

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "D", MUMBAI

Before Shri Mahavir Singh(JUDICIAL MEMBER)

AND

Shri G Manjunatha (ACCOUNTANT MEMBER)

I.T.A No.5620/Mum/2017
(Assessment year: 2015-16)

M/s Runwal Projects Pvt Ltd 5 th Floor, Runwal and Omkar Esquare, Off Eastern Express Highway, Sion (E), Mumbai- 22 PAN: AAECR2786P	vs	Dy.CIT, Cent.Cir.4(1), Mumbai
APPELLANT		RESPONDENT

Appellant by	Shri Rakesh Joshi
Respondent by	Shri K Madhusudan

Date of hearing	30 -05-2018
Date of pronouncement	27-07-2018

ORDER

Per G Manjunatha, AM :

This appeal filed by the assessee is directed against order of the CIT(A)-52, Mumbai dated 09-06-2017 and it pertains to AY 2015-16.

The assessee has raised the following grounds of appeal:-

"1) On the facts and circumstances of the case as well as in Law, Learned CIT(A) has erred in confirming the action of Learned Assessing Officer in making an addition of Rs.18,82,59,020/- as alleged on money received on sale of flats, without considering the facts and circumstances of the case.

2) On the facts and circumstances of the case as well as in Law, Learned CIT(A) has erred in confirming the action of Learned Assessing Officer in not appreciating the fact that the appellant is following the Project Completion Method to recognize the income from the projects, hence on

money is to be taxed in the year of completion of the relevant project from where the same has been earned.”

2. The brief facts of the case are that the assessee is a private limited company engaged in the business of builders and developers and also running malls, filed its return of income for AY 2015-16 on 28-11-2015 declaring total income of Rs.2,390. A search & seizure action u/s 132 of the Income-tax Act, 1961 was carried out on Runwal group of cases on 17-11-2014. During the course of search, incriminating material found and seized in the form of application for booking flats revealed that the assessee has sold flats in its project 'Runwal Elegante' and other projects at the rate ranging from Rs. 32,000 to Rs.38,000 per sq.ft., whereas in the books of account maintained under ERP system shown much lesser amount. During the course of search, when seized materials were confronted to the assessee, the assessee has admitted receipt of on-money from sale of flats from various customers. During the course of search, statements from various persons including Shri Anand Runwal, head of Sales, Runwal group, Ms. Sujatha Rao, Sales and Customer Relation Manager & Personal Secretary to Shri Sandeep Runwal, shri Kishore P Jain, head of Runwal group and Shri Shamsher Dutt, Senior Vice President, Customer Relations, Runwal group have accepted the fact that the group was receiving on-money from sale of

flats from various customers. When these evidences were confronted to Shri Sandeep Runwal, the Managing Director of the assessee has admitted in his statement recorded u/s 132(4) of the I.T. Act, had accepted fact that receipt of on-money over and above the registered value of properties. Accordingly, based on incriminating material found during the course of search and also on the basis of admission of various personnel working for the assessee, the assessee has admitted additional income of Rs.38.06 crores in various companies' names including an amount of Rs.18,82,59,020 towards project Runwal Elegante for the assessment year 2015-16.

3. Consequent to search, the case of the assessee was centralized. Subsequently, the case has been selected for scrutiny and accordingly, notices u/s 143(2) and 142(1) of the Act, were issued. In response to notices, the authorized representative of the assessee appeared from time to time and filed various details, as called for. During the course of assessment proceedings, the AO observed that although the assessee has admitted undisclosed income of Rs.18,82,59,020 towards on-money receipts from sale of flats, failed to disclose undisclosed income in the return of income filed for the year. Therefore, called upon the assessee to explain as to why addition shall not be made towards undisclosed income admitted during the course of search. In response, the

assessee, vide letter dated 23-09-2016 submitted that it has admitted undisclosed income of Rs.18,82,59,020 towards on-money receipts from sale of flats based on certain incriminating documents found during the course of search; however, no disclosure has been made in the return of income owing to the fact that the assessee is following project completion method for recognition of revenue and the project from which the assessee has received on-money, has not been completed during the financial year relevant to AY 2015-16. Therefore, additional income has not been disclosed in the return of income for the impugned assessment year. The assessee further submitted that although the Managing Director of the company has admitted undisclosed income of Rs.18,82,59,020 during the course of search in statement recorded u/s 132(4), such admission has been made under coercion without verification of relevant documents, but fact remains that the assessee has collected on-money from sale of flats from certain customers. Therefore, the quantification made during the course of search on the basis of taking a higher rate of sale and adopting such rate for all flats is incorrect.

4. The AO, after considering relevant submissions of the assessee and also taking into account statements recorded from various personnel working for the assessee, including statement recorded from

Shri Sandeep Runwal observed that the assessee continuously admitting the fact of receipt of on-money from sale of flats. The working of quantum of on-money has been done during search proceedings is also not being disputed by the assessee. However, the assessee is claiming that since it is following project completion method for recognition of revenue and the project from which on-money has been received is not completed during the year under consideration, whatever on-money received from sale of flats, may be allowed to offer for taxation in the year of completion of the project. But, fact remains that the method of accounting is relevant for the receipts that form part of the sales, but the method of accounting followed by the assessee is relevant insofar as taxation of on-money and as such, on-money has to be taxed in the year of receipt. Accordingly, he made addition of Rs.18,82,59,020 towards on-money received from sale of flats.

5. Aggrieved by the assessment order, assessee preferred appeal before the CIT(A). Before the CIT(A), the assessee has filed elaborate written submissions which has been reproduced at para 5 on pages 3 to 8 of the order of the Ld.CIT(A). The assessee also relied upon plethora of judgements, including the decision of Hon'ble Supreme Court in the case of CIT vs Bilhari Investments Pvt Ltd (2008) 299 ITR 1 (SC). The sum and substance of the arguments of the assessee before the

Ld.CIT(A) are that the AO has made additions towards receipt of on-money based on admission of the assessee without appreciating the fact that such admission has been quantified during the course of search based on few incriminating documents in the form of application for booking flat. The assessee further submitted that on-money receipt has been quantified on the basis of taking a higher rate ignoring the fact that in many cases, the amount recorded in the books of account as per ERP system is more than the amount recorded in application for booking flats. The quantification has been done by taking average rate of Rs.21,400 per sq.ft. and compared it with the rate appeared in the books of account to determine difference, but fact remains that while comparing the rate as per books of account, the AO has taken average rate of sales by dividing the total carpet area of the flat ignoring the fact that if the saleable area of the flat is taken, the average rate works out to much more than the rate quantified by the AO. The assessee further submitted that although it had admitted additional income for AY 2015-16, did not disclose such undisclosed income owing to the fact that it is following project completion method for recognition of revenue and the project on which on-money has been received is not completed during the under consideration. Therefore, the AO was erred in making addition towards on-money on the basis of estimated sale price and also

ignoring the fact that the assessee is following project completion method for recognition of revenue.

6. The CIT(A), after considering relevant submissions of the assessee and also taking into account statement recorded during the course of search from the personnel working for the assessee, including statement of Shri Sandeep Runwal, director of the company held that from the evidences gathered during the course of search it is very clear that the assessee has accepted receipt of on-money on sale of flats. Further, the employees of the assessee have also accepted the fact that on-money was being received which were outside the regular books of account and was not intended to be shown or disclosed in the books of account. Although, the assessee has admitted undisclosed income on the basis of incriminating material found during the course of search, failed to admit such undisclosed income in the return of income without any valid retraction. Therefore, he opined that there is no merit in the arguments of the assessee that admission of additional income during the course of search is given under coercion and also such undisclosed income is taxable in the year in which the project is completed. The relevant portion of the order of the CIT(A) is extracted below:-

6. I have considered the facts of the case, submissions of the assessee as well as the order of the AO. From the facts of the case it appears that during the course of search manual booking forms in case of various flats were seized and as per the sale rate and charge per square feet of carpet area by the assessee, in

respect of Runwal Elegante project ranged from Rs 27.554/- to Rs 38.162/- per square feet. Similarly, in respect of another project namely Runwal Symphony, the sale rate was Rs 27,411/- to Rs 27,470/- per square feet. As against this, in the ERP system, the electronic record maintained by the assessee, the sale rate shown by the assessee was only Rs 10,976/- to Rs 17,641/- per square feet of carpet area. There was huge gap in the sale rate charged by the assessee and sale rate intended to be disclosed in the regular books of accounts. In fact the relevant seized data was for the period August 2014 to October, 2014 and the search has been carried out on 17.11.2014. In view of the huge on - money receipt during the course of search, statement of Sales Manager Shri Ravi Raichuria at Runwal Symphony project was recorded on oath. In the said statement, Shri Raichuria admitted that car parking were being sold for Rs 12 to 15 lacs each, which were unaccounted. For clarity, the relevant statement has been reproduced as under:

“Q.No.45 I am showing you page number 35 of Annexure A-4, impounded during the course of survey from the site office of Runwal Symphony in which few things are written in your handwriting, please confirm?”

Ans. Yes, I confirm the same. It is the cost sheet given to the new client during visit of this site.

Q.No.46 I am showing you page number 13 of Annexure A-2 impounded *impounded during the course of survey from the site office of Runwal Symphony in which few things are written in your handwriting. Please confirm the same ?*

Ans--, Sir, I confirm that the details on page no 33 of Annexure A-2 is written in my handwriting and has been shown to me.

Q No 47 Please explain the detail written in your writing on page 13 of Annexure A-2?

Ans. Sir, as I told **you** in the answer to Q No 41, I was instrumental in making sale of the flat no A-904 co Chetna Chedda, sir, the details are reading the final deal of sale of flat wherein it is agreed that the total cost of flat is Rs 2,36,98,500/- based on the rate of Rs 15000 per square feet as per carpet area, further the client has to pay token amount of Rs.1,00,000/- on 8th September, 2014 and the other component which we use for cash payment on 13th September, 2014 - Rs 50 lacs and on 16th September, 2014 - Rs. 20 lacs. '

7. Similarly, statement of Shri Anand Modi head of Sale of Runwal Group was recorded on oath during the course of search in which he admitted that there was receipt of non-money to the tune of Rs 50 - 60 lacs in such deed. The relevant portion of the statement of Shri Anand Modi is reproduced as under;

Q. During the course of search proceedings at your premises. 201, Sunrise, Yogi Hills, Mulund West Mumbai 400 0 080 on 13/11/2014, you have stated that there are instances where the company has accepted cash / on money towards sale of residential units in the project developed by Runwal Group. Please give examples and also elaborate upon cash transactions.

Ans. One such instance is one of our clients, Mr Lal Punjabi has paid approx. Rs 60 lacs in cash or his deed to buy a flat in our project called Runwal Elegante, Lokhandwala, Mumbai in another instance, one Mr Vijay

Dhirvani, who stays in the same complex where I am residing has approached me with a request to finalise his booking of flat in Runwal Anthurium, Mulund as he came to know that I work for Runwal Group. As I do not handle Mukmd Project, the case was referred to Sujata Rao, Sr. General Manager through our channel partner Mr Sanjeeva Rao. I think the deal was finally negotiated and cash was delivered at head office at the time of closure of the deal, which may be approximately approx. Ry 50 lacs."

8. Similarly, statement of Smt. SujataRao, Sales and Customer Relation Manager and Private Secretary to Shri Sandeep Runwal was recorded wherein she admitted about receipt of on-money. The relevant portion of her statement is reproduced as under;

"Q.8 Does your company accept on-money towards the sale of flats in addition to the registered price?

Ans. Usually these decisions pertaining to mode of payment (Cash and cheque component) is decided by Sandcep Runwal. The decisions taken, thus were communicated to the customers. Cash brought in by that customer on account of on-money is accepted by Mr Sandeep Runwal, directly. In one instances, since he was busy. I was asked to collect Rs 50 lacs approx from a customer who has booked a flat at Runwal Anthurium. I have accepted the money from Shri Sanjeeva Rao, a real real esate broker / channel partner.

Q.9 What is the proportion of on-mancy in sate price of flat.

Ans The ratio of cash, to total agreed price, is decided and determined by Mr Sandeep Runwal. I have no knowledge about the rate or percentage of cash component in the agreed sale price."

9. Likewise, statement of Shri Klshore P Jain, Head of Taxation, Runwal group was also recorded about the on-money and he too confirmed about receipt of the same. Finally, the statement of Shri Sandeep Runwal, Director of the company was recorded on oath, wherein he agreed of applying higher sale rate in respect of ail flats and consequently, offered additional income to the tune of Rs.38,06,61,255/- as under:

Particulars of sold premises / projects	Name of the assessee in whose name such income is offered	Additional income so offered (in Rs.)	Financial year in which income is accruing
Runwal Anthurium-shops	Runwal Devlopers Pvt Ltd	7,36,15,000	2013-14
R. Square	Runwal Developers Pvt Ltd	1,32,40,000	2014-15
Runwal Anthurium	Runwal Developers	6,69,62,205	2014-15

residential premises	Pvt Ltd		
Runwal Anthurium – Flat No.T3-3101 & T3-3104 of Ramona in relation to which specific instances have been quoted by your goodself in the foregoing para of statement	Runwal Developers Pvt Ltd	1,25,00,000	2014-15
Elegante	Runwal Developers Pvt Ltd	18,82,59,020	2014-15
Olive	Subash Runwal	1,20,85,030	2014-15
Runwal Symphony	Runwal Developers Pvt Ltd	70,00,000	2014-15
Total		38,06,61,255	

10. Accordingly as a result of the search action, the assessee has offered a sum of Rs 38,06,61,235/- as additional income over and above the regular income in the hands of the respective above group concerns for the financial years concerned as per the above working. For clarity, relevant portion of his s

"Q.16 .Please take reference of the above question and your response there to. In furtherance; of the same I would like to bring to your notice that we have analyzed some of the sale transactions recorded in the ERF system of your office which are for the sale of flats in the same project side. Runwal Elegante, Runwal Symphony & Runwal Anthurium. However, it is observed that the consideration value in all such instances which are entered in to ERP system is comparably much lesser than that of the consideration value of similar kind of flats as reflected in the above referred booking forms which are maintained manually. This very fact indicate that there is some hidden component of cash in such sale transactions which are recorded in ERF system and that the physical booking forms are inclusive of such cash component as a result of which, the deal value in such forms is comparably much higher.

I am also showing you the sworn statement dated 30. 11, 2014 of Shri Anant Modi Vice- president Sales of Runwal Group recorded on oath u/s 132(4) of IT Act wherein he has accepted various instances of on money receipts over and above the registered value of respective property. Further, the statements of various key persons of your organization as shown to you in the course of recording of statement till now also establish conclusively that out of books cash component is being accepted in sale of flats/ shops/ etc. under your supervision/ direction.

In this background, you are requested to re-visit all the documentary evidences shown to you and in the light of facts gathered by the department during the course of ongoing search proceedings, you are requested to avoid any evasive reply and furnish your clear cut explanation on the above mentioned findings.

Ans. *Your above observation is based on comparison of price of flats sold in the project Kunwal Elegante, Runwal Anthurium. There are various reasons for such variations, i.e. market conditions, terms of payment, negotiating power of the customer, requirement of liquidity & location of the flat i.e.garden view, road view etc, I state that it is not true that we have taken on money in case of instances where agreement value is lower in comparison to other flats in the Elegante and Anthorium project. Further, I would like to state that as mentioned earlier there are genuine delays for entering bookings into the ERP system. I also like to confirm that no money is charged separately from customers for various amenities/ parking.*

However at the same time I do not deny acceptance of on money in some cases due to liquidity crunch in the group and because of our concern of not to lose customers in a buyer's market. At present, I am not in position to identify such instances where cash component is involved in the total sale consideration. But at your insistence and in order to buy peace of mind I agree to apply the highest sale rate to all the flats /shops sold during the current year to arrive at the lump sum amount of such on money receipts.”

11. Similar details of receipt of on-money were found in respect of project handled by another director Shri Subodh Runwal which are tabulated by the AO in Para 5.10 of the assessment order. As per these details, on an average about Rs 25-35 lacs has been charged by the assessee in the form of on-money on sale of individual flats / shop. These facts were once again confronted to Shri Subodh Runwal during the course of search and his statement was recorded on oath, wherein he admitted a sum of Rs 63,39, 52.372/- as on-money received. For clarity his statement is reproduced as under:-

“Ans to Q.16: Sir as I have answered in earlier question I again reiterate that this project was a joint venture with HDFC Limited right from the inception till they exited. Subsequently to that the market has become very competitive and due to opening of a forest land we had to sell aggressively to achieve the numbers from the calendar year 2014, I accommodated a few customers who wanted to pay part consideration in cash. The difference in the above chart is specifically related to these customers who have been accommodated. I offer this difference as my income, I hereby reiterate and state that prior to this we have never accepted in cash for any of the units sold in that project.

Following is the excerpts of the relevant portion of his statement.

“Q.17 Please provide the details as to other flats in which similar practice is followed.

Ans. Although in the other cases, I do not agree that in all the cases cash has been accepted by me over and above the agreement value. But to avoid protracted litigations with the department and to buy peace I accept the difference appearing in the chart beginning from 1st January, 2014 till date as my additional income over and above the regular income for the respective years as on-money (Cash received over and above the agreement value). I am submitting the working market as Annexure-1 to this statement which has two pages.

Q.18 As per the working submitted as part of annexure to answer to question number 16, the amount of on money accepted in the project namely Runwal Greens (M/s Runwal Homes Private Limited), i.e. Rs.63,39,52,372/-. Please confirm?

Ans: Sir, due to reasons mentioned above I confirm the amount of Rs.63,39,52,372/- (which as per Annexure-1), as the on money accepted in the projects Rrunwal Green (M/s Runwal Homes Private Limited), and the same has been offered as additional income over and above the income declared in the M/s Runwal Homes Prviate Limited. Here I want to state that Live project is under the proprietorship of Mr. Subhash Runwal.”

12. On tht: basis of the above declaration at the time of search, the AO during the course ol assessment proceedings confronted assessee with these facts and asked the assessee as to why the income may not be taken accordingly. In response, the assessee vide letter dated 23.09,2036 admitted that the amount of Rs 18.82,59,020/- is liable to be added in their hands for the current year in respect of Runwal Elegante project at Oshiwara Andheri West for the A.Y. 2015-16. Relevant declaration made by the assessee is appearing in para 6, page 16 of the assesement order .

13. From the above it is quite clear that the assessee has very clearly and categorically accepted the fact of receipt of on money on sale of flats . Further the employee of the assessee have also accepted the fact that on money was being received, which was outside the regular books of accounts and was not intended to be shown or disclosed and would not have been detected had a search seizure action not been carried out in the case of the assessee .

14. On the basis of the above declaration at the time of search, the AO during the course of assessment proceedings confronted assessee with these facts and asked the assessee as to why the income may not be taken accordingly. In response, the assessee vide letter dated 23.09.2016 admitted that the amount of Rs 18,82,59,020/- is liable to be added in their hands for the current year.

15. During the course of appeal proceedings, the Ld AR has brought no additional evidence before me as to how and why the addition of Rs. 18,82,59,020/- worked out by the AO was unfair or unjustifiable. Since, the addition has been worked out on the basis of hard evidence found during the course of search, and relevant facts have been confirmed both by Sri Sandeep Runwal and Sri Subodh Runwal directors in their statements on oath as

reproduced above , as also by the other key functionaries of the company and the group as reproduced above , the same is upheld. **Consequently, the grounds no 1 and 2 taken by the assessee are rejected.”**

7. The Ld.AR for the assessee, at the time of hearing submitted that the issue involved in this appeal is covered in favour of the assessee by the decision of ITAT, Mumbai in the case of M/s Runwal Homes Pvt Ltd in ITA No.5621/Mum/2017, wherein under similar set of facts the ITAT has held that additions cannot be made towards undisclosed income on account of on-money receipts only on the basis of admission of the assessee and what needs to be added is only the amount quantified on the basis of incriminating material found as a result of search. The Ld.AR further submitted that the ITAT, further held that when assessee is following project completion method for recognition of revenue, on-money received towards sale of flats shall be taxed along with regular sale proceeds for the year in which such project is completed. The Ld. AR for the assessee further referring to the paper book filed, submitted that the AO has quantified on-money only on the basis of admission of the assessee during the course of search without appreciating the fact that in many cases, the booking amount mentioned in application for booking is lesser than the amount recorded in the books of account. Therefore, quantifying undisclosed income by taking an average rate and applying that rate for all flats is incorrect. The Ld.AR further referring to

the paper book page 60 submitted that in four flats in Runwal Elegante, the sale value as per books of account is higher than the amount shown in application for booking. Even for these four flats, the AO has determined difference by adopting sale rate of Rs.21,400 per sq.ft., but the fact remains that the assessee has charged Rs.23,000 to Rs.32,000 per sq.ft for these flats, whereas the AO has adopted Rs.21,400 per sq.ft. and then compared that rate to average rate worked out on the basis of saleable area of the flat. The Ld.AR further submitted tht when the assessee is following project completion method for recognition of revenue, the total receipts including on-money receipts should be taxed in the year in which the project is completed in all respects, whereas the AO has taxed total on-money in the year of admission by the assessee. In this regard, he relied upon various judicial precedents including the decision of Hon'ble Supreme Court in the case of CIT vs Balhari Investments Pvt Ltd (supra) and also the decision of Hon'ble Gujarat High Court in the case of CIT vs Advance Construction Co Pvt Ltd (2005) 275 ITRE 30 (Guj). The Ld.AR relied upon the decision of ITAT, Mumbai Special Bench in the case of Wall Street Construction Ltd & Others vs JCIT (2006) 101 ITD 156 (Mum)(SB).

8. On the other hand, the Ld.DR strongly supporting the order of the Ld.CIT(A) submitted that the assessee itself has quantified undisclosed

income on account of receipts of on-money from sale of flat and such admission has been re-iterated by filing a letter during the course of assessment proceedings on 23-09-2016, therefore, there is no reason for the assessee to go back from its admission without any valid retraction. Even now, the Ld.AR for the assessee is not disputing the fact of receipt of on-money. Therefore, once the fact has been admitted and which is supported by incriminating material found during the course of search, then whatever on-money received should be taxed on receipt basis irrespective of the fact that the assessee is following project completion method of accounting for recognition of revenue. The AO as well as the Ld.CIT(A) have apprised the facts in the right perspective in the light of various incriminating material found as a result of search coupled with statement recorded u/s 132(4) from the director of the company to make addition and hence, the addition made by the AO should be upheld.

9. We have heard both the parties, perused the materials available on record and gone through the orders of authorities below. The fact that the assessee is receiving on-money from sale of certain flats is not disputed. The assessee, during the course of search has categorically admitted that it has received on-money from certain customers. The assessee has quantified undisclosed income on account of on-money

receipt based on incriminating material found as a result of search. Such admission has been reiterated by filing a letter during the course of assessment proceedings on 23-09-2016. The AO made addition towards undisclosed income quantified on account of receipts of on-money from sale of flats on the basis of statement recorded during the course of search which is based on incriminating material in the form of application for booking flats found during the course of search. According to the AO, the assessee is selling flats for higher rate, whereas while recording sale consideration in the books of account in ERP system, showing much lesser sale consideration. The AO further observed that the sale price per sq.ft. in Runwal Elegante is between Rs.23,000 to Rs.32,000 per sq.ft. whereas in the books of account the assessee has considered much lesser sale price which is ranging between Rs.12,000 to Rs.21,600. Accordingly, the AO has determined undisclosed income by taking average rate of Rs.21,400 per sq.ft. and applied such rate for 21 flats sold in project Runwal Elegante to determine undisclosed income of Rs.18,82,59,020. It is the contention of the assessee that undisclosed income quantified during the course of search is under mistaken facts and also under coercion without referring to necessary documents. Therefore, only on the basis of admission during the course of search in statement recorded u/s 132(4), addition

cannot be made, more particularly, when the assessee has demonstrated with evidence that in many cases, the amount shown in the books of account is much higher than the amount recorded in incriminating material being application for booking. The assessee further contended that in 4 cases, i.e. Flat No.A-406, A-804, A-605 & A1601, the sale consideration as per ERP system in assessee's books is higher than or equal to amount recorded in incriminating material being application for booking. But the AO has taken average rate of Rs.21,000 and then compared such rate to the average rate determined by dividing total sale consideration from total saleable area ignoring the fact that the average rate has been determined by taking into account rate per sq.ft. on carpet area of the flat.

10. There is no dispute with regard to the fact of receipt of on-money from sale of flats. This fact has been admitted by the assessee including its director in the statement recorded during the course of search. This fact is also supported by incriminating material found as a result of search. During the course of search, the department has found application form, booking form of certain flats as per which the rate charged for sales is higher than the amount recorded in the books of account. Accordingly, undisclosed income of Rs.18,82,59,020 has been quantified from sale of 21 flats in project Runwal Elegante. The

assessee has filed paper book containing copies of application for booking found during search. On perusal of documents filed by the assessee, we find that in 4 cases, the rate charged by the assessee and recorded in the books of account is much higher than or equal to the amount recorded in the incriminating material found in the form of application for booking. We further observe that the AO has arrived at average rate of Rs.21,400 per sq.ft. and then applied such rate to 21 flats and compared the rate as per books of account of the assessee recorded in ERP system to arrive at a difference of Rs.18,82,59,020. While doing so, the AO has determined average rate as per books of account by dividing total sale consideration from the saleable area of the flat to arrive at average rate per sq.ft., whereas while determining undisclosed income average rate has been arrived at on the basis of total carpet area of the flat. There is a lacunae in the quantification of undisclosed income inasmuch as that by adopting average rate of Rs.21,400 per sq.ft. and applying such rate uniformly to all flats without any evidence found as a result of search. In fact it is the case of the assessee also. The assessee never disputed the fact of receipt of on-money; however, disputed the manner in which the undisclosed income has been quantified. Therefore, we are of the considered view that the AO was incorrect in quantifying undisclosed income by adopting average

rate and then applying such rate to all flats sold in the project without any evidence found as a result of search. This finding of ours is supported by the decision of ITAT, Mumbai Bench "D" in assessee's group company, M/s Runwal Homes Pvt Ltd in ITA No.5621/Mum/2017 dated 20-12-2017, wherein under similar set of facts, where the assessee is also a party to the search proceedings, after considering relevant materials, the co-ordinate bench held that on-money receipt should be worked out on the basis of evidence found as a result of search. The relevant portion of the order of ITAT is extracted below:-

"7. We have heard the rival submissions and carefully considered the same along with the orders of tax authorities below. The first issue involved in this ground before us is whether the Assessing Officer was correct in law in adding a sum of Rs. 63,39,52,372/- as alleged on money received on sale of the flats and the second issue involved is if any addition has to be made during the impugned assessment year, whether the addition of the on money has to be made on the basis when the on money has been received or on the basis of the method of accounting followed by the assessee. It is not disputed that the assessee is following project completion method. The undisputed facts before us are that search and seizure action u/s. 132 of the IT Act took place on 17.11.2014 on the assessee as well as its group company. The assessee submitted return of income on 31.10.2015 declaring total income of Rs.13,48,82,480/-, which was subsequently revised to Rs. 13,45,71,200/- on 7.07.2016 and finally revised the return on 30.12.2016 by including therein a sum of Rs.72,50,000/- and paid taxes thereon. The sum of Rs.72,50,000/- declared by the assessee relate to the Chestnut project, single building project completed during the year in respect of which evidence was found during the course of the search for on money received and it was also surrendered by the assessee company during the course of the search and is included in the sum of Rs.63,39,52,372/- added by the Assessing Officer to the assessee's income. We noted that the

Assessing Officer while computing the total income of the assessee has considered the revised return declared by the assessee at Rs. 13,45,71,200/- Therefore, the addition of Rs.72,50,000/- has to be confirmed and, accordingly, we confirm the said addition of Rs.72,50,000/-.The assessee has also included the said amount in its revised computation and paid taxes thereon on 27.12.2016.

8. Now coming to the other addition included in the sum of Rs. 63,39,52,372/-. The following additions were made by the Assessing Officer -

	Project namely Runwal Greens Towers -1,2 & 3 and Commercial	Rs. 31,14,02,412/-
	Project namely Runwal Greens Towers - 4, 5, 6, 7 & 8	Rs.31,52,99,960/-
	Total	Rs.63,39,52,372/-

It is not disputed that the on-money on the basis of the seized material received by the assessee comes to Rs. 19,94,78,821/-out of which the addition of Rs. 72,50,000/- has already been confirmed by us and has been duly taken in to account by the assessee in the revised computation of income submitted by the assessee during the course of hearing before the Assessing Officer and on which the assessee has duly paid the tax. Now the question before us remains to the disputed addition amounting to Rs. 62,67,02,372/- The total on-money on the basis of the seized material found during the course of search relate to the period of the booking done from March 2014 to November 2014. The amount so worked out comes to Rs. 19,94,78,821/- as detailed under:-

On-money of flats as per seized material – Rs. 13,44,68,725/-

On-money of shops as per seized material – ` 6,50,10,096/-

Out of the said sum Rs. 72,50,000/- has already been confirmed by us in the preceding paragraph, therefore, on-money on flats as per seized material remains at Rs. 19,22,28,821/-. We noted that the Assessing Officer on the basis of seized material found during the course of search relating to the period of March 2014 to November

2014 took the view that the assessee might have received on-money in all the bookings and therefore, he estimated cash portion on other units sold by taking the highest rate of sale of other units although no on-money evidence were found during the course of search. The Assessing Officer while confirming the addition relied on the statements of the staff of the assessee as well as the statement of the Director Shri Subodh Runwal, mainly in reply to question nos. 16, 17 and 18, which are reproduced as under:

"Ans to Q.16

"Sir as I have answered in earlier question I again reiterate that this project was a joint venture with HDFC Limited right from the inception till they exited. Subsequently to that the market has become very competitive and due to opening of a forest land we had to sell aggressively to achieve the numbers from the calendar year 2014, I accommodated a few customers who wanted to pay part consideration in cash. The difference in the above chart is specifically related to these customers who have been accommodated. I offer this difference as my income. I hereby farther reiterate and state that prior to this we have never accepted in cash for any of the units sold in that project."

Thus the assessee has acknowledged the discrepancy and has accepted that "on-money" has been taken in all the above instances.

Further the assessee was asked to state the other instances where unaccounted cash has boon taken in lieu of sale of residential / commercial units in their projects. Following Is the except of the relevant portion of his statement

"Q.17 Please provide the details as to other flats in which similar practice is followed.

Ans: Although in the other cases, I do not agree that in all the cases cash has been accepted by me over and above the agreement value. But to avoid protracted litigations with the department and to buy peace I accept the difference appearing in the chart beginning from 1st January 2014 till date as my additional income over and above the regular income for the respective years as on- money (Cash received over and above the agreement value), I am submitting the working marked as Annexure~1 to this statement which has two pages.

Q.18 As per the working submitted as part of annexure to answer to question number 16, the amount of on money accepted in the project namely Runwal Greens (M/s Runwal Homes Private Limited}, is Rs.63,39,52,372/- Please confirm ?

Ans; Sir, due to reasons mention above I confirm the amount of Rs. 63,39,52.372A (which as per Annexure-1), as the on money accepted in the projects Runwal Green (M/s. Runwal Homes Private Limited), and the same has been offered as additional income over and above the income declared in the M/s. Runwal Homes Private Limited. Here I want to state that Olive project is under the proprietorship of Mr. Subhash Runwal."

We have gone through the answer to question nos. 16, 17 and 18. We noted that in reply to question no.16, Director of the assessee company stated that initially the project was joint venture with HDFC Limited. Subsequently, when the market has become more competitive and due to the opening of the forest land they had to sell aggressively, in order to achieve the numbers from the calendar year 2014 and, therefore, in order to accommodate few customers who wanted to pay part consideration in cash, they accepted cash for few units. He has categorically stated that prior to that date they have never accepted any cash. In reply to question no.17, he has categorically stated that he did not agree that in all cases cash has been accepted over and above the agreement value but he agreed to surrender the difference as its additional income over and above the regular income for the respective years as on-money to avoid protracted litigations with the department and buy peace. On that basis the total on-money received was worked out at Rs. 63,39,52,372/- and added to the income of the assessee. It is undisputed fact that on the basis of the documents and evidence produced before us, the copy of which are available at pages 436 to 441 of the paper-book, the on money received, on the basis of the seized documents, by the assessee in respect of flats comes to Rs. 13,44,68,725/-and in respect of shops comes to Rs. 6,50,10,096/-. For the rest of the addition in respect of which no incriminating material was found, we noted from pages 439 to 441 of the paper book, the Assessing Officer just estimated the on-money of the flat @15,750/- per sq. ft totaling to Rs. 33,47,33,101/- and that of the shops @26,000/- totaling to Rs. 9,97,40,450/-. But the Assessing Officer was fair enough to state that no incriminating material was found but had estimate @15750/- per sq. ft for flats and @26000/- per sq. ft. for shops. This is a case where assessment has been

completed u/s. 143(3), therefore, the addition has been made by the Assessing Officer as if the assessee has received whatever is stated in the documents executed by the assessee. In our opinion, the onus is on the Revenue to prove that the assessee has actually received the consideration much more than what has been agreed to or stated in the documents executed between the intended buyer and the assessee. No cogent material or evidence was brought to our knowledge by the learned DR even though he has vehemently relied on the order of the Assessing Officer as well as the statement of the Director of the company, which may prove that the assessee has received consideration @15750/- per sq. ft for flats and @26000/- per sq. ft. for shops. There has been search and seizure in the case of the assessee. If the assessee would have received consideration much more than what is stated in the documents, for which no evidence is found during the course of search, in our opinion, no addition can be sustained. There cannot be any agreement against the statute. The assessee agreed for declaration of the income for which no material was found merely to avoid protracted litigations with the department and buy peace. The assessee has earned income; the onus is on the Revenue to prove that the income has accrued to the assessee. Even otherwise also since there has been a search in the case of the assessee, if the assessee would have earned such income there must have been some evidence found that either the assessee has made investment outside the books of account or has spend this income in one way or the other. Income tax is leviable u/s. 4 of the I.T Act on the real income. If income has not accrued or received by the assessee, the assessee cannot be burdened for income tax liability. From the documents available on record, it is apparent that the Assessing Officer has estimated the booking amount and on that basis assumed that the assessee would have received the on-money. He made the presumption as if the assessee has sold all the flats @15750/- per sq. ft and the shops @26000/- per sq. ft. From the documents in the booking, it is evident that different flats and different shops have been booked at different rates by the assessee. From page 443 of the paper-book, as found during the course of search, the assessee has given discount on the bookings at different rates to different customers. We noted that in respect of two shops although the base rate has been mentioned @21,000 per sq. ft, the assessee has given discount around ` 4150 per sq. ft. and booked the shops @17500 per sq. ft including the club charges of Rs. 750/-. Similarly, in respect of flat also we noted that the base rate has been mentioned @12,000/- per sq. ft and after adding floor rise, club

charges, infra charges etc., total rate came to Rs. 14375 per sq. ft. and the assessee has also given discount of ` 1000/- and ultimately booked the flat @13,350 per sq. ft. Even on the same very page had the details of the flats which had been booked @ 14550/-, 14300/- and Rs. 13225/- per sq. ft. Therefore, the conclusion drawn by the Assessing Officer while making the addition is based just on assumption as if the assessee the assessee has sold all the flats @15750 per sq. ft.

In view of this fact, we delete the addition of Rs. 33,47,33,101/- made on the basis of estimating the sale consideration in respect of the flats @15750/- per sq. ft. and Rs. 9,97,40,450/- based on the presumption as having being booked shops @26000/-."

11. Coming to the second leg of arguments of the assessee. The Ld.AR for the assessee submitted that since the assessee is following project completion method for recognition of revenue, total receipts from the project including on-money receipts shall be taxed in the year in which the project has been completed. The Ld.AR further submitted that since the project was not completed during the year, the amount received by the assessee is merely a booking amount, i.e. only advance received for booking flat; therefore, the same cannot be added during the impugned assessment year. In this regard, he relied upon the decision of ITAT, Mumbai Bench "D" in assessee's group concern's case cited supra wherein the co-ordinate bench, by following various decisions including the decision of Hon'ble Supreme Court in the case of CIT vs Bilhari Investments Pvt Ltd (supra) and also Special Bench decision of Mumbai Benches of the Tribunal in the case of Wall Street

Construction Ltd vs JCIT 101 ITD 156 (Mum)(SB) held that when assessee is following project completion method for recognition of revenue, total receipts from the project including on-money received should be taxed in the year in which the project is completed. The relevant portion of the order is extracted below:-

“..... The learned AR at this juncture has taken a argument that it is a case where the assessee was following project completion method. Project completion method has been followed consistently by the assessee. Both the projects relating to the flats and the shops in respect of which the evidence were found for receipt of on-money by the assessee were not completed during the year. Since these projects were not completed during the year, the amount received by the assessee is merely a booking amount i.e. only the advance received for booking of the flat/shop. These amounts therefore in our view cannot be added during the impugned assessment year. We are of the view that the project completion method is one of the method of accounting where the expenses identifiable with the project are to be allowed in the year when the project is completed. Similarly, the receipt from the project is to be accounting for as income only in the year in which the project is completed. Since both the project for the flats as well as shops were not completed during the year therefore, respectfully following the decision of the hfon'ble Supreme Court in the case of CIT vs. M/S Bilahari Investment (P) Ltd 299 ITR 1 (SC), Special Bench decision of the Mumbai Benches of the Tribunal in the case of Wall Street Construction Ltd. vs. JCIT 101 ITD 156 (SB)(Mum); ITO vs. Panchvati Developers 115 TTJ 139 (Mum) and that of JCIT vs. K Raheja (P) Ltd. 102 ITD 314 (Mum), we delete the addition during the impugned assessment year and direct the AO to make the addition in respect of these on-money in the respect assessment years in which the projects have been completed.”

12. In this view of the matter and respectfully following co-ordinate bench decision in the case of Runwal Homes Pvt Ltd (supra), we are of the considered view that the AO was erred in quantifying undisclosed income by taking average rate of Rs.21,400 per sq.ft. and applying such rate to 21 flats without any evidence found as a result of search. Hence,

direct the AO to restrict the quantification of undisclosed income to the extent of incriminating material found as a result of search. We further direct the AO to delete addition made towards on-money received from sale of flats in the impugned assessment year and make addition in the year in which the project has been completed, since the assessee is following project completion method for recognition of revenue. Hence, we set aside the issue for the limited purpose of quantification of undisclosed income on the basis of incriminating material found as a result of search and to make addition in the year in which project is complete.

13. In the result, the appeal filed by the assessee is partly allowed, for statistical purpose.

Order pronounced in the open court on 27th July, 2018.

Sd/-

sd/-

(Mahavir Singh)	(G Manjunatha)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dt : 27th July, 2018

Pk/-

Copy to :

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

/True copy/

By order

Sr.PS, ITAT, Mumbai