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

BEFORE SHRI SHAMIM YAHYA, AM AND SHRI RAM LAL NEGI, JM

ITA No. 6656/Mum/2016
(Assessment Year: 2008-09)

ACIT-27(2), Room No. 420, 4th Floor, Tower No. 6, Vashi Rly. Station Complex, Vashi, Navi Mumbai-400 703	Vs.	M/s. Merit Magnum Construction Samruddhi, Office Floor, Plot No. 157, 18th Road, Nr. Ambedkar Garden, Chembur (East), Mumbai-400 703
PAN/GIR No. AACFV 9391 F		
(Revenue)	:	**(Assessee)**

CO No. 61/Mum/2018
(Arising out of ITA No. 6656/Mum/2016)
(Assessment Year: 2008-09)

M/s. Merit Magnum Construction Samruddhi, Office Floor, Plot No. 157, 18th Road, Nr. Ambedkar Garden, Chembur (East), Mumbai-400 703	Vs.	ACIT-27(2), Room No. 420, 4th Floor, Tower No. 6, Vashi Rly. Station Complex, Vashi, Navi Mumbai-400 703
PAN/GIR No. AACFV 9391 F		
(Assessee)	:	**(Revenue)**

Revenue by	:	Shri Abhakala Chanda
Assessee by	:	Shri Paresh Shaparia

Date of Hearing	:	06.08.2018
Date of Pronouncement	:	25.10.2018

O R D E R

Per Shamim Yahya, A. M.:

This appeal by the Revenue and cross objection by the assessee arise out of the order of the learned Commissioner of Income Tax (Appeals)-37, Mumbai ('ld.CIT(A) for short) dated 01.08.2016 and pertains to the assessment year (A.Y.) 2008-09.

2. The grounds of appeal raised in Revenue's appeal read as under:

1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs.699,58,00,000/- being the consideration received on transfer of development right holding that no income accrued to the assessee on payment of security deposit.
2. On the facts and circumstance of the case and in law, the Ld.CIT(A) failed to appreciate that the Development Agreement entered into between the assessee and the co-developer clearly provided for consideration on transfer of development right.
3. On the facts and circumstance of the case and in law, the Ld.ClT(A) failed to appreciate the fact that consideration was camouflaged as security deposit to avoid incidence of taxation since the parties involved in transaction were mutually related.
4. On the facts and circumstance of the case and in law, the Ld.CIT(A) failed to appreciate the fact that when no other assessment in respect of the same income has been made for any other year, the assessment made by the AO for the year under consideration has become a substantive assessment.
5. On the facts and circumstance of the case and in law, the Ld.ClT(A) has not given a finding of fact regarding the correct assessment year in which the substantial assessment for consideration for transfer of the development rights ought to be made.
6. The appellant prays that the order of the ClT(A) on the above grounds be reversed and that of the Assessing Officer be restored.

3. The grounds of appeal raised by the assessee in cross objection read as under:

I. CONFIRMATION OF RE-OPENING PROCEEDINGS U/S 147 IS BAD IN LAW
1. The Learned CIT(A) erred in confirming the re-opening proceedings u/s 147 as valid
2. The Learned CIT(A) ought not to have confirmed the re-opening u/s 147 of the I. T. Act 1961.
3. The re-opening u/s 147 is bad in law and the order is required to be quashed.
II. <u>CONFIRMATION OF THE PASSING OF ORDER U/S 143(3) / 147 / 144A ON PROTECTIVE BASIS VITIATES THE PROCEEDINGS U/S 147 AND IS BAD IN LAW</u>
1. The Learned CIT(A) erred in not passing a speaking order in relation to ground 2 being the passing of order u/s 143(3) / 147 / 144A on protective basis
2. The Learned CIT(A) ought to have passed a speaking order in relation to ground 2 being the passing of order u/s 143(3) / 147 / 144A on protective basis. Thereby ought not to have dismissed the said ground,
3. The passing of order u/s 143(3) / 147 / 144A on protective basis is bad in law and the order is required to be quashed.

4. At the outset, the ld. Counsel of the assessee has submitted that he shall not be pressing ground no.1 relating to confirmation of reopening proceeding u/s. 147 of the Act as bad in law. Accordingly, ground no. 1 of the assessee's cross objection is dismissed as not pressed.

5. Brief facts of the case are that the assessee is a firm engaged in the business of construction and development in real estate and other related activities like investments, finance, etc. It was formerly known as M/s. Vimal Builders. A survey under section 133A of the Act was conducted in the business premises of the assessee on 24.01.2012. During post-survey inquiry and assessment proceedings for AY 2010-11, the details filed by the assessee revealed that it had entered into a Joint Development Agreement (hereinafter, 'JDA') with M/s. Supernal Realtors Pvt. Ltd. (hereinafter, 'SRPL') on 16.01.2008 for a consideration of Rs.741.74 crores for a project at Wadala. Since, the aforesaid amount was not disclosed in its return of income filed for the AY 2008-09, the re-assessment proceedings were initiated by issue of notice under section 148 of the Act dated 07.01.2013, on the belief that income chargeable to tax had escaped assessment within the meaning of section 147 of the Act. The assessee was requested to state as to why the receipt of Rs.741.74 crores on account of JDA with M/s. SRPL for conferring co-development rights for the Wadala agreement dated 16.01.2008 should not be added to their total income.

6. The Assessing Officer (A.O.) summarized the assessee's response in this regard as under:

a) The assessee is a partnership firm engaged in the real estate business and follows the Project Completion Method of accounting. The assessee had under certain arrangement acquired certain rights to the property being all the piece and parcel of land bearing plot Nos. 9, 10, 304 to 306, 314 to 316, Sewari , Wadala Scheme No.57, Dadar Naigaon Division, Wadala, Mumbai. The assessee firm entered into a Joint Development Agreement dated 16.01.2008 with M/s. Supernal Realtors Pvt. Ltd. ('SRPL') Under the said agreement, M/s. SRPL agreed to jointly develop the project with the assessee and arrange for and / or procure all financing required for the project. In consideration of SRPL funding and constructing, the assessee agreed to settle all pending suits and other litigations affecting or in any manner relating to the said property and make out a clear marketable title to ^the said property and jointly develop with M/s. SRPL and share with M/s. SRPL the proceeds realized from the sale of units in the manner described in the said Agreement. The assessee has required M/s. SRPL to provide a security deposit in order to ensure that M/s. SRPL shall not default in its commitments. The security deposit was refundable upon completion of the project.

b) In its final account and Tax Audit Report, the assessee firm had shown receipt of Rs.60.97crores as security deposit and Rs.2.05 crores as additional security deposit from M/s. SRPL during the year under consideration. The Assessing Officer during the course of original assessment proceeding had asked for a break-up of the Work- in-Progress (WIP).The assessee furnished the same vide letter dated 07.09.2010, wherein, the WIP included an amount of Rs.90.01 lakh being interest on the security deposit/The AO after perusing the details, allowed the claim for the interest and passed an assessment order under section 143(3) making certain disallowance under section 14A of the Act. Despite the above, the assessee- firm was served with notice under section 148 of the Act.

c) The project under the said agreement is a Slum Rehabilitation Project (SRP) and it is only after the said project is completed will the assessee be entitled to exploit the balance land for construction of saleable tenements. The constructions of rehab/ transit buildings was incomplete as on the relevant balance sheet date i.e. 31.03.2008 It is apparent that the assessee has not generated any income till date. As per JDA, the assessee had to give a vacant and demarcated plot to M/s. SRPL Since, the balance land (sale plot) has not been made vacant and demarcated, the steps enumerated in JDA did not take place. Hence, no consideration is received nor transfer has taken place as the balance land has not been made vacant or handed over to SRPL.

d) The assessee has received a sum of Rs.60.97 crores as security deposits and Rs.2.05 crores as additional security deposits up to 31.03.2008 and Rs.3.03 crores as security deposits and Rs.22.47 crores as additional security deposits in subsequently years aggregating to total amount of Rs. 88.52 crores.

e) In any transaction of sale there are two parts - (i) to deliver the goods to the transferee or buyer and (ii) to receive payments by the seller from the buyer. In assessee's case the balance land has not been handed over and only nominal

security deposits of Rs. 88.52 crores has been received out of total security deposits which reduced from Rs.741.74 crores to Rs.310 crores as per Clause 8.2(b) of the JDA. Therefore, the transaction cannot be treated as sale. Reliance has been placed on the decision of the Hon'ble Bombay High Court at Goa in the case of *CIT v/s. Sadia Shaikh.*

f) The decision of Hon'ble Bombay High Court in the case of *Chaturbhuj Dwarkadas Kapadia v/s CIT[129* Taxman 497] is distinguishable on facts The assessee has referred to the decision of Hon'ble Allahabad High Court in the case of *CIT v/s Najoo Dara Deboo* [2013] 38 Taxman 258 wherein it has been held that capital gains will be charged only on receipt of sale consideration after development of land and not when agreement was signed for development of land. The assessee has also referred to the decision of Hon'ble Gujrat High Court in the case of *CIT v/s. Shivalik Buildwell Pvt. Ltd.* [2013] 40 Taxman 219 wherein it is held that transfer is complete only on receipt of sale consideration after transfer of land and profit would arise only on transfer of title of property and therefore, receipt of any advance or booking amount could not be treated as trading receipt of the year under consideration. Reliance was also placed on the decision of Hon'ble Supreme Court in *CIT v/s. Shoorji Vallabdas* andCo.[1962]46 ITR 144 where in it was held that hypothetical income cannot be taxed.

g) Te co-developer M/s. SRPL has shown it in their audited balance sheet as secudtv deposits as on 31.03.2008 under the head current assets, loans and advances. There is no real accrual of income to the assessee. In support of their contention, the decision in the case of *CIT v/s. Birla Gwalior Pvt. Ltd.* [1973] 89 ITR 266(SC) and *R.B. Jodha Mal Kuthiala Vs/. CIT* [1971] 82 ITR 570(SC) have also been referred to.

h) Decision in the case of *CIT v/s. Usha International Ltd.* [348 ITR 485] regarding reopening of the assessment prompted by a mere change of opinion has been referred to and it has been contended that since original assessment order was passed after accepting the return which contained existence of security deposits and additional security deposits received from SRPL, the assessment cannot be reopened as it amounts to change of opinion.

i) The income is said to accrue when the obligations of developers are fulfilled and the project is completed. It is not mandatory for all real estate developers to work out their profit by following percentage of completion method as prescribed by ICAI under AS-7.

j) Without prejudice to above, the assessee has stated that if the security deposit of Rs. 741.74 crores which got reduced to Rs.310 crores as per clause 8.2(b) of JDA is treated as income, the estimated expenses to be incurred for construction of transit and rehab buildings and fulfilling other obligations as per JDA (refer Clause 6 of JDA), which approximately Rs.819.15 crores as per working attached ought to be allowed.

k) The assessee firm has referred to various other issues referred in its letter dated. 04.02.2013 whereby objections to reopening were raised. Since, the

objections to the reopening originally filed on 04.02.2013 as well as, additional objections filed on 07.01.2014 were disposed of by a speaking order dated 09.01.2014, for the sake of brevity the same is not repeated here.

I) The assessee has contended that if JDA is considered *in toto* security deposit, hich is a liability, should not be treated as income of the assessee firm.

7. The A.O. was not satisfied with the above. He referred to the various aspects of the agreement. He opined that it was observed that the rights granted to the co-developers are substantial rights. The income in the form of consideration amount arose and accrued to the assessee-firm on grant of these substantial development rights and right to sell, lease, transfer or other disposal of the built up premises to the co-developer. The assessee firm is disputing the taxation of income on the ground that i) only some amount has been received against the consideration amount which is in the form of security deposit and ii) No transfer has taken place as the possession over the vacant land has not been given to the co-developer. However, it is not disputed that the substantial development rights were transferred to the co-developer M/s SRPL by virtue of JDA dated 16.01.2018.

8. The A.O. rejected the assessee's contention that there was no transfer giving rise to accrual/receipt of income as possession of the balance vacant land was not given to M/s. SRPL. He noted that the subject matter of the transfer is not the land itself but the development rights in it. That the possession of development rights was not disputed by the assessee. That it is observed that the assessee has obtained term loan of Rs.90 crores secured by the mortgage of Plot No. 10 in favour of Allahabad Bank. Therefore, he held that it is undisputed that the firm had clear title over a part of land also. That the assessee firm transferred substantial parts of such rights through JDA for a consideration. For this

he referred to the 'Rights of Co-Developers' in the agreement. From that the A.O. observed that Shri Vimal Shah, partner of the assessee firm is the person representing both developer and co-developer, i.e., assessee firm and SRPL. He observed that it clearly indicate that the assessee firm had a major say in the drafting of the JDA and consideration money has been camouflaged as security deposit. He observed that there is no force in the contention that the amounts received under the said agreement were security deposits and not the consideration because total consideration (in form of security deposit) was structured in the JDA and the consideration was to be received as per clause 8 of the JDA. Clause 8 of the JDA mentions as to how the consideration amount (so-called deposit) was to be paid to the assessee-firm:

i.	Total amount	Rs. 741.74 crores
ii.	Paid before execution of agreement	Rs. 37.09 crores
iii.	At the time of execution of agreement	Rs. 37.09 crores
iv.	From time to time as may be required by Assessee to fund the rehabilitation and settlement	Rs. 111.26 crores
v.	From time to time in proportion to the area out of Balance Land for which Commencement Certificate is received	Rs. 556.30 crores

9. The A.O. observed that the nature and schedule of payment indicate that it is the consideration amount that has been camouflaged as security deposit and moreover total amount was to be paid before commencement certificate is received. That it means that the assessee firm was not required to invest anything in the construction to be made on the balance land. The entire construction, sale and other incidental activities were to be carried out by the co-developer and the assessee firm had to simply transfer its development rights to the co-developer. The entire consideration amount was required to be paid to the assessee firm before commencement of work on Balance Land.

10. He further referred to the agreement that the assessee had no obligation towards investment to be made in the construction of the building on the balance land. Therefore, he held that the claim of the assessee that the consideration money in the JDA will be taxable on completion of the project is not tenable. He held that the income has accrued to the assessee on transfer of development rights to SRPL on securing of joint agreement on 16.01.2008. He further rejected the assessee's contention that JDA has been terminated as he noted that the copy of the letter dated 22.01.2012 of the Society was also furnished wherein it was mentioned that the society has terminated the development and power of Attorney. However, the assessee had not accepted the above termination and has disputed the termination. In books of account expenses have been booked in respect of this project even after 22.01.2012 and still being booked in the current financial year i.e. 2013-14. Further, the subsequent acts occurring after the accrual of income during A Y 2008-09 are not relevant to determination of income or profit for taxation. He further rejected the assessee's contentions that till the balance sheet date, i.e., 31.03.2008 only Rs.60.97 crores was received as security deposit. He referred to the concept of mercantile system of accounting and opined that the entire receipt of Rs.741.74 crores becomes taxable on the date of signing of co-development agreement granting substantial development as well as other rights. He held that the termination of agreement on 03.11.2012 does not affect the taxability of income on accrual basis in the assessment year 2008-09. As regards the estimated cost of the project submitted by the assessee, the A.O. held that the same was exaggerated. In view of the fact that the actual expenditure incurred upto 31.03.2014 is approximately Rs.41.83 crores only. He held that the claim of

estimated expenditure is not supported by certificate of any architect. Moreover, estimated expenditure cannot be higher than the estimate of revenue to be generated from JDA. That no prudent businessman will enter into such an agreement where estimated expenditure is higher than revenue to be received. That therefore, the claim of the estimated expenditure of Rs.819.15 is rejected.

11. He further referred to Clause 6.1 of the JDA which mentions that the estimated fund required for meeting the rehabilitation expenses in respect of the property is estimated at Rs.180 crores to Rs.200 crores. The A.O. concluded as under:

> 14.3 In the instant case, as discussed earlier, the entire consideration of Rs. 741.74 crores arisen and accrued to the assessee firm in A Y 2008-09. However, the assessee has not furnished details of any expense incurred in the same assessment year (i.e. A Y 2008-09), it has furnished the cost incurred in subsequent assessment years. Now let us examine as to whether the expenses incurred by the assessee firm after the assessment year under consideration can be allowed against the income that arose and accrued during A Y 2008-09. In this regard, reference may be made to the decision of the Hon'ble Supreme Court in the case of Calcutta Co. Ltd. vs. CIT 37 ITR 1. In this case the Hon'ble Supreme Court held that the accrued liability to be discharged at future date be allowed in cases where the assessee is following mercantile system of accounting. In this case the assessee and the JDA partner has quantified the estimated expenses at Rs. 180 to Rs. 200 crores. However, the expenditure is found to be excessive as the expenditure incurred up to financial year 2013-14 is approximately Rs. 41.83 crores only. Therefore, only this expenditure can be allowed against the revenue arose and accrued in the financial year 2007-08 relevant to A Y 2008-09 on transfer of development rights to SRPL Accordingly the difference amount (Rs. 741.41crores- Rs. 41.83 crores) i.e. Rs. 699.58 crores is liable to be added to total income of the assessee firm as business profits on transfer of the development rights to the co-developer M/s SRPL.

12. Thereafter, the A.O. referred to the direction of the Joint Commissioner of Income u/s. 144A of the Act. He referred to the requisition of the assessment records by the Addl. CIT. He referred to his observations. The Addl. CIT noted the A.O.'s observation that the

consideration amounts of Rs.741.74 crores were to be taxed in A.Y. 2008-09. He agreed with the A.O. in rejecting the expected expenditure of Rs.819.15 crores in this regard. Thereafter the Addl. CIT gave the following directions:

> 7. The assessee has unilaterally terminated the JDA by letter dated 03.11.2012 and adjusted the security deposit received from M/s SRPL. The assessee has admittedly received security deposit of Rs. 88.52 crores from M/s SRPL. This amount is liable to be taxed in the Assessment Year 2013-14 as the benefit derived from business u/s 28 of the Income-tax Act.
> 8. since the substantial development rights were transferred during the assessment year 2008-09 and part of the consideration money has been received, the revenue has to be recognized in this assessment year. If the revenue is not recognized in this assessment year, the revenue will not be able to tax it again due to limitation contained in the Income-tax Act. Further, the assessee has not offered any revenue in succeeding assessment years taking the plea that the project has been abandoned and development agreement with the Society has also been terminated.
> 9. The assessee has initiated arbitration proceedings wherein it has asked for compensation from M/s SRPL by taking the position that it had transfer-Table rights which were terminated by the society due to defaults committed by the co-developer M/s SRPL. However, the assessee has not recognized in any revenue on termination of JDA and abandoning of project although it has adjusted the entire security deposit of Rs. 88.52 crores.
> 10. In such circumstances, the Revenue is left with no option but to assess the income from the transaction resulting from the JDA in the assessment year under consideration on protective basis, and assess the income received by the assessee on unilateral abandoning of project, treating the project as abandoned (completed), inform of damages and adjustment (forfeiture) of security deposit on the termination of JDA on 03.11.2012 on substantive basis.
> 11. Therefore, the following directions are issued to the Assessing Officer-A. .Assess income from transfer of development and other rights to M/s SRPL in the Assessment Year 2008-09 on protective basis. Consideration amount to be taken as Rs. 741.74 crores and claim of expenses to be restricted to actual basis.
> B. Take action for assessing Rs. 88.52 crores received by the assessee and adjusted on unilateral termination of JDA on 03.11.2012, treating the project as abandoned/completed. Relevant Assessment Year being 2013-14.
> C. Keeps a periodical watch over the legal dispute regarding the project and if further amount is received on account of completion/abandoning of project the same should be taxed on the substantive basis.
> 12. The Assessing Officer is directed to assess the income accordingly.

13. After reproducing the above, the A.O. held that in view of the aforesaid binding direction of the Ld. Joint CIT the total income is computed as under:

Income as per order under section 143(3) dt 15.12.2010	19,17,410/-	
Add: as per para 14.3	699,58,00,000	699,77,17,410
Gross Total Income		699,77,17,410
Less: Deduction under Chapter VIA	Nil	-
Total Income		699,77,17,410

14. Before proceeding further we may gainfully refer to the provision of section 144A of the Act. The said section reads as under:

> **Power of Joint Commissioner to issue directions in certain cases.**
> **144A.** A Joint Commissioner may, on his own motion or on a reference being made to him by the Assessing Officer or on the application of an assessee, call for and examine the record of any proceeding in which an assessment is pending and, if he considers that, having regard to the nature of the case or the amount involved or for any other reason, it is necessary or expedient so to do, he may issue such directions as he thinks fit for the guidance of the Assessing Officer to enable him to complete the assessment and such directions shall be binding on the Assessing Officer :
> **Provided** that no directions which are prejudicial to the assessee shall be issued before an opportunity is given to the assessee to be heard.
> *Explanation.*—For the purposes of this section no direction as to the lines on which an investigation connected with the assessment should be made, shall be deemed to be a direction prejudicial to the assessee.

15. A reading of the above makes it clear that the above section provides for the Addl. CIT giving direction to the assessee for the guidance of the A.O. to enable him to complete the assessment. We find that on the premise of section 144A in the present case, the Addl. CIT has not provided any guidance to the A.O., rather he has vitiated the assessment order. Firstly, we note that in one part of his order, he has accepted the assessee's contention that the security deposit is a camouflaged receipt of income. While in another part he has directed that the JDA has been terminated on 03.11.2012. Hence,

the security deposit of Rs.88.52 crores is liable to be taxed in the A.Y. 2013-14 as the benefit derived from the business u/s. 28 of the Act. We note that A.Y. 2013-14 was never an issue in consideration in this case by giving such a direction, the Addl. CIT has clearly equivocated on this point. He further directed that the assessee's income from transfer of the development right to be assessed in A.Y. 2008-09 on protective bases. It is very strange that without any substantive assessment, how can there be a protective assessment. By making certain observations in this regard, the Addl. CIT has clearly referred to the uncertainty in the projects. In doing so, he is inferring that the addition of income done by the A.O. is not sustainable on substantive basis. In our considered opinion, this is very peculiar direction by the Addl. CIT. The A.O. despite noting that the direction of the Addl. CIT was binding on him has made the assessment only with reference to his observation in his para 14.3 of the order, which only speaks of clear addition in the hands of the assessee and not a protective assessment.

16. When the order of the A.O. was challenged before the ld. CIT(A), the ld. CIT(A) upheld the validity of reopening. Referring to certain case laws, the ld. CIT(A) held that since the security deposits as on 31.03.2008 was reflected in the current liability and provision, there was no real account of the income from the assessee. Here we note that the ld. CIT(A) has completely ignored the A.O.'s observation that the security deposits was a camouflage and a structure of the income receipt. Just merely because the same have been reflected in the balance sheet under the current liability and provision, the same cannot be a conclusive proof of the substance thereof. It is settled law that it is the

substance of the transaction and not the nomenclature that ignores. When the A.O. has clearly given a finding that this was a camouflaged income, the ld. CIT(A) should have unambiguously given a finding rejecting the same instead of getting under the shelter of nomenclature in the balance sheet to reject the A.O.'s finding. Thereafter, the ld. CIT(A) noted the observations of the Addl. CIT which we have already observed that which infact has vitiated the assessment order. He found fault in the Addl. CIT's directions that the amount should be added protectively without any substantive assessment. He proceeded to hold that mere receipt of security deposit does not accrue any income to the assessee. As the assessee has reflected the said security deposit under the head current liabilities and the other company has reflected the same under the head loans and advance in the balance sheet, therefore, he found the intention of the assessee to be clear. Accordingly, he directed that the addition of Rs.6,99,58,00,000/- should be deleted.

17. Against the above order, the Revenue has filed an appeal against the deletion of the addition and the assessee has challenged the reopening as well as the ld. CIT(A)'s not passing a speaking order on the issue that there could be any protective assessment without any substantive assessment. As noted earlier, the issue relating to reopening has not been pressed by the ld. Counsel of the assessee.

18. We have heard both the counsel and perused the records. The ld. Counsel of the assessee has made elaborate submissions in support of the deletion of the addition. He gave various propositions and referred to the several case laws.

19. The ld. Counsel of the assessee *inter alia* submitted that as per the joint development agreement balance land is to be made vacant and demarcated along with title and is to be handed over to SRPL along with the Commencement Certificate. That all the expenses in relation to development of the balance land is to be borne by the co-developer. That income/revenue for the developer and the co-developer is from the sale of the building on balance land/free sale building. That joint development agreement has neither been registered nor any stamp duty have been paid till date. That the said JDA dated 16.01.2008 is on a Rs.100 Non Judicial stamp paper. That there was termination of the developer agreement by the Wadala Village Welfare Co-op. Housing Society Ltd. on 22.01.2011. That as regards the current status of JDA, there are various pendency at various forums. That security deposit cannot be treated as income. That the real income has accrued to the assessee. That the assessee is availing project completion method. The ld. Counsel of the assessee has further referred to the Hon'ble Jurisdictional High Court decision in the case of *CIT vs. Chemosyn Ltd.* [TS-73-HC-2015 (Bom)]. That in the present case, the assessee has merely received security deposit which is to be refunded. The ld. Counsel of the assessee further referred to the accounting standard 9. The ld. Counsel of the assessee further extensively referred to the direction of the JCIT u/s. 144A. He further placed reliance upon the decision of the Hon'ble Bombay High Court in the case of *Pr. CIT vs. Mr. Fardeen Khan* (in ITA No.162 of 2016 (Bom). He further referred to the assessment in other years, i.e., A.Y. 2009-10 where after the verification, the A.O. held that the refundable security deposit cannot be taxed. He further referred to the assessment order of the assessee M/s. Money Magnum Nest Pvt. Ltd. (sister concern

of the assessee), wherein the security deposit upon entering into a JDA has rightly not been treated as income.

20. Upon careful consideration, we find that the A.O. in this case has given a finding that income has accrued to the assessee upon entering into the joint development agreement. The A.O. has given a finding that the joint development agreement was signed between the assessee and another concern where the person representing the assessee and the other concern was same person. The A.O. has given a finding that the JDA was so structured that the security deposit should be considered as part of the income. Accordingly, the A.O. has assessed the same as assessee's income. Thereafter, it is noted that the JCIT u/s. 144A has given an ambiguous direction wherein he has directed that the addition should be treated as protective assessment without specifying as to in which hand substantive assessment should be done. The ld. CIT(A) has elaborately dealt with this issue and referred to several case laws that there cannot be any protective assessment without any substantive assessment. Despite that he has not quashed the assessment on this account. In this regard, the assessee is aggrieved and in the cross objection it has been urged that the ld. CIT(A) has erred in not giving a speaking order on the issue of protective assessment. We find that in our considered opinion, this grievance of the assessee is well founded. It may be that being aware of the vitiation caused by the direction of the JCIT, the ld. CIT(A) has not given a speaking order on this issue. Be as it may, it was incumbent upon the ld. CIT(A) to give a speaking order on the validity of this assessment which has been directed by the JCIT to

be made a protective assessment without any substantive assessment anywhere or in any hand. It may not be out of place here to note that as held by the Hon'ble Apex Court in the case of *Kapoorchand Shrimal* [1981] 131 ITR 451 (SC) in connection with the appeal before the ld. CIT(A) that it is the duty of appellate authority to remove the errors in the order of authorities below and remit the issue with or without direction for reconsideration unless prohibited by law. Accordingly, since the ld. CIT(A) has not given a speaking order on this issue, we are of the considered opinion that the interest of the justice will be served if this issue is remitted to the file of the ld. CIT(A) to pass a speaking order on this issue as to whether he is sustaining or quashing the assessment on this issue.

21. The deletion of the addition on merits will be consequential to ld. CIT(A)'s speaking order on the assessee's challenge to the issue of protective assessment. In this connection, we note that the ld. CIT(A) has not addressed the A.O.'s view that the security deposit was income and JDA was so structured as to camouflage income as security deposit. That the person who signed the agreement on behalf of both the company was same person. The A.O. had also referred to the decision of the Hon'ble Jurisdictional High Court in the case of *Chatarbhuj Dwarkadas Kapadia vs CIT* 129 Taxman 497 (Bom). The ld. CIT(A) without dislodging A.O.'s finding has taken shelter under the headings in which this amount is reflected in the balance sheet. As already pointed out by us above it is the substance of the transaction which counts. If the ld. CIT(A) was of the opinion that the A.O.'s finding and observations regarding the

security deposits being a camouflage for income was incorrect, he should have clearly stated the same instead of simply referring to the nomenclature in the balance sheet. This line of the ld. CIT(A)'s reasoning is admittedly not sustainable in view of the settled law that it is the substance that counts and not the nomenclature.

22. The ld. CIT(A) has also not addressed the issue raised by the A.O. that the cancellation of JDA happened much later in subsequent year after the income has accrued during the year. Further, the A.O. has also noted that the assessee has not accepted the cancellation of JDA. It is nowhere emanating from the finding of the ld. CIT(A) that merely upon forfeiture of the said security deposit, the assessee has given up all its right pursuant to the agreement. The ld. Counsel of the assessee has himself admitted that various matters in this regard are pending before the various forums. Hence, we are of the considered opinion that the ld. CIT(A) should give a finding on the factual aspects raised by the Assessing Officer. Then only the issue of application of case laws will arise.

23. In view of the above discussion, we deem it appropriate to remit the issue on the merits of the deletion of the addition also to the file of the ld. CIT(A). While considering the merits of the addition, the ld. CIT(A) shall bear in mind the various case laws on this subject referred by the A.O. and the ld. Counsel of the assessee.

24. In the result, the Revenue's appeal as well as assessee's cross objection stands allowed for statistical purpose.

Order pronounced in the open court on 25.10.2018

Sd/-	Sd/-
(Ram Lal Negi)	(Shamim Yahya)
Judicial Member	Accountant Member

Mumbai; Dated : 25.10.2018
Roshani, Sr. PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT - concerned
5. DR, ITAT, Mumbai
6. Guard File

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai