IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 220 OF 2024

Pr. Commissioner of Income Tax-Central 4,
Aaykar Bhavan, M.K.Road, Mumbai-400020. Appellant

Versus

Aurum Ventures Pvt. Ltd.
(Successor in interest to Aurum Platz Pvt.Ltd.),
Gen 4/1, Industrial Area, Thane Belapur Road,
Ghansoli, Navi Mumbai-400710. Respondent

Mr.Suresh Kumar for the Appellant.

Mr.Sashi Tulsiyan a/w P. C. Tripathi for the Respondent.

CORAM: G. S. KULKARNI &
AARTI SATHE, JJ.

Date of Reserving the Judgment : 24th July 2026

Date of Pronouncing the Judgment : 4th August 2026

JUDGMENT – (Per : Aarti Sathe, J.) :-

1. This appeal has been filed by the Appellant-Revenue under Section 260A of the Income-Tax Act, 1961 (hereinafter referred to as the "Act"), challenging the order dated 20th June 2023 (hereinafter referred to as the "impugned order") passed by the Income Tax Appellate Tribunal (hereinafter referred to as the "ITAT"), allowing the Respondent-Assessee's appeal, which was filed against the order dated 30th August 2021 passed by the Commissioner of Income Tax (Appeals) (50) -Mumbai (hereinafter referred to as "CIT (A)"), thereby holding that the proceeds received on sale of properties

by the Respondent-Assessee be treated as income from 'Capital Gains' and not as 'Business Income'. The relevant assessment year (AY) is 2017-18. Though by the present appeal the Appellant-Revenue has raised nine questions of law, however, learned counsel on behalf of the Appellant-Revenue has restricted his challenge only in respect of question of law No. 1, which is reproduced below: -

> i. Whether on the facts and circumstances of the case and in law, the tribunal has erred in allowing the assessee's appeal on the issue of treatment and taxation of Capital Gain on sale of flats under consideration as business income?

2. Briefly the facts are as follows: -

(i) The Respondent-Assessee is in the business of buying properties and leasing out those properties on a long-term basis for earning rental income. The Respondent-Assessee developed a real estate project in South Bombay at CS No. 406, Babulnath Cross Lane, Pandita Ramabai Marg, Near Wilson College, Mumbai-400007, and the completed project was eventually named as 7, Marine Drive (hereinafter referred to as the "Project"). For the relevant AY, the Respondent-Assessee e-filed their original Return of Income (ROI), declaring total income at Rs. 12,84,53,100/-, and the same was processed under Section 143(1) of the Act. A search and seizure action under Section 132 of the Act was conducted on 22nd March 2018 by DDIT (Investigation), Unit – 6(1), Mumbai in the case of the Respondent-Assessee and its related entities. Consequent to the search, a notice under Section 153A of the Act was issued to the Respondent-Assessee on 4th July 2019, and in response thereto the Respondent Assessee filed its ROI on 17th July

2019 declaring total income at Rs. 12,84,53,098/-. Subsequently, notices along with questionnaires were issued and served on the Respondent-Assessee, and after examining the responses and details of the Respondent-Assessee, the assessment order dated 30th December 2019 was passed by the Assessing Officer (AO) under Section 153A read with Section 143(3) of the Act. In the aforesaid assessment order dated 30th December 2019, the income declared by the Respondent-Assessee arising from the sale of flats in the completed Project was assessed as 'Business Income' as opposed to 'Capital Gains'.

(ii) While arriving at the aforesaid conclusion, the AO noted that the land for the Project was bought on 31st January 2008, i.e., in AY 2007-08, the Project had commenced on 25th February 2010, and the Occupation Certificate (OC) was received on 5th September 2013. The value of the land was declared by the Respondent-Assessee at Rs. 13.21 crores, though the actual consideration paid was Rs. 10.50 crores. The value of the property as per Stamp Duty Authority was Rs. 15.56 crores, and the total cost of construction of the Project was declared by the Respondent-Assessee at Rs. 40.93 crores. The Respondent-Assessee, as stated aforesaid, claimed receipts on sale of seven apartments in Project as 'Capital Gains', which the AO negatived, and held that as 'Business Income' by the assessment order dated 30th December 2019. The AO disregarded the 'Objects' as set out in the Memorandum of Association (MOA) of the Respondent-Assessee, which reads as follows:-

> **"To own and let out apartments in the building situated at C.S no 406 Part I bearing D ward No. 2574(3), Street no. 58-70, 6A, Chowpatty Road of Malabar Hill Division at Pandita Ramabai Road,**

> **Babulnath Cross Lane, Mumbai 400007 also known as Aurum Platz for rent**",

and relied on the provision of 'Other Objects' which reads as:-

> "**To carry on the business of construction, purchasing, developing or otherwise dealing in buildings, houses, bungalows, factories, sheds, recreational clubs and facilities including golf courses, sports and social clubs, trade premises, plant, machinery, public buildings, lands, farms or any other kinds of assets, estates or property, immoveable rights or chose in action**"

relying on such "Other Objects", the AO reached to the conclusion that the proceeds from the sale of the flats in the Project were to be treated as 'Business Income'. The AO also held that the Respondent-Assessee did not have the intention of letting out the flats, and further on a perusal of the books of accounts of the Respondent-Assessee, held that a sum of Rs. 4 crores was credited to the account of the Respondent-Assessee on 29th November 2013 from a prospective buyer, soon after the Respondent-Assessee received the OC on 5th September 2013. The AO also held that the Respondent-Assessee had applied for water connection on 30th October 2013, and the water connection was made available on 8th February 2014, and he thus held that no person who had the intention to put a building on rent would offer for sale prior to water connection and basic amenities being made. He also held that the Investigation Wing had carried out a thorough investigation to determine the actual object of the Respondent-Assesee, and on the basis thereof, it was quite clear that the Respondent-Assesee had no intention to let out the flats in the Project, and in fact had acquired land and constructed building thereon with a view to conduct business. On the basis of the aforesaid findings the AO made an addition of Rs. 16,09,45,739/- to the assessed income of the

Respondent-Assessee under the head 'Business Income' by way of the aforesaid assessment order. The relevant findings of the AO in the assessment order dated 30th December 2019 are reproduced below:-

> 6.2. The assessee had developed/ constructed a building but declared income arising from the sale of flats in that building in its return of income as Capital Gains instead of income from business of development and construction by claiming the activity of construction as investment. The assessee thereby availed the advantage of reduced rate of taxation coupled with indexation benefit and adjustment of business loss by offering income under the head Long Term Capital Gains instead of business income. Further it is pertinent to note that in the latest annual return submitted to MCA, the company Aurum Platz Put Ltd has declared its main activity as "Construction" and description of business activity as "Buildings". But for income tax purpose such activity has been claimed to be not business but investment.
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> 6.6. Even with respect to the provision of letting out apartments, the following factors/ facts highlight that leasing out the apartments was never ever the objective of the company:
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> i) Each Apartment in 7, Marine Drive was sold as a bare flat. Even the basic furnishing was not provided which precluded any possibility of leasing out the flats.
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> ii) While the occupation certificate was received on 05.09.2013, the first flat (Apartment no.5) was sold vide agreement dated 11.07.2014 to Sh. Shahazad Dalal and Smt. Nafisa Dalal. The sale agreement itself mentions about the Declaration dated 10.06.2014 filed by the company under the Maharashtra Apartment Ownership Act, 1970 alongwith an amendment thereto dated 27.06.2014. With the Declaration under the Maharashtra Apartment Ownership Act, 1970, each buyer was granted proportionate share in the common areas of the building apart from proportionate undivided interest in the land. These concessions can hardly be afforded to lessee's of the flats. Thus vide Declaration dated 10.06.2014, the company had precluded any possibility of leasing out the flats and it appears that the whole point of including a separate provision of letting out flats in 7, Marine Drive in the Memorandum of Association of the company was to avail the advantage of offering receipts from sale of flats as Capital Gains instead of business income and claiming indexation thereto thus reducing the tax liability through ingenuine means.
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> 6.7. Further, during the course of investigation information has been called from Mitsubishi Elevators India Pvt Ltd and Alfa Façade Systems Put Ltd. It was examined that Mitsubishi Elevators Pvt Ltd was tasked with installation of two elevator units (P1 & P2) in the building, Alfa Facade Systems Put Ltd was tasked with providing and fixing of aluminium windows in the building. From the details submitted by Mitsubishi Elevators Pvt Ltd, it is amply clear that the work of the P2 elevator continued well into 2015 though the work of P1 elevator was completed in 2013 itself.
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> From the details submitted by Alfa Façade Systems Pvt Ltd, it comes forth that the work of fixing aluminium windows in the building was majorly done in 2015. This spillover of crucial work related to elevators and windows in the building highlights the gap in the claim of the company that the units were meant to be leased out.
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> 6.8. The pattern of major expenditure of Aurum Platz Private Limited is gathered as under:-

FY	Amount paid to contractors
2010-11	187,23,391
2012-13	269,08,777
2013-14	632,06,754
2014-15	3,96,31,517
2015-16	2,31,76,652
2016-17	59,45,201
Total	1775,92,292

This shows payment made to major contractors after financial year 13-14 is to tune of Rs. 6.87 crore, which is around 40% of total payments shown above. Therefore, it can be said that project was not ready for renting out as on date of issue of occupancy certificate i.e. 05.09.2013.

6.9. On analysing these expenses it is noticed that one of the party to whom payment is made is, Alfa Facade Systems Private Limited. This company (as discussed in earlier paras also) has done the work of fixed windows, shutters ete for Aurum Platz Private Limited. The ledger account of this party starts in the books of Aurum Platz Private Limited on 12.02.2014 and ends on 1.08.2016. No apartment can be said to be fit for rent until the window work is done. Construction expenses of approx. Rs. 80 lakh have been booked in the name of this party on 31.03.2015 and approx 83 lakh on 31.03.2016. This goes to show that the flats were not ready to be given for rent prior to that date.

6.10. Similarly, the bill for cabin assembly and completion of entrance for lift P2 has been raised on 29.09.2015. This shows that all the elevators in the apartment were not installed till this date.

6.15 The assessee had applied for water connection on 30.10.2013, permission was granted on 07.12.2013 and water connection has been made on 8.02.2014. Thus the assessee has received the advance for booking the flat on 29.11.2013 i.e. even prior to water connection being provided in the building. No person who has intention to put the building on rent will offer it for sale prior to water connection or any other basic amenities being made. This shows that there was no intention of assessee to give the building on rent.

8. The contention of the setessee has been perused and found not acceptable on following ground:-

8.1 The intention of the assessee is not to let out the apartments of 7 Marine Drive. In-fact the assessee has acquired the land and constructed Building thereon for selling out the apartments in said Building. Although, the assessee has set out the objects in MOA as investor but its intention was from the beginning to sale the flats for earning good profits. The investigation wing has carried out throughout investigation to determine the actual object of Assessce Company. In this regard it was examined that the company has made around 40% of contractor's payments after FY 2013-14; even after receiving occupancy certificate (OC) on 05.09.2013. Further, the assessee has constructed 7 luxurious Duplex Apartment in said Building and after acquiring the OC, the process of selling out properties was immediately started. The enquiries also supported that the elevator and windows work was majorly done in 2015. The assessee has also carried out various expenses after receiving OC. Thus the actual object of the assessee was never to lease out the properties. By showing from income from Capital gain the assessee has availed the advantage of reduced rate of taxation coupled with indexation benefit and adjustment of business loss by offering income under the head Long Term Capital Gains instead of business income. Moreover, the assessee had following the provision too in its "other object" to carry out the business of construction and developing of building etc.

8.2 The conduct of the assessee does not showing that he is working as Investor. The assesse's submission "Te is also an undisputed fact that the assessed has not sold any unit before or during the construction period. The Assessee had constructed only ? residential units within the bullding out of which the first unit was sold in July 2014, ich is 10 months after receiving the occupation certificate" is contradictory with his nduct. Moreover, the assessee with intention of sale has built and constructed the said 7 apartments Building. The submission filed by the assessee does not ascertain that the sale of apartment is not for Business. The assessee has received advance of Rs. 4 crores from the buyer Nafisa and Shahzad on 29.11.2013 with whom the first deed of sale had been entered into. (Sale deed date:11.07.2014) Thus, the assessee has taken booking for sale of apartment against which the company has received advances within 3 months of receiving of OC. Further, out of constructed 7 luxurious apartments, 4 apartments have been sold out within 2 years of receiving OC. Thus it is quite clear from above that the company had started accepting advances towards sale of the flats soon after it had received occupancy certificate on 05.09.2013. Further, the flats were, perceptibly, not in a condition to be rented out at that stage. Therefore, it can be safely concluded that assessee had no intention to give the flat on rent.

8.3 The submission of the assessee "On perusal of the Audited Financial Statement for the year ending 31.03.2011, 31.03.2012, 31.03.2013 and onwards (Annexure XII), it can be observed that the assessee has clearly demonstrated its intention of carrying out the leasing activity by disclosing the amount spent on construction as "Investments in Land and Building" under the head "Non-current Investments" and not as Inventory which is typical in case of Builder/Developer." is not acceptable. As already discussed in preceding para that the assessee records has shown that it has made expenditure of Rs 7.7 crore in the project in financial year 2014-15 after receipt of occupancy certificate. The analysis of payment made to major contractors shows that after financial year 13-14 payment was made to tune of Rs. 6.87 crore, which is around 40% of total payments. Therefore, the project was not ready for renting out as on date of issue of occupancy certificate i.e. 05.09.2013. The discussion has also made in preceding Para that the assessee had following the provision too in its "other object" to carry out the business of construction and developing of building etc. Thus disclosing the amount spent on construction as "Investments in Land and Building" under the head "Non-current Investments" and not as Inventory which is typical in case of Builder/Developer does not help to the assessee that he is working as an Investor.

(iii) Being aggrieved by the aforesaid assessment order dated 30th December 2019 passed by the AO, the Respondent-Assesee preferred an appeal before the CIT(A), primarily assailing the findings of the AO in respect of the treatment of the income earned by the Respondent-Assesee from the sale proceeds of flats in the Project as 'Business Income' and not as 'Capital Gains'. The Respondent-Assesee also assailed the order of the AO on the ground that in the search conducted under Section 132 of the Act, no incriminating material was found in so far as the Respondent-Assessee was concerned, and hence the order passed under Section 143(3) read with Section 153A of the Act ought to be set aside. The Respondent-Assesee made detailed submissions before the CIT(A) to contend that the income arising out of the sale of the seven flats in the Project ought to be taxed as 'Capital Gains' and not as 'Business Income', inasmuch as the Respondent-Assesee had always intended to own and let out the flats, and the said property was always held as an investment in the books of account of the Respondent-Assesee. However, the CIT(A), without considering the submissions made by the Respondent-Assesee, upheld the order of the AO and sought to tax the income from the sale of the seven flats in the said Project as 'Business Income' as opposed to 'Capital Gains'. The relevant findings in the order dated 30th August 2020 passed by the CIT(A) are reproduced below:-

> 7.4. Decision-
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> 7.4.1 I have considered the submissions of the appellant and perused the materials available on records. The appellant has requested to hold that the Ld. AO was not justified in treating "Capital Gain" offered by the appellant on sale of flats under consideration as "Profit and gains from Business." The appellant has made elaborate submissions as above and the same are considered carefully. The appellant main contentions are that from inception its intention was to hold the flats under consideration as Investment and not to sale the same for profit and in assessment years 2014-15 and 2015-16, while completing the scrutiny assessment u/s 143(3) of the Act, the Ld. AO has accepted the contentions of the appellant in this regard.
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> 7.4.2 In the impugned assessment order and above referred remand report, the Ld. AO has discussed the conduct of the assessee in detail and has held that the appellant had constructed the said building the 7, Marine Drive, Mumbai as builder with an intention to sale the flats under consideration for profit. The Ld. AO has

discussed the facts in detail as to how the appellant has incurred substantial expenses for constructions of said flats even after receipt of OC and how the window work and installation of one lift was completed after a long period of receipt of OC. The Ld. AO has also given a factual finding that the appellant had received the advances against sale of flats within 3 months of receipt of OC.

7.4.3 Section 2(13) of the Act stipulates that "business" includes any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture. The expression 'business' defined in sec 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.

7.4.4 The facts available on records, reveal that the land for the project under consideration was bought on 31.01.2008. The project was commenced on 25.02.2010 and the Occupation Certificate (OC) was received on 05.09.2013. The appellant has not denied the fact that they have incurred huge expenses in respect of said project even after receipt of OC. It's not a case that the appellant had purchased the land and constructed single apartment thereupon for personal use or to hold the same as Investment. The conduct of appellant in purchasing land, planning to construct 7 luxurious high end apartments/flats, getting approval of plan from competent authorities and then completing the project has all the characteristics of a 'Builder' or a person who is engaged in the 'Business of Real Estate'. The appellant's heavy reliance on the fact that there was no promotion made for sale is not material to decide the issue, as it is a well known fact that such high end luxurious flats are also sold through invitation or personal contacts. The appellant's other argument that unlike any builder they have not sold any flats during pre-construction or construction phase is also of no use as it is an admitted fact that the appellant did not let out a single flat till date and started selling of flats immediately after receipt of OC and even accepted advances for sale of one of the flats within 3 months of receipt of OC. This is also an admitted fact that the appellant was authorized in its Memorandum of Association, through other object, to carry out business of construction and developing of building.

7.4.5 The Hon'ble Supreme Court in the case of G. Venkataswami Naidu & Co vs CIT reported in 35 ITR 594, on which the appellant has placed reliance, has dealt the issue of "adventure in the nature of trade" in length and has discussed certain characteristics to ascertain the same. The Hon'ble Supreme Court has held that when section 2, sub-section (4) refers to an adventure in the nature of trade it clearly suggests that the transaction cannot properly be regarded as trade or business and it is allied to transactions that constitute trade or business but may not be trade or business itself. The Hon'ble Court further held that it is characterized 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. While laying down the various tests, the Hon'ble Supreme Court also held that where the purchaser by any act subsequent to the purchase, improve the quality of the commodity purchased and thereby made it more readily re-saleable, then it would give an indication that the transaction was adventure in the nature of trade. In the present case, it is an admitted fact that the appeliant did not sale the land purchased in the year 2008 as such, but constructed 7 luxurious flats on the same which have definitely improved the quality of the land purchased and made it more re-saleable. One of the other tests discussed by the Hon'ble Supreme Court was whether the transactions of purchase and sale were repeated. In the present case, neither the land purchased in the year 2008 was sold as such, nor even after improving the same by constructing 7 luxurious flats thereupon sold in single transaction. It is admitted facts that 6 out of 7 flats constructed were sold to different parties at different times, i.e. transactions of sales were repeated. These characteristics definitely suggest that the sale of flats under consideration were "adventure in the nature of trade"

7.4.7 The other aspect is huge profit/gain arising out of sale of impugned flats. From the impugned assessment order, it is observed that the Ld. AO has given a finding that the total cost of the project, including land cost, was Rs.40,93,26, 150/- and the 6 flats (Out of total 7 flats constructed) were sold at Rs. 169,08,44,099/-. Hence it is evident that the appellant has earned huge profit from the sale of flats under consideration. The Hon'ble Kerala High Court in the case of V.A. Jose vs DCIT reported in 98 taxmann.com 2, wherein the appellant had purchased the agricultural land and sold the same after leveling the same, held that the same is adventure in the nature of trade. The finding of the Hon'ble Court is reproduced is as under for ready reference.

…

7.4.8 The appellant has also placed reliance on the finding of the Ld. AO in scrutiny assessments u/s 143(3) of the Act for AYs 2014-15 and 2015-16. It is settled law that there is no res judicata for Income Tax proceedings and assessment for one year may not bind the officer for the next year. Similarly, erroneous or mistaken views annot bind the Tax Authorities to perpetuate such mistake and hence the Rule of consistency cannot be held as universal in its application. The Hon'ble Delhi High Court vide its decision dated 12.07.2012 in the case of Krishak Bharati Co-operative Ltd in ITA No. 205/2010, after considering the decision of the Hon'ble Supreme Court n the case of Radhasoami Satsang vs CIT(supra), has held as under.

…

7.4.9 In view of the facts and circumstances of the case and above discussions, I m of the considered opinion that the Ld. AO was justified in treating and taxing the sale consideration arising from sale of flats in present year as "Income from Business and Professions". Therefore, the action of the Ld. AO in this respect is **UPHELD**, and the Ground No.ll raised in appeal is **DISMISSED.**

7.4.10 As discussed above, during the course of appellate proceedings, vide letter/notice dated 23.07.2021, in respect of pending appeals from AYs 2012-13 to 2018-19, the appellant was requested to explain that if the action of Ld. AO in treating income from sale of flats at 7 Marine Drive, as Business Income is found acceptable and eventually confirmed then why the unsold flats in any assessment years should not be treated as WIP/Stock in trade, in above referred assessment years, in which the Ld. AO has failed to give any such finding. The appellant has submitted that reclassification of the investment in an apartment which the appellant continues to hold, cannot be done in unabated assessment particularly in absence of incriminating material u/s 153A of the Act. The said contentions of the appellant have been found acceptable in those assessment years where no assessment/re-assessment was abated and no incriminating material was found during the course of search in respect of said issue. However, it is an admitted fact that in the present assessment year the assessment was abated as the time limit for issuing the notice u/s 143(2) of the Act did not expire as on the date of initiation of search. While framing assessment u/s 153A rws 143(3) of the Act in any case where the assessment was abated, the powers of the Ld. AO is unfettered and he can use any material or facts in his possession while framing the assessment. It is a settled law, that the power of the CIT (Appeals) is co-terminus with that of the Ld. AO.

> The provisions of sec 251(1) of the Act specifically confers the powers to CIT(A) of enhancement of assessment. The extent of such powers conferred on the CIT(A) has been subject matter of the judicial scrutiny. It is settled law that the CIT(A) has plenary powers in disposing of an appeal and scope of his power is coterminous with that of Assessing officer. Hence, the CIT(A) can do what an Assessing Officer can do. The Hon'ble Supreme Court in the case of CIT vs. Kanpur Coal Syndicate reported in 53 ITR 225 has laid down similar law. Further, the Hon'ble Supreme Court in the case of Nirbheram Deluram reported in 91 Taxman 181, once gain reconfirmed the said position of law. The appellant's other contention that while framing assessment u/s 153A rws 143(3) of the Act even in abated assessment, the Ld. AO is empowered only to assess income or loss and not to re-classify any Investment as WIP/Stock in trade is devoid of merits as the same is against the provisions of the Act. The Ld. AO is empowered not only to assess the total income of any assessee, but also statutorily required to assess the income under correct head of income. If the said argument of the appellant is accepted, then in no case, the Ld. AO could change the head of income. The said argument of the appellant is fallacious and runs contrary to the provisions of the Act and hence herewith rejected. In view of above discussion and the fact that the undersigned has already upheld the action of the Ld. AO in treating and taxing gains/profit on sale of impugned flats as business income, instead of capital gain offered by the appellant, so in consequence to same, the Ld. AO is directed to treat the inventory of unsold flats) in said 7 Marine Drive, Mumbai as "Stock-in-trade"

(iv) Being aggrieved by the order dated 30th August 2021 passed by the CIT(A), the Appellant preferred an appeal before the ITAT, challenging the aforesaid findings of the CIT(A). The ITAT, by the impugned order dated 20th June 2023, reversed the findings of the CIT(A) on the ground that the main intention of the Respondent-Assesee as on the date of the acquisition of land on which the flats in the said Project were constructed was to hold that land to construct the flats, and lease them out, as was evident from the MOA and the 'Objects' clause in the said MOA of the Respondent-Assesee. The ITAT, also on the basis of the sequence of events as narrated in the impugned order, held that the Respondent-Assesee had purchased the land in 2008, and the first sale post initial acquisition was made only after 6 and a half years. The ITAT held that the conduct of the Respondent-Assesee does not resemble that of a builder, and no prudent businessman would hold the inventory for such a long period of time, and that too without making any conscious efforts for advertisement and marketing to sell the aforesaid flats. The ITAT also held that the Respondent-Assesee had consistently shown the assets under consideration as an investment in its audited financial statements, and that there was no change in its treatment by the Respondent-Assesee from the time of acquisition of land and construction of the flats in the said Project. The ITAT also held that even for the prior AYs 2014-15 and 2015-16, the Department had accepted the income from sale proceeds of the flats in the Project as 'Capital Gains', and therefore, in the absence of any differentiating factors in the present AY, the Department could not change the position to taxing the income as 'Business Income' as opposed to 'Capital Gains'. The ITAT also placed reliance on the decision of the Gujrat High Court in the case of **Pari Mangaldas Girdhardas Vs. CIT**[1] to hold that by applying the tests as formulated by the Gujrat High Court in the aforesaid decision, as to whether an Assesee can be said to be carrying on business, it can be inferred in the facts of the present case that the Respondent-Assesee does not carry on business. Considering the aforesaid legal position and the facts of the case, the ITAT reached the conclusion that the income received on the sale of flats in the said Project by the Respondent-Assessee was rightly offered to tax as a 'Capital Gain' as opposed as opposed to 'Business Income'. The relevant findings of the ITAT are reproduced below: -

> **36. In this case following sequence of events are important:-**
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> **i. Company was formed on 25/09/2003**
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> **ii. Land was purchased on 31/1/2008**
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> **iii. Commencement of construction on 25/2/2010**

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1 1977] 6 CTR 647 (Guj.)

iv. Change in MOA to let out the property as the main object 17/2/2011, In other ancillary object business as real estate developers was also

v. Occupancy certificate received on 5/9/2013

vi. Appointed broker for tenancy in FY 2012-13

vii. MOA was for the earning of leasing of property and earn lease rent as per main object

viii. In other ancillary object business as real estate developers was also

ix. Brokers unable to find out the tenant

x. First sale deed of one flat was executed in 11/7/2014

xi. Three flats were sold in Financial year 15-16

xii. One flat is sold in FY 2016-17

xiii. One flat is sold in 2017-18

xiv. One flat is still lying unsold

xv. One lift was already installed in 2013

xvi. Second Lift was installed in 2015

xvii. Assessee did not purchase any property other than the impugned property

xviii. For water connection it is mandatory to have building occupation certificate so water connection was applied after obtaining OC

37. Now whether the intention of the assessee was to hold the apartments as investment or to sell them to earn profit and whether the conduct of the assesee is that of a businessman or that of an investor. As regards the intention of the assessee, it is observed that the assessee had intention of holding the apartments as investment and leasing it to the tenants to earn rental income which is substantiated by the documentary evidences submitted before us in the form of Memorandum of Association of the assessee company, correspondence letters with the broker, audited financial statements of the company wherein the land & building are capitalized and treated as investment and also the fact that the said asset was held by the assessee for a very long duration. With respect to the conduct of the assessee company i.e. the question whether the act of sale of apartments by the assessee is 'an adventure in the nature of trade' or 'income from capital gains' can be decided in light of the tests laid down by various judicial precedents. These tests act as a yardstick for determination and taxability of income.

38. As on the date of acquisition of land, the intention of the assessee was to hold that land, construct the apartment and lease them out which is evident from the MOA formed at the time of its incorporation. Even on initial acquisition of the building i.e. at the time of receipt of occupancy certificate on 05.09.2013, the intention of the assessee was to lease the apartments which are evident from the altered MOA.

39. As is clear from the records, the first sale post initial acquisition of land was made after a lapse of approximately 6.5 years from that date and 10 months after the receipt of occupancy certificate. This conduct of the assessee does not resemble of a builder and developer

as no prudent businessman would hold his inventory for such a long period of time that too without making any conscious efforts in the form of advertisement and marketing. Even after the first sale the subsequent sale of other five flats were made over a period of 3 different assessment years which again shows that the assessee was not acting as a businessman but was conducting its affairs as an investor who had to sell its assets due to lack of availability of prospective tenants in sight.

40. Assessee, right from the initial acquisition, has consistently shown the asset under consideration as an investment in its audited financial statements and there has been no change in such treatment till date, which is evident from the said financial statements filed before us.

41. If the LD AO has any doubt about the statement made by the broker about not getting any client for taking apartment on rent, he should have examined that broker and also should have enquired about the enquiry made by broker, his capability in renting of apartment etc.

42. It is an undisputed fact that the income from sale of apartments has been offered to tax under the head 'Income from Capital Gains' by the assessee in its return of income filed for all the years after initial. acquisition and there has been no change with respect to such treatment. Further, even the department has accepted this position in the assessment proceedings completed u/s 143(3) of the Act for AY 2014-15 and AY 2015-16 as discussed above. The current dispute has only arisen as a result of search proceedings conducted in case of Aurum Group, during the course of which no incriminating material was found by the department which has already been discussed at length. As such there being no change in facts and circumstances of the case and in law, there is no reason to deviate from such stand taken by both the parties. Where an inquiry has been made in the earlier assessments years and income was inferred as capital gain, there can be no jurisdiction to assess the income as business income in subsequent years, merely saying that it was decided wrongly in those years. There could have been an action u/s 147 or u/s 263 of the Act, if it is wrong.

43. We find that the assessee company did not engage in any other such real estate project and therefore there is no volume, frequency, continuity or regularity with respect to purchase and sale. Only because the assessee company has sold apartments does not mean that they are engaged in business activities. There is only one time purchase of land and only one project was conducted on such land which was sold apartment by apartment spanning over a number of years and out of which even today one apartment remains unsold.

44. Even the Hon'ble Bombay High Court in the case of Ashok Kumar Jalan (supra) held that the transaction, must have some trappings of a business nature before it can be considered as an adventure in the nature of trade, such as bulk purchase, advertising for its sale, similar other profitable ventures, no likelihood of retaining purchased item for one's own use, etc. In the present case, none of these features have been established by the Department and are further demonstrated by the assessee in light of the decision of Hon'ble Gujarat High Court. There is no such evidence which proves that assessee acted as a businessman and not as an investor.

45. On perusal of documents submitted by the LD CIT DR it is observed that all these documents were executed after the broker informed the assessee that the it is unable to find any suitable tenants. The reasoning given by the broker for his inability to find tenants vide his Vetter dated 29.10.2013 was that the apartments built by the assessee were premium and high-end and the market is not ready to absorb such high-end rental as conterplated by the assessee. As submitted by the

assessee, the inability of both assessee and broker to find suitable tenants who are ready to pay rent for such high-end apartments, forced the assessee to sell one of the flats to recoup a part of the huge investment made in the project. The documents submitted as additional evidence in the shape of Board Resolution, Escrow Account Agreement, communication with the lender etc. were all executed after the above-mentioned communication received from broker i.e. in the month of November and December, 2013, showcasing his inability to find the tenants. We find that intention of the assessee of leasing the apartments and subsequently selling them due to non-availability. of suitable tenants is duly supported by the sequence of events and documents executed by the assessee. These events and documents show the intention of the assessee of leasing the apartments from the very beginning i.e. right from the date of its incorporation. Thus, we hold that the assessee had intention of renting out the apartments from the very beginning. If the assessee had the intention of selling the flats from the very beginning, it would have executed such documents well in advance i.e. around the time of commencement of construction of property so that apartments could be sold even before the occupancy certificate was received which is a normal practice in case of builders and developers. As against this, the assessee had been holding the land and the property for more than 6.5 years from the date of acquisition of land in F.Y. 2007-08 before being forced to sell one of the apartments in the month of July, 2014. Furthermore, with respect to the Memorandum of Association entered at the time of incorporation of the assessee company which was submitted by the Ld. DR before us, enforces the contention of the assessee and works in the favour of the assessee rather than revenue. This can be. explained with the terms of the main object clause and objects incidental or ancillary to the main object clause of the said memorandum. The relevant paras are:

> <u>Main Object Clause:</u>
>
> "2. To carry on the business of owners of lands, flats maisonattes, dwelling houses, shops, offices, industrial estates. lessees of lands, flats and other immovable properties and for these purposes to purchase, take on lease or otherwise acquire and hold any lands or Buildings_of any tenure or description wherever situated, or rights or interests therein or connected therewith, to prepare building sites, and to construct, re-construct, pull down, renovate, alter, improve, decorate and furnish and maintain flats, maisonettes, dwelling houses, shops, offices, blocks, buildings, industrial estates, works and conveniences of all kinds, and sell the same on ownership basis, installment basis, hire purchase basis or lease basis and transfer such building to cooperative society, limited companies or association of persons or individual as the case may be, to lay out roads, pleasure garden, recreation, grounds, auditoriums, theatres, and sports pavilion, to plant, Drain or otherwise Improve land Building or any part thereof."
>
> <u>Other Incidental or Ancillary Objects to the Main Object Clause:</u>
>
> "6. To acquire, buy, obtain, hire, take on lease and sell, dispose of, let on hire, give on lease, develop, improve upon level and otherwise deal in land, quarries, metal ores, mines, coal mines and forests, farms, gardens and other immovable properties and to act as estate agents, representatives and distributors."

46. Both the main object clause as well as the other objects clause as reproduced above contained provisions to enable them to let out the apartments on hire which establishes the intention of the assessee to hold the properties as investment and not as stock in trade. ubsequently, after acquisition of land in F.Y. 2007-08 for the fonstruction of the building and after commencement of such construction in w.e.f. 25.02.2010 the assessee altered its MOA to make specific changes in the main object clause to bring it in line with the activities of the assessee company. These changes

were made vide Board Resolution dated 17.02.2011. Even after altering the MOA, the assessee continued to hold the apartments for a period of approximately 3.5 years before making first sale i.e. vide agreement dated 11.07.2014. A rational builder will sale

property to make quick profits and would never hold such property for such a long period of time, project if considered as business has spread over 13 years from the date of acquisition which is unusual. in case of business, this period of 13 years can be summarized as under:

Sr. No.	Events	Date of such event	Period of Holding of apartments from the date of acquisition of land
1.	Date of Purchase of Land	31.01.2008	-
2.	Date of Commencement of Construction	25.02.2010	-
3.	Receipt of Occupancy Certificate	05.09.2013	5 years, months 8
4.	Sale of First apartment	11.07.2014	6 years, 6 months
5	Sale of Second apartment	07.05.2015	7 years, 4 months
6	Sale of Third apartment	12.06.2015	7 years, 5 months
7.	Sale of Fourth apartment	29.12.2015	7 years, 11 months
8.	Sale of Fifth apartment	19.01.2017	9 years
9.	Sale of Sixth apartment	21.09.2017	9 years, 8 months

Last flat is still held by the assessee and still classified as an investment in its books of accounts. Above event chart shows period of holding of the apartments is one of the factor which shows conduct of the assessee as an investor and not a businessman. Intention shown from the main object clause of memorandum of Association and conduct of the assessee shown from the accounting treatment and period of holding of the apartments are also another factor showing as investor looking to earn income from rental and appreciation in the value of assets held by it. In view of above facts we hold that conduct of the assessee is more like to earn the lease rent from the property and not to exploit these properties as business assets. Assessee has not undertaken any other projects of similar nature which could even remotely indicate that the assessee had intention and mindset of a businessman looking to earn profits by taking risks and engaging in multiple activities at once.

47. Moreover, the position that the assessee's activities are in the nature of an investor and it is not acting as a builder and developer was accepted by the revenue in the course of regular assessment proceedings u/s 143(3) of the Act for A.Y. 2014-15 and A.Y. 2015-16. It is true that the principle of res judicata does not apply to income tax proceedings as each assessment year is treated as a distinct unit, but that does not mean consistency in manner in which assessment proceedings are conducted should be ignored especially when there are no material changes in the

facts and circumstances of the case. The authorities are not permitted to take a different view in subsequent years when the law and facts are the same as earlier years. This position has been made sufficiently clear by the Hon'ble Supreme Court in the case of Bharat Sanchar Nigam Ltd and another v. Union of India and ors. (2006) 282 ITR 273 (SC). Further, the Hon'ble Apex Court in the case of Radhasoami Satsang vs CIT (193 ITR 321) stated that an accepted position in one assessment year cannot be allowed to be changed in a subsequent assessment year where the parties have allowed that position to be sustained by not challenging the order. Further Honourable Bombay High court in case of CIT V Mahindra Life space Developers Ltd [2013] 34 : taxmann.com 83 (Bombay) has held that

> "3. So far as question (C) and (d) are concerned, the Assessing Officer has recorded a finding of fact that on a similar issue for earlier assessment year 2003-04 the income earned from the sale of land has been assessed to capital gain. The revenue has accepted the order of the Assessing Officer for assessment year 2003-04. The Tribunal by impugned order while applying rule of consistency held that it is not permissible for the revenue to agitate the same issue when in the earlier assessment year 2003-04 the same being taxable as capital gains has been accepted by the revenue. In that view of the matter, we see no reason to entertain the questions (c) and (d)."

In Assistant Commissioner of Income-tax v. Shree Ami Office Owner's Association [2023] 148 taxmann.com 130 (Ahmedabad —Trib) coordinate bench on identical facts and circumstances has held as under :-

> "10. The second issue for consideration before us is whether in the instant set of facts, it can be held that the above sale of property was capital gains or adventure in the nature of trade and hence taxable as business income. We are in agreement with the order of Ld. CIT (Appeals), wherein he has held that the <u>mere fact that the assessee AOP purchased the land and made construction thereon</u> itself would not be sufficient to hold that income earned on such sale of property would qualify as "business income". We note that it was on 19-01-1994 that initially the assessee taken possession of the aforesaid property. It was finally sold in financial year 2007-08. <u>Thus. there is a long holding duration between which the assessee took possession of the property and the date when the land was finally sold after making construction thereon. The entire purchase was funded by the members of the AOP.</u> No interest-bearing loan was taken for the purpose of purchase of said property and construction thereon. No change in land user of the property was affected in order sell the aforementioned property<u>. It is not the case of the Department that when initially the assessee AOP purchased the land and took possession thereof on 19-01-1994, the buyers were identifiable and thus the whole purpose of purchase and subsequent construction was for the purpose of selling the same and not earning any rental income</u>. Accordingly, in view of the facts and circumstances cited above, in our considered view, the said sale of property would be taxable as capital gains and not business income, and we find no infirmity in the order of Id. CIT(A)."
>
> [Underline supplied by us]

49. Based on the facts of the case discussed above, evidences produced before us, we reversing the order of the Id CIT (A) direct the AO to treat the proceeds received on sale of properties as income from 'Capital Gains'. Accordingly, the Appeal filed by the assessee is allowed.

> 50. The assessee has also filed additional grounds of appeal challenging the direction given by Commissioner (Appeals)-50, Mumbai to treat the last unsold flat as 'Stock-in-Trade' instead of 'Investment'. In this regard we state that in view of our finding earlier on the matter of treatment of income from sale of apartments and quashed the order of Id cit [A] directed the AO to treat the proceeds received on sale of apartments as income from 'Capital Gains'. Therefore, it follows that the remaining unsold flat which is still held by the assessee and also generating rental income for it, cannot be treated as stock in trade of the assessee. Accordingly, this direction given by Id CIT [A] is not valid and is hereby quashed.
>
> **(Emphasis supplied)**

3. Learned counsel Mr.Suresh Kumar appeared for the Appellant-Revenue, and learned counsel Mr.Sashi Tulsiyan along with Mr.P.C. Tripathi appeared for the Respondent-Assessee.

4. On behalf of the Appellant/Revenue Mr.Suresh Kumar submitted that the impugned order was passed by the ITAT without considering the relevant facts of the present case, and therefore submitted that the same is liable to be set aside. His primary contention is that the Respondent-Assesee always had an intention to carry out business and sell the flats in the Project, and therefore the Respondent-Assesee did not want to merely rent out or lease the flats. He further submitted that in the course of search proceedings at the Respondent-Assessee's premises under Section 132 of the Act, incriminating documents were found, wherein it had come to light that repayment of loan and interest which the Respondent-Assesee had availed would be made from the income earned from the sale of flats in the Project, and that the intention of the Respondent-Assesee was to sell the flats and not rent out them or lease them.

5. He further submitted that the Respondent-Assessee had started accepting advances from prospective buyers as soon as the OC was received by Respondent-

Assessee in respect of the flats in the Project. He therefore submitted that at the time when advances were being taken for the sale of the said flats, they were not in a position to be leased or rented out, and hence the intention of the Respondent-Assessee was never to lease or rent out the flats. This clearly established that the Respondent-Assessee had carried on the business of selling flats, and hence the income from the sale thereof had to be treated as 'Business Income' as opposed to 'Capital Gains', as sought to be contended by the Respondent-Assessee. He also sought to place reliance on the findings rendered by the AO and the CIT(A) in respect of the aforesaid addition. In so far as the assessments for prior years were concerned, i.e., AY 2014-15 and AY 2015-16, he submitted that the same were unabated assessments, and therefore even though in those years, the Department had accepted income from the sale of flats in the Project as 'Capital Gains' and not 'Business Income', the same would not apply to the present AY as no search was conducted in those years, where incriminating material was found to come to another view. He therefore submitted that the impugned order passed by the ITAT ought to be set aside.

6. *Per contra*, Mr Sashi Tulsiyan appearing on behalf of the Respondent-Assessee submitted that the impugned order passed by the ITAT was passed on a correct appreciation of the facts and law. The thrust of his argument was on the ground that the MOA of Respondent-Assessee clearly set out the 'Objects' for which it was formed. The said 'Objects' is as follows: -

> "To own and let out apartments in the building situated at C.S no 406 Part I bearing D ward No. 2574(3), Street no. 58-70, 6A, Chowpatty Road of Malabar Hill

Division at Pandita Ramabai Road, Babulnath Cross Lane, Mumbai 400007 also known as Aurum Platz for rent"

He therefore contended that from a reading of the aforesaid 'Objects', it is crystal clear that the Respondent-Assessee always had the intention at the time of construction to let out the said flats at the Project. He further submitted that the Respondent-Assessee was primarily an investor and had neither marketed, nor sold any unit until the construction of the said flats. In fact, the Respondent-Assessee had engaged the services of a broker to sell the said flats, and had also sold the flats almost after a period of 10 months from their completion. Further out of the seven flats, the last flat still remained to be sold, thereby substantiating the claim of the Respondent-Assessee that the intention was never to sell the flats at a profit, but to hold onto them and earn returns from them by leasing out the same. He further submitted that in the present case, the Respondent-Assessee had purchased the land in the year 2008 and started construction in in the year 2010, and further always had reflected the same in the books of account under the head 'Investments in Land and Building' and not as 'Stock-in-Trade'. This accounting treatment has been consistently followed by the Respondent-Assessee and has been accepted by the Department in the earlier years, i.e., AY 2014-15 and AY 2015-16. He therefore submitted that the Department could not change its position in the present AY, in as much as there were no distinguishing facts in the present AY to treat the income earned by the Respondent-Assessee from the sale of flats in the Project as 'Business Income' as opposed to 'Capital Gains'. He also submitted that in the present AY, no incriminating material was found during the search by the Revenue authorities to change the treatment of taxation under a different head altogether and not follow a consistent approach. He therefore submitted that the impugned order dated 20th June 2023 of the ITAT deserves to be upheld.

ANALYSIS & FINDINGS

7. We have heard learned counsel for the parties and also perused the orders passed by the AO, the CIT(A), and the ITAT, and we are of the view that the ITAT has correctly reached its conclusion of taxing the income earned by the Respondent-Assessee from the sale of the flats in the Project as 'Capital Gains' instead of 'Business Income' by applying the correct principles of law. The forgoing discussion will aid the aforesaid conclusion we have reached.

8. At the outset, we are in agreement with the submission made on behalf of the Respondent-Assessee that in the earlier years, i.e., AY 2014-15 and AY 2015-16, the Department had accepted the taxability of income earned from the sale of flats in the Project as 'Capital Gains' and not as 'Business Income'. Both the assessment orders dated 23rd December 2016, and 23rd December 2017 passed for AY 2014-15 and AY2015-16 respectively have attained finality, in as much as the Department has not carried them forward before any appellate authority. In the present AY also, the same pattern continues, and learned counsel on behalf of the Appellant-Revenue has been unable to point out any distinguishing fact in the present AY to justify the change of treatment of income under a different head by the Appellant-Revenue. We are also inclined to reject the argument of learned counsel on behalf of the Appellant-Revenue that only because the assessments for the earlier AYs, i.e., AY 2014-15 and AY 2015-16 have remained unabated and no

search has been carried out in those years, the income has been treated as 'Capital Gains' as opposed to 'Business Income'. This, to our mind, will make no difference in the treatment of income, in the absence of any distinguishing facts for the present AY. Further, in the present AY, where search has been conducted, there has been no incriminating material which has been found on record to come to a different conclusion. Further, it is a settled principle of law that in taxation statutes consistency has to be adopted by the Department-Revenue while bringing to tax the income of an assessee. The Supreme Court, in the case of **Radhasoami Satsang v. Commissioner of Income-tax**[2] has held as follows:-

> 13. We are aware of the fact that strictly speaking *res judicata* does not apply to income-tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assess ment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year.
>
> 14. On these reasonings in the absence of any material change justifying the revenue to take a different view of the matter—and if there was no change it was in support of the assessee—we do not think the question should have been reopened and contrary to what had been decided by the Commissioner in the earlier proceedings, a different and contradictory stand should have been taken. We are, therefore, of the view that these appeals should be allowed and the question should be answered in the affirmative, namely, that the Tribunal was justified in holding that the income derived by the Radhasoami Satsang was entitled to exemption under sections 11 and 12

9. We are further of the view that the ITAT, on appreciation of the facts of the case has rightly come to the conclusion that the intention of the Respondent-Assessee was always to hold the acquired land, construct the flats thereon, and lease them out. The ITAT has reached the aforesaid conclusion on the basis of the MOA and the audited financial statements of the Respondent-Assessee, wherein the land and building were capitalized and treated as investments, and also the fact that the

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2 [1992] 60 Taxman 248 (SC)

asset was held by the Respondent-Assessee for a very long duration. It is on the basis of the aforesaid facts that the ITAT has rightly come to the conclusion that the conduct of the Respondent-Assessee, was not in the nature of an adventure of trade which could be assessed as 'Business Income'. In the facts of the present case, the intention of the Respondent-Assessee was always to lease out the flats, and there was never an intention to carry on business of sale of the aforesaid flats. In fact, the timeline of the sequence of events as reproduced in the ITAT's impugned order and also in paragraph 2(iv) above, which we once again reproduce, will throw light on the fact that in fact the Respondent-Assessee was formed in the year 2003, and the land was acquired on 31st January, 2008. The commencement of construction started on 25th February, 2010 and there was a change in the MOA of the Respondent-Assessee to let out the property as part of the main object on 17th February, 2011. It is only in the 'Ancillary Objects' that the objects were shown as being real estate developers. The OC was received on 5th September 2013, and thereafter, a broker was appointed for leasing out the said flats in the Project in financial year (FY) 2012-13. The MOA was for the leasing of property and to earn lease rent as per the main objects, and in fact the first sale deed of one of the flats was executed only in the year 2014, i.e., on 11th July 2014. The sequence of events is once again reproduced below for convenience:-

> **36. In this case following sequence of events are important:-**
> **i. Company was formed on 25/09/2003**
> **ii. Land was purchased on 31/1/2008**
> **iii. Commencement of construction on 25/2/2010**
> **iv. Change in MOA to let out the property as the main object 17/2/2011, In other ancillary object business as real estate developers was also**
> **v. Occupancy certificate received on 5/9/2013**
> **vi. Appointed broker for tenancy in FY 2012-13**

> vii. MOA was for the earning of leasing of property and earn lease rent as per main object
> viii. In other ancillary object business as real estate developers was also
> ix. Brokers unable to find out the tenant
> x. First sale deed of one flat was executed in 11/7/2014
> xi. Three flats were sold in Financial year 15-16
> xii. One flat is sold in FY 2016-17
> xiii. One flat is sold in 2017-18
> xiv. One flat is still lying unsold
> xv. One lift was already installed in 2013
> xvi. Second Lift was installed in 2015
> xvii. Assessee did not purchase any property other than the impugned property
> xviii. For water connection it is mandatory to have building occupation certificate so water connection was applied after obtaining OC
>
> (Emphasis supplied)

It is clear from the aforesaid timeline that the intention of the Respondent-Assessee was to always hold the acquired land and then to construct the flats thereon and let them out. The fact that the sale of the first flat happened almost after a lapse of six and a half years from the acquisition of land goes on to show that the Respondent-Assessee in fact never had the intention to carry on business, and was always an investor who wanted to hold on to the said property and let it out to gain rental income and thereby make 'Capital Gains' or rental income. In fact, as rightly held by the ITAT, the first sale happened only after the acquisition of land, after six and half years, and in fact, the subsequent sale of the other 5 flats was made over a period of 3 different AYs, which again goes on to show that the Respondent-Assessee was not acting as a businessman, but was conducting its affairs as an investor who had to sell its assets due to lack of availability of prospective tenants in the market. This further establishes that that the Respondent-Assessee always held the asset as an investment.

10. Further, the ITAT has also correctly relied upon the assessment orders passed for the earlier AYs, i.e., AY 2014-15 and AY 2015-16 to hold that the Department

had accepted the position of taxability of income of the Respondent-Assessee as 'Capital Gains', and in the present AY, even though a search was conducted, there was no incriminating material found by the Department which could give rise to the conclusion that the treatment of income ought to be treated as 'Business Income' opposed to the earlier AYs. The ITAT in fact has also placed reliance on the discussion that during the search proceedings no incriminating material was found, and hence the assessment for the present AY under Section 153A of the Act also was not rightly made.

11. The ITAT in the impugned order has also rightly appreciated that in the facts of the present case, the Respondent-Assessee had availed the services of a broker to sell the aforesaid flats, and if the AO had any doubt about the statement made by the broker about not getting any tenant for the said flats, he should have examined the broker and should have inquired with the broker his capability in renting of the flats. The ITAT has also correctly come to the conclusion that at all times the Respondent-Assessee had consistently shown the asset under consideration as an investment in its audited financial statements, and there has been no change in such treatment till date, which was evident from the financial statements filed before them. We are of the view that though the treatment given by the Respondent-Assessee in its books of accounts would not be the only determinative factor in coming to a conclusion that whether the income has to be taxed under the head 'Business Income' or 'Capital Gains', however, it is an important factor which has to be borne in mind while deciding the treatment of income which had arisen in the hands of the Respondent-Assessee. Our this view is

fortified by the decision of this court in **Karam Chand Thapar and Bros. (P.) Ltd. Vs. Commissioner of Income-tax**[3], where the Appellant-Assessee had acquired certain shares in two lots and thereafter sold the entire block of shares at a loss, claimed it as a trading loss. The Supreme Court in this context had observed that the shares were purchased in the year 1941 but they were sold only in the year 1955, which could have been sold at a much higher price than for which they were sold, and that locking up of shares for about 14 years must be held to be an unusual feature if those shares were the trading assets of the Appellant-Assessee. The Court therefore held that the circumstances were more consistent with the fact that those shares were investment shares, and that since the shares in question were shown as investment shares in the books as well as in the balance-sheet of the Appellant-Assessse, the loss incurred on the selling of these shares was in fact a capital loss. Relevant paragraphs of the aforesaid decision are reproduced below:-

> As seen earlier, one of the circumstances on which the Tribunal mainly relied is that those shares were purchased in the year 1941 but they were sold only in the year 1955. The Tribunal has also noted that, though at some stages these shares could have been sold at a much higher price than for which they were sold, the assessee did not choose to sell those shares.
>
> Locking up of shares for about 14 years must be held to be an unusual feature if those shares were the trading assets of the assessee. That circumstance is more consistent with the fact that those shares were investment shares. No explanation was offered for not dealing with those shares for about 14 years. It is least likely that a trader would retain his shares purchased by him in 1941 till 1955 though he had occasions to sell the same at a higher price earlier. It may be noted that, though, according to the assessee, the price of those shares was Rs. 50 per share in the year 1950, yet the assessee purchased 100 shares in 1950 at Rs. 75 per share. This is again indication that the assessee was not acquiring those shares as a trading activity. We fail to see why the shares of M/s. Karam Chand Thapar and Sons should have gone down in value in the years 1952-1953, 1953-1954 and 1954-1955 when that company was making substantial profits. This circumstance remains unexplained. **The Tribunal also relied on the circumstance that the assessee was showing these shares as investment shares in its books as well as in the balance-sheet. It is true that that circumstance by itself is not a conclusive circumstance. It cannot be denied that that is a relevant circumstance on which the Tribunal could have relied for drawing**

3 [1971] 82 ITR 899 (SC)

> the inference it did. The explanation that it had to do so because of the provisions of the company law is unfounded.
>
> In our opinion, on the facts found by it, the Tribunal was justified in drawing the inference that the loss in question was a capital loss. That is also the view taken by the High Court.
>
> (Emphasis supplied)

12. The ITAT has also correctly held that the Respondent-Assessee had not engaged in any other real estate project, and therefore there was no volume, frequency, continuity, or regularity with respect to purchase and sale of any assets, and only because the Respondent-Assessee had sold the flats in the said Project it did not mean that they had conducted any business activity. There was only one instance of purchase of land, and only one project which was undertaken by the Respondent-Assessee, spanning over a number of years, and income which the Respondent-Assessee derived from the sale of the flats in the said Project on the said property therefore could not be in the nature of an adventure in the nature of trade or business, but was rightly declared as 'Capital Gains' by the Respondent-Assessee.

13. The ITAT, by correctly relying on the tests as enumerated by the Gujarat High Court in the case of Pari Mangaldas Girdhardas Vs. CIT (supra), wherein the test to determine as to whether an assessee can be said to be carrying on business or holds the asset as an investment, has, on a detailed examination of the facts of the present case rightly come to the conclusion that in the present case, the Respondent-Assessee had not carried out business, and the intention was always to hold on to the asset as a long-term asset and in the form of an investment. The tests

as enumerated by the Gujarat High Court in Pari Mangaldas Girdhardas Vs. CIT (supra) are as follows:-

> "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, authorizes 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."
>
> (emphasis supplied)

It is after applying the aforesaid tests that the ITAT, to our mind, has rightly inferred that the Respondent-Assessee did not intend to carry on business, and therefore the income from the sale of the flats in the said Project cannot be taxed as 'Business Income'.

14. Therefore, in our view, it is pertinent to note that the intention of the Respondent-Assessee is one of the most determinative factors in deciding whether the Respondent-Assessee is carrying on business or holds the asset as an investment

on a long-term basis. Further, continuity, volume, and the frequency of the transactions also is a determinative factor, and in the facts of the present case, as discussed above, there has been only one sole transaction which has been carried out by the Respondent-Assessee, which does not amount to carrying on business. Though there have been instances where courts have taken a view that a single solitary transaction also can be considered as a business transaction, and hence treated income therefrom as 'Business Income', but in the facts of the present case, in our respectful view, the other determinative factors like volume, frequency, the length of the time for which the Respondent-Assessee held the asset, and also the fact that the Respondent-Assessee had treated the asset as an investment in the books of account, and the 'Objects' clause in the MOA as given by the Respondent-Assessee, clearly go to establish the fact that the intention of the Respondent-Assessee was never to carry on business.

15. Our view gets fortified by the following decisions of this court in **Commissioner of Income-tax, Bombay Central-I Vs. Administrator of the Estate of Shri E.F. Dinshaw**[4] and **Principal Commissioner of Income Tax Vs. M/s. Shree Shreemal Builders**[5], and the decision of the Kerela High Court in **Principal Commissioner of Income-tax, (Central) Vs. Arun Majeed**[6], which are discussed below.

16. In the case of Commissioner of Income-tax, Bombay Central-I Vs. Administrator of the Estate of Shri E.F. Dinshaw (supra) an individual had

4 [2012] 345 ITR 529 (Bombay)

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6 [2024] 165 taxmann.com 457 (Kerala)

purchased large tracts of land, which upon his demise were inherited by his legal heirs. Since the purchase of these tracts of land, different portions of the property were leased out to various persons against payment of ground rent for the purposes of constructing house properties. However, subsequently, agreements to sell were executed in respect of different portions of land. The AO in the aforesaid case had held that profit arising from sale of the portions of land would fall under 'Business Income'. Upon appeal, the ITAT however concluded that the income realized upon sale of the portions of land constituted 'Capital Gains' and not 'Business Income'. This Court in the facts of the case held that that it was clear there was no transaction involving the sale of the land during the lifetime of the individual who initially purchased the tracts of land, and that even upon his death and the property being devolved onto his legal heirs, there was no transaction involving the sale of the land for a period of nearly sixty-five years. This Court also observed that the sale of the land was not motivated by a desire to make a profit, but to protect the corpus and the resulting expenditure due to litigation, which was capitalised and accepted by the Department, and therefore the surplus that was realized on the sale of the land during the assessment years in question was in the nature of 'Capital Gains' rather than 'Business Income'. The facts in the aforesaid case are apposite to the facts of the present case, inasmuch as the conduct of the Respondent-Assessee in the present case does not resemble that of a builder, and it is evident that the transaction of selling the flats in the Project were not part of the routine activities conducted by the Respondent-Assessee. Relevant paragraphs of the decision of this Court in Commissioner of Income-tax, Bombay Central-I Vs. Administrator of the

Estate of Shri E.F. Dinshaw (supra) are reproduced below:-

> **13.** In assessing the facts of the present case, certain important considerations would have to be borne in mind. Firstly, a large tract of land of nearly 2500 acres was acquired in or about the year 1923 by late F.E. Dinshaw. F.E. Dinshaw was a Solicitor. The acquisition of the land was evidently not motivated by an adventure in the nature of trade. The statement of case makes it clear that there was no transaction involving the sale of the land during his lifetime. Secondly, neither E.F. Dinshaw, nor for that matter, Bachoobai purchased the land. The land had devolved on E.F. Dinshaw and upon Bachoobai by testamentary succession. Thirdly, upon the death of F.E. Dinshaw in 1936, there was no transaction involving the sale of the land for a period of nearly sixty five years since the purchase of the land. Fourthly, the assessee in the present case, is the Administrator of the estate of late E.F. Dinshaw. Half the interest of the land devolved upon E.F. Dinshaw under the will that was executed by his late father F.E. Dinshaw. Fifthly, both the CIT(A) and the Tribunal have rendered concurrent findings of fact. The finding of fact recorded by the Tribunal is that since independence encroachments gradually took over certain areas of the land. The sale of the land was not motivated by a desire to make a profit, but to protect the corpus and the resulting expenditure due to litigation. The finding of the Tribunal is also to the effect that there were no improvements on the land by way of laying out drainage, levelling or construction of roads. Though an area admeasuring about a hundred acres was repurchased, the Tribunal has recorded that this was hardly a purchase in the commercial sense since it was a repurchase of lands which were declared as surplus under the Urban Land Ceiling Act. Sixthly, the Revenue in the present case has not impugned the findings of fact recorded by the Tribunal either on the ground that they are based on no evidence whatsoever nor for that matter on the ground that the Tribunal has misdirected itself in law. The Tribunal in paragraph 17 of its decision has also noted that the expenditure or litigation expenses was treated by the Department on the capital account, declining to accede to the claim of the assessee that it should be set off against income from other sources. Having regard to the facts as found by the Tribunal, we have no hesitation in coming to the conclusion that the surplus that was realised on the sale of the land during the assessment years in question was in the nature of capital gains.

17. This Court in the case of **Principal Commissioner of Income Tax Vs. M/s. Shree Shreemal Builders**[7], where the Respondent-Assessee sold a building and offered the gain made on the sale of the building for tax under the heading of 'Capital Gains', had agreed with the findings of the Commissioner of Income Tax (Appeals) and the ITAT, and held as follows:-

> (e) We find that both CIT(A) and the Tribunal on consideration of all facts has concluded that the building which was acquired in 1978 and sold in previous year relevant to the subject assessment year was an investment. This finding was on the basis that the respondent had all along shown the building as its investment and not

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as its stock in trade in its Balance Sheet and Profit and Loss Account. Further, the interest paid on the amounts borrowed for acquisition of the building has been capitalised since beginning and no amount of interest was claimed as an expenditure in its profit and loss account. The first objection on behalf of Revenue is that as the Respondent is in the business of real estate development all its income relating to real estate can only be taxed as business income. This submission on behalf of the Revenue is contrary to the directions in the CBDT circular No.4/2007 dated 15th June, 2007 wherein in paragraph 10 thereof it is stated that it is possible for a tax payer to have two portfolios at the same time i.e. Investment portfolio (investment) and trading portfolio (stock in trade). Further this Court in Commissioner of Income Tax vs. Gopal Purohit (2010) 188 Taxman 140 has also held to the same effect. The second objection on behalf of the Revenue is that as the respondent had classified its rental income from the said building as business income that would by itself be evidence of it being stock in trade. In any case in such matters the totality of the facts are to be taken into account as done by the CIT(A) and the Tribunal i.e. the building being shown as investment and not as stock in trade since 1978, the interest paid not being claimed as expenditure in the profit and loss account, the long years of holding the property are all indicative of the fact that the building is not the stock in trade but an capital asset/investment. Therefore the profit/gain on sale of the investment is taxable under the head “capital gains”.

(f) Therefore the view taken by the CIT (A) and upheld by the Tribunal, on these facts, is a possible view. Thus would not warrant interference in appeal.

(g) Accordingly, the question as proposed does not give rise to any substantial question of law, hence not entertained.

18. Further, the Kerela High Court in the case of **Principal Commissioner of Income-tax, (Central) Vs. Arun Majeed**[8], where the Respondent-Assessee ran a medical shop and was also a partner in certain other medical shops has held that merely because an assessee makes some profit in a particular transaction, it cannot be treated as an adventure in the nature of trade so long as the initial intention or a reason for investing money was to hold the property and utilise it for a different purpose. The relevant findings of the Court are reproduced below:-

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:

8 [2024] 165 taxmann.com 457 (Kerala)

"15. This question has been the subjectmatter 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 Incometax 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 assesee 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.

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 [1972] 85 ITR 220 (Delhi)/[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 asseesse had held the landed property as investment and disposal of the same would not convert, what was a capital accretion, to an adventure in the nature of trade. 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.

19. In light of the above discussion, we do not find any infirmity in the impugned order of the ITAT giving rise to any substantial question of law. The appeal is accordingly dismissed. No costs.

(AARTI SATHE, J.) (G. S. KULKARNI, J.)

M.S.Thatte