

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'C' अहमदाबाद ।
IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH, AHMEDABAD

BEFORE SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER
& SMT. MADHUMITA ROY, JUDICIAL MEMBER

आयकर अपील सं./I.T.A. No. 361/Ahd/2019
(निर्धारण वर्ष / Assessment Year : 2015-16)

Harshadkumar Amrutlal Patel Prop. of K Z Finance, 23, Dwarkapuri Society, B/h. Perfect Plaza, Radhanpur Road, Mehsana-384002	बनाम/ Vs.	DCIT Mehsana Circle, Mehsana
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : ABIPP5977G		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी ओर से /Appellant by :	Shri S. N. Divatia, A.R.
प्रत्यर्थी की ओर से / Respondent by :	Shri L. P. Jain, Sr.D.R.

सुनवाई की तारीख / Date of Hearing	20/06/2019
घोषणा की तारीख /Date of Pronouncement	16/09/2019

आदेश/ORDER

PER PRADIP KUMAR KEDIA - AM:

The captioned appeal has been filed at the instance of the assessee against the order of the Commissioner of Income Tax(Appeals), Gandhinagar ('CIT' in short), dated 07.01.2019 arising in the assessment order dated 30.12.2017 passed by the Assessing Officer (AO) under s. 143(3) of the Income Tax Act, 1961 (the Act) concerning AY 2013-14.

2. As per its ground of appeal, the assessee has challenged the action of the CIT(A) in upholding the action of the AO for treating the profits arising on sale of land as 'business income' instead of capital gains as claimed by the assessee.

3. Briefly stated, the assessee is an individual and derives income by way of capital gains and other sources. The assessee filed the return of income for ay 2015-16 in question declaring total income at Rs.1,39,32,720/- which *inter alia* included long term capital gains of Rs.51,62,050/-. The return filed by the assessee was subjected to scrutiny assessment. In the course of the assessment proceedings, the AO *inter alia* noticed that the assessee has sold an immovable property being non-agricultural (NA) land bearing RS No. 1719 situated at Village Panchot, Dist. Mehsana, Gujarat vide sale deed dated 27.11.2014 held alongwith other four co-owners and that the assessee is having 25% share in the total consideration of Rs.12,30,49,800/-. The share of assessee in sale consideration thus worked out to Rs.3,07,62,451/-. The AO disputed the nature and character of transaction declared to be of capital nature by the assessee. According to the AO, the purchase and sale of land parcels by the assessee requires to be treated as 'business venture' and the profits arising on sale of land is taxable under the head 'business income' rather than under the head 'capital gains' as declared by the assessee.

3.1 For holding so, the AO traversed through the whole gamut of sequential events from purchase of land parcels up to the sale point. It was *inter alia* noticed that the land has been purchased by the assessee alongwith other co-owners during FY 2011-12 through five different sale deeds, all falling in old Revenue No. 1724/2 sim of Panchot Village, Mehsana. The land so purchased had been merged

with new Revenue Survey No. 1719 and sold to the purchaser namely M/s. Avenue Super Market Ltd. It was observed that the assessee has purchased the five different land parcels between 16.09.2011 to 30.10.2012. The AO tabulated the transaction details and observed that the assessee alongwith other co-holders got the 'lay out plan' approved from the competent authority initially for plotting of land and subsequently to build residential blocks with small business centre and finally residential blocks with commercial units. The lay out plans were signed by the assessee and other co-holders and the application for change of land user was signed by Narendra Patel on behalf of all the co-holders of new RS No. 1719. It was noted by the AO that sequential action such as purchase of adjoining lands and merger of the land into new RS No., getting lay out plan approved and making application for frequent change in land use indicated the underlying intention of the assessee to do business of land development. The AO noted that the land was converted to NA land after its purchase for residential purpose vide order dated 15.07.2013. The land use was thereafter revised for small business centre vide order dated 06.02.2014. Thereafter, the purpose of land use was again modified and converted for commercial use vide order dated 19.09.2014. An application for revision of land use for commercial purpose was made on 19.08.2014. The assessee thereafter entered into a pact with proposed buyer M/s. Avenue Super Market Ltd and received first installment of sale price on 12.09.2014. The AO thus observed that the purchase of plots of different survey numbers adjoining to each other on different dates and clubbing/merging them in single survey number, conversion of land initially into NA for residential purpose and then for small business centre purpose and finally for commercial purpose clearly indicate that the land was purchased and sold exclusively keeping in mind the dynamics of business and such venture is akin to business as defined under s.2(13)

of the Act. The AO observed from the registered sale deed that the entire act of the assessee was to provide possession of land with ready commercial use to the buyer to enable it to construct the Mall. It was thus inferred that all series of act are purely business oriented and therefore, the profits arising on sale of land is required to be treated as 'business income'. The AO incidentally also noticed that the initial Banakhat amount of Rs.21 Lakhs was received from the buyer after application for modification in land use plan for commercial purposes was moved and therefore the assessee was under no compulsion to act on behest of the proposed buyer as claimed. The AO inferred the merger and change of land use plan thrice adverse to the assessee and an indication of business leaning for exploitation of land. The AO also noted that the assessee has derived extraordinary profits in a short time horizon which also suggests the element of commerciality in the act of the assessee. The AO accordingly treated the amount of Rs.2,97,02,410/- to be 'business income' of the assessee arising from such land sale which is susceptible to taxation under the head 'business income'. The AO accordingly denied the concessional tax treatment available to the income chargeable under the head 'capital gains' and also denied the deductions and benefits available to capital gains.

4. Aggrieved, the assessee preferred appeal before the CIT(A). The CIT(A) took note of various submissions made by the assessee but however did not find any merit in the case of the assessee. The relevant operative para of the order of the CIT(A) is reproduced hereunder:

"I have considered the facts of the case, perused the assessment order and the written submissions made by the appellant. The facts of the case are summarized as under:-

- 1) *The appellant has declared short term capital gain of Rs. 1,36,21,351/- in the return of income which has arisen out of sale*

of the land at Revenue Survey No.1.719 Sim of Panchot, Mehsana which was sold on 27.11.2014 through sale deed No.MSN/10750/2014 for the total sale consideration of Rs.12,30,49,800/- in which the appellant had share of 25%. The said land has been purchased by the co-owners during the FY 2011-12 through five different sale deeds, all falling in old revenue No.1724/2 of Sim of Panchot village, Mehsana. The land so purchased had been merged with new revenue Survey No.1719 and sold to M/s Avenue Super Market Ltd.

- 2) *The appellant along with other co-owners got this land approved for residential purposes for which the first plan was approved on 05.08.2013 and revised plan on 06.02.2014 for converting the land for residential and small business centre and lastly on 15.09.2014 for converting the entire plot of land for commercial purpose only. The A.O. has taken the stand that the purchasing of land in 5 pieces, merging of the land into new revenue number and converting the same from residential to commercial purposes by making three different applications, is an adventure in nature of business.***
- 3) *Before arriving at this conclusion, the A.O. issued a detailed show cause notice dated 10.11.2017 which has been reproduced in the assessment order itself. Further, the appellant has filed the reply vide his letter dated 04.12.2017 which has also been reproduced in the assessment order itself. The A.O. considered the submissions and rejected them for the reasons assigned in para 3.2 of the assessment order mainly holding that the appellant intended to gain maximum profit on sale of the piece of land, the claim that the conversion of land was as per buyer's request was found incorrect, etc. He ultimately held that the sale of land is an adventure in nature as defined in section 2(13) of the Act and therefore, the profit on sale of the land as required to be taxed u/5.28 of the Act.***
- 4) *The appellant has contended that the appellant along with other co-owners had fulfilled the demand of the buyer of the land for getting the necessary permissions for which correspondence was made through email on 13.08.2014 and 18.08.2014 wherein small layout plans were provided by the buyer of the land. The appellant also objected to the proposition put forth by the AO that the intention of the appellant was business only for the reason that he applied for N.A. on 19.12.2012 and second one on 04.04.2013 and also the A.O/s finding that some expenses had been incurred for getting the land converted into N.A. and the appellant contended that the said expenses were on account of payment of brokerage for the sale of land only. The expenses for approving the lay out plan were also compulsory and based on the agreement made with the buyer of land, for which a copy of agreement has also been filed with the written submissions. The appellant has also contended that he did not enter into frequent sale and purchase of lands in the past and this was the only single land transaction sold to one party, the appellant did not carry out any activity of land development on the said land by way of earth filling, construction of boundary wall, etc. , the asset was not shown as stock in trade in the books of accounts of the appellant, the business of the appellant Is only of***

finance, no series of transactions so as to constitute a business activity, etc.

5) *The appellant has relied on the decision of Hon'ble ITAT, Ahmedabad in the case of Shri Ajitkumar T. Patel Vs. DCIT for A.Y.2008-09 in ITA NO.826/AHD/2010, Deepchand & Co. Vs. CTT(107-ITR-716(Allahabad High Court, CIT Vs. Rewashanker A. Kothari (2006) 155 Taxmann 214 (Gujarat High Court, JankiRam Bahadur Ram(1965) 57 ITR 21 (Supreme Court) which all have been reproduced in the case of Shri Ajitkumar T. Patel(Supra). On the strength of the contentions with judicial citations, the appellant stated that the transaction of purchase and sale of land should not be considered as adventure in the nature of business and the capital gain as declared in the return of income be accepted and the AO's finding in this regard be reversed.*

6.1 *Since the AO has referred to definition as provided in section 2(13) of the Act, the issue is required to be examined with reference to this definition. As per the definition of section 2(13) of the Act, the term "business" is defined as under-*

"Business includes any trade, commerce or manufacture of any adventure or concern in the nature of trade, commerce or manufacture"

6.2 *Further, there is no definition of "Adventure or concern in the nature of trade, commerce or manufacture" in the Income-tax Act. Therefore, various judicial pronouncements on the subject have to be referred. Since the appellant has relied on the decision in the case of Shri Ajitkumar T. Patel, the same has been carefully perused. Further, there are two more decisions at hand, one is in the case of [2018] 89 Taxmann.com (Kerala High Court) rendered in the case of V.A, Jose Vs. DOT, Central Circle, Thrissur and another is [2016] 74 Taxmann.com 12 delivered by the HAT, Pune in the case of Dilip Battu Karanjule Vs., ITO, Pune. (both in favour of revenue). Further, in the case of Pari Mangaldas Girdhardas v. CIT 197 CTR (Guj.) 647, after analyzing various decisions of Apex Court, the Hon'ble High Court of Gujarat has formulated certain tests to determine as to whether an assessee can be said to be "carrying on business in their decision in the case of CIT Vs. Revashanker A Kothari (2006) 155 Taxman 214 (Gujarat) which are as under:-*

- (a) *The **first test** is whether the initial acquisition of the subject-matter of transaction was with the intention of dealing in the item or with a view to finding an investment. If the transaction, since the inception, appears to be impressed with the character of a commercial transaction entered into with a view to earn profit, it would furnish a valuable guideline.*
- (b) *The **second test** that is often applied is as to why and how and for what purpose the sale was effected subsequently.*
- (c) *The **third test** which is frequently applied, is as to how the assessee dealt with the subject-matter of transaction during the time the asset was with the assessee. Has it been treated as stock-in-trade*

or has it been shown in the books of account and balance sheet as an investment. This inquiry, though relevant, is not conclusive.

- (d) *The **fourth test** is as to how the assessee himself has returned the income from such activities and how the Department has dealt with the same in the course of preceding and succeeding assessments. This factor, though not conclusive, can afford good and cogent evidence to judge the nature of transaction and would be a relevant circumstance to be considered in the absence of any satisfactory explanation.*
- (e) *The **fifth test**, normally applied in cases of partnership firms and companies, is whether the deed of partnership or the memorandum of association, as the case may be, authorises such an activity.*
- (f) *The **last but not the least, rather the most important test**, is as to the volume, frequency, continuity and regularity of transactions of purchase and sale of the goods concerned. In a case where there is repetition and continuity, coupled with the magnitude of the transaction, bearing reasonable proportion to the strength of holding, then an inference can readily be drawn that the activity is in the nature of business on following parameters: -*
- a) *Whether the seller of the land was holding the land for the long time or received through inheritance from forefather and he himself was doing any agricultural activities on this land or not?*
 - b) *Whether the seller of the land was legally obliged by the purchaser by providing finance in the form of advance money for the purchase of land intended to be sold to the purchaser?*
 - c) *Whether the purchase of land was with an intention to hold the same for the longer period and in the same status quo or any development of land was to be made such as soil filling (leveling work), obtaining permissions for the purposes of construction of buildings either for residential or commercial purposes?*
 - d) *Whether the seller had made any agreement before selling of the land with the purchaser for carrying out any development work on the said land with mutual consents and through legal agreements and bearing of the expenses by the purchaser?*
 - e) *Whether the purchaser imposed certain conditions on the seller for carrying out the obligations cast on the seller or not and if so, whether they are linked with the payments towards purchase cost by the purchaser?*
 - f) *Whether any agreement to sale has been made and the payments had been received by the sellers setting certain conditions of development of land or not?*

6.3 *First the tests applied in the case of Ajitkumar T Patel (non-reported case of ITAT, Ahmedabad) have been perused and it has been noticed that in that case, the applicant before the Hon'ble ITAT the facts have been summarized as under:-*

- a) *The applicant was a director in several companies and disclosed salary income, dividend income and income from other sources.*
- b) *He purchased the two plots of agricultural land on 28.02.2005 and 14.02.2005 which were consolidated on 16.05.2005.*
- c) *The application for transfer of agricultural land to commercial purpose land (NA land) was made on 17.07.2007 and conversion fees and other charges were paid by the applicant.*
- d) *Final order was passed by the AUDA after deduction of 20% and 40% as per order dated 24.07.2007 and there was some commercial loss in terms of land area on account of deduction.*
- e) *These two plots of land were sold on 23.08.2007 to one Urbanedged Hotels Pvt. Ltd. after retaining the said plots of land for about 2½ years and sold.*
- f) *The A.O. observed that investment in the purchase of plots from own funds did not have any bearing on carrying out of business or investment, the applicant took further steps for conversion of land into N.A. (commercial purposes), payment of WT did not have any bearing on investment, single transaction can also be treated as business transaction, and the intention of the applicant was to earn the profit by selling the developed lands etc.*
- g) *The Hon'ble Tribunal decided the issue in favour of the applicant with the following observations:-*

"11. In the light of the detailed foregoing discussion and on consideration of the evidences placed on record as well as in view of the legal propositions laid down by the Hon file Courts, we hereby hold that the asset in question was not purchased with the object to enter into the trade of land-dealing; because after this transaction or before this transaction there was no evidence of any such activity ever carried out by the assessee. We have perused the expenses incurred by the assessee and the nature of those expenses are mainly towards payment of legal charge, or prescribed fees for consolidation of the plots or for the conversion of the agricultural land into non-agricultural land. Commonly known fact is that in a land trade, generally the land is parceled out into small plots and thereafter marketed. Such an activity has not been carried by the assessee. Even there was no systematic or repetitive buying or selling of land which could indicate an adventure in the nature of trade. Few steps taken by this assessee might be an attempt to receive higher price of land but merely because of these steps, it cannot be held that the appellant is dealing in land estate business. The land in question was never treated as stock in trade but it was treated as capital asset on which wealth-tax was paid All the circumstances and evidences thus demonstrated the purpose of purchase of land and the objective of the assessee for which the land was acquired which by no means can be held an adventure in the nature of trade. We, therefore, hold that the appellant has not entered

into any adventure in the nature of trade and the consideration received on the said land transaction was in the nature of capital gain only, Resultantly, Ground No.1 goes in favour of the assessee."

6.4 *If the facts of the appellant's case are compared with the facts as brought out in the case of Shri Ajitkumar T. Patel, the majority of the tests fail in the case of the appellant. These facts are distinguished as under: -*

Sr. No.	Appellant's case	Case of Ajitkumar T. Patel
1.	<i>The said land has been purchased by the co-owners during the FY 2011-12 through five different sale deeds, all falling in old Revenue No. 1724/2 of Sim of Panchot village, Mehsana. The land so purchased had been("merged,, with new Revenue Survey No.1719 and sold to M/s Avenue Super Market Ltd.</i>	<i>He purchased the two plots of agricultural land on 28.02.2005 and 14.02.2005 which were consolidated on 16.05.2005.</i>
2.	<i>The appellant along with other co-owners got this land approved for residential purposes for which the first plan was approved on 05.08.2013 and the revised plan on 06.02.2014 for converting the land for residential and small business centre and lastly on 15.09.2014 for converting the entire plot of land for commercial purpose only.</i>	<i>The application for transfer of agricultural land to commercial purpose land (NA land) was made on 17.07.2007 and conversion fees and other charges were paid by the applicant.</i>
3.	<i>No such deduction has been made as the land was not falling in any of the Urban Development Authority.</i>	<i>Final order was passed by the AUDA after deduction of 20% and 40% as per order dated 24.07.2007 and there was some commercial loss in terms of land area on account of deduction.</i>
4.	<i>The said lands were held for the period commencing from 16.09.2011 in respect of first three plots (from 30.12.2012 to 11.09,2014) which is less than 3 years and 22 months in respect of other two plots.</i>	<i>These two plots of land were sold on 23.08.2007 to one Urbanedged Hotels Pvt. Ltd. after retaining the said plots of land for about 2Vz years and sold.</i>
5.	<i>There was MOD between the purchasing party and selling party for providing the finance for various processes so that the land can be used for commercial purpose. The buyer was predetermined with whom correspondence through email and subsequent MOU made.</i>	<i>No such MQU was made and all the expenses were borne by the applicant himself before selling of the land and the buyer was not predetermined.</i>
6.	<i>No wealth-tax was paid for the period of holding of land and no personal accounts were prepared or submitted during the course of assessment proceedings exhibiting that the lands were treated as capital assets.</i>	<i>Wealth-tax has been paid and the asset is reflected as capital asset.</i>

Since the facts of the appellant's case are distinguishable from the facts of Shri Ajitkumar T. Patel(Supra), the decisions in the case of [2018] 89 Taxmann.com2 (Kerala High Court) rendered in the case of

V.A. Jose Vs. DCIT, Central Circle, Thrissur and [2016] 74 Taxann.com 12 delivered by the ITAT, Pune in the case of Dilip Battu Karanjule Vs., ITO, Pune have been examined and found that the facts reported in both these cases are quite similar to the facts of the appellant's case. In the case of Shri V.A. Jose, the Hon'ble Tribunal held as under:-

- a) *The assessee purchased a piece of land on 16-8-2006. After leveling the land, he entered into an agreement for sale of the said property to 'T' and sale was concluded in year 2008.*
- b) *The Assessing Officer disregarding the objection of the assessee seeking exemption from taxation on the ground that it was an agricultural land, opined that no agricultural activities had taken place on the land. It was purchased in year 2006 and after leveling, it was sold in year 2008. Soon after the purchase, the assessee had left for Saudi Arabia and he could not have done any agricultural activity, being a Non-Resident Indian (NRI) without obtaining permission of RBI under Foreign Exchange Management (Acquisition & Transfer of Immovable Property in India) Regulations, 2000. The Assessing Officer thus held that the transaction was 'Adventure in the nature of Trade' and accordingly brought to tax income in question under the head 'income from business'.*

The Tribunal upheld the order of Assessing Officer:

HELD

The question of law arising in this appeal is whether the sale consideration was liable to be treated as business income of the assessee under section 28 or whether being the sale of an agricultural land, he was entitled to be exempted from capital gains tax under section 45. [Para 5]

It is an undisputed fact that the assessee had purchased agricultural land on 16-8-2006 while he was still a nonresident Indian and thereafter he did not do any agricultural operations on that land. After retaining it for about two years, he sold it to T, In the meanwhile, he had also leveled the land. Admittedly, he did not obtain the permission of the RBI under rule 47 of the Foreign Exchange Management (Acquisition & Transfer of Immovable Property in India) Regulations, 2000, which prohibits acquisition of agricultural land by an NRI.

The fact that he had leveled the land and enhanced its saleability was also an indication of his intention to resell the land even when he purchased it. He had made huge profits consequent to the sale and therefore undoubtedly the transaction amounts to 'adventure in the nature of trade'. The profit which he made out of this sale would therefore be chargeable to tax under the head 'income from business'. There is no infirmity, whatsoever, in the orders of assessment confirmed by the two appellate forums, which had

considered its validity. Consequently, the appeal fails and it is dismissed. [Para 6]

JUDGMENT

Ashok Menon, J. - *This appeal arises from ITA No.484/Coch/2013 on the file of the Income Tax Appellate Tribunal, Cochin Bench dated 14-11-2014. Appellant challenges the concurrent findings of the first Appellate Authority and the Tribunal confirming the findings of the Assessing authority. The appellant is a non-resident Indian, who filed the report of income on 11-05-2010 for the assessment year 2009-2010 in response to the notice dated 18-02-2010 under Section 142(1) of Income Tax Act (The Act' for brevity). The notice was one issued by the respondent in pursuance to a search operation under Section 132 of the Income Tax Act. It was revealed that the petitioner had purchased 1 acre and 64.75 cents of land at A vinissery Village on 16-08-2006 for a sum of Rs.7,39,200/- (inclusive of documentation charges), and after levelling the land, he entered into an agreement for sale of the said property to one Salgunan of Thrissur on 22-08-2007 for Rs.63,96,000/-. He received an advance of Rs.25,00,000/- as per the agreement and finally sold it to M/s St.Antony's Timber Depot on 20-08-2008.*

2. The Assessing officer disregarding the objection of the assessee seeking exemption from taxation on the ground that it is an agricultural land, opined that no agricultural activities have taken place on the land. It was purchased in 2006 and after leveling, it was sold in 2008. Soon after the purchase, the assessee had left for Saudi Arabia and he could not have done any agricultural activity, being a Non-Resident Indian (NRI) without obtaining permission of RBI under Foreign Exchange Management (Acquisition & Transfer of Immovable Property in India) Regulation, 2000. The assessing officer held that the transaction was "Adventure in the nature of Trade" and accordingly brought to tax the property under the head "income from business" and determined the total income of the appellant at Rs.56,19,593/- apart from the agricultural income return of Rs.28,17,500/- as per Annexure A. Aggrieved by the order, the appellant filed JTA No.345/10-11 before the Commissioner of Income Tax(Appeals)-I, Kochi, who confirmed the assessment and dismissed the appeal as per Annexure B. The appellant challenged the said order before the Income Tax Appellate Tribunal, Kochi Bench as ITA 484/Coch/2013 and it was once again confirmed that the land in question was indisputably not an agricultural land, as per Annexure C. It is this finding, which is under challenge.

3. We heard the learned counsel for the appellant and the counsel appearing for Government of India (Taxes) and records were perused.

4. It is submitted by the learned counsel for the Appellant that there is no capital gains accrued, as defined under

Section 45 of the Income Tax Act. The appellant had purchased agricultural land and retained with intention to cultivate it on his return from Gulf, for good. Agricultural land is excluded by sub-clause (Hi) of sub-section (14) of Section 2, the definition of capital asset. It is further stated that the land still continues to be an agricultural property.

5. The question of law arising in this appeal is whether the sale consideration was liable to be treated as business income of the appellant under Section 28 of the Act or whether being the sale of an agricultural land, the appellant was entitled to be exempted from capital gains tax under Section 45 of the Act.

6. It is an undisputed fact that the appellant had purchased agricultural land on 16-08-2006 while he was still a Non-resident Indian and thereafter he did not do any agricultural operations on that land. After retaining it for about two years, he sold it to St Antony's Timber Depot, Chevoor. In the meanwhile, he had also levelled the land by expending a sum of Rs.1,75,000/-, Admittedly, he did not obtain the permission of the RBI under Section 47 of the Foreign Exchange Management (Acquisition & Transfer of Immovable Property in India) Act, 1999, which prohibits acquisition of agricultural land by an NRI. The fact that he had levelled the land and enhanced its saleability is also an indication of his intention to resell the land even when he purchased it. He had made huge profits consequent to the sale and therefore undoubtedly the transaction amounts to "adventure in the nature of trade". The profit which he made out of this sale would therefore be chargeable to tax under the head "income from business". We do not find any infirmity, whatsoever, in the orders of assessment confirmed by the two Appellate forums, which had considered its validity. Consequently, the appeal fails and it is dismissed. No costs,"

Further, in the case of Dilip Battu(supra), the Hon'ble Tribunal held as under:-

Facts of the case:-

- a) The assessee was an advocate by profession. During relevant year under consideration the assessee was found to have sold immovable property (land) on which gains arising therefrom were not offered for taxation. The assessee claimed the gains arising from sale of lands as exempt from tax taking shelter of section 2(14) read with section 45.*
- b) The Assessing officer observed that (i) the land was not purchased with any intention to hold it for capital accretion, enjoyment and own use but were purchased with the sole motive of earning huge profits on immediate sale thereof as a trading asset, (ii) Major portion of these agricultural lands were not useful for cultivation (Hi) Occupation of assessee was not primarily of an agriculturist (iv) Land was acquired out of borrowed funds. Thus, the Assessing Officer concluded that entire activity of purchase and*

immediate sale of land by the assessee falls within the domain of 'adventure in nature of trade'. He accordingly treated the profit relating to assessee arising on sale of land as 'business income' under section 28(i) read with section 2(13).

- c) *On appeal, the Commissioner (Appeals) held that the intention of the assessee was never to purchase the aforesaid lands with a view to cultivate the same. Hence, she confirmed the action of the Assessing Officer in holding that activities carried out by the assessee towards purchase and sale of impugned land as 'adventure in nature of trade' and thus, a business activity chargeable to tax.*

HELD

- a) *On consideration of various materials on record it is observed that the assessee acquired certain parcel of land at Annapur village of Pune and thereafter re-sold within a very short span of about one and half months or so. The transaction of impugned purchase and sale has given rise to profits which was brought to tax by the revenue as an 'adventure in the nature of trade' under section 28 read with section 2(13). The assessee has disputed the aforesaid action of the revenue on various counts, firstly, it is the case of the assessee that the purchase and sale transaction of impugned land is a transaction of capital nature and consequently, gain arising therefrom is chargeable under section 45 under the head 'capital gains' in contrast to stand of the revenue seeking to treat the land so acquired as a 'trading asset' and, thus, taxing resultant profits on its sale as 'business income' under section 28. Secondly, it is the case of the assessee that the impugned land is an agricultural land. Thirdly, the impugned agricultural land is situated in rural area outside the jurisdiction of municipality or cantonment board etc. is thus outside the purview of definition of 'capital asset' defined under section 2(14) in view of the exclusions provided in sub-clause (Hi) therein. Fourthly, there being no transfer of 'capital asset' per se in view of the exclusions for rural agricultural land as noted above, gain arising therefrom is not taxable under section 45 at all. In essence, the assessee claims that the gain arising on sale of agricultural property not being a capital/asset is not subject to tax at all in view of the mandate of law in this regard. [Para 7]*
- b) *Under section 45, there cannot be any levy of capital gains unless the asset transferred is a 'capital asset' as defined under section 2(14). It is the case of the assessee that the transaction is capital in nature and the impugned land not being a 'capital asset', the gain arising on sale of property not being a capital asset is not chargeable to tax at all. The revenue on the other*

- hand disputes capital nature of transaction as claimed by the assessee. It is the case of the revenue that the sequence of events in the impugned transaction lends credence to the impression of an adventure in the nature of trade referred to in section 2(13) and, therefore, it is akin to 'business' giving rise to its taxability under section 28. [Para 7.1]*
- c) *The question of determination of other issues namely whether the land is agricultural land and if so whether the impugned land is outside the definition of 'capital asset' to claim exempt/on from applicability of section 45 will arise only if the impugned transaction do not bear the trappings of adventure in the nature of trade or commerce etc. Thus, in the context of case in hand, first and foremost controversy that calls for adjudication is whether the impugned transaction is a business transaction or a capital transaction. [Para 7.2]*
- d) *In this context, it is noted that there is a qualitative difference between profits arising from sale of capital assets and that of trading assets. Section 2(13) defining 'business' and section 2(14) defining capital assets operates in mutual exclusion. To put it differently, capital assets and trading assets or stock-in-trade are treated differently under the scheme of the Act. They cannot be compared on par with each other as a similar class of assets. Section 2(13) defines the expression 'business' in an inclusive manner and further embraces any adventure in the nature of trade or commerce etc. within its sweep. [Para 7.3]*
- e) *The claim of the assessee is that the intention at the time of purchase of land was to hold it for his enjoyment and to earn regular yield thereon and, thus, is a capital transaction. Needless to say, these intentions are incapable of any proof. These can only be inferred on the basis of facts and circumstances of each case. The facts of the case as narrated above are quite peculiar. As noted, the assessee has purchased large tracts of land for a substantial consideration. Simultaneously, the wife of the assessee has also purchased some parcels of adjacent land for a consideration. The combined land area is stated to be nearly 18 hectares and 45R equivalent to 45 acres and 28 gunthas. The aforesaid land was sold altogether by the assessee jointly with his wife for a combined consideration of Rs. 2 crores. The share of profit of the assessee is stated to be Rs. 35.87 lakhs on account of transaction of such purchase and sale. Immediately after the impugned purchase, a sale deed was executed between family 'P' and the assessee and his wife jointly. The land is claimed to be an agricultural land by the assessee. Pertinently, the buyer (Family 'P') had earlier advanced a sum Rs. 1 crore to the assessee through Demand Draft (DD) dated 13-8-2008*

i.e. two months before assessee had purchased the property. Evidently, assessee did not possess any own liquid funds at his disposal to enable him to acquire the impugned land. The entire purchase cost is funded by family 'P'. Thus, apparently, the entire money towards purchase of land has been financed by the persons to whom the land was ultimately sold in a very short span of time. The purchase and subsequent sale of the land has quickly happened within a marginal time gap of about one and half months. The contention on behalf of the assessee was that assessee intended to sale other agricultural land in his possession to return the money borrowed from family 'P' which did not fructify. For this purpose, some Memorandum agreement was referred to by way of additional evidence. However, there is nothing on record to justify the circumstances which prevented the assessee to produce the impugned agreement before revenue authorities. No perceptible reasons have been assigned. Notwithstanding, purported agreement for sale of other agricultural land was not acted upon at all. No advance was received against such purported agreement either. The entire explanation for initial intention to return borrowed money which failed is thus bald and unverifiable. It also does not coincide with a normal behavior of a person of ordinary prudence. The entire explanation based on a dumb document not acted upon, thus, has no rational probative value of the purported intention to return friendly borrowals. Whether the value of existing land recorded in the purported agreement was capable of matching the borrowals is also not available on record. The relevant financial data proving the financial capacity of the assessee is not available to justify the stand. Mere averments of generic nature based on some documents which were neither verified by the revenue nor acted upon in any manner cannot be taken as source of explanation for transaction of such magnitude. The assessee has made out a case that owing to the pressure from family 'P' to return their loan amount which was not immediately possible due to financial constraints, it was reluctantly proposed to sell the impugned land so purchased by the assessee. It was thus made out that the compelling circumstances propelled the assessee to enter into such unintended resale. It was thus insisted that there was no intention to earn immediate profits by its sale. The land was thus claimed to be purchased with a view to hold it for exploitation in agriculture and for its capital appreciation and, therefore, the transactions cannot be regarded as an 'adventure in the nature of trade' as held by the Assessing Officer. Such explanation is found to be shallow and superficial. The return of income filed by the assessee shows that the source of regular income

is not commensurate with the magnitude of the land transaction. A person intending to hold a land of this value for its own exploitation and enjoyment and not investing any money of his own are quite contradictory conduct. The assessee seeks to explain that he was wholly dependent of sale of existing agricultural land to substitute the money financed by the lender by his own is without any tangible evidence showcasing the aforesaid intention. On the other hand, here is a financier who has given money of formidable amount purportedly on a friendly consideration without any corresponding commercial benefit and then suddenly turns heat for return of money and thereafter conveniently agrees to acquire the same land without any demur which was purchased from the aforesaid money and that too at very large differentials in such a very short span. These facts when combined together gives a common thread to belief that entire transaction was systematic and pre ordained one, ventured into with clear trappings of commercial spirit where the assessee identified the land on behalf of the existing and known buyer and transferred it to him as soon as the title of the land was obtained and in the process, abnormal and exorbitant gains were earned. The pattern of sequential events dearly suggests that the fund received in advance for such purchase served as an assurance for the transaction to sail through. Notably, initial funds of Rs. 1 crore were provided to the assessee by family 'P' by way of a demand draft unlike cheque transactions. Reasons for friendly loan given by way of a demand draft without any discernible emergency is best known to the parties involved. The governing factors in the form of purchase financed entirely by the ultimate buyer and consequent transfer of land to the ultimate buyer almost immediately on its acquisition cannot be simply brushed aside. Clearly, the assessee was interested in exploiting commercial opportunity for quick gains in a very short time horizon. The attendant facts also points out that the purchase of land was far beyond the earning capacity of the assessee and, thus, claim of the assessee that the land was intended for personal use and its exploitation and for appreciation with efflux of time is utterly improbable and thus is devoid of merits. A combined reading of all connected facts warrant for an inescapable conclusion that the motive for purchase itself was for embarking in an adventure in the nature of trade. [Para 7.5]

- f) *It is also noted that the other contentions of the assessee were that the assessee owns other tract of agricultural land apart from the impugned land and is holding these lands with a view to carry out agricultural operations and, therefore, adverse inference against the assessee is not justified.*

However, this argument is also not impressing. The mere presence of other ho/dings of agricultural land would not grant any indefeasible right to claim any and every transaction of land to be of capital nature. Similarly, solitary transaction of such nature is also of no bearing for determination of the nature of transaction. The issue for determination depends on totality of facts of each case, As noted, the impugned transaction giving rise to the dispute is beset with uncharacteristic features which are akin to adventure in the nature of trade rather than a capital transaction. [Para 7.6]

- g) An incidental point may arise that the land was registered prior to its sale and, thus, be viewed a capital transaction. It is observed that nothing turns on this act of the assesses either. The purchase in a pre-ordained transaction could be registered with a motive to gain proximity to and for overriding control over the sale transaction. The encumbrance if any, thereon can also be weighed by the ultimate buyer for his comfort in purchase. Also, by registration prior to sale, the huge potential of gain can be harnessed without any possible interference. This has all been done with the money of the ultimate buyer without any commitment of his own. The transaction is dearly driven by commerce. The intention to exploit the land for its own agricultural use is not borne out on these facts. As per records, the assessee has reflected meager income from cultivation of existing land. The occupation of the assessee as noted by the revenue is pre dominantly leaned towards legal profession. [Para 7.7]*
- h) Pertinent to note here that the Supreme Court in the case of Dalmia Cement Ltd. v. OT [19761105ITR 633 held that it is not possible to evolve any single legal test or formula which could be applied in determining whether a transaction is an adventure in the nature of trade and that the answer to the question must depend in each case on the total impression and effect of all the relevant factors and circumstances proved therein and which determine the character of the transact/on. [Para 7.8]*
- i) Thus, the cumulative facts and circumstances seen holistically and read in conjunction the tests or parameters laid down by judicial precedents provides sound basis to infer the intention of commercial gain in the impugned transaction. [Para 7.9]*
- j) Having regard to the totality of facts and circumstances, it is to be held that the impugned land was purchased with an intent/on to sell the same to the identified buyers to achieve commercial objectives outright. As noted earlier, section 2(13) seek to explain the term of 'business' by way of inclusive definition. As per section 2(13) expression 'business' include not only trade or commerce, etc. but definition*

further extends to encompass within its ambit an 'adventure in the nature of trade'. The entire gamut of action of the assessee in engaging in such big ticket land purchase without employing any fund of his own and almost immediate resale thereof clearly demonstrates the implicit intention of the assessee that the transaction entered was nothing but an 'adventure in the nature of trade' i.e. a business transaction under extended definition of section 2(13). Consequently, profits arising therefrom acquires the character of 'business income' chargeable under section 28. [Para 8]

k) *Thus, the view of the Assessing Officer and the Commissioner (Appeals) in bringing the income arising on sale of land under the head 'business income is acceptable. [Para 9]*

*6.5 In the light of the above facts of the appellant as compared with relied upon two cases as mentioned above, it is held that the appellant had carried out an adventure in the nature of business as defined in section 2(13) of the Act with a view to earn the profit on sale of the land in question which was to be developed as a commercial property by the pre-determined buyer of the land. Thus, the addition made by the Assessing Officer of Rs.2,97,02,410/- as profit of the business and in lieu of capital gains of Rs.1,36,21,351/- declared by the appellant in the return of income is **confirmed. In the result, the sole ground of appeal is rejected.**"*

The CIT(A) accordingly declined to interfere with the order of the AO and refused to grant any relief claimed in the appeal.

5. Further aggrieved, the assessee preferred appeal before the Tribunal.

6. When the matter was called for hearing, the learned AR for the assessee broadly reiterated the contentions made before the lower authorities and submitted that both the authorities have misdirected themselves in appreciating the facts and have applied wrong tests to come to an adverse conclusion. The learned AR for the assessee submitted that the assessee is an individual and his never entered into purchase and sale of land in past and this is the only land transaction carried out. The assessee alongwith others had purchased land in 2011 of nearly 17,125 sq.mtrs. whereas the sale was made of only 4228.62

sq.mtrs. i.e. around 25% only and the rest of the land also continued to be held by the assessee. The assessee has not undertaken any land development activity of his own. The conversion of agricultural land into NA land was stated to be legal compulsion failing which the land could not have been transferred. It was further asserted that consolidation of different parcels of lands could not be recorded as any 'business activity' *per se*. Such acts were done in December 2012 and September 2013 whereas the negotiation for sale of land commenced in August 2014. The plans were submitted as per the requirement of purchaser and the appellant was not concerned with such act whatsoever except for deal to sail through. It was further pointed out that the sale proceeds of the said plot were not utilized for acquiring another land which is a normal course in the case of a trader. It was thus submitted that merely because the property was sold at a high profit would not give rise to any presumption towards an adventure in the nature of trade. The learned AR for the assessee relied upon the decision of the co-ordinate bench in *Ram Saroop Saini HUF vs. ACIT ITA No. 1409/Del/2005* order dated 27th May, 2007 to contend that where a portion of agricultural land was converted into NA land and thereafter sold, the surplus arising therefrom should not be regarded as 'business activity'. The learned AR assailed the action of the lower authorities and submitted that such action of the Revenue was guided by consideration of Revenue alone to gather unlawful taxes from the assessee. The learned AR accordingly urged for reversal of the action of the lower authorities and restoration of claim of the assessee for taxability of surplus arising from sale under the head 'capital gains'.

7. The learned DR, on the other hand, relied upon the order of the lower authorities and submitted that the relevant facts have been objectively analyzed by the CIT(A) while affirming the action of the

AO. The learned DR for the Revenue submitted that when all the facts as narrated by the AO and CIT(A) are read together, the conclusion cannot be faulted. It was submitted that the assessee has acquired the land in FY 2011-12 and 2012-13 and thereafter took a series of action immediately thereafter prior to its sale within a short time horizon. The concerted action undertaken by the assessee one after the other immediately after purchase would suggest that the assessee was in hurry to exploit the land and maximize its value commercially. The learned DR accordingly submitted that the concessional treatment available to the profits arising on sale of a capital asset cannot be given to the assessee herein where the surrounding circumstances clearly suggest that the assessee intended to resale the land at best available profits by indulging in commercial behavior. The learned DR accordingly submitted that no interference with the order of the lower authorities is called for.

8. We have carefully considered the rival submissions. The solitary issue for adjudication is whether the profits earned on sale of certain parcels of land by the assessee in the relevant assessment year is required to be taxed under the head 'capital gains' (at concessional rate) as offered by the assessee or is to be treated as 'business income' (susceptible to tax at higher rate) of the assessee as realigned by the AO.

8.1 The issue involved is essentially factual in nature and depends squarely upon the totality of the facts of a given case. Therefore, no rigid legal test can be applied *per se* and the question has to be determined on the basis of the totality of facts given case. No single fact could thus be seen in isolation. As noted, it is the case of the assessee that the plots/land parcels were purchased in FYs. 2011-12 & 2012-13 alongwith other co-owners by different registration deeds from different owners. However, the land sale transaction in question

is a single land transaction and sold to one party without any subdivision thereof in smaller plots. It is further case of the assessee that he has not entered into any developmental activity of plot, such as, earth filling, construction of boundary wall etc. The land parcels were not treated as trading asset in the books. The primary business of the assessee is finance only and the assessee had acquired the land with the only motive to fetch capital appreciation. Some parcels of the land in question being an agricultural land at the time of purchase faced legal restriction of sale (only to agriculturists) and therefore, the lands were converted into NA land as per the prescribed procedure. The converted land was sold in FY 2014-15. Thus, a solitary transaction giving rise to surplus was rightly offered under the head 'capital gains' in the circumstances of the case.

8.2 The Revenue, on the other hand, contends that the transaction of purchase and sale of land parcels is an adventure in the nature of trade as defined in Section 2(13) of the Act and consequently, the profits arising on sale of land is required to be taxed under s.28 of the Act. The pre-dominant contention of the Revenue is that the assessee has indulged in not merely purchase and sale of land but has undertaken measured steps in tandem to significantly improve the value of the land for its commercial exploitation and consequently, the extraordinary profits arising from sale of land in a short time horizon do not support the claim of the assessee for its chargeability under the head 'capital gains'.

8.3 On a perusal of the assessment order, we observe that the AO has tabulated the parcels of land purchased by the assessee between September 2011 to October 2012 alongwith other co-holders. It is further noticed by the AO that the land parcels being adjoining to each other were merged and consolidated in a single piece of land by virtue of the order of the competent authority. The land use was also

modified from agricultural land to non-agricultural land. The AO further noticed that the assessee alongwith other co-holders got the lay out plan approved from the competent authority initially for the plotting of land and subsequently to build residential blocks with small business centre and finally residential block with a commercial unit. It is thus the case of the AO that frequent changes made in the land use would indicate the real intent of the assessee to do the business of land development. It is emphasized on behalf of Revenue that the application was made for revision of land use for commercial purpose prior to the Board Resolution of the purchaser company intending to acquire a portion of the aforesaid land parcels and noticeably first installment was also received subsequent to the application moved for exploitation of land for commercial purposes. Thus, the case made out on behalf of the assessee that the actions were undertaken on behalf of buyer is unsupportable on facts. The purchasers were handed over the possession with its commercial use so as to construct the Mall by the proposed buyer.

8.4 On a cumulative reading of these glaring facts, the real intention of the assessee is quite demonstrable. The assessee has purchased the land in September 2011 onwards and swung into action immediately thereafter for conversion of land into NA land, merger of land, conversion of land for commercial use etc. As noted by the AO, the assessee also got a lay out plan approved from competent authority initially for plotting of land and subsequently to build the residential blocks with small business centre in the intervening period. The facts and circumstances of such sequential events give rise to an infallible impression that the driving force for purchase of land was to exploit it commercially. The series of action taken by the assessee one after another does not bear out the contention of the assessee that the land was purchased with an idea to enjoy accretion to capital and the

purchase transactions were meant for maximization of wealth. While it is the case of the assessee that the land parcels were held as capital asset prior to sale, such contention appears to be shallow. It is an admitted position that the land parcels were not subjected to wealth tax as applicable to capital assets. Coupled with this, we also fail to see anything on record to suggest the use of the land for agricultural purpose or for any purpose to enable the assessee to generate any regular yield altogether thereon. The absence of any yield also gives an impression that assessee never intended to exploit the land for its own use or enjoyment. The concerted and measured action of the assessee as noted above underscores the overriding motive of the assessee to maximize the profit with systematic action. It is thus tough to debunk the perception that the lands were purchased as 'trading assets' indeed to reap profits commercially. Such inference also gains traction from the fact that the assessee has reported a profit in the vicinity of Rs.3 Crores on investment of Rs.10.60 Lakhs within a span of the 3-4 years. Such profits are possibly attributable to the intermediate steps of substantial nature undertaken by the assessee for commercial exploration. The whole approach of the assessee is thus nothing but a purely business oriented approach.

8.5 The assessee has harped on the facts that this is a solitary transaction of purchase and sale of land and therefore ought not to have been regarded as a 'business activity'. We do not find any weight in such plea. The assessee has not merely purchased and sold a portion of land but has taken calculated steps one after the other with commercial motives in mind. While it is true that a solitary transaction is not to be ordinarily regarded as a 'business transaction', such proposition however is not absolute and abstract. It entirely depends on the facts and circumstances of a given case. Sometimes, a solitary transaction may also carry trappings of business whereas multiple transactions undertaken one after the other may also be out of

ambit of Section 2(13) of the Act having regard to fact situation. A single plunge theory thus cannot be applied as held in several judicial precedents. A reference may be made to the decision of the Hon'ble Supreme Court in *Raja J. Rameshwar Rao vs. CIT (1961) 42 ITR 179 (SC)* in this regard where the fact situation is quite similar. In that case, the Hon'ble Supreme Court regarded the activity to be a 'business venture' where a person acquires land with a view to selling it later after developing it and after making the area more active. The assessee in the present case has done somewhat similar things with a rather greater intensity. The assessee has changed the character of land in entirety and undertaken multiple actions which enabled it to sale the land at astronomical profits in quite a short duration. The pro-active conduct of the assessee since the time of purchase till the sale underscores the real intention of the assessee. In the present case, what has been done is not merely a realization or a change of investment but an act done in what is truly the carrying on of business in commercial sense.

8.6 It may be pertinent to notice here the purport and intent of Section 2(13) of the Act which defines the expression 'business' in an inclusive manner. The expression 'business' as defined in Section 2(13) of the Act does not merely include any trade, commerce or manufacture but is elastic and wider to include the adjunct 'adventure in the nature of trade, commerce etc.' Thus, the legislature has made a conscious inclusion to expand the scope of business to include certain actions akin to 'business' in addition to normal business. The activity of the assessee herein has engaged the time, attention and the labour of the assessee apart from money. The profit arising on sale is nearly 30 times of investment in a period of 3-4 years owing to such concerted and planned action. Thus, when functional test is applied, the transaction of purchase and sale of land has been rightly regarded as business activity by the AO.

8.7 As observed earlier, the issue is essentially factual and is governed by the facts of each case. Judicial utterances made in the setting of the facts of a case would thus not supply unless it is shown that facts are identical. We are thus not required to delineate the nicety of law *de hors* the facts of such case. The reliance placed by the assessee on judicial precedents before the CIT(A) as well as before us are rendered in the fact situation which are substantially different. Thus, no abstract principle can be applied in the present facts. On the contrary, the fact situation is closure to the facts in *Raja J. Rameshwar Rao (supra)* and therefore the issue is required to determine in parity therewith. We thus find that the CIT(A) has rightly endorsed the action of the AO. We find no reason to interfere with the conclusion drawn by the CIT(A).

9. In the result, the appeal filed by the assessee is dismissed.

This Order pronounced in Open Court on 16/09/2019

Sd/-
(MADHUMITA ROY)
JUDICIAL MEMBER
Ahmedabad: Dated 16/09/2019

Sd/-
(PRADIP KUMAR KEDIA)
ACCOUNTANT MEMBER

True Copy

S. K. SINHA

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. राजस्व / Revenue
2. आवेदक / Assessee
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद /
DR, ITAT, Ahmedabad
6. गार्ड फाइल / Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण, अहमदाबाद ।