<u>आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ,F ,मुंबई ।</u>

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "F", MUMBAI

श्री अमित शुक्ला, न्यायिक सदस्य **एवं**

श्री अश्वनी तनेजा, लेखा सदस्य**,** के समक्ष

Before Shri Amit Shukla, Judicial Member, and
Shri Ashwani Taneja, Accountant Member

ITA No.3656/Mum/2014
Assessment Year: 2004-05

Vithal Nagar Co. Operative Housing Society Ltd., 51 N.S.S. Rd No.11, Jia Hind Club, JVPD Scheme, Mumbai-400056	**<u>बनाम</u>**/ Vs.	CIT-21 Pratyakshkar Bhavan, BKC Bandra (E) Mumbai- 400050
(Revenue)		(Respondent)
P.A. No.AAAAT3055F		

ITA No.3655/Mum/2014
Assessment Year: 2004-05

The Navyug Co. Operative Housing Society Ltd. Plot No. 51 Jain Hind Club Gldg. N.S. RD no.11, Jai Hind Society JVPD Scheme Vile Parle (W) Mumbai-400049	**<u>बनाम</u>**/ Vs.	CIT-21 Pratyakshkar Bhavan, BKC Bandra (E) Mumbai- 400050
(Revenue)		(Respondent)
P.A. No.AAAAT0325L		

ITA No.3657/Mum/2014
Assessment Year: 2004-05

Nutan Laxmi Co. Operative Housing Society Ltd. Plot No. 51 Jain Hind Club Gldg. N.S. RD no.11, Jai Hind Society JVPD Scheme Vile Parle (W) Mumbai-400049	**बनाम**/ Vs.	CIT-21 Pratyakshkar Bhavan, BKC Bandra (E) Mumbai- 400050
(Revenue)		(Respondent)
P.A. No.AAAAT1208J		

ITA No.3658/Mum/2014
Assessment Year: 2004-05

Suvarna Nagar Co. Operative Housing Society Ltd. Plot No. 51 Jain Hind Club Gldg. N.S. RD no.11, Jai Hind Society JVPD Scheme Vile Parle (W) Mumbai-400049	**बनाम**/ Vs.	CIT-21 Pratyakshkar Bhavan, BKC Bandra (E) Mumbai- 400050
(Revenue)		(Respondent)
P.A. No.AAAAS4938E		

ITA No.3659/Mum/2014
Assessment Year: 2004-05

Vallabhnagar Co. Operative Housing Society Ltd. Plot No. 51 Jain Hind Club Gldg. N.S. RD no.11, Jai Hind Society JVPD Scheme Vile Parle (W) Mumbai-400049	**बनाम**/ Vs.	CIT-21 Pratyakshkar Bhavan, BKC Bandra (E) Mumbai- 400050
(Revenue)		(Respondent)
P.A. No.AAAAVO288J		

ITA No.2363/Mum/2014
Assessment Year: 2004-05

Jai Hind Co. Operative Housing Society Ltd. Plot No. 51 Jain Hind Club Gldg. N.S. RD no.11, Jai Hind Society JVPD Scheme Vile Parle (W) Mumbai-400049	**बनाम**/ Vs.	CIT-21 Pratyakshkar Bhavan, BKC Bandra (E) Mumbai- 400050
(Revenue)		(Respondent)
P.A. No.AAAAJ2782R		

ITA No.3883/Mum/2014
Assessment Year: 2004-05

Friends Co. Operative Housing Society Ltd. Plot No. 51 Jain Hind Club Gldg. N.S. RD no.11, Jai Hind Society JVPD Scheme Vile Parle (W) Mumbai-400049	**बनाम**/ Vs.	CIT-21 Pratyakshkar Bhavan, BKC Bandra (E) Mumbai- 400050
(Revenue)		(Respondent)
P.A. No.AAAAT9169N		

ITA No.3882/Mum/2014
Assessment Year: 2004-05

The Presidency Co. Operative Housing Society Ltd. Plot No. 51 Jain Hind Club Gldg. N.S. RD no.11, Jai Hind Society JVPD Scheme Vile Parle (W) Mumbai-400049	**बनाम**/ Vs.	CIT-21 Pratyakshkar Bhavan, BKC Bandra (E) Mumbai- 400050
(Revenue)		(Respondent)
P.A. No.AAAAT4479M		

ITA No.3881/Mum/2014
Assessment Year: 2004-05

The Azad Nagar Co. Operative Housing Society Ltd. Plot No. 51 Jain Hind Club Gldg. N.S. RD no.11, Jai Hind Society JVPD Scheme Vile Parle (W) Mumbai-400049	**बनाम**/ Vs.	CIT-21 Pratyakshkar Bhavan, BKC Bandra (E) Mumbai- 400050
(Revenue)		(Respondent)
P.A. No.AAAAA1983F		

Assessee by	Ms. Arti Vissanji, Shri Rajesh Shah & Shalin S. Divatia (ARs)
Revenue by	Shri G.M. Doss (CIT-DR)

सुनवाई की तारीख/**Date of Hearing:**	**29/07/2016**
आदेश की तारीख /**Date of Order:**	**28/09/2016**

आदेश / O R D E R

Per Bench:

These appeals have been filed by the above mentioned appellants against respective orders passed by the Commissioner of Income Tax-21, Mumbai, {(in short Ld. 'CIT'}, u/s 263 of the Income Tax Act, 1961. In these appeals, the issues have arisen out of common subject matter, giving rise to identical issues and therefore, these were heard together and being disposed of by this common order.

2. During the course of hearing, arguments were made by Ms Arti Vissanji, Shri Rajesh Shah & Shalin S. Divatia, Authorised Representatives (AR) on behalf of the Assessee and by Shri G.M. Doss, Departmental Representative (CIT-DR) on behalf of the Revenue.

First we shall take up appeal of M/s Vithalnagar Cooperative Housing Society Ltd. in ITA No.3656/Mum/2014 for A.Y. 1995-96:

The assessee has filed its appeal on following grounds:

> *"1.The Learned Commissioner of Income Tax erred in exercising jurisdiction and passing Order u/s 263 of the Act, in respect of the Order u/s. 143(3) r.w.s.147, which was had in law as notice u/s. 147 was not served upon the assessee.*
>
> *2. The learned Commissioner of Income Tax erred in exercising jurisdiction under the provisions of Section 263 of the Act.*
>
> *3. The Learned Commissioner of Income Tax erred in holding that the provisions of Section 50C were not applied by the Assessing Officer.*
>
> *4. The Learned Commissioner of Income Tax, Mumbai erred in exercising jurisdiction regarding the applicability of Section 50C, when the issue of computation of Capital Gains in respect of the same transaction had been adjudicated upon by the CIT (A)-32, Mumbai.*
>
> *5. The assessee craves leave to add to or amend the grounds of appeal and file a detailed statement of facts at the time of the hearing."*

3. The brief facts as culled out from the orders of the lower authorities and submissions made by the assessee are that the assessee society along with 13 other housing societies (in all 14 societies) were owning a plot at Juhu, Mumbai under Juhu Vile Parle Development Scheme. The said plot was managed by the Association (M/s Juhu Vile Parle Development Cooperative Housing Association Ltd.), which was formed by aforesaid 14 Societies to provide suitable utilities and amenities for their common benefits.

Originally, the Income Tax Department had assessed income on sale of plot in the hands of Association which had sold the plot to a cooperative society formed for the benefit of Indian Police Service Officers. The matter went to the Commissioner of Income Tax-(Appeals) and he held that the impugned transaction resulted into capital loss on sale of the property and therefore the question of making an addition does not arise. Thereafter, the matter reached before the Income Tax Appellate Tribunal and the Tribunal held that since the plot did not belong to the Association, the question of any transfer by the Association does not arise and hence no capital gain can be assessed in the hands of Association. In pursuance to the above order, the Assessing Officer reopened the assessment of assessee (which is one of the 14 societies) to assess aforesaid income in the hands of the assessee.

3.1. Thereafter, the AO passed the assessment order in the name of assessee society and brought to tax in its hands the amount of capital gains arising on account of transfer of impugned plot of land for the proportionate share of the assessee in the total sales consideration, after taking cost of acquisition as 'nil'. The assessee society filed an appeal before the concerned Commissioner of Income Tax-(Appeals), challenging the computation of capital gains done by the assessee on the ground that no indexation was granted by the AO and cost of acquisition was wrongly taken at nil.

3.2. In the appeal order passed by the concerned Commissioner of Income Tax-(Appeals), the grounds raised by

the assessee were dismissed and AO's action in taking cost of acquisition at nil was upheld. On the other hand, in the meanwhile, Ld. CIT issued show cause notice u/s 263 to the assessee, after going through the aforesaid assessment order passed u/s 147/143(3) as well as assessment records of the assessee.

> *"On verification of the records, it is observed that Stamp Duty was paid on a valuation of Rs. 11,88,43,200/- as determined by the Stamp Duty Authorities. As per the provisions of 50C, this value should have been considered as the sale value. Thus the amount taxable as 'Capital Gains' in the hand of the assessee would stand at Rs.1,18,84,320/- as against the amount of Rs. 7,41,789/- as determined by the Assessing Officer".*

3.3. The assessee contested the show cause notice of Ld. CIT and filed detailed submissions challenging the validity of aforesaid show cause notice. The relevant part of submissions filed by the assessee in response to show cause notice, vide its letter dated 02.01.2014 is reproduced hereunder:

> *"3. It is submitted that the valuation of Rs. 11,88,43,200/- as determined by the stamp duty authorities cannot be the basis for determining the sale consideration as Rs. 1,18,84,320/-for said computation of capital gain for the following reasons:*
> *a) This plot was under acquisition by the Government of Maharashtra as the same was reserved for Recreation Ground, Garden, Police Quarters as per Table 41(g) of the Development Control Regulations (DCR) 1991. The owners of 14 Societies were, therefore, able to develop the plot for its own or the society, members' use. Please find enclosed letter dt.21.04.2003 of the Chief Engineer (9 Dev. Plan), Municipal Corporation of Greater Mumbai confirming reservation of plot for public purpose, inter alia, Police Quarters. Further, the Home Dept. of the Government of Maharashtra had taken the possession of this*

plot in 1975 issued by the Public Works and Housing Department of the Govt. of Maharashtra.

It is submitted that the provision of Section 50C cannot apply to sale of plot of land to the Government or where the Plot is reserved for a particular purpose by the Government and possession thereof taken by the Govt. of Maharashtra.

The Officers of the Police Department proposed to form a Cooperative Housing Society. The proposed society entered into a memorandum of understanding on 2510112000 with 14 societies. As per this MOU, a sum of Rs. 14,19,670/- was paid as an advance by the proposed society. The conveyance deed was executed between the said proposed society of the Police Official and the 14 Societies on 14.05.2003 for a total consideration of Rs. 77,14,920/- as against the consideration of Rs. 70,98,350/ - proposed in the MOU dated 25.01.2000.

The MOU in respect of the sale to the proposed society of officers of the Indian Police Service (IPS) was entered into on 25.01.2000 whereas Section 50C of the Act was introduced with effect from 01.04.2003. The subsequent deed of conveyance dated 14.05.2003 conveyance dated 14.05.2003 conveying the plot was only the fulfillment of a pre-existing obligation and hence cannot possibly be subjected to the rigors of Section 50C of the Act which does not have retrospective effect.

The purpose behind the enactment of Section 50-C was set out in Department Circular No.5/2010 dated 03.06.2010- "23.2. With a view to preventing the leakage of revenue, section 50C is amended, so as to provide that where the considering received or accruing as a result of transfer of a capital asset, being land or building or both is less than the value adopted or assessed or assessable by an authority of the state Government for the purpose of payment of stamp duty in respect of such transfer, the value so adopted or assessed or assessable shall be deemed to be the full value of consideration received or accruing as a result of such transfer for computing capital gain" (emphasis supplied)

It is humbly submitted that where a Reserved Plot is sold pursuant to possession being taken by a Government Authority and / or where it can be sued

only for a public purpose like providing housing for Government employees (in the instant case for Police Quarters) there cannot be any leakage of revenue. Under the said circumstances and going by the mischief sought to be addressed, the provision of Section 50C of the Act cannot be made applicable on the instant case.

d) The Indenture dated 14th May 2003 clearly specifies that the said plot was sold on "as is where basis is".

In the alternative and without prejudice it is submitted that the value adopted or assessed by the Stamp Valuation Authority under sub Section (2) exceeds the Fair Market Value of the plot on the date of transfer a plot of land subject to reservation without encumbrances. Further, in the instant case, the encumbrance was use of plot for Police Quarters. Hence, the said plot of land had no value for anybody other than the employees of the police department and was subject to necessary approvals from the Government of Maharashtra. The possession thereof had been handed over to the Govt. of Maharashtra in 1975.

Under the circumstances, we have to request you to kindly refer the valuation of the plot to under the provisions of Section 50C (2) of the Act.

The assessee also places reliance on the Order dated 03.03.2009 bearing reference CIT (A)XXI/DCIT-21(1)/IT-359/06-07 passed by the CIT(A)-XXI wherein respect of the same transaction it has been held that the provisions of Section 50C are not applicable under the facts and circumstances of the case. The same was passed when protective assessment was made in case of JVPD, Association.

It may be noted that the Department has not gone in further appeal against the said order of the CIT(A) but not on the issue of applicability of the provision of Section 50C; (copy of ITAT order in ITA 3132/MUM. 2009-10 enclosed). Hence, the assessee stand on the applicability of Scheme 50C to the above transactions has already been accepted by the department.

6. We therefore, humbly submit that proceedings u/s 263 of the IT Act be dropped in the above matter."

3.4. Ld. CIT considered submissions of the assessee but was not satisfied with the submissions of the assessee and it was

held by him that the impugned assessment order passed by the AO was erroneous and prejudicial to the interest of the revenue since the AO did not apply the provisions of section 50C of the Act and did not examine the impugned transaction through parameters of these provisions in this case inspite of the fact that capital gains had arisen to the assessee as a co-owner of the impugned plot of land transferred during the year. Accordingly, the assessment order u/s 143(3) r.w. section 147 dated 29.12.2011 passed by the AO was set aside u/s 263 of the Act, and matter was sent back to the file of the AO for deciding the issue afresh after due verification and after giving adequate opportunity of hearing to the assessee before the finalizing fresh assessment.

3.5. Being aggrieved, the assessee has brought this matter before the Tribunal by filing an appeal against the impugned order passed u/s 263 by the CIT. During the course of hearing, exhaustive submissions were made by Ms. Arti Vissanji, Ld. Counsel appearing on behalf of the following appellants:

1. The Vithalnagar Co-operative Housing Society Ltd. 3656/Mum/2014
2. The Nutan Laxmi Co-operative Housing Society Ltd. 3655/Mum/2014
3. The Navyug Co-operative Housing Society Ltd. 3655/Mum/2014
4. Vallabhnaghar Co-operative Housing Society Ltd. 3659/Mum/2014
5. The Suvarnagar Co-operative Housing Society Ltd. 3658/Mum/2014

3.6. Similarly, detailed arguments were made by Shri S. Divatia on behalf of M/s Jai Hind Cooperative Housing Society

Ltd. (ITA No.2363/Mum/2014). On the other hand, arguments were made by Mr. G.M. Doss (CIT-DR) on behalf of the Revenue.

The arguments made by the counsels appearing on behalf of the appellants can be summarized as under:

(i). It has been firstly argued that in this case, the impugned assessment order had merged into the order of the Ld. CIT(A) and therefore, applying the Doctrine of Merger, Ld. CIT had no jurisdiction for invoking provisions of section 263. It could not have held the assessment order to be erroneous and prejudicial to the interest of revenue and therefore, it could not have been set aside. It has been submitted that issue of section 50C was involved before the CIT(A) in the appellate proceedings of the Association i.e. M/s Juhu Vile Parle Development Co-operative Housing Association Ltd., wherein it was *inter-alia* held that section 50C was not applicable. It was further contended that even in the proceedings before the AO the question of computation of capital gain was involved and complete facts were there before the AO. Further, when the assessee had filed an appeal before the concerned Commissioner of Income Tax-(Appeals) against the assessment order, the issue of computation of capital gain was open before the Commissioner of Income Tax-(Appeals). It was further submitted that the Commissioner of Income Tax-(Appeals) had power of enhancement and therefore, even if no ground was raised with regard to section 50C, but still the issue was well within the jurisdiction of the Commissioner of Income Tax-(Appeals). Reliance in this regard was placed on the judgments

in the case of CIT vs. Nirma Chemicals Works P. Ltd. 309 ITR 67 (Gujarat High Court), Ms. Pushpa Devi Tibrewala v. ITO (Hyd)(order dated 7th June, 2013), Sonal Garments vs. JCIT 95 ITD 363(ITAT, Mumbai) and Merico Industries Ltd. vs. ACIT 115 TTJ 497(ITAT, Mumbai).

(ii). It has been argued by the Ld. Counsel that section 50C is not applicable upon the impugned transaction. It was submitted that in this case possession was handed over on 29th July, 1975, to the Public Works and Housing Department, the Government of Maharashtra and thereafter a Memorandum of Understanding dated 25.01.2000 was entered between the 14 Co-operative Societies, JVPD Co-operative Housing Societies Association Ltd. and Vasundhara C.S.H. Ltd. (i.e. a society of IPS Officers of Maharashtra). It was further stated that payment was fully received up to 11th February, 2003 and therefore, transaction was completed before the impugned financial year. Under these circumstances, the conveyance deed dated 14.05.2003 between aforesaid 14 cooperative housing societies, Association and Vasundhara CHS Ltd. was just a legal formality for executing the transaction in the impugned year. It was further submitted that in any case the agreement for sale was done on 25.01.2000 and therefore, sales consideration cannot be deemed as per rates prevailing on 14.05.2003. The Ld. Counsel(s) placed reliance in their support upon the judgment of Hon'ble Allahabad High Court in the case of Shindhu Mehar 236 taxman 561. Reliance was also placed upon the decision of Hyderabad bench in the case

of Shri Mohd. Imran Baig order dated 27.11.2015 (ITA No.194/hyd/2014 and others) and Smt. D. Anitha v. ITO 55 taxmann.com 538(Hyd).

(iii). It has been also argued by the Ld. Counsels on behalf of the assessee that in this case Ld. CIT has passed the impugned revision order without any independent application of mind. It was submitted that the revision order has been passed by the Ld. CIT without giving any reasoning and it is very brief and cryptic and therefore it is illegal in the eyes of law. In nutshell, Ld. Counsels vehemently submitted that order passed u/s 263 is not valid in the eyes of law and therefore it should be quashed.

3.7. Per contra, Ld. CIT-DR, appearing on behalf of the Revenue, vehemently assailed all the arguments of the counsels of the assessee and his arguments are briefed hereunder:

(i) With regard to the argument of the assessee on the merger of the original assessment order with the order of the Commissioner of Income Tax-(Appeals) by applying 'Doctrine of Merger', it has been submitted by the Ld. CIT-DR that the said Doctrine is not applicable here upon the given facts of this case. It was submitted that during the course of assessment proceedings, no issue with regard to applicability of section 50C was ever raised by the AO at all. The limited issue raised in the assessment order was with regard to determination of cost of the impugned property. The Society had claimed total cost of acquisition of the impugned plot of land at Rs.60,01,030/- whereas, the AO determined the same at nil

value. Thus, when assessee filed appeal before the concerned Commissioner of Income Tax-(Appeals), it was aggrieved only with regard to aspect of taking cost of acquisition at nil and therefore only this issue was raised before the Commissioner of Income Tax-(Appeals). Our attention has been drawn on the grounds raised before the Commissioner of Income Tax-(Appeals) in the first appeal filed by the assessee against the original assessment order dated 29.12.2011 as well as statement of facts therein with a view of emphasize upon the point that no other issue was raised before the Commissioner of Income Tax-(Appeals). Our attention was also drawn upon the appeal order passed by the Commissioner of Income Tax-(Appeals) to show that no such issue has been dealt by him. Thus, it was argued that neither the issue was raised in the assessment proceedings nor in the assessment order nor in the grounds of appeal nor written submissions filed by the assessee and nor even by the Commissioner of Income Tax-(Appeals) in the appeal order passed by him. Thus, the issue has not been adjudicated at all by the Commissioner of Income Tax-(Appeals) and therefore, there cannot be merger of assessment order with the order of the Commissioner of Income Tax-(Appeals) qua this aspect. Our attention was drawn on explanation 1(c) of section 263 to argue that it was well within the powers of the CIT to pass revision order on such matters as had not been considered and decided in the appeal by the Commissioner of Income Tax-(Appeals). Reliance was placed in this regard upon the judgment of Hon'ble Supreme Court in the case of CIT v. Shri Arbuda Mills Ltd.

231 ITR 50 (SC) which was subsequently followed by the Supreme Court in another judgment in the case of CIT v. Jay Kumar B. Patil 236 ITR 469. The reliance was also placed on the judgment of Hon'ble Allahabad High Court in the Mehra Borthers v. CIT order dated 11.03.2015 in writ tax no. 185 of 2015 for the proposition that Doctrine of Merger could not have been applied to that part of assessment order which was not subject matter of appeal. It was thus argued by him that since aspect of application or examination of section 50C had never been subject matter of assessment order nor of appeal before the Commissioner of Income Tax-(Appeals) and therefore, to this extent, the impugned assessment order was open for revision by Ld. CIT and has been rightly done so.

(ii) With regard to the second argument of the Ld. Counsels that section 50C was not applicable in this case as transfer had already taken place, Ld. CIT-DR drew our attention upon the assessment order to show that the position of taxability of capital gain on transfer of plot of land arising in the impugned year has been accepted by the assessee. Thus, the only dispute was with regard to determination of cost of acquisition, and therefore, assessee is not allowed now to take U-turn at this stage. Without prejudice to these submissions, Ld. CIT-DR drew our attention on the Memorandum of Understanding dated the 25.01.2000 and submitted that it was merely an Agreement to Sale which did not give rise to any transfer of the impugned property. It was submitted that this agreement was entered into for sale of impugned plot of land, subject to fulfillment of various conditions as were narrated in

detail in the said agreement. Our attention was drawn more specifically upon certain clauses of the said MOU wherein numerous conditions have been described. It was submitted that it was clearly stipulated in the said agreement that transfer of the impugned plot of land shall take place only subject to fulfillment of these conditions as well as payment of total consideration. It was submitted that fulfillment of these conditions were dependent upon various other agencies and therefore, unless these conditions were fulfilled or complied with, the assessee was not in a position to affect the transfer. It was further submitted that the purchaser was also not in a position to use on this plot in its own right until and unless these conditions were fulfilled and transfer was affected. It was further submitted that in case of non-fulfillment of these conditions, the amount of sale consideration was to be refunded. It was further submitted that as per the MOU (agreement), total amount of consideration agreed was for Rs.70,98,350/- whereas in the conveyance deed entered on 14.05.2003, the amount of sales consideration was revised to a sum of Rs.77,14,920/- which clearly shows that there was some kind of revision or re-negotiation on the price. It was thus argued that the impugned MOU could not have given effect to any type of transfer of title and that's why the assessee had disclosed the amount of capital gain in the year under consideration. Under these circumstances, provisions of section 50C are mandatorily to be applied while assessing correct amount of capital gain to be taxed in the hands of assessee. The reliance was also placed on the judgment of

Hon'ble Supreme Court in the case of Sanjiv Lal v. CIT 46 taxman.com 300 as well as Poddar Cement (P) Ltd. 226 ITR 625 (SC). It was thus, summarized that section 50C has been rightly directed to be invoked by the Ld. CIT in the year under consideration for determination of sales consideration in accordance with law.

(iii) With regard to the argument of the Ld. Counsel for alleged non-application of mind by the Ld. CIT, it has been submitted by the Ld. CIT-DR that perusal of the impugned revision order clearly reveals that Ld. CIT had called for the records and after going through the assessment records as well as order u/s 143(3), show cause notice u/s 263 was issued by Ld CIT. In response of the same, assessee had submitted its reply which was duly considered by Ld. CIT before reaching on the conclusion that assessment order passed by the AO was erroneous and prejudicial to the interest of revenue on the ground that mandatory provisions of section 50C were omitted to be applied by the AO while computing taxable amount of capital gains in the hands of the assessee. It was lastly submitted by the Ld. CIT-DR that Ld. CIT has merely directed the AO to examine the provisions of section 50C and thus objections on determination of correct sale value raised by the assessee before the tribunal can very well we raised while these provisions are applied by AO/CIT(A). Thus, in principle, the provisions of section 50C must be applied and the issues regarding the value to be adopted and other similar objections can very well be adjudicated while applying the provisions of section 50C. But, in absence of any examination of application

of section 50C, the assessment order was erroneous and prejudicial to the interest of revenue and therefore, revision order passed by the Ld. CIT was perfectly valid in the eyes of law and facts of this case.

3.8. In the rejoinder both the Ld. Counsels reiterated their submissions and assailed the order of Ld. CIT.

3.9. We have gone through the orders passed by the lower authorities as well as submissions made by both the sides before us. For the sake of brevity and to avoid repetition, we are not again discussing here the background and facts of the case which we have already discussed in the initial part of our order. Thus, proceeding further, we shall decide the issues raised by both the sides on the validity of impugned order passed u/s 263 by the Ld. CIT. The primary argument of the Ld. Counsels appearing on behalf of the assessee society was that Ld. CIT was precluded from exercising his jurisdiction u/s 263 for the reason that in view of 'Doctrine of Merger', the assessment order had got merged into order of the Commissioner of Income Tax-(Appeals) on the aspect of taxability of capital gains earned on transfer of impugned plot of land. We have examined this argument very carefully. The brief facts in this regard are that in consequence to the order passed by the Tribunal in the case of M/s The Juhu Vile Parle Development Cooperative Housing Association Ltd Dt 4th November, 2010 in ITA No 3132/M/2009, the AO reopened/opened the assessment of these 14 societies with a view to bring to tax the amount of capital gains in

the hands of these societies by recording following set of 'Reasons' on identical basis:

> *"During the course of assessment in the case of M/s Juhu Vile Parle Development Co Operative Housing Association Ltd. For A Y 2004-05, an amount of Rs.74,17,895/- was taxed under the head capital gains. M/s. Juhu Vile Parle Development Co Operative Housing Association Ltd executed a deed for transferring plot no. A/47 to the promoters of Vasundhara Co. Op Housing Society formed by Maharashtra Cadre of Indian Police Service. The said plot was under acquisition by the Govt. of Maharashtra as the same was reserved for police quarters. Therefore neither the association nor the 14 society members were able to develop the plot. The proposed society entered into a MOU on 26.1.2000 with 14 society members including the assessee. Thereafter the conveyance deed was executed between the police officers and 14 society members on 14.5.2003 relevant to A Y 2004-05 for a consideration of Rs.77,14,920/- and an amount of Rs.74, 17,695/- was credited in the ratio of the ownership rights of the 14 society members in its books of account. As the assessee is the owner of the said plot and share of the assessee amounting to Rs.5,93,424/- is credited to assessees account, the same has escaped assessment for the year under consideration. Therefore, I have reasons to believe that the an amount of Rs.5,93,424/- has escaped assessment."*

3.10. During the course of assessment proceedings, the assessee submitted following reply (taking a sample reply in the case of M/s. Vithalnagar Cooperative Housing Society Ltd.):

> *"The assessment in the aforesaid case is proposed to be made pursuant to the notice issued under Section 148 dated 28.03.2011. the aforesaid notice has been issued pursuant to the decisions of the Hon'ble ITAT Bench "J", Mumbai in ITA No.3232/Mum/2009 for A. Y. 2004-05 in the case of ACIT*

Cir.21(1) vs. Juhu Vile Parle Development Housing Association Ltd. the issue in the above matter was pertaining to the assessment of the capital gains on sale of the common plot, which is not the subject matter of assessment in the hands of the society, to the extent of its share in the said pot. The area of the land comprising the aggregate of the building plots and the area of the common amenities and public utilities were conveyed to the societies by the Bombay Housing Board vide indenture dated 261h day of April 1960. We would like to draw yourkind attention to the recital at Page Nos. 4 and 5 of the Indenture conveying the said plot:

"AND WHEREAS on the basis of the total cost of completing the scheme on the left bank of the Irla Nalla including the cost of earth filling and construction for roads and canalization the cost payable by each Society works out to about Rs10.00 per square yard of the building plots to be allotted to each Society including the proportionate cost of acquisition and development of common amenity and utility plots roads and canalization AND WHEREAS all the fourteen Societies have paid the proportionate costs payable by them amounting in all to Rs.60,01,030, which is the total estimate cost of acquisition and development of the whole area (emphasis supplied).

The assessee places reliance on the Supreme Court' judgement in case of B.C. Srinivasa Shetty 1981 128 ITR 294 and humbly submits that if the Cost of acquisition of the above mentioned asset is taken as 'NIL' then the receipt of money in the hands of the assessee's capital receipt without any cost and the same cannot be taxed as long term capital gains."

3.11. Thereafter, the AO concluded the assessment without accepting aforesaid submissions of the assessee with regard to adoption of the cost at Rs.60,01,030/-, and adopted cost at Nil and taxed the capital gain worked out accordingly. In the assessment order dated 29.12.2011 passed u/s 143(3) r.w. section 147, which subsequently became subject matter of revisions in the impugned revisions order passed by the Ld. CIT u/s 263, the assessee had filed an appeal against the

aforesaid assessment order before the concerned Commissioner of Income Tax-(Appeals) wherein following grounds were taken:

> *"(1) The Learned Assessing officer erred in taking the cost of acquisition of the common plot sold during the year as Rs. Nil and in consequently calculating long term capital gain of Rs.7,41,789/- instead of loss of Rs.5,92,345/- as claimed by the assessee.*
> *(2) In alternative and without prejudice the Learned Assessing Officer erred in charging to tax Rs.7,41,789/- as long term capital gains even though the cost of acquisition was taken as nil."*

3.12. Thereafter, the said Commissioner of Income Tax-(Appeals) considered the submissions of the assessee with respect to determining appropriate amount of cost and accepted the submissions of the assessee and deleted the addition made by the AO, vide his appeal order 27.11.2012, with following observations:

> *"3.3. I have considered the arguments of Ld. AR and perused the assessment order. The indenture dated 26.4. 1960 by which all the 14 societies were allotted plot by Bombay Housing Board, on payment of certain amounts by all the 14 societies was available before the AO. It was as per the said indenture dated 26/4/1960 that the ownership of the plot to all 14 societies was conferred. The said indenture is a registered agreement which is a valid evidence indicating the ownership by 14 societies. Even in the conveyance deed dated 14/5/2003, there is mention of the indenture dated 26/4/1960 by which the 14 societies had become the owner of the said plot. Hence the claim of the AO that there was no evidence of payment of cost to acquire the ownership is misplaced. On page 3 of the said indenture dated 26/4/1960, it is clearly mentioned that the said plot was allotted to cooperative housing societies which had agreed to pay the cost of acquisition and development of the said land and the conveyance was executed in favour of societies*

subject to payment of balance cost and liabilities. Page 4 & 5 of the said indenture reads as under:

"AND WHEREAS on the basis of the total cost of completing the scheme on the left bank of the Irla Nalla including the cost of earth filling and construction of roads and canalization the cost payable by each Society works out to about Rs.10.00 per square !,a1d of the building plots to be allotted to each Society including the proportionate cost of acquisition and development of common amenity and utility plots roads and canalization AND. WHEREAS ***all the fourteen Societies have paid the proportionate costs payable by them amounting in all to Rs.60,01,030.00 which is the total estimated cost of acquisition and development of the whole area". (emphasis supplied)***

This clearly shows that the societies were allotted the land in 1960 on payment of cost and hence the cost of acquisition cannot be Nil. It does not make any difference whether the cost is paid towards the earth filling or road or canalization work, if the allotment of plot is in lieu of payment of such charges by 14 societies as evident from the indenture dated 26/4/1960. Once the property has been acquired prior to 1/4/1981 for a cost, then as per the provisions of section 48 & 49, the cost of acquisition shall be taken to be indexed cost of the FMV as on 1/4/1981. The valuation report of the registered valuer dated 26/7/2006 va1uing the total common plot at Rs 28,81,500 was before the AO but the AO, has not pointed out any mistake or or discrepancy in the said valuation report. In fact while deleting the addition of capital gains for AY 2004-05 on protective basis in hands of JVPD Association, the then CIT(A) also, based on the same valuation report had held that the FMV at Rs 28,81,800 as on 1/4/1981 was required to be allowed after indexation. Since the ITAT Mumbai has held that the capital gains, if any on transfer of the common plot is assessable in hands of 14 societies and not in hands of JVPD association, then it is logical to apply the same cost in hands of the 14 societies also in the ratio of their

respective shares. ***Hence the action of the AO in treating the cost as Nil is erroneous and not as per law and facts.*** *If the deduction of indexed cost as per registered valuer's report dated 26/7/2006 is allowed for the share of appellant, it will result in Long term capital loss.* ***Accordingly the addition of LTCG of Rs 7,41,789 made by AO is directed to be deleted. In the result appeal is allowed."***

3.13. Thus, perusal of the 'Reasons' recorded by the AO, reply of the assessee filed in the course of assessment proceedings, assessment order passed by the AO, grounds of appeal filed by the assessee before the Commissioner of Income Tax-(Appeals), submissions made before the CIT(A) as well as appeal order passed by the Ld. CIT(A) reveal that issue with regard to section 50C had never been subject matter of discussion. It has been fairly admitted by both the parties before us that no query whatsoever with regard to application of section 50C was ever raised by the AO in any manner and during the course of assessment proceedings, issue with regard to application of section 50C never came up for discussion. Similarly, during the course of appellate proceedings before the CIT(A) also, no inquiry was made with respect to application or examination of provisions of section 50C. The limited aspect involved in the proceedings before the Ld. CIT(A) was confined to determination of cost of acquisition and computation of long term capital gain, accordingly. Thus, determination of the sale consideration in the light of mandatory provisions of section 50C has never been subject matter of inquiry or discussion. Thus, admitted fact on record are that issue with regard to application of section 50C and

adoption of appropriate amount of sales consideration as per law had neither been raised nor adjudicated by the Commissioner of Income Tax-(Appeals).

3.14. Thus, in view of the aforesaid fact, we shall now deal with the arguments made by both the sides. We shall first like to refer to explanation 1(c) of section 263(1) which reads as under:

> *"(c) Where any order referred to in this sub-section and passed by the Assessing officer had been the subject matter of any appeal filed on or before or after the 1st day of June, 1988, the powers of the Principal Commissioner or Commissioner under this sub-section shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in such appeal."*

3.15. The perusal of the aforesaid explanation clearly reveals that these provisions are widely worded and clearly lay down that power of the Commissioner of Income Tax to revise an assessment order shall continue to extend in all those matters which have not been considered and decided in any appeal. It is not disputed by any party that matter pertaining to application of section 50C has neither been considered nor decided in appeal by the Commissioner of Income Tax-(Appeals). Thus, as per plain provisions of law, Ld. CIT had requisite power under the law to consider and examine application of section 50C for revision u/s 263, since the 'Doctrine of Merger' would not apply upon such matter. However, Ld. Counsel has placed reliance upon the judgment of Hon'ble Gujarat High Court in the case of CIT v. Nirma

Industries Chemical Work (P) Ltd. (supra) 309 ITR 67. We have gone through the said judgment. In the said case, the issue arisen was with respect to allowbility of deduction u/s 80I. It was contended by the said assessee that issue of allowbility u/s 80I was considered by the AO and the CIT(A) had given part relief to the assessee and therefore, the issue of allowbility of deduction u/s 80I was subject matter of appeal and therefore, Doctrine of Merger applied upon the assessment order. Under these peculiar facts of the said case, Hon'ble High Court was pleased to hold that assessment order on this issue was not open for revision by the CIT since the CIT(A) had examined and adjudicated the issue of deduction u/s 80I. Similarly, in the other judgment of Sonal Garments, (supra) the issue involved was that of computation of deduction u/s 80HHC and it was held by the Hon'ble Bench that since this issue was subject matter of consideration before the CIT(A), therefore, it could not be subject matter of revision u/s 263. Similar facts were involved in the case of Merico Industries Ltd. (supra) where the subject matter under consideration was about allowbility of deduction u/s 80IB. Thus, these judgments have different factual situations. Reliance was also placed by the Ld. Counsel on the decision of Hyderabad Bench in the case of Ms. Pushpa Devi Tibrewala. We have gone through this judgment. It is noted that the issue under consideration in the said case was with regard to determination of nature of capital gains. It was observed by the bench while analyzing the facts of the said case that the whole issue of capital gain arising out of development

agreement as well as sale invoking of plot was not only considered by the AO while completing the assessment u/s 143(3) of the Act, but was also subject matter of appeal before the CIT(A) and it was quite evident from the assessment order passed that the AO had not only inquired into the issue and applied his mind to the facts and materials on record but also dealt with the issue of capital gain in the assessment order. In view of the totality of the facts, it was held by the bench that whole issue of capital gain was subject matter of appeal before the CIT(A) he had decided the issue much prior to issuance of notice u/s 263 of the Act. Thus, facts of the said case are not comparable with the facts of the case before us.

3.16. On the other hand, we find that judgments relied upon by Ld. CIT-DR, appear to be applicable on the facts of this case. He relied upon heavily on the judgment of Hon'ble Supreme Court in the case of CIT v. Shri Arbuda Mills Ltd. 231 ITR 50 wherein it was held that powers u/s 263 of the Act, shall extend to such matters as had not been considered and decided in any appeal. He also drew our attention upon the decision of Hon'ble Andhra Pradesh High Court in the case of CIT v. New Srinivasa Construction Co. 236 ITR 503, wherein following the aforesaid judgment of Hon'ble Supreme Court, Hon'ble Andhra Pradesh High Court laid down the principle that the untouched part of the assessment order, which did not fall for consideration before the CIT(A), was still open for revision u/s 263 of the Act before the CIT.

3.17. Under these circumstances and facts of the case before

us, we find force in the argument of Ld. CIT-DR that in this case section 50C has not been touched at all by the AO and therefore it was not subject matter of appeal before the CIT(A). Though, the CIT(A) has *co-terminus* powers with the AO but unless and until an issue is touched either by the AO or by the CIT(A), it remains open for revision u/s 263 by the CIT, subject to the compliance of other conditions of section 263. The law on this issue has been properly explained by Hon'ble Supreme Court in at least two judgments as stated earlier also. In the case of CIT v. Shri Arbuda Mills Ltd.(supra), Hon'ble Supreme Court took note of explanation 1(c) to section 263(1) and held that the powers u/s 263 of the Commissioner shall extend and shall be deemed to always have extended to such matters as had not been considered and decided in an appeal. This judgment was given by the Bench comprising of three Hon'ble Judges had come up again for consideration before the Hon'ble Supreme Court in the case of CIT v. Jaykumar B. Patil wherein the Revenue had sought the reference of following two questions before Hon'ble Supreme Court:

> *"(1) Whether, on the facts and in the circumstances of the case the Tribunal was right in law, in holding that the Commissioner of Income Tax had no jurisdiction and powers to initiate proceedings under section 263 of the Income tax Act 1961, in respect of issues not touched by the Commissioner of Income Tax (Appeals) in this appellate order?*
> *(2) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that not only the issues dealt with in the assessment order but also the order issues were merged in the Commissioner of Income Tax (Appeal)'s order ignoring the provisions*

contained in clause (c) of Explanation to sub-section (1) of section 263 of the Income Tax Act, 1961?"

3.18. Hon'ble Supreme Court after considering these two questions held as under:

"Notice on the special leave petition has been served upon the respondent but he has not chosen to appear. The notice stated that the matter might be disposed of at the special leave petition stage in view of the judgment of this court dated January 23, 1996, in TRC No.11 of 1983 CIT v. Shri Arbuda Mills Ltd. (1998) 231 ITR 50.
That judgment covers the two questions that were sought to be raised they were questions of law and the High Court ought to have called for a reference thereof, but, having regard to the fact that this court has in the aforementioned case squarely dealt therewith we shall deem this to be a reference of the questions to ourselves and, following the aforementioned case, answer the questions thus: in the negative and in favour of the Revenue.
The appeal is allowed accordingly, with no order as to costs.

3.19. It may be noted from the perusal of above judgment of Hon'ble Supreme Court that the *ratio decidendi* in the case of Shri Arbuda Mills Ltd (supra) has been followed and these questions have been decided in favour of the Revenue. In other words, Hon'ble Supreme Court held that the Commissioner of Income Tax had jurisdiction and powers to initiate proceedings u/s 263 of the Act in respect of the issues not touched by the Commissioner of Income Tax-(Appeals) in his appeal order in view of explanation (c) to sub-section (1) of section 263 of the Act. No other contrary judgment of Hon'ble Supreme Court has been brought to our knowledge by the assessee. It is further noted that Ld. CIT-DR had relied upon a detailed judgment from Hon'ble Allahabad High Court in the

case of M/s Mehra Brothers vs CIT dated 11th March 2015 in writ tax no. 185 of 2015. We have gone through these judgments and find that Hon'ble High Court has discussed entire law available up to date on the issue of jurisdiction of the CIT to make revision u/s 263 of the issues which were not subject matter of appeal before the CIT(A). Hon'ble High Court *inter-alia* followed the judgment of Hon'ble Supreme Court in the case of CIT v. Arbuda Mills Ltd.(supra) as well as CIT v. Jaykumar B. Patil. Hon'ble High Court also discussed and followed various other judgments in this case. The facts were that the assessee had claimed deduction u/s 10B of the Act. The AO granted the benefit of deduction u/s 10B partly by reducing amount of export turnover shown by the assessee against which the assessee filed an appeal before the CIT(A). Subsequently, notice u/s 263 was issued by the Ld. CIT questioning the very eligibility of deduction u/s 10B in the impugned assessment order. The assessee filed writ against the notice u/s 263 before the Hon'ble High Court on the ground that in view of 'Doctrine of Merger', Ld. CIT was ousted from its jurisdiction to invoke provisions of section 263 with regard to claim of deduction u/s 10B. On the other hand, the Revenue pleaded that in the given facts 'Doctrine of Merger' did not apply because the issue of very applicability/eligibility of deduction u/s 10B was not examined by the AO and was therefore not subject matter of appeal before the Ld. CIT(A). Hon'ble High Court after analyzing aforesaid two judgments of Hon'ble Supreme Court observed as under:

"29. In EIMCO K.C.P. Ltd. vs. C.I.T. [(2000) 242 ITR 659 (SC)], a question arose whether Commissioner can exercise power under Section 263 of Act, 1961, while agreeing with the order of assessment against which appeal is pending before Commissioner (A), involving the point upon which notice under Section 263 is issued, the Court up held the notice issued under Section 263 and held that such notice can be issued.

30. The decision in CIT Vs. Abuda Mills Ltd. (Supra) has also been followed by this Court in CIT Vs. Dhampur Sugar Mills Co. Ltd. [(2004) 270 ITR 576 (All)], CIT Vs. Indo Persian Rugs [(2008) 299 ITR 300 (All)] and CIT Vs. Span International [(2004) 270 ITR 538 (All)].

31. In CIT Vs. Amrit Banaspati Co. Ltd. [(2005) 277 ITR 559 (All)], Court held that in respect of items which have not been considered in appeal, power of Commissioner under Section 263(1) shall be extended to that extent.

32. Now looking to the facts of present case, in the light of exposition of law discussed above, we find that claim of assessee seeking exemption under Section 10B of Act, 1961 for assessment year 2011-12, was not doubted by Assessing Officer. Applicability of Section 10B of Act, 1961 for assessment year 2011-12, as claimed by assessee, was accepted by him. Thus, this aspect was not in appeal at any stage. It is only on the question of "quantum of profit" for which exemption was claimed that the appeal was filed. The Assessing Officer discussed the matter and found that instead of Rs.4,97,28,163.45 which was claimed by assessee, it was entitled to exemption to the extent of Rs.4,61,90,179.58 under Section 10B and there is taxable income of Rs.3537980/-. On taxability of aforesaid amount, assessee preferred appeal and only that aspect was considered by CIT(A) as also Tribunal. At no stage, the issue whether assessee was entitled to claim exemption under Section 10B at all or not, having already exhausted beyond the period of exemption permissible under Section 10B, was not a subject matter of consideration before appellate authorities. Hence, this

question was open to be looked into by Commissioner. In our view, he has rightly exercised power under Section 263 of Act, 1961, by taking aforesaid view we find support from a decision in CIT Vs. Ratilal Bacharilal And Sons [(2006) 282 ITR 457 (Bom.)], wherein almost in similar circumstances, the Court said as under :-
"..... At the instance of the assessee, the allowance on the sum of Rs. 5,63,350 could not have been the subject matter of appeal before the Commissioner of Income-tax (Appeals) as the assessee was never aggrieved with that part of the order. In other words, so far as weighted deduction under section 35B in the sum of Rs. 5,63,350 is concerned, the same was not a subject matter of the appeal before the Commissioner of Income-tax (Appeals). Factually, in this case, the doctrine of merger could not have been applied by the Tribunal to that part of the order which was not a subject matter of appeal as indicated, so as to exclude revisional jurisdiction of the Commissioner of Income-tax under section 263 of the Act."

33. On behalf of petitioner, reliance has been placed on a Division Bench decision of Karnataka High Court in CIT Vs. Tata Elxsi Ltd. [2012 (247) CTR 334], but having gone through the aforesaid decision, we find no application thereof to the issues which which we are concerned in this writ petition. The aforesaid decision therefore renders no help to petitioner at all.

34. In the circumstances, questions no. 1 and 2, are answered against petitioner. The question no. 3 is returned in favour of Revenue, holding that notice issued by Commissioner under Section 263 of Act, 1961, impugned in this writ petition is perfectly valid and in accordance to law.
35. In the result writ petition lacks merit Dismissed.

3.20. From the above analysis it is noted that Hon'ble Allahabad High Court took note of judgment of Hon'ble Bombay High Court in the case of CIT Vs. Ratilal Bacharilal

and Sons, (supra) wherein it was held that 'Doctrine of Merger' could not have been applied by the Tribunal to that part of the order which was not a subject matter of appeal so as to exclude revisional jurisdiction of the Commissioner of Income Tax under section 263 of the Act. In the given facts of the said case, it was held that since at no stage the issue whether assessee was entitled to claim exemption u/s 10B at all or not, was subject matter of consideration before the appellate authorities, therefore, this question was open to be looked into by the Commissioner, because it is only on the question of "quantum of profit" upon which exemption was claimed, an appeal was filed and only to that extent allowbility of exemption u/s 10B was subject matter of appeal and NOT in its entirety. On the similar lines, judgment relied upon by Ld. Counsel in the case of CIT vs Forteleza Developers 374 ITR 510 (Bom) is not applicable on the facts of the case before us. In the said case also, issue involved before the AO as well as Ld CIT(A) was computation of amount of deduction allowable u/s 80IB. Hon'ble High Court primarily and substantially decided the case in favour of the said assessee on merits of the issue. It was observed by Hon'ble High Court that the AO had examined all the conditions prescribed under the law before allowing deduction u/s 80IB(10) and that view was taken by the AO after deliberations and that interpretation placed by the assessee was correct on facts and law. It was briefly observed while concluding the judgment in addition to the above observations that order passed u/s 263 was held to be invalid applying doctrine of merger for the reason that all the

facets of the deduction u/s 80IB were under consideration before the AO/CIT(A) and that is why order of AO had merged into order of CIT(A). But, in the case before us, issue of section was 50C was not touched by any of the authorities.

3.21. Turning back to the facts of the case before us, it is noted that AO had touched the issue of computation of capital gains with respect to ascertaining the cost of acquisition of the plot of land sold by the assessee on which capital gain was assessed by the AO, against which the assessee preferred an appeal before the concerned CIT(A) and thus, only this issue i.e. ascertaining the correct amount of cost of acquisition, was subject matter of appeal before the CIT(A). The AO did not touch at all the applicability of mandatory provisions of section 50C nor was so done by the CIT(A). Thus, mandatory provisions of section 50C were not subject matter of appeal before the CIT(A). It is noted by us that provisions of section 50C are deeming provisions and stand on an independent basis *de-horse* the aspect of determination of cost of acquisition, also because determination of sales consideration, in accordance with the provisions of the statute, is a distinct exercise. Under these circumstances, it would be too far to stretch the argument based upon an imagination that since cost of acquisition has been determined by the AO, and then it should be presumed that AO has determined the sales consideration also in accordance with law. No such exercise was shown to have been done by the AO. The records also did not indicate any such exercise having been done by the AO.

Under these circumstances, there could not have been any appeal on this aspect before the CIT(A). The CIT(A) had also not touched the issue of application of section 50C. In our opinion, according to the 'Doctrine of Merger', judgments of lower courts merge into judgments of higher court and after the merger there remains no judgment of the lower courts and therefore, obviously and admittedly, there can be no revision of the judgment which does not even exist. However, in tax statutes like Income Tax Act, 1961, the legislature has not thought it fit to apply 'Doctrine of Merger', but **'Doctrine of Partial Merger'** has been adopted. Thus, once the issue of merger is governed by the provisions of the statute, then, obviously under the income tax proceedings it is the statute which shall prevail over general 'Doctrine of Merger'. The 'Doctrine of Partial Merger' would apply for the purpose of section 263 of the Act, to the extent as explained under the relevant provisions contained in clause (c) of explanation 1 of section 263(1) of the Income Tax Act 1961. This provision has already been discussed in earlier part of our order which clearly provide that powers of the Commissioner under this section shall extend to such matters as had not been considered and decided in the appeal. Thus, going by common sense approach as well as cardinal principles of law as well as judgments of various courts if applied on the facts of this case, clearly suggest that the CIT had requisite powers and jurisdiction u/s 263 to examine the application of provisions of section 50C which were omitted to be applied by the AO and

therefore, the argument of the assessee with regard to the 'Doctrine of Merger' fails in the given facts of this case.

3.22. It was also argued by the Ld. Counsel that in the appeal proceedings of JVPD Association i.e. M/s JVPD Cooperative Housing Association Ltd (which was formed by these 14 societies to take care of maintenance of the plot), the concerned CIT(A) had given observations about the non applicability of provisions of section 50C upon the impugned transaction and thus, it could be said that these facts were there before the AO when the impugned assessment order in the case of assessee was passed. In this regard, it is noted by us that in the appeal filed by the Revenue against the order passed by the CIT(A) in the case of JVPD Association, the reasoning of the CIT(A) about non-applicability of provisions of section 50C has not been expressly approved by the Tribunal. In fact this issue was not touched by the Tribunal. The Tribunal had held that JVPD Association was not owner of the plot and therefore, there was no question of assessing the capital gain in the hands of JVPD Association. Further, once it was held that JVPD Association was not owner of the plot, then whatever observations were given by the CIT(A) in the case of JVPD Association, that would have no bearing in the hands of present assessee who is admittedly legal owner of the impugned plot of land. Even otherwise,

the order passed by the CIT(A) in the case of JVPD Association is not part of the proceedings before the AO who had passed the impugned assessment order. Further, there is nothing on record to show that the Assessing Officer while passing the impugned assessment order had applied his mind and took conscious decision for not applying the provisions of section 50C and that too by relying upon the order of the CIT(A) of JVPD Association. Therefore, under these circumstances, the jurisdiction of CIT in exercising its power u/s 263 is not excluded from examining the applicability of provisions of section 50C in the hands of present assessee.

3.23. Now, we shall deal with other arguments of the assessee with regard to its objections about applicability of provisions of section 50C and more specifically about substitution of amount of sales consideration with the value adopted by the stamp valuation authority for effecting the transfer of impugned plot of land. The objections of the assessee in this regard are twofold. The primary objection of the assessee is that the provisions of section 50C could not have been applied in the year under consideration, since the transaction had already taken place and the second objection is that value adopted by the stamp valuation authority at the time of registration of the conveyance deed could not have been adopted in the year under consideration.

3.24. We have considered all the objections very carefully. It has been contended that impugned plot was not in the exclusive possession of the assessee and that the assessee was not enjoying the usage of the plot for its own purposes for the reasons that its possession was handed over to the Public Works and Housing Department, Government of Maharashtra on 29th of July, 1975. In this regard, it is observed by us that it is admitted case of the assessee that the assessee, along with other 13 society members was legal owner of the said plot of land; title of the said plot was very much held by the assessee and that's why the assessee had legally entered into an agreement/memorandum of understanding dated 25.01.2000 with the association of officers of Indian Police Services for transfer of impugned plot of land. It is in pursuance of the said agreement/MOU, that the assessee was able to execute a conveyance deed during the year under consideration on 14th May, 2003 for effecting transfer of the legal title of ownership in favour of M/s. Vasundhara C.H.S. Ltd. (i.e. Society of Indian Police Service officers of Maharashtra Cadre). The issue with regard to the dispute in the ownership and assessment of capital gain arose in the hands of JVPD Association i.e. M/s JVPD Cooperative Housing Association Ltd (which was formed by these 14 societies to take care of maintenance of the plot). The AO of JVPD Association had assessed the resultant capital gain in the hands of JVPD Association by treating it as owner of plot. The issue had reached up to the Tribunal and the Tribunal did not approve action of the Revenue and held that said JVPD

Association was not the owner and these 14 societies were co-owners of the plot. Relevant part of the observations of the Tribunal contained in its order dated 4th November, 2010 in ITA No.3132/M/2009 is reproduced as under:

> *"On appeal, the CIT(A) noticed that conveyance deed was executed between the proposed society of the Police Officers and the 14 society members on 14.05.2003 for a total consideration of Rs.77,14,920/- and that the 14 members societies agreed to deposit the sale consideration with the assessee in proportion to their ownership in the plot. The amount was so deposited with the assessee society which after deducting the expenses incurred on development and maintenance of the plot credited the balance of Rs.74,17,895/- in the ratio of the ownership rights to the accounts of the 14 societies members in its books of account. The CIT(A) further found that the memorandum of understanding had been entered into between the 14 members societies and the proposed Vasundhara Co-operative Housing Society and finally conveyance deed was executed on 14.05.2003. On these facts, he held that the Assessing Officer was right in considering the net sale proceeds of Rs.74,17,895/- for the purpose of working out the capital gains, but held that if the 1.4.1981 value was adopted as the cost of acquisition in terms of section 48, and indexation benefit is also allowed, there would be net capital loss of Rs.57,65,385/-. In this view of the matter, he deleted the addition of capital gains on protective basis in the assessment of the assessee.*
>
> *5. The revenue is in appeal to contend that the assessee is practically the owner of the plot and since the monies are still lying with it, not having been handed over to the 14 societies, the Assessing Officer was right in holding that the assessee should be protectively assessed in respect of the capital gains. On the other hand, the learned counsel for the assessee submitted that the assessee was merely holding possession of the plot, that it was not the owner of the plot and there was no transfer of the plot by the assessee and therefore there was no question of any*

capital gains being assessed in the hands of the assessee on protective basis.

6. On a careful consideration of the facts and the rival contentions, we are inclined to uphold the decision of the CIT(A). It is not the case of the department that the assessee was the owner of the plot and therefore it should be assessed to capital gains. There is no dispute that the plot was owned by 14 different co-operative housing societies in specific shares and that the assessee was merely put in possession of the plot for the purpose of common management. The plot was originally allotted to the 14 co-operative housing societies by the Bombay Housing Board under an indenture dated 26.04.1960 (pages 47 to 74 of the paper book) and in the light of this indenture it cannot be said that the assessee became the owner of the plot. The byelaws of the assessee society, a copy of which is placed at pages 105 to 112 of the paper book, shows that the 14 cooperative housing societies were holding the residential plot, which was part of the land in JVPD scheme. The proportionate share of these societies in the property and their liability to pay the cost of development of the property is also mentioned in the byelaws. There is no document to which our attention was drawn on behalf of the department transferring the ownership of the plot to the assessee society. The finding of the CIT(A) which is not challenged before us is that the conveyance deed was executed by the 14 societies members on 14.5.2003 in favour of Vasundhara Co-operative Housing Society Ltd. formed by the Maharashtra Cadre of IPS. Earlier to this conveyance, there was a memorandum of understanding entered into between these parties on 26.1.2000, a copy of which is at pages 75 to 104 of the paper book. A perusal of the memorandum of understanding shows that it was executed between the 14 co-operative housing societies, the assessee and the promoters of Vasundhara Cooperative Housing Society Ltd. Clause (iii) of the preamble states that the society was formed by the 14 societies and registered under the Maharashtra Co-operative Societies Act to take possession of the property from the managing committees of the 14 co-operative housing societies and to hold and utilise the property for providing suitable utilities and amenities such

as play ground, schools, colleges etc. and to do all such acts and things as are of common interest to the 14 societies. The memorandum of understanding does not show the assessee as a owner of the property. Capital gains can arise to a person only if he owns the plot and transfers the same for consideration. The assessee not being the owner of the plot but merely holding possession thereof on behalf of the 14 co-operative societies and managing the same for the common benefit of the member societies cannot be considered as the owner of the property in order to bring the sale price to tax in its hands as capital gains. This is also supported by the accounting entries which show that the respective shares of the 14 housing societies in the sale consideration, after deducting the common expenses, has been divided in proportion to their respective shares in the property and credited to their accounts and shown as deposits in the assessee's balance sheet. In the absence of any transfer by the assessee, no capital gains can be assessed in its hands even on protective basis.

7. We thus affirm the decision of the CIT(A) but for different reasons and dismiss the appeal filed by the revenue with no order as to costs.

3.25. Thus, it is noted from the observations of the Tribunal that impugned plot of land was owned by these 14 society members (present assessee being one of them) with specific shares and said JVPD Association was formed merely for the purpose of common management of the subject property. Subsequently, after the order of the Tribunal, the respective assessing officers of these 14 societies reopened the assessment in the hands of these societies after recording the 'Reasons' that the assessee had effected the transfer of the impugned plot of land in A.Y. 2004-05 and therefore, resultant capital gain was to be assessed as income under the head of capital gains in the impugned assessment year. It is noted

that during the course of reassessment proceedings, though the assessee filed detailed replies raising objection about the adoption of cost of acquisition at nil, but no objection was raised with regard to the fact that plot was owned by the assessee and its transfer of title of legal ownership has been effected during the year under consideration and consequently the capital gain was liable to be assessed in the year under consideration. Further, when the appeal was filed before the CIT(A), there also no such dispute was raised. The dispute was confined to ascertaining the correct amount of cost of acquisition. Thus, the issue of ownership of the plot, its transfer during the year under consideration and assessability of the capital gain in the hands of assessee in the year under consideration had attained finality and became *fait accompli*. This issue was no more *res-integra*. Under these circumstances, the only dispute that could have been raised was with regard to the various aspects related to adoption of correct amount of sales consideration, cost of acquisition of plot and determining the correct amount of capital gain to be taxed in the hands of the assessee.

3.26. It is noted that provisions of section 50C are deeming provisions and mandatory in nature. The application of such provisions is made by operation of law. Exception to these provisions can be made only in accordance with law, as provided in section 50C only. It is noted that AO did not raise any query with regard to application of section 50C, as has been fairly admitted by both the parties during the course of

hearing. Under these circumstances, the AO committed a mistake of law and thus, it rendered the order of the AO as erroneous and since non application of section 50C would also amount to under assessment of income and tax payable thereon, therefore, it was prejudicial to the interest of revenue. Thus, in the given facts of the case, it can be undoubtedly said that the impugned assessment order was erroneous and prejudicial to the interest of revenue.

3.27. Further, various objections have been raised by the assessee with regard to the value to be adopted for the purpose of section 50C. In our opinion, these objections are to be examined in the light of merits of the objections and keeping in view of facts of this case and law applicable in this regard. But that exercise can be done only when the impugned transaction is examined through the prism of mandatory provisions of section 50C. It is also worth noting that the case of the assessee did not fall in any of the exception also.

3.28. The assessee had relied upon in this regard upon the judgment of Hon'ble Allahabad High Court in the case of CIT v. Shimbu Mehra (Supra) in its support. We have gone through the said judgment and find that in the said case, the said assessee had disputed the factum of transfer of the property in the year under consideration. Therefore, the applicability of provisions of section 50C was challenged in the year under dispute. On the other hand, the facts of the case before us are that 'year' of the transfer of the plot and taxability of the resultant capital gain has been admittedly to

be the year under consideration and issue on that aspect has already been settled as was discussed by us in the earlier part of the order.

3.29. It is further noted by us that the assessee is having few objections with regard to value to be adopted viz the stamp value at the date of aforesaid MOU shall be taken or stamp value as on the date of conveyance deed shall be adopted and one more objection that since the plot was received for police quarters, therefore, it is FMV cannot be taken as per free market value and only discounted value could have been taken as its FMV. We agree with the assessee on this aspect to this extent that these objections need to be dealt with as per law before finally adopting appropriate value u/s 50C. But, as stated by us earlier also that all these objections or any other objection with regard to the manner in which section 50C has to be applied can be dealt with in accordance with law and procedure as has been laid down u/s 50C itself. But that would be possible only when the provisions of section 50C are applied and the impugned transaction is tested through the prism of these provisions. Under these circumstances, we uphold the revision order passed by the CIT order u/s 263 with the liberty to the assessee to raise these objections on the manner and procedure of application of section 50C following due procedure prescribed u/s 50C. In case assessment order has already been passed, then assessee may file these objections before the CIT(A), which shall be duly considered by him and a remand report shall be called from the AO if considered appropriate by the CIT(A), so as to meet principles

of nature justice while following the mandate of the law. We direct accordingly. With these directions the order passed by the CIT is upheld and the appeal of the assessee is dismissed.

Now we shall take up ITA No.2363/Mum/2014 in the case Jai Hind Co. Operative Housing Society Ltd. of Assessment Year: 2004-05

4. In this case ground no.1 was not pressed by the Ld. Counsel during course of hearing and therefore same is dismissed.

5. The remaining grounds are identical to ITA No.3656/Mum/2014; no distinction has been made out in facts or in the legal position by either party, therefore, we uphold the order of the CIT u/s 263 and dismiss the appeal of the assessee with the same directions as have been given in ITA No.3656/Mum/2014. The lower authorities are directed to follow our directions given in ITA No.3656/Mum/2014.

Other appeals in ITA No.3881/Mum/2014, ITA No.3882/Mum/2014, ITA No.3883/Mum/2014, ITA No.3657/Mum/2014, ITA No.3658/Mum/2014, ITA No.3655/Mum/2014 & ITA No.3659/Mum/2014.

6. In these appeals, it was informed to us that grounds are identical. No distinction has been made on facts or law, therefore, the lower authorities are directed to follow our direction as given in ITA No.3656/Mum/2014. Accordingly, these appeals are

dismissed and the order passed by the Ld. CIT is upheld with the directions as given above.

7. In the result, the appeals filed by the Assessee are dismissed.

Order pronounced in the open court on 28th September, 2016.

Sd/-	Sd/-
(Amit Shukla)	(Ashwani Taneja)
न्यायिक सदस्य / JUDICIAL MEMBER	**लेखा सदस्य** / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 28 /09/2016

*Patel, P.S.*नि.स.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**