

आयकर अपीलीय अधिकरण, इन्दौर न्यायपीठ, इन्दौर

**IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE**

**BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER
AND
SHRI MANISH BORAD, ACCOUNTANT MEMBER**

**ITA No.263/Ind/2013
Assessment Year: 2006-07**

M/s. Bhomiyaji Land & Finance Co. 123, Tukoganj, NayapuraChowk, Dewas.	<u>बनाम/</u> Vs.	ACIT -1(1), Ujjain
(Appellant)		(Revenue)
P.A. No.AACFB9350N		

**ITA No.411/Ind/2013
Assessment Year: 2006-07**

DCIT -1(1), Ujjain	<u>बनाम/</u> Vs.	M/s. Bhomiyaji Land & Finance Co. 123, Tukoganj, NayapuraChowk, Dewas.
(Appellant)		(Revenue)
P.A. No. AACFB9350N		

**ITA No.490/Ind/2013
Assessment Year: 2007-08**

M/s. Bhomiyaji Land & Finance Co. 123, Tukoganj, NayapuraChowk, Dewas.	<u>बनाम/</u> Vs.	ITO Dewas
(Appellant)		(Revenue)
P.A. No.AACFB9350N		

ITA No.412/Ind/2013
Assessment Year: 2007-08

DCIT -1(1), Ujjain	<u>बनाम/</u> Vs.	M/s. Bhomiyaji Land & Finance Co. 123, Tukoganj, NayapuraChowk, Dewas.
(Appellant)		(Revenue)
P.A. No. AACFB9350N		

ITA No.142/Ind/2013
Assessment Year: 2008-09

M/s. Bhomiyaji Land & Finance Co. 123, Tukoganj, NayapuraChowk, Dewas.	<u>बनाम/</u> Vs.	ITO Dewas
(Appellant)		(Revenue)
P.A. No.AACFB9350N		

ITA No.137/Ind/2013
Assessment Year: 2008-09

DCIT -1(1), Ujjain	<u>बनाम/</u> Vs.	M/s. Bhomiyaji Land & Finance Co. 123, Tukoganj, NayapuraChowk, Dewas.
(Appellant)		(Revenue)
P.A. No. AACFB9350N		

ITA No.634/Ind/2013
Assessment Year: 2010-11

DCIT -1(1), Ujjain	<u>बनाम/</u> Vs.	M/s. Bhomiyaji Land & Finance Co. 123, Tukoganj, NayapuraChowk, Dewas.
(Appellant)		(Revenue)
P.A. No. AACFB9350N		

Appellant by	Shri S.S. Deshpande, CA
Revenue by	Shri K. G. Goyal Sr. DR
Date of Hearing:	30.01.2018
Date of Pronouncement:	31.01.2018

आदेश / O R D E R

PER BENCH:

These are bunch of seven appeals. Cross appeals are filed for A.Ys. 2006-07, 2007-08 & 2008-09 and Revenue's appeal for A.Y. 2010-11 are directed against the order of Ld. CIT(A)-Ujjain dated 28.03.2013, 28.03.2013, 13.12.2012 & 14.7.2014 respectively. As all these appeals relates to same assessee and grounds raised are common, these are heard together and are being disposed of by this common order for the sake of convenience and gravity.

First we take cross appeal for A.Y. 2006-07

2. Briefly stated facts as culled out from the records are that the assessee is engaged in the business of developing land and plotting and constructing houses there upon. Return of income was filed on 31.10.2006 declaring income of Rs.190250/-. Survey proceedings u/s 133A of the Act was conducted on 15.03.2007, Income surrendered during the course of survey was retracted on the next day pleading that the surrendered was made under coercive presser and deserves state of mind. Case selected for scrutiny. Notices u/s 143(2) and 142(1) issued. Detail filed by the assessee were examined. The Learned Assessing Officer(in short Ld. AO)

completed the assessment after making addition of Rs.1,06,49,250/- for suppression of sales and also addition of Rs.28,66,250/- for unverified creditors. The appeal by the assessee before the Ld. CIT(A) brought part relief. Now both the assessee and Revenue are in appeal before the Tribunal.

3. First common issue relates to alleged unaccounted sales addition of Rs.1,06,49,250/-. The Ld. AO made the impugned addition observing that the assessee has not shown actual sale consideration in its books and they were disclosed in the range of 25% to 46% of actual sales consideration. The statement recorded by the AO in the case of few parties also supported his basis of estimating suppression sales. Thereafter when the issue came up before the Ld. CIT(A), he called for remand reports from the AO which were received on 11.02.2010, 25.03.2010 & 15.10.2012. On the basis of remand reports and the facts emanating out of the records, the Ld. CIT(A) estimated the sales at Rs.1 crore in place of Rs.70,99,500/- shown by the assessee and also calculated the profit @ of 8% as against 1.70% shown by the assessee thereby giving part relief by the assessee. Now both the assessee and Revenue are in appeal before us. Ld. counsel for the assessee vehemently argued referring to the submissions made before the lower authorities and other documents placed in the paper book. The Ld. DR supported the order of the Ld. AO.

4. We have heard the rival contentions and perused material on record placed before us. The issue raised by both the assessee and revenue relates to addition of suppressed sales made by the AO. We find that the assessee is maintaining regular books of account which are audited and quantitative details are also available. There were certain discrepancies in the accounts in the form of unrecorded sales as revealed by the Ld. AO on the basis of information and statement recorded in case of few buyers. We find that the AO on the basis of the findings recorded in case of few buyers of plot and applied the same on the total units sold by the assessee. There was no other evidence with the AO for estimating suppressed sales. Further even in the remand report it was revealed that no major discrepancy was observed by the AO during the verification of entries with the regular books of accounts. Further it has been consistently held by Hon'ble Courts in various cases that only the profit percentage of the undisclosed sales are liable to be taxed.

5. We further observe that Ld. CIT(A) partly allowed this issue in favour of the assessee observing as following:

3.2.12 I have considered the facts of the case carefully. The appellant has shown sales of Rs. 70,99,500/- during the year and gross profit shown at 15.50% and net profit at 1.70% against the sales of Rs. 71.99 lacs in previous year and G.P. @ 22.5% and N.P. @ 2.70%. The accounts of the appellant are audited and it is maintaining regular books of account and quantitative details available in trading account. The appellant has raised objection of applying the provision of section 145(3) by the Assessing Officer And estimating the income of the appellant by the Assessing Officer. It is observed that there are certain discrepancies in the accounts of the appellant and

appellant has not recorded sale proceeds in entirety in its books of accounts which are evident from the statement of the creditors who had given advance against the purchase of plot in Madhuban Colony, Dewas. Shri Rajesh Agrawal who had been working with the appellant as property broker has also admitted that during the survey u/s 133A that registry was made on lesser amount than the actual price of the plot. On that account he had surrendered Rs. 5,00,000/- during the survey, although later on he has retracted from his statement and explained that the entries recorded in the diaries were only estimates. But, it does not change the facts of the case that appellant has not recorded sale proceeds entirely in its books of accounts . The AO has recorded the statements of some of the plot holders on test check basis and appellant could not rebut the finding of the AO recorded on the basis of the statement. Appellant has raised objection only, but could not furnished the evidence that it has received that amount only for which it has issued the receipt and property got registered. The AO has worked out the sale outside books of account on the basis of the statements and added 60% of the recorded sales in taxable income of the appellant. In my view the addition made by the AO by estimating suppressed sale to the extent 60% and adding it to the taxable income of the appellant on the basis of the three statements is not justified.

3.2.13 During the appellate proceeding when CIT(A) has got conducted enquiry through AO in respect of the registers impounded during survey no major discrepancy was observed by the AO after verifying the entries with regular books of account. The appellant has explained the discrepancies what has been observed by the AO. But the books results of the appellant considering the above discrepancies and statements can not be accepted as such. The relevant portion of section 145(3) is reproduced as under-

“ (3) Where the Assessing Officer is not satisfied about the correctness or completeness of the accounts of the assessee, or where the method of accounting provided in sub-section (1) or accounting standards as notified under sub-section (2), have not been regularly followed by the assessee, the Assessing Officer

may make an assessment in the manner provided in section 144.]”

3.2.14 As per the provisions of section 145(3), if AO is not satisfied about the correctness of the account he can invoke the provisions of section 145(3). It is held by **Hon'ble Supreme Court in the case of CIT vs. A. Krishna Swami Mudliyar (1964) 53 ITR 122 (SC)** held that:

“ Section 145 does not compel the ITO to accept in all cases a balance sheet of cash receipt and out goings prepared from the books of account.”

3.2.15 In the case of **Hon'ble CIT vs. McMillan & Co. (1958) 33 ITR 182 (SC)** it is held by the **Hon'ble Apex Court** that :

“ The ITO even when he accepts the assessee's method of accounting is not bound by the figure of profits shown in the accounts .”

3.2.16 The AO has estimated 60% of sales i.e. 1,06,49,250/- outside books of accounts on the basis of three statements only which appears to be on higher side considering the defects noticed by the AO. However, after considering all the discrepancies as observed, I hereby estimate the sales of the appellant after rejecting books of accounts by invoking provisions of section 145(3). It would be appropriate and meet the interest of justice if the sales is estimated at Rs. 1,00,00,000/- in place of 70,99,500/-. But the entire difference in the sale cannot be taken as income of the appellant and only net profit of the on the estimated sales can be taxed.

3.2.17 **Hon'ble M.P. High Court in the case of CIT vs. Balchand Ajit Kumar 135 Taxman 180 (M.P.)**. Hon'ble High Court has held that :

“ The total sales cannot be regarded as the profit of the assessee. The net profit rate has to be adopted and once a net profit rate is adopted, it cannot be said that there is a perversity of approach.”

3.2.18 Further the net profit as shown by the appellant cannot be applied in its case because in the case of the

*appellant there are suppressed sales and appellant has not recorded the entire sales in its books of accounts. Hon'ble ITAT, Indore Bench, Indore in the case of M/s Shree Ram Tractors vs. ITO ward 1 (2), Ujjain reported in ITA No. 1102 to 1105/Ind/04 and ITA No. 63 to 66/Ind/05 dated 30.01.2006 has held that :
“ After considering the totality of the facts and circumstances of the case we are of the opinion that net profit rate shown by the assessee as per its books of account is of no relevance, because had it been correct and true, then there was no opportunity for the Commercial Tax Department to find out and determine the sale outside books of account which were in crores. The fact that assessee was indulging in carrying out sale/purchase outside the books of account and there is sufficient evidence to show that net profit rate depicted by the assessee in books of account was not correct and true state of affairs. Cosequently the assessee claim that net profit rate of 3% applied by the CIT(A) was on higher side do not have any merit.”*

3.2.19 Considering the facts of the case and various judicial pronouncements it will be reasonable if N.P.@ 8% is applied on estimated sales of 1,00,00,000/- in place of 1.70% shown by the appellant in its return, because net profit shown by the appellant is on lower side considering its line of the business. The net profit on estimated sales works out to Rs. 8,00,000/-. The appellant has already shown net profit of Rs. 1,70,343/-, hence balance addition will be at Rs. 6,29,657/- and it is hereby confirmed and appellant will get relief of Rs. 1,00,19,593/-.

*This ground of the appeal of the appellant is **Partly Allowed.***

6. Therefore, even though the assessee had disclosed 1.7% net profit against the total sales of Rs.71.99 lakhs, in view of the facts and circumstances of the case and the detailed finding of Ld. CIT(A) which goes un-rebutted at the end of both the parties, we find merit in the finding of Ld. CIT(A) estimating net profit @ of 8% on the

sales of Rs.1 crore which takes care of suppressed portion of sales unearthed by the Ld. AO on the basis of his investigation and estimating of higher profit earned on the suppressed sales. We therefore, in the given facts and circumstances of the case find no reason to interfere in the finding of the Ld. CIT(A) deleting the addition of Rs.1,00,19,593/- in sustaining the addition at Rs.6,29,657/-.

7. As a result ground no.1 of Revenue's appeal and Ground No. 1 & 2 of assessee's appeal are dismissed.

8. Next issue raised by the revenue for A.Y. 2006-07 relates to unproved creditors of Rs.28,66,250/-.

9. We have heard rival contentions and perused relevant material before us. We find that during the course of assessment proceedings, the assessee could not produce complete details of unsecured loan/creditors and advance received against plot booking to the satisfaction of Ld. AO. For this very reason, the Ld. AR calculated the amount of trade creditors and unexplained cash credit totaling to Rs.1,35,15,500/- but made the impugned addition for unproved creditors at Rs. 28,66,250/- after giving benefit of deduction towards addition made for suppressed sales of Rs.1,06,49,250/-.

10. We further find that the ld. CIT(A) deleted the impugned addition of Rs.28,66,250/- observing as follows:

“3.3.4 I have considered the finding of the AO and written submission of the appellant carefully. The AO has added Rs. 45,16,000/- of opening balances during the year under consideration. It is already decided by the CIT(A) in the case of the appellant for A.Y.2005-06 that addition in respect of earlier year advances was not justified in this year. It has to be taxed in the year when the appellant has received the advances. The AO can examine the genuineness of the transaction in the relevant year only. However, Assessing Officer is free to take necessary action in respective years, if such advances are non genuine by him. It is held by **Hon'ble Supreme Court in the case of CIT vs. P.Mohankala (2007) 291 ITR 278 (SC)** that :

“ A bare reading of section 68 suggests that there has to be credit of amounts in the books maintained by assessee; that such credit has to be of a sum during the previous year; and that the assessee offer no explanation about the nature and source of such credit found in the books or the explanation offered by the assessee in the opinion of the Assessing Officer is not satisfactory. It is only then the sum so credited may be charged to income tax as the income of the assessee of that previous year. The expression ‘the assessee offer no explanation’ means where the assessee offer no proper, reasonable and acceptable explanation as regards the sums found credited in the books maintained by the assessee. It is true that the opinion of the Assessing Officer for not accepting the explanation offered by the assessee as not satisfactory is required to be based on proper appreciation of material and other attending circumstances available on record. The opinion of the Assessing Officer is required to be formed objectively with reference to the material available on record. Application of mind is sine qua non for forming the opinion. [Para 14]”

Considering the above facts, therefore, AO is not justified in making addition of Rs. 45,16,000/- of opening balance in the taxable income of the appellant and it is hereby **deleted**.

3.3.5 *The appellant has filed the evidences in support of advances which were refunded through cheques and registries were made in the name of the persons who have given advances or in the name of the persons whose name was endorsed by them. I have verified the entries alongwith the supporting evidences and found that appellant has refunded Rs. 19,36,000/- through cheques to the parties and entries were appearing in the bank account of the appellant. With respect of Rs. 35,15,500/- sale deeds were registered and out of the remaining amount of Rs. 35,48,000/- some sale deeds were registered and some amounts were refunded to the parties who have given advance for plot booking. The appellant has filed the evidences which were on record. Remand report is called from the AO on the written submission of the appellant, but AO has not commented anything on this issue and not given any justification for sustaining addition after considering the supporting documents furnished by the appellant.*

3.3.6 *The appellant has not taken unsecured loans, the advances received by it against plot booking is not in the nature of cash credit, therefore appellant is not required to prove the creditworthiness of the depositors who have given advance against the booking of the plot. The appellant has provided the addresses to the AO on the basis of the information provided by the prospective buyers, if they were not found on the given address or not responded in proper manner to the AO appellant could not be penalized for their action. It is held by the **Hon'ble ITAT, Indore Bench, Indore** in the case of the appellant for the A.Y. 2005-06 that:*

“ it is not in dispute that the appellant was engaged in the business of developing and selling plots houses. The advances were received from the customers against the booking of plots/flats which were either paid in cash or by cheques. In some cases advance was received in installments. As per the terms of booking, the registry was to be got done only after receipt of entire amount of sale consideration. Thus the amount so received for booking the land/house was not strictly in the nature of cash credit in so far as normally the assessee was not under obligation to return the same and such booking

payment/installment was got converted in to income in the year of receipt of entire amount of sale consideration of the respective plot/flats. The booking amount was, thus not purely in nature of cash credit for which the assessee was required to prove the creditworthiness of the persons, who booked the plot with him.”

3.3.7 *I have verified respective registries placed on record and the details of the payments mentioned in the registries which is duly tallied with the details of payment shown by the appellant in the chart placed on record. The appellant has proved the genuineness of the transaction by furnishing the copies of the registries and refunded the amounts through banking channels. In the case of the appellant in the A.Y. 2005-06 CIT(A) and Hon'ble ITAT have deleted all the additions relating to parties in whose case sales deeds have been ultimately registered, amount have been refunded and amounts transferred to other accounts. Considering the above facts and finding of the Hon'ble ITAT, Indore Bench, Indore the addition made by the AO at Rs. 89,99,500/- is not sustainable and it is hereby **deleted**.*

3.3.8 *Considering the above facts addition made by the Assessing Officer at Rs. **1,35,15,500/-** (and net addition of Rs **28,66,250/-** after allowing the set off of suppressed sale of Rs. **1,06,49,250/-**) is not **sustainable** and it is hereby **deleted**.*

11. In the case of assessee for A.Y. 2005-06, coordinate bench Indore vide ITANo.269/In/2010 decided in favour of the assessee on the issue of advance receipts for plot booking by holding that the booking amounts were not purely in the nature of cash credit for which the assessee was required to prove the creditworthiness of the persons who books the plot with him. We further find that the Ld. CIT(A) examined the issue in detail by verifying respective registry placed on records and details mentioned in the registry

duly tallied with the payments shown by the assessee. Genuineness of the transactions stands proved with the copies of registries and the amounts refunded through banking channels. We, therefore, respectfully following the decision of coordinate bench in assessee's own case for A.Y. 2005-06, detailed finding of Ld. CIT(A) which goes uncontroverted by the Revenue as well as in the given facts and circumstances of the case and the documents placed before the lower authorities, find no reason to interfere in the finding of Ld. CIT(A), deleting the addition of Rs.28,66,250/-.

12. As a result Revenue's ground No.2 for A.Y. 2006-07 is dismissed.

Now we take cross appeal for A.Y. 2007-08

13. First common issue relates to addition of suppressed sales of Rs.3,72,79,410/-. The Ld. CIT(A) estimated the sales at 2.5 crores and estimated net profit @ 8% thereby sustaining addition at Rs.17,05,082/- and deleted the remaining addition of Rs.3,55,74,328/-. We further find that very same issue came up before us during the adjudication of appeal for A.Y. 2007-08. As all the facts and circumstances remains the same which have not been disputed by both the parties, we are inclined to apply same view as taken while deciding the issue for A.Y. 2007-08 and confirm the view taken by Ld. CIT(A) sustaining addition of Rs.17,05,082/- and deleting remaining addition of Rs.3,55,74,328/-. As a result ground

No.3 of Revenue's appeal and Grounds Nos. 2 & 3 of assessee's appeal are dismissed.

14. Apropos to Ground No.1 of assessee's appeal for A.Y. 2007-08 relating to alleged addition of Rs.8,03,142/- on account of alleged extra cash found during the course of survey u/s 133A of the Act, we have heard the rival contentions and perused the record before us.

15. We find that during the course of survey proceedings inventory of cash found at the business premises was made and cash of Rs.814340/- was found. Rs.11198/- was cash in hand in the books of assessee as on 15.03.2007. The partner of the assessee firm could not explain the excess cash found at Rs.803142/- in light of these facts the contention of the assessee as well as the Ld. Counsel before the lower authorities and before us that no cash was found during the course of survey is not accepted. We therefore, uphold the view taken by the ld. CIT(A) and confirm the addition of Rs.803142/-. Ground No.1 of assessee's appeal is dismissed.

16. Now we take up Ground No.4 & 5 of assessee's appeal relating to addition confirmed u/s 68 at Rs.35,37,500/- and Rs. 3,30,000/- on account of unexplained cash credit.

17. We have heard the rival contention and perused material on record placed before us. The Ld. AO issued notices to 53 parties u/s

133(6) of the Act, which were received back unserved with the remarks of postal authorities “incomplete address not traceable”. Thereafter the matter travelled to Ld. CIT(A) who partly allow the appeal sustaining addition at Rs.35,37,500/- by observing as follows:

*“I have considered the facts of the case carefully. The appellant has shown advances against plot and building booking as on 31.03.2007 at Rs. 3,02,40,550/- the AO has issued letter u/s 133(6) to the parties from whom the appellant has received advances during the year, treating the advance as loan received by the appellant. The appellant has not taken unsecured loans, the advanced by it against plot booking is not in the nature of case credit, therefore appellant is not required to prove the creditworthiness of the depositors who have against the booking of the plot. the appellant has provided to the AO on the basis of the information provided by the prospective buyers, if they were not found on the given address of not responded in proper manner to the AO appellant could not be penalized for their action. It is held by the **Hon’ble***

ITAT, Indore Bench, Indore in the case of the appellant for the A.Y. 2005-06 that:

“it is not in dispute that the appellant was engaged in the business of developing and selling plots houses. The advances were received from the customers against the booking of plots/flats which were either paid in case or by cheques. In some cases advance was received in installments. As per the terms of booking, the registry was to be got done only after receipt of entire amount of sale consideration. Thus, the amount so received for booking the land/house was not strictly in the nature of case credit in so far as normally the assesses was not under obligation to return the and such booking payment/installment was got converted in to income in the year of receipt of entire amount of sale consideration of the respective plot/flats. The booking amount was, thus not purely in nature of

cash credit for which the assesses was required to prove the creditworthiness of the persons, who booked the plot with him.” The appellant has filed the copies of the sale deeds in respect of 17 cases in which amount involved at Rs. 28,05,100/-. I have verified respective registries placed on record and the details of the payment mentioned in the registries which are duly tallied with the details of the payment shown by the genuineness of the transaction by furnishing the copies of the registries. Further, the appellant has refunded the amount of Rs. 32,47,500/- in respect of 32 cases. The appellant could only get verified the amount of Rs. 75,000/- received from shri Ashok Kumar Chouhan and later on sale deed was registered in his name. for remaining amount of Rs. **31,72,500/-** which it has claimed as refunded to the parties, no proof of case receipt and repayment was furnished by the appellant, therefore, claim of the appellant is only self-serving and it could not be accepted without any evidence that appellant has received the amount and repaid the same. Similarly, the appellant has not furnished any detail in respect of the advance appearing at Sl. No. 26 of the AO’s list in the name of NamiBaiShivhare at Rs. **1,25,000/-**. The appellant has filed confirmation in respect of the advanced as pre Sl. no . 28 & 29 in the name of shri Om PrakashGoud and Shri Pop Singh Rajput from whom the appellant had received Rs. 75,000/- each and amount is outstndng as it is their name. but it failed to file any detail in respect of advance received from ShriYogeshIlawa at **Rs. 2,40,000/-** appearing at sl. No. 52. These are the unproved credits which appellant failed to explain. Therefore, the addition made by the **AO at Rs. 35,37,500/- (31,72,000/-+Rs. 2,40,000)** is **hereby confirmed** as appellant failed to furnish any evidence to prove that amount was refunded to them and no confirmation in respect of these amounts were furnished by the appellant.

18. We further observe that the assessee showed advances against plot and building booking as on 31.03.2007 at Rs.30240550/-. Letters were issued u/s 133(6) of the Act, by the AO on the address provided by the assessee as in turn provided by the prospective buyers. Coordinate bench, Indore in the case of assessee for A.Y. 2005-06(supra) also held in the favour of assessee that if address given by the prospective buyers were not correct or they have not responded in proper manner to the Ld. AO then the assessee could not be penalized for their action. Genuineness of the transactions stands proved with the copies of registries. Assessee has been unable to prove source of cash credit of Rs.35,37,500/- even up to the stage of appellate proceedings before first appellate authority and nor any substantial evidence has been placed before us. We, therefore, in the given facts and circumstances of the case, find no reason to interfere in the finding of Ld. CIT(A) confirming addition of Rs.35,37,500/-. Thus, ground no.4 of the assessee's appeal is dismissed.

19. Apropos ground no.5 of assessee's appeal relating to addition u/s 68 of the Act at Rs.3,30,000/-, we have heard rival contentions and perused the record placed before us.

20. We find that this addition related to 4 entries appearing in the name of Shri Ramesh Shinde, at Rs.45,000/-, ShriDev Karan Yada, at Rs.1,55,000/-, ShriLaxmi Narayan Chowkse, at Rs.60,000/- and Shri Ashok Rao Thourat at Rs.70,000/-. For all these four persons

assessee miserably failed to provide any information sufficient to prove the genuineness and creditworthiness of the cash credit. The Ld. CIT(A) confirmed the addition of Rs.3,30,000/- by observing as follows:

*“I have considered the fact carefully. The appellant has filed explanation in respect of each and every except 4 entries appearing in the names of Ramesh shinde (-Rs. 45,000/-), Devkaranyadav (-Rs. 60,000/-) and Ashok RaoThorat (-Rs.70,000/-) totaling to Rs. 3,30,000/-. For remaining account amounting to Rs. 7,34,5000/- the appellant has filed proof of refund to them through banking channel, copies of registries, cash receipt vouchers or copy of money receipt, which is verified along with the books of account and found to be explained. The AO has made the addition without providing and confronting the information received by him from the creditors u/s 133(6). During the appellate proceeding also the same were not provided to the appellant. However, the appellant has explained the entries the made by it in its books of account along with documentary evidences, therefore, AO is not justified in making addition in respect of those entries which were explained by the appellant. **Hence addition made by the AO to the extent of Rs. 7,34,500/- is not sustainable and is hereby deleted.** The balance addition made by the AO at **Rs. 3,30,000/- is hereby confirmed** as appellant failed to furnish any evidence in support of receipt of payments from the parties and its repayment thereof.*

*This ground of appeal of the appellant is **Partly Allowed.***

21. We further find that the ld. counsel failed to bring any new fact in support of this ground we, therefore, in the given factual matrix

uphold the view taken by the Ld. CIT(A) confirming addition of Rs.3,30,000/- u/s 68 of the Act. Thus, ground no.5 of the assessee's appeal is dismissed.

22. Apropos Ground No.1 of Revenue's appeal challenged the Ld. CIT(A) finding deleting the addition of Rs.23,02,500/- unexplained investment.

23. We have heard the rival contention and perused material on record before us. We find that the Ld. AO taking the basis of the statement of one of the partner Shri Prem Kumar Agrawal in which he accepted that the investment made in the business are more than the price of the property and accordingly offered Rs.52,00,000/- as unexplained investment. However, the statement was retracted on the very next day of completion of survey proceedings by way of filing of affidavit signed by all the partners. This fact has not been disputed by the Revenue that Ld. AO failed to bring anything on record which could prove that the assessee made unexplained investment in purchase of profits except the admission of one of the partner. It is also observed that the alleged addition of Rs.23,02,500/- was made on account of difference in stamp valuation of the land purchased on 28.09.2006 and 09.10.2006 at Rs.31,1000/- and Rs.31,10,000/- from Mr. Amritpal Singh Khanuja. The market price of this land as per the stamp valuation authority was Rs. 42,69,500 & Rs.42,44,000/- respectively. The difference of the market price and purchase cost of

these two lands comes to Rs.23,02,500/-. However, we do not find any basis in the finding of the Ld. AO applying provisions of section 50C of the Act, because provisions of section 50C of the Act applies on the seller of the property and not on the purchaser. The Ld. CIT(A) has rightly adopted this view holding that provisions of section 50C were not applicable on the assessee being the purchaser of the property and also during the survey proceedings no documentary evidence was found which may prove that the assessee has made payment over and above the registered valuation of the property. In lack of any incriminating material, no addition was called for by the AO as rightly held by I.T.A.T., Indore bench in the case of ACIT vs. Raj Homes P. ltd. Bhopal 9 ITJ 286 (2007) and further Hon'ble High Court of Delhi in the case of CIT vs. Dheengar Metal Works (2010) 328 ITR 384 also held that, *"in any event it is settled law that though the admission is extremely important piece of evidence it cannot be said to be conclusive and it is open to the person, who has made the admission, to show that it is incorrect."*

24. We, therefore, respectfully following the decision and judgments discussed above and in the given facts and circumstances of the case find no inconsistency in the finding of Ld. CIT(A) deleting the addition of Rs.23,02,500/- made by the Ld. AO u/s 69 of the Act. In the result Revenue's ground no.1 is dismissed.

25. Apropos Ground No.2 of Revenue's appeal for A.Y. 2007-08 related to deleting of addition of Rs.28,97,500/- made on account of

unexplained investment, we have heard the rival contention and perused material on record placed before us.

26. We find that this issue relates to ground no.1 of Revenue's appeal adjudicated above, wherein we have discussed about surrender made by the partner at Rs.52 lacs and thereafter retracted on the very next day. The Ld. AO made addition of Rs.23,02,500/- u/s 69 of the Act taking the basis of provisions of section 50C of the Act, being the difference of market value and purchase cost of the plots purchase. Ld. AO made the remaining addition (Rs. 52 lacs-23,02,500/-) at Rs.28,97,500/- as unexplained investment in the properties. We have already discussed the issue in detail while adjudicating ground no.1 above that addition cannot be made merely on the basis of statement given during the course of survey which is not on oath and if there is no incriminating material with the AO to make such addition. We, therefore, are of the view, Ld. AO erred in making the addition of Rs.28,97,500/- without bringing any evidence on record. We, therefore, upheld the view taken by the Ld. CIT(A) deleting addition of Rs.28,97,500/-. Thus, ground no.2 of the Revenue's appeal for A.Y. 2007-08 is dismissed.

Now we take up Cross appeal for A.Y. 2008-09

27. First common issue raised by Revenue in Ground No.1 as well as assessee's ground no.1 relates to disallowance of refund of

advance money and cancellation charges paid by the assessee to its customers of Rs.45,13,000/-.

28. We have heard the rival contention and perused material on record before us. We find that during the course of assessment proceedings the Ld. AO while verifying the claim of the cancellation charges being the extra amount paid together with the amount of advance observed that the assessee returned the amount of advance after a period of long time and paid extra amount to reduce the profitability and simultaneously increasing the cost of stock. He also observed that the *modes operandi* adopted by the assessee in A.Y. 2008-09 was not followed in the preceding A.Y. 2007-08. He also observed that there was a change in method of valuation thereby giving rise to applicability of section 145 of the Act. However, auditor did not report any deviation in method of valuation. In backdrop of these finding Ld. AO added the amount of Rs.45,13,000/- to the income of assessee. When the issue came up before the Ld. CIT(A), it was revealed by him that actually total payment of advance was Rs.50,08,000/- which already included extra amount paid of Rs.10,37,000/-. The portions of advance amount repaid by the assessee is of Rs.39,71,000/- and the Ld. CIT(A) deleted this addition of Rs.39,71,000/-, in view of the fact that the Ld. AO could not bring anything material on record to prove that appellant has not made repayment to the customers.

29. Further from perusal of the records we find that the forfeiture of the amount was as per the agreement and in the independent enquiry conducted by the Ld. AO during the remand proceedings the customers have confirmed to have received back the amount. Further the assessee recognizes the sale on the date of registry of sale deed and the amount received as advance on account of plot booking is being capitalized and shown as liability in the balance sheet till the date of sale. During the year under appeal the assessee has returned the advance to difference customers and reduced the liability to that extent. We, therefore, in the given facts and circumstances of the case confirm the view taken by the Ld. CIT(A) deleting the addition of Rs.39,71,000/- being the repayment of advance of plot booking received by the assessee in earlier years and the same has been duly proved by the assessee with documentary evidences. Ground No.1 of Revenue's appeal is dismissed.

30. Apropos ground no.1 of assessee's appeal regarding the remaining amount of Rs.10,37,000/- is concerned which the assessee has claimed as cancellation charges and Ld. CIT(A) confirm the view taken by the Ld. AO disallowing the expenditure of Rs.10,37,000/-, we are unable to support the contentions of the Ld. Counsel, because the assessee has paid extra payment over and above the advance for plot booking. There is no clause in the agreement about payment of extra amount. The plot booking has been cancelled after substantial time gap of 2 to 3 years. As there

was no clause in the agreement for payment of cancellation charges, by debiting the extra amount of plot booking charges in trading account the assessee has increased the purchase cost reduced the gross profit. We, therefore, agree with the view taken by the Ld. CIT(A) that as the assessee has capitalized the amount of advance and recognized sales on the date of registry for sale deed the amount paid over and above the advance amount should be in the nature of capital expenditure and not Revenue expenditure. We, therefore, sustain the addition of Rs.10,37,000/-. In the result ground no.1 of assessee's appeal is dismissed.

31. Apropos ground No.2 of Revenue's appeal challenging the deletion of addition of Rs.10,86,557/- made by the AO by estimating net profit @ 8% on total sales of all the projects and adding the difference amount of the profit worked out and profit shown by the assessee thereby adding Rs.10,86,557/- to the income of assessee, we have heard the rival contention and perused material on record before us.

32. We find that the Ld. AO invoked the provision of section 145(3) of the Act by observing that there is a change in the valuation of closing stock and accordingly estimated net profit @ of 8%. Ld. CIT(A) deleted this addition in lieu of his finding of confirming addition of Rs.10,37,000/- sustained by way of disallowing the claim of cancellation charges. We also find that Ld. CIT(A) took the basis that the AO has not pointed out any defects in the books of

account and did not compare the case of the appellant with the past history nor cited any comparable cases.

33. We, however, do not agree with the finding of Ld. CIT(A) because in the preceding years in A.Y. 2006-07 & 2007-08, we have confirmed the view of adopting net profit @ 8% being applied on the total/estimated sales. We, therefore, following the consistency as taken in the past as well as similarity of facts are of the view the Ld. AO has rightly applied net profit @ 8% on the total sale of the assessee and we therefore, brush aside the view taken by Ld. CIT(A) that as the addition of Rs.10,37,000/- stands confirmed, it will take care of the profit element. We, therefore, set aside the finding of Ld. CIT(A) and confirm the addition of Rs.10,86,557/-. As a result ground no.2 of the Revenue's appeal is allowed.

Now we take Revenue's Appeal for A.Y. 2010-11

34. First ground relates to disallowance u/s 80IB(10) of the Act partly sustained by the Ld. CIT(A).

29. We have heard the rival contention and perused material on record before us. We find that the assessee claimed deduction u/s 80IB(10) of the Act for the profits earned from activity of construction of row house in Gaurav Nagar Extension, claimed deduction of Rs.55,57,839/-. The Ld. AO after examining the P & L account of both units, observed that the assessee has not

distributed expenses according to the level of activity, time devoted and turnover achieved by it for the two set of business being one eligible for deduction u/s 80IB(10) and the other not eligible for deduction. Ld. AO was not convinced with the allocation of expenditure and disallowed the deduction by Rs.16,86,083/-. However, when the issue came up before the Ld. CIT(A), the assessee got part relief and disallowance was sustained to Rs.5,25,614/-.

35. We further observe that taking into consideration that the assessee executed 127 sale deeds and to sale the plots it had to incur the expenses at various stages. Out of the 127 sale deeds, 28 pertained to the Gaurav Nagar Extension for which the assessee is eligible for deduction u/s 80IB(10). We therefore, find substance in the finding of Ld. CIT(A) adopting 25% of total expenses for 'Gaurav Nagar Extension' project because 28 sale deeds were of Gaurav Nagar Extension out of the total 127 sale deeds. The Ld. CIT(A) has given detailed working for each expenses in his findings in para 4.1 of his appellate order and accordingly sustained the disallowance at Rs.5,25,614/-. We find no reason to interfere in the finding of Ld. CIT(A) and uphold the same. As a result ground no.1 &2 of the Revenue's appeal are dismissed.

36. Apropos Ground No.3& 4 the Revenue has challenged the deletion of disallowance of Rs.20,27,000/- on account of plot booking cancellation.

37. We have heard the rival contention and perused material on record before us. We find that this issue of plot booking cancellation came up in the appeal for A.Y. 2008-09 also. The assessee has furnished the party wise list of plot cancelled and the same forms part of appellate order of Ld. CIT(A). These details have been examined by the first appellate authority. The Ld. counsel for the assessee has been unable to controvert the finding of Ld. CIT(A). It is not disputed that assessee has furnished the list of plots to the Ld. AO for examination and is also offered the revenue from sale of these plots for taxation. In backdrop of these facts we uphold the finding of Ld. CIT(A) deleting the addition of Rs.20,27,000/-. In the result ground No.3& 4 are dismissed.

38. Apropos Ground no.5 relating to deletion of u/s 40(a)(ia) of Rs.4,32,745/-, we find that the assessee paid the amount of Rs.4,32,745/- to M/s. MPPKVV Co. Ltd. on account of supervision charges and towards electrification work and system development. This fact is not in dispute that M/s. MPPKVV Co. Ltd. is a State Government undertaking and Ld. CIT(A) deleted the disallowance for the very reasons that the amount was paid to State Government undertaking. The Ld. DR could not controvert this finding of Ld. CIT(A). We therefore confirm the finding of Ld. CIT(A) that no disallowance was called for as payment was made to the electricity company for various charges and tax was not required to be deducted and therefore, no disallowance was called for u/s 40(a)(ia) of the Act. Thus, ground No.5 is dismissed.

39. As a result, Appeal of the Revenue for A.Y. 2010-11 is dismissed.

40. In the result Cross appeals for A.Y. 2006-07 & 2007-08 are dismissed, appeal of the Assessee for A.Y. 2008-09 is dismissed, appeal of Revenue for A.Y. 2008-09. is partly allowed and appeal of Revenue for A.Y. 2010-11 is dismissed.

Order was pronounced in the open court on. 31. 01.2018.

Sd/-
(KUL BHARAT)
JUDICIALMEMBER

Sd/-
(MANISH BORAD)
ACCOUNTANTMEMBER

Indore; दिनांक Dated : 31 / 01/2018

Patel. P.S./नि.स.

Copy to: Assessee/AO/Pr. CIT/ CIT (A)/ITAT (DR)/Guard file.

By order

Private Secretary/DDO, Indore