

AFR**Reserved on 19.05.2017****Delivered on 25.01.2018****Court No. - 3**

- (1) **Case :-** INCOME TAX APPEAL No. - 24 of 2012
Appellant :- Commissioner of Income Tax-II Aayakar Bhawan
Lucknow
Respondent :- M/S The Upper India Couper Paper Mills Co.
Pvt. Limited, Lucknow
Counsel for Appellant :- D.D.Chopra, Ghanshyam Chaudhary,
Manish Misra
Counsel for Respondent :- Rohit Nandan Shukla, Mudit
Agarwal
- (2) **Case :-** INCOME TAX APPEAL No. - 25 of 2014
Appellant :- M/S Upper India Couper Paper Mills Co. Pvt.
Limited through its Director
Respondent :- Commissioner of Income Tax-II, Ashok Marg
Lucknow
Counsel for Appellant :- Mudit Agarwal
Counsel for Respondent :- Ghanshyam Chaudhary, Manish
Misra
- (3) **Case :-** INCOME TAX APPEAL No. - 120 of 2015
Appellant :- M/S Upper India Couper Paper Mills Co. Private
Limited, Lucknow
Respondent :- Commissioner of Income Tax-II, Ashok Marg,
Lucknow
Counsel for Appellant :- Mudit Agarwal
Counsel for Respondent :- Manish Misra
- (4) **Case :-** INCOME TAX APPEAL No. - 121 of 2015
Appellant :- M/S Upper India Couper Paper Mills Co. Private
Limited, Lucknow
Respondent :- Commissioner of Income Tax-II, Ashok Marg
Lucknow
Counsel for Appellant :- Mudit Agarwal
Counsel for Respondent :- Manish Misra

(5) **Case :-** MISC. BENCH No. - 1812 of 2014

Petitioner :- M/S Upper India Couper Paper Mills Co. Private Limited through its Director

Respondent :- Commissioner of Income Tax (Appeal)-II, Lucknow and others

Counsel for Petitioner :- Mudit Agarwal

Counsel for Respondent :- Manish Misra

Hon'ble Sudhir Agarwal, J.

Hon'ble Virendra Kumar-II, J.

(Delivered by Hon'ble Sudhir Agarwal, J.)

1. Heard Sri J.N. Mathur, learned Senior Advocate, assisted by Sri Mudit Agarwal, Advocate, for Assessee and Sri Manish Misra, Advocate, for Revenue.

2. These four appeals (except Sl. No.-5) have been filed under Section 260A of Income Tax Act, 1961 (hereinafter referred to as “Act, 1961”) arising from judgments and orders of Income Tax Appellate Tribunal (hereinafter referred to as “Tribunal”). Three appeals are by Assessee, M/s Upper India Couper Paper Mills Co. Private Limited (hereinafter referred to as “Assessee”) and one by Commissioner of Income Tax (hereinafter referred to as “Revenue”). The details of judgments of Tribunal, relevant Assessment Years (hereinafter referred to as “A.Y.”) etc. are given in the following chart:

Sl.No.	I.T.A. No.	Date of Impugned judgment	I.T.A. No. Before Tribunal	Assessment Year
1	24 of 2012	07/08/12	154/LKW/2012	2007-08
2	25 of 2014	15.07.2014	52/LKW/2014	2007-08
3	121 of 2015	23.06.2015	62/LKW/2012	2008-09
4	120 of 2015	23.06.2015	301/LKW/2013	2009-10

3. There is a Writ Petition also, filed by Assessee, i.e., Misc. Bench No. 1812 of 2014 wherein petitioner has challenged Reference dated 10.10.2013 made by Joint Commissioner of Income Tax,

Range-VI, Lucknow, i.e. Assessing Officer (hereinafter referred to as “A.O.”) to District Valuation Officer (hereinafter referred to as “D.V.O.”) and provisional valuation report dated 28.02.2014/03.03.2014 and 10.03.2014 submitted by DVO i.e. respondent-3.

4. ITA No. 24 of 2012 filed by Revenue was admitted on 08.10.2013 on following two substantial questions of law:

(A) Whether under the facts and circumstances of the case the Income Tax Appellate Tribunal has erred in believing that the Assessing Officer has taken a view in the light of surrounding circumstances which cannot be called to be erroneous and prejudicial to the interest of Revenue and Commissioner of Income Tax has exercised his jurisdiction under section 263 of Income Tax Act without having sufficient material with him.

(B) Whether Income Tax Appellate Tribunal has erred in law in directing that value of land as on 01.04.1981 be taken at Rs.95 per Sq. Ft. as the same is a hypothetical value adopted by Assessee on the basis of an auction held on 23.03.1985.

5. ITA No. 120 of 2015 and 121 of 2014, both, were admitted on 09.10.2015 on three substantial questions of law which are identical and reproduced from ITA 120 of 2015, as under:

(A) Whether finding recorded by Income Tax Appellate Tribunal to the effect that Registered Valuer has not scaled down value adopted from the exemplar of 1985 to arrive at the fair market value for the year 1981, is perverse and incorrect?

(B) Whether in the facts and circumstances of the case at hand, Income Tax Appellate Tribunal could have doubted correctness of Valuation Report of Registered Valuer without there being any fresh material on record, when it had upheld the said report in respect of the proceedings for Assessment Year 2004-05?

(C) Whether Income Tax Appellate Tribunal could have permitted Assessing Officer to refer the matter for valuation to DVO in spite of the fact that said Reference would be beyond the scope of such reference as laid down in Section 55-A of Income Tax Act, 1961?

6. ITA No. 25 of 2014 has not been formally admitted but as agreed by learned counsel for parties, following substantial questions of law have arisen, which need be adjudicated in this appeal:

(A) Whether Income Tax Appellate Tribunal being the last fact finding authority was justified in not recording any finding pertaining to Grounds H, I and J of memo of appeal filed before it, pertaining to applicability of doctrine of merger, raised by appellant in the memo of appeal, and in rejecting appeal merely after discussing only 7 out of 10 grounds raised?

(B) Whether order of Income Tax Appellate Tribunal, which does not deal with all the grounds raised, but only confines to one of the issues, is justified and tenable in the eye of law?

(C) Whether an order of Assessing Officer merges with the order of Appellate Authority even through the order of Appellate Authority is only to the effect of permitting appeal to be withdrawn and does not delve upon the merits of the case?

(D) Whether right of appeal which is a statutory right guaranteed to every Assessee can be taken away by applying doctrine of merger in the circumstances that earlier appeal stood withdrawn in order to pursue application under Section 154 of Act, 1961?

(E) Whether appellant can be left without a remedy against an assessment order inflicting a heavy tax liability against him only because in proceedings under Section 154 he had filed an appeal which has been decided against him?

(F) Whether an order of assessment in respect of which an appeal was preferred before CIT (Appeals), but was subsequently withdrawn can subsequently be rectified by Assessing Officer under Section 154 of Act, 1961?

(G) Whether error pointed out by appellant in its application under Section 154 to the effect that Assessing Officer had made a mistake apparent on record by not subtracting the value of land being developed by appellant from the total value of land on the date of conversion while the same was done by Assessing Officer in respect of value of land as on 01.04.1981?

(H) Whether principle of res-judicata or constructive res-judicata will apply in respect of two different set of proceedings, each of them different in nature, where the challenge in each of them is distinctly different orders?

7. Before coming to the merits of issues, to answer the substantial questions of law formulated above, it would be appropriate to have a brief factual matrix giving rise to these matters.

8. Assessee is a Company registered under the provisions of Companies Act, 1956 (hereinafter referred to as "Act, 1956") having its registered office at Lucknow and Head Office at Mumbai. It is engaged in the business of property development. It had established a Paper Mill, namely, M/s Upper India Couper Paper Mills Col Pvt. Ltd. at Nishatganj, Lucknow. In 1942, State Government leased out land for establishment and running a Paper Mill, besides constructing residential building for the benefit of Staff of Assessee Paper Mill having area of 72 Bigha, 16 Biswa 11 Biswansi and 18 Kachwansi, i.e., 1982785 square feet. Lease of land was executed in 1942. It commenced from 01.04.1942, granted initially for a period of 30 years, renewable upto 90 years. Part of this land was converted by Assessee from "capital asset" to "stock in trade" on 01.04.2003 and area thereof was 1204438.33 square feet. The aforesaid area was

proposed to be bifurcated into 933518.33 square feet for residential and 270920 square feet for commercial purposes. The cost price of land on 01.04.2003 was taken to be cost price as on 01.04.1981 which was indexed as per cost index prescribed on the date of conversion. Assessee got valuation through a Registered Valuer who submitted report on 19.03.2001 and 13.06.2002 determining value of land as under:

a) Value as on 01.04.2003

- (i) Residential - Rs. 285/- Per sq. Ft.
- (ii) Commercial - Rs. 600/- Per sq. Ft.

b) Value as on 01.04.1981

- (i) Residential - Rs. 95/- Per sq. Ft.
- (ii) Commercial - Rs. 200/- Per sq. Ft.

9. For A.Y. 2004-05 (F.Y. 2003-04) Assessee filed return showing land as converted into "stock-in-trade" on the basis of market value determined by Registered Valuer. It declared net loss of Rs. 171240/- and claimed refund of Rs. 39686/-. Subsequently a revised return was filed on 24.03.2005 increasing amount of refund to Rs. 5,39,686/-. It also disclosed that Assessee has entered into an agreement with M/s Arif Builders on 20.06.2003 for development of land. The case was selected for scrutiny on the ground that the factum of Builder's agreement etc., which was element of capital gain, was not disclosed. Assessment was finalized by Assistant Commissioner of Income Tax, Range-IV, Lucknow (hereinafter referred to as "ACIT-IV, Lko") vide order dated 28.12.2006 and it computed long term capital gain as under:

Valuation of 1733.40 sq. mtr land (18651 sq. ft) as per valuation Report dated 19.03.2001 as on 1.4.1981	37,30,277
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Valuation of 1901 sq. mtr land (20455 sq. ft) as per valuation Report dated 13.6.2002 as on	19,43,225
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1.4.1981	
Total	56,73,502
Indexed cost as on 31.3.2004 is multiplied by 463/100	2,62,68,314
Less:-	
Total contemplated value as per Agreement	3,00,00,000
Long Term Capital Gain	Rs. 37,31,686

Subject to the above, total income was computed as under:-
Not loss as per P&L a/c

LESS:-		
1) Depreciation of separate Consideration	26,070	
2) Provision for gratuity	24,811	<u>50,881</u>
		1,34,724
Add:- Depreciation as per I.T. Act		<u>36,511</u>
Net Loss		1,71,235

LTCG changed to tax as discussed above"	37,31,686
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10. ACIT-IV, Lko held that Builder also entered into an agreement and advanced Rupees 51 lacs to enable Assessee to get lease land free hold and language of agreement shows that there is a "deemed transfer of land" to Builder, therefore Assessee is liable to pay capital gain tax. A.O. held transfer of land in dispute covered under Section 2(47)(iv), (v) and (vi) of Act, 1961.

11. Assessee preferred appeal before Commissioner of Income Tax (Appeals)-II, Lucknow (hereinafter referred to as "CIT(A)-II") who allowed appeal and held Section 45(2) of Act, 1961 applicable. CIT(A)-II said that loss or gain whatsoever should be computed during the A.Y. in which land was so converted and not during the period of conversion. Revenue preferred an Appeal before Tribunal but order of CIT(A)-II was upheld by Tribunal by judgment and order dated 23.06.2015.

12. In the A.Y. 2007-08, A.O. vide assessment order dated 23.12.2009 accepted cost of land on 01.04.1981 at Rs. 17,80,61,568/-

(at the rate of Rs. 95/- per square feet) and indexed the same as on 01.04.2003. It calculated capital gain as loss of Rs. -79,25,89,300/-. Challenging assessment order dated 23.12.2009, Assessee preferred Appeal before CIT(A), Lucknow but the same was subsequently got dismissed as not pressed vide order dated 16.03.2011. Assessee then filed an application under Section 154 of Act, 1961 on 05.10.2011 before Deputy Commissioner, Range-IV, Lucknow (hereinafter referred to as “D.C.I.T, Lko”).

13. Commissioner of Income Tax-II, Lucknow (hereinafter referred to as “C.I.T.-II”), however, issued a notice dated 20.01.2012 to Assessee to show cause why assessment order be not revised under Section 263 and subsequently passed order dated 20.03.2012 setting aside assessment order holding it erroneous and prejudicial to the interest of Revenue and directed A.O. to pass fresh assessment order. This order of CIT-II, Lucknow dated 20.03.2012 was challenged by Assessee in ITA No. 154/LKW/2012 which has been allowed by Tribunal vide judgment dated 07.08.2012. Setting aside CIT-II's order dated 30.03.2012 passed under Section 263, Tribunal confirmed assessment order dated 23.12.2009. Thereafter A.O. passed order dated 13.02.2013 on Assessee's application under Section 154 and rejected the same in view of judgment of Tribunal dated 07.08.2012. This order of A.O. dated 13.02.2013 was challenged in appeal by Assessee before CIT(A)-II, Lko which has been dismissed vide order dated 23.10.2013. Assessee then further preferred appeal before Tribunal which has also been dismissed vide judgment dated 15.07.2014. ITA 25 of 2014 has been filed by Assessee challenging Tribunal's order dated 15.07.2014 while Tribunal's judgment dated 07.08.2012 whereby CIT-II's order passed order under Section 263 was set aside by Tribunal has been challenged by Revenue in ITA No. 24 of 2012.

14. For Assessment Year 2008-09 return of income was filed on 08.10.2008 declaring total income of Rs. 57285150/-. The case was selected in scrutiny. Notice under Section 143(2) was issued by A.O. to Assessee on 27.08.2009. Assessee's representative appeared and explained that Assessee converted land in Stock in trade in 2003. It also entered into building agreement with M/s Arif Construction Company on 20.06.2003 for construction of residential Flats, School, Buildings, Religious Building, Parking Stilts etc. and commercial shops and commercial Garages. Assessee's share was 1/3 in each residential Towers (Floor wise), commercial shopping, garages, parking stilts, open parking, value added facilities, educational schools buildings, clubs, swimming pool etc. Assessee divided its total area of land in four parts as under:

1	a)	Residential Area	6,43,580.57 sq.ft.
	b)	Commercial Area	16,004.10 Sq.ft.
2	a)	Residential Area	9,33,518.33 Sq.ft.
	b)	Commercial Area	2,70,920 Sq.ft.
Total			1864023 Sq.ft.

15. Out of above, land mentioned at Sl.No.-2, i.e., 933518.22 sq. ft. for residential area and 270920 sq. ft. for commercial area, was sold by Assessee in A.Y. 2007-08. A.O. then worked out capital gains giving its reasons as under:

*“The assessee has converted its land into stock in trade in the year 2003. Section 45(2) of the Income Tax Act, 1961 provides that although **such a conversion of capital assets into stock in trade will be a transfer of the previous year in which the assets is so converted**, but the capital gain will not arise in the previous year in which the assets is converted, it will arise in the previous year in which such converted assets is sold or otherwise transferred. Indexation of cost of acquisition &*

improvement, it required, will be done till the previous year in which such conversion took place.

Hence, the capital gain has arisen at the time of conversion of land in stock in trade in the F.Y. 2003 but it is payable as and when such stock is sold. As per agreement with M/S Arif Constructions the total built up area will be 87447.30 Sq. Mts and 1/3rd share i.e. 29149.2 Sq. Mts or 313645.39 Sq.ft will be the share of assessee. **The assessee has received a built up area of 29149.2 Sq. ft. (1/3 share) or 313645.39 Sq. ft. This built up area received is now his “stock in trade” and the assessee liable to pay capital gain as and when he sales the above area.** In the assessment year 2008-09 the assessee has sold 9 flats measuring 1492.01 Sq. Mts.

The assessee was asked to explain the basis of calculation of capital gain. In respondent, the assessee submitted copy of revised return of income filed on 13.10.2010 and alongwith above submitted revised computation of income and capital gain calculation. The capital gain calculation shown by the assessee is as under:-

	Areas Sq. Ft.	Value
Residential Area as per valuer's report as on 01.04.2003	643580.57	183420462.4
Total flat 200 taken on above land area on which capital gain taken	64358057/200 =3217.90	183420462/200 =917102
Value of land taken in sold flat during the F.Y. 07-08 A.Y. 08-09	3218X9 =28962	917102X9 =8253920
Cost of land area taken in sold flat as on 01.04.1981 as per valuer's report	9528962 +2751390	
Index Cost	2751390X463/100	12738935.7

Capital gain/loss on land area taken in 9 sold flat during the F.Y. 2007-08 (A.Y. 2008-09) as under:

Sale Consideration of land	82,53,920/-
Index Cost	<u>1,27,38,936/-</u>
Net Loss	(-) 44,85,016/-

It is notice in the above calculation of capital gain, the assessee has taken demand cost of land as on 01.04.1981 as Rs. 95/- on the basis of registered valuer's report. The circle rats as on 01.04.1981 of Nishatganj (Paper Mill) where the land of the assessee is situated, is maximum Rs. 15/-. Copy of circle rate is obtained and is placed on records. The assessee was shown this rate and asked as to why as much higher figure than the applicable circle rate was taken for the purpose of computing capital gain. Along side, the assessee was also asked why the reduced capital gain (computed on rates taken by valuer) not be accepted by the revenue and capital gain computed as per circle rate value be taken as the correct determination of capital gain. The assessee expressed that the valuer's report is a reliable and justified documents on which capital gain was computed. **The contention of the assessee that deemed cost of land as on 01.04.1981 as per valuer's report should be accepted does not hood merit because the demand value of land as on 01.04.1981 has been increased many times by the assessee. As such the capital gain of the assessee is re-calculated on the basis of circle rates prevailing in the area as on 01.04.1981 and as on 01.04.2003.**

The computation of capital gains payable by the assessee is as under:

Land Area	- Rs. 6,43,580.57
1. Demand Cost as on 1981	
Area X Circle Rate	- Rs. 643580.57X15=9653708
2. Index cost of land	- Rs. 9653708 X 463/100
	Rs. 4,46,96,668/-
3. Fair market value of date of conversion i.e. 2003	
Circle rate of 2002 prevailing= 3500 Sq. mt. or 325.27 Sq.ft.	

- = 325.27X643580.57=20,93,37,452/-
4. Capital Gains as on date of Conversion (3-2) = 16,46,40,784/-
5. Total built up area = 87447.30 Sq. Mt.
= 1/3 share = 29149.2 Sq. mt.
or 313645.39 Sq. ft.
6. 16,46,40,784/313645.39= 524.92 Sq. Ft.
7. 9 Flats Sold and total area = 1492.01 Sq. Mt or 16054 Sq. Ft*
(* Total area submitted by assessee as different flats sold)
8. Capital Gains = 16054X524.92
= 84,27,065/-

16. A.O. then computed income of Assessee as under:

In view of the above, the income of the assessee is computed as under:

1.	Net Profit as per P&L A/c	- 10,80,92,539/-
Add:	1. Depreciation	- Rs. 16,22,267/-
	2. Provision FBT	- Rs. 45,594/-
	3. FBT 05-06	- Rs. 2,960/-
	4. Provision of Gratuity	- Rs. 3,45,805/-
		<u>Rs. 20,16,626/-</u>
		<u>Rs. 10,60,75,913/-</u>
Less:	1. Depreciation	= Rs. 18,28,272/-
	2. Dividend Income	= Rs. 2,08,13,932/-
	3. Profit on Mutual Funds	= Rs. 3,08,204/-
	4. Company land sold	= Rs. 28,54,601/-
	5. Business loss 01-02	= Rs. 4,42,619/-
	6. Business loss 04-05	= Rs. 1,34,724/-
	7. Business loss 06-07	= Rs. 11,87,030/-
	8. Business loss 07-08	= Rs. 2,19,93,446/-
	9. Unabsorbed Depreciation	
	2001-02	= Rs. 20,726/-
	10. Unabsorbed Depreciation	
	2004-05	= Rs. 36,511/-
	11. Unabsorbed Depreciation	
	2006-07	= Rs. 61,741/-
		<u>Rs. 4,96,81,806/-</u>
		<u>Rs. 5,63,94,107/-</u>
2.(a)	Capital Gain as calculated in para 2 above	Rs. 84,27,065/-
	(b) Profit on Mutual Fund	Rs. 3,08,204/-
	(c) As discussed in para (3) above	Rs. 13,99,150/-”

17. Assessee preferred appeal before CIT(A)-II against assessment order dated 30.12.2010 in relation to A.Y. 2008-09 and appellate authority vide order dated 05.12.2011 partly allowed appeal. The first ground considered by CIT(A)-II was value of land as on 01.04.1981 and as adopted on 01.04.2003. CIT(A)-II held that since valuation report of Registered Valuer relied on by Assessee was accepted by

A.O. in earlier year, A.O. was not justified in taking market value for the purpose of computing “capital gain” as “circle rate” as that cannot be a necessary parameter for arriving at a fair market value. The ground was answered in favour of Assessee and addition of Rs. 84,27,065/- by A.O. working out capital gain on the basis of circle rate for cost of acquisition was deleted. Second ground taken by Assessee related to addition of Rs. 13,99,150/- which was disallowed by A.O. under Section 14A and that was also answered in favour of Assessee.

18. Against this order of CIT(A)-II dated 05.12.2011, Revenue preferred ITA No. 62/LKW/2012. Tribunal on the question of value of land as on 01.04.1981 held that neither the view taken by A.O. was correct nor appellate authority has correctly appreciated the matter inasmuch Tribunal clearly said that fair market value determined by Registered Valuer as also the one adopted by A.O. was incorrect and consequently, set aside order passed by CIT(A)-II Tribunal and remanded the matter to A.O. for fresh adjudication. The finding in this regard given in para-28 of judgment of Tribunal reads as under:

“28. Having carefully examined the orders of the lower authorities and the documents placed on record in the light of the rival submissions, we find that the assessee has adopted the demand value as on 1.4.1981 of the land on the basis of the registered valuer's report which was prepared on the basis of the land sold through public auction in the year 1985 which is very close to the land of the assessee. We also find force in the contentions that if the Assessing Officer has any doubt with regard to the valuation adopted by the assessee as on 1.4.1981, he could have made reference to the DVO either in those years in which the land was converted into stock-in-trade or in those years when the capital gain is to be worked out, but the Assessing Officer has not made any effort to

make reference to the DVO. On perusal of the Valuation report of the Registered Valuer filed by the Assessee, it is noticed that the Registered Valuer has determined the value on the basis of land sold through public auction in the year 1985 which was claimed to be close to the land of the assessee. While determining the market value of the impugned land as on 1.4.1981, the Registered Valuer should have scaled down the value of the land by applying certain formula, but he did not do so. He adopted the market value of the land sold through public auction in the year 1985. Therefore, we are of the view that the fair market value determined by the registered valuer is not correct. On the other hand, the Assessing Officer has adopted the circle rate as on 1.4.1981 without looking to the fact that the assessee has filed the registered valuer's report to determine the fair market value of the land on 1.4.1981. We find force in the contention of the assessee that the Assessing Officer is not expert in the field of determining the value of land therefore, he should have made reference to the DVO to determine the value of land as on 1.4.1981, but he did not do so. He adopted the circle rate as fair market value of land as on 1.4.1981 ignoring the registered valuer's report submitted by the assessee and computed the long term capital gain. The approach adopted by the Assessing Officer does not appear to be correct. Since the market value of the land as on 1.4.1981 was not determined correctly either by the assessee or the Assessing Officer, this issue requires a fresh adjudication by the Assessing Officer. Accordingly, we set aside the order of the Id. CIT(A) in this regard and restore the matter to the file of the Assessing Officer with a direction to re-adjudicate the issue afresh after determining the fair market value of the land as on 1.4.1981.

Since the assessee has filed the registered valuer's report to the DVO in order to determine the fair market value of the land for the purpose of long term capital gain.”

19. With regard to invocation of Section 14A and disallowance of expenses, Tribunal said that before invoking Section 14A of Act, 1961 read with Rule 8D(2)(iii), A.O. was required to record objective satisfaction with regard to correctness of expenditure or accounts relating to investment on which dividend income was earned. If no satisfaction was recorded, no disallowance under Section 14A could be made and on this aspect, ultimate view taken by CIT(A) for deletion of addition of Rs. 13,99,150/- has been upheld. Accordingly, Revenue's appeal was partly allowed.

20. In ITA No. 120 of 2015, dispute relates to A.Y. 2009-10. Assessee filed E-Return of income on 30.09.2009 declaring total income of Rs. 4,36,16,810/-. A revised return was filed on 12.10.2010 declaring total income at Rs. 3,53,62,890/-. Another revised return was filed on 13.10.2010 declaring total income of Rs. 3,53,65,890/-. The case was selected in scrutiny and notice under Section 143(2) was issued on 25.08.2010. Representative of Assessee brought to the notice of A.O. that Assessee Company as originally incorporated, i.e., “Upper India Couper Paper Mills Co. Ltd.” has now changed its title as “Upper India Couper Paper Mills Private Ltd” and approved by Registrar of Companies, Kanpur on 07.05.2007. Thus, title was changed only to the extent that from Public Limited, it became Private Limited. Before A.O., Assessee, filed a revised computation of income on 21.10.2001 declaring total income as Rs. 5,45,34,228/-. A.O. followed its earlier decision taken in A.Y. 2008-09 for determining deemed cost of land as on 01.04.1981 and thereby computed long term capital gain as Rs. 85,72,936/-. Accordingly it computed total income of Assessee for A.Y. 2009-10 vide order dated 30.12.2011 as under:

“In view of above discussion, the income of assessee is computed as under:

Income as per revised computation of assessee Rs. 5,45,34,228/-

Add:

(i) Long term capital gain as

Per discussion in Para (4) Rs. 85,72,936/-

Total Income Rs. 6,31,07,164/-”

21. Assessee preferred appeal before CIT(A)-II and vide order dated 15.02.2013, it followed earlier appellate order dated 05.12.2011 passed by CIT(A)-II in relation to A.Y. 2008-09 and deleted addition of Rs. 85,72,936/- made by A.O. by working out capital gain on the basis of circle rate for cost of acquisition and partly allowed appeal accordingly. Thereagainst Revenue preferred ITA No. 301/LKW/2013 which has been decided by Tribunal vide judgment dated 23.06.2015 and setting aside order of CIT(A)-II, it has remanded the matter to A.O., to redetermine fair market value as on 01.04.1981.

22. The above facts disclose an important aspect that land in question was owned by State Government and is 'Nazul Land'. This fact was also not disputed by learned counsels for parties during the course of arguments that land in question was/is 'Nazul'. Lease to Assessee was granted vide lease deed executed in 1942. It forms a 'Capital Assets' to Assessee in the light of definition of 'Capital Asset' under Section 2(14) which reads as under:

“(14) "capital asset" means property of any kind held by an assessee, whether or not connected with his business or profession, but does not include-

(i) any stock- in- trade, consumable stores or raw materials held for the purposes of his business or profession;

(ii) For personal effects, that is to say, movable property (including wearing apparel and furniture, but excluding jewellery) held for personal use by the assessee or any member of his family dependent on him.

Explanation.- For the purposes of this sub- clause," jewellery" includes-

(a) ornaments made of gold, silver, platinum or any other precious metal or any alloy containing one or more of such precious metals, whether or not containing any precious or semiprecious stone, and whether or not worked or sewn into any wearing apparel;

(b) precious or semi- precious stones, whether or not set in any furniture, utensil or other article or worked or sewn into any wearing apparel;

(iii) agricultural land in India, not being land situate-

(a) in any area which is comprised within the jurisdiction of a municipality (whether known as a municipality, municipal corporation, notified area committee, town area committee, town committee, or by any other name) or a cantonment board and which has a population of not less than ten thousand according to the last preceding census of which the relevant figures have been published before the first day of the previous year; or

(b) in any area within such distance, not being more than eight kilometres, from the local limits of any municipality or cantonment board referred to in item (a), as the Central Government may, having regard to the extent of, and scope for, urbanisation of that area and other relevant considerations, specify in this behalf by notification in the Official Gazette;”

23. The property of any kind held by Assessee in the case in hand does not mean the land itself but it is lease right which Assessee had over land in dispute and that is the kind of property held by Assessee. A lease right over immovable property is a kind of property right possessed by Lessee and would be a 'capital asset' as defined under

Section 2(14), but it cannot be said that property i.e. land itself is owned by Assessee. The kind of property which Assessee held did not include its title as he did not held property with absolute rights as are available to an owner of a land. Here, admittedly owner of land is State Government. It is in this backdrop, certain basic issues, we find have not been addressed by any Revenue Authority, though integrally connected and relevant to be looked into to understand the nature of further transactions. These are:

(I) Whether Assessee could have converted 'capital asset' in the form of lease rights over land in dispute in 'stock in trade' which may have effect of converting land itself from 'capital asset' to 'stock in trade'. In other words, whether conversion of 'capital asset' into 'stock in trade' in respect of land in dispute was confined only to the extent of lease rights which Assessee held over property in dispute or it can be said that land itself became a 'stock in trade'.

(II) On 01.04.2003 when Assessee claimed that 'capital asset' in respect of land was converted into 'stock in trade', whether Assessee held land in question as a 'Lessee'.

(III) Whether, on 01.04.2003 Assessee was in possession of land in dispute validly having lease renewed/ or unauthorizedly or otherwise, since lease was not renewed.

(IV) If answer to above two questions results in that Assessee's rights were confined to lease rights only and not to land itself extending to the extent ownership, or that its possession was unauthorized, then what will be the effect on the entire transactions and when Assessee can claim right over land itself, as owner?

24. These questions have not been addressed at any stage by Revenue Authorities and have been completely overlooked though integral and formed the basis whereupon further transactions of

Assessee could/ought to have been examined. It appears that Revenue Authorities are/were not clear in their concept with regard to “Nazul” and its nature. What a 'Nazul Land' is and what is its nature has been examined time and again. Recently, in a Division Bench judgment of this Court in **Income Tax Appeal No. 31 of 2009 (Commissioner of Income Tax-I, Aayakar Bhawan, Lucknow Vs. M/S Carlton Hotel Pvt Ltd.)** decided on 31.01.2017, this aspect has been examined and referring to earlier judgments of the Court, entire aspect relating to 'Nazul Land' has been discussed. It would be fruitful to reproduce paragraphs- 26 and 27 of the judgment which deals with the nature of 'Nazul Land' as under:

*“26. A 'Nazul' land is owned by State, though it may have vested in the State for various reasons. Nature of 'Nazul' land has been discussed by this Court in some of the judicial pronouncements. In **Sunni Central Board of Waqfs vs. Sri Gopal Singh Visharad and others 2010 ADJ (1) SFB (LB)** (in which one of us Sudhir Agarwal, J. was a member; rendered judgment which constituted majority on this aspect), this Court has observed as under :*

"4430. In the Legal Glossary 1992, fifth edition, published by the Legal Department of the Government of India at page 589, the meaning of the word "Nazul" has been given as "Rajbhoomi i.e. Government land". It is an Arabic word and it refers to a land annexed to Crown. During the British Regime, immoveable property of individuals, Zamindars, Nawabs and Rajas when confiscated for one or the other reason, it was termed as "Nazul property". The reason being that neither it was acquired nor purchased after making payment. In the old record, we are told when they used to

be written in Urdu, this kind of land was shown as "Jaidad Munzabta".

4431. For dealing with such property under the authority of the Lt. Governor of North Western provinces, two orders were issued in October, 1846 and October, 1848 wherein after **the words "Nazul property" its english meaning was given as "Escheats to the Government"**. Sadar Board of Revenue on 20th May, 1845 issued a circular order in reference to Nazul land and in para 2 thereof it mentioned **"The Government is the proprietor of those land and no valid title to them can be derived but from the Government."** The Nazul land was also **termed as confiscated estate.** Under circular dated 13th July, 1859, issued by the Government of North Western Provinces, every Commissioner was obliged to keep a final confiscation statement of each district and lay it before the Government for orders. The kingdom of Oudh was annexed by East India Company in 1856. It declared the entire land as vested in the Government and thereafter settled the land to various individuals Zamindars, Nawabs etc.

4432. At Lucknow revolt against the British Company broke up in May, 1857 which is known as the first war of independence which very quickly angle a substantial part of north western provinces. After failure of the above revolution, the then Governor General Lord Canning on 15th May, 1858 issued a proclamation confiscating propriety rights in the soil with the exception of five or six persons who had given support and assistance to British Officers. This land was resettled first for a period of three years and then permanent propriety rights were

given to certain Talukdars and Zamindars by grant of 'Sanad' under Crown Grants Act. In the meantime we all know that under the Government of India Act, 1858 the entire Indian Territory under the Control of East India Company was placed under Crown w.e.f. First November, 1858. A kind of first settlement in summary we undergone in Oudh in 1861 wherein it appears that the land in dispute was shown as Nazul and since then in the records, the nature of land is continuously being mentioned as Nazul.

4435. *The claim of the muslim parties is that the entire territory which came in the control of Babar after defeating Ibrahim Lodhi and others became his land since king was the owner of the land and no system of private ownership was recognized and therefore, he was at liberty to direct for any kind of construction on such land and the land could not have been treated to be owned by any private individual or anyone else.*

4436. *Let us consider this aspect also in the context of the theory of 'Nazul'. Such kind of land cannot be a Nazul land. If the entire territory during Mughal regime would that of a king, as soon as the territory annexation or otherwise changed its hand with the East India Company, they would have entered into the shoes of the Mughal king and got the same rights, obligations, privileges etc. on the land. The status of the land would not have changed in such a manner. Such a land could not be confiscated since it was already the land of the king but when a proclamation was issued for confiscating the land, meaning thereby the East India Company or the British Government did not follow the*

same principle. In our view, in such a matter, even the doctrine of "escheat" or "bona vacantia" may not be applicable.

4437. The question as to who could have been owner of the land in 1528 AD when alleged that the disputed building was constructed by Babar through his Commander Mir Baqi, the concept sought to be canvassed is that law, whether Islam or Hindu Shastras, do not recognise any personal right of ownership upon immoveable property. The entire property within the suzerainty of the king belong to him, who had right to tax its subject in the form of tax or otherwise by realising share in the agricultural or other income in the immoveable property. The percentage of share may differ and that may not be relevant for our purpose.

4438. The second aspect of the matter is that since ancient time the right of ownership proceeded with possession and is recognized by the well known principle "possession follows title". The individual right of ownership therefore was well recognized in the various personal laws and the only right the king had to acquire the land in known valid means, namely by purchase or gift etc. The obligation upon the king is to protect the subject and his property from enemies and for that purpose he used to raise revenue from the subject in the form of tax and/ or share from the income of the property etc. It is said that the King, by virtue of its authority, was not the sole owner of the entire immoveable property within his suzerainty but though the immoveable property was subject to his suzerainty, the individual right of the owner on the property continued to be

recognized. Besides, the fact that the land could have been acquired by the king by valid means like purchase, gift etc., meaning thereby other modes of acquisition of immoveable property by King existed otherwise no private owner of the land in question would have been there within his suzerainty.

4439. The learned counsel for the parties in this aspect referred to the **doctrine of Escheat/bona vacantia**. We find that the right of the King to take property by escheat or as bona vacantia was recognized by common law of England. Escheat property was the lord's right of reentry on real property held by a tenant dying intestate without lawful heirs. It was an incident, of feudal tenure and based on the want of a tenant to perform the feudal services. On the tenant dying intestate without leaving any lawful heirs, his estate came to an end and the lord was in by his own right and not by way of succession or inheritance from the tenant to reenter the real property as owner. In most of the cases the land escheated to the Crown as the lord paramount, in view of the gradual elimination of intermediate or mesne lords since 1290 AD. The Crown takes as bona vacantia goods in which no one else can claim property. In **Dyke Vs. Walford 5 Moore PC 434 = 49613 ER 557 (580)** it was said "it is the right of the Crown to bona vacantia to property which has no other owner." The right of the Crown to take as bona vacantia extends to personal property of every kind. Giving a notice at this stage that the escheat of real property of an intestate dying without heirs was abolished in 1925 and the Crown cannot take its property as bona vacantia. **The principle of acquisition**

of property by escheat i.e right of the Government to take on property by escheat or bona vacantia for want of a rightful owner was enforced in the Indian territory during the period of East India Company by virtue of statute 16 and 17 Victoriae, C. 95, Section 27.

*4440. We may recollect having gone through the history that several estates were taken over by British Company by applying the **doctrine of lapse like Jhansi which was another kind of the above two principles.** The above provisions had continued by virtue of Section 54 of Government of India Act, 1858, Section 20(3)(iii) of Government of India Act, 1915 and Section 174 of the Government of India Act, 1935. After the enactment of the Constitution of independent India, Article 296 now provides :*

*"Subject as hereinafter provided, **any property** in the territory of India which, if this Constitution had not come into operation, **would have accrued to His Majesty or, as the case may be, to the Ruler of an Indian State by escheat or lapse, or as bona vacantia for want of a rightful owner, shall if it is property situate in a State, vest in such State, and shall, in any other case, vest in the Union.**"*

*4441. The Apex Court in **Pierce Leslie and Co. Ltd. (supra)** has considered the above principles in the context of sovereign India as it stands under its constitution after independence and has observed that **"in this country the Government takes by escheat immoveable as well as moveable property for want of an heir or successor.** In this country escheat is not based*

on artificial rules of common law and is not an incident of feudal tenure. It is an incident of sovereignty and rests on the principle of ultimate ownership by the State of all property within its jurisdiction."

4442. The Apex Court placed reliance on **Collector of Masulipatam Vs. C. Vencata Narainapah** 8 MIA 500, 525; **Ranee Sonet Kowar Vs. Mirza Himmut Bahadoor** (2) LR 3 IA 92, 101, **Bombay Dyeing & Manufacturing Co. Vs. State of Bombay** (1958) SCR 1122, 1146, **Legal Remembrancer Vs. Corporation of Calcutta** (1967) 2 SCR 170, 204.

4443. The Judicial Committee in **Cook Vs. Sprigg** 1899 AC 572 discussing what is an act of state, observed :

"The taking possession by Her Majesty, whether by cession or by any other means by which sovereignty can be acquired, was an act of State."

4444. This decision has been followed in **Raja Rajinder Chand Vs. Mst. Sukhi and others** AIR 1957 S.C. 286.

4445. In **Vajesingji Joravarsingji Vs. Secretary of State** AIR 1924 PC 216, Lord Dunedin said :

"When a territory is acquired by a sovereign State for the first time, that is an act of State. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognised ruler. In all cases the result is the same. Any inhabitant of the territory can make good in the municipal Courts established by the new sovereign only such rights as that sovereign has, through his officers,

recognised. Such rights as he had under the rule of predecessors avail him nothing."

4446. In *Dalmia Dadri Cement Co. Ltd. Vs. Commissioner of Income tax* AIR 1958 SC 816, the Court said :

"The expression 'act of State' is, it is scarcely necessary to say, not limited to hostile action between rulers resulting in the occupation of territories. It includes all acquisitions of territory by a sovereign State for the first time, whether it be by conquest or cession."

4447. In *Promod Chandra Deb Vs. State of Orissa* AIR 1962 SC 1288, the Court said, " 'Act of State' is the taking over of sovereign powers by a State in respect of territory which was not till then a part of its territory, either by conquest, treaty or cession, or otherwise."

4448. To the same effect was the view taken by the Constitution Bench in *Amarsarjit Singh Vs. State of Punjab* AIR 1962 SC 1305 in para 12 as under :

*"It is settled law that **conquest is not the only mode by which one State can acquire sovereignty over the territories belonging to another State, and that the same result can be achieved in any other mode which has the effect of establishing its sovereignty.**"*

4449. In *Thakur Amar Singhji Vs. State of Rajasthan* AIR 1955 SC 504, in para 40, the Court said :

"The status of a person must be either that of a sovereign or a subject. There is no tertium quid. The law does not recognise an intermediate status of a person being partly a sovereign and partly a

subject and when once it is admitted that the Bhomicharas had acknowledged the sovereignty of Jodhpur their status can only be that of a subject. A subject might occupy an exalted position and enjoy special privileges, but he is none the less a subject ..."

4450. In *State of Rajasthan and Others Vs. Sajjanlal Panjawat and Others* AIR 1975 SC 706 it was held that the Rules of the erstwhile Indian States exercised sovereign powers, legislative, executive and judicial. Their firmans were laws which could not be challenged prior to the Constitution. The Court relied on its earlier two decisions in *Director of Endowments, Govt. of Hyderabad Vs. Akram Ali* AIR 1956 SC 60, and *Sarwarlal Vs. State of Hyderabad* AIR 1960 SC 862.

4451. In *Promod Chandra Deb Vs. State of Orissa* A.I.R. 1962 S.C. 1288 "act of the State" was explained in the following words:

"an "act of State" may be the taking over of sovereign powers either by conquest or by treaty or by cession or otherwise. It may have happened on a particular date by a public declaration or proclamation, or it may have been the result of a historical process spread over many years, and sovereign powers including the right to legislate in that territory and to administer it may be acquired without the territory itself merging in the new State."

4452. This decision has been followed later on in *Biswambhar Singh & Anr. Vs. The State of Orissa & Ors.* 1964(1) Supreme Court Journal 364.

Thus, a territory acquired by a sovereign State is an Act of State but the land comprising territory does not become the land owned by State. The land owned by State may come to it in various ways, like confiscation, purchase, escheat or bona vacantia, gift etc. In such a case the ownership vests in State, like any other individual and State is free to deal with the same in a manner like any other owner may do so.

Thus 'Nazul' is a land vested in State for any reason whatsoever that is cession or escheat or bona vacantia, for want of rightful owner or for any other reasons and once land belong to State, it will be difficult to assume that State would acquire its own land. It is per se impermissible to acquire such land by forcible acquisition under Act, 1894, since there is no question of any transfer of ownership from one person to another but here State already own it, hence there is no question of any acquisition. (emphasis added)

27. Presently various provisions dealing "Nazul" land have been compiled, in the State of U.P., in "Nazul Manual". In the context of **Nazul land and Nazul Manual, recently in State of U.P. Vs. United Bank of India & others, 2016 (2) SCC 257**, Court has observed that land and building in question is "Nazul" property being property of Government maintained by State authorities in accordance with Nazul Rules but not administered as a State property. Court has also observed that lease of "Nazul" land is governed in accordance with Government Grants Act, 1895 (hereinafter referred to as "Act, 1895"). Section 2 and 3 thereto very specifically provide that provisions of Transfer of Property Act, 1882 (hereinafter referred to as "Act, 1882") do not apply to Government land. Section 3 says that all provisions, restrictions, conditions and limitations ever contained in any such grant or transfer, as

aforesaid, shall be valid and take effect according to their tenor, any rule of law statute or enactment of the Legislature to the contrary notwithstanding.”

25. The above discussion makes it clear that title of land was with Government. Mere grant of lease to any person cannot have the consequence of divesting title from State to such person. The land in question was leased out to Assessee in 1942. Lease rights became effective from 01.04.1942. Initial tenure of lease was 30 years. Thereafter it was renewable for two terms, each of 30 years, total of 90 years. The first tenure of 30 years ended on 31.03.1972. Second term would have ended on 31.03.2002. It has not been brought on record, whether the term of lease was extended in 1972 and thereafter in 2002. Only when term of lease would have been renewed by State Government, Assessee could have continued with lease rights, validly upto 31.03.2032, otherwise in absence of renewal of lease, after expiry of initial period, lease rights of Assessee came to an end in terms of lease-deed and its status thereafter of having possession of land in dispute would also be of a different nature i.e. unauthorized.

26. We may notice at this stage that grant of lease of land belong to State is/was governed by Crown Grants Act, 1895, nomenclature whereof subsequently changed to Government Grants Act, 1895 (hereinafter referred to as “Act, 1895”). In 1942, land belong to Crown and therefore lease in question is/was to be governed by Act, 1895. It excludes application of provisions of Transfer of Property Act, 1882 (hereinafter referred to as “Act, 1882”) to the land which is governed by Act, 1895.

27. Since in the present case, Assessee tried to change status of his right over land in question on 01.04.2003, i.e. after expiry of second term of lease on 31.03.2002, it would be relevant to find out whether Assessee got the lease renewed before or after 31.03.2002 or not. If lease was renewed, then Assessee possessed only 30 years of lease

right over property in dispute. The valuation of said rights when converted from 'capital asset' to 'stock in trade' had to be valued looking these aspects of the matter wherein nature of lease and the terms of lease are also relevant factors. It is not a case of perpetual lease. Lease was/is for a tenure. If lease was not renewed, status of Assessee in respect of possession over land in dispute became that of an “unauthorized occupant” in view of provisions of U.P. Public Premises (Eviction of Unauthorised Occupants) Act, 1972 (hereinafter referred to as “Act, 1972”). On this aspect also, in **Commissioner of Income Tax Vs. Carlton Hotel Pvt. Ltd. (Supra)**, Court has examined the matter in the light of Supreme Court's judgment in **Delhi Development Authority vs. Anant Raj Agencies Pvt. Ltd. AIR 2016 SC 1806** and relevant discussion contained in para- 35 and 36 may be reproduced as under:

*“35. In **Delhi Development Authority vs. Anant Raj Agencies Pvt. Ltd. (supra)** Court considered that land vested in DDA was a 'Nazul land' and that being so, power has been conferred upon DDA to grant lease which includes renewal of lease but in absence of said renewal of lease of property as required in law, original lessee cannot claim an automatic renewal in his favour. Court held as under:-*

"Thus, it is abundantly clear from the aforesaid legal statutory provisions of the DD Act and terms and conditions of the lease deed and the case law referred supra that there is no automatic renewal of lease of the property in question in favour of the original lessee"

36. Having said so, Court held that in absence of renewal of lease, status of original lessee in relation to disputed property was an "unauthorized occupant" in terms of Section 2(g) of Act, 1972.”

28. We may also notice at this stage that judgment in **Commissioner of Income Tax Vs. Carlton Hotel Pvt. Ltd. (Supra)** has attained finality since appeal before Supreme Court in Special Leave to Appeal (C) No. 28637 of 2017 has been dismissed by Supreme Court on 06.11.2017.

29. If Assessee continued to have possession over land in dispute without renewal of lease as an unauthorized occupant, this has again to be examined whether Assessee could have claimed any right over property in dispute either as 'capital asset' or as 'stock in trade' at all.

30. What has been done in the case in hand is that ignoring the fact that Assessee did not have any title over land but possessed only lease rights, and land was owned by State Government, Revenue Authorities have proceeded to consider valuation assuming that Assessee had a right/title over land which is convertible into the manner, Assessee liked, and have proceeded accordingly.

31. Lease land was converted by Assessee in 'stock in trade' on 01.04.2003 i.e. Financial Year 2003-04 (A.Y. 2004-05). For the purpose of working out cost price as on 01.04.2003, Assessee got valuation through a registered Valuer who followed the price of a land flashed in an auction held in 1985 and on that basis valued rate of Rs. 95/- per square feet as on 01.04.1981 and accordingly indexed cost as on 01.04.2003 was worked out at Rs. 285/- per square feet. It is pointed out by Sri Mathur, learned counsel for Assessee that assessment for 2004-05 when made, A.O. vide order dated 28.12.2006 accepted valuation relied by Assessee and proceeded accordingly by working out 'long term capital gain' at Rs. 37,31,686/-. Assessee preferred appeal only to the extent that loss or gain should have been computed in the A.Y. in which land was converted and not during the period of conversion. This order of A.O. was challenged in appeal and CIT(A)-II allowed appeal of Assessee and this order of CIT(A)-II was upheld by Tribunal vide judgment dated 23.06.2015. A.O. in A.Y.

2007-08, while passing order dated 23.12.2009, followed earlier assessment order dated 28.12.2006 which was passed in reference to A.Y. 2004-05 observing that appeal of Assessee was pending. We however find that Assessee's Valuer's report as claimed has not been accepted as such at any point of time. The assessment order dated 28.12.2006 relating to A.Y. 2004-05 shows that A.O. basically has considered the question that land of Assessee under building agreement was converted into 'stock in trade', hence long term capital gain/loss has to be worked out. Since such agreement of builder results in transfer of land under Section 2(47)(iv)(v)(vi), therefore, 'long term capital gain' has to be worked out on the land for which agreement was executed with the builder on 20.06.2003. Against this order, Assessee preferred appeal before CIT(A)-II which was pending and during pendency of appeal, assessment in relation to A.Y. 2007-08 was finalized vide order dated 23.12.2009 and therein also A.O. followed assessment order dated 28.12.2006.

32. The assessment with respect to A.Y. 2004-05 upto the stage of Tribunal got finalized on 23.06.2015 when Tribunal dismissed Revenue's Appeal and upheld order of CIT(A)-II. This matter is not before us. However, since the questions and issues, as we have already discussed above, forming root of the matter, were not examined at all, it cannot be said that earlier assessment of A.Y. 2004-05 will have any affect and legal consequence like res-judicata or estoppel against Revenue in examining those matters and proceeding accordingly. An issue not considered would not attract the principle of res-judicata.

33. Moreover, so far as A.Y.2004-05 is concerned, we find that CIT(A)-II while allowing Assessee's appeal against assessment order dated 28.12.2006 held that loss or gain, whatever, should be computed during A.Y. in which land was converted from 'capital asset' to 'stock in trade' and not during the period of conversion and this fact has been

confirmed by Tribunal by dismissing Revenue's appeal and confirming order of CIT(A). The question is, when it can be said that land itself was converted into 'stock in trade' from 'capital asset'. Since, this aspect having not been taken further in appeal and in relation to A.Y. 2004-05 matter has become final, it is rightly argued that in the subsequent A.Ys., this status cannot be followed. One thing which has been ignored by Revenue as well as Assessee is that land itself was not owned by Assessee in A.Y. 2004-05. Question of conversion of land has to be seen as per status of Assessee vis-a-vis land in the year 2004-05. As is admitted, land being Nazul, owned by State Government and Assessee was only enjoying lease rights over the land, the definition of 'capital asset' includes within it, 'lease rights' over land since 'capital asset' means property of any kind held by an Assessee but that will not extend to land itself. The term 'transfer' in relation to a 'capital asset' includes extinguishment of any right therein and conversion or treatment as 'stock in trade' in business. Such conversion or treatment is defined under Section 2(47) but this conversion is only in relation to 'lease rights' over land in question and not the title or ownership of land. That continued to be vested in State Government even in A.Y. 2004-05. In respect of capital gain over land in question, thus occasion for computation would arise only when title is transferred by State Government, i.e., ownership, upon Assessee/lessee who held that land under a lease agreement of 1942 for a period of 30 years, renewable upto 90 years. It is nobody's case that such transfer of property took place in the A.Y. 2004-05. Therefore, transfer of land as such resulting in capital gain could not have been worked out in A.Y. 2004-05 in the manner as has been done by Assessee since it did not own land in A.Y. 2004-05. It has not come on record, when Assessee got title of land after execution of freehold deed/sale deed from State Government. The Builder's agreement with respect to share in land and transfer of land under the

impression that land itself has been converted into 'stock in trade' is nothing but a colourable transaction and it amounts to fraud. A similar issue has been considered in detail by this Court in **Commissioner of Income Tax Vs. M/s Carlton Hotel Pvt. Ltd. (supra)** wherein after setting aside judgment of Tribunal, Court remanded the matter to decide in the light of discussion made in the said judgment.

34. In view of above discussion, we answer Question-(A) in ITA 24 of 2012 in favour of Revenue. The view taken by Tribunal cannot be sustained inasmuch A.O. having not examined the matter in correct perspective, as discussed above, it is a clear case where his order is erroneous and prejudicial to the interest of Revenue and, therefore, CIT has rightly exercised jurisdiction under Section 263 of Act, 1961.

35. The orders in respect of A.Y. 2008-09 and 2009-10 have followed the orders in A.Y. 2007-08 and, therefore, have to be re-examined in the light of the findings of A.O. on issues, we have discussed above and now require A.O. to examine in the present case. So far as Question-(B) in ITA 24 of 2012 and Questions-(A), (B) and (C) in ITAs 120 of 2015, 121 of 2015 and 25 of 2014 are concerned, we hold that these questions need not be answered at this stage for the reason that we are remanding the matter to A.O. to re-examine the entire matter in the light of discussions made above and, thus, set aside/modify order of Tribunal in respect of all three Assessment Years, i.e., 2007-08, 2008-09 and 2009-10. Now A.O. will examine the entire aspect afresh and pass fresh orders in respect of aforesaid Assessment Years.

36. All the appeals stand disposed of accordingly. The order of Tribunal, impugned in ITA 24 of 2012 is hereby set aside. In remaining ITAs, since therein Tribunal has already remanded the matter, it is modified to the extent that now A.O. will re-examine entire matter in the light of discussions made above in respect of relevant Assessment Years.

37. So far as Writ Petition (MB) 1812 of 2014 is concerned, therein order of Reference dated 10.10.2013 made by A.O. to D.V.O. for valuation of land in dispute and consequential provisional valuation report submitted by D.V.O. are under challenge, since we are remanding the matter to A.O. to look into entire exercise in the light of discussions made above, and, therefore, valuation, if any, would have to be looked into in different facts and circumstances, hence, writ petition stands allowed and orders impugned in the writ petition are set aside. We hold that valuation, rights of Assessee, vis-a-vis land in question, will follow the order of A.O., which it would pass in view of order passed in connected appeals. We make it clear that right of A.O. to seek valuation under appropriate provision from competent authority shall be available to him and mere setting aside orders impugned in writ petition will not be construed as creating any disability in such exercise of power by A.O., if the occasion so arise.

38. Parties shall bear their own costs.

Dt. 25.01.2018

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