IN THE HIGH COURT OF JUDICATURE AT

BOMBAY

BENCH AT AURANGABAD.

TAX APPEAL NO.5 OF 2007

The Commissioner of Income
Tax No.I, Kendriya Rajaswa
Bhavan, Gadkari Chowk,
Old Agra Road, Nasik-422002. … Appellant.

Versus

Jasumati Properties Pvt. Ltd.
At Nandurbar, Dist.Nandurbar. … Respondent.

…

TAX APPEAL NO.6 OF 2007

The Commissioner of Income
Tax No.I, Kendriya Rajaswa
Bhavan, Gadkari Chowk,
Old Agra Road, Nasik-422002. … Appellant.

Versus

Vimalnath Properties Pvt. Ltd.
At Nandurbar, Dist.Nandurbar. … Respondent.

…

TAX APPEAL NO.7 OF 2007

The Commissioner of Income
Tax No.I, Kendriya Rajaswa
Bhavan, Gadkari Chowk,
Old Agra Road, Nasik-422002. … Appellant.

Versus

Mruga Properties Pvt. Ltd.
At Nandurbar, Dist.Nandurbar. … Respondent.
…

TAX APPEAL NO.8 OF 2007

The Commissioner of Income
Tax No.I, Kendriya Rajaswa
Bhavan, Gadkari Chowk,
Old Agra Road, Nasik-422002. … Appellant.

Versus

Bhavik Properties Pvt. Ltd.
At Nandurbar, Dist.Nandurbar. … Respondent.
…

TAX APPEAL NO.9 OF 2007

The Commissioner of Income
Tax No.I, Kendriya Rajaswa
Bhavan, Gadkari Chowk,
Old Agra Road, Nasik-422002. … Appellant.

Versus

Saraswati Properties Pvt. Ltd.
At Nandurbar, Dist.Nandurbar. … Respondent.
…

TAX APPEAL NO.10 OF 2007.

The Commissioner of Income
Tax No.I, Kendriya Rajaswa
Bhavan, Gadkari Chowk,
Old Agra Road, Nasik-422002. … Appellant.

Versus

Nami Properties Pvt. Ltd.
At Nandurbar, Dist.Nandurbar. … Respondent.

…

TAX APPEAL NO.11 OF 2007

The Commissioner of Income
Tax No.I, Kendriya Rajaswa
Bhavan, Gadkari Chowk,
Old Agra Road, Nasik-422002. … Appellant.

Versus

Sarthi Properties Pvt. Ltd.
At Nandurbar, Dist.Nandurbar. … Respondent.

…

TAX APPEAL NO.12 OF 2007

The Commissioner of Income
Tax No.I, Kendriya Rajaswa
Bhavan, Gadkari Chowk,
Old Agra Road, Nasik-422002. … Appellant.

Versus

Vasupujya Properties Pvt. Ltd.
At Nandurbar, Dist.Nandurbar. … Respondent.

…

TAX APPEAL NO.13 OF 2007

The Commissioner of Income
Tax No.I, Kendriya Rajaswa
Bhavan, Gadkari Chowk,
Old Agra Road, Nasik-422002. … Appellant.

Versus

Ketan Properties Pvt. Ltd.
At Nandurbar, Dist.Nandurbar. … Respondent.

…

TAX APPEAL NO.14 OF 2007

The Commissioner of Income
Tax No.I, Kendriya Rajaswa
Bhavan, Gadkari Chowk,
Old Agra Road, Nasik-422002. … Appellant.

Versus

Mitul Hotels Pvt. Ltd.
At Nandurbar, Dist.Nandurbar. … Respondent.

…

TAX APPEAL NO.15 OF 2007

The Commissioner of Income
Tax No.I, Kendriya Rajaswa
Bhavan, Gadkari Chowk,
Old Agra Road, Nasik-422002. … Appellant.

Versus

Nutan Properties Pvt. Ltd.
At Nandurbar, Dist.Nandurbar. … Respondent.

…

TAX APPEAL NO.16 OF 2007

The Commissioner of Income
Tax No.I, Kendriya Rajaswa
Bhavan, Gadkari Chowk,
Old Agra Road, Nasik-422002. … Appellant.

Versus

Mitul Constructions Pvt. Ltd.
At Nandurbar, Dist.Nandurbar. … Respondent.

…

Mr.Alok Sharma, Senior Standing Counsel for the appellant.
Respondents absent though served.

…

CORAM : S.V.GANGAPURWALA &
A.I.S.CHEEMA,JJ.

Date : 13.04.2015.

ORAL JUDGMENT (Per S.V.Gangapurwala,J.)

1. Heard.

2. All these appeals are based on same set of facts, as such are decided together.

3. In the assessment year 1998-99, the Respondent-Company disclosed the income from long term capital gain on sale of plots. The

Assessing Officer was of the view that the land was acquired with intention to earn profit by making construction of flats. The Assessing Officer required the assessee to justify the claim of long term capital gain. The assessee claimed that it had decided to construct the flats as promoters. The Assessing Officer was not satisfied with the reply. It held that the activity of the Respondents was business adventure, as such order U/s 143(3) of the Income Tax Act, 1961 was passed. The Respondents filed appeals before Commissioner of Income Tax (Appeals). The Commissioner of Income Tax (Appeals) allowed the appeals holding that the activity of the Respondents amounts to long term capital gain. Against the said order of the Commissioner of Income Tax (Appeals, the Revenue filed appeals before the Income Tax Act Appellate Tribunal. The Tribunal dismissed the appeals of the Revenue confirming the judgment of the Commissioner of Income Tax (Appeals). Aggrieved thereby, the present appeals. This Court while admitting the appeals framed following substantial question of law :

> *"Whether income earned by sale of land (plots) is long term capital gain as defined by Section 2 (29B) or the same is income from business/profession.?"*

4. Mr.Sharma, learned counsel for the appellant submits that the Commissioner of Income Tax (Appeals) and the Tribunal committed error in coming to the conclusion that the transaction in question amounted to capital gain and is not in the nature of business adventure. The learned counsel submits that the number of transaction is not relevant. Even isolated transaction can amount to adventure in the nature of trade. The learned counsel submits that the Assessing Officer has taken into consideration all the relevant aspects of the matter. The Respondent Company had purchased the land for the purpose of construction of flats and thereafter to sell it on profit. The Respondent sold the said land to Reliance Industries after holding it for more than three years. The very purpose of the

incorporation of the Respondent Company was relevant. According to the learned counsel, the assessment order is self-explanatory. The Directors of the Company mainly deal in purchase and sale of immovable assets. The land was acquired through the consent terms filed in the Apex Court from 25 co-owners. It was decided to construct buildings or flats. In view of the aforesaid aspect, the Assessing Officer was right in concluding that the transaction was adventure in the nature of trade. The intention of the acquisition of the land would be relevant. This aspect has not been considered by the Commissioner of Income Tax (Appeals) and the Tribunal. The learned counsel relies on the judgment of the Apex Court in a case of **"G.Venkataswami Naidu and Co Vs. Commissioner of Income Tax"** reported in **AIR(SC)-1959-0-359,** so also the judgment of the Division Bench of this Court in a case of **"Narayan Ramdayal Lathi (HUF), Gopal Ramnarayan Kasat, Subhash Ramnarayan Kasat Vs. CIT and ITO"** reported in **(2010) 328 ITR 556 (Bombay).**

5. The Respondents are served, none

appears for the Respondents.

6. With the assistance of the learned counsel for the appellant, we have considered the judgment passed by the authorities below and have also considered the case laws. The Apex Court in the case of **"G.Venkataswami Naidu and Co Vs. Commissioner of Income Tax"** referred supra has observed that the jurisdiction of the High Court relates to question of law. The conclusion as to whether the transaction is an adventure in the nature of trade or capital gain is one of mixed law and fact. There is no Abstract Rule to determine the same. It has also been observed by the Apex Court that single or isolated transaction can also tantamount to adventure in the nature of trade.

7. The Apex Court in the said judgment has observed as under :

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

8. The Tribunal in its judgment has observed as under :

"The existence of few admitted facts were that the company has purchased the said chunk of land on 26.4.1991 relevant to AY. 1992-93 After retaining the land without a development activity on the same, the land was sold during the year under consideration and capital gain was disclosed by the assessee. There is no dispute about the expenditure incurred

during the year such as administrative expenses, bank charges, preliminary expenses, rent professional fees, interest etc. The revenue has not placed any evidence on record that there was incurring of expenditure such as levelling of plot, digging brickwork or any like nature construction activity. There is also no proof or evidence whatsoever to indicate that the said piece of land was dealt with in any manner or divided into small plots for sale. There is also no evidence on record to indicate that the assessee company had ever entered into the trade of purchase and sale of land. Next is the question that why construction of flat could not be started and the ld. AR has given satisfactory explanation that due to the hindrance of the Municipal Corporation and non-supply of drainage system, the company had to forbid the project. One of the main reasons as *stated by the AO for treating the said as business transaction was that the company has disclosed in the balance sheet the value of the plot under the head "fixed asset", "land and building (work-in-progress)". This objection of the AO has also been properly answered by the Ld.A.R. as were seen in the above paragraphs. We are convinced that simply an asset was disclosed as "fixed asset" does not convert it into "business asset". This is also not a case of lull of business or a gap in the business activity. This is a case where the business was not started at all and stopped at the nascent stage. Since the assessee was unable to fulfill the object of the incorporation i.e. construction of property and flats, hence, a decision was taken to dispose off the property and the sale consideration was offered as long term capital gain."*

9. After considering various Judgments of the Apex Court and the High Court, the Commissioner of Income Tax (Appeal) also relied on the judgment in a case of **“G.Venkataswami Naidu And Co. Vs. Commissioner of Income Tax”** The facts have been discussed threadbare by the Commissioner of Income Tax (Appeals) and the Tribunal and thereafter they have arrived at a plausible conclusion. It is observed that the land was held by the assessee for about five years. The land was not productive. The land was situated outside the Municipal limit. The said land was also not divided into small plots. There is also no evidence on record to indicate that the assessee Company had ever entered into the trade of purchase and sale of land. The revenue has not placed any evidence on record there was incurring of expenditure such as levelling of plots, digging, brick work or any like nature of construction activity.

10. Considering the aforesaid aspect of the matter, the Commissioner of Income Tax (Appeal), the Tribunal have arrived at a plausible

conclusion.

11. In light of the above, no case for interference is made out. The Tax Appeals as such are disposed of. No costs.

(A.I.S.CHEEMA,J.) **(S.V.GANGAPURWALA,J.)**

asp/office/Ta5.07

(A.I.S.CHEEMA,J.) **(S.V.GANGAPURWALA,J.)**

asp/office/