

IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT: MR. JUSTICE MIAN SAQIB NISAR, HCJ
MR. JUSTICE UMAR ATA BANDIAL
MR. JUSTICE FAISAL ARAB

CIVIL APPEAL NO.8 OF 2007
*(Against the judgment dated
12.4.2006 of the High Court of Sindh,
Karachi passed in I.T.A.No.55/1999)*

Fancy Foundation

...Appellant(s)

VERSUS

Commissioner of Income Tax, Karachi

...Respondent(s)

For the appellant(s): Mr. Iqbal Salman Pasha, ASC

For the respondent(s): Mr. M. D. Shahzad Feroz, ASC

Date of hearing: 13.4.2017

...
ORDER

MIAN SAQIB NISAR, CJ.- The facts of this appeal are that the appellant, namely, Fancy Foundation, is a registered charitable trust. It purchased property bearing Plot No.7/3, Survey Sheet SR-1, Serai Quarters, I. I. Chundrigar Road, Karachi (*the property*) vide a registered sale deed, on 28.06.1963, for a consideration of Rs.1,895,183/-. It finally sold the property for Rs.18,287,500/- in the year 1995. The appellant filed its income tax return for the year 1996-97, in which it claimed exemption from payment of income tax on the surplus/differential between the purchase and sale prices of the property in terms of Section 27(2)(a) of the Income Tax Ordinance, 1979 (*the Ordinance*). However, the department passed an assessment order to the effect that the profit made upon the sale of the property was income from business thus the appellant was liable to pay income tax thereupon in light of Section 22 read with Section 2(11) of the

Ordinance. The appellant's appeals before the Commissioner Income Tax (Appeals) and the Income Tax Appellate Tribunal, and the income tax reference before the learned High Court all failed. Leave was granted on 03.01.2007 to consider whether *"the petitioner was not an adventure in the nature of trade and was not liable to tax under the Income Tax laws as the surplus amount/profit received by the petitioner Foundation from the transaction of sale was in the nature of capital gain which is exempt from charge to tax."*

2. Heard. We will first attend to the argument of the learned counsel for the respondent that the reference before the learned High Court was not maintainable as no question of law arose from the order of the Tribunal. In the judgment reported as **Naseer A. Sheikh and 4 others Vs. The Commissioner of Income-Tax (Investigation), Lahore and others (1992 PTD 621)** this Court held that the High Court had erred in returning the reference to the Tribunal without answering the questions referred to it because whether or not the sale of the second lot of shares (*resulting in a gain to the appellants*) constituted an adventure in the nature of trade, was a mixed question of law and fact whilst the High Court had wrongly treated it as a pure question of fact.¹ Thus we hold that the question of whether the sale/purchase of property constitutes 'business' within the meaning of Section 2(11) of the Ordinance and its effect on the taxpayer involves a factual determination of the characteristics of the transaction in question and an interpretation of the aforesaid provision of law, therefore, this is a mixed question of fact and law and the reference before the learned High Court was maintainable.

3. Sections 22 and 27 of the Ordinance (*relevant parts*) read as under:-

¹ See also **Oriental Investment Co., Ltd Vs. The Commissioner of Income-tax Bombay** (AIR 1957 SC 852), **Juggilal Kamlatpat, Kanpur Vs. Commissioner of Income Tax, U. P.** (AIR 1970 SC 529) and **Commissioner of Income-tax, Bombay Vs. H. Holck Larsen** (AIR 1986 SC 1695).

22. **Income from business or profession.**– The following incomes shall be chargeable under the head "Income from business or profession", namely:-

- (a) profits and gains of any business or profession carried on, or deemed to be carried on, by the assessee at any time during the income year;
- (b); and
- (c)

Explanation.....

27. **Capital gains.**- (1) Any profits or gains arising from the transfer of a capital asset shall be chargeable under the head "Capital gains" and shall be deemed to be income of the income year in which the transfer took place.

(2) For the purposes of sub-section (1) and section 28 and 29,–

- (a) "capital asset" does not include-
- (i); and
- (ii) any immovable property; and

(b) "transfer" includes the sale, disposition, exchange or relinquishment of the asset, or the extinguishment of any rights therein, but does not include–

⋮

4. Section 15 of the Ordinance provides various heads of income for tax purposes. The two relevant heads are 'income from business or profession' [Section 15(d)] and 'capital gains' [Section 15(e)]. According to Section 27 of the Ordinance, any profits or gains arising from the transfer of a capital asset shall be chargeable under the head 'capital gains' and shall be deemed to be income of the (income) year in which the transfer took place. As per Section 27(2)(ii) of the Ordinance, for the purposes of Section 27(1) thereof, capital asset does not include any immovable property. It is the appellant's case that the property they sold was an immovable property and not a capital asset: therefore the profit/gain from its transfer was not chargeable to income tax under the

head 'capital gains'. Whereas the department's stance is that the purchase and ultimate sale of the property was an “*adventure in the nature of the trade*” in terms of Section 2(11) of the Ordinance thus the profit/surplus made on the sale thereof was a profit and gain of a business carried on by the appellant and was chargeable to income tax under the head 'income from business or profession' under Section 22(a) of the Ordinance. Hence the terms 'adventure' and 'trade' need to be defined. The ordinary dictionary meaning of 'adventure' is as follows:-

Black's Law Dictionary (9th Ed.)

1. A commercial undertaking that has an element of risk; a venture.

Chamber's 21st Century Dictionary

1. an exciting and often dangerous experience. 2. The excitement of risk and danger.

Oxford Advanced Learner's Dictionary (9th Ed.)

1. an unusual, exciting or dangerous experience, journey or series of events.

P. Ramanatha Aiyar's Concise Law Dictionary (4th Ed.)

A mercantile or speculative enterprise of hazard; a venture;

'Trade' has been defined as under:-

Black's Law Dictionary (9th Ed.)

1. The business of buying and selling or bartering goods or services. (n) 2. A transaction or swap. 3. A business or industry occupation; a craft or profession (vb)

Chamber's 21st Century Dictionary

1. a. the act, an instance or the process of buying and selling; 3. a. business and commerce, especially as opposed to a profession or the owning of landed property;

Oxford Advanced Learner's Dictionary (9th Ed.)

1. the activity of buying and selling or of exchanging goods or services between people or countries.

P. Ramanatha Aiyar's Concise Law Dictionary (4th Ed.)

Trade in its primary meaning is the exchanging of goods for goods or goods for money; in its secondary meaning it is repeated activity in the nature of business carried on with a profit motive, the activity being manual or mercantile, as distinguished from the liberal arts or learned professions or agriculture. State of Punjab v. Bajaj Electricals Ltd., AIR 1968 SC 739, 741.

5. Is the buying and selling of a single property an adventure in the nature of trade, rendering it a business? From the above definitions, “*any adventure in the nature of trade*” means an enterprise, venture or activity involving the buying and selling of goods or services. On a strict interpretation, the action of buying and selling property by the appellant may conceivably be tantamount to business. But, as per Section 2(11) of the Ordinance, ‘business’ “*includes any, trade, commerce or manufacture, or any adventure or concern in the nature of trade, commerce or manufacture.*” The use of the word ‘includes’ in the definition means that the definition is not exhaustive or all-encompassing, and it may well cover things other than those mentioned therein. Therefore ‘business’ has to be given its widest possible amplitude by examining its ordinary dictionary meaning, in the light whereof “*adventure in the nature of trade*” needs to be understood. ‘Business’ has been defined as under:-

Black's Law Dictionary (9th Ed.)

1. A commercial enterprise carried on for profit; a particular occupation or employment habitually engaged in for livelihood or gain. 2. Commercial enterprises. 3. Commercial transactions.

Chamber's 21st Century Dictionary

1. the buying and selling of goods and services. Also called commerce, trade. 3. A regular occupation, trade or profession.

Oxford Advanced Learner's Dictionary (9th Ed.)

1. the activity of making, buying, selling or supplying goods or services for money.

P. Ramanatha Aiyar's Concise Law Dictionary (4th Ed.)

The word "business" is one of wide import and it means an activity carried on continuously and systematically by a person by the application of his labour or skill with a view to earning an income. Barendera Prasad v. I.T. Officer, AIR 1981 SC 1047, 1953. [Income-tax Act (43 of 1961), S. (1)(i)(a)].

Major Law Lexicon (4th Ed.) 2010

An element of continuity and habit is essential to constitute the exercise of a profession or business. [AIR 1919 All. 13(2)]

Business connotes some real, substantial and systematic or organized course of activity or conduct with a set purpose. [Narain Swadeshi Mills v. Commissioner of Excess Profits Tax, AIR 1955 SC 176]

In its ordinary parlance, 'business' entails regularity or continuity in an activity with the intention of earning income. Consequently, generally the adventure in the nature of trade must involve regular and continuous activity. Before giving a conclusive finding on what does or does not constitute an "adventure in the nature of trade" and is a 'business' within the contemplation of Section 2(11) of the Ordinance, it is pertinent to advert to the case law on the matter.

6. In **Commissioner of Income-Tax (Central), Karachi Vs. Messrs Habib Insurance Co. Ltd., Karachi (PLD 1969 Karachi 278)**,²

² This judgment was upheld by this Court in **Messrs Habib Insurance Co. Ltd. Vs. Commissioner of Income-Tax (Central), Karachi (PLD 1985 SC 109)**.

the case was decided in favour of the department on the facts but the learned Division Bench of the High Court of Sindh held that:-

...in order to constitute a business, there must be a continuous exercise of activity for the purpose of gain. This element of continuity is essential to constitute a business of investment. The reason for this condition is that in modern society people no longer hold their savings in gold or cash but are encouraged to invest their savings in property and securities, yet a man who invests his savings in buying a property would not be said to be carrying on a business if he lets out the property on rent, nor would a person who has purchased shares out of his savings be said to carry on business merely because he derives income from his investments. If, however, he regularly buys and sells property or shares, so as to make profit out of the fluctuations in the prices of property or shares, then it would be said that he was carrying on the business of investment; there is thus a fundamental distinction between the business of investment, and the purchase and sale of investments by a person. As pointed out by Lord Wright, in the definition quoted, even occasional speculation in shares does not amount to carrying on a business; therefore, a person, who buys property or shares and retains them for a long period of time, would not be considered to be carrying on the business of investment.

In **Naseer A. Sheikh**'s case (*supra*) this Court, while considering whether a transaction of sale of shares by the assessee was an adventure in the nature of trade, held as under:-

It is to be noticed that even if a receipt is of casual and non-recurring in character, it shall be liable to tax, if it arises out of business. The definition of the term 'business', as given in section 2(4) of the Act, has already been noticed. The question as to whether or not that (sic) a transaction is an adventure in the nature of trade has to be determined, keeping in view the intention of the assessee, in the light of the legal requirements of concept of the business.

In the case of **Commissioner of Income Tax Vs. Mahmood Ali** (2008 PTD 82) the High Court of Sindh opined as under:-

The intention must be deduced from the facts and circumstances of each case and whether a man makes a business of speculation the same must be deduced from the facts of each case. The mere change of investment would not amount to adventure in nature of trade. It will be beneficial to quote the law laid down in the case of (1966) 62 ITR 578. In that case the company was a family company which was formed for the purpose of dealing in properties transferred to it and it had power to purchase and sell properties. The company made profits on the sale of land but it was held that the transaction of sale of plots was one that prudent owner of land would engage in and which was, therefore, no more than realization of a capital investment or conversion of land into money and not a venture in the nature of trade.

18. We may further observe that in determining the nature of the transaction regard has to be made to the nature of the property, length of its ownership and holding, actual conduct of the assessee in respect of it all along and other factors including absence of evidence of any trading activity of the speculative venture. In another case the Indian Supreme Court in the case reported as AIR 1959 SC 1252, while striking down the finding of the department, pointed out that mere fact that the assessee had realized that the property was valuable and would increase in price was no reason to hold that it should be treated as income and reliance was placed on a decision of the House of Lords in which it was held that: "An accretion of capital does not become income merely because original capital was invested in the hope and expectation that it would rise in value. If it so rises its realization does not make it income."

Again the High Court of Sindh had the opportunity to dwell upon the issue of what constitutes an adventure in the nature of trade in the

judgment reported as Major General (Retd.) M. Jalaluddin Vs. ACIT, CIR-VI, Zone-C, Karachi (2011 PTD 1377) in which the Court held:-

6. *Before adverting to the issue in hand, it would be pertinent if the law regarding adventure in the nature of trade be first examined. It is a trite proposition of law that facts of one case are to be examined on the basis of the surrounding circumstances of that case only. There may be occasions where the facts of one case may be akin to the facts of the other case but as no two sun rises are same so are the cases of tax laws. The prime consideration is the cases wherein the question of adventure in the nature of trade is involved is to examine and gather information from which it can be deduced as to what the intention of the purchaser was at the time of the purchase of the plot. If from the facts gathered it becomes imperative that the said plot was purchased with the intention of resale then the case squarely falls under the ambit of adventure in the nature of trade but if due to subsequent facts and circumstances the assessee had to sale a plot for some reasons to convert an un-remunerative asset into a remunerative asset and obtains a gain, specially in the case of sale of plot, the gain arising there-from is a capital gain on which no tax is applicable subject to the condition that the assessee is neither a dealer nor a habitual purchaser and seller of the plots, though this gain is not considered to be a yardstick so far as the sale of plots are concerned. It has been held in some decisions that under the given circumstances an isolated transaction of sale of the plot was held to be an adventure in the nature of trade and under different circumstances a series of sale of plots can be held not to be so. Therefore, no yardstick or parameter, as far this aspect is concerned, could be laid down and each case is to be judged on the basis of the facts pertaining to that case only. It is also a trite proposition of law that the onus of proving adventure in the nature of trade lies squarely on the department.*

In Pakistan Steel Mills Corporation (Pvt.) Ltd., Karachi Vs. Commissioner Inland Revenue (Legal Division), Karachi and another (2012 PTD 723) the High Court of Sindh observed that:-

“12. In order to establish that a transaction whereby a plot of land has been sold out for profit constitutes as “adventure in the nature of trade”, we have to take cognizance of the entire transaction keeping in view intention of the assessee at the time of purchasing the said land as well as future transaction whereby such land has been sold out by the assessee with a intention to earn profit. No hard and fast rule can be adopted in cases of adventure in the nature of trade and each transaction has to be examined on the basis of its own facts.”

7. Coming to cases from the Indian jurisdiction, in the case of Messrs Narain Swadeshi Weaving Mills Vs. The Commissioner of Excess Profits Tax (AIR 1955 SC 176) the Supreme Court, while interpreting the term ‘business’ as defined in Section 2(5) of the Excess Profits Tax Act, 1940 (*which is identical to the definition of ‘business’ in the Ordinance*), held that:-

“14. ...Whether a particular activity amounts to any trade, commerce or manufacture or any adventure in the nature of trade, commerce or manufacture is always a difficult question to answer.

On the one hand it has been pointed out by the Judicial Committee in the – ‘Commissioner of Income-tax, Bengal v. Shaw Wallace & Co.’, AIR 1932 PC 138 (A), that the words used in that definition are no doubt wide but underlying each of them is the fundamental idea of the continuous exercise of an activity. The word ‘business’ connotes some real, substantial and systematic or organised course of activity or conduct with a set purpose. On the other hand, a single and isolated transaction has been held to be conceivably capable of falling within the

definition of business as being an adventure in the nature of trade provided the transaction bears clear indicia of trade. The question, therefore, whether a particular source of income is business or not must be decided according to our ordinary notions as to what a business is.

In the facts and circumstances of the case, the Indian Supreme Court was of the opinion that the letting out of plant, machinery, etc., could not be held to fall within the definition of 'business' under Section 2(5) *ibid.* In the judgment reported as **G. Venkataswami Naidu & Co. Vs. The Commissioner of Income Tax (AIR 1959 SC 359)** the Indian Supreme Court, in great detail, observed as under:-

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 enjoyment. 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.

In the case of **Saroj Kumar Mazumdar Vs. Commissioner of Income-tax, West Bengal** (AIR 1959 SC 1252), the Indian Supreme Court, while determining whether the transaction in question had characteristics which would allow one to conclude that it was a venture in the nature of trade, held:-

Hence, the possibility or the probability that the site may appreciate in value, would not necessarily lend itself to the inference that the transaction was a venture in the nature of trade, as distinguished from a capital investment. In all the circumstances of this case, the total impression created on our mind is that it has not been made out by the Department that the dominant intention of the appellant was to embark on a venture in the nature of trade, when he entered into the agreement which resulted in the profits sought to be taxed.

In The Commissioner of Income-tax, Punjab, Haryana, Jammu and Kashmir and Himachal Pardesh Vs. Prabhu Dayal (dead) by his legal representatives (AIR 1972 SC 386) the Supreme Court of India, while dealing with the question whether the compensation received by the assessee for the termination of the agreement was a capital receipt and hence not taxable, held as follows:-

11. Business as understood in the income-tax law connotes some real, substantial and systematic or organised course of activity or conduct with a set purpose – see the decision of this Court in Narain Swadeshi Weaving Mills v. Commissioner of Excess Profits Tax, 26 ITR 765 = (AIR 1955 SC 176). By this statement we do not mean to say that under no circumstance a single transaction cannot amount to a business transaction. But this is not one such. Herein we are dealing with the stray activity of a non-business man. Hence it is difficult to agree with the Revenue in its contention that the agreement entered into by the assessee with the Dalmia Dadri Cement company should be considered as a business activity.

In the judgment reported as The Commissioner of Income-tax, Nagpur Vs. M/s. Sulej Cotton Mills Supply Agency Ltd. (AIR 1975 SC 2106) the Indian Supreme Court was faced with the question as to whether the profit arising from the sale of shares was assessable as business profit. The Court observed as under:-

13. Where a purchase is made with the intention of resale, it depends upon the conduct of the assessee and the circumstances of the case whether the venture is on capital account or in the nature of trade. A transaction is not necessarily in the nature of trade because the purchase was made with the intention of resale...

14. A capital investment and resale do not lose their capital nature merely because the resale was foreseen and

contemplated when the investment was made and the possibility of enhanced values motivated the investment (see Leeming v. Jones, (1930) 15 Tax Cas 333 and also the decisions of this Court in Saroj Kumar Mazumdar v. C. I. T. (1959) 37 ITR 242 (250-251) = (AIR 1959 SC 1252, 1258-1259) and Janki Ram Bhadur Ram v. C. I. T. (1965) 57 ITR 21 = (AIR 1965 SC 1898)).

15. *In I. R. C. v. Fraser, (1942) 24 Tax Cas 498 (502) (Scot) Lord Norman said:*

“The individual who enters into a purchase of an article or commodity may have in view the resale of it at a profit and yet it may be that that is not the only purpose for which he purchased the article or the commodity, nor the only purpose to which he might turn it if favourable opportunity for sale does not occur. An amateur may purchase a picture with a view to its resale at a profit, and yet he may recognise at the time or afterwards that the possession of the picture will give him aesthetic enjoyment if he is unable ultimately, or at his chosen time, to realise it at a profit...”

16. *An accretion to capital does not become income merely because the original capital was invested in the hope and expectation that it would rise in value; if it does so rise, its realisation does not make it income. Lord Dunedin said in Leeming v. Jones, (1930) 15 Tax Cas 333 at p. 360:*

"The fact that a man does not mean to hold an investment may be an item of evidence tending to show whether he is carrying on a trade or a concern in the nature of trade in respect of his investments, but per se it leads to no conclusion whatever."

This Court laid down in Venkataswami Naidu & Co. v. C.I.T.(1959) 35 ITR 594 (610; 622) = (AIR 1959 SC 359 at p.367; 374) that the dominant or even sole intention to resale is a relevant factor and raises a strong presumption, but by itself is not conclusive proof, of an adventure in the nature of trade.

17. The intention to resell would, in conjunction with the conduct of the assessee and other circumstances, point to the business character of the transaction.

In the judgment reported as **Commissioner of Income Tax Vs. A. Muhammed Mohideen [(1989) 176 ITR 393]** the High Court of Madras held that the transaction whereby the assessee purchased a property and sold the same after converting it into small housing plots did not amount to an adventure in the nature of trade as no material was presented by the department to indicate that the assessee ever intended to indulge in any trading activity. In holding so, the Court relied upon its own previous decision rendered in **Commissioner of Income Tax, Madras Vs. Kasturi Estates (P.) Ltd. [(1966) 62 ITR 578]** in which it held that:-

Can we then say that the sales of land in the accounting year were transactions constituting an adventure in the nature of trade? A great deal of stress has been laid for the revenue on the objects mentioned in the preamble to and in the body of the memorandum and articles. Undeniably, the company has the power to deal or traffic in immovable property, to purchase and sell it at a profit as a business. But the objects by themselves are not determinative of the character of the transaction, though the objects should be kept in view. A sale of immovable property may possibly be a trading or commercial transaction, but need not necessarily be so. Here is a company possessed of vast immovable property including lands in different parts of the city and mofussil. It may well be described that the company is a land-owner or at least its position may be similar to it. There are no facts and circumstances present in the case which may be inconsistent with that way of looking at it, notwithstanding the objects shown in the memorandum and articles. If a land-owner developed his land, expended money on it, laid roads, converted the land into house sites and with a view to get a better price for the

land, eventually sold the plots for a consideration yielding a surplus, it could hardly be said that the transaction is anything more than a realisation of a capital investment or conversion of one form of asset into another. Obviously, the surplus in such a case will not be trading or business profit because the transaction is one of realisation of assets in investment rather than one in the course of trade carried on by the assessee or an adventure in the nature of trade. The case of the assessee can stand on no different footing, as we think, only because it is a company which has among its objects power to trade or traffic in land. There is here no evidence of a venture or adventure. The transaction involved no risk or speculation; nor can it be truly said that it is a "plunge in the waters of trade." It is a transaction which any prudent owner of land will engage in and which is, therefore, no more than realisation of capital investment, conversion of land into money, not a venture in the nature of trade. Having regard to the nature of the property, length of its ownership and holding, actual conduct of the assessee in respect of it all along and all other facts including absence of evidence of any trading activity or speculative venture, we are of the view, therefore, that the Tribunal was right in its conclusion that the surplus from sale of the land did not result from any trade or business in land carried on by the assessee or from any transaction which may properly be described as an adventure in the nature of trade.

8. In light of the above discussion, we find that indeed there can be no hard and fast rule as to whether a transaction constitutes an "*adventure in the nature of trade*" amounting to 'business' in terms of Section 2(11) *supra*; instead, such a determination is dependent upon the facts and circumstances of each case. However, in order to make such a determination, the following guiding principles may be employed:-

- (a) Generally, in order to constitute 'business', there must be a continuous, regular or habitual activity for the purpose of earning gain or profit;

- (b) However, this does not mean that a single transaction cannot constitute an adventure in the nature of trade, which must be examined on a case to case basis;
- (c) A transaction is not necessarily in the nature of trade because the purchase was made with the intention of resale;
- (d) A capital investment and resale do not lose their capital nature merely because the resale was foreseen and contemplated when the investment was made and the possibility of enhanced values motivated the investment;
- (e) The intention to resell, by itself is not conclusive proof, of an adventure in the nature of trade, rather would have to be examined in conjunction with the conduct of the assessee and attendant circumstances, to determine the business character of the transaction; and
- (f) If it is alleged that an activity is in the nature of an adventure, there must be positive material brought on the record to prove that the assessee intended to indulge in such an activity and, in the absence of evidence, the sale of immovable property would give rise only to capital accretion.

9. The appellant is a charitable foundation which is clear from its memorandum of association (MOA). While Clause 21 of the MOA allows the appellant to *“purchase, take on lease, exchange, hire or otherwise acquire any real and personal or immoveable and moveable property and any rights and privileges whatsoever and to build, construct, alter and maintain buildings, house or other constructions for the housing of the Foundation or its staff or as necessary or convenient for any of the objects or purposes of the Foundation;”* mere permissibility of a transaction by itself does not automatically confer on

it the status of a business. It is settled law that the burden to prove that an assessee's receipts fell within the scope of 'income' and were liable to be taxed, lies on the department, and if the latter manages to establish this, then the burden shifts onto the former to show that such receipts were exempt from tax. In this regard reference may be made to the case reported as **The Commissioner of Income Tax Vs. M/s. Smith, Kline & French of Pakistan Ltd. and others (1991 PTD 999)**.³ This is particularly so in the cases where a single transaction of immovable property is involved and it is not established on the record that a person engages in continuous, regular and habitual activities for the purposes of earning profit. Therefore, in the instant case, the burden was on the department to prove that the surplus earned from the single transaction of sale of the property fell within the scope of 'income' being a profit/gain of the appellant's business. As is evident from the assessment order, the department wanted to draw an inference from the fact that the appellant converted the property into a parking lot and derived some rental income therefrom, that the appellant had intended, at the time of purchase of the property, to indulge in an adventure in the nature of trade to generate profit. The Commissioner Income Tax (Appeals), the Tribunal and the learned High Court made bald insinuations that the appellant's conduct vis-à-vis the property and the circumstances surrounding the Fancy family suggested that the property was purchased with the sole intention to sell it at a later time for profit and not to utilise it for charitable purposes. The department failed to discharge its initial burden as there was no concrete material presented by it which proved that the appellant purchased the property

³ See also the Indian cases reported as **Parimiseti Seetharanamma Vs. Commissioner of Income-tax, Hyderabad (AIR 1965 SC 1905) = [(1965) 57 ITR 532]**, **S. A. Ramakrishnan Vs. Commissioner of Income-Tax Madras [(1978)] 114 ITR 253 (Mad)** and **Sumati Dayal Vs. Commissioner of Income-tax Bangalore (AIR 1995 SC 2109)**.

with the intention to indulge in a trading activity. Therefore the question of the appellant proving that the transaction was not an adventure in the nature of trade and hence a business, did not arise as the burden never shifted onto the appellant. That the property had increased in value when it was finally sold by the appellant and therefore fetched a price higher than that for which it was purchased, would not *ipso facto* mean that this act of selling was an “*adventure in the nature of trade*” and constituted a ‘business’ under Section 2(11) of the Ordinance and was liable to tax under Section 22(a) thereof. Rather, being a sale of an immoveable property and not a capital asset, the profit/gain from its transfer was not chargeable to income tax under Section 27(2)(a)(ii) of the Ordinance. Thus, the single and isolated incident of buying and selling property by the appellant is not an “*adventure in the nature of trade*” and would not constitute ‘business’ in terms of Section 2(11) *supra*, and the surplus earned therefrom was not a profit/gain in terms of Section 22(a) *ibid* and was not liable to income tax.

10. In the light of the above, this appeal is allowed and the impugned judgment is set aside.

CHIEF JUSTICE

JUDGE

JUDGE

Islamabad, the
13th of April, 2017
Approved For Reporting
Mudassar/*