



2024/KER/53805

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE DR.JUSTICE A.K.JAYASANKARAN NAMBIAR

&

THE HONOURABLE MR.JUSTICE SYAM KUMAR V.M.

FRIDAY, THE 19TH DAY OF JULY 2024 / 28TH ASHADHA, 1946

ITA NO.229 OF 2019

ARISING OUT OF THE ORDER DATED 06.02.2019 IN ITA NO.494/Coch/2018

OF I.T.A.TRIBUNAL, COCHIN BENCH

APPELLANT:

THE PRINCIPAL COMMISSIONER OF INCOME TAX,
(CENTRAL), KOCHI-682011.

BY ADVS.

SRI.P.K.R.MENON, SENIOR COUNSEL, GOI (TAXES)
SRI.JOSE JOSEPH, SC, FOR INCOME TAX
SMT.SUSIE B VARGHESE, SC
SRI.NAVANEETH N NATH, SC

RESPONDENT:

ARUN MAJEED,
S/O.DR.P.H.ABDUL MAJEED, "PALAK", TEMPLE LANE,
VELIYANNUR, THRISSUR-680021.

BY ADVS.

P.JAYABAL
P.DEEPAK
ANIL D. NAIR
TELMA RAJU(K/000635/2014)
EDATHARA VINEETA KRISHNAN(K/1088/2021)
P.K.BIJU(K/000364/2022)
ANJANA A. (K/1284/2020)

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON
14.06.2024, ALONG WITH ITA.251/2019 AND CONNECTED CASES, THE COURT
ON 19.07.2024 DELIVERED THE FOLLOWING:



IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE DR. JUSTICE A.K.JAYASANKARAN NAMBIAR

&

THE HONOURABLE MR. JUSTICE SYAM KUMAR V.M.

FRIDAY, THE 19TH DAY OF JULY 2024 / 28TH ASHADHA, 1946

ITA NO. 254 OF 2019

ARISING OUT OF THE ORDER DATED 06.02.2019 IN ITA

NO.496/Coch/2018 OF I.T.A.TRIBUNAL,COCHIN BENCH

APPELLANT:

THE PRINCIPAL COMMISSIONER OF INCOME TAX,
(CENTRAL), KOCHI- 682011.

BY ADVS.

SRI.P.K.R.MENON, SENIOR COUNSEL, GOI (TAXES)

SRI.JOSE JOSEPH, SC, FOR INCOME TAX

SMT.SUSIE B VARGHESE, SC

SRI.NAVANEETH N NATH, SC

RESPONDENT:

ARUN MAJEED,

S/O.DR.P H ABDUL MAJEED, "PALAK",

TEMPLE LANE, VELIYANNUR, THRISSUR 680021.

BY ADVS.

ANIL D. NAIR

TELMA RAJU (K/000635/2014)

P.K.BIJU (K/000364/2022)

ANJANA A. (K/1284/2020)

EDATHARA VINEETA KRISHNAN (K/1088/2021)

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON
14.06.2024, ALONG WITH ITA.229/2019 AND CONNECTED CASES,
THE COURT ON 19.07.2024 DELIVERED THE FOLLOWING:



ITA Nos.229/ 2019, 251/2019, 252/2019 & 254/2019 :3:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE DR. JUSTICE A.K.JAYASANKARAN NAMBIAR

&

THE HONOURABLE MR. JUSTICE SYAM KUMAR V.M.

FRIDAY, THE 19TH DAY OF JULY 2024 / 28TH ASHADHA, 1946

ITA NO. 252 OF 2019

ARISING OUT OF THE ORDER DATED 06.02.2019 IN ITA

NO.495/Coch/2018 OF I.T.A.TRIBUNAL,COCHIN BENCH

APPELLANT:

THE PRINCIPAL COMMISSIONER OF INCOME TAX,
(CENTRAL), KOCHI-682 011.

BY ADVS.

P.K.RAVINDRANATHA MENON (SR.)

SRI.JOSE JOSEPH, SC, FOR INCOME TAX

SMT.SUSIE B VARGHESE, SC

SRI.NAVANEETH N NATH, SC

RESPONDENT:

ARUN MAJEED,
S/O.DR.P.H. ABUL MAJEED, "PALAK",
TEMPLE LANE, VELIYANNUR, THRISSUR-680 021.

BY ADVS.

ANIL D. NAIR

TELMA RAJU(K/000635/2014)

EDATHARA VINEETA KRISHNAN(K/1088/2021)

P.K.BIJU(K/000364/2022)

ANJANA A.(K/1284/2020)

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON
14.06.2024, ALONG WITH ITA.229/2019 AND CONNECTED CASES,
THE COURT ON 19.07.2024 DELIVERED THE FOLLOWING:



ITA Nos.229/ 2019, 251/2019, 252/2019 & 254/2019 :4:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE DR. JUSTICE A.K.JAYASANKARAN NAMBIAR

&

THE HONOURABLE MR. JUSTICE SYAM KUMAR V.M.

FRIDAY, THE 19TH DAY OF JULY 2024 / 28TH ASHADHA, 1946

ITA NO. 251 OF 2019

ARISING OUT OF THE ORDER DATED 06.02.2019 IN ITA
NO.497/Coch/2018 OF I.T.A.TRIBUNAL,COCHIN BENCH

APPELLANT:

THE PRINCIPAL COMMISSIONER OF INCOME TAX
(CENTRAL), KOCHI 682 011

BY ADVS.

P.K.RAVINDRANATHA MENON (SR.)
SRI.JOSE JOSEPH, SC, FOR INCOME TAX
SMT.SUSIE B VARGHESE, SC
SRI.NAVANEETH N NATH, SC

RESPONDENT:

ARUN MAJEED
S/O DR P.H. ABDUL MAJEED, PALAK, TEMPLE LANE,
VELIYANNUR, THRISSUR 680021

BY ADVS.

ANIL D. NAIR
TELMA RAJU(K/000635/2014)
EDATHARA VINEETA KRISHNAN(K/1088/2021)
ANJANA A. (K/1284/2020)
P.K.BIJU(K/000364/2022)

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON
14.06.2024, ALONG WITH ITA.229/2019 AND CONNECTED CASES,
THE COURT ON 19.07.2024 DELIVERED THE FOLLOWING:

**C.R.****JUDGMENT****Syam Kumar V.M., J.**

These appeals filed by the Revenue raises common questions for consideration and hence they are considered and disposed of together. The orders under challenge in all these appeals were all rendered by the Income Tax Appellate Tribunal, Cochin Bench on 06.02.2019 and they pertain to the assessment years 2011-12 to 2014-15.

2. The challenge in these appeals is confined to the correctness of taxing profits from the sale of lands as 'business income' instead of treating the same as 'capital gain'. Revenue contends that though the primary business activity of the assessee is that of running medical shops under the Trade name 'Sevana', he had during the relevant assessment years indulged in buying and selling of landed property with a view to earn profit. This, according to the Revenue can only be termed as an 'adventure in the nature of trade' as envisaged in Section 2(13) of the Income Tax Act, 1961 thus making the income derived from the sale of landed property to be business income as against the claim of the assessee that it was in 'the nature of capital gains'.

**Brief facts :**

3. The assessee, who is the respondent in these appeals, runs a medical shop and is also a partner in certain other medical shops under the trade name "SEVANA". There was a search under Section 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 the income for the assessment year 2011-12 to 2014-15. The Assessing Officer completed the assessment u/s.143(3) r.w.s Section 153A of the Act on 31.03.2016 **[Annexure A]** by making various additions. While thus completing the assessment, the AO had treated the income from sale of landed property as 'income' under the head 'business' as against the claim of the assessee that it was 'income from capital gain'. According to the AO, there has been systematic purchase and sale of large extent of land in various locations on a continuous basis over many years either in individual capacity or in collaboration with other individuals. The assessee had filed appeals against the Annexure A Order of the AO before the Commissioner of Income Tax (Appeals). The CIT(A) vide Order dated 10.07.2018 **[Annexure B]** partly allowed the appeals of the assessee and held that the income from the sale of landed property is to be assessed as 'income from capital gain' instead of income under the head 'business income' as proposed by the Assessing Officer. The CIT (A)



reasoned that since the assessee had consistently disclosed the income from sale of land as capital gains, the same should have been accepted by the AO. Annexure B Order of the CIT (A) thus directed the AO to treat the income from sale of land as capital gains and not as income from 'adventure in the nature of trade'. On appeals filed by the Revenue, the Income Tax Appellate Tribunal (ITAT) vide Order dated 06.02.2019 **[Annexure C]** concluded that there was no finding by the AO that the assessee had converted the landed property into stock in trade so as to start business in the landed property. It was also noted by the ITAT that the assessee had not taken permission from the authorities for converting the landed property as plots, as the assessee never had intention to carry on any business of real estate in respect of landed property. The ITAT held that the intention of the assessee cannot be presumed by the AO unless supported by any material evidence that the assessee is in the business of real estate. Holding thus, the ITAT concluded that the treatment given by the assessee for the landed property clearly indicates that the intention of the assessee was to hold the same as capital asset to have good returns from the same. The ITAT after due consideration held that income has to be treated as income from capital gain and not from business. Annexure C Orders passed by the ITAT are challenged in these appeals.

**Substantial questions of law:**

4. The following substantial questions of law have been framed in all the above appeals:

(1) Whether on the facts and in the circumstances of the case, the Tribunal is right in law and fact in interfering with the action of the assessing officer in treating the activities of the assessee as 'adventure in the nature of trade'?

(2) Whether on the facts and in the circumstances of the case and the nature of the issue being one depending on the facts of the case, the Tribunal is right in holding : " In our opinion this issue is squarely covered by the judgment of the jurisdictional High Court...." Is not such an approach and conclusion perverse and illogical ?

(3) Whether on the facts and in the circumstances of the case are not the transactions and dealings in land, adventures in the nature of trade and hence assessable as business?

5. We have heard Smt.Susie B.Varghese, learned Standing Counsel for the appellant and Mr.Anil D.Nair, learned Senior Advocate appearing for the respondent.

Appellant's contentions:

6. The learned Standing Counsel submits that ITAT erred in properly appreciating the scope and ambit of the term 'business'



as defined in Section 2(13) of the Income Tax Act, 1961. According to the learned Counsel, 'business' as defined in the said Section includes any adventure or concern in the nature of trade, commerce or manufacture and when the assessee had been found to be engaging in transactions with a motive for profit, the same can only be treated as an adventure in the nature of trade. The learned counsel relying on precedents submits that even a single transaction of purchase and sale, albeit outside the assessee's line of business, could constitute an adventure in the nature of trade. Thus understanding the term 'adventure' as a pecuniary risk, or as a venture with a commercial purpose, and co-relating it with the facts as revealed during the search under Section 132 of the assessee's premises, the learned Standing Counsel submits that the assessee was indulging in real estate business during the relevant assessment years thus justifying the taxing of the profits from the sale of lands as 'business income' and not as capital gains. The learned Standing Counsel places reliance on the decision of the Supreme Court in **G.Venkataswami Naidu & Co. v. Commissioner of IncomeTax** [(1959) 35 ITR 594 (SC)] and **Smt.Indramani Bai and another v. Additional Commissioner of Income Tax, A.P.** [1994 Supp. (2) SCC 114] to buttress her contentions.

**Respondents' contentions:**

7. *Per contra* the learned Senior Advocate appearing on behalf of the assessee submits that the existence or otherwise of an adventure in the nature of trade is to be identified not based on any straight jacket method, but on the basis of facts and circumstances of the case at hand. The learned Senior Advocate points out that the AO has not brought out any material on record to suggest that the property transactions undertaken by the assessee during the relevant assessing years constitute a 'business activity' in the ordinary sense of the term. The learned Senior Advocate points to various factors as borne out from the records of the Revenue which would reveal that the assessee was doing business in medicines and was only dabbling in the real estate as a long term investment, devoid of any immediate or short range commercial interest. That the assessee used family funds for land purchases and no external borrowings were made for investment in properties and the fact that the assessee never advertised the sale of properties, according to the Senior Advocate are clear pointers to the fact that the land purchases and sale were not carried out as a business venture by the assessee. As regards the reliance placed by the Revenue on the dictum laid down by the Supreme Court in **G.Venkataswami Naidu & Co. v. Commissioner of Income Tax** and **Smt.Indramani Bai and another v. Additional Commissioner**



of Income Tax, A.P. (supra), the learned Senior Advocate submits that there exists significant divergence in the facts and circumstances of the said decisions from the subject appeals, thus making reliance on the said dictum perfunctory and unsustainable.

Discussion and conclusion:

8. Towards answering the substantial questions raised, it assumes relevance to understand the meaning, scope and ambit of the term 'adventure in the nature of trade' as used in Section 2(13) of the Income Tax Act, 1961 while defining the term 'business'. Section 2(13) reads as follows:

“business” includes any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture;

It can be seen from the above definition that it is not only a trade, commerce or manufacture that would constitute a business under the Act. Any '*adventure or concern in the nature of*' a trade, commerce or manufacture will also constitute a business. The term '*adventure*' used in the definition though in the semantic sense presupposes the existence of an element of 'risk' and or 'uncertainty' either with respect to the manner in which the trade, commerce or manufacture is carried out or regarding its final outcome, the term '*concern*' that follows it qualifies its meaning as an activity or enterprise which has the nature of a trade, commerce



or manufacture. Understood thus, semantically, the words '*adventure in the nature of trade ...etc.*' used in Section 2(13) of the Act refers to a purposive venture or activity that had been carried out or pursued with a clear commercial design and purpose or a profit making motive. It may fall short of the established drappings or paraphernalia of a trade and may have some randomness about it, still if it has a commercial design and has profit making as its central purpose or motive, then it constitutes a '*business*' as used in the Income Tax Act, 1961 making the income earned therefrom, exigible to tax.

9. The wording '*adventure in the nature of trade*' has been the subject matter of much judicial scrutiny. The *lex classicus* on the point is the decision of the Supreme Court which was rendered by Gajendragadkar J. in **G.Venkataswami Naidu and Co. v. Commissioner of Income Tax** [(1959) 35 ITR 594 (SC)]. The Supreme Court in that case held that the question whether the endeavour is '*an adventure in the nature of trade*' is a mixed question of fact and law and succinctly explained this conclusion as follows:

"11. What then is the nature of the question raised before us in the present appeal ? The Tribunal and the High Court have found that the transaction in question is an adventure in the nature of trade; and it is the correctness of this view that is challenged in the present appeal. The expression



“adventure in the nature of trade” is used by the Act in Section 2, sub-s. (4) which defines business as including any trade, commerce or manufacture, or any adventure or concern in the nature of trade, commerce or manufacture. Under Section 10, tax shall be payable by an assessee under the head profits and gains of business, profession or vocation in respect of the profit or gains of any business, profession or vocation carried on by him. Thus the appellant would be liable to pay the tax on the relevant amount if it is held that the transaction which brought him this amount was business within the meaning of Section 2, sub-s. (4) and it can be said to be business of the appellant if it is held that it is an adventure in the nature of trade. In other words, in reaching the conclusion that the transaction is an adventure in the nature of trade, the Tribunal has to find primary evidentiary facts and then apply the legal principles involved in the expression “adventure in the nature of trade ” used by Section 2, sub-s. (4). It is patent that the clause “ in the nature of trade ” postulates the existence of certain elements in the adventure which in law would invest it with the character of a trade or business; and that would make the question and its decision one of mixed law and fact.”

10. Having answered the nature of the question, the Supreme Court in **G.Venkataswami Naidu & Co.** (supra) proceeded to do a detailed survey in the English and Indian precedents on the point and delineated the nature of the question and the important considerations which are to be borne in mind in determining the character of the transaction, even if it be an isolated one, as follows:



“15. This question has been the subject-matter of several judicial decisions; and in dealing with it all the judges appear to be agreed that no principle can be evolved which would govern the decision of all cases in which the character of the impugned transaction falls to be considered. When Section 2, sub-s. (4), refers to an adventure in the nature of trade; it clearly suggests that the transaction cannot properly be regarded as trade or business. It is allied to transactions that constitute trade or business but may not be trade or business itself. It is characterised by some of the essential features that make up trade or business but not by all of them; and so, even an isolated transaction can satisfy the description of an adventure in the nature of trade. Sometimes it is said that a single plunge in the waters of trade may partake of the character of an adventure in the nature of trade. This statement may be true; but in its application due regard must be shown to the requirement that the single plunge must be in the waters of trade. In other words, at least some of the essential features of trade must be present in the isolated or single transaction. On the other hand, it is sometimes said that the appearance of one swallow does not make a summer. This may be true if, in the metaphor, summer represents trade; but it may not be true if summer represents an adventure in the nature of trade because, when the section refers to an adventure in the nature of trade, it is obviously referring to transactions which individually cannot themselves be described as trade or business but are essentially of such a similar character that they are treated as in the nature of trade. It was faintly argued for the appellant that it would be difficult to regard a single or an isolated transaction as one in the nature of trade because income resulting from it would inevitably lack the characteristics attributed to it by Sir George Loundes in Commissioner of I.T. v. Shaw Wallace and Company [(1932) 59 IA 206]. 'Income their Lordships think ', observed Sir George Loundes, " in this Act



connotes a periodical monetary return coming in with some sort of regularity or expected regularity from definite sources. Then the learned judge proceeded to observe that income has been likened pictorially to the fruit of a tree, or the crop of a field. It is essentially the produce of something which is often loosely spoken of as capital". In our opinion, it would be unreasonable to apply the test involved in the use of this pictorial language to the decision of the question as to whether a single or an isolated transaction can be regarded as an adventure in the nature of trade. In this connection we may, with respect, refer to the comment made by Lord Wright in Raja Bahadur Kamakshya Narain Singh of Ramgarh v. CIT that "it is clear that such picturesque similes cannot be used to limit the true character of income in general ". We are inclined to think that, in dealing with the very prosaic and sometimes complex questions arising under the Income-tax Act, use of metaphors, however poetic and picturesque, may not help to clarify the position but may instead introduce an unnecessary element of confusion or doubt.

16. As we have already observed it is impossible to evolve any formula which can be applied in determining the character of isolated transactions which come before the courts in tax proceedings. It would besides be inexpedient to make any attempt to evolve such a rule or formula. Generally speaking, it would not be difficult to decide whether a given transaction is an adventure in the nature of trade or not. It is the cases on the border line that cause difficulty. If a person invests money in land intending to hold it, enjoys its income for some time, and then sells it at a profit, it would be a clear case of capital accretion and not profit derived from an adventure in the nature of trade. Cases of realisation 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? Affirmative answers to these questions may furnish relevant data for determining the character of the transaction. What is the nature of the commodity purchased and resold and in what quantity was it purchased and resold? If the commodity purchased is generally the subject-matter of trade, and if it is purchased in very large quantities, it would tend to eliminate the possibility of investment for personal use, possession or Government. Did the purchaser by any act subsequent to the purchase improve the quality of the commodity purchased and thereby made it more readily resaleable? What were the incidents associated with the purchase and resale? Were they similar to the operations usually associated with trade or business? Are the transactions of purchase and sale repeated? In regard to the purchase of the commodity and its subsequent possession by the purchaser, does the element of pride of possession come into the picture? A person may purchase a piece of art, hold it for some time and if a profitable offer is received may sell it. During the time that the purchaser had its possession he may be able to claim pride of possession and aesthetic satisfaction ; and if such a claim is upheld that would be a factor against the contention that the transaction is in the nature of trade. These and other considerations are set out and discussed in judicial decisions which deal with the character of transactions alleged to be in the nature of trade. In considering these decisions it would be necessary to remember that they do not purport to lay down any general or universal test. The presence of all the relevant circumstances mentioned in any of them may help the court to draw a similar inference; but it is not a matter of merely counting the number of facts and circumstances pro and con; what is important to consider is their distinctive character. In each case, it is the total effect of all relevant factors and



circumstances that determines the character of the transaction; and so, though we may attempt to derive some assistance from decisions bearing on this point, we cannot seek to deduce any rule from them and mechanically apply it to the facts before us.

17. In this connection it would be relevant to refer to another test which is sometimes applied in determining the character of the transaction. Was the purchase made with the intention to resell it at a profit ? It is often said that a transaction of purchase followed by resale can either be an investment or an adventure in the nature of trade. There is no middle course and no half-way house. This statement may be broadly true; and so some judicial decisions apply the test of the initial intention to resell in distinguishing adventures in the nature of trade from transactions of investment. Even in the application of this test distinction will have to be made between initial intention to resell at a profit which is present but not dominant or sole; in other words, cases do often arise 'Where the purchaser may be willing and may intend to sell the property purchased at profit, but he would also intend and be willing to hold and enjoy it if a really high price is not offered. The intention to resell may in such cases be coupled with the intention to hold the property. Cases may, however, arise 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 no doubt a relevant factor and unless it is offset by the presence of other factors it would raise a 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. We thus come back to the



same position and that is that the decision about the character of a transaction in the context cannot be based solely on the application of any abstract rule, principle or test and must in every case depend upon all the relevant facts and circumstances.”

11. The Supreme Court has thus concluded in **G.Venkataswami Naidu & Co.** (supra) that there is no straight jacket formula or method to answer the question whether the activity is an *‘adventure in the nature of trade* and that the answer to the same must in every case, depend upon all the relevant facts and circumstances and should be answered by various factors, including the *‘intention’* of the assessee while engaging in the transaction/activity, the nature of which is under consideration.

12. The question of discerning or gauging the intention of the assessee has not been an easy one. There had been variance of opinion among High Courts as to the nature of the test to be applied to ascertain intention and regarding the timing of the intention. Should the intention of the assessee be discerned from his conduct prior to or subsequent to the transaction? Should conduct of the assessee both prior and subsequent to the purchase of the commodity be considered? It would hence be relevant to examine some precedents on this point to ascertain whether any broad contours could be identified.

13. The Supreme Court had in **Smt.Indramani Bai and**



another v. Additional Commissioner Of Income-Tax, A.P. [1994 Supp. (2) SCC 114] considered the question of intention to be drawn from the conduct of the assessee. In that case the wives of two brothers, who were partners in a firm, purchased a piece of land for a consideration of Rs.10,620/- in the month of December, 1963. Shortly after purchase, they carved it into four plots and sold them individually in the year 1964. The Hon'ble High Court held that the fact that soon after the purchase of land, the assessee carved it into plots and sold them within a few months, coupled with the other facts of the case, establishes that the intention of the assessees even when they purchased the land, was to resell the same and not to make an investment. The Hon'ble Supreme Court affirmed the view taken by the High Court and further held as under :

"The fact that soon after the purchase, the assessees carved out the land into plots and sold them within a few months, coupled with other circumstances of the case, is consistent more with the theory of adventure in the nature of trade than with the other theory of making an investment."

14. In **Bhogilal H. Patel v. Commissioner Of Income-Tax (Central), Bombay** [1969 SCC OnLine Bom. 110], Bombay High Court following the observations of the High Court of Madras in **Janab Abubucker Sait v. Commissioner Of Income-Tax, Madras** [1961 SCC OnLine Mad. 307] held as follows:



"One of the essential elements in an adventure in the nature of trade is the intention to trade; that intention must be present at the time of the purchase. The mere circumstance 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".

15. In **Commissioner of Income-Tax v. Sushila Devi Jain** [(2003) 259 ITR 671], the High Court of Punjab and Haryana had occasion to consider the same question and it basing on the facts and circumstances which disclosed a total lack of intention it was held as follows:

"The Tribunal and the Commissioner of Income-tax (Appeals) have both rightly held that the sale of land by the assessee was not in the nature of business because there is no continuous activity. It is true that even a single venture could be regarded as a trade or business but there have to be circumstances which should give rise to such a conclusion. There are no such circumstances existing in the present case. What is necessary is to find out the intention of the assessee at the time of the purchase of land. In the case before us, the land was never purchased by her. She acquired the same on the basis of a will on the death of her husband. She sold the same in parcels because the huge area could not be sold in one go. Such an activity, in our opinion, cannot amount to trade or business within the meaning of the Act."

16. In **Commissioner of Income Tax v. Sohan Khan & Mohan Khan** [(2008) 304 ITR 194 (Raj)] Rajasthan High Court considered the question and held as follows:



In our view, one of the most significant considerations would be, the regularity of transaction of purchase and sale. Mere fact that there was a series of transactions of sale only, by selling the part of the whole land, purchased in one go, or purchased once upon a time, in piecemeal, would not render the activity of sale to be an "adventure in the nature of trade". In the present case, there is nothing to show that the land was purchased with the intention to sell at a profit, or with requisite intention, to bring it within the parameters of "stock-in-trade". It is not shown that the assessee is a regular dealer in real estate. It appears, that the land was purchased in 1970, which was under cloud of land ceiling laws, and after that cloud was cleared, and other adjoining lands had been developed, and since the land was not yielding any return, it was decided to be sold in piecemeal, by earmarking plots, but then nonetheless it would remain a disposal of the capital asset only, and not a transaction of any "stock-in-trade" so as to be described as "adventure in the nature of trade". Obviously therefore, it is liable to be taxed only, as the capital gain.

17. In **Commissioner of Income Tax v. A. Mohammed**

Mohideen [(1988) SCC OnLine Mad. 404], it was observed that :

"in order to hold that an activity is in the nature of an adventure, there must be positive materials to prove that the assessee intended to trade in such an activity and, in the absence of evidence, the sale of immovable property consisting of land could give rise only to capital accretions."

18. The precedents discussed above show that the intention of the assessee gauged from his conduct both prior and subsequent to the transaction assumes relevance while proving that the transaction effected is an adventure in nature of trade. As regards



the burden of proving it in **Uttam S.Arora v. Deputy Commissioner Of Income Tax** [(1999) 102 Taxman 150 (Delhi)] the High Court of Delhi following the dictum laid down in **Commissioner of Income-Tax v. Raunaq Singh Swaran Singh** [1971 SCC OnLine Del. 366] it was held that:

“The burden is upon the Department to show that a transaction effected by the assessee is an adventure in the nature of trade.”

19. The precedents discussed above leads us to conclude that when a property kept not for trade, but for an investment purpose is sold, the gain has to fall under head 'capital gains' and such transaction is only taxable under capital gain and not under adventure of trade. If the Revenue intends to prove the contrary, then the burden is upon it to prove it by reliable evidence. Merely because the assessee makes some profit in a particular transaction, it can not be treated as an adventure in the nature of trade so long as the initial intention or a reason investing money was to hold the property and utilise it for a different purpose.

20. Having understood the term “adventure in the nature of trade” used in Section 2(13) of the Income Tax Act as above and that the burden of proving it is on the Revenue, we now proceed to consider whether the the assessee’s investments in real estate, factual details of which were unearthed during the search would



justify terming his involvements in real estate transactions as one on capital account or whether the Revenue has sufficient evidence to prove that the activities of the assessee constituted an adventure in the nature of trade.

21. It is noted that in the impugned Orders, the ITAT has found that the assessee was engaged in medical business and there was no material to show that the purchase and sale of landed properties were allied or incidental to such business. The real estate transactions conducted by him were not frequent and their scale was not substantial. For instance after a sale of property in 2007, the next sale occurred only in 2011. No external borrowings were seen affected by the assessee for investment in properties and the source was only the family funds. The holding period of properties were very low thereby meaning that the element of risk involved in the engagement was deliberately kept low displaying the intent of such investment to be more towards creating a long term capital gain and increase in value of the capital asset rather than to engage in an adventurous pursuit of real estate trading. It has been revealed that the assessee had sufficient funds during the relevant time to purchase properties and the entire cost was paid at the time of purchase of the property itself. Availing of borrowed funds to invest in real estate purchases, which is an essential facet of commercial real estate trading, is thus absent in the forays into



the real estate investment made by the assessee. It has been noted that the assessee had been devoting very less time and effort in property transactions which were isolated and once-in-a-while activities when compared to the substantial effort and time spent in focusing on the building and propagation of the medical business under the trade name 'SEVANA'. Finally and more importantly, it had been noted by the ITAT that the assessee had never treated the properties as stock in trade and the search in the residential and business premises of the assessee had not revealed any material to suggest that the assessee had advertised the sale of properties or that he had made any efforts towards creating or submitting a development plan before any authorities with the objective of developing the property and thus augmenting its value in real estate market. The ITAT has noted that no evidence has been procured to reveal that the assessee had done activities such as plotting, consolidation, laying of roads, preparation of development plans, obtaining permits for piling, excavation etc, or preparation of reports for external financing which are typical activities indulged in by real estate traders.

22. In the light of the above facts as revealed through evidence it was valid on the part of CIT (A) and the ITAT to conclude that the assessee had held the landed property as investment and disposal of the same would not convert, what was a capital



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accretion, to an adventure in the nature of trade. The finding arrived at by the ITAT based on the facts and circumstances available at hand, that the assessee had treated the landed property as an investment acquired over the years and did not choose to carry on any commercial activity with reference to such land and had upon noticing favourable market conditions, sold the land and fetched a good price, does not justify the action of the AO to treat the activities of the assessee as adventure in the nature of trade.

23. We find the reliance placed by the ITAT on the precedents discussed, and the consequent dismissal of the appeals filed by the Revenue, as valid and sustainable. Accordingly, the substantial questions of law raised in these appeals are answered against the Revenue and in favour of the assessee.

The above ITAs are thus dismissed.

Sd/-

DR. A.K.JAYASANKARAN NAMBIAR
JUDGE

Sd/-

SYAM KUMAR V.M.
JUDGE

csl



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APPENDIX OF ITA 254/2019

PETITIONER'S ANNEXURES

ANNEXURE A COPY OF THE ASSESSMENT ORDER DATED 31-03-2016

**ANNEXURE B COPY OF THE ORDER OF THE COMMISSIONER OF
INCOME TAX (APPEALS) DATED 10-07-2018**

**ANNEXURE C COPY OF THE ORDER OF THE TRIBUNAL DATED
06-02-2019 (ORIGINAL & COPY)**



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ITA Nos.229/ 2019, 251/2019, 252/2019 & 254/2019

:27:

APPENDIX OF ITA 252/2019

PETITIONER'S ANNEXURES

**ANNEXURE A COPY OF THE ASSESSMENT ORDER DATED
31.3.2016**

**ANNEXURE B COPY OF THE ORDER OF THE COMMISSIONER
OF INCOME TAX (APPEALS) DATED 10.7.2018**

**ANNEXURE C COPY OF THE ORDER OF THE TRIBUNAL DATED
6.2.2019 (ORIGINAL & COPY)**



APPENDIX OF ITA 251/2019

PETITIONER'S ANNEXURES

**ANNEXURE A COPY OF THE ASSESSMENT ORDER DATED
31.3.2016**

**ANNEXURE B COPY OF THE ORDER OF THE COMMISSIONER
OF INCOME TAX (APPEALS) DATED 10.7.2018**

**ANNEXURE C COPY OF THE ORDER OF THE TRIBUNAL DATED
6.2.2019 (ORIGINAL & COPY)**



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APPENDIX OF ITA 229/2019

PETITIONER'S ANNEXURES

**ANNEXURE A COPY OF THE ASSESSMENT ORDER DATED
31.3.2016**

**ANNEXURE B COPY OF THE ORDER OF THE COMMISSIONER
OF INCOME TAX (APPEALS) DATED 10.7.2018**

**ANNEXURE C COPY OF THE ORDER OF THE TRIBUNAL DATED
6.2.2019 (ORIGINAL & COPY)**