

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'A' NEW DELHI**

**BEFORE SHRI S.V. MEHROTRA, VICE PRESIDENT
AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER**

**ITA No. 1789/Del/2011
AY: 2007-08**

**ITA No. 4579/Del/2011
AY: 2008-09**

**Amrit Corp Limited, vs Addl. Commissioner of Income Tax,
Amrit Nagar, G.T. Road, Range-2, Ghaziabad.
Ghaziabad.
(PAN: AAFCA7387Q)**

**ITA No. 5337/Del/2011
AY: 2008-09**

**ITA No. 2163/Del/2011
AY: 2007-08**

**Addl.CIT, vs Amrit Corp Limited,
Range-II, Ghaziabad.
VGO-2, Hapur Road,
Ghaziabad.
(Appellant) (Respondent)**

**Appellant by : S/Shri Rohit Jain, Rohit Garg, Advs.
Respondent by : Shri S.K. Jain, DR**

ORDER

PER SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

These four appeals have a common issue and were heard together. For the sake of convenience, they are being disposed of through this common order. ITA 1789/Del/2011 is appeal filed by the assessee for AY 2007-08 whereas ITA 2163 is the cross appeal by the Department. ITA 4579/Del/2011 has been

preferred by the assessee for AY 08-09 whereas ITA 5337/Del/2011 is the cross appeal by the Department.

2.0 The brief facts of the case are that the assessee owned 77,638 sq. yards of industrial land since 1940-41 at G.T. Road, Ghaziabad. The land was always shown as capital asset by the assessee since beginning in the books of accounts. It is on this very land, that the Ghaziabad Vanaspati Unit of the assessee was located. On closure of the said Ghaziabad Vanaspati unit, the assessee, pursuant to a scheme of rehabilitation in the financial years 2001 -02/2002-03, decided to sell surplus land of the said unit. Based on the aforesaid, from the financial year 2002-03, relevant to the assessment year 2003-04, the assessee started selling the surplus land. Gains arising on sale of the surplus land were declared under the head 'capital gain' by the assessee in the returns of income for the assessment years 2003-04 to 2006-07. During the relevant previous year 2006-07, the assessee had offered for taxation 'long term capital gain' of Rs. 1,68,93,649/- and 'business income' of Rs. 1,32,84,593/- on account of sale of industrial land measuring 7681.458 sq. yards, which was converted into stock in trade during the relevant previous year 2006-07, by applying the provisions of section 45(2) of the

Income Tax Act, 1961 (The Act). The assessing officer, however, held/ observed that the assessee had converted the above land from capital asset to stock-in-trade during the financial year 2002-03 and not in the financial year 2006-07, as claimed by the assessee. Accordingly, the assessing officer proceeded to re-compute 'long term capital gains' and 'business income' of the assessee. The AO disputed the assessee adopting the value of land at Rs. 190/- per sq. yard as on 1.4.1981 (based on valuer's report) and adopted the rate of Rs. 20/- per sq. yard being the value fixed by the Uttar Pradesh State Industrial Development Corporation (UPSIDC). The AO proceeded to make an addition of Rs. 24,78,670/- being the difference/short computation of Long Term Capital Gain arising out of the difference in valuation. Consequentially, the AO took the business profit on sale of land/plots at Rs. 2,48,10,528/- in place of business profit shown by the assessee at Rs. 1,32,84,593/- and the difference of Rs. 1,15,25,935/- was added to the income of the assessee.

2.01 Similarly, for AY 2008-09, the AO added back a sum of Rs. 11,52,246/- on account of difference in the working of long term capital gain due to the difference in valuation rates of Rs. 190/- per sq. yard as adopted by the assessee and Rs. 20/- per sq. yard

as adopted by the AO. Further, the AO also made an addition of Rs. 55,71,333/- on account of difference in the business profit which was shown by the assessee at Rs. 76,39,932/- whereas the AO computed the same at Rs. 1,32,11,265/-.

2.02 The assessee approached the Ld. First Appellate Authority who partly allowed the appeals of the assessee for both the years by directing the AO to adopt the circle rate of Rs. 100/- per sq. yd. for the determination of fair market value on 1.4.1981.

2.03 Now, both, the assessee as well as the Department, have approached the ITAT.

2.04 The assessee is challenging the action of the Ld. CIT (A) for both the assessment years under appeal in confirming the action of the AO in holding that the assessee had converted the impugned industrial land into stock in trade during FY 2002-03 thereby attracting the provisions of section 45(2) of the Act in that year as against the assessee's claim that the conversion took place in the financial year 2006-07. The assessee is also challenging the action of the Ld. CIT (A) in directing the AO to adopt the Fair Market Value as on 01/04/1981 at Rs. 100/-sq.

yard as against Rs. 190/- per sq. yard adopted by the assessee for the purpose of computation of capital gains.

2.05 The Department is challenging the action of Ld. CIT (A) in both the years under appeal in directing the AO to take the Fair Market Value (FMV) of land on 01/04/1981 @ Rs. 100/- per sq. yard as against Rs. 20/- per sq. yard adopted by the AO.

3.0 The Ld. AR submitted that the primary issue that arises for consideration is whether the industrial land was converted into stock in trade on 01.04.2002 (as held by the assessing officer) or on 01.04.2006 (as contended by the assessee)? It was submitted that the following **facts demonstrate that the Industrial Land was held as Capital Asset till assessment year 2006-**

07 are as under:-

(i) The industrial land under consideration was held since 1940-41 and housed the Ghaziabad Vanaspati Unit of the assessee. Thus, there can be no dispute that the land was not acquired and held for sale but for exploitation/ use as a capital asset.

(ii) Sale of land was part of the Rehabilitation Scheme framed by the Board for Industrial Finance and Reconstruction (BIFR)

and on the directions of the BIFR, an Asset Sale Committee (ASC) was constituted for the purpose of sale of asset of the erstwhile Ghaziabad Vanaspati Unit, including the surplus land. Furthermore, the sale consideration was used to fund the cost of rehabilitation scheme and repayment of loans.

(iii) In the financial statements for the years ended 31st March 2003 to 31st March, 2006, the land sold by the assessee was shown as capital asset in Schedule "E- Fixed Assets".

(iv) Under the Companies Act and as per the applicable mandatory Accounting Standards, every company is required to give segment wise results of all the business segments. Had the sale of land been part of the business of the assessee, the same would have constituted a separate business segment of the assessee and the assessee would have had to declare separately the results of the said segment. However, from perusal of the financial statements for the financial years 2002-03 to 2005-06, it will be evident that real estate has not been shown as a separate business segment, which also goes to prove that land was not held as 'stock in trade' by the assessee-company during the relevant year.

(v) Profit on sale of land was separately shown as 'Extraordinary income'. Further, in the profit and loss account, only profit on sale of land was shown and not the gross consideration received.

(vi) The assessee also paid wealth tax on the land before converting such land into stock in trade.

(vii) The wealth tax returns were filed by the assessee for Assessment Years 2003-04 to 2006-07 wherein the land at Ghaziabad was shown as taxable asset and substantial wealth tax was paid thereon as follows:-

<u>Financial Year</u>	<u>Wealth Tax Paid</u>
2003-04	13,47,557/-
2004-05	11,20,227/-
2005-06	13,55,765/-

(viii) No wealth tax is payable on 'stock-in-trade' and, therefore, had the land been treated/ held as 'stock in trade' by the assessee during the relevant years, the assessee would not have been required to pay such huge wealth tax in the relevant years.

(ix) The aforesaid position is not at all disputed and the above returns have also attained finality.

3.01 The Ld. AR further submitted that the **facts to demonstrate that the Industrial Land was converted into “stock in trade” in the financial year 2006-07 are as under:-**

(i) Object clause of the Memorandum of Association was amended in September, 2005 to include 'real estate' as one of the main object vide clause (ii).

(ii) The approval of the shareholders was taken for amendment of the Memorandum of Association and also for the commencement of business of real estate under section 149(2A) of the Companies Act, 1956.

(iii) In the audited financial statements for the relevant Assessment Year 2007-08, the assessee had shown its results separately for 'real estate'.

(iv) Note given in Note 12 of Schedule O – Notes to Accounts reads as under:-

“13. Segment information for the year ended 31st March, 2007

(a) Business Segments

Based on the guiding principles given in Accounting Standard As-17 “Segment Reporting” issued by the Institute of Chartered Accountants of India, the Company’s business

segments include Milk/Milk products (manufacture of dairy milk & milk products) & Real Estate”.

3.02 It was submitted that, thus, it is evident, that the industrial land was held as capital asset till assessment year 2006-07; and that the industrial land was converted from capital asset into stock-in-trade in assessment year 2007-08 only.

3.03 The Ld. AR drew our attention to the recent decision of the Hon'ble **Allahabad High Court in assessee's own case** for assessment years 2003-04 to 2006-07 wherein the initiation of reassessment proceedings for the said assessment years were quashed holding that-

- a) *“there was complete disclosure of all material facts relating to land by the assessee during the course of assessment proceedings and there was no failure on the part of assessee to disclose fully and truly all the material facts necessary for the assessment-years under consideration;*
- b) ***there was no conversion of capital asset into stock-in-trade nor such capital asset was treated as stock-in-trade of business during the years under consideration and that the assessing authority erred in invoking section 45(2) on sale of land by assessee. The HC further observed that to make the provisions of section 45(2) applicable, there must be positive act on the part of the owner of the capital asset to transfer the asset by way of conversion into stock-in-trade or treating such capital asset as stock-in-trade of a business.”***

3.04 The Ld. AR further submitted that the Hon'ble High Court had observed that the land was a long term capital asset in the hands of the assessee during the financial years 2002-03 to 2005-06 and that, there was no conversion of the capital asset into stock-in-trade under the provisions of section 45(2) of the Act during such period as contemplated by the Revenue. As a result, any gain/loss accruing as a result of transfer of land was to be taxed as 'Long Term Capital Gains'. The Ld. AR referred to the relevant observations of the Hon'ble High Court as under:-

“32. Now coming to the question that whether, on the facts and circumstances, the provision of Section 45(2) of the Act is applicable.

33. Section 45(2), as referred hereinabove, provides the profit or gain arising from the transfer by way of conversion by the owner of the capital asset into, or its treatment by him as, stock-in-trade of a business carried on by him shall be chargeable to income tax as his income of the previous year in which such stock-in-trade is sold or otherwise transferred by him and, for the purposes of section 48, the fair market value of the asset on the date of such conversion or treatment shall be deemed to be the full value of the consideration received or accruing as a result of the transfer of the capital asset.

34. Section 45(2) is applicable in a situation where there is a transfer by way of conversion by the owner of a capital asset

into stock-in-trade of a business or owner has treated such capital asset as stock-in-trade of a business. To make the provision application, there must be a positive act on the part of the owner of the capital asset to transfer the asset by way of conversion into stock-in-trade or treating such capital asset as stock-in-trade of a business. In the absence of such a positive act on the part of the owner of the capital asset, the provision of Section 45(2) does not apply. In the present case, it is not the case of the revenue that the owner has transferred, by way of conversion of the capital asset, converted the capital asset into stock-in-trade or has treated such capital asset as stock-in-trade of a business. There is no such material in this regard on record. The assessing authority, while initiating the proceeding, under Section 148, read with Section 147, has inferred such conversion of capital asset into the stock-in-trade and applied the provision of Section 45 (2), which is wholly erroneous. ”

3.05 It was submitted that the fact that the land was held by the assessee as “capital asset” till assessment year 2006-07 stands accepted by the Revenue, which has now attained finality. Therefore, there could be no question of the very same land being treated as having been converted into stock in trade in financial year 2002-03, as alleged by the assessing officer, for the purpose of computing capital gains during the year under consideration.

3.06 It was further submitted that in the aforesaid decision, the Hon'ble High Court has also recognized the fact that in order to attract the provisions of section 45(2) of the Act, there must be a positive act on the part of the owner of the capital asset to transfer the asset by way of conversion into stock-in-trade or treating such capital asset as stock-in-trade of a business. In the absence of such a positive act on the part of the owner of the capital asset, the provision of Section 45(2) does not apply. It was submitted that there was no act on part of assessee to convert land into stock-in-trade during the financial years 2002-03 to 2005-06. The land was shown as capital asset since beginning in the books of accounts of the assessee. In financial year 2000-01, the permission for converting the said land from 'Industrial' to 'Residential' was sought in order to sell the existing capital asset, which does not mean that the assessee converted the land into "stock in trade". It was submitted that, thus, in view of the above, the land was converted from capital asset to stock-in-trade only during the year under consideration and not any time before that.

3.07 It was further submitted that the aforesaid contention is supported by the clear language of section 45(2) of the Act,

since the precondition of that section is that either of the following situation must exist:

- a) capital asset held by the owner is converted by him into stock in trade; or
- b) capital asset is treated as stock in trade by the owner.

3.08 It was further submitted that in both the aforesaid situations, the emphasis is on the treatment given by the owner of the capital asset. Thus, till the time the owner himself either converts the capital asset into stock in trade or treats the capital asset as stock in trade, the provisions of section 45(2) of the Act are not at all attracted. The Ld. AR submitted that this contention is fortified by use of the expression "*conversion by the owner*" and "*its treatment by him*" in section **45(2)** of the Act. The words "*by the owner*" and "*by him*" clearly refer to a positive act on the part of the owner of either converting his capital asset into stock in trade or treating the same as such. The Ld. AR reiterated that for section **45(2)** to apply what is relevant and conclusive is the conduct of the owner of the capital asset and nothing else. If the assessee/owner has not converted/treated his capital asset into as stock in trade in any particular year, then it will not be open to

the assessing officer to hold that the capital asset was, for the purposes of tax under section 45(2) of the Act, treated as or converted into stock in trade. Further, only the positive act/conduct of the owner- assessee in converting/ treating the capital asset into/as stock in trade is relevant to determine the applicability of section 45(2) of the Act and nothing else.

3.09 The Ld. AR also invited the Bench's attention to the decision of the **Mumbai Bench of the Tribunal in the case of Jehangir T. Nagree: [2008] 23 SOT 512 (MUM)** wherein the Tribunal held that under section 45(2) of the Act it was the sweet will of the assessee to decide as to when he intended to convert his investment into stock in trade.

3.010 As regards the observations of the assessing officer, and also affirmed by Ld. CIT(Appeals), that since the assessee had applied for/ obtained permission from the Ghaziabad Development Authority, Ghaziabad, for converting its industrial land into residential land in the financial year 2002-03, the land was to be treated as converted in the said financial year, the Ld. AR submitted that the same cannot be the sole basis for holding that the land was converted by the assessee from capital asset to stock in trade in the financial year 2002-03. He submitted that

the conversion, in terms of section 45(2) of the Act, takes place only when the assessee, by his voluntary act, converts/treats the capital asset into stock in trade and not otherwise.

3.011 The Ld. AR further submitted that there may be many instances where an assessee may seek permission from a regulatory /development authority for change in the land use. Therefore, seeking such change, by itself, cannot be the basis to hold that the assessee changed the character of the land from capital asset to stock in trade or vice-versa. It was submitted that in the present case, the assessee sought permission for converting its industrial land into residential land since the assessee felt that it would be able to realize higher price for the large piece of land, if the assessee sold such land as residential plots rather than selling the entire land as industrial land to a single buyer. It was further submitted that at the time when such decision was taken, the assessee was a sick **company and, therefore, the aim of the ASC set up by the BIFR was to take steps to realize higher consideration. It was not at all the intention, at that time, to start new venture/business of real estate.**

3.012 The Ld. AR also drew our attention invited to the following decisions wherein the Courts have held that the mere fact that the assessee took certain steps for selling bigger plot to fetch higher price, including seeking relevant permissions, would not mean that the gain realized was business income:

Deep Chandra and Co. v. CIT : 107 ITR 716 (All.)

CIT v. Kasturi Estates (P.) Ltd: 62 ITR 578 (Mad.)

CIT vs. MLM Mahalingam Chettiar: 107 ITR 236 (Mad.)

CIT vs. A. Mohammed Mohideen: 176 ITR 393 (Mad.)

CIT vs. Suresh Chand Goyal: 298 ITR 277 (MP)

Kaur Singh vs. CIT: 144 ITR 756(P&H)

Asha Housing Enterprises vs. DCIT: 127 ITD 94 (Bang.)

3.013 Our attention was also invited to the following decisions wherein it has been held that to determine the nature of an asset, one must look at the intention of an assessee **at the time of purchase** of an asset-whether the same was to be held as “capital asset” or as “stock-in-trade”:-

CIT v. Mohakapur Ice and Cold Storage: 281 ITR 354~(All.)

Bhogilal H. Patel v. CIT: 74 ITR692 (Bom.)

CIT v. Anandlal Becharlal & Co.: 107 ITR 677 (Bom.)

CIT v. B.K. Bhaumik: 245 ITR 614 (Del.)

Marudhar Hotels Pvt. Ltd. v. ACIT: ITA No. 75/Ju./2012

3.014 The Ld. AR submitted that in light of the aforesaid facts and legal position and also applying the ratio of decision of the Hon'ble Allahabad High Court in the assessee's own case (supra), the provisions of section 45(2) of the Act were not at all applicable till the financial year relevant to the assessment year 2005-06. He submitted that the assessing officer may, therefore, be directed to accept the gains as declared in the return of income on the basis of conversion of land in the financial year 2006-07, i.e. the year under consideration.

3.10 On the issue of determination of **Fair Market Value of the industrial land as on 01.04.1981, the Ld. AR submitted that** the assessee had, while computing 'long term capital gains', adopted Rs.190/- per sq. yard as fair market value of the land on 01.04.1981. The said valuation of Rs.190/- per sq. yd. was duly supported by the valuation report of the Government registered valuer (available on **pages 92-93 of the paper book**). **It was submitted that** the registered valuer determined the fair value of the land at Rs.190/- per sq. yard as under:

(a) Valuer first took into account the circle rate of the land at

Rs. 100/- per sq. yard and fair value of the land at Rs. 115/- per sq. yard;

(b) Thereafter, the valuer took into account the fact that out of total land admeasuring 77,638 sq. yards, only land admeasuring 46,232 sq. yards was saleable. Since saleable area of land was less, to determine the true fair value for the purpose of capital gains, the valuer determined the fair value of the saleable area by appropriately increasing the fair value of the saleable portion.

3.11 The Ld. AR submitted that the assessing officer rejected the said valuation report of the registered valuer without any basis and adopted the fair market value of the land at Rs.20/- per sq yard as intimated by the U.P. State Industrial Development Corporation ('UPSIDC'), vide letter dated 17.12.2009, filed in pursuance to the assessing officer's notice under section 133(6) of the Act (available at page 123 of the paper book).

3.12 It was further submitted that the Ld. CIT (A), however, concluded that the fair market value of the land as on 01.04.1981 should be taken at Rs.100/- being the circle rate and the Ld. CIT (A) did not accept the second step adopted by the

registered valuer in increasing the value of land on account of lower saleable area.

3.13 It was submitted by the Ld. AR that on perusal of the aforesaid letter of the UPSIDC, it would be seen that even though the rate of industrial land has been mentioned at Rs.20/- per sq. yard, yet it was clearly stated that the land allotted to the assessee does not come under the purview of the industrial area for which the said rate was mentioned. Furthermore, the land of the assessee is a freehold land and in the above letter of the UPSIDC, it has not at all been stated as whether the rate of Rs.20/- per sq. yard is applicable for leasehold land or for freehold land.

3.14 The Ld. AR further submitted that during the year ended 30th June, 1985, the assessee had revalued the value of land in the books of accounts on the basis of the report of an approved valuer vide report dated 8th October, 1985, (available at pages 94-122 of the paper book) wherein the valuer had valued the land at Ghaziabad at Rs. 12,50,000/- per acre, i.e. Rs.258 per sq. yard. Thus, land having market value of Rs.258 per sq. yard in 1984-85 could not be valued at Rs.20/- per sq. yard as on 1.04.1981. The Ld. AR submitted that this fact also

substantiates the claim of the assessee that the value of land as on 1.04.1981 was Rs. 190/- per sq. yard.

3.15 It was further submitted that in case the assessing officer disagreed with the valuation done by the Registered Valuer, he ought to have pointed out the discrepancies therein and recorded the reasons for doing so. Reliance, in this regard, was placed on the following decisions:

CWT vs Raghunath Singh Thakur: 304 ITR 268 (HP)

Sosamma Paulose vs JCIT: 79 TTJ 573 (Coch.)

Shanti Complex vs ITO: 63 ITD 181 (Pat.) (TM)

Chitra Publicity Company (P) Ltd. vs. ACIT: (2010) 127 TTJ (Ahd) TM 1

ACIT vs Vinod Kumar Agarwal: 82 ITD 1 (Vishakapattnam)

Amit Estate Organizer vs ITO: 316 ITR (AT) 190

3.16 It was submitted that in the aforesaid circumstances, particularly having regard to the valuation report furnished by the registered valuer certifying the fair market value of the land under consideration as on 1.4.1981 at Rs.190/-per sq. yard, it was not open to the assessing officer to have disregarded the same and adopted an altogether different rate of Rs.20/- per sq. yard, that too on the basis of letter received from UPSIDC, which

was not at all relevant for the purpose of determining the fair market value of the land under consideration.

3.2 During the course of hearing on an earlier occasion, this Bench had directed the assessee to furnish documentary evidences in support of the contention that the assessee had transferred the portion of land comprising of open spaces, parks, public utility areas, etc without any consideration as per clause (V) of the agreement dated 03/08/2002.

3.21 In this regard the assessee sought to place on record additional evidences to substantiate the averment of the assessee that the saleable area of the land was approved at 43,425 sq. yards (later 43,418 sq. yards) and therefore, the fair market value of land as on 01/04/1981 should proportionately be enhanced and determined at Rs. 190/- per square yard. The Ld. AR submitted an application for admission of additional evidences in terms of Rule 29 of the Income Tax (Appellate Tribunal) Rules, 1963 and sought to place on record the following documents by way of additional evidences –

1. Copy of affidavit of the director of the assessee along with letter dated 28/07/2007 filed by the assessee before the Ghaziabad Development Authority (GDA) for issuance of completion certificate.
2. Copy of original layout plan dated 08/08/2002 and revised layout plan dated 17/08/2004.
3. Copy of letter dated 25th of September 2012 issued by GDA to the assessee regarding transfer of parks, roads, etc.
4. Letter dated 05/10/2012 filed by the assessee in response to the aforesaid letter of GDA and requesting issuance of completion certificate.

3.22 The Ld. authorised representative submitted that the assessee had adopted the fair market value at Rs. 190/- per square yard relying on the valuation report wherein the circle rate of Rs. 100/- per square yard was extrapolated in relation to the saleable area. It was submitted that such extrapolation is correct and necessary considering that out of total area of 77,638 yd.², the GDA granted approval for sale to the extent of 43,425 yd.² (later revised to 43,418 yd.²) and the remaining land to the extent of 34,213 yd.² (later revised to 33,794 yd.²) occupied by parks, roads, pavements, drains, water supply system and other public

utility services which were to be transferred to the GDA without consideration. The Ld. AR submitted that the additional evidences are being placed to substantiate the averment of the assessee that the saleable area of land was approved at 43,425 yd.² (later 43,418 yd.²) and therefore, the fair market value of land as on 01/04/1981 should be proportionately enhanced and determined at Rs. 190/- per square yard. It was further submitted that this fact was brought to the knowledge of the AO vide letter dated 23/12/2009 and the AO as well as the Ld. CIT (Appeals) had never disputed the fact that out of total area, the saleable area was only 43,425 yd.². It was submitted that this was evident from the fact that the AO, while computing capital gains, took into consideration the saleable area of 43,425 yd.², as was evident from pages 7 and 8 of the assessment order. It was further submitted that the assessee was never directed to produce these aforesaid additional evidences either by the AO or by the Ld. CIT (Appeals) and the issue of saleable area was never disputed. It was further submitted that the issue of transfer as per clause (V) was also never raised by the assessing officer or the Ld. CIT (Appeals) and, therefore, these additional evidences were being furnished only to address and clarify the specific query raised by

the Bench during the course of hearing. It was further submitted that these additional evidences may be admitted and taken into consideration for the disposal of the appeals.

4. The Ld. Departmental Representative placed reliance on the orders of the authorities below and read out extensively from both the orders while vehemently arguing that the same should be upheld.

5. We have heard the rival submissions and have perused the relevant material on record. The first issue that arises for consideration is whether the industrial land held by the assessee was converted into stock-in-trade on 1st April 2002 (as held by the Assessing Officer) or on 1st April 2006 (as contended by the assessee). In this regard, the following facts remain undisputed:-

1. The assessee was holding industrial land since the year 1940-41 and it housed Ghaziabad Vanaspati unit of the assessee. Thus, the land was initially not acquired for sale but was held as a capital asset.
2. The sale of industrial land was part of the rehabilitation scheme framed by the BIFR and the sale consideration

was to be used to fund the cost of rehabilitation scheme and repayment of loan.

3. Even for year ending 31.03.2004, 2005 and 2006, the land sold by the assessee was being shown under capital assets in the schedule of fixed assets.
4. The wealth tax returns filed by the assessee for assessment years 2003-04 to 2006-07 show that the land at Ghaziabad was shown as a taxable asset and wealth tax was paid thereon.
5. The object clause of the Memorandum of Association was amended in September, 2005 to include real estate as one of the main objects.
6. In audited financial statement 2007-08, the assessee, for the first time, showed the financial results separately for real estate.

5.1 These above facts demonstrate that the industrial land was held as capital asset till assessment year 2006-07 and the industrial land was converted into stock-in-trade in the financial year 2006-07 and not 2002-03 as held by the Assessing Officer. Further, the Hon'ble Allahabad High Court in assessee's own case in Tax Writ Nos. 47 to 50 of 2010 in the case of Amrit

Corporation Ltd. vs ACIT reported in 275 CTR 174 (All) has also held in assessee's favour by impliedly holding that the transfer for the purpose of capital gains did not take place in the year 2002-03. Although this judgment of the Hon'ble Allahabad High Court was rendered in respect of validity of reassessment proceedings, the Hon'ble High Court did hold in Para 33 and 34 of the order as under:-

33. Section 45(2), as referred hereinabove, provides the profit or gain arising from the transfer by way of conversion by the owner of the capital asset into, or its treatment by him as, stock-in-trade of a business carried on by him shall be chargeable to income tax as his income of the previous year in which such stock-in-trade is sold or otherwise transferred by him and, for the purposes of section 48, the fair market value of the asset on the date of such conversion or treatment shall be deemed to be the full value of the consideration received or accruing as a result of the transfer of the capital asset.

34. Section 45(2) is applicable in a situation where there is a transfer by way of conversion by the owner of a capital asset into stock-in-trade of a business or owner has treated such capital asset as stock-in-trade of a business. To make the provision application, there must be a positive act on the part of the owner of the capital asset to transfer the asset by way of conversion into stock-in-trade or treating such capital asset as stock-in-trade of a business. In the absence of such a

positive act on the part of the owner of the capital asset, the provision of Section 45(2) does not apply. In the present case, it is not the case of the revenue that the owner has transferred, by way of conversion of the capital asset, converted the capital asset into stock-in-trade or has treated such capital asset as stock-in-trade of a business. There is no such material in this regard on record. The assessing authority, while initiating the proceeding, under Section 148, read with Section 147, has inferred such conversion of capital asset into the stock-in-trade and applied the provision of Section 45 (2), which is wholly erroneous. ”

5.2 This adjudication by the Hon'ble High Court goes in favour of the assessee that there was no conversion of the capital asset to stock-in-trade in financial year 2002-03 as has been contended by the department and that the provisions of section 45(2) will apply only in a situation where there is a transfer by way of conversion by the owner of the capital asset into stock-in-trade by a positive act on the part of the owner of the capital asset and that in absence of such a positive act on the part of the owner of the capital asset, the provisions of section 45(2) will not apply. The Hon'ble High Court also concluded that in the present case, it was not the case of the assessee that the owner had transferred, by way of conversion of the capital asset, converted the capital asset into stock-in-trade or had treated such capital

asset as stock-in-trade of the business. Thus, the Hon'ble High Court has adjudicated that the land was a long term capital asset in the hands of the assessee during the financial years 2002-03 to 2005-06 and that there was no conversion of capital asset into stock-in-trade under the provisions of section 45(2) of the Act during such period as contemplated by the revenue.

5.4 Therefore, on count also, there can be no question of the very same land being treated as having been converted into stock-in-trade in financial year 2002-03, as contended by the department, for the purpose of computation of capital gains during the year under consideration.

5.5 Further, the Hon'ble Court has also recognized the fact that in order to attract provisions of section 45(2) of the Act, there must be some positive act on the part of the owner of the capital asset to transfer the asset by way of conversion into stock-in-trade or treating such capital asset as stock-in-trade of the business. It is amply clear that in absence of a positive act on the part of the owner of the capital asset, the provisions of section 45(2) will not apply.

5.6 It is undisputed that there was no act on the part of the assessee to convert such land into stock-in-trade during the financial years 2002-03 to 2005-06 and the land was shown as capital asset since the beginning in the books of accounts of the assessee. It was only in financial year 2000-01 that the assessee had sought permission for converting the said land from industrial to residential but this does not imply that the assessee had converted the land into stock-in-trade during the financial year 2000-01. We find merit in the contention of the assessee that the land was converted from capital asset to stock-in-trade only during the year under consideration i.e. FY 2006-07 and not any time before that, because the language of section 45(2) of the Act provides that capital asset held by the owner is converted by him into stock-in-trade or capital asset is treated as stock-in-trade by the owner and in both the situations, the emphasis is on the treatment given by the owner of the capital asset. Thus, till the time the owner himself either converts the capital asset into stock-in-trade, the provisions of section 45(2) of the Act will not be attracted. Thus, what is provided is that only positive act/conduct of the owner assessee in applying/treating a capital asset into stock-in-trade is relevant to determine the applicability

of section 45(2) of the Act and nothing else and this aspect has been approved by the Hon'ble High Court in the assessee's case referred to above.

5.6 We also agree with the assessee's contention that since the assessee had applied for obtaining permission from the Ghaziabad Development Authority (GDA), Ghaziabad for conversion of industrial land into residential land during financial year 2002-03, the land cannot be treated as converted in the financial year 2002-03 as in terms of section 45(2) of the Act, the conversion takes place only by the voluntary act of the assessee for such conversion and a mere act of seeking permission for conversion of land use will not come within the definition of 'transfer'.

5.7 Therefore, on an overall consideration of the facts, we hold that the industrial land was held as capital asset till assessment year 2007-08 and the same was converted into stock-in-trade only in the financial year 2006-07 and not in assessment year 2003-04 as contended by the department. Accordingly, ground nos. 1, 1.1 and 1.2 in assessee's appeal for assessment year 2007-08 and ground nos. 1, 1.1 and 1.2 for assessment year 2008-09 stand allowed.

5.8 The second issue arising for our consideration is the determination of Fair Market Value of the land on 1st April, 1981. The assessee had claimed Fair Market Value at Rs. 190/- per sq yard. The assessee had relied on the valuation report of a registered Valuer in arriving at the Fair Market Value. However, the Assessing Officer had rejected the valuation report and had adopted the Fair Market Value of land at Rs. 20/- per sq yard as intimated by UPSIDC filed in pursuance of notice u/s section 133(6) of the Act. On appeal, the Ld. CIT (A) determined the Fair Market Value at Rs. 100/- per sq yd according to the existing circle rate and now department is contesting the valuation at Rs. 100/- per sq. Yard in place of Rs. 20/- per sq. yard whereas the assessee is challenging the valuation of Fair Market Value at Rs. 100/- per sq yd instead of Rs. 190/- as claimed by the assessee.

5.9 It is seen that the assessee wanted to adopt the Fair Market Value @Rs. 190/- per sq yd based on the fact that out of the total land measuring 77,638 sq yards, the saleable land area was only 46,232 sq yards in terms of clause (iv) of the agreement made between the assessee and the GDA vide agreement dated 3rd August 2002 wherein certain area was to be transferred from

the assessee to the GDA free of cost. The relevant clause (iv) reads as under:-

“that the first party shall transfer ownership of parks, roads, pavements, drains, water supply system and public utility services, if any, and the land underneath without consideration of money in favour of the authority or as directed by the party”.

5.10 It is the assessee's contention that since the saleable area of land was less, the Fair Market Value of the saleable portion had to be appropriately increased so as to determine the true Fair Market Value for the purpose of computation of capital gains. The assessee's claim is duly supported by the report of the registered valuer. However, the department did not accept the assessee's computation of Fair Market Value at an increased value so as to factor the decrease in the saleable area. The Assessing Officer adopted value of Rs. 20/- per sq yd which the Ld. CIT (A) himself has rejected on the ground that the value of Rs. 20/- per sq yd as intimated by the UPSIDC was not applicable to the assessee's case as the assessee's land did not fall under the UPSIDC area. We find no reason to interfere with the findings of the Ld. CIT (A) in this regard as this finding is duly

supported by letter from the UPSIDC dated 17.12.2009 addressed to the ACIT, Ghaziabad which mentions that the assessee's land did not come under the jurisdiction of the UPSIDC. Thus, the sole ground in department's appeals in both the years stands dismissed.

5.11 The next issue for consideration is whether the figure of Rs. 100/- sq yd, being the circle rate, as adopted by the Id. CIT (A) is to be sustained or the value of Rs. 190/- per sq yd, as contended by the assessee, is to be applied for the purpose of computation of long term capital gain. In our considered opinion, the assessee has a strong case for adopting a higher Fair Market Value given the fact that the total area measuring 77,638 had a saleable area of only 46,232 sq yds. The assessee had to essentially provide for parks, roads, pavements, drains, water supply system and public utility services free of cost to the GDA and as such, the reduction in saleable area would have to be necessarily factored into the Fair Market Value. Therefore, in principle, we do agree with the assessee's contention that the Fair Market Value should be appropriately enhanced so as to offset the reduction in the total saleable area.

5.12 The Bench had raised a query and had asked the Ld. AR to demonstrate before the Bench that the transfer ownership of the areas/facilities as contemplated in clause (iv) of the agreement with GDA had actually taken place and the Ld. AR has filed an application for admission of additional evidence in terms of Rule 29 of the ITAT Rules, 1963 in this regard and we deem it fit to admit the same. The Ld. AR has placed on record an affidavit from the Chairman and MD of the assessee company stating that under the terms of the agreement, the assessee company did not have any right over parks, roads, pavements, drains, water supply system, public utility services etc. i.e. the common areas and facilities and these were to be transferred to the local body free of cost. It has also been averred in the said affidavit that in terms of the agreement, the assessee company was neither entitled to receive any consideration nor has received any consideration in respect of said common areas and facilities and that the residents of the township have the right to use these common areas and facilities. It has further been averred in the affidavit that the assessee had applied for issuance of completion certificate before the authority vide letter dated 20th July 2007 but the same had not been granted till date. It has also been

averred that as per section 15A of the UP Urban Planning and Development Act 1973, if the authority fails either to grant or refuses to grant completion certificate within three months of submission of completion notice, the completion certificate is deemed to have been granted by the authority. The Ld. AR has also placed on record letter dated 20th July 2007 addressed to the GDA as aforesaid along with copy of plans. Ld. AR has also placed on record copy of communication dated 25.9.2012 wherein the GDA has informed the assessee that the assessee is still to transfer open areas, road, parks etc. to Ghaziabad Nagar Nigam free of cost. The Ld. AR has also placed on record a copy of letter dated 5th October, 2012 addressed to GDA again requesting for the issuance of completion certificate.

5.13 A perusal of these documents reveals that although the assessee has duly been following up the matter pertaining to the issuance of completion certificate, the transfer of ownership of the open areas/facilities in terms of clause (iv) of the agreement is still not complete as per the letter dated 25.09.2012 issued by the GDA. It is also pertinent that these additional evidences filed by the assessee have not been examined by the lower authorities. Therefore, while we do agree with the

assessee's contention that the Fair Market Value as on 1.4.1981 should be enhanced so as to include the cost of unsaleable area in terms of open space/facilities etc., the issue will necessarily have to be decided by the Assessing Officer after duly considering the valuation report submitted by the assessee supporting the Fair Market Value of Rs. 190/- per sq yd as neither the Assessing Officer nor the Ld. CIT (A) have commented upon the same. We also hold that should the assessee be able to demonstrate before the Assessing Officer that the transfer of ownership of unsaleable area has taken place, as contemplated in clause (iv) of the agreement, the assessee should be allowed due weightage of the same while computing the market value of the same as on 1.4.1981. Accordingly, ground nos. 2, 2.1 and 2.2 for both the years in assessee's appeal stand allowed for statistical purposes.

6. In the final result, both the appeals of the assessee are allowed in terms of our directions as aforesaid and both the appeals of the department are dismissed.

Order is pronounced in the open court on 6th June, 2017.

Sd/-

(S.V. MEHROTRA)
VICE PRESIDENT

Sd/-

(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

Dated: 6th June, 2017
'GS'

Copy forwarded to:-

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. Ld. DR

By Order

Asstt. Registrar