IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT

BEFORE SHRI PAWAN SINGH, JM &DR. A.L.SAINI, AM

आयकर अपील सं./**ITA No.143/SRT/2019**

(निर्धारणवर्ष / **Assessment Year: (2015-16)**

(Physical Court Hearing)

Girdharbhai Haribhai Gajera 1,Vrushal Nagar, Opp. Ktargam Police Station, Katargam Road, Surat-35004	**Vs.**	Income Tax Officer (**International Taxation**), 107, 1st Floor, Anavil Business Centre, Adajan-Hazira Road, Opp. Star Bazar, Adajan, Surat-395009
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: **ABEPG 7339 M**		
(Assessee)		**(Respondent)**

निर्धारिती की ओर से /Assessee by : Shri Hiren R.Vepari, C.A

राजस्व की ओर से /Respondent by : Shri Vinod Kumar, Sr-D.R

सुनवाई की तारीख/ **Date of Hearing** **: 14/12/2022**

घोषणा की तारीख/**Date of Pronouncement** **: 22/02/2023**

आदेश / **O R D E R**

PER DR. A. L. SAINI, ACCOUNTANT MEMBER:

Captioned appeal filed by the assessee, pertaining to assessment year 2015-16, is directed against the order passed by the Learned Commissioner of Income-tax (Appeals)13- Ahmedabad ['Ld. CIT(A)' for short' dated 22.02.2019, which in turn arises out of an assessment order passed by the Assessing Officer u/s 143(3) of the Income Tax Act, 1961 [hereinafter referred to as the "Act"] dated 29.12.2017.

2. Grounds of appeal raised by the assessee are as follows:

"(I) Addition of Rs.2,44,28,561 as Long Term Capital Gains:

(1) The CIT(A) was not justified in not comprehending the essence of the MoU dated 02-07-2011, which showed the assessee's intent to convert his agriculture land into stock-in-trade.

(2) The learned CIT(A) misconceived the facts of the case by confirming addition of the transferred land u/s45(2) of the Act, particularly when the agriculture land

converted into stock-in-trade in the year 2011 was not a capital asset within the meaning of Section 2(14) of the Act.

(3) The CIT(A) misconstrued the facts by incorrectly interpreting the conversion date of agriculture land into the stock-in-trade by considering an event anterior to the intent of the assessee.

(4) On the facts and circumstances of the case, the learned CIT(A) having been driven by the extraneous consideration, the appeal needs to be allowed.

(II) Miscellaneous:

The assessee craves leave to add, alter or vary any of the grounds of appeal."

3. The relevant material facts, as culled out from the material on record, are as follows. The assessee before us is a non-resident (Individual) and filed his return of income on 15.09.2015 declaring total income at Rs.3,45,720/-. The case of the assessee was selected for scrutiny through CASS and accordingly notice u/s 143(2) of the Act was issued. Thereafter, notices u/s 142(1) were issued on 09.06.2017, 29.08.2017, 08.09.2017. The Penalty notice u/s. 271(l)(b) was also issued on 08.09.2017. The assessee with other persons have transferred two non-agricultural land to Shanti Integrated Textile Park Pvt. Ltd. and Assessee's share was Rs.2.28,72,600. The assessee has not offered any capital gain or business income on sale of above land. The assessee vide letter dated 22nd December, 2017 has stated that above lands were acquired in the year 1992, agricultural lands were converted into stock-in-trade, stock-in-trade was converted into non-agricultural land and sales were made hereafter. The assessee has stated that before obtaining permission for conversion of agricultural land into non-agricultural land, capital asset was converted into stock-in-trade at Jantri value of Rs.2,28,72,600/-. When there is such conversion, assessee is not liable for tax either at the time of conversion or at the time of sale, because, agricultural land is itself converted as stock-in-trade from capital asset. As per provisions of Section 45(2) of the Act when capital asset is converted into stock-in-trade and such stock-in-trade is sold subsequently, assessee is required to compute income i.e. (i) difference between fair value of the asset and original cost is liable for capital gain, and (ii) difference between sale value and FMV on the date of conversion is liable as business income. On this basis assessee has explained to AO that when land is converted

from capital asset to stock-in-trade, such land was agricultural land itself and as per provisions of Section 2(14) of the Act, assessee is not liable for any tax under the head "**income from capital gain**". When above land was sold, assessee received consideration of Rs.2,28,72,600 which is exactly the same as Jantri value prevailing on the date of conversion hence income from business and profession in present case is nil. The assessee in support of its claim has referred to MoU dated 2nd July, 2011 and affidavit dated 29th October, 2011 which is discussed in subsequent para. During the course of assessment proceedings the assessee has submitted MoU dated 2nd July, 2011 entered into between all the co-owners wherein the land held by different co-owners is mentioned and at page No.4 of such MoU it is stated that each co-owners is transferring their agricultural land into stock-in-trade and as per this MoU, each co-owner would not enter into land dealing independently. It was also stated in such MoU that each co-owner will file affidavit for such conversion. On this basis assessee has submitted his affidavit dated 29th October, 2011, above lands were converted into non-agricultural lands. The assessee has contended before Assessing Officer that date of affidavit i.e. 29th October, 2011 being date of conversion of capital asset into stock-in-trade, as alleged by Assessing Officer is misplaced because fate of intention is decided on the date of MoU. However, this contention of assessee was not accepted by Assessing Officer on the ground that MoU is merely an intention of the contracting parties and it is not a final document. The Assessing Officer has further stated that assessee has not submitted any accounting entry passed in the books of account for such conversion on the date of MoU. The Assessing Officer has also stated that while filing the return of income for AY 2012-13 or subsequent year, or in balance sheet there is no reference to stock-in-trade which clearly proves that no such conversion has taken place. The Assessing Officer has also referred to application of conversion of agricultural land into stock-in-trade made by assessee and other commission-owners on 7th February, 2011 and contended that even though assessee has claimed that they have entered into MoU, this fact is not stated in MoU which clearly means that above land was not converted into stock-in-trade on the date of MoU. The Assessing Officer has

referred to various agreements executed by assessee and other co-owners and claimed that all the documents are duly notarized whereas MoU referred by the assessee is not notarized hence there is no sanctity of such document and MoU is an afterthought. On this basis Assessing Officer has rejected assessee's clam for conversion of land into stock-in-trade on 2nd July 2011. The Assessing Officer has also observed that assessee in its written submission has stated that Jantri rate has remained static from 2nd July, 2011 to 15th December, 2014 hence there is no business income. This contention of assessee was rejected by AO on the ground that as per letter dated 8th December, 2014 given by state Competent Authority, Jantri rate is 1950 per sq. mtr. The market value of stock-in-trade is 1,92,46,500 for non-agricultural land being Block No.344 and Rs.11,01,45,800 for land at Block No.345 as against consideration of Rs.1,77,66,000/- and Rs.10,16,73,000/- shown by assessee and other co-owners in their return of income. On this basis Assessing Officer worked out market value of the land at Rs.2,47,78,660/- and after allowing cost of purchase and indexed cost of purchase, Assessing Officer worked out Long term Capital Gain at Rs.2,44,28,561/- as follows:

Share of the assessee in sale consideration of the lands as on 15.12.2014 (As per the letters dated 08.12.2014 of the Additional Superintendent of Stamps. Gujarat)

Details of capital assets	Market value	Share of assessee
Non-agricultural land of area 9870 sq.mt. block no.344, Hissa No.2, Revenue Survey No.583/6, Village Navi Pardi,Taluka Karmrej, Surat	Rs.1,92,46,500	Rs.27,49,500/- (1/7th share of total sale consideration)
Non-agricultural land of area 56485 sq.mt. block no. 345, Revenue survey No.583, Paiki 1/583/6/1, 585, Village Navi pardi,Taluka Kamrej, Surat	Rs.11,01,45,800/-	Rs.2,20,29,160/- (1/5th of total sale consideration)
	Total	Rs.2,47,78,660/-

Computation of long term capital gains on sale on non-agricultural lands

Share of the assessee in the market value as per the letters dated 08.12.2014 of the Addl. Superintendent of Stamps, Gujarat	Rs.2,47,78,660/-

Less: Indexed cost of purchase in respect of land at block No. 344	Rs.2,71,939/- (Rs.59,221/- *1024/223)	Rs.38,848/- (1/7th share of assessee)	Rs.38,848/-
Less: Indexed cost of purchase in respect of land at block No. 345	Rs.15,56,255/- (Rs.3,38,911/- *1024/223)	Rs.3,11,251/- (1/5th share of assessee)	Rs.3,11,251/-
Long Term Capital gains taxable in A.Y. 2015-16			Rs.2,44,28,561/-

1. Purchase cost of land at block No.344 as per deed dated 12.11.1992: Rs.59,221/-
2. Purchase cost of land at block No. 345 as per deed dated 26.03.1992: Rs.3,38,911/-
3. Cost Inflation index for F.Y. 2014-15: 1024
4. Cost Inflation index for F.Y. 1992-93: 223

Hence, the long term capital gains of Rs.2,44,28,561/- worked out as above was treated as undisclosed long term capital gains of assessee and added to the total income of the assessee.

4. Aggrieved by the order of the Assessing Officer, the assessee carried the matter in appeal before Ld. CIT(A) who has confirmed the action of the Assessing Officer.

5. Aggrieved by the order of Ld. CIT(A), the assessee is in further appeal before us.

6. Learned Counsel for the assessee, pleads that the prime controversy is regarding the point of conversion of rural agriculture land (*within the exceptions carved out u/s 2(14) of the Act*) into stock-in-trade. Based on the facts of the case and legal position, the issue is whether what was converted in the financial year 2011-12 into stock-in-trade was a rural agriculture land (within the exceptions cared out u/s 2(14) of the Act) and it was already a capital asset as stated by the Assessing Officer. The ld Counsel stated that Agriculture land at Block No.344 at Navi Pardi village was purchased on 12-11-1992 by the assessee's mother Smt. Shantaben Haribhai Gajera. The agriculture land at Block No.345 at Navi Pardi village was purchased on 26.03.1993 by the assessee alongwith his brother. Somewhere in 1990s, the shares were re-aligned within the family and that the assessee was allotted 12707 sq./mts. of agriculture land. For a period of 19 years

since its purchase, the pieces of land remained as agriculture land. The land was more than 12 kms. from the aerial distance from the city of the Surat, clearly falling within the exception u/s 2(14)(iii)(b) of the Act; hence, was not a capital asset. This fact is not disputed by the department.

7. With help of the above facts, the ld Counsel stated that assessee with the others decided to do the business by converting this agriculture land into stock-in-trade by making an application for conversion of the agriculture land into non-agriculture land (stock-in-trade) on 7-2-2011(noted by the Assessing Officer in paragraph 3.8). It was at that point that the intention to do the business came into force and that the character of the land changed from agriculture land to stock-in-trade. There is no other way one can reclassify land as stock-in-trade. The land hitherto was only an agriculture land for a period of 19 years. As noted by the Assessing Officer in paragraph 3.9 of the assessment order, for conversion of agriculture land into non-agriculture land, the assessee further executed following documents:

a. For Block No.344; a notarized affidavit and notarized Suvidha Karar dated 22-2-2011 as also making notarized affidavit dated 28-4-2011 and notarized Bahendhari Karar dated 4-6-2011 before the State Government Authorities. These documents vest with the AO and not disputed.

b. For Block No.345; a notarized affidavit and notarized Suvidha Karar dated 23-2-2011 as also making notarized affidavit dated 21-3-2011 and notarized Bahendhari Karar dated 4-6-2011 before the State Government Authorities. These documents vest with the AO and not disputed.

On 2-7-2011, the assessee with the others entered into the MoU (paper book page No.29 to 34) to undertake business on the land that they have been holding since 19 years, (clearly spelling their intention to undertake the business). The assessee was party No.3 amongst the 13 parties to the MoU. Relevant text of two of the

conditions of the MoU are translated in English below for better appreciation of the facts are as follows:

> a. Clause 1 of the MoU: To convert into stock-in-trade, each of the members will adopt current industrial jantry/market value. Accordingly, as per this MoU, all the members stated herein have converted agriculture land into stock-in-trade. To effect that, all the members would be executing an affidavit.
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> b. Clause 5 of the MoU: After entering into this MoU, the respective member shall not be in a position to take independent decision of its land. In future, only collective decision will be taken for the land.

It is the contention of the assessee that the point when agriculture land is converted into stock-in-trade, no capital gains takes place since neither agriculture land beyond 8 kms nor stock-in-trade comes to fall within the meaning of section 2(14). The value adopted by the assessee for converting the agriculture land into stock-in-trade was the prevalent stamp authority rate which is Rs.1800 per sq.mt. even today.

8. The ld Counsel further stated that intent to do the business changes the character of the property. To demonstrate that the character of the property was changed from agriculture land to stock-in-trade. The above string of events and evidence are sufficient to prove that the assessee converted his agriculture land into stock-in-trade before 11-8-2011 when the land came to be converted into non-agriculture land.

9. About additional ground raised by the assessee, Learned Counsel submitted that such additional ground relates to incorrect determination of jantri by the department at Rs.1,950/- per sq.mt. against Rs.1,800/- per sq.mt. The ld Counsel states that this is only a measurement difference, and the assessee supports Rs.1800 per sq.mt. with the applicable jantri rates, and the difference is less than 10% (Rs.150/ Rs.1800) which is now allowable, as tolerance band. For that ld

Counsel relied on the decision of Mumbai Tribunal in the case of Maria Fernandes Chery (123 taxmann.com 252).

10. On the other hand, Ld. Sr.DR for the Revenue, argued that assessee, with other person, made application for the first time for conversion of agricultural land into non-agricultural land on 07.02.2011.The sanctity of the MoU dated 02.07.2011 is questionable, it is after thought to cheat the Revenue. Further, Stamp Paper of Rs.100/- had been purchased only in the name of Shri Girdharbhai Haribhai Gajera even though it meant for 13 persons/parties. The parties/persons had put their signature only on the last page whereas the signatures of all the parties to MoU are required in all pages. Original copy of MoU has not been submitted by the assessee. Anybody can easily prepare such form of MoU at any point of time. Hence, the MoU has not evidentiary value and hence it is not acceptable. The ld DR pointed out that lands were converted into non-agricultural lands by State Competent Authority on 11.08.2011, hence the nature of lands was changed by the Competent Authority and therefore the lands were capital assets. The event of conversion of agricultural land into stock-in-trade is not supported by any accounting entry in the accounting year of the said conversion and is not finding any place in the balance sheet or return of income of the said financial year. The notarized affidavit was made on 29.10.2011 declaring the conversion of agricultural land into stock-in-trade on 02.07.2011, which is nothing but a colourable device. What were sold to M/s Shanti Integrated Textile Park Limited were not agricultural lands, but capital assets as they were non-agricultural lands on the date of sale i.e. 15.12.2017. **Further the land sold was also not stock-in-trade as returns of income filed by assessee and balance sheets do not support the theory of assessee and hence question of business income also not arises on the transfer of the said lands.**

11. The ld DR further pointed out that Jantri rate as on date of sale to M/s Shanti Integrated Textile Park Limited was Rs.1950/- and not Rs.1,800/- as contended by the assessee, in his submission dated 22.12.2017, as the Addl.

Superintendent of Stamps, Gujarat has considered the market value of the lands at the rate of Rs. 1,950/- per sq. mt. Therefore, the conversion of assets into stock-in-trade through affidavit/MoU in the absence of any corresponding accounting entry in the books of account is considered as an afterthought and hence not genuine. In view of the same, the transaction between the assessee (with other persons) and M/s Shanti Integrated Textile Park Limited in respect of non-agricultural lands is considered as sale of capital assets generating capital gains. Hence, long term capital gains on sale of land to M/s Shanti Integrated Textile Park Limited is taxable in the hands of the assessee for the year under consideration. This way, ld DR supported the order passed by the Assessing Officer.

12. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position. We note that ld CIT(A) has passed very elaborate and speaking order. The findings of ld CIT(A), which is useful for our analysis, are reproduced below:

> *"....5.4 On careful consideration of entire facts, it is observed that assessee has claimed profit arising on sale of land held by him since 1992 as tax free by making arrangement i.e. first by converting agricultural land into stock in trade as per his whims and valuing such land as FMV and selling the land as same value and such action on part of assessee is not as per provisions of law. The assessee has claimed that land held by assessee along with other co-owners were converted into stock in trade on 02/07/2011 by entering into MoU amongst the co-owners. The assessee and other commission-owners were holding the land since 1992 and land was agricultural land and assessee by his own whims converted such land as stock in trade on above date. There is no event that has happened which lead to conclusion that intention of assessee for holding land as capital assets has changed. The assessee and other co-owners have agreed to convert agricultural land as stock in trade by allegedly entering into MoU which is not notarized but entered into simple paper. The assessee was required to prove the circumstances which lead him to convert capital assets as stock in trade and such act is mere afterthought so that assessee is not required to pay legitimate tax. It is pertinent to note that when assessee is holding land since last 20 years, and no event has happened on 02/07/2011 which can support the claim of assessee that he want to treat such lands as stock in trade by mentioning such fact on plain paper, no capital asset can be converted into stock in trade. It is also found that assessee has even not made any development in land subsequently nor made any plotting of the land non entered into development agreement with builders to develop housing projector commercial project which can support the claim of assessee that he has decided to carry out business activity on such land. Mere converting agricultural land into non-agricultural land does not mean that land held by assessee become stock in trade. It is pertinent to note that even circumstantial evidences does not suggest that land has been converted into stock in trade as claimed by assessee. The AO was correct in holding that assessee has not provided any accounting entries passed in the books of*

account for year 2011-12 wherein above land are classified as stock in trade in 02/07/2011 and even such lands are not shown as stock in trade for year 2012, 2013 and so on. The assessee was required to disclose such lands as stock in trade in books of account and in ITR filed by it on year to year basis. Had assessee actually converted land into stock in trade, he would have obtained audit report u/s 44AB of the Act, filed audit report, disclosed sale of land as turnover and remaining land if any as stock in trade and failure to obtain such audited books of account clearly prove that entire theory of conversion of agricultural land as stock in trade is baseless and after thought. Even otherwise, as discussed in preceding paras, claim of assessee for conversion of asset into stock in trade is mere afterthought as no event has happens which can prove that assessee wanted to enter into any business of land dealing. The assessee has not brought any evidences to prove that there is frequent purchase and sell of land in support of his contention that by converting land into stock in trade, he carries out business of land dealing at regular interval. Reliance is also placed on decision of Hon'ble Rajkot ITAT in the case of Shailesh Gangaram Ramani Vs ITO 89 taxmann.com 76 has held as under:

> *"Section 45, read with section 28(1)of the Income-tax Act, 1961 – Capital gains – Chargeable as (Business income vs. Capital gains – Land dealings) – Assessment, year 2009-10 – During relevant year, assessee filed return wherein profit from sale of land was claimed as exempt on ground that it was an agricultural land not falling within meaning of capital asset under section 2(14) – Assessing Officer taking a view that assessee was trading in land, brought profit to tax as 'business income' – it was found from records that assessee had not traded in land, rather it was a simplicitor investment for agriculture operation, but on account of getting good price said land had been sold, and higher volume of agricultural land was purchased subsequently at different places – Whether on facts, assessee was to be regarded as an agriculturalist and, thus, profit arising from sale of land could not be brought to tax – Held, yes [Para 17] In favour of assessee]*

It is seen from above decision that Hon'ble court has held that when assessee has sold agricultural land at different places does not mean that assessee has earned business income and in present case, assessee has held that land since 1992, no evidences were brought on record that assessee has carried out any business activity on such land and when such land are sold at higher value then cost value, profit arising on such land was rightly taxed by assessee as long term capital gain ignoring the conversion of agricultural land into stock in trade as claimed by assessee. The assessee has made mere tax arrangement by which assessee convert his capital assets stock in trade and value his capital assets on FMV and by valuing land at FMV, he was not required to pay tax and ultimately selling the land at FMV only by which even he was not required to pay profit on business income. Reliance is also placed on decision of Hon'ble Rajasthan High Court in the case of CIT Vs Sohan Khan & Mohan Khan [2008] 304 ITR 194 has held as under:

> *"Section 45 of the Income-tax Act, 1961 -Capital gains – Chargeable as – Assessment, year 1994-95 – Where land was purchased in 1970, and after cloud of land ceiling laws, was cleared and other adjoining lands had been developed, it was decided to be sold in piecemeal by earmarking plots, nonetheless sale transaction would remain a disposal of capital asset only, and not a transaction of any 'stock-in-trade' so as to be described as 'Adventure in nature of trade' and therefore, it was liable to be taxed only as capital gain"*

In the present case, assessee was holding the land as agricultural asset, converted land into non-agricultural and sold in year under consideration and gain cannot be held as adventure in nature of trade. Reliance is also placed on following decisions in support of observation made hereinabove that not even has happens which justify conversion of

agricultural land into stock in trade and selling of land is required to be taxed as income from capital gain.

(i) Deep Chandra & Co. vs. CIT (107 ITR 716)[Allahabad] The Hon'ble Court has opined that the question whether profit earned in any transaction had arisen out of adventure in the nature of trade is a mixed question flaw and facts and such a question fall within the realm exclusive facts of each case. The mere fact that the land is purchased with a view to re-selling under favourable conditions does not by itself give rise to a circumstance to hold that the land was purchased with the intention to enter into a trade. The conduct of a purchaser should be inconsonance with the investment and, thereafter realization of investment on sale and in the absence of any other circumstances it is to be held as the surplus money so received was a capital gain. The activity of parcelling out the land and thereafter selling in the market, can be said to be designed to enhance the value of the land and such an activity is a business activity, but where a person has no intention of trading, the land by either parcelling or buying and selling cannot be considered to be a person engaged in an adventure in the nature of trade simply because by taking some steps he might succeed in receiving higher price of land in the market. Merely because of certain developments in the town, if the consequence is the increase in the price do not establish that a trade activity was carried out by an assessee.

(ii) Sarojkumar Mazumdar vs. CIT (37 ITR 242) [SC] The Hon'ble Court has observed while discussing the nature of business activity that though the assessee was engaged in various types of businesses as a share-holder or a Director, as also in building contracts, but dealing in landed estate was not in the line of his business. The court has said that if such transaction was in the line of his business, then it would not matter whether it was one transaction or several transaction and even a single transaction being a part of his day-to-day business would be a profit out of trade activity. It was a single transaction out of which a considerable profit was earned which was in the nature of a wind-fall. The possibility or the probability that the site in question may appreciate in value, but would not necessarily land itself to the inference that the transaction was a venture in the nature of trade.

(iii) CIT Vs. Rewashanker A. Kothari [2006] 155 Taxman 214 (Guj.)
The Hon'ble court has observed that the tests laid down by various decisions of the Apex Court indicate that, in each case, it is the total effect of all the relevant factors and circumstances that determine the character of the transaction. Each case has to be determined on the total impression created on the mind of the court by all the facts and circumstances disclosed in a particular case. One of the principal tests is whether the transaction is related to the business normally carried on by an assessee. It is equally well-settled that, merely because the original purchase was made with the intention to re-sell, if an enhanced price could be obtained, that by itself is not enough to infer that assessee is carrying on business.

(iv) Ajitkumar T Patel, ITA No.826/AHD/2010 dated 13/09/2010
"11. In the light of detailed foregoing discussion and on consideration of the evidences placed on record as well as in view of the legal propositions laid down by the Hon'ble courts, we hereby hold that the asset in question was not purchased with the object to enter into the trade of land-dealing, because after this transaction or before this transaction there was no evidence of any such activity ever carried out by this assessee. We have also perused the expenses incurred by the assessee and the nature of those expenses are mainly towards payment of legal charges, or prescribed fees for consolidation the plots, or for the conversion of the agricultural land into non-agricultural land. Known fact is

> *that in a land trade, generally the land is parceled out into small plots and thereafter marketed. Such an activity has not been carried by this assessee. Even there was no systematic or repetitive buying or selling of land which could indicate an adventure in the nature of trade. Few steps taken by this assessee might be an attempt to receive higher price of land, but merely because of those steps, it cannot be held that the assessee is dealing in land estate business. The land in question was never treated as a stock-in-trade but it was treated as capital asset on which wealth-tax was paid. All the circumstances and evidences thus demonstrated the purpose of purchase of land and the objective of the assessee for which the land was acquired which by no means can be held an adventure in the nature of trade. We, therefore, hold that the assessee has not entered into any adventure in the nature of trade and the consideration received on the said land transaction was in the nature of capital gain only."*

Thus, contention of assessee that he has made application for converting land into non-agricultural land clearly prove that assessee has intention to carry out business activity cannot be accepted in view of decisions referred supra. The assessee has sold non agricultural land during the year which are nothing but capital asset held by him and is required to be taxed as income from capital gain.

5.5 It is pertinent to note that in present case, assessee and other co-owners have made application for first time for conversion of agricultural land into non agricultural land on 07/02/2011 and not after entering into alleged MoU. The sanctity of MoU dated 02/07/2011 is questionable as discussed in preceding para and further MoU is prepared on simple paper not signed by all the co-owners in all pages, original copy not provided in assessment proceedings. Even assessee has entered into various agreements in current year as well as in earlier assessment year and all such agreements are notarized and same are discussed in assessment order whereas above referred MoU is not notarized which also suggest that it is an afterthought. The claim of assessee that MoU required each co-owner to file separate Affidavit regarding such conversion and preparing such affidavit by assessee on 29/10/2011 to give effect of MoU dated 02/07/2011 is nothing but colourable device and to claim that capital assets are converted into stock in trade before obtaining NA permission is incorrect as no evidences / circumstantial evidences are brought on record by assessee or events have triggered which can support contention of assessee that intention of holding land as capital assets have charged in FY 2011-12. Even AO has not observed that land was converted into stock in trade on the date of Affidavit but on the contrary, he at para 3.12 has observed that "it cannot be assumed that the assessee converted into agricultural land into stock in trade on 02/07/2011 in the circumstances when the sanctity of MoU is questionable…" Mere selling the land at substantially higher value to Shanti Integrated Textile Park Limited does not prove that assessee has converted land into stock in trade. The assessee has claimed to have entered into MoU and converting agricultural land into stock in trade is arrangement entered into by assessee and other co owners so that no tax is paid to government even though assessee has earned huge income by selling land. As explained by the Supreme Court in Vodafone International Holdings B.B. 341 ITR 1 the question whether a scheme is a colourable or an artificial device would have to be considered in the context of the surrounding facts. The issue whether transaction pertaining to sale of shares of a non-resident holding company which resulted in transferring the controlling interest in downstream Indian subsidiary, was a device to evade tax. In that context, the Supreme Court observed that "whether a transaction is used principally as a colourable device for the distribution of earnings, profits and gains, is determined by a review of all the facts and circumstances surrounding the transaction". The court held that if an actual controlling Non-Resident Enterprise (NRE) makes an indirect transfer through abuse of organization form / legal form and without reasonable business purpose, which results in tax avoidance then the Revenue may disregard the form of the arrangement and re-

characterize the equity transfer according to its economic substance. The court accepted the principle that transaction done without reasonable purpose but only for avoidance of legitimate tax by using a corporate form can be ignored. In the present case, the facts clearly indicative the transaction to be a part of a scheme, the sole purpose of which is to evade tax payable on the by artificially converting asset into stock in trade. The Hon'ble Madras ITAT in the case of ITO Vs. R. Krishnaswamy 54 ITD 145 has held as under:

> *"Section 45 of the Income-tax Act, 1961 – Capital gains – Chargeable as – Assessment year 1984-85 – Assessees, K and his minor son R. converted some of their shareholding in various companies from investment into stock-in-trade income of two firms on 9-11-1983 -Shares were later sold on 15-12-1983 to a private limited company incorporated on 14.12.1983 purportedly to deal in shares, its only shareholders being K.K's wife and R. Capital of assessees in share business stood substantially reduced after transaction in question was over – Whether all transactions question being by interested parties, principles of McDowell &Co. Ltd vs. CTO [1985] 154 ITR 148 (SC) were attracted to facts and transaction being colourable device to avoid tax arising on capital gains, Assessing Officer was right in brining gains to capital gains tax -Held, yes.*

Reliance is also placed on ratio of decision of Hon'ble Allahabad High Court in the case of CIT Vs. Carlton Hotel (P.) Ltd. [2017] 88 taxmann.com 257 wherein it is held as under:

> *"Section 2(47), read with section 45, of the Income-tax Acts, 1961 – Capital gains Transfer (Firm in the case of) Assessment year 2004-05 Assessee company entered into partnership with one SICCL and SIA -Towards capital contribution in stock of firm, assessee contributed land, valued as per books, at cost of Rs.7.81 crores – Assistant Commissioner held that there was transfer of land to partnership firm, thus, worked out capital gain in hands of assessee – It was noted that contribution of assessee was 88 per cent of total capital but it was assigned only 5 per cent profit sharing in firm – Partnership deed showed that assessee had a little role in partnership business -Business of partnership was to be exclusively carried out by SICCL – There was no right to assessee on name and goodwill of firm -Whether value of land contributed by assessee in stock of firm was much higher as against its negligible profit sharing in firm, entire transaction of contribution to partnership was a sham, and an attempt to device a method to avoid capital gain tax on transfer of land to firm – Held, yes [Para 86] [In favour of revenue]*

Reliance is also placed on decision of Hon'ble Delhi ITAT in the case of AO Vs. Shiva Gases [SOT 2] herein it is held as under:

> *"Section 28(i) of the Income-tax Act, 1961 – Business loss/deductions – Allow-able as – Assessment year 1996-97 -Assessee deducted loss on sale of shares in 'B' Ltd. from profit on sale of fixed assets and dividend income – Assessing Officer noticed that six companies, to whom shares of 'B' Ltd had allegedly been sold, were private limited companies controlled and managed by closely connected persons who were partners in assessee firm as well as directors in these companies; that all six transfer forms purportedly executed on different dates with different transferees had same witness; that even though transactions in question were claimed to be credit transactions and mere book entries had been made in books of assessee-firm as well as transferee companies yet all these entries were dated 31-3-1996, i.e., much after alleged date of transaction in February 1996 – Assessing Officer disallowed deduction claimed by assessee on ground that entire gamut of sale transaction was merely a part of tax planning resorted to with a view to reduce tax liability – Whether income-tax authorities were entitled to took into surrounding circumstances to find out reality of matter – Held, yes – Whether entirety of circumstances surrounding alleged sale of*

> *shares by assessee, when viewed in context of human probabilities, lead to irresistible inference that sales transactions were sham and were merely an afterthought so as to reduce tax liability and, therefore, loss claimed by assessee was rightly disallowed by Assessing Officer – Held, yes"*

> *Considering the fact discussed hereinabove, AO was correct in rejecting conversion of capital asset into stock in trade as claimed by assessee and taking gain as long term capital gain. With regards to contention of assessee that AO was incorrect in considering JANTRI value at Rs.1950 Sq meter as against 1800 Sq meter considered by assessee, it is observed that the AO has considered such value on the basis of report received from Additional Superintendent of Stamps, Gujarat received in assessment proceedings. The AO on the basis of such report has considered FMV of block no 344 at Rs.1,92,46,500 (assessee's share at Rs.27,49,500) as against sale value mentioned in sale deed at Rs.1,77,66,000. Here, it is pertinent to refer to paper book page no 59 submitted by assessee in appellate proceedings which referrers to letter issued by Office of Superintendent of Stamp to buyers and such letter is forming part of sale deed wherein it is clearly stated that fair market value of the property is Rs.1,92,46,500 which is exactly the same figure as is considered by AO while computing income from capital gains. Similar is the case for block no 345 wherein assessee has executed sale deed at Rs.10,16,73,000 but letter issued by stamp authority forming part of sale deed and part of paper book page no. 108 states that fair market value of the property is Rs.11,01,45,800 and such value is also considered by AO while computing income from capital gains. Thus, claim of assessee for adopting incorrect JANTRI value by AO is rejected. Thus, entire addition for Rs22,44,28,561/- is upheld and the related grounds of appeal are dismissed."*

13. We have gone through the above findings of ld CIT(A) and noted that even circumstantial evidence does not suggest that land has been converted into stock in trade as claimed by assessee. The AO was correct in holding that assessee has not provided any accounting entries passed in the books of account for year 2011-12 wherein above land are classified as stock in trade in 02/07/2011 and even such lands are not shown as stock in trade for years 2012, 2013 and so on. The assessee was required to disclose such lands as stock in trade in books of account and in ITR filed by it on year to year basis. Had assessee been actually converted land into stock in trade, he would have obtained audit report u/s 44AB of the Act, filed audit report, disclosed sale of land as turnover and remaining land if any as stock in trade and failure to obtain such audited books of account clearly prove that entire theory of conversion of agricultural land as stock in trade is baseless and after thought, therefore, we confirm the above findings of ld CIT(A) and dismiss the appeal (main grounds of the assessee`s appeal) of the assessee.

14. Now, we shall adjudicate the additional ground raised by the assessee, which reads as follows:

> *"Without prejudice to the main ground, the AO ought to have accepted the measurement at Rs.1,800 per sq. mt. against Rs.1,950 per sq. mt. as transfer value when the valuation difference is less than 10%."*

15. We have heard both the parties. We note that the additional ground raised by the assessee is only a legal ground where the Assessing Officer ought to have accepted the measurement at Rs.1,800/- per sq. mt. against Rs.1950/- per sq. mt as transfer value when the valuation difference is less than 10%, therefore, we admit such additional ground for adjudication.

We note that amendment in third proviso to section 50C of the Act was held to be retrospectively applicable by Coordinate Bench of Mumbai Tribunal in the case of Maria Fernandes Chery (123 taxmann.com 252). We note that as per assessee the measurement is at Rs.1,800 per sq. mt. However, as per Revenue, the measurement is at Rs.1950 per sq. mt, as transfer value. We note that difference between both the measurement is 8.33%, which is less than 10%. Such tolerance limit is allowable as per provisions of third proviso to section 50C of the Act. Therefore, we direct the assessing officer to consider measurement at the rate of Rs.1,800 per sq. mt. to compute the long term capital gain. Hence, we allow the additional ground raised by the assessee.

16. In the result, additional grounds raised by the assessee is allowed.

17. In the result, the appeal of the assessee is partly allowed to the extent indicated above.

Order is pronounced on 22/02/2023 by placing the result on the Notice Board.

Sd/-	**Sd/-**
(PAWAN SINGH)	**(Dr. A.L. SAINI)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

सूरत /Surat दिनांक/ Date: 22/02/2023
Dkp Outsourcing Sr.P.S.

Copy of the Order forwarded to

1. The Assessee
2. The Respondent
3. The CIT(A)
4. Pr.CIT
5. DR/AR, ITAT, Surat
6. Guard File

By Order

// **True Copy** //

Senior Private Secretary
/Private Secretary/Assistant Registrar
ITAT, Surat