

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'G', NEW DELHI**

**BEFORE SH. H.S. SIDHU, JUDICIAL MEMBER
AND
SH. O.P. KANT, ACCOUNTANT MEMBER**

ITA No.2601/Del/2014
Assessment year: 2009-10

DCIT, Central Circle -10, New Delhi	Vs.	M/s. Saamag Developers Pvt. Ltd., B-67, Sarita Vihar, New Delhi
PAN : AAJCS4952R		
(Appellant)		(Respondent)

And

ITA No.3000/Del/2014
Assessment year: 2009-10

M/s. Saamag Developers Pvt. Ltd., B-67, Sarita Vihar, New Delhi	Vs.	ACIT, Central Circle -10, New Delhi
PAN : AAJCS4952R		
(Appellant)		(Respondent)

And

ITA No.433/Del/2014
Assessment year: 2006-07

ACIT, Central Circle -10, New Delhi	Vs.	M/s. Saamag Developers Pvt. Ltd., B-67, Sarita Vihar, New Delhi
PAN : AAJCS4952R		
(Appellant)		(Respondent)

And

ITA No.2602/Del/2014
Assessment year: 2006-07

DCIT, Central Circle -10, New Delhi	Vs.	M/s. Saga Developers Pvt. Ltd., B-67, Sarita Vihar, New Delhi
PAN : AAJCS4932K		
(Appellant)		(Respondent)

**ITA Nos.2601/Del/2014; 3000/Del/2014;
433/Del/2014; 2602/Del/2014;
2999/Del/2014; 2604/Del/2014;
3165/Del/2014 & 436/Del/2014**

And

ITA No.2999/Del/2014
Assessment Year: 2006-07

M/s. Saga Developers Pvt. Ltd., B-67, Sarita Vihar, New Delhi	Vs.	ACIT, Central Circle -10, New Delhi
PAN : AAJCS4932K		
(Appellant)		(Respondent)

And

ITA No.2604/Del/2014
Assessment year: 2009-10

DCIT, Central Circle -10, New Delhi	Vs.	M/s. Saga Developers Pvt. Ltd., B-67, Sarita Vihar, New Delhi
PAN : AAJCS4932K		
(Appellant)		(Respondent)

And

ITA No.3165/Del/2014
Assessment Year: 2009-10

M/s. Saga Developers Pvt. Ltd., B-67, Sarita Vihar, New Delhi	Vs.	ACIT, Central Circle -10, New Delhi
PAN : AAJCS4932K		
(Appellant)		(Respondent)

And

ITA No.436/Del/2014
Assessment year: 2007-08

ACIT, Central Circle -10, New Delhi	Vs.	M/s. Saga Township Pvt. Ltd., B-67, Sarita Vihar, New Delhi
PAN : AAKCS1955M		
(Appellant)		(Respondent)

Assessee by	Sh. M.P. Rastogi, Adv. & Sh. S. Srikant, Adv.
Department by	Sh. S.S. Rana, CIT(DR)

Date of hearing	09.05.2018
Date of pronouncement	30.05.2018

ORDER

PER O.P. KANT, A.M.:

The aforesaid appeals filed by the Revenue and cross appeals by the assessee, have been directed against different orders passed by the Ld. Commissioner of Income-tax (Appeals) [in short the 'Ld. CIT(A)'] in case of following assesses:

Sl. No.	Appellant Vs. Respondent	Assessment year	Appeal no.	Date of order of Ld. CIT(A)
1.	DCIT Vs. Samag Developers Pvt. Ltd.	2009-10	2601/Del/2014	28.02.2014
2.	Saamag Developers Pvt. Ltd. Vs. ACIT	2009-10	3000/Del/2014	28.02.2014
3.	ACIT Vs. Saamag Developers	2006-07	433/Del/2014	29.10.2013
4.	DCIT Vs. Saga Developers Pvt. Ltd.	2006-07	2602/Del/2014	28.02.2014
5.	Saga Developers Vs. ACIT	2006-07	2999/Del/2014	28.02.2014
6.	DCIT Vs. Saga Developers	2009-10	2604/Del/2014	28.02.2014
7.	Saga Developers Pvt. Ltd. Vs. ACIT	2009-10	3165/Del/2014	28.02.2014
8.	ACIT Vs. Saga Township Pvt. Ltd.	2007-08	436/Del/2014	25.10.2013

2. Since in these appeals, identical issues are involved in same set of circumstances, therefore, these appeals were heard together and disposed of by way of this consolidated order for convenience.

ITA Nos. 2601/Del/2014 & 3000/Del/2014

3. First, we take cross appeals of the Revenue (ITA No. 2601/Del/2014) and the assessee (ITA No. 3000/Del/2014) in

the case of Saamag Developers Private Limited for assessment year 2009-10.

4. Grounds of appeal raised by the Revenue are reproduced as under:

1. *That the Commissioner of Income Tax (Appeals) erred in admitting additional evidence under Rule 46A.*
2. *That the Commissioner of Income Tax (Appeals) erred in law and on facts of the case in deleting the addition of Rs.52,19,500/- on account of un-explained expenditure u/s 69C.*
3. *That the Commissioner of Income Tax (Appeals) erred in law and on facts of the case in deleting the addition of Rs.34,25,000/- made by the Assessing Officer u/s 2(22)(3) of the Income Tax Act, 1961.*
4. (a) *The order of the CIT(Appeals) is erroneous and not tenable in law and on facts.*
(b) *The appellant craves leave to add, alter or amend any/all of the grounds of appeal before or during the course of the hearing of the appeal.*

5. Grounds of appeal raised by the assessee are reproduced as under:

- 1) *The disallowance of Rs.8,56,111/- on account of prior period expenses is wrong and is opposed to evidences on record.*
- 2) *The liabilities on account of impugned sum of Rs.8,56,111/- having accrued in the captioned assessment year, the same is allowable in the very same assessment year.*
- 3) *The CIT(A) has erred in holding that sum of Rs.34,25,000/- is covered by provisions of sec. 2(22)(e) of the Act. Such findings are opposed to evidences on record.*
- 4) *It is contended that the provision of sec. 2(22)(e) of the Act are not applicable to the impugned sum of Rs.34,25,000/-.*

5) *It is contended that the provisions of sec. 2(22)(e) of the Act cannot apply to business advances extended during the course of carrying on of business.*

6. Briefly stated facts of the case are that consequent to search action under section 132 of the Act at the premises of the assessee, notice under section 153A of that Act was issued and in compliance the assessee filed return of income declaring loss of Rs.11,16,497/- on 21/07/2010. In view of the complexity of the accounts of the assessee, audit under section 142(2A) of the Act was referred to the Special Auditor, who submitted his report to the Assessing Officer. Relying on the report of the Special Auditor, the Assessing Officer made certain additions/disallowances to the income returned by the assessee. Aggrieved, the assessee filed appeal before the Ld. CIT(A), who partly allowed the appeal of the assessee. Aggrieved, both the Revenue and the assessee are in appeal before the Tribunal raising grounds as reproduced above.

7. The ground No. 1 of the appeal of the Revenue relates to admitting additional evidences under Rule 46A of the Income-tax Rules, 1962 [in short 'the Rules']

7.1 Before us, the Ld. DR submitted that the Ld. CIT(A) admitted Evidences on the Issue of Unexplained Expenditure under Section 69C of the Act without following the due procedure of Rule 46A of the Rules. He submitted that the Assessing Officer objected to admission of additional evidences and could not give his comment on merit of the additional evidences due to failure on the part of the assessee to comply with the remand proceedings. According to him, in view of the decision of the Hon'ble Delhi High Court in

the case of CIT Vs. Manish Build Well (p) limited (2011) 245 CTR 397, the Ld. CIT(A) was required to send the additional evidences to the Ld. Assessing Officer for his comment after admitting the same. The Ld. DR, accordingly, submitted that the ground No. 1 of the appeal might be allowed and consequently, the ground No. 2 of the appeal should be restored to the file of the Assessing Officer for examining the additional evidences and decide the issue in dispute accordingly.

7.2 The Ld. counsel of the assessee, referred to the order of the Ld. CIT(A) and submitted that remand report was called from the Assessing Officer and therefore there is no violation of Rule 46A of the Rules.

7.3 We have heard the rival submission and perused the relevant material on record. We find that Hon'ble Delhi High Court in the case of Manish Build well (P) Ltd. (supra) observed that after admitting the additional evidences, the Ld. Assessing Officer should be provided reasonable opportunity to rebut those additional evidences for compliance of Rule 46A(3) of the Rules. The relevant finding of the Hon'ble Delhi High Court is reproduced as under:

“24. In the present case, the CIT(A) has observed that the additional evidence should be admitted because the assessee was prevented by adducing them before the AO. This observation takes care of cl. (c) of sub-r. (1) of r. 46A. The observation of the CIT(A) also takes care of sub-r. (2) under which he is required to record his reasons for admitting the additional evidence. Thus, the requirement of sub-rs. (1) and (2) of r. 46A have been complied with. However, sub-r. (3) which interdicts the CIT(A) from taking into account any evidence produced for the first time before him unless the AO has had a reasonable opportunity of examining the evidence and rebut the same, has not been complied with. There is nothing in the order of

the CIT(A) to show that the AO was confronted with the confirmation letters received by the assessee from the customers who paid the amounts by cheques and asked for comments. Thus, the end result has been that additional evidence was admitted and accepted as genuine without the AO furnishing his comments and without verification. Since this is an indispensable requirement, we are of the view that the Tribunal ought to have restored the matter to the CIT(A) with the direction to him to comply with sub-r. (3) of r. 46A. In our opinion and with respect, the error committed by the Tribunal is that it proceeded to mix up the powers of the CIT(A) under sub- s. (4) of s. 250 with the powers vested in him under r. 46A. The Tribunal seems to have overlooked sub-r. (4) of r. 46A [sic-s. 250] which itself takes note of the distinction between the powers conferred by the CIT(A) under the statute while disposing of the assessee's appeal and the powers conferred upon him under r. 46A. The Tribunal erred in its interpretation of the provisions of r. 46A vis-à-vis s. 250(4). Its view that since in any case the CIT(A), by virtue of his coterminous powers over the assessment order, was empowered to call for any document or make any further enquiry as he thinks fit, there was no violation of r. 46A is erroneous. The Tribunal appears to have not appreciated the distinction between the two provisions. If the view of the Tribunal is accepted, it would make r. 46A otiose and it would open up the possibility of the assessee's contending that any additional evidence sought to be introduced by them before the CIT(A) cannot be subjected to the conditions prescribed in r. 46A because in any case the CIT(A) is vested with coterminous powers over the assessment orders or powers of independent enquiry under sub-s. (4) of s. 250. That is a consequence which cannot at all be countenanced."

7.4 In the instant case, also the assessee filed additional evidences during the first appellate proceedings before the Ld. CIT(A), which included copies of exchange deeds, engagement letters and other correspondence with brokers and copy of certificate of the Gram Pradhan, village Bamhetta, certifying that no banking facilities were available in the village. The Assessing Officer objected admitting of additional evidences. On the issue of the merit, the Assessing Officer during remand proceeding provided opportunities to the assessee, however, no compliance

was made by the assessee of the letter issued by the Assessing Officer and, therefore, he could not provide any comment on the additional evidences. The relevant part of the remand report as produced by the Ld. CIT(A) in the impugned order is extracted as under:

“4. Even otherwise on merits also the assessee was again given an opportunity vide this office letter dated 13.08.2013, fixing the case for 20.08.2013, no compliance whatsoever was made to justify its claim.”

7.5 The Ld. CIT(A) admitted the additional evidences observing as under:

“6. I have gone through the contents of the remand report of the Assessing Officer, rejoinder of the appellant and also the additional evidence filed under Rule 46A of the I.T. Rules, 1962. As the document in form of exchange deed now furnished by the appellant as additional evidence are vital and go to the root of the matter, the same are admitted under rule 46A to decide the issue on merit. In the case of CIT Vs Virgin Securities Credit P. Ltd. (2011)332 ITR 396(Del) the jurisdictional High Court has held that, evidence which is crucial in disposing the case can be admitted. Since, the document filed by the appellant as additional evidence is of the nature that may advance the interest of justice and show that there was no justification for addition made, the same need to be admitted and considered. Therefore, the document filed as additional evidence in the course of appeal proceedings is admitted for consideration. Accordingly, the issue under consideration will be decided on merits in the light of the document filed as additional evidence in the following paragraphs.”

7.6 It is evident from the facts of the case that the additional evidences have been filed by the assessee on the issue of unexplained expenditure under section 69C of the Act. On perusal of the contents of the remand report reproduced above, it is also seen that due to non-compliance on the part of the assessee, the Assessing Officer could not give comment on the merit of the additional evidences. Since, the Ld. CIT(A) has admitted the additional evidences without providing opportunity of rebutting the same to the Assessing Officer, respectfully following the finding of the Hon'ble Delhi High Court in the case of Manish Build Well (P) Ltd (supra), we restore issue in dispute to the file of the Ld. CIT(A), with a direction to the allow opportunity to the Ld. Assessing Officer to rebut the additional evidences filed by the assessee and decide the issue afresh in accordance with law. It is needless to mention that the assessee shall be provided adequate opportunity of being heard. Accordingly, the ground No. 1 of the appeal of the Revenue is allowed, whereas the ground No. 2 of the appeal is allowed for statistical purposes.

8. The ground No. 3 of the appeal of the Revenue relates to addition of Rs.34,25,000/- for deemed dividend under section 2(22)(e) of the Act. The ground No. 3 to 5 of the appeal of the assessee also relates to this addition of deemed dividend.

8.1 On the basis of the report of the Special Auditor, the Assessing Officer observed that in view of the shareholding pattern, the dividend income was taxable in the hands of the shareholder to the extent of accumulated profit of the assessee

company. The assessee submitted that advances of Rs.69,26,109/- had been given to associated entities engaged in real estate development for business purposes and, therefore, same were outside the purview of the deemed dividend. The assessee further claimed that the said advances were trade advances and also submitted copies of the agreement entered into for purchase of land for business purposes by those associated entities. The Ld. Assessing Officer rejected the contention of the assessee and computed deemed dividend amounting to Rs.34,25,000/-. On further appeal, the Ld. CIT(A) deleted the addition holding that the assessee is a lender and not the borrower and therefore addition under section 2(22)(e) of the Act cannot be made in the hands of the assessee. The relevant finding of the Ld. CIT(A) is reproduced as under :

“16. I have considered the facts of the case and the submissions made by the AR of appellant. I have also perused the case laws relied upon by the appellant. In the se of appeal proceedings, the AR of the appellant filed a copy of the appeal order dated 22.03.2013 in the case of M/s. Saamag Construction Ltd. passed by my predecessor CIT(A) in appeal No. 37/11-12/-(A)32 for the A.Y. 2007-08 wherein on identical facts, as in the case of the appellant for assessment year under consideration, my predecessor CIT(A) had deleted the addition of Rs. 44,74,198/- made by the Assessing Officer u/s 2(22)(e) of the I.T. Act, 1961. I have perused the copy of my predecessor’s order passed in the above mentioned case for A.Y. 2007-08 wherein while deleting the addition made u/s 2(22)(e) of the I.T. Act, 1961, he has observed as under:

“5.13 I have considered the findings recorded by the Id. AO as per the assessment order, the submissions made by the Id. AR and the facts of the case on record. The Assessing Officer has made additions in the hands of the lending companies on

the basis that the monies have been given as loans to the Group Companies in which there are common shareholders. While calculating the accumulated profits, the Assessing Officer has added the amount of addition made in the Assessment Order to the figure of the profit available as per the books of account. The Id. AR argued that the appellant is a lender and not the borrower, therefore, the addition u/s 2(22)(e) made on protective basis is not called for in this case. The appellant further contended that the judgment of Hon'ble Supreme Court in the case of P.K. Badiani vs. CIT (supra) has been applied entirely erroneously and even as per the said judgment itself, the accumulated profit does not mean assessable or taxable profit liable to be taxed as income and will not include any addition effected by the Assessing Officer in determining the total income. In this regard, the appellant has also made the working of accumulated profits for the entire Group, based on the judgment of Hon'ble Supreme Court in the case of P.K. Badiani vs. CIT (supra). (Copy attached as per Annexure 'A').

5.14 On being asked during the appellate proceedings as to why the accumulated profit is to be adjusted / reduced against the additions made u/s 2(22)(e) in the earlier years, the appellant relied upon the judgments of Hon'ble Supreme Court in the case of CIT vs. G. Narasimhan (Deed.) and Others [1999] 238 1TR 327 (SC) and that of Hon'ble Chennai Bench of TAT in the case of Aswani Enterprises vs. ACIT [2009] 121 TTJ (Chennai) 408 (supra).

5.15 As mentioned earlier, the addition in the instant case were made in the hands of the lender, whereas section 2(22)(e) does not contemplate the same, rather it provides for the group companies was not produced either before the Id. AU or before the special auaitors. Hence, the same cannot he relied upon. Therefore, in my considered opinion, the invocation of the provisions of section 2(22)(e) has rightly been made by the Assessing Officer. However, as per the provisions of section 2(22)(e), the additions are required to be made in the hands of the borrowers/shareholders instead of the lender, hence I am unable uphold the action of the Id. AO making an addition of Rs.44,74,198/- in this case. With the above observations, the addition of Rs.44,74,198/- is directed to be deleted and accordingly, the ground no. 8 of the appeal is allowed in favour of the appellant."

16.1 Since the facts involved in the appellant's case are identical to the facts of the above case, following the above

order of my predecessor CIT(A) in the case of M/s Saamag Construction Ltd., a company of Saamag group, I also delete the addition of Rs. 34,25,000/- made by the Assessing Officer u/s 2(22)(e) of the I.T. Act, 1961 in the case of the appellant. Accordingly, this ground of appeal is allowed.

17. Ground nos. 2, 3, 4, 7, 7A, 9 & 10 are not pressed by the appellant. Hence, these grounds are dismissed as such.”

8.2 The Revenue is aggrieved with about finding of the Ld. CIT(A).

8.3 Before us, the Ld. DR supported the order of the Assessing Officer, whereas the Ld. Counsel relied on the order of the Ld. CIT(A) and submitted that since the assessee has not received any loan or advance and therefore no addition could have been made in the hand of the assessee for deemed dividend under section 2(22)(e) of the Act.

8.4 We have heard the rival submission of the parties and perused the relevant material on record. In the instant case, the Assessing Officer has treated the advances given by the assessee as deemed dividend in the hands of the assessee under section 2(22)(e) of the Act. The Assessing Officer has considered advance given by the assessee company for making addition of deemed dividend observing as under on page 14 of the assessment order:

“The moot argument of the assessee rests on its claim that the amounts advanced by it to the other concerns of the Saamag Group were trade advances and not deemed dividends. The assessee’s reply has been examined and considered and is not found acceptable. At the outset,

there is no denial by the assessee to the fact that advances have been given to the other companies by it. Also there is no denial that there are common shareholders in the company giving and in the company receiving advances. For the sake of brevity, the detail of the shareholding is not being stated but is being attached as per Annexure –A.]

.....”

8.5 In view of the above finding of the Ld. Assessing Officer, in our opinion, there is no dispute on this fact that the amounts advanced by the assessee to other related concerns have been treated as deemed dividend by the Assessing Officer. From the plane language of the section 2(22)(e) of the Act, it is clear that the amount of loan or advance received by the shareholder or on behalf of the shareholder is liable to be considered as deemed dividend. For ready reference the relevant part of the section 2(22)(e) is reproduced as under :

“2(22) "dividend" includes—

- (a)
- (b)
- (c)
- (d)
- (e) *any payment by a company, not being a company in which the public are substantially interested, of any sum (whether as representing a part of the assets of the company or otherwise) made after the 31st day of May, 1987, by way of advance or loan to a shareholder, being a person who is the beneficial owner of shares (not being shares entitled to a fixed rate of dividend whether with or without a right to participate in profits) holding not less than ten per cent of the voting power, or to any concern in which such shareholder is a member or a partner and in which he has a substantial interest (hereafter in this clause referred to as*

the said concern) or any payment by any such company on behalf, or for the individual benefit, of any such shareholder, to the extent to which the company in either case possesses accumulated profits;”

8.6 Thus, in view of the plain language of the relevant section, the lender of the advance/loan cannot be held liable for deemed dividend. In view of this finding, we are not required to examine the other arguments of the Ld. Counsel of the assessee that the money advanced was in the course of business. In our opinion, the order of the Ld. CIT(A) on the issue in dispute is well reasoned and we do not find any error in the same, accordingly we uphold the same. The ground No. 3 of the appeal of the Revenue is accordingly dismissed and ground No. 3 to 5 of the appeal of the assessee are accordingly allowed.

9. In ground No. 1 & 2 of the appeal, the assessee has challenged sustaining of disallowance of alleged prior period expenses of Rs.8,56,111/- by the Ld. CIT(A).

9.1 The facts qua the disallowance are that the Assessing Officer on the basis of the report of the special auditor observed that commission expenses of Rs.8,56,111/- claimed pertaining to booking of flats in financial year 2006-07 relevant to assessment year 2007-08. The Assessing Officer has reproduced list of the said expenses on page 5 of the assessment order, which is extracted as under for ready reference:

Date of entry in books	Date of Bill	Name of Party	Amount	Remarks
11.04.2008	11.04.2008	Goldmine Developers Pvt. Ltd.	265,450	<i>This Commission relates to Plot Bookings * made in Fin Yr 2006-07 and hence these are prior period expenses</i>
24.05.2008	24.05.2008	Om Estate Consultant	56,250	<i>This Commission relates to Plot Bookings made in Fin Yr 2006-07 and hence these are prior period expenses</i>
25.06.2008	31.03.2009	R. B. Associates	61,250	<i>This Commission relates to Plot Bookings made in Fin Yr 2006-07 and hence these are prior period expenses</i>
14.07.2008	14.07.2008	RR Consultancy Services Pvt. Ltd.	96,911	<i>This Commission relates to Plot Bookings made in Fin Yr 2006-07 and hence these are prior period expenses</i>
31.03.2009	31.03.2009	R. B. Associates	61,250	<i>This Commission relates to Plot Bookings made in Fin Yr 2006-07 and hence these are prior period expenses</i>
31.03.2009	31.03.2009	R. B. Associates	315,000	<i>This Commission relates to Plot Bookings made in Fin Yr 2006-07 and hence these are prior period expenses</i>

9.2 The assessee claimed that expenses and payment were recognized when same were due and accordingly accounted in the books of accounts. According to the Assessing Officer, plots have been booked in the period corresponding to assessment year 2007-08 and, therefore, corresponding commission expenses were due in relevant assessment year only and cannot be allowed in the year under consideration. Before the Ld. CIT(A), the assessee claimed that that the assessee received plot booking advances from the public through various real estate agents and those agents had raised bills during the assessment year under consideration and accordingly, the assessee had recognized the

said expenses in the year under consideration. The Ld. CIT(A) rejecting the contention of the assessee observed as under:

“10. I have considered the facts of the case and the written submissions of the appellant. On perusal of the details of these expenses I find that these expenses relate to the commission for the sale of plots made in the financial year 2006-07 relevant to assessment year 2007-08. Thus, these expenses clearly pertained to the assessment year 2007-08 and not to the assessment year under consideration. It does not matter as to when the person to whom to commission was paid have raised the bills for payment of such commission. The expenses for booking of plots have to be recognized in the year in which the plot was booked and advance from the customer was received. Therefore, considering the facts of the case, I see no justification to interfere the order of the Assessing Officer on this issue. Accordingly, the action of the Assessing Officer in disallowing the impugned expenses is upheld and the addition made is confirmed.”

9.3 Before us, the Ld. counsel of the assessee filed a paper book containing pages 1 to 33 and submitted that the commission expenses in question relate to buy-back of plots during the year under consideration rather than booking of the plots in earlier years. He submitted that facts have not been correctly appreciated by the lower authorities and the expenses in question are not prior period expenses. Accordingly, he submitted that matter may be restored back to the lower authorities for deciding the issue afresh.

9.4 The Ld. DR, on the other hand, relied on the order of the lower authorities.

9.5 We have heard the rival submissions in the light of the material available on record. On perusal of page 20 of the paper book, we find that party M/s Om Estate Consultant raised a bill of incentive of Rs.1,12,500/- out of which 50% amount of Rs.56,250/- has been shown as due as on 24/05/2008. Similarly, on pages 21, Bill of Rs.1,22,500/- issued by another party M/s RB Associates is available, out of which Rs.61,250/- has been shown as due on 25/06/2008. Similarly, on page 22 and 23 bills of M/s RR Consultancy Services Private Limited and M/s RB Associates are available. According to these bills, incentive was due on buyback of bookings from various parties during the year under consideration. The issue in dispute before us is, whether the expenditure was relatable to earlier years or to the year under consideration. The contention of the assessee that expenses have been incurred in relation to buy back of the plots during the year under consideration, whereas the contention of the Assessing Officer that expenses were incurred in relation to booking of the flats in earlier years. As the matter relates to factual finding on the issue, whether the expenses are prior period expenses or not, we feel it appropriate to restore the issue for deciding afresh. Since, while deciding the appeal of the Revenue, we have already restored the ground No. 2 to the file of the Ld. CIT(A) and, therefore, to avoid multiplicity of the proceedings, we restore this issue also to the file of the Ld. CIT(A) for deciding afresh in the light of the evidences submitted by the assessee. Both the assessee and the Assessing Officer shall be afforded reasonable opportunity of being heard. Accordingly, the

ground No. 1 and 2 of the appeal of the assessee are allowed for statistical purposes.

10. In result, the appeal of the Revenue is allowed partly for statistical purposes, whereas appeal of the assessee is allowed for statistical purposes.

ITA No.433/Del/2014

11. Now, we take up the appeal of the Revenue in ITA No. 433/Del/2014 in the case of 'Saamag Developers Private Limited' for assessment year 2006-07. The grounds of appeal raised by the Revenue are reproduced as under:

1. *The Commissioner of Income Tax (Appeals) erred in admitting additional evidences under Rule 46A.*
2. *That the Commissioner of Income Tax (Appeals) has erred in law and on facts of the case in deleting an addition of Rs.23,67,367/- on account of disallowance u/s 40A(3) of the I.T. Act.*
3. *That the Commissioner of Income Tax (Appeals) has erred in law and on facts of the case in deleting an addition of Rs.2,59,47,379/- on account of unexplained expenditure u/s 69 of the I.T. Act.*
4. (a) *The order of the CIT(A) is erroneous and not tenable in law and on fact.*
(b) *The appellant craves leave to add, alter or amend any/all of the grounds of appeal before or during the course of the hearing of the appeal.*

12. Briefly stated facts of the case are that a search and seizure action under section 132 of the Income-tax Act, 1961 (in short the 'Act') was carried out by the Investigation Wing of the Income Tax Department on 29/01/2009 at the premises of the assessee

company along with other cases of 'Saamag Group'. Consequent to search action, notice under section 153A of the Act was issued on 10/07/2009 and in response to which, the assessee filed return of income on 06/11/2009 declaring total income of Rs.9,200/-. In the assessment completed under section 153A of the Act on 03/08/2011, the Assessing Officer made certain additions/disallowances to the returned income. Aggrieved, the assessee filed appeal before the Ld. CIT(A), who partly allowed the appeal of the assessee. Aggrieved, with the relief allowed, the Revenue is in appeal before the Tribunal.

12.1 Before the Tribunal, the assessee filed an application under Rule 27 of the Income-tax Appellate Tribunal Rules, 1963 (In short the 'ITAT Rules') supporting the order of the Ld. CIT(A) and submitted that disallowance under section 40A(3) has been rightly deleted by the Ld. CIT(A) on merit, however, the proceedings under section 153A of the Act have been wrongly upheld by the Ld. CIT(A). According to the Ld. counsel, finding on the issue of jurisdiction acquired by the Ld. AO u/s 153A, has been decided against the assessee, and, therefore, assessee is before the Tribunal by way of application under Rule 27 of the ITAT Rules.

12.2 On the contrary, Ld. DR objected to the admission of application on the ground that issue of disallowance under section 40A(3) has been decided in favour of the assessee both on merit as well as on legality .

12.3 We have heard the rival submissions and perused the relevant material on record. We note that Hon'ble Delhi High

Court in the case of Kabul Chawla Vs. CIT, 281 CTR 45 (Del.) has held that no addition under section 153A of the Act could be made in case of completed assessments, in absence of any incriminating material found during the course of search. In the instant case, before the Ld. CIT(A) the assessee challenged the 153A proceedings on the ground that no incriminating material was seized in the course of search. We find that in the impugned order, the Ld. CIT(A) has rejected the legal challenge to proceeding under section 153A of the Act. The Ld. CIT(A) held that incriminating material, which led to addition under section 69C of the Act, exists in the case of the assessee and, therefore, proceeding under section 153A have been validly initiated. Further, we note that the Ld. CIT(A) has deleted disallowance under section 40A(3) of the Act on merit as well as due to lack of jurisdiction. The assessee in its application under Rule 27 has challenged before us that the legal issue has been decided against the assessee. However, we find that facts raised by the assessee before us are not correct. The Ld. CIT(A) has rightly upheld the validity of assessment under section 153A in view of the incriminating material found during the course of search, leading to addition under section 69C of the Act. But, in respect of the addition in question of disallowance under section 40A(3) of the Act is concerned, the Ld. CIT(A) has observed that there was no nexus or relation of the disallowance with the material found or seized. The relevant part of the order of the Ld. CIT(A) is reproduced as under :

“14 In view of above discussion, I am of the considered opinion that the payment made by the appellant in cash to the farmers residing in the village/rural area that fell within the exemptions provided in Rule 6DD does not attract on addition u/s 40A(3). Otherwise also this addition made by AO did not have any nexus or relation with the material found and seized during the search. Hence, the addition made by the AO amounting to Rs.23,67,367/- deserves to be deleted and therefore the same is hereby deleted. In result this ground of appeal is allowed.”

12.4 Accordingly, the Ld. CIT(A) has not only deleted the addition in question on merit, but also deleted the addition due to lack of jurisdiction. In our opinion, the Ld. CIT(A) has decided the issue of disallowance under section 40A(3) in favour of the assessee, both on legal ground as well as on the merit . In terms of Rule 27 of the ITAT Rules, a respondent, though he may not have appealed, may support the order appealed against on any of the grounds decided against him. We find that the issue of disallowance under section 40A(3) of the Act has not been decided against the assessee, either on the issue of validity or on merit and, therefore, there is no justification for filing such an application under Rule 27 of the ITAT Rules. As in the circumstances, no application under Rule 27 of the ITAT Rules lies, it is dismissed accordingly.

13. Now, we take up the appeal of the Revenue. The ground No. 1 of the appeal of the Revenue is in respect of admitting additional evidences under Rule 46A of Income-tax Rules, 1962 (in short ‘the Rules’).

13.1 On perusal of the order of the Ld. CIT(A), we find that actually additional evidences filed by the assessee have not been admitted by the Ld. CIT(A) and, therefore, the ground raised by the Revenue itself is incorrect and liable to be dismissed. The relevant finding of the Ld. CIT(A) in para 11 of the impugned order is reproduced as under:

“11. Before adjudicating the additions and disallowance made by AO on merit, it is pertinent to decide the issue of additional evidences filed by appellant during the appellate proceeding which are objected by AO. I have carefully considered the submissions of AR of the appellant and objections raised by the AO and I found forces in the objection of the AO. The appellant during the appellate proceedings did not demonstrate any reasonable cause or sufficient reasons for not furnishing the evidences before AO during the assessment proceedings. Even the opportunity provided by AO during the remand proceedings i.e. on 20.08.2013, was not availed by appellant to prove its case. In view of above facts the additional evidences filed by appellant during the appellate proceedings are rejected, since the appellant was not prevented by sufficient cause to produce such evidences before AO. Therefore, the additional evidences filed by appellant are not admitted.”

13.2 The Ld. DR also concurred that the ground raised is not correct and has been raised inadvertently. Since the Ld. CIT(A) has not admitted the additional evidences in terms of rule 46A of the Rules, the ground challenging the admitting of additional evidence has been raised without any basis and without

application of mind and hence, it deserved to be dismissed. We order accordingly. The ground No.1 of the appeal is dismissed.

14. The ground No. 2 of the appeal relates to disallowance of Rs.23,67,367/- in terms of section 40A(3) of the Act. The Assessing Officer on the basis of report of the special auditor, observed that payments of Rs.1,18,36,835/- have been made by M/s Saamag Construction Ltd. on behalf assessee, in cash exceeding Rs. 20,000/-, which are in contravention of section 40A(3) of the Act. The assessee explained that payments were made to farmers located in rural area for purchase of land and in view of no bank facilities, there was no alternative other than making cash payments. The Assessing Officer, however, rejected the contention of the assessee and observed that there is no such exception laid out in Rule 6DD of Rules. Accordingly, in view of the provisions of 40A(3) of the Act, he disallowed 20% of the amount of cash payment of Rs.1,18,36,835/-, which was worked out to Rs.23,67,367/-. The Ld. CIT(A) has summarized the facts of the issue in dispute as under:

“13. On perusal of the material on record the following undisputed facts are noticed:

- a) The payment was made in cash for purchase of land by M/s Saamag Construction Ltd. on behalf of the appellant.*
- b) The payments were made to farmers residing in rural area/village.*
- c) The village did not have the facility of Bank at relevant time.*
- d) The land purchased by the appellant was shown as current assets under the head ‘Stock of land’ and not*

debited to Profit & Loss Account during the year under consideration.

- e) Non incriminating material relating to the purchase of land was found and seized.*
- f) The allegation of AO as well as the special auditors is that the appellant made the cash payment. Such observation was made on the basis of examinations of regular books of account of appellant. This is also not a case of the AO that these are unaccounted transactions.”*

14.1 After considering the submission of the assessee, the Ld. CIT(A) deleted addition, observing as under:

“13.1 After considering the above facts, and the observation of the AO, the provisions envisaged in section 40A(3) and rule 6DD clause (g) as under:

“Where the payment made in a village or town, which on date of such payment is not served by any Bank to any person who ordinarily resides or is carrying on any business or profession or vocation in any such village or town.”

Such payment mentioned as above would not come under the mischief of the provisions of Sec. 40A(3). In the case, in hand, admittedly the payment was made to the farmers, living in a village and that village did not have the facility of a Bank, hence, the provisions of Sec. 40A(3) of the Income Tax Act, 1961 do not have any application to these cash payment.

14. In view of the above discussion, I am of the considered opinion that the payment made by the appellant in cash to the farmers residing in the village/rural area that fell within the exemptions provided in Rule 6DD does not attract an addition u/s 40A(3). Otherwise also this addition made by the AO did not have any nexus or relation with the material found and seized during the search. Hence, the addition made by the AO amounting to Rs.23,67,367/- deserves to be deleted and

therefore the same is hereby deleted. In the result this ground of appeal is allowed.”

14.2 Before us, the Ld. DR relied on the order of the Assessing Officer and submitted that the assessee has failed to justify exigencies of cash payment and documentary evidences to support its contention of specific demand of cash payment by the farmers. According to him, there are no exception as contested by the assessee in Rule 6DD of Rules and, therefore, the assessee is liable for disallowance under section 40A(3) of the Act.

14.3 The Ld. counsel of the assessee relied on the order of the Ld. CIT(A) and also submitted that no incriminating material in relation to the disallowance has been found and seized during the course of search and, therefore, the above addition could not be made in assessment year under consideration.

14.4 We have heard the rival submission and perused the relevant material on record. The disallowance under section 40A(3) of the Act can be made out of the expenses claimed under the head profit and gains of business and profession. In the instant case, the fact that cash payments in question have not been claimed as expenditure has not been disputed by the Ld. DR. In our opinion, if expenditure has not been claimed, the question of disallowance also cannot arise. In our opinion, finding of the Ld. CIT(A) on the issue in dispute is well reasoned and we do not find any error in the same, accordingly we uphold the same. The ground No. 2 of the appeal is accordingly dismissed.

15. The ground No. 3, relates to addition of Rs.2,59,47,379/- on account of unexplained expenditure under section 69C of the Act.

15.1 The facts qua the addition-in-dispute are that from the report of the Special Auditor, the Assessing Officer observed that on reconciliation of seized documents with books of accounts, the payments of Rs.2,59,47,379/- were found to be made out of books of accounts. The assessee filed reconciliation of seized documents with books of accounts and explained that all those expenses were duly recorded in the books of accounts. The assessee furnished a certificate from M/s Apex Marin Consulting Ltd. claiming that transactions mentioned in seized documents never materialized. The Assessing Officer rejected the contention of the assessee and made addition of Rs.2,59,47,379/- in terms of section 69C of the Act.

15.2 The Ld. CIT(A) observed that the Special Auditor has mentioned that the said payment of expenses were made by M/s Sammag Construction Ltd. on behalf of the assessee and not by the assessee itself. In view of the observation, the Ld. CIT(A) concluded that since the expenditure was not incurred by the assessee, no addition under section 69C of the Act could have been made in the hands of the assessee. The relevant finding of the Ld. CIT(A) on the issue-in-dispute is reproduced as under:

“16.1 I have considered the submission made by the appellant and also the contents of assessment order which are reproduced above on this issue. The main observation of the AO is that the appellant incurred expenses which were not recorded in its regular books of account. The special auditors in their audit report made a detailed observation on the basis of seized material and the regular books of account maintained by appellant. The amount of expenses incurred and which are not recorded in books of account of the appellant was quantified at

Rs.2,59,47,379/- for the year under consideration. In the special audit report the auditors also mentioned that these payment of expenses were made by M/s Saamag Construction Ltd. on behalf of the appellant and not by the appellant itself.

16.2 The AR of the appellant submitted that from the alleged seized material, it cannot be determined on which date these payments were made. It was also not possible to ascertain the month and year of the alleged payment. Therefore, these documents were dumb documents and cannot be used to ascertain the financial value. The AR of the appellant also argued at length that the additions should not be made on the basis of dumb documents. The AR of the appellant further submitted that since the special auditors in their audit report U/s 142(2A) had specifically observed that the alleged payments were made by M/s Saamag Construction Ltd. and if any additions were to be made the same should be made in the hands of the Saamag Construction Ltd. and not in the hands of the appellant.

16.3 From the facts on record and also evident from the audit report of special auditors that the alleged payments were made by M/s Saamag Constructions Ltd. and not by the appellant. I have also considered the seized material available on record and it is not clear Whether these documents belonged to the appellant or M/s Saamag Constructions Ltd. However, after a detailed examination of the seized material and regular books of account of the appellant, the auditors in their special audit report have gave a categorical finding that these payments were made by M/s Saamag Constructions Ltd. Section 69C can be invoked when the appellant on its on incurs any expenditure and the source such expenditure was satisfactorily explained with regard to the expenditure or apart thereof, where the amount covered by such expenditure would be deemed to be income of the appellant. In view of above undisputed facts I am of the considered opinion that if any additions are required to be made then it should be made in the hands of M/s Saamag Constructions Ltd. and not in hands of appellant.

Therefore, the addition of Rs.2,59,47,379/- made by the AO u/s 69C deserves to be deleted and same is hereby deleted. In the result this ground of appeal is allowed.”

15.3 Before us, the Ld. DR relied on the finding of the Assessing Officer and submitted that addition in question has been rightly made by the Assessing Officer in the hands of the assessee.

The Ld. counsel of the assessee, on the other hand relied on the finding of the Ld. CIT(A) and submitted that proceedings in the case of M/s Sammag construction Ltd have already been reopened on this count.

15.4 We have heard the rival submission and perused the relevant material on record. We find that certain expenses found in seized records could not be reconciled by the special auditor with the books of accounts of the assessee. The Assessing Officer accordingly made addition under section 69C of the Act. The Ld. CIT(A) has given a finding of the fact referring report of the special auditor that those payments in question were made by M/s Sammag construction Ltd on behalf of the assessee. Accordingly, the Ld. CIT(A) concluded that addition if any could be made in the hands of the M/s Sammag construction Ltd and not in the hands of the assessee. In our opinion, the finding of the Ld. CIT(A) on the issue in dispute is justified, because if those expenses have not been incurred by the assessee, how the assessee can be asked source of such expenditure. The section 69C can be invoked only when an assessee incurs the expenditure and he offers no explanation about the source of such expenditure . The fact that expenditure was incurred by M/s Sammag construction

Ltd, has not been disputed by the Ld. DR before us. In view of above facts and circumstances, we do not find any error in the finding of the Ld. CIT(A) on the issue in dispute. Accordingly, we uphold the same. The ground of the appeal of the Revenue is accordingly dismissed.

16. In result, the appeal of the Revenue is dismissed

ITA Nos. 2602/Del/2014 & 2999/Del/2014

17. Now we take up the cross appeals of the Revenue (ITA No. 2602/Del/2014) and assessee (ITA No. 2999/del/2014) in the case of Saga Developers Private Limited for assessment year 2006-07. The respective grounds raised by the parties are reproduced as under:

(I) Grounds of appeal raised by the Revenue are as under:

1. *That the Commissioner of Income Tax (Appeals) erred in admitting additional evidence under rule 46A*
2. *That the Commissioner of Income Tax (Appeals) erred in law and on facts of the case in deleting the addition of Rs.1,00,42,833/- on account of un-explained expenditure u/s 69C.*
3. *That the Commissioner of Income Tax (Appeals) erred in law on facts of the case in deleting the addition of rs.16,26,160/- on account of cash payment for purchase of land.*
4. (a) *The order of the CIT(Appeals) is erroneous and not tenable in law and on facts.*
(b) *The appellant craves leave to add, alter or amend any/all of the grounds of appeal before or during the course of the hearing of the appeal.*

(II) Grounds of appeal raised by the assessee are as under:

- 1) *The order passed u/s 153A of the Act is without jurisdiction.*
- 2) *The CIT(A) has erred in holding that “there is no requirement for an assessment u/s 153A of the Act to be based only on any material seized in the course of search”. Such findings are opposed to presently prevailing settled legal positions.*
- 3) *The addition of Rs.7,03,450/- on account of negative cash in hand, not being based on seized material, being based on regularly maintained books of accounts, the assessment being completed before the date of search, cannot be sustained u/s 153A of the Act. The CIT(A) has erred in confirming the disallowance of Rs.7,03,450/-*
- 4) *The CIT(A) has erred in enhancing the income of the appellant by treating a sum of Rs.4,62,093/- by invoking the provisions of sec. 2(2)(e) of the Act.*
- 5) *It is contended that the provisions of sec. 2(22)(e) of the Act are not applicable to advances made in the course of conduct of business and for the purposes of business.*
- 6) *Without prejudice to the ground of appeal no.s’ 4 & 5, the addition of Rs.4,62,093/- not being based on seized materials, the assessments having been completed prior to date of search, is not sustainable u/s 153A of the Act.*

The appellant craves leave to add, alter, amend or withdraw any of the grounds of appeal at the time of hearing.

18. Briefly stated facts of the case are that consequent to search and seizure action at the premises of the assessee carried out on 29/01/2009, notice under section 153A of the Act was issued and in response the assessee filed return of income on 10/02/2010 declaring total income of Rs.22,81,180/-. In the assessment completed on 03/08/2011, the Assessing Officer

made certain additions/disallowances to the returned income. On further appeal, the Ld. CIT(A) allowed the appeal partly. Aggrieved, both the parties are in cross-appeal before the Tribunal raising respective grounds.

19. The ground No. 1 of the appeal relates to admitting additional evidences under Rule 46A of the rules. Both the parties agreed that the additional evidences filed before the Ld. CIT(A) are related to ground No. 2 and ground No. 3 of the appeal of the Revenue. In the instant case also the Ld. Assessing Officer in remand proceeding objected to admission of additional evidences, however due to non-compliance on the part of the assessee, no comments on merit was given by him.

19.1 Before us, the Ld. DR relying on the decision of the Hon'ble Delhi High Court in the case of Manish Build well (P) Ltd. (supra) submitted that ground No. 2 and 3 of the appeal of the Revenue might be restored back either to the Ld. CIT(A) or the Assessing Officer for deciding afresh after providing opportunity of rebutting the additional evidences to the Assessing Officer. The Ld. Counsel of the assessee also concurred with the Ld. DR and submitted that list of additional evidences filed by the assessee before the Ld. CIT(A), are available on page 69 to 70 of the paper book of the assessee .

19.2 We have heard the rival submission and perused the relevant material on record. We note that the identical issue in same set of circumstances has been decided by us in preceding paras in the case of Saamag Developers Private Limited (ITA No. 2601/del/2014) for assessment year 2009-10. Accordingly, to

have consistency in our finding, in the instant case, also we hold that the Ld. CIT(A) has not complied with the provisions of the Rule 46A of Rules and accordingly, we allow the ground No. 1 of the appeal of the Revenue and restore the ground No. 2 and 3 of the appeal of the Revenue to the file of the Ld. CIT(A) for providing opportunity to the Assessing Officer for rebutting the additional evidences. It is needless to mention that the assessee shall be afforded reasonable opportunity of being heard.

20. The ground No. 4 of the appeal of the Revenue, being general in nature, we are not required to adjudicate upon.

21. The ground No. 1 of the appeal of the assessee is general in nature and covered by other grounds of appeal, and hence, we not required adjudicating specifically.

22. The ground No. 2 and 3 of the appeal of the assessee are related to addition of Rs.7,03,450/- on account of negative cash balance. The assessee has challenged the addition on the ground that in proceedings under section 153A of the Act, in absence of incriminating material, no addition could be sustained in completed assessments.

22.1 The Ld. counsel of the assessee, relied on the decision of the Hon'ble Delhi High Court in the case of Kabul Chawla (supra) and submitted that in the instant case return of income was filed on 22/11/2006 and limitation for issue of notice under section 143(2) of the Act expired on 30/11/2007. According to him, no notice under section 143(2) of the Act was issued and, therefore, as on the date of search the assessment is treated as completed assessment. The Ld. counsel submitted that addition in dispute

has been made not on relying on any incriminating document found during the course of search and therefore this addition could not be sustained in view of the decision of the Hon'ble Delhi High Court in the case of Kabul Chawla(supra).

22.2 The Ld. DR, on the other hand, relied on the order of the lower authorities.

22.3 We have heard the rival submission and perused the relevant material on record. The Ld. Counsel of the assessee, referred to page 1 and 2 of the paper book, which is a copy of the acknowledgement of the return of income filed for the year under consideration. It is evident from the said pages, that the return of income was filed on 22/11/2006. No scrutiny proceedings were pending in the case of the assessee as on the date of the search i.e. 29/01/2009 and therefore assessment is treated to be in the category of completed assessment. The Assessing Officer has not referred any incriminating material for making this addition in the current proceeding under section 153A of the Act. In view of the decision of the Hon'ble Delhi High Court in the case of Kabul Chawla(supra), no addition could be made in the proceedings under section 153A of the Act, in absence of any incriminating material where regular assessment proceedings already stood completed. In the instant case, both the conditions as held in the case of Kabul Chawla (supra) are satisfied and, therefore, in our view, the addition in dispute could not be sustained. Accordingly, we direct the ld. AO to delete the same. The ground of the appeal of the assessee is accordingly allowed.

23. Similarly, ground Nos. 4 to 6 of the appeal of the assessee relate to addition of Rs.4,62,093/- under section 2(22)(e) of the Act. In ground No. 6, the assessee challenged the addition in view of the decision of the Hon'ble Delhi High Court in the case of Kabul Chawla(supra).

23.1 The Ld. counsel of the assessee submitted that addition made is not based on any incriminating material and therefore it cannot be sustained in view of the decision of the Hon'ble Delhi High Court in the case of Kabul Chawla (supra). The Ld. counsel referred to para 24 to 25 of the order of the Ld. CIT(A) and submitted that there is no reference of any incriminating material for making the above addition.

23.2 On the contrary, the Ld. DR relied on the order of the Ld. CIT(A).

23.3 We have heard the rival submission and perused the relevant material on record. In the instant case, the fact of completed assessment has already been decided by us while adjudicating ground No. 2 and 3 of the appeal. We have also perused the paras 24 to 25 of the impugned order of the Ld. CIT(A), and find that there is no reference of any incriminating material which has been relied upon by the Ld. CIT(A) for making the said addition. In view of the above facts, this addition could not have been made in the case of the assessee in absence of any incriminating material found during the course of the search. Accordingly, we direct the ld. AO to delete the addition. The ground No. 6 of the appeal of the assessee is accordingly allowed. Since the addition has been deleted by us on this ground, the

ground No. 4 and 5 of the appeal are not required to be adjudicated.

24. In result, the appeal of the Revenue is allowed for statistical purposes, whereas the appeal of the assessee is allowed.

ITA Nos. 2604/Del/2014 & 3165/Del/2014

24. Now we take up the cross appeals of the Revenue (ITA No. 2604/Del/2014) and assessee (ITA No. 3165/Del/2014) in the case of Saga developers Private Limited for assessment year 2009-

25. The grounds raising in respective appeals are reproduced as under:

(I) Grounds of appeal raised by the Revenue are as under:

1. *That the Commissioner of Income Tax (Appeals) erred in admitting additional evidence under Rule 46A.*
2. *That the Commissioner of Income Tax (Appeals) erred in law and on facts of the case in deleting the addition of Rs.21,55,835/- on account of un-explained expenditure u/s 69C.*
3. *That the Commissioner of Income Tax (Appeals) erred in law and on facts of the case in deleting the addition of Rs.4,58,24,310/- made by the Assessing Officer u/s 2(22)(e) of the Income Tax Act, 1961.*
4. (a) *The order of the CIT(Appeals) is erroneous and not tenable in law and on facts.*
(b) *The appellant craves leave to add, alter or amend any/all of the grounds of appeal before or during the course of hearing of the appeal.*

(II) Grounds of appeal raised by the assessee are as under:

1. *The CIT(A) has erred in holding that sum of Rs.4,58,24,310/- is covered by the provisions of sec.*

2(22)(e) of the Act. Such findings are opposed to evidences on record.

- 2) It is contended that the provisions of sec. 2(22)(e) of the Act are not applicable to the impugned sum of Rs.4,58,24,310/-.*
- 3. It is contended that the provisions of sec. 2(22)(e) of the Act cannot apply to business advances extended during the course of carrying on of business.
The appellant craves leave to add, alter, amend or withdraw any of the grounds of appeal at the time of hearing.*

26. The brief facts of the case in the year under consideration are identical to the facts and circumstances in assessment year 2006-07, except the amount of additions disputed in ground No. 2 and 3 of the appeal.

27. We note that in ground No. 1 of the appeal, the Revenue has challenged admitting additional evidences by the Ld. CIT(A) under Rule 46A of the Rules. The parties have agreed that the additional grounds filed before the Ld. CIT(A) relate to ground No. 2 raised before the Tribunal. We note that in this case also the additional evidences have been admitted by the Ld. CIT(A) without providing opportunity of rebutting those additional evidences to the Assessing Officer, which is evident from portion of the remand report reproduced by the Ld. CIT(A) in the impugned order. In the remand report, the Assessing Officer has objected to admission of the additional evidences however, he could not provide comments on merit due to non-compliance on the part of the assessee. Since facts and circumstances in the instant case being identical to the facts and circumstances in ground No. 1 in the case of Saamag Developers Private Limited (ITA No. 2601/Del/2014), to maintain

consistency in adjudicating on issue in dispute, we allow the ground No. 1 of the instant appeal, and restore around No. 2 to the file of the Ld. CIT(A) for compliance of provisions of the Rule 46A of the Rules and decide afresh after providing opportunity of being heard both, to the Assessing Officer and the assessee. The ground No. 2 of the appeal is accordingly allowed for statistical purposes.

28. The ground No. 3 of the appeal of the Revenue relates to addition of Rs.4,58,24,310/- made by the Assessing Officer under section 2(22)(e) of the Act. The Assessing Officer in the assessment order has mentioned that the assessee company provided loans and advances to other concern of the “Saamag Group” which being liable for deemed dividend under section 2(22)(e) of the Act, he made the addition. The Ld. CIT(A), however deleted the addition holding that no addition could be made in the hand of the lending companies. In support, he relied on the finding of his predecessor. The relevant finding of the Ld. CIT(A) is reproduced as under:

“14. I have considered the facts of the case and the submissions made by the AR of the appellant. I have also perused the case laws relied upon by the appellant. In the course of appeal proceedings, the AR of the appellant filed a copy of the appeal order dated 22.03.2013 in the case of M/s. Saamag Construction Ltd. passed by my predecessor CIT(A) in appeal No. 37/11-12/-(A)32 for the A.Y. 2007-08 wherein on identical facts, as in the case of the appellant for assessment year under consideration, my predecessor CIT(A) had deleted the addition of Rs. 44,74,198/- made by the Assessing Officer u/s 2(22)(e) of the I.T. Act, 1961. I have perused the copy of my predecessor’s order passed in the above mentioned case for A.Y. 2007-08 wherein

while deleting the addition made u/s 2(22)(e) of the I T. Act, 1961, he has observed as under:

"5.13 I have considered the findings recorded by the Id. AO as per the assessment order, the submissions made by the Id. AR and the facts of the case on record. The Assessing Officer has made additions in the hands of the lending companies on the basis that the monies have been given as loans to the Group Companies in which there are common shareholders. While calculating the accumulated profits, the Assessing Officer has added the amount of addition made in the Assessment Order to the figure of the profit available as per the books of account. The Id. AR argued that the appellant is a lender and not the borrower, therefore, the addition u/s 2(22)(e) made on protective basis is not called for in this case. The appellant further contended that the judgment of Hon'ble Supreme Court in the case of P.K Badiani vs. CIT (supra) has been applied entirely erroneously and even as per the said judgment itself, the accumulated profit does not mean assessable or taxable profit liable to be taxed as income and will not include any addition effected by the Assessing Officer in determining the total income. In this regard, the appellant has also made the working of accumulated profits for the entire Group, based on the judgment of Hon'ble Supreme Court in the case of P.K. Badiani vs. CIT (supra). (Copy attached as per Annexure 'A').

5.14 On being asked during the appellate proceedings as to why the accumulated profit is to be adjusted / reduced against the additions made u/s 2(22)(e) in the earlier years, the appellant relied upon the judgments of Hon'ble Supreme Court in the case of CIT vs. G. Narasimhan (Deed.) and Others [1999] 238 ITR 327 (SC) and that of Hon'ble Chennai Bench of ITAT in the case of Aswani Enterprises vs. ACIT [2009] 121 TTJ (Chennai) 408 (supra).

5.15 As mentioned earlier, the addition in the instant case were made in the hands of the lender, whereas section 2(22)(e) does not contemplate the same, rather it provides for the addition in the hands of the borrowers. Under section 2(22)(e), there is no distinction between a loan given for the business purpose or otherwise. Moreover, the appellant has not brought on record any cogent evidence in support of its contention that the amounts advanced were for business purpose. The so called master land development agreement amongst the various group companies was not produced

either before the Id. AO or before the special auditors. Hence, the same cannot be relied upon. Therefore, in my considered opinion, the invocation of the provisions of section 2(22)(e) has rightly been made by the Assessing Officer. However, as per the provisions of section 2(22)(e), the additions are required to be made in the hands of the borrowers/shareholders instead of the lender, hence I am unable uphold the action of the Id. AO making an addition of Rs.44,74,198/- in this case. With the above observations, the addition of Rs.44,74,198/- is directed to be deleted and accordingly, the ground no. 8 of the appeal is allowed in favour of the appellant"

14.1 Since the facts involved in the appellant's case are identical to the facts of the above case, following the above order of my predecessor CIT(A) in the case of M/s Saamag Construction Ltd., a company of Saamag group, I also delete the addition of Rs.4,58,24,310/- made by the Assessing Officer u/s 2(22)(e) of the I.T. Act, 1961 in the case of the appellant. Accordingly, this ground of appeal is allowed.

15. Ground nos. 6, 6A, 7 and 8 are not pressed by the appellant. Hence, these grounds are dismissed as such."

28.1 We have heard the rival submission of the parties on the issue in dispute. We note that facts and circumstances in the instant case are identical to the facts and circumstances in the case of 'Saamag Developers Private Limited.' (ITA No. 2601/del/2014), wherein preceding paras we have deleted the addition. To maintain consistency in our decision, in the instant case also we uphold the finding of the Ld. CIT(A) on the issue in dispute. The ground of the appeal of the Revenue is accordingly dismissed.

29. As regard to the appeal of the assessee (in ITA No.3165/Del/2014) is concerned, the director of the assessee

company has filed a letter dated 08/05/2018 before us, withdrawing the appeal. Accordingly, in view of the withdrawal of the appeal, all the grounds raised stand dismissed.

30. In the result, appeal of the Revenue is partly allowed for statistical purposes, whereas appeal of the assessee is dismissed.

ITA No. 436/Del/2014

31. Now, we take up the appeal in the case of Saga Township Private Limited (ITA No. 436/Del/2014)

32. The grounds of appeal raised by the Revenue are reproduced as under:

1. *That the Commissioner of Income Tax (Appeals) has erred in law and on facts of the case in deleting the penalty of Rs.83,00,000/- imposed u/s 271D for accepting cash loans.*
2. *That Commissioner of Income Tax (Appeals) erred in law and facts of the case in accepting the contention of assessee that it acted under "bonafide belief" in accepting cash loans in pursuance to the terms of MOU between ground companies, and there was reasonable cause for not imposing penalty u/s 271D.*
3. (a) *The order of the CIT(A) is erroneous and not tenable in law and on facts.*
(b) *The appellant craves leave to add, alter or amend any/all of the grounds of appeal before or during the course of the hearing of the appeal.*

33. Briefly stated facts of the case are that during assessment proceeding the Assessing Officer observed that the assessee had accepted loan/deposits in cash on following dates from M/s Saamag Construction Ltd., which being exceeding Rs.20,000/-,

are in violation of provision of section 269SS of the Act and, therefore, liable for penalty under section 271D of the Act:

S. No.	Date	Amount
(i)	12.05.06	47,00,000/-
(ii)	14.11.06	16,00,000/-
(iii)	15.11.06	17,00,000/-
(iv)	05.12.06	3,00,000/-
	Total	83,00,000/-

33.1 The matter was referred to the Additional Commissioner for levy of penalty u/s 271D of the Act. The assessee submitted that out of the amount of Rs.83 lakhs, the amount of Rs.53,21,800/- has been paid to the farmers for token money and Rs.28,54,400/- has been paid for stamp duty and which is an essential way of making land deals and as a necessity of business. The Additional Commissioner of Income-tax, rejected submission of the assessee and levied penalty of Rs.83,00,000/- vide order dated 25/02/2013. Aggrieved, the assessee filed appeal before the Ld. CIT(A), who deleted the penalty observing as under:

“ 5. I have considered the facts of the case and written submissions of the appellant. I have also perused the case laws relied upon by the AR of the appellant in support of his submission. On considering the facts of the case and the nature of transaction, I find that the provisions of section 269SS are not applicable in this case. In the instant case; during the assessment year 2007-08, the appellant company alongwith the other group companies viz. M/s Saamag Construction Ltd., M/s Saamag Township Pvt. Ltd. and M/s. Saamag Developers Pvt. Ltd.

entered into a Memorandum of Understanding (MOU) vide MOU dated 02.06.2006 to develop an integrated township in Rudra Pur (Uttrakhand). This MOU was duly approved by the Board of Directors of the appellant company and other three companies, in a resolution passed on 02.06.2006. In the- resolution passed, certain duties/obligations of the appellant company and other three companies were clearly laid out. As per said MOU and Board Resolution, the appellant had to purchase land in its name and develop the same in association with other group companies. One of the duty/obligation as per Board Resolution Las that M/s Saamag Construction Ltd. was also responsible to arrange finances for the Rudrapur Project. It was in the process of implementation of the duties/obligations assigned, that M/s Saamag Construction Ltd. provided funds to the appellant company amounting to Rs.83 lakhs in cash on various- dates. It was with these funds received in cash, from M/s Saamag Construction Ltd., the appellant entered into sale agreements with various persons and made payments, both in cash and by cheques. Therefore, considering all these facts and the nature of the transactions, it is clear that in this case there were transfer of funds from the group company for the purpose of business of development of Rudra Pur Project. Thus, the transaction of Rs.83 lakhs is not a loan or deposit as contemplated in section 269SS 'of the I.T. Act. 1961. These transactions are in the nature of business transactions carried out by the appellant pursuant to the terms of the MOU for development of the Rudra Pur Project. The transactions of transfer of funds among the group companies pursuant to the terms of the MOU and Board Resolution only represented diversion of funds from one group company to another group company depending upon the exigencies of the business. Hence, the provisions of section 269SS were not attracted to the facts of the present case. Even if there was violation of principles of section 269SS, the action of the appellant company in accepting the funds in cash could be ascribed to its bona fide belief that it would not attract the provisions of section 269SS given the nature of the

transactions. Bona fide belief coupled with the genuineness of the transactions would constitute reasonable cause for not invoking the provisions of section 271D of the I.T. Act, 1961.”

33.2 Aggrieved, the Revenue is in appeal before the Tribunal raising the grounds as reproduced above.

34. During the hearing, the counsel of the assessee drawn our attention to application under Rule 27 of the ITAT Rules filed by the assessee. In the said application, the assessee has challenged the penalty should have been imposed by the Joint Commissioner rather than Additional Commissioner of Income Tax. The assessee also raised the issue that penalty levied is barred by limitation under section 275 of the Act.

34.1 On the contrary, the Ld. DR opposed the application on the ground that the assessee did not raise these issues before the Ld. CIT(A) and since he has not adjudicated those issues, therefore, the assessee cannot be aggrieved on the issues and the no application under Rule 27 of the ITAT Rules could lie.

34.2 We have heard the rival submission and perused the relevant material on record. We are agreed with the contention of the Ld. DR that issues raised by the assessee in application under Rule 27 are not emanating from the impugned order, and therefore assessee cannot take shelter of Rule 27 of the ITAT Rules, under which the assessee can support the order of the Ld. CIT(A) on the issue which is decided against the assessee.

Accordingly, we dismiss the application under Rule 27 of the ITAT Rules filed by the assessee.

35. In respect of the grounds of appeal of the Revenue, before us, the Ld. DR submitted that the transactions among group companies are in the nature of loan or deposits and not business transactions as claimed by the assessee. The Ld. DR further submitted that the entities from whom the payments are received have been shown as unsecured loan in balance sheet, which confirm the fact of loan transactions.

36.1 On the contrary, the Ld. counsel of the assessee, relied on the order of the Ld. CIT(A) and submitted that amount in question were received from M/s Saamag Construction Ltd. in the process of duties/obligation assigned under the Memorandum of Understanding (MOU) among the parties, which was also approved by the board of director of the assessee company. The Ld. counsel submitted that cash payment were made for purchase of lands in terms of MOU and, therefore, it was merely a transaction of transfer of funds among the group companies and not in the nature of loan or deposits. Moreover, the Ld. counsel submitted there was a reasonable cause for non-compliance of the provisions of 269SS of the Act and therefore penalty may not be required to levied in terms of section 273B of the Act and accordingly, the Ld. CIT(A) is justified in deleting the penalty.

36.2 We have heard the rival submission and perused the relevant material on record. The fact that amount mentioned by the Ld. Additional Commissioner of Income Tax in the impugned order, have been received consequent to the Memorandum of

Understanding (MOU) among the parties i.e. the assessee, M/s Saamag construction Limited and M/s Saamag developers Private Limited, has not been disputed by the Revenue. In furtherance of the MOU, the assessee received payment and made payment in cash for token money as well as for a stamp duty. The only argument of the Ld. DR is that those transactions have been recorded in balance sheets of the companies as unsecured loans. In our opinion, when payments have been received in cash in terms of MOU in relation to business purpose, the purpose of transaction is business transaction and same cannot be treated as loan/deposit irrespective of the manner in which accounting entries have been made in the books of accounts. In substance, the transactions are business transaction. In our opinion, the finding of the Ld. CIT(A) on the issue in dispute is well reasoned. Further, the amounts are been received in cash for payment to farmers as well as payment to government accounts for a stamp duty. The contention of the assessee that it could not comply with the requirement of section 269SS due to reasonable failure on its part, has also been considered by us. The argument of the Ld. counsel is justified to some extent as it is generally known that while purchase of land, farmers prefer payment in cash. The payment by cheque is also not accepted sometimes by stamp duty authorities. In our opinion, it constitutes a reasonable cause for not adhering to the provisions of section 269SS by the assessee.

36.3 In view of the above, we did not find any error in the order of the Ld. CIT(A), in deleting the penalty under section 271D of

the Act, and accordingly, we uphold the same. The grounds of the appeal of the Revenue are dismissed.

31. In result, both the appeal of the Revenue and the application of the assessee under Rule 27 of the ITAT Rules are dismissed.

32. To sum up, decisions in the appeals of the assessee and Revenue are summarized as under:

Sl. No.	ITA Nos. (Assessee/Revenue)	Assessment year	Result
1.	2601/Del/2014 (Revenue)	2009-10	Partly allowed for statistical purposes.
2.	3000/Del/2014 (Assessee)	2009-10	Allowed for statistical purposes.
3.	433/Del/2014 (Revenue)	2006-07	dismissed
4.	2602/Del/2014 (Revenue)	2006-07	Allowed for statistical purposes.
5.	2999/Del/2014 (Assessee)	2006-07	Allowed
6.	2604/Del/2014 (Revenue)	2009-10	Partly allowed for statistical purposes.
7.	3165/Del/2014 (Assessee)	2009-10	Dismissed
8.	436/Del/20014 (Revenue)	2007-08	Dismissed

The decision is pronounced in the open court on 30th May, 2018.

Sd/-
(H.S. SIDHU)
JUDICIAL MEMBER

Sd/-
(O.P. KANT)
ACCOUNTANT MEMBER

Dated: 30th May, 2018.

RK/-(D.T.D.)

Copy forwarded to:

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