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

Before Shri G Manjunatha (ACCOUNTANT MEMBER)

AND

Shri Ravish Sood (JUDICIAL MEMBER)

ITA No.4030/Mum/2016 - 2010-11
ITA No.4031/Mum/2016 - 2009-10
ITA No.4032/Mum/2016 - 2011-12

DCIT, Cent.Cir.8(4), Mumbai	vs	Sitara Builders Pvt Ltd Govardhan Bldg No.2, Dr Parekh Road, Prarthana Samaj, Mumbai PAN : AABCS4975L
APPELLANT		**RESPONDEDNT**

ITA No.4029/Mum/2016 - 2011-12

DCIT, Cent.Cir.8(4), Mumbai	vs	M/s Peccadally Estate Pvt Ltd Govardhan Bldg No.2, Dr Parekh Road, Prarthana Samaj, MumbaI AAECP3575N
APPELLANT		**RESPONDEDNT**

ITA No.4027Mum/2016 - 2011-12

DCIT, Cent.Cir.8(4), Mumbai	vs	M/s Mindset Estate Pvt Ltd Govardhan Bldg No.2, Dr Parekh Road, Prarthana Samaj, Mumbai PAN : AAFCM3426Q
APPELLANT		**RESPONDEDNT**

Revenue by	Shri Awungshi Gimson
Assessee's by	Shri Vijay Mehta

Date of hearing	17-05-2019
Date of pronouncement	31-05-2019

O R D E R

Per G Manjunatha, AM :

This bunch of 5 appeals filed by the revenue in respect of three different assessees are directed against separate, but identical orders of CIT(A)-47, Mumbai, dated 28-03-2016 and 30-06-2016 and they pertain to AY 2009-10, 2010-11 and 2011-12. Since facts are identical and issues are common, for the sake of convenience, these appeals were heard together and are disposed of by this consolidated order.

2. The revenue has, more or less, raised common grounds of appeal in all five appeals. Therefore, for the sake of brevity, grounds of appeal raised for AY 2009-10 in ITA No.4031/Mum/2016 are reproduced below:-

> *"1) "On the facts and in the circumstances of the case and in law, the Id CIT(A) erred in deleting the addition of on-money of Rs. 3,90,53,280/- received on sale of flats relying on the observation and decision in the case of ACIT vs. Janak Raj Chauhan (102 TTJ 316) (Amritsar) and Maheshwari Industries vs. ACIT (148 Taxman 74(Jodh.) (Mag)) without appreciating the facts that the addition was made on the basis of the statement of the Director Shri Haresh Mohanalal Mehta and three key employees of the* assesses *group namely Ms. Chaula Joshi (Sales and* Marketing *Executive of Rohan Group) and Mr. Vijay Jasani (Accountant of the Rohan Group) and also of Mr. Paresh Panchlotiya (Office Assistant/Liaison Officer) during the course of search. The CIT(A) further failed to appreciate that the Rohan Group had been searched earlier too on 10.08.2006 and even during the course of that search, the same Ms. Chaula Joshi had admitted to the fact that the group executed sales deed by accepting on money in cash which was over and above the agreement price."*

3. The brief facts of the case extracted from ITA No.4031/Mum/2016 are that Rohan group of entities, along with directors, family members and related parties was subjected to search & seizure action u/s 132 of the I.T. Act, 1961 on 26-05-2011. The assessee is also associated with the said group and search action was carried out on its registered office located at Govardhan Bldg No.2, Dr Parekh Road, Prarthana Samaj, Mumbai. Consequent to search, the case of the assessee was centralised and accordingly, DCIT, Cent.Cir.47, Mumbai issued notice u/s 153C of the I.T. Act, 1961 dated 28-03-2013 which was duly served on the assessee. In response to the notice, the assessee filed return of income on 21-10-2013 declaring income at Rs.77,79,119. The case was selected for scrutiny and notice u/s 143(2) and 142(1) of the Act, were issued. In response to notice, the authorised representative of the assessee appeared from time to time and filed various details, as called for.

4. During the course of assessment proceedings, the AO noticed that the assessee was engaged in the business of real estate development and has undertaken the project, named 'Moksh Plaza' at Borivali during the year under consideration. The AO further noted that during the course of search, unaccounted cash, jewellery and incriminating documents indicating suppression of sales, etc. were found and seized as per Panchanama prepared. In the course of search proceedings, statement of late Shri Jitendra Mehta

(demised subsequent to search) was recorded on oath u/s 132(4) of the Act, on 27-05-2011, where he had admitted undisclosed income of Rs.100 crores in respect of various entities of Rohan group. He had also reconfirmed the said disclosure in his statement recorded on 22-07-2011 and also filed entity wise break up of such disclosure. The AO further observed that during the course of search proceedings, statement of Shri Haresh M Mehta, director of M/s Rohan Devlopers Pvt Ltd was recorded on oath u/s 132(4) on 04-06-2011 wherein he had admitted that Rohan group was indulging in accepting on-money @30% over and above the registered value in sale deeds from the customers on sale of residential / commercial premises. Further, the statement of Ms. Chaulla G Joshi, sales and marketing executive of the group entities was recorded on oath u/s 132(4) on 26-05-2011 where she had admitted that the directors of the company have accepted on-money on selling residential flats / commercial premises. Similarly, statement of Shri Vijay Jasani, accountant of the group was recorded on 26-05-2011 where he had admitted that on-money has been collected from a buyer which is over and above the value mentioned in the sale deeds and the same is outside books of account. Likewise, statement of Shri Paresh Panchlotiya, liaisoning officer / office assistant was also recorded u/s 132(4) of the Act, on 26-05-2011 wherein he admitted that the group was

indulging in collection of on-money from sales over and above the value mentioned in registered documents.

5. During assessment proceedings, the AO, on the basis of statements of director and employees of the group, called upon the assessee to explain as to why income towards collection of on-money from sale of properties shall not be estimated @30% on total sales declared for the year under consideration. In response to show cause notice, the assessee, through its authorised representative, vide letter dated 13-01-2014 submitted that during the course of search, no incriminating material / evidence was found which indicated receipt of on-money from sales over and above registered value mentioned in documents in case of the assessee. Therefore, based on the statement of certain persons, estimating income towards collection of on-money, that too, in absence of evidence collected during the course of search is incorrect. The assessee further submitted that Shri Haresh M Mehta is not authorised to look after sales of assessee group. Therefore, the statement given by him during the course of search cannot be considered as relevant to assessee's case because when a person is not authorised to lookafter the business of the assessee, he is not aware of the facts. Therefore, unless there is corroborative evidence on record to prove that the assessee has collected on-money from sales, there cannot be any estimation by extrapolating documents found

during the course of search in some other cases or statement of persons, who is / are not authorised to give such statements. The assessee further submitted that the persons, who gave the statement have filed the retraction and also explained under what circumstance they were compelled to give statements of admission even though there is no reference to any incriminating material found which indicated collection of on-money. In this regard, he relied upon various judicial precedents including the instruction issued by CBDT dated 10-03-2003 where it was directed that no addition can be made unless the same is corroborated by any material brought on record.

6. The AO, after considering the submissions of the assessee and also by taking note of the statements recorded from the director and employees of group, came to the conclusion that the assessee has collected on-money of 30% over and above the value shown in the registered documents and accordingly, estimated undisclosed income from sale of flats @30% on sales declared for the year under consideration. The AO further observed that although the assessee claims that no incriminating material pertaining to the assessee was found and seized during the course of search, but fact remains that during the course of search enormous details regarding unaccounted income, suppression of sales and cash was seized from the group which clearly indicated that the group was indulging in receipt of on-money over and above

the value shown in the sale deed. He, further, observed that this was further supported by the statement of employees where they have admitted that the group is indulging in receipt of on-money and hence, there is no merit in the claim of the assessee that nothing on record to indicate receipt of on-money from sales. Accordingly, he rejected the arguments of the assessee and estimated 30% of total sales declared for the year towards on-money and made addition to the returned income. The relevant findings of the AO are as under:-

> "7.38 The assessee has submitted that the seized material pertains to only few flats/ projects. The assessee has submitted that no evidence is found in the course of search with respect to sales in the other projects. After careful consideration of the facts of the case and the submissions of the assessee it is seen that the contention of the assessee that the income should not be extrapolated to the other projects and the other group companies is nothing but an eye wash. It is observed that the assessee is only harping upon its argument that there is no evidence to establish that on money is received in of its other projects.
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> 7.39 The contentions of the assessee cannot be accepted as there is no reason as to why the assessee would charge on money in one project and not in the other. More so, in the statement given by Mr, Haresh Mohanlal Mehta, director of Rohan Developers Pvt. Ltd., he has clearly stated that the group is accepting on money on sales. Thus, the remark and observations for receipt of on money are for the group as a whole and not individual project. It is very obvious that if the assessee is involved in accepting cash in one project then definitely he would be doing the same for all the projects. In the backdrop of the seized material, it is also observed that the assessee has failed to convincingly establish that no on money was accepted on sales, Accordingly, I hold that the income with respect to receipt of on money to the extent of 30% of sales needs to be added in all the projects of the company for all the years.
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> 7.40 During the year consideration, the sales made by the company is Rs. 13,01,77,600/- and 30% on account of on money on the above works out to Rs.3,90,53,280/-. Therefore, in view of the observations made, I am adding the income on account of on money to the tune of Rs. 3,90,53,28Q/-. Penalty

> proceedings u/s. 271(1)(C) of the Act are separately initiated for concealment of income and furnishing inaccurate income."

7. Aggrieved by the assessment order, the assessee preferred appeal before the CIT(A). Before the CIT(A), the assessee challenged the addition made by the AO towards estimation of on-money on sales on the ground that without reference to incriminating material found as a result of search, no addition could be made in assessments framed u/s 153C of the Income-tax Act, 1961. The assessee further contended that unless the AO arrive at a satisfaction with reference to incriminating material found as a result of search, the proceedings u/s 153C cannot be initiated. Therefore, in absence of any material found as a result of search and also nexus between incriminating material with satisfaction, the proceedings initiated u/s 153C is void ab initio and liable to be quashed. Insofar as addition made by the AO towards estimation of on-money from sales, the assessee submitted that although the AO has stated that there are incriminating materials seized which is marked as Annexure A-1, but on perusal of the seized material found during the course of search clearly indicates that those papers did not belong to the assessee and therefore, based on material which is not belonging to the assessee, no addition could be made in the hands of the assessee towards on-money unless the AO establishes with cogent materials that the assessee is indulging in receipt of on-money. The assessee further submitted that the documents

relied upon by the AO is nothing but dumb documents where nothing has been recorded except the rates pertaining to sale of flats. Further, the contents of seized material mentioned on page 114 neither related to the assessee nor anything written about receipt of on-money. Although, the AO has relied upon statements of Shri Haresh M Mehta, director and other employees of the group, but fact remains that nowhere in the statement, they have indicated the name of the assessee and collection of on-money from sale of flats. Further, the persons, who gave the statement have retracted their statements by filing affidavit and also explained the circumstances under which they gave admission in the statement recorded u/s 132(4). The assessee has also explained the seized materials found n the possession of Shri Haresh M Mehta, as per which, none of the seized material pertained to business of the assessee or receipt of on-money, rather, all seized papers related to personal affairs of Shri Haresh M Mehta. Therefore, in absence of any material found as a result of search, which suggests receipt of on-money, estimation of on-money @30% on sales declared for the year is totally incorrect.

8. The Ld.CIT(A), After considering relevant submissions of the assessee and also by relying upon various judicial precedents including decision of ITAT, Special Bench in the case of All Cargo Global Logistics vs DCIT I.T.A Nos. 5018 to 5022 & 5059/M/10 held that it was clear from the records that necessary

free condition to issue notice u/s 153C is that money, bullion, jewellery or other valuable article or thing or books of account belonging to a person other than the person searched, should have been seized or requisitioned. Further, as per circular No.24/2015(F.No.279-Misc-140-2015-ITJ), the issue of satisfaction of the AO through recording of a satisfaction has also been clarified to be mandatory. In the instant case, on perusal of the impugned order indicates that excess amount of Rs.25,86,687 was found at 112-122, Hira Bhavan, Rajaram Mohan Roy Road, Prarthana Samaj, Mumbai, but the assessee explained that the said amount was actually seized from the residential premises of late Shri Jitendra Mehta, director and he had duly admitted said amount in his individual capacity. Except this, there is nothing on record for the impugned year to say that any money, bullion, jewellery or other valuable article or thing or books of account belonging to the assessee was seized or requisitioned as a result of search. Further, with regard to the seized paper on page 114, Annexure A-1 on perusal of the same shows that there is no mention of the assessee company or the project undertaken by the assessee. During the year under consideration, as observed by the AO in the impugned assessment order, the assessee company has executed the project name 'Moksh Plaza' and this name did not find mention on page 114 of Annexure A-1. Thus, it is very clear from the above facts that seized paper

found during the course of search cannot be considered belonging to the assessee. He further observed that in this case, the assessee has filed its original return of income u/s 139 on 30-09-2009. The return was selected for scrutiny and the assessment was completed u/s 143(3) on 31-12-2009. The search u/s 132 of the Act, on Rohan Group was carried out on 26-05-2011. From the above, it is clear that the assessment for the AY 2009-10 is unabated as on the date of search, because the proceeding u/s 143(3) has been concluded much before the date of search and also there was no proceeding of whatsoever is pending for the year under consideration. Thus, the case of the assessee cannot be said to be one where assessment proceedings had been abated. Once the assessment proceedings have been unabated, in absence of any incriminating material found as a result of search or satisfaction qua incriminating material, no addition could be made in the assessment framed u/s 153C of the Act. Therefore, by following the decision of ITAT, Special Bench in the case of All Cargo Global Logistics Ltd vs DCIT (supra) and also the decision of Hon'ble Bombay High Court where the appeal filed by the department has been dismissed by the Court, held that the AO has made addition towards estimation of on-money without there being any incriminating material found as a result of search; consequently, the addition made by the AO cannot be sustained. He, accordingly, deleted addition made

by the AO towards estimation of on-money. The relevant findings of the Ld.CIT(A) are as under:-

> **"5.1 In Grounds No.l and2 the** appellant has challenged the validity of the impugned order passed u/s 153C as being bad in law. The appellant has argued that as per the provisions of section 153C, the AO is required to be 'satisfied' that the seized material indicating undisclosed income pertains to the 'other person'. It is emphasised that proceedings can only be initiated where the AO is satisfied that any money, bullion, jewellery or other valuable article or thing or books of account or documents seized is belonging to a person other than the person searched. As per the appellant, in the instant case, there was no such seizure or requisition. The appellant has further challenged the impugned order as null and void for the reason that the addition was made to the returned income of the appellant despite the absence of any incriminating material yielded by the search and as the assessment for the year under consideration had not abated, the additions made were unsustainable. For these >vt feasons it is submitted that the very issuance of notice u/s 153C is bad in law. V^JheSubmissions made by the appellant in this regard are as follows:
> "9. *In this regard, at the outset, we would like to draw Your Honour's kind attention to the provisions of section 153C of the Act which reads as under:*
> *"153C. (1) [Notwithstanding anything contained in section 139. section 147. section 148. section 149. section 151 and section 153.* ***where the Assessing Officer is satisfied*** *that, -*
> ***(a) any money, bullion, jewellery or other valuable article or thing, seized or requisitioned, belongs to; or***
> ***(b) any books of account or documents, seized or requisitioned, pertains or pertain to, or any information contained therein, relates to,***
> ***a person other than the person referred to in section 153A.*** *then, the books of account or documents or assets, seized or requisitioned shall be handed over to the Assessing Officer having jurisdiction over such other person] [and that Assessing Officer shall proceed against each such other person and issue notice and assess or reassess the income of the other person in accordance with the provisions of section 153A.* ***if, that Assessing Officer is satisfied that the books of account or documents or assets seized or requisitioned have a bearing on the determination of the total income of such other person for the relevant assessment year or years*** *referred to in sub section (1) of section 153A1"* ***(Emphasis Supplied)***
> *10. On plan reading of the above, it may please be noted that as per the provisions of section 153C of the Act, proceedings can be initiated on the other person, only upon satisfaction of the following pre-requisites:*
> *The AO must be satisfied-*
> *a. That money, bullion, jewellery or other valuable article or thing found in the course of search belongs to a person other than the person searched, or b. That the Books of accounts or documents seized or acquisitioned belongs to a person other than the person referred in section 153A (i.e., person searched) and c. That the above consists of undisclosed income of the other person.*

It may please be noted that before proceeding with initiating proceedings u/s. 153C of the Act, the AO has to be thoroughly satisfied that the seized material indicating escaped income pertains to the other person (i.e. other than the searched party).

11. In this regard, at the outset, it is submitted that no incriminating material whatsoever (in the form of money, bullion, jewellery, books of account document seized, etc.) has been found, to suggest any concealed particulars of income pertaining to the appellant company. Further, proceedings u/s 153C of the Act can be initiated by the AO upon complete satisfaction that the seized material belongs to the appellant and that income has not been disclosed thereon. Thus, only on fulfilment of all of the aforementioned prerequisites, the AO can initiate proceedings u/s 153C of the Act. However, in the present case none of the pre-requisites were fulfilled by the AO so as to justify initiation of proceedings u/s 153C of the Act.

12. Thus, Your Honour may note that the very issuance of notice under section 153C of the Act is bad in law and void ab initio. In light of the above discussion, we pray before Your Honour that the notice issued and consequential order passed by the AO u/s 143(3) r.w.s. 153C is bad in law and is required be quashed."

5.1.1 I have considered the contentions of the appellant. As regards the aspect of issue of notice u/s 153C is concerned, it is clear that the necessary the pre-condition to issue of notice u/s 153C is that money, bullion, jewellery or other valuable article or thing or books of account belonging to a person other than the person searched should have been seized or requisitioned. Also as per Circu|ar No.24/2015 (F.No.279/Misc./140 /2015/ITJ), the issue of satisfaction of the AO through recording of a satisfaction note has also been c!arified to be mandatory.

5.1.2 - In the instant case, perusal of the impugned order indicates that excess cash of Rs.25,86,687/- was found at 112-122, Hira Bhawan, Raja Ram
Mohan Roy Road, Prarthana Samaj and Rs.8,50,000/- and unexplained jewellery found at M/s Goodwill Properties, 26-27-28 floor, Penthouse, Shiv Tapi Apartments, Gamdevi. In this regard, the appellant has clarified that the amount of Rs. 8,50,000/r was actually seized from the residential premises of Late Shri Jitendra Mehta, Director, as duly reflected in the Panchnama and has been offered to tax by him. It is further seen that the premises of the appellant company are II, 2nd Floor, Goverdhan Building, 12-14 Dr. Parekh Street, Prarthana Samaj, Mumbai-400004. There is no mention in the impugned order to show that any money, bullion, jewellery or other valuable article or thing or books of account belonging to the appellant was seized or requisitioned as a result of the search.

5.1.3 With regard to the seized paper at Page 114, Annexure A-l, found and seized from 112-122, Hira Bhawan, Raja Ram Mohan Roy Road, Prarthana Samaj (referred by the AO on page 12 of the impugned order), perusal of the same shows that there is no mention of the appellant company or the project undertaken by it on the said page. During the year under consideration, as observed by the AO in the impugned order, the appellant company has executed the project named Moksh Plaza which name does not find mention on page 114, Annexure-Al. Perusal of the said document at page 114 reveals that the projects listed on it are namely Siddhesh Darshan; Mayuresh Apartments; Lifescapes Kshitij; Siddhesh

Jyoti. In the submissions made in appeal, it is stated that these projects are undertaken by the following entities:

	Name of Project	*Entity of Rohan Group*
	Siddhesh Darshan	*Meridian Construction Private Limited*
	Mayuresh Apartment	*Rohan Developers Private Limited*
	Lifescapes Kshitij	*Roxina Real Estate Private Limited*
	Siddhesh Jyoti	*Manav Builders Private Limited*

Thus, it cannot be concluded that the seized paper makes any mention of the appellant company or the project undertaken by it during the year and as such this document cannot be taken as incriminating material with reference to
the appellant.

5.1.4 As per the impugned order, the appellant filed its original return of income u/s 139 on 30.09.2009 declaring total income as Rs.78,71,430/-. The return was selected for scrutiny and assessment u/s 143(3) was completed vide Order dated 31.12.2008 accepting the returned income. The search u/s 132 on the Rohan Group was carried out on 26.05.2011. Thereafter return for the same year was filed in response to notice u/s 153C on 21.10.2013 declaring income at Rs.77,79,190/-. As noted earlier, the original assessment proceedings stood

5.1.5 In the decision of the Special Bench in the case of All Cargo Global Logistics Ltd. the scope of assessment u/s 153A was elucidated as under:

"53. *The question now is - what is the scope of assessment or reassessment of total income u/s 153A (1) (b) and the first proviso? We are of the view that for answering this question, guidance will have to be sought from section 132(1). If any books of account or other documents relevant to the assessment had not been produced in the course of original assessment and found in the course of search in our humble opinion such books of account or other documents have to be taken into account while making assessment or reassessment of total income under the aforesaid provision. Similar position will obtain in a case where undisclosed income or undisclosed property has been found as a consequence of search. In other words, harmonious interpretation will produce the following re suits :-*

(a) In so far as pending assessments are concerned, the jurisdiction to make original assessment and assessment u/s 153A merge into one and only one assessment for each assessment year shall be made separately on the basis of the findings of the search and any other material existing or brought on the record of the AO,

(b) In respect of non-abated assessments, the assessment will be made on the basis of books of account or other documents not produced in the course of original assessment but found in the course of search, and undisclosed income or undisclosed property discovered in the course of search."

Thus the Special Bench held that in cases where there has not been any abatement of assessment, in addition to the income that had already been assessed, the assessment u/s 153A subsequent to search would be made on the basis of incriminating material, which in the context of relevant provisions means books of account and other documents found in the course of the search but not produced in the course of original assessment as well as undisclosed income or property disclosed in the course of the search. The decision of the Special Bench was challenged by the Department before the Jurisdictional High Court and vide order ITA No.523 of 2013 dated 21.04.2015, the Hon'ble Court upheld the view taken by the Special Bench. The principle enunciated regarding the scope of assessment u/s 153A extends to assessments completed u/s 153C also, inasmuch as the link to incriminating material is necessary for addition to be made in a non-abated assessment.

5.1.6 As discussed earlier, in the instant case, the impugned order does not show that any document, money, bullion, etc. was seized or requisitioned in the case of the appellant. Neither is there any indication of the satisfaction of the AO that any such item seized or requisitioned specifically belonged to the appellant company. The only document that is referred to in the assessment order, is the seized paper at Page 114, Annexure A-l, found and seized from 112-122, Hira Bhawan, Raja Ram Mohan Roy Road, Prarthana Samaj, which is not the appellant's premise. Also, as discussed in para 5.1.3, the said paper does not make any mention of the appellant company or the project undertaken by it. The statements of various parties recorded during the search were subsequently withdrawn through filing of affidavits. Even otherwise, the impugned order does not show that these statements made any specific mention of the appellant company or of the project carried out by it in this year and any undisclosed income related thereto. Therefore considering the facts of the case and the judicial pronouncements cited above, it is evident that the impugned assessment is not based on any incriminating material pertaining to the appellant seized \ during the search. Similarly, the impugned order does not reflect any finding emanating from the search that has led to the disallowances on account of conveyance charges or telephone expenses. Therefore these additions can also not be taken to be based on seized material. **Grounds No.l to 3,** raised by the appellant are therefore **allowed.”**

9. Insofar as addition made towards estimation of on-money on merit, the Ld.CIT(A), by following certain judicial precedents, including the decision of Hon’ble Bombay High Court in the case of CIT vs Uttamchand Jain reported in 320 ITR 554 (Bom) held that the statements relied upon by the AO including

director and employees of the group cannot be said to have provided sufficient evidence of on-money transactions in respect of the assessee company. Further, the loose paper on which the AO has placed heavy reliance also does not reflect the name of the assessee or its project. Thus, on the facts of the instant case and after due consideration of the judicial precedents, the addition of on-money of Rs.3,90,53,280 was deleted. The relevant findings of the CIT(A) are as under:-

> "**5.2.9** The AO has also held that circumstantial evidence of cash and unexplained jewellery found during the search showed suppression of sales. In this regard it is noted that cash of Rs.25,86,687/- was seized from 112-122 Hira Bhawan which was common premises for 4 entities of the appellant group i.e. M/s Rohan Lifescapes, M/s Rohan Developers, M/s Goodwill Properties and M/s Silver Arch. During the appeal proceedings, the appellant submitted that total cash found from the various premises of group concerns/directors etc. was Rs.1,35,00,000/- and that from this sum, an amount of Rs. 1,09,13,313/- was reconciled with the books of accounts of the constituent companies, directors etc. of the Group (refer letter dated 24.10.2013 submitted during the course of assessment of M/s Rohan Developers Private Limited.). The balance amount of Rs. 25,86,687/- is stated to have been offered as undisclosed income in the hands of M/s Rohan Developers Private Limited for A.Y. 2012-13. This reconciliation has not been rejected or contradicted by the AO.
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> **5.2.10** With reference to carrying out of proceedings against concerned persons, the materiality, relevance, admissibility or weight of retracted statements has been examined by various courts. While it is true that retraction itself does not provide an impenetrable shield to the concerned person, it is also equally true that a statement per se, by itself is not conclusive evidence. In this regard, in the decision rendered in the case of ACIT vs Janak Raj Chauhan 102 TTJ 316 (Amritsar)}, the Tribunal held that admission made at the time of
> •- ' search is important but not conclusive. In the decision rendered in the case of
> Maheshwari Industries vs ACIT {148 Taxman 74 (Jodh)(Mag)}, the Tribunal held that additions should be considered on merits rather than on the basis of surrender made by an assessee. In the decision rendered in the case of Surinder Pal Verma v. Asstt. CIT [2004] 89 ITD 129 (Chd.) (TM)the Tribunal observed as
> follows:

"It is well known fact that the confessional statements made during the search are often vulnerable on the ground that the persons giving such statements remain under great mental strain and stress, They also do not have the availability of relevant details, documents and books of account at the time of giving such statements in the absence of which precise information relating to the mode of utilization of such income and the year of such investment cannot be correctly furnished. The assessees are, therefore, entitled to modify/clarify the statements after verifying the necessary details from the relevant records at later point of time."

5.2.11 In the decision rendered in the case of CIT vs K.Bhuvanendra & Others reported at 303 ITR 235, the Court held that the statement of assessee which was not relatable to seized material and which was subsequently retracted could not be a basis for making any addition in block assessment. In this case, the assessee's wife and sons had purchased a property. During the statement recorded during the search, the assessee admitted to payment of on-money. However the statement was subsequently retracted. Addition was however, made by the AO on the basis of the statement. The Court observed that no material was found during the course of search to indicate transaction of on-money, that the statement recorded from the assessee was subsequently retracted and rebutted and that the registered sale deed did not show any payment more than what was disclosed. The Court further held that addition could not be made on the basis of the statement when it was not relatable to seized material and where the Revenue had not brought on record any material to show that on-money had been paid.

5.2.12 In the decision rendered in the case of CIT vs Uttamchand Jain reported at 320 ITR 554 (Bom), the Hon'ble Court held that a retracted confession can be relied upon only if there is independent and cogent evidence to corroborate the statement.

9.2.13 Therefore, in light of the detailed discussion in the preceding paragraphs, the statements relied upon by the A.O. cannot be said to have provided sufficient evidence of on-money transactions with regard to the appellant company. As discussed earlier, the single sheet of paper on which the AO has placed reliance also does not reflect the name of the appellant or its project. Thus on the facts of the instant case and after due consideration of the judicial pronouncements cited above, the addition of on money of Rs.3,90,53,280/- is deleted and the grounds raised by the appellant are **allowed.**"

10. Aggrieved by the order of Ld.CIT(A), the revenue is in appeal before us.

11. The Ld.DR submitted that the Ld.CIT(A) was erred in deleting the addition of on-money received on sale of flats by relying on the decision of ITAT, Amritsar Bench in the case of ACIT vs Janakraj Chauhan and the decision

of Jodhpur Bench in the case of Maheshwari Industries vs ACIT 148 Taxman 74 without appreciating the facts that the addition was made on the basis of statement of the director, Shri Haresh M Mehta and three key employees of the group during the course of search. The Ld.CIT(A) further failed to appreciate that Rohan group had been searched earlier too, on 10-08-2010 and during the course it was found that, the same Ms Chaula Joshi had admitted to the fact that the group executed sale deed by accepting on-money in cash which was over and above the agreement price. The Ld.DR further submitted that the AO has brought out clear facts to the effect that there are certain incriminating material found during the course of search throw light on the modus operandi of the assessee group, as per which, the asssessee group was indulging in receipt of on-money over and above the registered value shown in the documents. This fact was further strengthened by the statement of director and employees. The Ld.CIT(A) without appreciating these facts, deleted addition made by the AO, that too, on technical grounds that there is no nexus between incriminating material found as a result of search and satisfaction of the AO other than the AO, who has completed the assessment without appreciating the fact that that there is a clear nexus between incriminating materials found during the course of search and satisfaction and hence, the proceedings u/s 153C has been validly initiated.

12. The Ld.AR for the assessee, on the other hand, submitted that the issue is squarely covered in favour of the assessee by the decision of ITAT, Mumbai Bench in the case of M/s Silver Arch Builder & Promoters Pvt Ltd in ITA No.4024/Mum/2016 where the Tribunal, after considering relevant facts and also in the context of same search conducted on Rohan group, came to the conclusion that in absence of any incriminating material found as a result of search, no addition could be made in assessment u/s 153C of the Act. The Ld.AR further submitted that the Tribunal has rightly apprised the facts in the light of decision of the Hon'ble Bombay High Court in the case of CIT vs Continental Warehousing Corporation (Nava Sheva) Ltd 374 ITR 645(Bom) where it was categorically held that no addition could be made in assessment framed u/s 153A / 153C in absence of incriminating material found as a result of search, in unabated / concluded assessments. In this case, the assessment for the AY 2009-10 is unabated as on the date of search, because the search u/s 132 of the Act was carried out on 26-05-2011 and by that time the assessment for AY 2009-10 had been completed u/s 143(3) on 31-12-2009. Insofar as assessment years 2010-11 and 2011-12, both the assessments are unabated, because the assessments have been framed u/s 153C on the basis of notice issued u/s 153C dated 28-03-2013. As per the proviso to section 153C, in case of such other person, the reference to the date of initiation of the

search u/s 132 or making of requisition u/s 132A in the Second Proviso to sub section (1) of section 153A shall be construed as reference to the date of receiving the books of account or other documents or assets seized or requisitioned by the AO having jurisdiction over such other person. In this case, on the basis of notice issued by the AO having jurisdiction over the assessee u/s 153C on 28-03-2013 does not specify anything about receipt of documents. Therefore, in absence of any specific date on which the AO received the documents, the only conclusion that can be drawn is that the AO of such other person, other than the searched person has taken over the possession of the seized document on the date on which notice u/s 153C had been issued, i.e. on 28-03-2013. If, said date is considered as the date of search, as per the proviso provided u/s 153C, then the assessment for AYs 2010-11 and 2011-12 are unabated, because the time limit for issue of notice u/s 143(2) was expired on 30-09-201,1 whereas the AO has received books of account and other materials on 28-03-2013. Therefore, the assessments for AYs 2010-11 2011-12 are unabated, consequently, addition could not be made in absence of any incriminating materials. In this regard, he relied upon the decision of ITAT, Delhi Bench in the case of ACIT vs Inlay Marketing Pvt Ltd (2015) 167 TTJ (Del) 273. The Ld.AR further submitted that even assuming for a moment, the assessments for AYs 2010-11 and 2011-12 are abated, if the

date of search is considered, then the whole proceedings initiated u/s 153C is null and void, because the condition precedent for issue of notice u/s 153C is that the seized document must belong to the third party, but there is nothing on record to indicate that there was any reference to seized material in the satisfaction recorded by the AO and hence, the entire proceedings taken u/s 153C becomes null and void. In this regard, he relied upon the decision of Hon'ble Bombay High Court in the case of CIT vs Arpit Land Pvt Ltd (2017) 393 ITR 276 (Bom). He also relied upon the decision of Hon'ble Delhi High Court in the case of ARN Infrastructure India Ltd vs ACIT (2017) 394 ITR 569 (Del).

13. Insofar as addition made towards estimation of n-money, the Ld.AR submitted that there is no iota of evidence with the AO to indicate that the assessee is indulging in collection of on-money over and above whatever stated in registered documents towards sale of flats. Though, the AO has referred to page 114 of Annexure A-1, but on perusal of the said document it is very clear that neither the assessee's name is mentioned in said document nor the project undertaken by the assessee. In fact, said document pertains to other group companies and projects executed by them. Therefore, the same cannot be considered as incriminating material, which throw light on receipt of on-money in the case of assessee. The Ld.AR further submitted that although the AO has taken note of statement recorded from director and other key

employees of group, but none of them took the name of the assessee in the statement recorded u/s 132(4) nor did any reference to seized material find as a result of search. Further, the assessee has filed retraction statement filed by them alongwith their affidavits, where they have categorically denied of having received on-money by the assessee and also explained under what circumstance they were compelled to give admission of receipt of on-money. Therefore, in absence of any material found as a result of search, making estimation towards receipt of on-money, more particularly on adhoc basis by extrapolation of documents found in some other cases, is arbitrary and incorrect. The Ld.CIT(A), after considering relevant facts has rightly deleted addition made by the AO towards estimation of on-money and his order should be upheld.

14. We have heard both the parties, perused materials available on record and gone through the orders of authorities below, along with case laws cited by the Ld.AR for the assessee. The solitary issue that needs to be resolved in this bunch of appeal is addition made by the AO towards on-money in cash on sale of flats. The AO has estimated 30% on total sales declared by the assessee for the relevant financial year towards receipt of on-money in cash over and above normal sales declared in the books of account on the basis of statement recorded from Shri Haresh M Mehta, director of M/s Rohan Developers Pvt Ltd

at the time of search u/s 132(4) of the Act. The AO had also taken support from statement of certain key employees, who looked after day today affairs of the assessee group. According to the AO, the contention of the assessee cannot be accepted that there is no evidence to establish that on-money is received in respect of its projects, because the statement of director and other employees threw light on the modus operandi of the assessee group, as per which, the group was indulging in receipt of on-money on sales which is 30% over and above the normal sales price declared in the registered document. The AO, further, observed that this fact is further strengthened by enormous material found during the course of search, including cash seized from premises of the group and other assets. The assessee had also admitted Rs.100 crore undisclosed income in various group companies name on the basis of incriminating material found as a result of search and also to cover up any errors / omissions / discrepancies, etc. There are certain specified seized materials, which clearly indicated undisclosed income. Therefore, he came to the conclusion that there is no merit in the arguments of the assessee that there is no evidence to establish receipt of on-money. The AO further observed that when the material gathered during the course of search coupled with statement of directors clearly established the fact of receipt of on-money, it is very essential to infer that the group as a whole was indulging in this kind

of modus operandi and accordingly he estimated 30% on total sales declared for the year towards on-money receipt and made addition to the total income.

15. The facts with regard to declaration of undisclosed income in various group companies names towards omissions / errors, etc. are not disputed. It is also not in dispute that during the course of search cash and other unaccounted income pertaining to the group was found and seized. But, the AO, nowhere in his assessment order, had brought out facts to the effect that the seized material found during the course of search has a direct nexus with the assessee and its project carried out during the year under consideration. Although, the AO has referred to the seized material page 114 of Annexure A-1, to argue that there are seized materials, which indicated collection of on-money from sale of flats, but the assessee has rebutted the allegation of the AO with necessary evidence and also proved that seized material page 114 of Annexure A-1 is nothing to do with business activity of the assessee and its project undertaken during the year. Insofar as seizure of cash during the course of search at No.112 – 122, Hira Bhavan, Rajaram Mohan Roy Road, Prarthana Samaj, Mumbai, the assessee made it clear that said amount has been seized from the residence of Shri Jitendra Mehta, director and this fact has been reflected in the Panchanama drawn during the course of search and also the same has been disclosed to tax in his individual capacity. As regards

statement of director, Shri Haresh M Mehta and other employees of the group, the assessee has filed retraction statements alongwith affidavits filed by them before the AO and also explained under what circumstance they have given admission in the statement recorded u/s 132(4) of the Act. The assessee also made it clear that neither Shri Haresh M Mehta, director, nor the employees from whom statements were recorded u/s 132(4) were ever authorised to conclude sales in respect of its projects. Therefore, on the basis of their statements recorded during the course of search, no adverse inference could be drawn against the assessee regarding receipt of on-money by extrapolation of seized material found during the course of search which belonged to some other concerns.

16. Having deliberated at length on the arguments of both sides, we find that although the AO has tried to establish nexus between incriminating material found during the course of search and other undisclosed asset to the assessee, but he has failed to prove the nexus between seized materials and business activity of the assessee and also receipt of on-money. Unless, the AO has brought out some cogent materials or evidences which establish receipt of on-money from sale of flats, no addition could be made, that too, on adhoc estimation of on-money on the basis of regular sales declared by the assessee. We further note that although the AO has placed his reliance on the statement

of Mr. Haresh M Mehta recorded on 05-06-2011, but on perusal of affidavit of Shri Haresh M Mehta dated 11-02-2014, it is seen that reference to on-money is made by Shri Haresh M Mehta only in the answer to question No.12 and that such reference is general inasmuch as Shri Haresh M Mehta stated that he looked after project clearance and tenant association matter and that these areas required lot of cash which was spent through on-money taken in cash on sale of flats. Even in respect of statements of employees of group, nowhere they have specifically attribute the name of the assessee with reference to receipt of on-money while answering questions to statement recorded during the course of search. All along the director as well as the employees made a general statement about receipt of on-money with reference to a question posed by the Investigation wing without any reference to particular seized material found as a result of search. Similarly, the AO has taken circumstantial evidence of cash and unexplained jewellery found during the course of search to argue that the assessee is in the habit of suppression of sales by showing under valuation which was used in its business, but on perusal of cash and other assets found during the course of search it was very clear that the cash was found from 112-122, Hira Bhavan, Rajaram Mohan Roy Road, Prarthana Samaj, Mumbai, which was common premises for four entities of the assessee group and that the total cash found from various premises was almost

equivalent to cash balance maintained in the books of account. Although, there is a difference of cash balance of Rs.25,86,687, the same has been offered to tax in the hands of directors and also M/s Rohan Developers Pvt Ltd. Neither the Panchanama drawn during the course of search nor the statement recorded during search indicated that cash and other unaccounted assets found during the course of search belonged to the assessee. The Ld.AO has even failed to establish nexus between incriminating materials found during the course of search to the business of the assessee. Unless there is a direct nexus between incriminating material found during the course of search coupled with statement recorded from the director and employees of the group, merely on the basis of admission of certain parties, that too, after retraction of such statements by the parties, addition cannot be made towards receipt of on-money on adhoc basis taking a clue from statement of those persons. No doubt, estimation is possible in assessment proceedings provided the AO is having sufficient information with him regarding suppression of sales or receipt of on-money. In a case, where the department is in possession of material regarding suppression of sales or receipt of on-money for part of a period, then for the remaining period, the AO may go for estimation by taking into account various parameters including certain degree of estimation. But, then this cannot be extended or enlarged to the extent of extrapolation of

information to another assessee, though the same belongs to one group, unless there is specific material in the possession of the AO with regard to suppression of sales or receipt of on-money. Further, statement recorded during the course of search including confession may be a best piece of evidence, but that by itself would not be conclusive evidence unless such statement is further supported by evidence in the form of incriminating material found during the course of search. The AO before estimating income has to bring on record some cogent materials to justify his action. In this case, on perusal of facts available on record, it is abundantly clear that nowhere the AO linked the seized material found during the course of search to the income estimated towards on-money received from sale of flats. While it is true that retraction by itself does not provide an impenetrable sheild to the concerned person, but it is also equally true that a statement per se by itself is not conclusive evidence. This legal proposition is fortified by the decision of Hon'ble Supreme Court in the case of CIT vs S Kader Khan Sons (2013) 352 ITR 480(SC) where it was categorically held that admission is a best piece of evidence, but that by itself is not a conclusive evidence unless it is supported by further evidence in the form of incriminating materials. This legal proposition is further fortified by the decision of ITAT, Amritsar Bench in the case of ACIT vs Janakraj Chauhan (supra) where it was held that admission at

the time of search is important, but not conclusive. The Tribunal further held that addition should be considered on merits, rather than on the basis of sworn statement made by the assessee. The Hon'ble Bombay High Court in the case of CIT vs Uttamchand Jain (supra) had considered the admission and subsequent retraction of the assessee and held that a retracted confession can be relied upon only if there is independent and cogent evidence to corroborate the statement. In this case, the AO has failed to bring any corroborative evidence to support the statement of directors as well as employees in order to support his action of estimation of on-money on sales declared by the assessee for the relevant financial years. Therefore, we are of the considered view that the AO was erred in estimating adhoc on-money received from sale of flats on the basis of statement of some employees even after such statement has been retracted and also nothing on record to indicate that the assessee is in receipt of on-money.

17. Coming to the legal argument taken by the assessee in the light of certain judicial precedent, including the decision of Hon'ble Bombay High Court in the case of Continental Warehousing Corporation (Nava Sheva) vs CIT (supra). No doubt, if we consider the date of search, i.e. on 26-05-2011, the assessment for AY 2009-10 is unabated, because the assessment for the impugned assessment is completed u/s 143(3) on 31-12-2009 and further, no

proceedings of whatsoever was pending as on the date of search. This fact has been categorically accepted by the lower authorities. Therefore, once an assessment is unabated as on the date of search, it is a settled law that no addition can be made in absence of any incriminating material found as a result of search. This legal position is considered by the Hon'ble Bombay High Court in the case of Continental Warehousing Corporation (Nava Sheva) Ltd vs CIT (supra), where it was held that in absence of any seized material, no addition can be made in respect of unabated assessment which becomes final as on the date of search. This legal proposition is further supported by the decision of the Division Bench of Hon'ble Bombay High Court in the case of Murli Agro Products Ltd 2014) 49 Taxman.com 172. Further, the Hon'ble Delhi High Court in the case of CIT vs Kabul Chawla (2016) 380 ITR 573 (Del) has considered an identical issue and held that unless there is an incriminating material found as a result of search, no addition could be made in respect of assessments that have become unabated / concluded as on the date of search. In this case, there is no doubt of whatsoever with regard to the reference of incriminating material found during the course of search to addition made by the AO with regard to the estimation of 30% on-money on total sales declared by the assessee. Therefore, we are of the considered view that even on this count, the addition made by the AO towards estimation of on-money for AY

2009-10 cannot be sustained. Insofar as assessment years 2010-11 and 2011-12, the assessments for these assessment years have been completed u/s 153C of the Income-tax Act, 1961. The AO has issued notice u/s 153C on 28-03-2013. The proviso provided to section 153C states that in case of such other person, the reference to the date of initiation of the search u/s 132 or making of requisition u/s 132 in the Second Proviso to sub section (1) of section 153A shall be construed as reference to the date of receiving the books of account or documents or asset seized by the AO having jurisdiction over such other person. The arguments of the Ld.AR for the assessee is that in absence of any specific date on which the asset or other books of account requisitioned by the AO having jurisdiction over such other person, then only conclusion that can be drawn is that the AO of such other person other than searched has taken over the possession of the seized document on the date on which he recorded his satisfaction as required u/s 153C or the date on which notice u/s 153C has been served on the assessee. We find that if the date of search is considered, then assessment for AY 2010-11 and 2011-12 are abated, because the due date for issue of notice u/s 143(2) is expires on 30-09-2012 which after the date of search. If you consider date of issue of notice u/s 153C, i.e. 28-3-2013, then assessment for AY 2010-11 and 2011-12 are unabated, because the due date of issue of notice u/s 153C was expired on 30-09-2012 which before the

date of search. But, in this case, there is no clarity with regard to date of receipt of receiving the books of account or documents or asset seized by the AO having jurisdiction over such other person. In absence of such date, no presumption as to date of issue of notice u/s 153C cannot be considered as date of receipt of assets and books by the AO having jurisdiction over person other than the person searched, even though the coordinate bench of ITAT, Delhi has resorted to deeming conclusion. But, fact remains that, assuming for a moment, the assessment for AY 2010-11 and 2011-12 are abated, still the primary precondition for initiation of proceedings u/s 153C remains applicable and that precondition of seizure or requisition of money, bullion, jewellery or other valuable article or thing or books of account belonging to the assessee, other than the person is essential before initiation of proceedings u/s 153C of the Act. In this case, there was nothing on record to indicate that the AO was in possession of any money, bullion, jewellery or other valuable article which was found and seized during the course of search. Therefore, in terms of section 153C of the act, the proceedings u/s 153C could be initiated against a party only if the document seized during the search and seizure proceedings of another person belonging to the assessee concerned. The requirement of section 153C could not have been ignored. The department had to strictly comply with section 153C. Unless, the AO has arrived at a satisfaction with

reference to material found during the course of search and non satisfaction of the condition precedent qua seized material belonging third party was a jurisdiction issue and non satisfaction thereof would make the entire proceedings taken thereunder null and void. This legal proposition is fortified by the decision of Hon'ble Bombay High Court in the case of CIT vs. Arpit Land Pvt Ltd (supra), where it was categorically held that non satisfaction of the condition precedent with seized document must belong to the third party was a jurisdictional issue and non satisfaction thereof made the entire proceedings taken thereunder null and void. The Hon'ble Supreme Court has dismissed SLP filed by the department against the decision of Hon'ble Bombay High Court in the case of CIT vs Arpit Land Pvt Ltd (supra) in SLP (C) 1628/2018, where the Hon'ble Court upheld the findings of the Hon'ble Bombay High Court that the condition precedent for invocation of section 153C is that the seized material / document must belong to third party was a jurisdictional issue and failure to satisfy it made the entire proceedings taken u/s 153C null and void. The Hon'ble Delhi High Court in the case of ARN Infrastructure India Ltd vs ACIT (supra) had considered an identical issue and held that the requirement of section 153C of the Act cannot be ignored at the altar of suspicion. The revenue has to strictly comply with section 153C of the Act. Non satisfaction of the condition precedent which the seized document must belong to the

respondent assessee is a jurisdictional issue and non satisfaction thereof would make the entire proceedings taken thereunder null and void. Further, the Hon'ble Supreme Court in the case of CIT vs Singhad Technical Education Society 397 ITR 344 (SC) has considered an identical issue and held that where incriminating material was found in the course of search, but was not related to the concerned years and hence, addition for those years could not be made in the assessment order passed u/s 153A of the Act.

18. In this case, it is abundantly clear that there is nothing on record to indicate that there is a reference to seized material found during the course of search vis-a-vis addition made by the AO towards estimation of 30% on-money on total sales declared for the year. The Ld.CIT(A), after considering all these aspects, has rightly come to the conclusion that the addition made by the AO cannot be sustained either on jurisdictional issue or on merits. Hence, we are of the considered view that there is no reason to interfere with the findings of the Ld.CIT(A) insofar as deletion of addition made by the AO towards estimation of on-money @30% on sales declared by the assessee for the relevant assessment years. Hence, we are inclined to uphold the findings of Ld.CIT(A) and dismiss the appeal filed by the revenue.

19. In the result, appeal filed by the revenue in ITA. N0. 4030/Mum/2016 for AYs 2010-11, ITA No. 4031/Mum/2016 for AY 2009-10 and ITA No.

4032/Mum/2016 for AY 2011-12 in case of M/s Sitara Builders Pvt Ltd are dismissed.

ITA Nos 4027/Mum/2016 and 4029/Mum/2016

20. The facts and issues involved in these two appeals filed by the revenue are identical to the facts and issues which we have already considered in ITA Nos.4030 to 4032/Mum/2016 in case of Sitara Builders Pvt Ltd. The Revenue has challenged only issue in these two appeals is deletion of addition made by the AO towards estimation of on-money on the basis of statement recorded from the director and other employees of the assessee group. We have already considered an identical issue in ITA Nos.4030 to 4032/Mum/2016 in case of Sitara Builders Pvt Ltd. The reasons given by us in preceding paragraph shall mutatis mutandis apply to these appeals also. Therefore, for the detailed reasons given by us in the preceding paragraphs, we are of the considered view that there is no error in the findings recorded by the Ld. CIT(A) while deleting addition made by the AO towards estimation of on-money @30% on total sales declared for the year under consideration. Hence, we are inclined to uphold the order of Ld.CIT(A) and dismiss the appeals filed by the revenue.

21. In the result, appeals filed by the revenue in ITA No. 4029/Mum/2016 for AY 2011-12 in casi e of M/s Peccadally Estate Pvt Ltd and ITA No. 4027/Mum/2016 for AY 2011-12 in case of M/s Mindset Estate Pvt Ltd are dismissed.

22. As a result, all the appeals filed by the revenue are dismissed.

Order pronounced in the open court on 31-05-2019.

Sd/- sd/-

(Ravish Sood)	(G Manjunatha)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dt : 31st May, 2019
Pk/-
Copy to :

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

/True copy/ By order

Asstt. Registrar, ITAT, Mumbai