IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 03rd DAY OF NOVEMBER 2016

PRESENT

THE HON'BLE MR. JUSTICE JAYANT PATEL

AND

THE HON'BLE MR. JUSTICE ARAVIND KUMAR

ITA No.157/2011
c/w
ITA No.145/2011, ITA No.146/2011, ITA No.183/2014,
ITA No.349/2014 & ITA No.350/2014

IN ITA No.157/2011

BETWEEN:

1. COMMISSIONER OF INCOME
TAX (CENTRAL)
CENTRAL REVENUE BUILDINGS
QUEENS ROAD
BANGALORE 560 001.

2. THE ASSISTANT COMMISSIONER
OF INCOME TAX
CENTRAL CIRCLE 2(3)
CR BUILDINGS
BANGALORE.

... APPELLANTS

(By Sri K.V.ARAVIND a/w Smt. E I SANMATHI, ADVS.)

AND:

M/S. BAGMANE DEVELOPERS
PVT LTD, LAKE VIEW BUILDING
NO.66/1-4, A BLOCK,
8TH FLOOR, BAGMANE TECH
PARK, C V RAMN NAGAR

BANGALORE

... RESPONDENT

(By Sri CHYTHANYA K K, ADV.)

THIS ITA IS FILED UNDER SEC.260-A OF I.T.ACT 1961 ARISING OUT OF ORDER DATED 03/12/2010 PASSED IN ITA NO.382/BANG/2010 FOR THE ASSESSMENT YEAR 2004-05, PRAYING THAT THIS HON'BLE COURT MAY BE PLEASED TO: 1.FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW STATED THEREIN. 2. SET ASIDE THE COMMON APPELLATE ORDER DATED 03/12/2010 PASSED BY THE ITAT, 'B' BENCH, BANGALORE IN APPEAL PROCEEDINGS ITA NO.382/BANG/2010, AS SOUGHT FOR IN THIS APPEAL, IN THE INTEREST OF JUSTICE AND EQUITY.

IN ITA No.145/2011

BETWEEN:

1. COMMISSIONER OF INCOME
   TAX (CENTRAL)
   CENTRAL REVENUE BUILDINGS
   QUEENS ROAD
   BANGALORE-560 001.

2. THE ASSISTANT COMMISSIONER
   OF INCOME TAX
   CENTRAL CIRCLE 2(3)
   CR BUIDLINGS
   BANGALORE.

... APPELLANTS

(By Sri K.V.ARAVIND a/w Smt. E I SANMATHI, ADVS.)

AND:

M/S. BAGMANE DEVELOPERS
PVT LTD, LAKE VIEW BUILDING,
NO.66/1-4, A BLOCK,
8TH FLOOR, BAGMANE TECH
PARK, C V RAMAN NAGAR
BANGALORE

... RESPONDENT

(By Sri K K CHYTHANYA, ADV.)

THIS ITA IS FILED U/S.260-A OF I.T.ACT, 1961 ARISING OUT OF ORDER DATED 03/12/2010 PASSED IN ITA NO.182/BANG/2010 FOR THE ASSESSMENT YEAR 2002-03, PRAYING THAT THIS HON'BLE COURT MAY BE PLEASED TO: 1.FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW STATED THEREIN. 2. SET ASIDE THE APPELLATE ORDER DATED 03/12/2010 PASSED BY THE ITAT, 'B' BENCH, BANGALORE, IN APPEAL PROCEEDINGS ITA NO.182/BANG/2010, AS SOUGHT FOR IN THIS APPEAL, IN THE INTEREST OF JUSTICE AND EQUITY.

IN ITA No.146/2011

BETWEEN:

1. COMMISSIONER OF INCOME
   TAX (CENTRAL)
   CENTRAL REVENUE BUILDINGS
   QUEENS ROAD
   BANGALORE-560 001

2. THE ASSISTANT COMMISSIONER
   OF INCOME TAX
   CENTRAL CIRCLE 2(3)
   C R BUIDLINGS
   BANGALORE.

... APPELLANTS

(By Sri K.V.ARAVIND a/w Smt. E I SANMATHI, ADVS.)

AND:

M/S. BAGMANE DEVELOPERS
PVT. LTD. LAKE VIEW BUILDING,
No.66/1-4, A BLOCK,
8TH FLOOR,
BAGMANE TECH PARK
C V RAMAN NAGAR
BANGALORE

... RESPONDENT

(By Sri CHYTHANYA K K, ADV.)

THIS ITA IS FILED U/S.260-A OF I.T.ACT, 1961 ARISING OUT OF ORDER DATED 03-12-2010 PASSED IN ITA NO.383/BANG/2010, FOR THE ASSESSMENT YEAR 2005-2006, PRAYING THAT THIS HON'BLE COURT MAY BE PLEASED TO: 1.FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW STATED THEREIN. 2. SET ASIDE THE COMMON APPELLATE ORDER DATED 03/12/2010 IN ITA NO.383/BANG/2010 PASSED BY THE ITAT, 'B' BENCH, BANGALORE, AS SOUGHT FOR IN THIS APPEAL, IN THE INTEREST OF JUSTICE AND EQUITY.

IN ITA No.183/2014

BETWEEN:

M/S. BAGMANE DEVELOPERS
PVT. LTD. LAKE VIEW BUILDING
NO.66/1-4, A BLOCK
8TH FLOOR, BAGMANE TECH PARK
C.V.RAMAN NAGAR
BANGALORE-560093.
(REPRESENTED BY ITS
MANAGING DIRECTOR
RAJA BAGMANE
AGED ABOUT 53 YEARS

S/O.SRI CHANDRE GOWDA)

... APPELLANT

(By Sri CHYTHANYA K K, ADV.)

AND:

THE ASSISTANT COMMISSIONER
OF INCOME TAX
CENTRAL CIRCLE -2(3)
CR BUILDINGS QUEENS ROAD
BANGALORE-560001.

... RESPONDENT

(By Sri K.V.ARAVIND a/w Smt. E I SANMATHI, ADVS.)

THIS ITA IS FILED UNDER SEC.260-A OF I.T. ACT 1961, ARISING OUT OF ORDER DATED 03/12/2010 PASSED IN ITA NO.382/BANG/2010 FOR THE ASSESSMENT YEAR 2004-05 PRAYING TO 1. FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW STATED ABOVE. 2. ALLOW THE APPEAL AND SET ASIDE THE IMPUGNED ORDER (TO THE EXTENT PREJUDICIAL) OF THE INCOME TAX APPELLATE TRIBUNAL BEARING ITA NOS.382/BANG/2010 DATED 03/12/2010 FOR THE ASSESSMENT YEAR 2004-05.

IN ITA No.349/2014

BETWEEN:

M/S. BAGMANE DEVELOPERS PVT. LTD.
LAKE VIEW BUILDING
NO.66/1-4, A BLOCK
8TH FLOOR, BAGMANE TECH PARK
C.V.RAMAN NAGAR
BANGALORE-560 093
(REPRESENTED BY ITS DIRECTOR

D.V.RAMAKRISHNA
AGED ABOUT 43 YEARS
S/O SRI VENKATARAMANAPPA)

...APPELLANT

(By Sri CHYTHANYA K K, ADV.)

AND:

THE ASSISTANT COMMISSIONER
OF INCOME TAX
CENTRAL CIRCLE-2(3)
CR BUILDINGS, QUEENS ROAD
BANGALORE-560 001.

... RESPONDENT

(By Sri K.V.ARAVIND A/W Smt E I SANMATHI, ADVS.)

THIS ITA IS FILED UNDER SEC.260-A OF I.T. ACT 1961, ARISING OUT OF ORDER DATED 03/12/2010 PASSED IN ITA NO 182/BANG/2010 FOR THE ASSESSMENT YEAR 2002-03 PRAYING TO 1. FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW STATED ABOVE. 2. ALLOW THE APPEAL AND SET ASIDE THE IMPUGNED ORDER (TO THE EXTENT PREJUDICIAL) OF THE ITAT BEARING ITA NO.182/BANG/2010 DATED 03/12/2010 FOR THE ASSESSMENT YEAR 2002-03.

IN ITA No.350/2014

BETWEEN:

M/S. BAGMANE DEVELOPERS
PVT. LTD. LAKE VIEW BUILDING
NO.66/1-4, A BLOCK
8TH FLOOR, BAGMANE TECH PARK
C.V.RAMAN NAGAR
BANGALORE-560 093
(REPRESENTED BY ITS DIRECTOR

D.V.RAMAKRISHNA
AGED ABOUT 43 YEARS
S/O SRI.VENKATARAMANAPPA)

...APPELLANT

(By Sri CHYTHANYA K K, ADV.)

AND:

THE ASSISTANT COMMISSIONER
OF INCOME TAX
CENTRAL CIRCLE-2(3)
CR BUILDINGS, QUEENS ROAD
BANGALORE-560 001

... RESPONDENT

(By Sri K.V.ARAVIND a/w Smt. E I SANMATHI, ADVS.)

THIS ITA IS FILED UNDER SEC.260-A OF I.T. ACT 1961, ARISING OUT OF ORDER DATED 03/12/2010 PASSED IN ITA NO.383/BANG/2010 FOR THE ASSESSMENT YEAR 2005-2006 PRAYING TO 1. FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW STATED ABOVE. 2. ALLOW THE APPEAL AND SET-ASIDE THE IMPUGED ORDER (TO THE EXTENT PREJUDICIAL) OF THE ITAT BEARING ITA NOS.383/BNG/2010 DATED 03/12/2010 FOR THE ASSESSMENT YEAR 2005-06.

THESE ITAs COMING ON FOR FINAL HEARING THIS DAY, ***JAYANT PATEL .J,*** DELIVERED THE FOLLOWING:

JUDGMENT

As in all these appeals, as common questions arise for consideration, they are being considered simultaneously.

2. Various questions are raised, but in the facts and circumstances of the case, we find that concise question can be formulated as under;

> "Whether in the facts and circumstances of the case, the Tribunal was right in law in allowing the assessee's claim as regards sale of the land to be treated as 'capital gain' instead of 'business income' even when the assessee had earlier claimed the sale of land as part of 'business income' and claimed deduction under Section 80 IA (4) of the Income Tax Act while furnishing the returns of the income under Section 139 (1) of the Income Tax Act?"

3. Independent of the first question, the second question as has been formulated by the Revenue is as under:

> "Whether in the facts and circumstances of the case, the Tribunal was right in law in

> allowing the assessee's appeal as regards loans advanced to the sister concerns by holding that the said loans were given for commercial expediency even when no document or any evidence relating to any such agreement was found during the course of search and assessee also failed to substantiate such claim?"

4. On the latter question, we may record that learned counsel appearing for the Revenue has fairly conceded that the aforesaid question is already covered by the decision of this Court dated 14.10.2014 in ITA No.175/2014 against the Revenue. Hence, we find that the said question would no more hold for consideration in the present appeals, since it is already covered by the decision of this Court against the Revenue and in favour of the assessee.

5. The aforesaid would lead us to examine only the first question, which is common in all the appeals.

6. The short facts of the case appears to be that the assessee filed returns for the Assessment Year 2002-03

on 31.10.2002 declaring the total income at Rs.14,67,913/-. Even for the subsequent Assessment Years 2003-04, 2004-05 and 2005-06, respective incomes were declared, but the common basis in the returns filed by the assessee was that the property of land was shown as 'stock-in-trade/inventory' in the respective books of accounts and the income was so declared on the basis of the respective incomes so earned. There was search proceedings in the respect of the assessee in the month of September 2006 and, thereafter, notice under Section 153A of the Act was issued to the assessee and the assessee during the month of January 2007 filed revised returns declaring business loss of Rs.1,05,77,033/- and business income and capital gain at Rs.56,97,511/-. The Assessing Officer in the assessment proceedings found that the difference shown out of the sale of property could not be termed as 'capital gain' and could be termed as only 'business income' and ultimately based on the same, concluded the assessment proceedings by calculating the amount of tax payable with interest. The matter was

carried in appeal before the CIT (Appeals). The CIT (Appeals) ultimately concurred with the view taken by the Assessing Authority and dismissed the appeal of the assessee. In the further appeal to the Tribunal, the Tribunal after considering the submissions made by both sides, observed at paragraphs 10 to 11.9.2 as under;

> "10. We have carefully considered the rival submissions, meticulously perused the relevant records, various judicial pronouncements on which either party had placed their faith and also the voluminous paper books in volumes [I, II, III & IV running into hundreds of pages – group of cases] furnished by the Ld. AR during the course of hearing proceedings.
>
> 11. For the **assessment years, 2002-03, 2004-05 and 2005-06,** the **first ground** being identical i.e., the AO had, for the reasons set-out in the respective impugned orders under dispute that the intention of the assessee in purchasing of the lands was to develop and resell them at profits. Therefore, the assessee dealt with the lands as its stock-in-trade and not as investments. Having regard to the total effect of the circumstances as recorded in his impugned orders referred supra, he held that the transactions of the assessee constitute **'adventure in the nature of trade'** and was in the course of profit making scheme.
>
> 11.1 However, the divergent views of the assessee were that it had acquired a vast

land ad-measuring to the extent of 52 acres in C.V.Raman Nagar from raja Bagmane way back in 1996. During the year 2000, the assessee intended to set up STPI for which it had approached the Union Government for its approval in July, 2002 and subsequently, STPI came into being on the subject property. According to the assessee, after having set up the STPI and the assessee had no intention to go for further exploitation spree in the said piece of land, the same was sold to three parties with a specific condition to set up STPI/IT parks and the details of which are as below:

Asst. Year	Name of the purchasers	Area (in sft)	Surplus Amount
2002-03	Embassy Constructions	291360	Rs.5,83,10,000
2004-05 (24.9.03)	Texas Instruments	304920	Rs.35,98,05,600
2005-06 (9.12.04	Cognizant Technology Solutions	130680	Rs.29,17,69,920

11.2 Further contention of the assessee was that it had erroneously offered the surplus arising on the sale of the above piece of land as "business income" in its original returns of income for the relevant assessment years under dispute. When the assessee came to know of the flaws in its stand, corrective steps were duly taken and, accordingly, furnished the returns of income for the respective assessment years under dispute, incidentally, in pursuance of notices u/s.153A of the Act and offered the surplus under the head 'capital gains'.

11.3 Brushing aside the contentions put forth by the assessee, the AO went ahead in treating the surplus amounts so offered by the assessee as **'business income'** and taxed accordingly for the AYs under consideration.

11.4 It could be seen that the subject property was acquired by the assessee with a sole intention of investment only and also setting up of an unit for the software companies. To implement its intention of STPI Unit, it had set in motion way back in 2000 itself. As put-forth by the assessee, there was no scope for further expansion of its units in the existing surplus land in its possession, its intention of selling away its surplus piece of land, the parties who were in the wings came forward and, accordingly, the areas ad-measuring 291360 sft, 304920 sft and 130680 sft were sold to Embassy Constructions, Texas Instruments and Cognizant Technology Solutions during the AYs 2002-03, 2004-05 and 2005-06 respectively. Incidentally, the latter two companies were in the field of software business.

11.5 The AO's perception that the assessee should have cultivated the land and build a building was rather untenable. The assessee company was incorporated, according to the assessee, only for the purchase of the subject property as investment. The assessee being in the line of business of real estate, developer and builder could not have been expected, as attributed by the AO, to adorn as a progressive agriculturist to indulge in cultivation that too in a land being situated in a prime and centre of the silicon city of Bangalore. As a matter

of fact, the AO had himself conceded that the assessee did make improvements and allowed it to remain unutilized which amply proves that the land in question was acquired by the assessee as an investment. It did so prove that the agriculture land was originally acquired and subsequently got converted into a non-agricultural zone. Had the assessee attempted to put to use the subject land for cultivation purposes as attributed by the AO, it would have contravened the conversion provision which, in our view, the AO would not have been unaware of it? It could also been seen from the sequence of events that the assessee did construct Tech Park on the subject property after obtaining due approval from various Government agencies – State and Central. Sale of a piece of land from the vast holding of total area of 52A was merely a coincident which cannot, by any stretch of imagination, be constructed or categorized as a regular feature (business) of the assessee. It was an un-denying fact that the assessee did purchase the HMT property that too at the fag end of March 2007 which, according to the assertion of the assessee, held by it for barely six months before selling it away. This cannot be categorized as a precedent or taking a leaf out of it to jump into a haste conclusion that the assessee had indulged in buying and selling of lands as its business.

11.6 Let us now turn our attention towards the case laws on which the rival parties have placed their faith to drive home their respective points.

(i) In the case of CIT v. R.Ramaiah reported in 146 ITR 39 (Kar) – relied on by the

Revenue – the issue before the Hon'ble Jurisdictional Court was, in brief, that

" The assessee were brothers. They purchased agricultural lands and used for the same purpose and thereafter got the land converted for non-agricultural purpose. The assessees then converted the land of ***building sites*** *and started selling the sites year after year. Whether the finding of the Tribunal that the surplus arising out of the sale of sites is only a realization of capital and not an adventure in the nature of trade or business is correct in law? No. The assesses did not sell any land in the condition in which they bought it. They made convenient* ***building sites and sold*** *the same. They did not even dispose of all the sites in one year. They went on selling the sites year after year realizing more and more profits. The fact that all the assesses started converting their lands into building sites almost simultaneously itself is an indication of their intention to trade in the lands as a venture. They made it commercially more attractive by converting and dividing into plots.* ***The inevitable inference is that they had no intention to hold the lands as an investment.*** *They dealt with the lands as their stock-in-trade."*

With due respects, we would like to point out that those brothers purchased agricultural lands and then converted the land of **building sites** after conversion and started selling the sites year after year. They did not sell any land in the condition in which they bought it as they made **building sites** and **sold** the same. After duly analyzing the issue, the Hon'ble court ruled that **"The inevitable inference is that they**

had no intention to hold the lands as an investment." Whereas in the present case, the assessee did purchase the agricultural land, converted it into non-agricultural and went ahead with establishing of STPI Unit, but, did not precisely indulge in converting the subject property into building sites and sold the same as in the case which was dealt by the Hon'ble Court. We are, therefore, of the firm view that the stand of the Revenue in taking sanctuary in the ruling of the Hon'ble Court cited supra is misconceived and, put it gently, *misleading.*

(ii) In the case of Fort Properties Pvt. Ltd. V. CIT and CIT v. Fort Properties Pvt. Ltd. Reported in 208 ITR 232 (Bom), the Hon'ble Court, after analyzing the issue – *whether the purchase and sale of the Fort property by the assessee was a purchase and sale of a capital asset or it was a business transaction or an adventure in the nature of trade* – ruled that –

" *We have considered the rival submissions of counsel for the parties. The first question that falls for determination is whether the purchase and sale of the Fort property by the assessee was a purchase and sale of a capital asset or it was a business transaction or an adventure in the nature of trade. To decide this question, it is necessary to note a few factual findings of the Tribunal. Before the Tribunal, it was contended by the assessee that it had acquired the above property from its holding company as "stock-in-trade". Reliance was sought to be placed on the fact that in the books of account of the assessee, it was shown as "stock-in-trade". This contention of the assessee was repelled by the Tribunal. It was held:*

Our conclusion, therefore, is that the subsidiary company (assessee) acquired the property as a capital asset and sold it as such. No acceptable evidence has been produced to show that the subsidiary company (assessee) by an overt act converted this capital asset into stock-in-trade. Apart from the fact that one can be a dealer in real estate in respect of some properties and may hold some other properties as investment our conclusion in this case is that the subsidiary company (assessee) has not been a dealer in real estate at all."

It was also observed: " The mere fact that the subsidiary company (assessee) showed it as stock-in-trade in its balance sheet and valued it at Rs.57,50,000 on August 31, 1967, also does not make any difference as it is only a part of the scheme to avoid capital gains tax. Needless to mention, in matters like this one has to take into account the cumulative effect of all facts and circumstances and not individual facts and circumstances by itself."

The above findings have been arrived at by the Tribunal on a proper consideration of the facts and circumstances of the case and the evidence on record. No fault can be found with the above finding of the Tribunal that in the instant case, the acquisition of the property by the assessee was as a capital asset and it did not form part of the stock-in-trade of the assessee. This court, therefore, has to accept the same and it cannot go behind it.

We also do not find any infirmity in the observations of the Tribunal in regard to the effect of the description of the above property in the books of account of the assessee

company as "stock-in-trade" in the determination of the nature of the asset. It is well-settled that the way in which entries are made by an assessee in his books of account is not determinative of the question whether the asset was held as a capital asset or stock-in-trade. The assessee may, by making entries which are not in conformity with the facts of the case or proper accountancy principles, conceal the real nature of the asset or the transaction. Entries made by him, therefore, cannot be regarded as conclusive one way or the other. The true nature of the transaction in each case has to be determined on a consideration of the totality of the facts and circumstances of that case.

It is, thus, clear that in the instant case the property in question was acquired by the assessee from its holding company as a capital asset and after its acquisition it was not converted by the assessee as its stock-in-trade. In other words, it was retained by the assessee as a capital asset.

11.7 With regard to the AO's observation that the assessee in its original returns of income for the AYs under dispute, profits from sale of the piece of land were offered for taxation under the head 'business income', it was confronted by the assessee that mere erroneous offering of surplus as business income or the mere categorization as inventories in the Balance Sheet cannot go to show that the intention of the assessee was to resell the land.

11.8 In this connection, we recall the ruling of the Hon'ble highest judiciary of the land in the case of Kedarnath Jute Manufacturing Co. Ltd. V. CIT (Central)

Calcutta 82 ITR 363 (SC) wherein, the Hon'ble Court was pleased to observe that –

"We are wholly unable to appreciate the suggestion that if an assessee under some misapprehension or mistake fails to make an entry in the books of account and although, under the law, a deduction must be allowed by the Income-tax Officer, the assessee will lose the right of claiming or will be debarred from being allowed that deduction.

Whether the assessee is entitled to a particular deduction or not will depend on the provision of law relating thereto and not on the view which the assessee might take of his rights nor can the existence or absence of entries in the books of account be decisive or conclusive in the matter...."

11.9.1 From the facts presented before us it is evident that the Assessee Company had purchased land in C.V.Nagar from Raja Bagmane extending to 52 acres for the purpose of setting up a Software Technological Park. It is pertinent to note that if the property was intended to be only sold then there was no necessity of it being transferred to the Assessee Company incurring unnecessary cost, since Raja Bagmane and associates are holding substantial interest in the Assessee Company. Therefore, the basic purpose for the purchase of land by the Assessee company could only be to develop a STPI. After purchasing the Land way back in 1996 and complying with all the initial requirements, the Assessee Company made an application to the State and Central Government for grant of approval to set up a

Software Park during the year 2000. It is very relevant to note the nature of the project for it to be construe as a fixed assets/investment to the company or stock-in-trade. Software parks are projects consisting of buildings for office purposes set up in a specific location with prior approval of the State and Central Government installed with various infrastructures required for developing and transmitting software. Normally, the takers of the building space are multinational companies. These multinational companies, seldom purchase real estate property in India, but only lease them out for their requirements. Only in stray cases, these buildings are sold. Therefore, the promoter of a software park can generally view these project only for the purpose of investment and not stock in trade. The buildings and the infrastructures created are leased out to various clients, the maintenance of which is looked after by the promoter. In these circumstances, all the assets created in the project including the land have to be necessarily classified in the balance sheet of the assessee company as fixed assets/investments. In this given case, the assessee company has erred in disclosing the land earmarked for promoting software park in the financial systems of stock-in-trade. This genuine mistake of the assessee in recording the financial statements cannot be seriously viewed in interpreting the provisions of the IT Act. The subsequent conduct of the assessee in leasing out the buildings also reflects the initial intention of the company to hold these assets as fixed assets/investments.

11.9.2 In an overall consideration of facts and circumstances of the issue as

> deliberated upon in the foregoing paras and also in conformity with the legal position cited supra, we are of the considered view that the **authorities below were not justified** in holding that the surplus rising on sale of a piece of land as **'business income'** for the **AYs 2002-03, 2004-05 and 2005-06.** It is ordered accordingly."

Under these circumstances, the present appeals before this Court.

7. It may be recorded that the Revenue has preferred the appeals being ITA No.145/2011, ITA No.146/2011 and ITA No.157/2011 for the respective assessment years, whereas the assessee has preferred appeals being ITA No.183/2014, ITA No.349/2014 and ITA No.350/2014.

8. We have heard learned counsel Mr.K.V.Aravind appearing for the Revenue and learned counsel Mr.Chythanya appearing for the assessee in the respective appeals.

9. It was contended by learned counsel appearing for the Revenue that, the fact that assessee treated the property of the land in the books of accounts as 'stock-

in-trade/inventory' and the fact that the assessee considered the difference as 'business income' and that the land was 'stock-in-trade' and filed returns as that of 'business income' are sufficient evidence to show that it was, in reality, a 'business income'. He submitted that it is only after the search proceedings when the opportunity was available to the assessee, it has filed revised returns and a contrary stand is made by showing the land as 'capital asset' and the difference is considered as that of a 'capital gain'. He submitted that the Assessing Officer as well as the CIT (Appeals) had rightly negatived the claim of the assessee and it treated the income as that of 'business income' as per the returns filed earlier i.e. prior to the search proceedings and he, therefore, submitted that the Tribunal has not properly considered the evidence on record and it ought to have disallowed the claim of the assessee as that of 'capital gain' and ought to have confirmed the income as of 'business income' of the assessee.

10. Whereas, learned counsel for the assessee contended that it is true that in the books of accounts, initially, the land was shown as 'stock-in-trade' and it is also true that the returns were initially filed for business income. However, the assessee having realized its mistake filed revised returns after the notice under Section 153A of the Act and had shown the 'capital gain' for the purpose of taxable liability. He submitted that in the assessment proceedings up to the stage of the Tribunal, voluminous records were produced to show that the property of the land was for all purposes can be treated as 'capital asset' and there were voluminous circumstances to show that the income or the difference out of sale of a portion of the land would only be termed as 'capital gain' and not the 'business income'. He submitted that the Tribunal, after undertaking the exercise of appreciation of the evidence and the material on record, has accepted the explanation for the earlier return filed and the earlier entries in the books of accounts. Once the Tribunal, after undertaking the appreciation of the evidence, has recorded a finding of

fact that the land can be termed as 'capital asset' and has found that there was error committed on the part of the Assessing Authority in treating the income as 'business income', this Court may not interfere with the order passed by the Tribunal since the Tribunal is the ultimate fact finding authority. He submitted that in the various decisions of the High Courts as well as of the Apex Court, the parameters for treating the income as 'capital gain' or 'business income' are provided. The Tribunal has undertaken such exercise and thereafter was satisfied on the point that it was 'capital gain' and not 'business income'. He, therefore, submitted that this Court may not interfere with the order passed by the Tribunal.

11. However, in the appeals preferred by the assessee, learned counsel declared that if this Court is not to enter into the finding of fact, possibly the appeals of the assessee would no more survive and the other question would no more arise for consideration in the present appeals.

12. We may, at the outset, record that the scope of judicial scrutiny in the appeal against the order of the Tribunal is limited to the question of law and it is not available for up-setting the finding of facts, unless such finding is perverse to the record or the Tribunal has taken a view which is impossible by applying normal prudence.

13. We may also record that whether particular property can be considered as a 'stock-in-trade' or a part of 'inventory' or whether it can be treated as capital asset though a question may be touching to law but would essentially depend upon consideration of so many factual aspects germane to record the conclusion. At this stage, we may usefully refer to decision of the Division Bench of High Court of Gujarat in case of ***COMMISSIONER OF INCOME TAX VS. REWASHANKER A. KOTHARI*** reported in **[2006] 283 ITR 338 (GUJ.)** wherein the question arose for various tests on the basis of which a finding can be recorded as to whether the asset is a 'stock-in-trade' or an 'inventory' or a 'capital

asset'. In the said decision at paragraphs 9 to 11 it was observed thus:

> "**9.** Upon examination of the aforesaid record, the Tribunal recorded that the assessee had given an effective answer to the show-cause notice and thereafter, proceeded to record the following findings:
>
> (1) There was a large time-gap between the dates of acquisition of the shares and the sale thereof.
>
> (2) Thus, the intention to sell cannot be inferred at the point of time of the purchase.
>
> (3) That merely because the sale had resulted in a profit did not mean that when the assessee purchased the shares, it was with an intention to sell them at a profit.
>
> (4) That an investor may sell the shares when he gets a good price for the shares.
>
> (5) That the assessee had shares in 25 to 30 companies and the value of the total holding was between Rs.57,000 and Rs.63,000, which was very small amount considering the number of companies in which the shares were held, thus, denoting that the assessee was a small investor.
>
> (6) That number of transactions are not many every year and the assessee could not be said to indulge

in several transactions of purchase and sale every year.

10. The tests laid down by various decisions of the Apex Court indicate that, in each case, it is the total effect of all 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. The nature of the commodity was made with the intention to re-sell, if an enhanced price could be obtained, that by itself is not enough to infer that an assessee is carrying on business. However, though profit motive in entering into a transaction is not decisive, if the facts and circumstances indicate that the purchase of the asset factor for inferring that the transaction was in the nature of business.

11. In the case of *Pari Mangaldas Girdhardas v. CIT 1977* CTR (Guj.) 647, after analyzing various decisions of the Apex Court, this Court has formulated certain tests to determine as to whether an assessee can be said to be carrying on business.

(a) The first test is whether the initial acquisition of the subject-matter of transaction was with the intention of dealing in the item, or

with a view to finding an investment. If the transaction, since the inception, appears to be impressed with the character of a commercial transaction entered into with a view to earn profit, it would furnish a valuable guideline.

(b) The second test that is often applied is as to why and how and for what purpose the sale was effected subsequently.

(c) The third test, which is frequently applied, is as to how the assessee dealt with the subject-matter of transaction during the time the asset was with the assessee. Has it been treated as stock-in-trade or has it been shown in the books of account and balance sheet as an investment. This inquiry, though relevant, is not conclusive.

(d) The fourth test is as to how the assessee himself has returned the income from such activities and how the Department has dealt with the same in the course of preceding and succeeding assessments. This factor, though not conclusive, can afford good and cogent evidence to judge the nature of transaction and would be a relevant circumstance to be considered in the absence of any satisfactory explanation.

(e) The fifth test, normally applied in cases of partnership firms and companies, is whether the deed of partnership or the memorandum of

> association, as the case may be, authorizes such an activity.
>
> (f) The last but not the least, rather the most important test, is as to the volume, frequency, continuity and regularity of transactions of purchase and sale of the goods concerned. In a case where there is repetition and continuity, coupled with the magnitude of the transaction, bearing reasonable proportion to the strength of holding, then an inference can readily be drawn that the activity is in the nature of business."

14. After considering the aforesaid, if we further consider the approach of Tribunal it appears that Tribunal in above referred reasoning and more particularly at paragraph 11.9.1 and 11.9.2 has taken into consideration the various aspects namely;

(i) The assessee purchased the land in C.V.Nagar from Raja Bagmane admeasuring 52 acres for the purpose of setting up a Software Technological Park;

(ii) If the property was intended to be only sold then there was no necessity of it being transferred to Assessee Company incurring unnecessary costs;

(iii) After the land was purchased wayback in 1996, the assessee – company made applications to the State and the Central Government for grant of approval to set up a Software Park during the year 2000;

(iv) Software Park projects are consisting of buildings for office purposes is set up in a specific location with prior approval of State and Central Government installed with various infrastructures required for developing and transmitting the software;

(v) The promoters of a Software Park can generally view this project only for the purpose of investment and not as stock-in-trade;

(vi) The buildings and infrastructures created are leased out to various clients, the maintenance of which is looked after by the promoters.

15. On the basis of aforesaid facts and circumstances, based on the factual scenario the Tribunal has recorded the finding of fact that Assessee Company has erred in disclosing the land earmarked for promoting Software Park in the financial system of stock-in-trade. The

Tribunal has further found that it is genuine mistake of the assessee in recording the financial statements cannot be seriously viewed in interpreting the provisions of the Income Tax Act. Tribunal has also further recorded that subsequent conduct of the assessee in leasing out the buildings also reflects the initial intention of company to hold these assets as fixed assets / investments.

16. In our considered view, the aforesaid finding of fact so recorded by the Tribunal cannot be termed as perverse to the record because learned counsel for the revenue has not been able to show or satisfy the Court that any of the aforesaid finding of fact is not supported by the record or Tribunal has recorded such finding of fact without there being any material on record.

17. Applying the test of reasonable prudence, when aforesaid facts and circumstances are apparent and if the Tribunal has taken the view that entries in the books of accounts or statement given by the assessee to the property as stock-in-trade and not as fixed assets /

investments / capital assets, could be said as genuine mistake or error, such view on the part of Tribunal cannot be said to be exfacie unreasonable view or that no person with reasonable prudence would take such a view. As such, we are of the considered opinion that a view on the basis of facts placed before the Tribunal could be said as one possible view and not an impossible view by applying the test of reasonable prudence.

18. In view of the aforesaid reasons, when we have found that finding recorded by Tribunal is not perverse to the record nor we have found that finding recorded or the view taken by the Tribunal is not an impossible view, rest of the other aspects would fall in the arena of appreciation and re-appreciation of the evidence and thereafter, may result in disturbing the finding of fact as already recorded by the Tribunal but it is only for the matter of question of law, the jurisdiction of this Court in the appeal under Section 260A can be invoked.

19. In view of the above, we find that when on facts Tribunal has recorded a considered finding, no question

of law would arise for consideration but the question so formulated shall stand answered in favour of assessee and against the revenue.

20. With these observations ITA Nos.157/11, 145/11 & 146/11 stands disposed of accordingly. However, so far as ITA Nos.183/14, 349/14 & 350/14 shall not survive in view of the aforesaid observations made by us and conclusion recorded along with declaration made on behalf of the appellant. Hence, same shall also stand disposed of.

SD/-
JUDGE

SD/-
JUDGE

MV/DR