the business of the assessee and therefore the assessee was entitled in law to hold certain class of assets as Capital Assets even while he was dealing with the asset of similar nature in business with commercial objectives. The Tribunal finally held that the land/properties sold by the assessee are Capital Assets and the consequential gains arising on sale thereto is chargeable under the head "Capital Gains".

f) Javanthibai D. Panchal Vs. DC1T (IT(SS)A.No. 89 to 94/Ahd/2010 order dated 04/01/2013)

It was submitted that in this case, a search operation u/s. 132 of the Act was carried out on the group of assessee on 31.05.2006 and consequence thereof proceedings u/s 153A were initiated. The assessee declared long term capital gain on sale of plots of land for the relevant Asst. Year and the same was held as business income by the Assessing Officer in the 153A assessment. According to the Assessing Officer, the assessee had purchased number of big chunks of land and the assessee was a Partner/Director in 5 concerns which were involved in plotting of the land and construction activity

in large scale. The Assessing Officer further observed that the assessee's intention was to increase the profit by sale of land by plotting it and by executing separate sale deed with different purchasers. The Assessing Officer further held that this was clear case of "adventure in the nature of trade" of the assessee. In this case, at the appellate stage, the department fairly submitted before the ITAT that same addition was made in the original assessment framed by the Department and the issue was decided in favour of the assessee by the ITAT. In the original assessment proceedings, sale of plots were held to be assessable under the head "LongTerm Capital Gains". The Department further pointed out that there were certain material found at the time of search which justified the assessment of the income from sale of plots under the head business income of the assessee and the seized documents were produced before the ITAT. The Tribunal observed that the issue whether the gains arising on sale of plots on land is assessable as business income or capital gain was covered by the order of the Tribunal on original assessment. However, in a case where subsequent to the search operation, the department had produced some material or evidence to prove that the income arising out of the same of plots of land was taxable as business income, the matter is to be adjudicated again. The Tribunal further observed that "we find that the papers seized at the time of search on 31.05.2006 does not give any strength to the case of the Revenue to assess the income from gains on sale of plot of land under the head 'business

income" and in fact is not an incriminating material/evidence found against the assessee. The Revenue's appeal against the order of the Tribunal in the case of the assessee dated 24.10.2008 to the Gujarat High Court was unsuccessful and the Revenue's appeal has been dismissed by the High Court. In the absence of any incriminating material/evidence found as a result of search operation at the premises of the assessee, we are bound by the judicial discipline to follow the decision of the earlier Bench of the Tribunal and accordingly, the issue is decided in favour of the assessee and the ground of the appeal of the Revenue being without any merit, is dismissed."

g) Tulla Veerender Vs. Addl. CIT 1(2013) 36 Taxmann.com 545 (Hyderabad –Trib.) It was submitted that in this case, the assessee along with other co-owners, acquired agricultural land on 08.09.2005. Thereafter, the assessee floated a company VVT Ltd. for carrying on agricultural operation and entered into a lease agreement with VVT Ltd., whereby the entire land was to be given on lease for purpose of cultivation. Later, the lease was cancelled on 29.09.2006 and the property was sold soon thereafter. The Assessing Officer held that the amount received on sale on property was on account of adventure in the nature of trade and taxed the same as business income. The Tribunal held that "though the intention subsequently formed after the purchase of land may be taken into account in deciding the issue

whether transaction is in the nature of trade, it is the intention at the time of inception, which is crucial. One of the essential elements in an adventure in the nature of trade is the intention of trade and 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, it would leave a margin on profit, would not be sufficient to show, and intention to trade at the inception. In the present case, it was due to certain compelling circumstances which came into picture at a later stage, the assessee was forced to sell the land. Merely because of the fact the land was sold in a short period of holding, it cannot be held that income assessing from 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 adventure in the nature of trade ".

9.8 In view of the above, the Ld. AR submitted that the Assessing Officer was not correct in assessing the capital gains on property transactions under the head "Business Income" and the CIT(A) rightfully treated it as income from capital gain.

10. We have heard the rival submissions and perused the record. It is pertinent to note that;

a) The assessee was doing medicine business. The purchase and sale of properties are not allied to it or incidental to it.

b) The scale of activity is not substantial and the transactions are not frequent. After the sale of a property in 2007, the next sale happened only in 2011.

c) There were no external borrowings for investment in properties but used only family funds.

d) The holding period of the properties are very long.

e) The time of the assessee, devoted to the property transactions was very small and the livelihood of the assessee is the medicine business. Since 2005, the entire time, energy and mind of the respondent was focused only for building up medicine business under the trade name "Sevana".

f) The assessee had sufficient funds at the time of purchase of the properties and the entire cost was paid at the time of purchasing the property itself.

g) The assessee had never treated the properties as stock in trade. Further, even after an extensive search in the residential and business premises of the respondent, no material was seized or found which even remotely suggest that:-

- a) The assessee had advertised for sale of properties.
- b) The assessee had prepared or submitted developmental plan to the authorities for a permit for development of the property.
- c) The assessee had done activities such as plotting, consolidation, laying roads, preparation of development plans, obtaining permits for filling, excavation, etc., preparation of project reports for external financing etc., which are normally associated with real estate business.

10.1 It was also submitted that no expenses of improvement were claimed in respect of Ayyanthole property and Nadathara property. In the case of M.K. Kavu property, improvement expenditure of 1.80 lakhs alone (sale value of Rs. 50 lakhs) was incurred on account of construction of compound wall and fencing for protection of the property. It was submitted that the only intention while purchasing all the properties was long term investment and enjoyment. But due to problems unforeseen, the assessee had to dispose off certain properties. It was submitted that various courts have held that, "if a person invests money in land intending to hold it for some time and then sells it at a profit, it is clear case of capital accretion and not a profit derived from an adventure in the nature of trade. The test of initial intention to resell distinguishes the adventures in the nature of trade from the transactions of investment. The presence of such an intention is a relevant factor in deciding the issue". In the case of the assessee, there was no such intention of resale at all, at the time of purchase of

properties and the Assessing Officer had also not proved the same with facts and records or even alleged the same, while treating the gains on sale of properties as business income. The Ld. AR submitted that while purchasing the properties, the intention of the assessee was not to carry on a business as an estate developer or a builder. For an investor, the steps taken by him to maximize his gain on sale of investment would not render such gain to be looked upon as business profit. The intent to maximize the gain on sale of investment in land cannot by itself reflect any intention of making business profits unless the other factors of the case demonstrates so. In the assessee's case, there was no material brought on record which suggested that the intention at the time of purchase of property by the assessee was to make profit in the near future.

10.2 It is an admitted fact that the land was held by the assessee as capital asset from the date of purchase till the date of sale. There was no finding by the Assessing Officer that the assessee had converted the landed property into stock in trade so as to start business in the landed property. The assessee reflected the income earned from sale of the impugned landed property as capital gain. It is also not the case of the Assessing Officer that the assessee had taken permission from the authorities for converting the landed property as plots, as the assessee never had the intention to carry on any business of real estate in respect of the landed property. Thus, the intention of the assessee

cannot be presumed by the Assessing Officer unless supported by any material evidence that the assessee is in the business of real estate. In the instant case, the treatment given by the assessee for this landed property clearly indicate that the intention of the assessee was to hold the same as capital asset to have good returns from the same.

10.3 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. In deciding as to whether a particular transaction is an adventure in the nature of trade, the Assessing Officer must consider all the relevant facts and circumstances of the case. Realization of investment consisting of purchase of landed property and resale, though profitable are clearly outside the domain of adventure in the nature of trade.

10.4 The assessee held the landed property as investment and 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 land by the assessee and realization 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 as investment and the same was sold. This was nothing but realization of investment which resulted in the profit of the assessee. There was no element of trade attached to the realization of investment. A continuous business requires more activity and greater organization which 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.

10.5 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 realization 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.

10.6 In this case, the assessee treated the landed property as investment which was already acquired by them in the earlier years. 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. Because of favourable market conditions the assessee sold the land and the same fetched them a good price. Therefore, in the present case there is no dispute that the assessee acquired land and there is also no dispute that there were no continuous activities of buying and selling of land.

10.7 The Assessing Officer was of the opinion that the amount received on sale of the landed property is nothing but on account of adventure in the nature of trade and the same was brought into as 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 assessee 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 assessee in acreage and not by making plots.

10.8 In our opinion, this issue is squarely covered by the judgment of the Jurisdictional High Court in the case of Pr. CIT vs. John Poomkudy 9409 ITR 149) wherein it was held as under:

"Held, dismissing the appeal, that the fact that there was an isolated transaction of sale which generated profit to the assessee would not result in the transaction being treated as an adventure in the nature of trade. The findings of the Assessing Officer on meagre details of transactions of

purchase long prior and sale together after 12-15 years, as found from the order was not justified. None of the tests had been employed by the Assessing Officer in finding out an adventure in the nature of trade in the transactions in land entered into by the assessee. The Assessing Officer had examined other purchases made in different parts of the State and outside the State, of landed properties by the assessee and on that premise alone had held that the assessee had indulged in adventure in the nature of trade. He had not examined whether the properties purchased were lying contiguously or there was any connection between the intended purchaser in the agreement, the assessee and the ultimate purchaser of the lands which would have resulted in the assessee having specifically anticipated the sale transaction. The assessee had made investments in the lands long prior to the sale and had held the land for a considerable period of time; almost 12-15 years. It was an admitted fact that the assessee had not derived any income from the lands and also not made any improvements in the land. There could be no adventure in the nature of trade since the assessee had not identified the seller long prior and had not purchased the land holdings with a definite and sole intention to sell it. The sale for profit being the intention it was distinguished from an adventure in the nature of trade by the fact that the assessee intended to hold the property and that there was no specific sale in contemplation at the time of purchases. On sufficient profits being received the assessee eventually sold the property, which had resulted in an accretion of capital for which if there was liability to tax on capital gains that would have to be satisfied. Though there was an intention to derive profit on sale of such properties purchased as an investment, the assessee, from the circumstances also, was willing to hold it so that the eventual purchase gave him sufficient profit. This alone would take it out of the definition of adventure in the nature of trade and the solitary instance of sale alone could not characterize the transaction as an adventure in the nature of trade."

11. In the result, the appeals of the Revenue are dismissed.

Order pronounced in the open Court on this 6th February, 2019

sd/-
(GEORGE GEORGE K.)
JUDICIAL MEMBER

sd/-
(CHANDRA POOJARI)
ACCOUNTANT MEMBER

Place: Kochi

Dated: 6th February, 2019

GJ

Copy to:

1. Shri Arun Majeed, S/o Dr. P.H. Abdul Majeed, "Palak", Temple Lane, Veliyannur, Thrissur-680 021.
2. The Assistant Commissioner of Income-tax, Central Circle, Thrissur.
3. The Commissioner of Income-tax(Appeals)-III, Kochi.
4. The Commissioner of Income-tax, Central, Kochi.
5. D.R., I.T.A.T., Cochin Bench, Cochin.
6. Guard File.

By Order

(ASSISTANT REGISTRAR)
I.T.A.T., Cochin