IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'B', NEW DELHI

Before Sh. H. S. Sidhu, Judicial Member

Dr. B. R. R. Kumar, Accountant Member

ITA No. 1731/Del/2014 : Asstt. Year : 2009-10
ITA No. 1732/Del/2014 : Asstt. Year : 2010-11
ITA No. 6114/Del/2014 : Asstt. Year : 2011-12

Emmar MGF Construction Pvt. Ltd., First Floor, ECE House, 28, Kasturba Gandhi Marg, New Delhi-110001	Vs	Asstt. Commissioner of Income Tax, Central Circle-7, New Delhi
(APPELLANT)		**(RESPONDENT)**
PAN No. AABCE7912K		

ITA No. 2001/Del/2014 : Asstt. Year : 2009-10
ITA No. 2002/Del/2014 : Asstt. Year : 2010-11
ITA No. 5827/Del/2014 : Asstt. Year : 2011-12

Deputy Commissioner of Income Tax, Central Circle-7, New Delhi	Vs	Emmar MGF Construction Pvt. Ltd., First Floor, ECE House, 28, Kasturba Gandhi Marg, New Delhi-110001
(APPELLANT)		**(RESPONDENT)**
PAN No. AABCE7912K		

ITA No. 913/Del/2017 : Asstt. Year : 2013-14
ITA No. 914/Del/2017 : Asstt. Year : 2014-15

Emmar MGF Construction Pvt. Ltd., First Floor, ECE House, 28, Kasturba Gandhi Marg, New Delhi-110001	Vs	Asstt. Commissioner of Income Tax, Central Circle-2, New Delhi
(APPELLANT)		**(RESPONDENT)**
PAN No. AABCE7912K		

ITA No. 1253/Del/2017 : Asstt. Year : 2013-14

Asstt. Commissioner of Income Tax, Central Circle-2, New Delhi	Vs	Emmar MGF Construction Pvt. Ltd., First Floor, ECE House, 28, Kasturba Gandhi Marg, New Delhi-110001
(APPELLANT)		**(RESPONDENT)**
PAN No. AABCE7912K		

Assessee by : Sh. I. P. Bansal, Adv. &
Sh. Vivek Bansal, Adv.
Revenue by : Ms. Nidhi Srivastava, CIT DR

Date of Hearing: 17.12.2019		**Date of Pronouncement: 26.12.2019**

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeals filed by the assessee are directed against the orders of the ld. CIT (A)-1 dated 13.01.2014, 28.08.2014 & orders of the ld. CIT (A)-23 dated 22.12.2016 and the appeals filed by the revenue are directed against the orders of the ld. CIT (A)-1 dated 13.01.2014, 28.08.2014 and order of the ld. CIT (A)-23 dated 22.12.2016, New Delhi.

2. Since, the issues involved in both the appeals are common, they were heard together and are being disposed off by common order.

3. In ITA No. 1731/Del/2014, the assessee has raised following grounds:

> *"1. That the Commissioner of Income-tax (Appeals) ["CIT(A)"] erred on facts and in law in observing that the Assessing Officer could have drawn adverse inference regarding unsubstantiated purchases to the extent of Rs.17,76,06,532/- for the relevant assessment year, in respect of parties from whom confirmations were not received before the conclusion of assessment proceedings.*
>
> *1.2 That the CIT(A) erred on facts and in law in not admitting and considering the confirmations received from 23 parties on the ground that-*
> *(i) the appellant had exhausted opportunity to file the said confirmations at an earlier stage;*

(ii) Revenue had no opportunity to examine/rebut the said evidences.

2. That the CIT(A) erred on facts and in law in holding that the disbursement of income as per the revenue sharing agreement with EMLL, was not diversion of income by overriding the title, but application of income.

2.1 That the CIT(A) erred on facts and in law in not appreciating that in essence, under the arrangement between the parties, the entire project was awarded and executed on the strength of EMLL and EMLL had, in fact, paid 75% of the total consideration to the appellant.

2.2 That the CIT(A) erred on facts and in law in not allowing deduction of expenditure incurred towards services obtained from EMLL, at 25% of revenue, actually paid as per the terms agreed between the appellant and EMLL, and instead allowing deduction of cost/expenses incurred by EMLL in providing support to the appellant.

2.3 That the CIT(A) erred on facts and in law in adopting its own method of computing reasonable expenditure that ought to have been incurred by the appellant in relation to services obtained from EMLL, which is not permissible in law. ”

4. In ITA No. 1732/Del/2014, the assessee has raised following grounds:

“1. That the Commissioner of Income-tax (Appeals) [“CIT(A)”] erred on facts and in law in observing that the Assessing Officer could have drawn adverse inference regarding unsubstantiated purchases to the extent of Rs.56,79,06,899/- for the relevant assessment year, in respect of parties from whom confirmations were not received before the conclusion of assessment proceedings.

1.2 That the CIT(A) erred on facts and in law in not admitting and considering the confirmations received from 23 parties on the ground that-

(i) the appellant had exhausted opportunity to file the said confirmations at an earlier stage;
(ii) Revenue had no opportunity to examine/rebut the said evidences.

2. That the CIT(A) erred on facts and in law in holding that the disbursement of income as per the revenue sharing agreement with EMLL, was not diversion of income by overriding the title, but application of income.

2.1 That the CIT(A) erred on facts and in law in not appreciating that in essence, under the arrangement between the parties, the entire project was awarded and executed on the strength of EMLL and EMLL had, in fact, paid 75% of the total consideration to the appellant.

2.2 That the CIT(A) erred on facts and in law in not allowing deduction of expenditure incurred towards services obtained from EMLL, at 25% of revenue, actually paid as per the terms agreed between the appellant and EMLL, and instead allowing deduction of cost/expenses incurred by EMLL in providing support to the appellant.

2.3 That the CIT(A) erred on facts and in law in adopting its own method of computing reasonable expenditure that ought to have been incurred by the appellant in relation to services obtained from EMLL, which is not permissible in law. ”

5. In ITA No. 6114/Del/2014, the assessee has raised following grounds:

“1. That the Commissioner of Income-tax (Appeals) [“CIT(A)”] erred on facts and in law in sustaining disallowance of purchases to the extent of Rs.1,68,17,082/- for relevant assessment year, in respect of parties from whom confirmations were not received directly by the Assessing Officer during the course of assessment proceedings.

2. That the CIT(A) erred on facts and in law in following the order for assessment years 2009-10 and 2010-11 and holding that the disbursement of income as per the revenue sharing

agreement with EMLL, was not diversion of income by overriding the title, but application of income.

2.1 That the CIT(A) erred on facts and in law in not appreciating that in essence, under the arrangement between the parties, the entire project was awarded and executed on the strength of EMLL and EMLL had, in fact, paid 75% of the total consideration to the appellant.

2.2 That the CIT(A) erred on facts and in law in not allowing deduction of expenditure incurred towards services obtained from EMLL, at 25% of revenue, actually paid as per the terms agreed between the appellant and EMLL, and instead allowing deduction of cost/expenses incurred by EMLL in providing support to the appellant.

2.3 That the CIT(A) erred on facts and in law in adopting its own method of computing reasonable expenditure that ought to have been incurred by the appellant in relation to services obtained from EMLL, which is not permissible in law."

6. In ITA No. 913/Del/2017, the assessee has raised following grounds:

"1. That the Commissioner of Income-tax (Appeals)-23, New Delhi (hereinafter referred to as 'CIT(A)') has erred on facts and in law in following the order for assessment years 2009-10, 2010-11, 2011-12 and 2012-13 and holding that the disbursement of income as per the revenue sharing agreement with M/s Emmar MGF Land Ltd. (hereinafter referred to 'EMLL'), was not diversion of income by overriding the title, but application of income.

2. That the CIT(A) erred on facts and in law in not appreciating that in essence, under the arrangement between the parties, the entire project was awarded and executed on the strength of EMLL and EMLL had, in fact, paid 75% of the total consideration to the appellant.

3. That the CIT(A) erred on facts and in law in not allowing deduction of expenditure incurred towards services obtained from EMLL, at 25% of revenue, actually paid as per the terms

agreed between the appellant and EMLL, and instead allowing deduction of cost/expenses incurred by EMLL in providing support to the appellant.

4. That the CIT(A) erred on facts and in law in adopting its own method of computing reasonable expenditure that ought to have been incurred by the appellant in relation to services obtained from EMLL, which is not permissible in law. "

7. In ITA No. 914/Del/2017, the assessee has raised following grounds:

"1. That the Commissioner of Income-tax (Appeals)-23, New Delhi (hereinafter referred to as 'CIT(A)') has erred on facts and in law in following the order for assessment years 2009-10, 2010-11, 2011-12 and 2012-13 and holding that the disbursement of income as per the revenue sharing agreement with M/s Emmar MGF Land Ltd. (hereinafter referred to 'EMLL'), was not diversion of income by overriding the title, but application of income.

2. That the CIT(A) erred on facts and in law in not appreciating that in essence, under the arrangement between the parties, the entire project was awarded and executed on the strength of EMLL and EMLL had, in fact, paid 75% of the total consideration to the appellant.

3. That the CIT(A) erred on facts and in law in not allowing deduction of expenditure incurred towards services obtained from EMLL, at 25% of revenue, actually paid as per the terms agreed between the appellant and EMLL, and instead allowing deduction of cost/expenses incurred by EMLL in providing support to the appellant.

4. That the CIT(A) erred on facts and in law in adopting its own method of computing reasonable expenditure that ought to have been incurred by the appellant in relation to services obtained from EMLL, which is not permissible in law. "

8. In ITA No. 2001/Del/2014, the revenue has raised following grounds:

"1. The order of ld. CIT (A) is not correct in law and facts.

2. On the facts and circumstances of the case, the ld. CIT (A) has erred in deleting the addition of Rs.65.46 crores made by the Assessing Officer on account of wrong budgeted estimated used in POCM.

3. On that facts and circumstances of the case, the ld. CIT (A) has erred in law in deleting the addition of Rs.105,90,50,000/- made by the AO on account of Sham transaction.

4. On the facts and circumstances of the case, the ld. CIT (A) has erred in law in deleted the addition of Rs.2,33,47,177/- made by the AO under the head income from other sources as against claimed as netted off against project cost."

9. In ITA No. 2002/Del/2014, the revenue has raised following grounds:

"1. The order of ld. CIT (A) is not correct in law and facts.

2. On the facts and circumstances of the case, the ld. CIT (A) has erred in deleting the addition of Rs.Rs.100.54 crores made by the Assessing Officer on account of 'Inflated/Bogus Construction Cost'.

3. On the facts and circumstances of the case, the ld. CIT (A) has erred in law in deleting the addition of Rs.211,23,81,220/- made by the AO on account of Sham agreement.

4. On the facts and circumstances of the cases, the ld. CIT (A) has erred in law in determination of business income for A.Ys. 2009-10 and 2011-12.

5. On the facts and circumstances of the case, the ld. CIT (A) has erred in law in deleting the addition of Rs.6,54,80,690/- under the head "income from other sources & capital gain."

10. In ITA No. 5827/Del/2014, the revenue has raised following grounds:

"1. The order of ld. CIT (A) is not correct in law and facts.

2. On the facts and circumstances of the case, the ld. CIT (A) has erred in deleting the addition of Rs.49,91,82,918/- out of total addition of Rs.51,60,00,000/- made by the Assessing Officer on account of 'Inflated/Bogus Construction Cost'.

3. On that facts and circumstances of the case, the ld. CIT (A) has erred in law in deleting the addition of Rs.108,20,56,857/- made by the AO on account of Sham transaction.

4. On the facts and circumstances of the case, the ld. CIT (A) has erred in law in directing the AO to determine the business income of the assessee based on findings for A.Y. 2009-10 and 2010-11.

5. On the facts and circumstances of the case, the ld. CIT (A) has erred in law in directing the AO to treat certain incomes amounting to Rs.2,08,06,019/- as business income instead of capital gains and income from other sources (interest on Margin Money of Rs.49,66,039/-, Gain on Sale of Current Investment Rs.1,45,10,435/- and income from Scrap Sales Rs.13,29,545/-."

11. In ITA No. 1253/Del/2017, the revenue has raised following grounds:

"1. The order of ld. CIT (A) is not correct in law and facts.

2. That on the facts and circumstances of the case, the ld. CIT (A) has erred in deleting the addition of Rs.9,11,79,858/- made by the AO on account of 'Sham Agreement'.

3. That on the facts and circumstances of the case, the ld. CIT (A) has erred in directing the AO to compute the income of the assessee for the year under consideration based on his findings."

12. Ground Nos. 1 & 1.2 of the assessee deals with adverse inference drawn by the AO regarding the unsubstantiated purchases and not

considering the confirmations with regard to the purchases filed by them during the assessment proceedings.

13. The ld. AR argued that the conclusion of the ld. CIT (A) as unsubstantiated purchases of Rs.17.76 crores as well as not considering the confirmations received and filed from 23 parties cannot be accepted as proper reconciliation and the details of the payments for the purchases have been duly submitted. He has referred to various parties, namely Kohler India Co. Pvt. Ltd., Rashtriya Ispat Nigam Ltd., Steel Authority of India Ltd., Indo Alusys Industries Ltd., Sudhir Power projects Pvt. Ltd. and others which have not been considered by the ld. CIT (A) inspite of all their evidences. The details of the purchases for which the evidences have been submitted at a later date, not examined by the revenue are as under:

S. No	*Name Of The Party*	*AY 2009-10*	*AY 2010-11*	*AY 2011-12*	*Total*
1	*M/S Adon SYSTEM & Solution Pvt. LTD, A-28 Sector 16, Noida -201307*	*6,87,228*	-	-	*6,87,228*
2	*M/S Amrit Stones,& Suppliers Sastri Nagar Colony, Head Post Office Road, Jalore*	*13,57,096*	*51,99,597*	-	*65,56,693*
3	*M/s B.N. Traders, 249, commerciel comples, Cycle Market, Jhandewalan, New Delhi-110055*	*1,74,24,033*			*1,74,24,033*
4	*M/S Daga Trading Company Pvt Ltd Y-162, Loha Mandi Naraina, New Delhi-110028*	*4,86,90,325*			*4,86,90,325*

5	M/s Dees Granite & Marbles, GI-674, Chopaki Industrial Area, Tehsil-Tijara. Disst- Alwar Tijara	21,79,294	1,25,95,400	1,45,69,539	2,93,44,233
6	M/s Khanna Brothers, B 276, Nehru Road, NIIT Faridabad-121001	55,98,156	-	-	55,98,156
7	M/s Link Marble & Granities p Ltd 99, Diamond Nest 1st Floor, Unit No. 103, BDA Main Road, Banglore	6,66,97,551	11,92,44,540	46,22,065	19,05,64,156
8	M/S Parryware Roca Pvt Ltd, 2nd Floor jeevan Deep Building 10, Parliament Street, New DELHI-110001	35,04,662	70,97,519		1,06,02,181
9	M/S. PG Industry Ltd, C1, Ring Road, Rajouri Garden, New Delhi-110027	17,11,413	'	.	17,11,413
10	M/S S.K Tradind Company F-22, Ground Floor Shahpur Jtt, New Delhi-110049	22,62,294			22,62,294
11	M/S Vikrant Ispat Udyog,113/8 Navyug Market Floor Ghaziabad-201001	2,51,24,561	5,71,02,883	24,33,824	8,46,61,268
12	M/s A & A Modular System, 149-150, village, sainsiwala barotiwala.tehsil, disst, solan-174103	-	11,80,34,068	36,11,647	12,16,45,715
13	M/S C.PaSSOCIATE Pvt Ltdf-5/209, DDA Building no.5, 2nd floor. District Centre, Janakpuri-110058	-	2,22,31,062		2,22,31,062

14	*M/S euro Ceramics Ltd, Boston House, Ground Floor, Suren Road, Chakala, Andheri (e) Mumbai*	*-*	*1,93,'56,645*	*9,05,972*	*2,02,62,617*
15	*M/S. Farewood Industries Ltd, 4/605, Old MahabalipuramRoad, Opp Nehru Nagar Perungudi, Chennai 600096*	*-*	*5,75,66,590*	*11,93,243*	*5,87,59,833*
16	*M/S Furncraft, 2nd Floor, 125, Shahpurjat, New Delhi-110049*	*-*	*3,74,12,218*		*3,74,12,218*
17	*M/s MK-Furncraft Pvt Ltd 2nd Floor, 125, Shahpurjat, New Delhi-110060*	*-*	*1,72,91,865*	*23,64,494*	*1,96,56,359*
18	*M/S H8i Rjohnson i() Ltd 501, Surya Kiran Building, k. marg, Connaught Place, New Delhi-110001*	*-*		*5,65,817*	*5,65,817*
19	*M/s Mahabir Marble Works, TEES Dara Pul, Near Sapna Cinema, Khanalampur-247001*	*-*	*12,07,334*		*12,07,334*
20	*M/s Pixel Moasic India, Ho no.325,3rd FLOOR, Ring Road, Mall Outer Ring Road. New Delhi-110085*	*-*	*13,79,244*		*13,79,244*
21	*M/s Sakha Engineers Pvt Ltd. 2nd Floor, Gulmohar House, 161, B/4. Gautam Nagar, Yusuf Sarai, New Delhi-110049*	*-*	*89,79,644*	*12,68,717*	*1,02,48,361*

22	*M/s Sintex Industries Ltd A-38, Second Floor, Mohan Co-operative Industrial Estate, Main Mathura Road New Delhi-110044*	*-*	*1,18,81,020*		*1,18,81,020*
23	*M/s Root Cooling SYSTEM,C 66/1, Okhla Industrial Area, Phase-2, New Delhi-110020*	*-*	*5,26,35,615*	*40,22,363*	*5,66,57,978*
	Total(A)	*17,52,36,613*	*54,92,15,244*	*3,55,57,681*	*76,00,09,538*

List of remaining parties from whom confirmation could not be furnished

24	*M/S Aditya Stones, HS-38, Kailash Colony, New DELHI.*	*10,30,297*	*1,28,39,474*	*9,27,796*	*1,47,97,567*
25	*M/S Arihant Trailer SERVICES, 7259/4 Ajendra Market Prem Nagar, Shastri Nagar Delhi-110007*	*13,39,622*		*-*	*13,39,622*
26	*M/s Kohinoor Granites, Bhagli Sindhian Bhinmal Road, Jalore-343001*	*-*	*20,04,181*	*-*	*20,04,181*
27	*M/s Rockland Developers & Engineers, D-8, Basement Street No.1 Laxmi Nagar DELHI-110092*	*-*	*38,48,000*	*-*	*38,48,000*
	Total(B)	*23,69,919*	*1,86,91,655*	*9,27,796*	*2,19,89,370*
	Total(A+B=C)	*17,76,06,532*	*56,79,06,899*	*3,64,85,47*	*78,19,98,908*
	Add: Transaction pertaining to FY			*-*	*4,75,95,711*
	Total Addition as per CIT(A) order(C+D)				*82,95,94,619*

14. The ld. DR, on the other hand, argued that the revenue never had the opportunity of examining the confirmations filed at a later stage and hence in the fitness of things, the matter should be allowed to be examined by the Assessing Officer. The ld. AR did not object to the proposal. Hence, the interest of the justice, the matter is being referred to the file of the Assessing Officer with a direction to conduct enquiries,

investigation as deemed fit in accordance with the provisions of the Income Tax Act and take a decision regarding the allowability of this expenditure based on the outcome of the enquiries.

15. Ground No. 2 of the revenue pertains to the deletion of addition made by the Assessing Officer on account of wrong budgeted estimates used in Percentage of Completion Method (POCM).

16. The facts relevant to the issue culled from the record are as under: Background of the case is that the Group of Ministers constituted by the Government of India for coordinating the work relating to organization of the Commonwealth Games (CWG) 2010 decided on 04.01.2006, inter alia, that public private participation (PPP) model, which projected a Government funding of Rs.293 crores for development works and temporary over lay and Delhi Development Authority (DDA) / Private funding for Rs.662 crore for development of hotel / residential apartments etc., should be resorted to DDA for the Commonwealth Games Village (CGV). The DDA, in turn, constituted a High Powered Committee (HPC) to oversee the developments relating to construction activities of the CWG. The Request for Qualification (RFQ) for the CGV project was issued on 02.12.2006 wherein 11 parties were short-listed and notified by DDA. The Request for Proposal (RFP) for the project was issued on 24.04.2007 fixing reserve price at Rs.300 crore and net worth of the bidder at Rs.100 crore, and requiring security deposit of Rs.10 crore and performance guarantee of Rs.500 crore. However, the HLC agreed in its meeting dated 07.06.2007 that in view of the declining real estate market, the key elements determining viability of the project, i.e. upfront reserve price of Rs.300 crore, 50% share of the apartments and the performance Bank. Guarantee of Rs.500 crore, made the project financially unviable and therefore decided to reduce DDA's share from 50% to 1/3rd and

performance Bank Guarantee from Rs.500 crore to Rs.400 crore, besides certain other concessions. However, the upfront reserve price at Rs.300 crore was not changed. An addendum to the RFP was issued on 08.06.2007. Only two bids were received in response to the RFP - from M/s DLF Ltd. and M/s EMAAR MGF Consortium. The DLF bid was rejected in the technical evaluation. Emaar-MGF was awarded the contract at upfront payment bid of Rs.321 crore.

17. The assessee company is a special purpose vehicle (SPV) incorporated primarily to execute the CGV project at New Delhi for the purpose of housing the athletes and officials participating in the CWG 2010. The promoters of the assessee company and its share-holding originally at the time of bidding for the RFP for CWG 2010 (letter dated 15.06.2007 addressed to DDA) were as under:

(i)	Emaar Properties PJSC, Dubai	-	26%
(ii)	Emaar MGF Land Private Limited	-	25%
(iii)	MGF Developments Limited	-	25%
(iv)	Discovery Estates Limited	-	24%

18. Thus, at incorporation, 51% equity was owned by Emaar group of Dubai and 49% by the MGF group of Delhi. Subsequently, the equity structure of the SPY underwent some modification and the equity ownership became as under:

(i)	Emaar MGF Land Limited (EMLL)	-	53.99%
(ii)	Emaar Holdings Limited	-	26.04%
(iii)	MGF Developments Limited	-	18.49%
(iv)	Discovery Estates Limited	-	1.48%

19. The Assessing Officer during the course of assessment proceedings had called for the detail of estimated cost and the actual cost incurred in the specified format. Following are the details which were filed during the course of the assessment regarding estimated cost and the actual cost:

"Computation of Recognition of Cost Incurred for the Financial Year 2008-09.

Particulars	*Estimated Cost*	*Cost Incurred till Mar 09*
Land Cost	*3,504,716,858*	*3,210,000,000*
Architectural & Consultancy	*303,940,263*	*258,167,847*
Project Infrastructure	*50,860,645*	*35,948,339*
Security	*20,720,167*	*8,138,874*
Construction Cost	***10,270,619,191***	***4,865,072,470***
Finance & Interest of CWG	*826,289,133*	*482,755,297*
Subvention Interest	*190,153,059*	-
Bank Guarantee/LC Charges	*58,535,414*	*23,497,769*
Interest from EM'GF	*335,939,104*	*258,569,803*
Admin & Overhead.	*89,476,232*	*28,347,214*
Contingencies	*323,068,881*	-
Total	*15,974,318,947*	*9,170,497,613*
Interest Income		*(23,347,117)*
G. Total		*9,147,150,496*

20. Based on the above calculation, the assessee based on accounting standard 9 recognized revenue of Rs.317.71 crores for the relevant assessment year. The Assessing Officer challenged the estimated construction cost of Rs.1027.06 crores. Based on the Shunglu Committee report, the AO held that the entire construction work was subcontracted to an entity namely, Ahluwalia Construction India Ltd. (ACIL) at Rs.2875 per sq. ft. Based on that, the AO held that the total construction cost cannot exceed to Rs.752.35 crores and accordingly estimated project cost was worked to Rs.1322.71 crores against Rs. 1597.43 crores estimated by the assessee. Due to this reduction in estimated costs, the Percentage completion was worked out to 69.32% instead of 57.40% computed by the assessee. Accordingly, the revenue of the assessee was reworked to Rs.511.59 crores by stating that the assessee has under stated its

revenue by Rs. 193.87 crores. Hence, the Assessing Officer made an addition of Rs.87.97 crores to the income of the assessee.

21. After relying on Shunglu Committee Report, the AO observed that the Assessee has sub-contracted the entire construction work to ACIL at Rs.2,875 per sq. Ft. and on that basis, he inferred that the assessee has also inflated its estimated cost by Rs.87.97 crores since there was no escalation in the contract with ACIL. The contention of the AO that the cost cannot be more than Rs.2,875 per square feet as per agreement with ACIL.

22. For the sake of ready reference, the relevant points made by the AO while amending the POCM and the consequent addition is reproduced below:

> *"16A.The entire construction and development work of Residential Facility and Residential Apartments was awarded to Ahluwalia Contracts (I) Ltd. by Emaar MGF Construction Private Ltd. vide Project Development Agreement dated 10th July 2008, on Cost price basis with a Target Price Cap of Rs.2875/- per Sq. Ft. on actual achievement of FAR. It was specifically agreed upon vide Clause 6 of the contract that in no case the price of Rs.2875/- shall exceed at the completion of the project for entire scope of work. The contract price included payment for supply of all labour, equipments, materials, plant & machinery, tools, transportations, framework, scaffolding, construction of civil works and all applicable taxes including WCT, duties, octroi, levies, royalties, fees, insurance premiums, contributions towards employees benefits, distribution of power and water and all services and activities constituting the scope of work but excluding service tax and labour cess. The contract price also included the contractor's establishment, infrastructure, over heads and all other charges and generally necessary for the proper execution and completion of the work.*
>
> *Price escalation / variation was not allowed. Further a co-joint reading of clause 6 (f) & (j) makes it abundantly clear that if certain material viz. Reinforced steel structure, elevators, DG*

sets, flooring, bathroom fittings are supplied by Emaar MGF Construction Pvt. Ltd. to the contractor the per square feet price decided amongst the parties shall get proportionately reduced. In other words, the cost to Emaar MGF Construction Pvt. Ltd. could not have exceeded Rs.2875/- Per Sq feet under any circumstances as per the agreement referred to above.
(Reference clause 6 of the Agreement dated 10.7.2008 executed between the assessee company and Ahluwalia Contracts (India) Ltd.)

B. The maximum construction cost in accordance with the development agreement which was to be borne by Emaar MFG was Rs.2875/- per Sq. feet only. If the same rate is applied to the total plinth area of 26,16,878.60 Sq. feet as mentioned in the Evaluation Committee recommendations, the total construction cost works out to Rs.752.35 Crs only. The Evaluation Committee has however considered the construction contract cost at Rs.1168.21 Crs as worked out by the financial expert K.N Goyal & Co. Thus, the construction cost considered was wrongly padded by Rs.415.86 Crs (i.e. Rs.1158.21 Crs - 752.35 Crs).

C. The total project cost, therefore, should have been Rs.1224 Cr instead of Rs 1639.86 Crs as worked out by the HLC consultant.

D. Emaar MGF Construction Private Ltd. has borrowed funds from SBI, Overseas Branch Javvahar Vyapar Bhavan, New Delhi. In the proposal submitted, the total project cost has been shown at Rs.1264 Cr, which corresponds to the project cost computed by HLC's consultant after considering the construction cost of Rs.752.35 Cr. It is pertinent to note that in the projections submitted to the bank, namely SBI, for availing loans, the per square feet cost of construction has been reckoned at Rs.2600/- per square feet, which also more or less matches with; the per square feet cost of Rs.2875/- mentioned in agreement with Ahluwalia Contracts (I) Ltd.

E. In order to further validate the above discussed data pertaining to ascertainment of actual construction cost, position regarding actual payments made / bills provided by Emaar Construction (P) Ltd. in respect of Ahluwalia Contracts (I) Ltd., were verified by HLC's consultant from the TDS Returns filed by

Emaar MGF Construction (P) Ltd. Scrutiny of T.D.S Returns for FY 07-08, 08-09 & 09-10 revealed that gross bills raised by Ahluwalia Contracts (I) Ltd. to Emaar Construction (P) Ltd amounted to only approx. Rs.600 Crores. Therefore, looked at from this dimension, even the billings made by Ahluwalia Contracts (I) Ltd and in turn, payments made by Emaar MGF Construction (P) Ltd. are only Rs.600 Crores, approx., which is way below the projected construction cost of Rs.1168.21 Crores reckoned in the note put up to the evaluation committee.

17. In view of above, it is held that the budgeted cost of project reckoned by the assessee at Rs.1597.43 crores is not correct and has in fact been inflated by approx. Rs.400 crores. The estimated cost of construction of Rs.1027.06 crores is inflated. The revenue to be recognized under POCM is therefore recomputed by adopting the cost of construction at Rs.752.35 crores as determined by HLC's consultant. The re-computation is being made as under:

Computation of Recognition of Cost Insured for Mar 09

Particulars	***Estimated Cost Mar – 09***	***Cost Incurred till - Mar 09***
Land Cost	*3,504,716,858*	*3,210,000,000*
Architectural & Consultancy	*303,940,263*	*258,167,847*
Project Infrastructure	*50,860,645*	*35,948,339*
Security	*20,720,167*	*8,138,374*
Construction Cost	*7,523,500,000*	*4,864,894,906*
Finance & Interest of CWG	*826,289,133*	*482,755,297*
Subvention Interest	*190,153,059*	*—*
Bank Guarantee / LC Charges	*58,535,414*	*23,497,769*
Interest from EMGF	*335,939,104*	*258,569,803*
Admin & Overhead	*89,476,232*	*28,347,214*
Contingencies	*323,068,881*	
Total	***13,227,199,756***	***9,170,320,049***

POC (Cost Incurred/Estimated Cost) 9,170,320,049/13,227,199,756 = 69.3293%

Agreement executed *Rs. 737.91 crores*

Revenue to be recognized: 69.3293% of Rs. 737.91 crores Rs. 511.59.crores

Total Area of the project *17,49,099 sq. feet*
Area Sold *5,58,715 sq. feet*

*% Area sold 5,58,715 sq. feet/17,49,099 sq. feet * 100*
31.9400%

Actual Cost Incurred *9,170,320,049*

Cost to be Recognized in P&L account *2,929,056,938*

(39.94% of Rs. 9,170,320,049/-)

The comparative position of the income and cost computed above vis-a-vis the income and cost recognized by the assessee in its P&L account is tabulated as under:

Particulars	*As per audited accounts for A.Y. 2009-10*	*As computed in the assessment order*	*Difference*
Turnover/Income	*423,61,84,544* *(-) 105,90,46,136* *317,71,38,408*	*511,59,00,000*	*393,87,61,592*
Cost of sales	*292,47,76,002* *(-) 42,80,936* *292,90,56,938*	*292,47,76,002*	*Negligible*

18. From above, it can be seen that revenue to the extent of Rs.193,87,61,592/- has been under-declared by the assessee. Out of this, Rs.87,97,15,456/- pertains to under-statement due to variance in budgeted cost of the CWGV project and Rs.105,90,46,136/- is due to sharing of revenue with the holding company Emaar MGF Land Ltd. The understatement of Rs.87.97 crores is because the assessee has computed the level of completion of the project at 57.4078 % whereas the same has been computed at 69.3293 % in the assessment order on the basis of detailed reasons given above. Hence, the difference of Rs.87,97,15,456/- on account of excess budgeted cost declared by the assessee is hereby added to the income of

the assessee. The allowability or otherwise of Rs.105,90,46,136/- passed on the assessee company to its holding company namely Emaar MGF Land Ltd. by reducing it from turnover is being separately discussed in subsequent part of this assessment order."

23. During the arguments before us, the ld. DR submitted her arguments in writing which is as under:

Construction of excess FAR

The Site selected for the CWG village had an approved FAR of 1.67 initially, which was increased to an FAR of 2.00 by the Delhi City Master plan 2021 which came into force effective form 07th February, 2007. He Project was, thus, approved with a built-up area of 2,05,140 square meters by the Building Section of DDA on 18th March, 2008. (para 4.26 of the report).

However, an actual FAR of 2,30,689.33 square meters was built as per the plan submitted by Emaar MGF for obtaining Completion certificate from DDA. The Developer, therefore, constructed an area of 25,549.33 square meters in excess of the approved plans. This was almost 12.5% more than the approved FAR.

• Excess Cost of Project

The assessee company adopted percentage of completion method (POCM) of accounting for recognition of revenue from real estate project being executed i.e. CWGV project. As per the POCM method of accounting, the revenue of project is recognized based upon the percentage of completion achieved at the end of the financial year. Under the POCM method, the project revenue is matched with project cost incurred in reaching stage of completion, resulting in reporting of

revenue, expenses and profit which can be attributed to the proportion of work completed. Accounting Policy of the assessee company regarding the method and procedure of recognizing revenue from various projects under construction is stated in Schedule 19 forming part of the audited Balance Sheet as on 31.03.2009. The policy for revenue recognition as per point No. 2 (h) is on page 16 of Departmental Paper Book.

The assessee company is claiming the estimated cost of project to be Rs. 1597.43 crores. This estimate seems to be on the higher side, especially with respect to the construction cost of Rs. 1027.06 crores. The assessee did not furnish correct, break up of this cost in spite of specific requisitioning of the same. In order to verify the genuineness and bonafides of the budgeted construction cost reliance was placed by AO on the details collected both from the assessee as well as from other sources including the Shunglu Committee Report (HLC) dated 4th March, 2011.

Shunglu Committee was examining the issue of purchase of 333 flats by DDA from the assessee company. The Shunglu Committee was examining the bonafides of the transaction as well as determining whether the purchase price of Rs. 11,000/- per square feet was justified or not. The Sunglu Committee examined both these issues on the basis of documents available on record such as the consultants engaged by DDA for evaluating the correct market price of the flats being purchased. The Shunglu Committee thereafter compared these reports against independent evaluation by consultants engaged by the Shunglu Committee and found that the price of Rs. 11,000/- per square feet paid by DDA for purchase of 333 flats was highly exaggerated. It is in this context that the findings arrived at by the Shunglu Committee

determining the cost of construction of the CWGV project become relevant and important for the purpose of present assessment proceeding. The relevant part of the Shunglu Committee report, particularly of the consultant appointed by the committee is annexed to the order as Annexure A.

• Project Cost calculation

The entire work of the project was given by the assessee to M/s. Ahluwalia Construction (India) Ltd. (Hence forth referred to as ACIL). In fact, it is seen that the said works contract was executed between Emaar MGF Construction Pvt. Ltd. and Ahluwalia Contracts (India) Ltd. The assessee has applied for loan to State Bank of India and the proposal submitted has been examined. The TDS returns of the assessee for the relevant period and the Project Report submitted by the Developer to SBI while seeking loans were also examined.

• Marshalling of Facts:

The entire construction and development work of Residential Facility and Residential Apartments was awarded to Ahluwalia Contracts (i) Ltd. by Emaar MGF Construction Private Ltd. vide project Development Agreement dated 10th July 2008, on cost price basis with a Target Price Cap of Rs. 2875/- per Sq. Ft. on actual achievement of FAR. It was specifically agreed upon vide clause 6 of the contract that in no case the price of Rs. 2875/- shall exceed at the completion of the project for entire scope of work. The contract price included payment for supply of all labour, equipment, materials, plant & machinery, tools, transportations, framework, scaffolding, construction of civil works and all applicable taxes including WCT, duties, octroi, levies, royalties, fees,

insurance premiums, contributions towards employees benefit, distribution of power and water and all services and activities constituting the scope of work but excluding services tax and labour cess. The contract price also included the contractor's establishment, infrastructure, overheads and all other charges generally necessary for the proper execution and completion of the work. (Reference Page 588 Departmental Paper Book)

Price escalation/variation was not allowed. Further, a joint reading of clause 6 (f) & (j) makes it abundantly clear that if certain material viz. Reinforced steel structure, elevators, DG sets, flooring, bathroom fittings are supplied by Emaar MGF Construction Pvt. Ltd. to the contractor the per sq. ft. price decided amongst the parties shall get proportionately reduced. In other words the cost to Emaar MGF Construction Pvt. Ltd. could not have exceed Rs.2875/- per sq. ft. under any circumstance as per the agreement referred to above). (Ref Pg 589/ Dept Paper Book)

The maximum construction cost in accordance with the development agreement which was to be borne by Emaar MGF was Rs. 2875/- per Sq. feet only. If the same rate is applied to the total plinth area of 26,16,878.60 Sq. feet as mentioned in the Evaluation Committee recommendations, the total construction -cost works out to Rs. 752.35 Cr only. The Evaluation Committee has however considered the construction contract cost at Rs. 1168.21 Cr as worked out by the financial expert K.N. Goyal & Co. Thus, the construction cost considered was wrongly padded by Rs 415.86 Cr (i.e. Rs. 1168.21 Cr-752.35 Cr)

Emaar MGF Construction Pvt. Ltd borrowed funds from SBI, overseas Branch, Jawahar Vyapar Bhavan, New Delhi. In the proposal submitted,

the total project cost has been shown at Rs 1264 Cr, which corresponds to the project cost computed by HLC's consultant after considering the construction cost of Rs 752.35 Cr. It is pertinent to note that in the projections submitted to the bank, namely SBI, for availing loans, the per square feet cost of construction has been reckoned at Rs 2600/- per square feet, which also more or less matches with the per square feet cost of Rs 2875/- mentioned in agreement with Ahluwalia Contracts (I) Ltd.

In order to further validate the above discussed date pertaining to ascertainment of actual construction cost, position regarding actual payments made/ bills provided for by Emaar Constructions (P) Ltd in respect of Ahluwalia Contracts (I) Ltd, were verified by HLC's consultant from the TDS Returns filed by Emaar MGF Construction (P) Ltd. Scrutiny of T.D.S Returns of FY07-08,08-09 & 09-10 revealed that gross bills raised by Ahluwalia Contracts (I) Ltd to Emaar Contructions(P) Ltd amounted to only approx. Rs 600 Crores which is way below the projected construction cost of Rs.1168.21 Crores reckoned in the note put up to the evaluation committee.

24. Rebutting the above arguments, the ld. AR submitted that there have been more enlargement in the scope and specification in cost as per the estimate and as per the execution which is as under:

S.No.	*Description of item*	*PDA / RFP*	*As per Execution*
1.	*Toilets - Flooring & Cladding*	*Imported Ceramic Tiles / Vitrified Tiles*	*Imported Marble / Imported Sandwich Tiles*
2.	*Common Toilets*	*No. of Toilet in an apartment shall be Total No. of bed Room in that apartment minus 1*	*All bed Rooms are having independent attached Toilets.*

3.	*Servant Toilets*	*Nothing mentioned about this toilet under Accommodation requirement*	*All units are provided with servant Room Toilet*
4.	*Powder Room*	*No. of Toilet in an apartment shall be Total No. of heel Room in that apartment minus 1. Hence, no provision for powder room.*	*All 5 Bed Room & 4 Bed Room Units are provided with Powder Room*
5.	*Master Bed Room*	*Wash Basin, Lavatory, Shower, Mirrors, Geysers Glass Showers in one of the bathrooms of each unit*	*In all Master bed room 2 Wash Basins are provided.*
6.	*False Ceiling & Bulk Heads*	*Not considered in specification and requirements.*	*Provided wherever the VRV pipings are exposed and in lower Ground Units.*
7.	*Painting in Servant Room and Utility Room*	*Oil Bound Distemper*	*Instead on oil bound Plastic Emulsion is provided.*
8.	*Terrace Treatment*	*Brick coba with precast terrazzo tile finish*	*In addition to Brick coba Thermal insulation is provided.*
9.	*ACP & Fins*	*Not in RFP*	*Aluminium composite Panel is provided in Elevational Areas of Tower*
10.	*Aluminium Curtail Wall in Top floors of Towers*	*Only Al. Windows*	*Provided in all towers at Top Floors*
11.	*Masonry*	*Brick Masonry as per RFP*	*Autoclaved Aerated Concrete Blocks and Fly Ash Bricks are being used.*
12.	*Sky Lights*	*Poly carbonate sheet*	*Laminated Glass*
13.	*Modular kitchens*	*Not mentioned*	*Provided in all kitchens*
14.	*Lifts*	*2 in each tower*	*Addl. Provided*
15.	*Basement Ventilation System*	*Not considered*	*System is provided for huge basement*

16.	*Basement Ventilation Tunnel*	*Not considered*	*Addl. Provided*
17.	*Other MEP Items for Addl. Basement Area*	*781466 Sft*	*System is provided for huge Basement of 1543177 Sft.*
18.	*Soil*	*There was no provision or disclosure on the fact that the soil was soft*	*Piling was done to make the soil harder, which resulted in increase of scope of work.*
19.	*Basement*	*There was no provision for building of the Basement.*	*Basement was build.*

25. It was argued that due to the various changes, the estimate has been increased. Further, in absolute financial term it was argued that the estimated cost in the cost incurred is as under:

Particulars	*Estimated Cost*	*Cost Incurred PTD Dec-11*
Land Cost	*3,583,745,556*	*3,583,745,556*
Architectural & Consultancy	*298,596,389*	*276,070,980*
Construction Cost	*10,810,213,351*	*10,050,914,160*
Project Infrastructure	*47,468,970*	*48,016,217*
Security	*16,819,027*	*16,955,075*
Admin & Overhead	*94,218,062*	*56,932,803*
Personnel Cost	*85,929,433*	*85,929,433*
Finance & Interest of CWG	*786,890,632*	*786,890,633*
Bank Guarantee/LC Charges	*52,660,563*	*52,660,563*
Subvention Interest	*89,074,464*	*89,074,463*
Interest from EMGF	*273,981,085*	*273,981,087*
Total	*16,139,597,533*	*15,321,170,971*

26. It was argued that the accounts have been maintained as per the accounting standards and no defect in relation to Section 145(2) or Section 145(3) has been found out by the revenue authorities.

27. It is further submitted that the Budgetary expenditure on the project is Rs. 1597.43 crores as on 31st March 2009 and actual expenditure upto this date is Rs. 917.03 crores. This will yield a ratio for POCM at 57.40% (Rs. 917.03 / 1597.43 X 100 = 57.40%). In this budgetary estimate of expenditure construction cost has been taken at Rs. 1027.06 crores. Thus, other budgetary cost of the project comes out to be Rs. 570.37 crores (Rs. 1597.43 - Rs. 1027.06). However, by adopting cost of construction at Rs. 2875 per square feet, total cost of construction has been worked out by AO at Rs. 752.34 crores. The same amount has been taken as budgetary estimate by him and included in the other cost to work out total budgetary cost at Rs. 1322.71 crores (Rs. 752.34 + Rs. 570.37), this figure has been used by AO as denominator to determine ratio of POCM at 69.32% (Rs. 917.03 / 1322.71 X 100 = 69.32%). It has lead to a high ratio of allocable revenue which is incorrect as per accounting principles because one has only to adopt budgetary estimate of total expenditure and not part of the budgetary expenditure.

28. It was further argued that the Assessing Officer has not disturbed other cost in the budgetary estimate or cost actually incurred in other areas other than cost of construction. He has only replaced Rs. 1027.06 crores being cost of construction estimated by the assessee by Rs. 752.35 crores which is based on cost of construction of Rs. 2875 per square feet. This rate ignores several other payments which the assessee had to make for purchase of steel and cement provided to ACIL or used directly to complete the project when ACIL has abandoned it. He argued that the cost of steel and cement has risen much by the time, the construction started

compare to the time of preparation of estimates. In fact, upto 31st March 2009, the actual expenditure of Rs. 486.48 crores incurred on cost of construction includes payment to ACIL of Rs. 308.84 crores and payment to others of Rs. 177.66 crores. He argued that a number of payments were made to other parties too in addition to payment made to ACIL. It is, therefore, incorrect to confine to the budgetary estimate only on the basis of money paid / payable to ACIL. It was also submitted that actual expenditure including on cost of construction upto 31.12.2011 was Rs. 1532.12 crores which is almost matching with the budgetary estimate of Rs. 1597.43 crores. Therefore, he argued that budgetary estimate should not be disturbed. He argued that the addition was solely based on the report of Shunglu Committee without bringing any iota of differences factually.

29. The other reasons canvassed by the ld. DR regarding the increase in cost is as under:

- substantial wastages at site, especially costly items like, marble, steel etc., which led to increase in incurrence of additional costs on account of owners material supplied by the appellant;
- substantial/abnormal increase in price of steel as envisaged in the RFP vis-a-vis actual, cost incurred by the appellant, which was totally unanticipated;
- ACIL did not complete the project in entirety stopped work in December 2009 and was forced to leave by DDA on 28-Aug-2010. Accordingly, the appellant had to incur additional expenditure over and above the payments already made to ACIL, after exit of ACIL.
- ACIL has, in fact, invoked arbitration proceedings and has raised claims against the appellant for reimbursement of additional amount for alleged work carried out in the project, which has not been

accepted by the appellant. The appellant, on the other hand, has raised the counter claim on ACIL for refund of the additional; payments made to ACIL on account of, inter alia, short adjustment of owners material supplied by the appellant to ACIL and liquidated damages on account of defective / deficient work carried out by ACIL along with interest thereon, for which the appellant had to incur extra cost to remedy the defective work done by AGIL and to pomp lefty the pending/unfinished work, so as to hand over the Project in time.

- It is a matter of record that the appellant had incurred the aforesaid additional costs, which resulted in increase in the overall cost of the Project, which was duly considered by the Financial Consultant appointed by the DDA before purchasing additional flats from the appellant at Rs.11,000 per sq. ft., while bailing out the appellant from financial distress and providing funds to the appellant, in order to complete the project within the stipulated time limits. The said fact was also accepted by the Labour Commissioner in the assessment order passed, while levying labour cess on the total construction cost incurred by the appellant.
- The total estimation of the budgeted costs made by the appellant in the relevant previous year also matches the total actual cost incurred on the Project upon completion.
- In that view of the matter, considering that additional expenses were actually incurred by the appellant due to aforesaid cumulative reasons, which exceeded the original target price of Rs.2875 per sq. ft. agreed with ACIL, the same were required to be recognized and included in the total estimated/budgeted costs of the Project, for the purpose of recognizing revenues and expenses as per POCM.

30. Further, the ld. AR brought our attention to the break-up of expenditure incurred by the assessee by way of payment to ACIL.

S. No.	Particulars	Upto 31st March, 2009	Upto 31st March 2010
1.	Cost incurred towards payment to ACIL	Rs.313.25 Cr	Rs.605.68 Cr
2.	Cost incurred towards payment to other sub-contractors on account of supply of "owners material".	Rs.168.52 Cr	Rs.332.63 Cr

31. It was argued that the assessee supplied "owners material" and made payments to sub-contractors appointed by the assessee, due to liability of ACIL to complete the work in time to the tune of Rs. 168.52 crores upto 31.03.2009 and of Rs.332.63 crores upto 31.3.2010.

32. Although, ACIL was to reduce the cost of 'owners material' supplied by the assessee from the total cost of the work carried out by the former in the bills raised, ACIL did not give full credit of the aforesaid total actual costs incurred by the assessee on account of supply of 'owners material'. It may be pointed out that the assessee had incurred actual additional expenditure of Rs. 332.63 crores upto 31.3.2010 on account of supply of owners material, whereas ACIL gave total credit of Rs. 177.23 crores only, in its bills with respect to the above. Thus, he argued that there were dispute with ACIL.

33. Heard the arguments of both the parties and perused the material available on record.

34. Primarily, we find that the addition has been made solely based on the Shunglu Committee Report. The object of the Shunglu Committee was to determine, if the purchase of 333 additional flats by DDA was according to the norms / rules and had not caused any loss to the exchequer. Its

object was not to determine the cost or expenditure to the assessee, indeed, the assessee was never called to the proceedings of the Shunglu Committee, nor was any input / clarification taken from the assessee. It can also be find that another government agency, the Labour Commissioner, has accepted the cost of the assessee for the purpose of levy of labour cess on the CGV project. What is primarily required is to prove the inflation in the cost of construction is to determine, investigate and prove whether any expenditure claimed in the P&L account or said to be incurred for construction are bogus or inflated. This inflation could be either on payment of sub-contractors or cost of materials. The issue of the purchase of materials is also dealt in this order while dealing with the ground taken up by the assessee relating to purchase of material. There is no dispute about the difference between the estimated specifications and executed specifications. Hence, incurring of additional expenditure over and above the contract given to the ACIL can be accepted. Further, after the departure of ACIL from the execution of the work, the same has been completed by resorting to the completion by other agencies. The increase in the cost of cement and steel cannot be ruled out. The Assessing Officer ultimately held and calculated the difference in POCM based on the budgeted cost and the payments made to EMLL. Nowhere, the method of accounting standard followed by the assessee has been disputed, in fact, no grounds could be brought out by the Assessing Officer to alter the percentage shown by the assessee except the document of estimated cost. The Assessing Officer held that the estimated cost of the project computed by the assessee at Rs.1597.43 crores was higher by approximately Rs.270 crores on account of cost of construction computed at Rs.1027 crores. The AO's conclusion that the total construction cost cannot exceed Rs.752.35 crores and hence total estimated project cost worked out to Rs.1322.71 crores against Rs.1597.43 crores estimated by the assessee cannot be

accepted. This reduction in estimated expenditure consequently resulted in working of POCM at 69.32% instead of 57.40%. This resulted in the absolute figure of Rs.87.97 crores rise in the estimated income of the assessee which is not without any tangible basis and hence cannot be accepted. The AO's contention that the negligible profit declared by the assessee warrants the alteration in POCM is also cannot be accepted. We also rely on the judgment of CIT Vs Vikram Plastics 239 ITR 161 (Guj.) wherein it has been held that, where no discrepancies or defects pointed out in the books of account and further that they were regularly maintained and also on the finding that there was no material brought on record to establish that purchases or expenses were inflated or sales suppressed. The profits declared by the assessee cannot be altered. Similarly, the Hon'ble Delhi Court in the case of Winner Constructions Pvt. Ltd. in ITA 796/2011 held that low gross profit or net profit may be a ground are reason to conduct detailed and thorough investigation and verification but on that stand alone the profits cannot be rejected. System of accounting adopted by the assessee cannot be rejected on the grounds that gross profit disclosed by the assessee was low. It is also a fact and as submitted by the revenue that the assessee had constructed 230,689.33 sq. mt. against the approved built up area of 205,140 sq. mt. In that case, it is a natural corollary that the cost incurred for construction of the plots would be more than the estimated cost. The fact that the DDA purchased the flats for Rs.11,000 per sq. ft. and sold in auction @ Rs.24,000 per sq. ft. has been ignored by the Assessing Officer and took a fixed stance that the cost of construction cannot be more than RSs2875 per sq. ft. The factor such as increase in the input cost, exit of the main contractor, change in the specification are not considered by the Assessing Officer. In the instant case, there has been no evidence of inflation of purchases, the Assessing Officer has not rejected the books of account, the accounts have

been accepted but altered the profits based on the estimated project cost. This cannot be said to be legally tenable. The re-computation and the consequent addition made by the Assessing Officer is hereby directed to be deleted.

35. Regarding the addition of Rs. 105.90 crores taken up at ground no. 3 of the revenue's appeal and ground 2.1 & 2.2 of the assessee's appeal:

The facts in brief relating to this issue are that assessee company (herein after referred to as EMCPL) had to enter into a collaboration agreement with its holding company viz., M/s Emaar MGF Land Limited (herein after referred to as 'EMLL') dated 07.04.2008 for providing technical and financial support to carry out the project of construction of flats at Common Wealth Games village (herein after referred to as 'CWG Village') as per terms and specifications laid down by DDA. There was a consortium of four companies which bid in the auction to win the project. The assessee has then floated as a special purpose vehicle for completing this project. For providing financial security to the assessee and guarantees to the financial institutions and DDA the holding company secured 25% revenue from the sale proceeds of the flats. The collaboration agreement was accordingly drafted and executed. The share of revenue to the holding company was declared in its return of income and assessed by the department accordingly.

36. The Assessing Officer has taxed that 25% share of the holding company in the hands of the assessee by disregarding the collaboration agreement. The facts as submitted before the Assessing Officer are as under:

"i. The Assessee is a company established under the laws of India. The assessee is engaged in the business of promotion, construction,

development and sale of integrated township, residential and commercial multi-storey building, flats, shopping malls, IT park, Hotels and apartments.

ii. The assessee filed its return of income for AY 2009-10 on September 30, 2011 declaring a total income of Rs.75,239,325. The return of income was selected for scrutiny under section 143(3) of the Act. During the course of assessment proceedings for AY 2009-10, the assessee furnished documents/ information/ clarifications requested by the AO. Subsequently, the AO completed the assessment and issued an order under section 143(3) of the Act wherein he has made the impugned additions to assessee's total returned income.

iii. The Ministry of Sports and Youth Affairs awarded the prestigious contract of construction of Commonwealth Games Village to Delhi Development Authority. The project was located within the revenue limits of Village Chirag Janubi, near Akshardham Temple at Noida crossing on land measuring about 11 hectres.

iv. The contract was a project of great national importance and consequently DDA decided to develop this project under a Public Private Partnership ('PPP') Model. The partnership in this prestigious project meant a great leap for any private developer, not only commercially but also as demonstration of its quality and execution capabilities.

v. The DDA released a Request for Proposal on 2007. It detailed the techno-commercial requirements of the project that were supposed to be met by the private partner. The salient features of the minimum commercial requirements to be fulfilled by the bidder were as under:
Pre-bidding stage

a) Bid security of Rs. 10 crores to be deposited

b) The bidder should have a net worth of Rs. 100 crores

c) The reserve price for the bid was Rs. 300 crores

Post-bidding stage

a) Technically qualified bidder to provide 25% of the quoted upfront amount less any bid security (EMCPL bid Rs.321 crores)

b) Technically qualified bidder to provide balance 75% of the quoted upfront amount within 3 days of award of the bid (EMCPL bid Rs.321 crores)

c) Technically qualified bidder to provide performance guarantee of Rs.400 crores

d) Seed capital / working capital for the project where estimated cost was Rs.1550 crores to Rs.1650 crores.

vi. In this back-drop a consortium of developers led by M/s Emaar PJSC UAE submitted its bid. The consortium comprised of the following:

- Emaar PJSC, UAE
- EMLL
- MGF Developments
- Discover Estates

vii. A copy of the resolution from all the four members of the consortium which authorizes the company to enter into consortium are enclosed as Annexure K.

viii. The modus operandi for execution of the project was worked out within the guidelines specified for the execution of the project by DDA. The following structure was designed and followed:

- A special purpose vehicle EMCPL will be incorporated. It will be the legal entity in whose name the entire project will be executed and delivered. The responsibilities of the bidder will all be borne by EMCPL.
- EMCPL will execute the construction work, appoint sub-contractors, ensure agreed quality of the work, be responsible for time-over-runs etc.
- EMLL will provide capital and quasi-capital to EMCPL and stand guarantor to the funds borrowed by EMCPL. It will also stand guarantor for the performance guarantees furnished in turn by EMCPL to DDA.
- EMLL took the commercial risk also related to delay in completion of project, drop in sales and financial crunch.

ix. The consortium comprising of the above four companies entered into an understanding to represent the consortium before DDA and other authorities in the form of a company which was a special purpose vehicle to execute the project awarded by DDA to the consortium, took a legal shape in the form of assessee company. Thus, the assessee company is nothing but the consortium in the legal form. Subsequently, the consortium has made correspondence with DDA in respect of the project through this legal form i.e., the assessee company. A copy of the letter addressed by the consortium to DDA and also mentioning that assessee company is a legal form of consortium is enclosed as Annexure L.

x. At the time of arriving at the understanding to create the legal entity of the consortium i.e., assessee company it was mutually agreed among the members of the consortium that M/s Emaar MGF Land Private Limited will provide entire finance and guarantees and in lieu thereof it will take 25% of the revenue out of the sale proceeds of the project. In order, to

give a legal shape to this understanding a 'Collaboration Agreement' was drafted and executed on 07.04.2008.

37. EMCPL entered into a Collaboration Agreement dated 7 April, 2008 with EMLL. The snippets of the agreement between EMCPL (the assessee) and EMLL are as under:

"i. That it is agreed between the parties that the total estimated cost of the above stated project will be in the range of Rs. 1550 to 1650 crores spread over a period of three years.

ii That the Party of the second part has agreed to secure initial and vital funds requirements of the project by way of Equity Capital Contribution and also by way of Quasi Equity in the shape of deposits / advances for which it has agreed to provide a sum not exceeding 40% of the total estimated cost of the project as stated in clause (i) above.

iii That it has been agreed that the above stated infusion / availability of the funds will be made available on the basis of various stages of the project (as made available till date), primarily for initial stages and the balance cost required for the execution of the project will be funded through borrowings from third parties and accruals / revenues emanating from the said project.

iv That it has therefore been agreed that the contribution of the party of the second part will primarily be utilized to meet the initial fund requirements of the project, including the payment to Delhi Development Authority (DDA) and to meet day to day fund requirement for the project.

v. That it is mutually agreed by and between the parties that the party of the first part shall reimburse to the party of the second part the average capital carrying cost of the party of the second part which will range

anywhere between 5% to 7% of the quasi capital or deposits/advances contributed, by the party of the second part to the corpus of the project to be computed in the manner as mutually agreed between the parties……

xi That the party of the first part hereby agreed that in consideration of the various capital covenants highlighted above along with assuming inherent and associates risks embedded in the project, to compensate the party of the second part, by way of attribution of 25% of the gross revenue accrued through sale of project stock computed on the percentage of completion achieved as ascertained at the end of the year in favour of the party of the second part. It is also agreed that the party of the second part shall be eligible for such attribution only if project stands completed to the extent of either or above 30% of the total project completion, being the threshold limit at which the revenue is recognized by the party of the first part.

xii That it is also agreed between the parties that in the event of "Bulk/Institutional Sales", the entitlement of the party of the second part in terms of consideration/compensation mentioned in clause (xi) supra, shall stand varied and will depend oil the terms and conditions of such sale. Such varied compensation to the party of the second part by the party of the first part will be mutually decided only after the completion of such Bulk/Institutional sales…….

MISCELLANEOUS

a) That it is mutually agreed that there exists clear demarcation of the roles and responsibilities of the parties of this collaboration; the party of the first part being exclusive developer and executor and the party of the second part being financial collaborator for successful completion of the project.

From the terms of the agreement, there is a clear demarcation of the roles and responsibilities of the assessee and EMLL whereby the assessee is an exclusive developer and executor and EMLL is commercial and financial collaborator.

The cost estimated for the CWG Project was to range between Rs.1550 to 1650 crores. The estimated cost was to spread over a period of three years. Referring to the pre-conditions mentioned in the bid, M/s Emaar MGF Land Limited agreed to secure initial and vital fond requirements of the project by way of Equity Capital contribution and also by way of Quasi Equity in the shape of deposits / advances for which it has agreed to provide a sum not exceeding 40% of the total estimated cost of the project as stated above.

The funds infusion, directly and indirectly, happened throughout the project execution stage evidencing continuous and active involvement of EMGFL as commercial and financial collaborator for the project.

The agreement between assessee and EMLL provided that EMCPL was also provides to EMLL, the average capital carrying cost of ranging between 5% to 7% of the quasi capital or deposits / advances contributed by EMLL.

38. Therefore considering the capital contribution made by EMLL, the assessee also agreed to compensate EMLL by way of attribution of 25% of the gross revenue accrued through sale of CWG Project stock computed on the basis of percentage of completion achieved at the end of every year. It was also agreed that such attribution is to take place only if the project stands completed to the extent of either or above 30% of the total project completion, being the threshold limit at which the revenue is to be recognized by the assessee.

39. Role of EMLL as financial and commercial risk-bearer:

EMLL was to be duly consulted for appointment or nomination of the directors or officer bearers:

EMLL to be duly consulted in respect of mortgage /lien /encumbrance /charge on any of the assets or other rights in the projects;

EMLL to be consulted with respect to prices or other terms and conditions of the sale of stock or other rights in the project; Books of accounts may be inspected by EMLL.

EMLL acting as a financial collaborator, similar to the funding by banks/financial institutions, EMLL also sought to control the operations of assessee company in relation to project being funded by EMLL. This control of operations of the assessee is to protect the funds advanced by way of creating an underlying security.

40. Thus, it is seen that funding of CWG project by EMLL is in nature of unsecured commercial/financial collaboration whereby in consideration of the capital infusion and other covenants, the lender is being compensated through revenue sharing.

Commercial justification of EMLL's involvement

41. The assessee company was a Special Purpose Vehicle (SPV) created to execute CWG project as one of main conditions of CWG project was that it should be undertaken by an SPV. SPV could not undertake such a large project without financial support from either its shareholder or any external party. At the time of bidding itself, EMLL provided funds to the extent of Rs.221 crores which was used to pay Rs.321 crores to DDA. Monies paid by EMLL are as under:

Date	*Amount in INR*	*Purpose*
03-M-07	*25,50,00,000*	*Amount Paid for DDA as Earnest Money for Commonwealth Game Village*
04-Aug-07	*60,37,50,000*	*amount Paid for DDA Selection of Project Developers for construction of residential Project of Commonwealth Games Village*
04-Aug-07	*60,00,00,000*	*amount Paid for DDA Selection of Project Developers for construction of residential Project of Commonwealth Games Village*
14-Jun-07	*10,00,00,000*	*Amount Paid for submission of the RFP for Residential Project Commonwealth Games, 2010 Village.*
02-Jul-07	*44,75,00,000*	*Amount Paid for DDA as Earnest Money for Commonwealth Game Village*
05-Sep-07	*20,37,50,000*	*Advance Paid for DDA for Commonwealth Game*
Total	*221,00,00,000*	

42. The balance Rs.1,00,00,00,000 was paid by EMCPL out of borrowed funds. The loan was given by bank under guarantee by EMLL. Further, in accordance with bid the requirement, EMLL paid original bid amount along with a bank guarantee of Rs.400 crores which was also arranged by EMLL either directly or by providing corporate guarantee. Detail of loan raised and bank guarantee provided is as under:

Lender	*Project Loan (INR in crores)*	*Bank Guarantee Facility (INR in crores)*	*Total Credit Facility*	*Security given to Lenders*
State Bank Of India	*150*	*300*	*450*	*Assignment of Development Right and Corporate Guarantee of EMLL Land*
State Bank: Of Patiala	*. 50*	*50*	*100*	
HDFC Ltd.	*50*	*-*	*50*	
HSBC	*-*	*50*	*50*	*Corporate Guarantee of EMLL Land*
Total	*250*	*400*	*650*	

43. The supports which were provided by EMLL to the assessee are summarized as under:

i. EMLL provided funds to the extent of Rs. 221 crores which was used to pay Rs. 321 crores to DDA. Such money was paid by EMLL. The balance Rs. 1,00,00,00,000 was paid by the assessee out of borrowed funds. The loan was given by bank under guarantee by EMLL.

ii. In accordance with the bid requirement, EMLL paid original bid amount along with a bank guarantee of Rs. 400 crores which was also arranged by EMLL either directly or by providing corporate guarantee.

iii. Further, it is also important to note that Board of Directors (BoD) of EMLL has approved and agreed to provide financial support to the assessee company as and when required.

iv. EMLL stood guarantor for loans from the financial institutions for the assessee EMCPL, where the guarantee in the form of Corporate Guarantee was given by EMLL.

v. EMLL took the commercial risk, also related to delay in completion of project, drop in sales and financial crunch.

vi. EMLL made direct intervention by way of infusion of capital/quasi capital as and when EMCPL faced a credit crunch from lenders side. The contribution made by EMLL as on March 31, 2009 stood at Rs.270 crs.

vii. The DDA invoked, bank guarantee of . 183 crs and EMLL provided the following contribution to meet the obligation of EMCPL towards the guarantor banks:

- Rs. 11,41,000 on October 30,2010;
- Rs. 29,07,00,000 on November 4, 2010;

- Rs. 25,00,00,000 on October 27, 2010;
- Rs. 42,00,000 on October 31,2010; and
- Rs. 1,25,03,000 on October 31,2010

Further, Rs.70 crores has been funded through overdraft limits allowed to assessee on the basis of corporate guarantee given by EMLL.

Subsequent to dispute with DDA, the matter is in arbitration and once the liability on the matter crystallizes in case assessee loses the arbitration, it is possible that a loss of entire Rs. 183 crores will be borne by EMLL.

Since, the land for the CWG contract was owned by DDA, therefore the assessee did not have any asset which could have been mortgaged with the financial institutions to arrange the funds for the projects. Hence, EMLL had provided the entire necessary guarantee to the financial institutions for securing funds from them.

viii. The risk was to be shared mainly by 2 entities, EMCPL & EMLL, the former from the perspective of execution of the project construction work, and the latter from perspective of bearing all the risk related to price fluctuations, lack of sales, credit crunch, commercial liability due to non-execution/slow execution of the project etc. or in a nutshell, the commercial risk associated with the project.

ix. It was therefore logical, that the companies that have undertaken the risk jointly should also share commensurate returns emanating from the project. The terms of the risk and return sharing ought to the spelled out ab-initio to provide clarity for all future transactions between the two entities EMCPL and EMLL, who also happened to be in a subsidiary and holding company relationship.

44. The AO raised the following arguments while making the disallowance:

(i) Reliance upon agreement dated 07.04.2008 is an afterthought. This document never existed and surfaced for the first time during present assessment proceedings.

(ii) Agreement dated 07.04.2008 is sham and transactions between assessee company and its holding company involving transfer of 25% of the gross revenue is nothing but sham and is arranged to reduce tax liability (of the assessee company) and is a colourable device.

(iii) Contents of the agreement dated 08.05.2008 mentioned in schedule 19 of the balance sheet are contradictory to the contents of agreement dated 07.04.2008. In spite of repeated opportunities, the assessee failed to furnish the agreement dated 08.05.2008.

(iv) The holding company was already paid interest cost towards deployments of funds and hence adequately compensated.

(v) Inherent and associated risks claimed by the holding company are only a bogey. It is not understood what kind of Inherent and associated risks embedded, in the project are being assumed by the holding company.

(vi) The holding company is virtually holding entire share holding of assessee Company. It was responsible for arranging the funds for the CWGV project. By virtue of being owner of the assessee company the holding company has already assumed the inherent risks associated with the project.

(vii) The manner of accounting treatment of the said, sum of Rs.105,90,46,740 is also dubious as much as the same has been reduced from the turnover instead of debiting it separately in the P/L account.

(viii) No TDS has been deducted from this payment and therefore even the provisions of section 40(a)(ia) of the Act would get attracted.

(ix) The said amount has been shown as liability in the books at the end of the year and. therefore there is no movement of funds.

(x) The claim of revenue sharing is disallowable under section 40(A)(2)(b) of the Act as holding company with which revenue of 25% was shared is having substantial interest in the assessee company as per this section.

(xi) The revenue shared at 25% is not only excessively high but also not backed by rendition of tangible services.

(xii) The obligation of the holding company is very general in nature. It has not been specified as to exactly what efforts were made by and what functions were discharged by the holding company.

(xiii) No real value addition has been provided by the holding company as entire work, was outsourced to Ahluwalia contracts (India) Limited.

(xiv) It is not explained as to what services were rendered by the holding company in the marketing and selling of flats as the assessee company has separately incurred expenses @ 2% of the sale price to various marketing agents for sale of flats.
(xv) Holding company does not take responsibility for any loss or default committed by assessee co. during the course of execution or completion of the project.

(xvi) For getting finance for execution, of the project the assessee company has compromised its entire profits which it would have earned from the project.

(xvii) As there is no independent consideration for revenue sharing, as for providing finance interest is being charged, the agreement for revenue sharing is not valid under Indian contract Act 1872. There is no valid contract in the eyes of law.

(xviii) Interest payment (on finance provided by holding company to the assessee company) is deliberately kept low (@ 5 to 7 %) to camouflage

revenue sharing with clear intention of wiping off the profits of the assessee company by adjusting brought forward losses of the holding company

(xix) The collaboration agreement has not been entered into at Arms' length price.

45. Before us, the ld. DR and ld. AR argued extensively about the various aspects of the business affairs of the assessee. The arguments and the counter-arguments are as under:

Sl.No.	*Arguments of the DR*	*Counter arguments of the AR*
1.	*Reliance upon agreement dated 07.04.2008 is an afterthought. This document never existed and surfaced for the first time during present assessment proceedings.*	*The cop of the agreement has been provided/submitted to the AO during the course of assessment proceedings on 29.11.2011. There was no earlier occasion for the assessee to submit/provide the same. On the other hand, the agreement was executed on a stamp paper which was purchased prior to 07.04.2008 and the agreement was signed by the parties on that date. An affidacit of the director of the holding company to this effect has also been executed.*
2.	*Agreement dated 07.04.2008 is sham and transactions between assessee company and its holding company involving transfer of 25% of the gross evenue is nothing but sham and is arranged to reduce tax liability (of the assessee company) and is a colourable device.*	*There is no material to show that the agreement is intended to reduce tax liability of the assessee company. In fact, had the entire contract been executed by the holding company than the profit arising from the contract would have been absorbed in the losses brought forward from earlier years.* *There was nothing to prevent the holding company to get the contract in his name and execute it in his name. But for the purposes of satisfaction of DDA and other contractees, it was considered necessary to float a common Special purpose vehicle ("SPV") and accordingly the assessee company was floated with majority shares held by holding company. Similarly, there is*

		no material on record to hold that agreement is a colourable device. *Both the companies (the assessee and holding company) are assessed at the same rate of tax. There is as such no tax saving or tax avoidance.* *Holding company is assessed to tax. The share of revenue has been duly declared in its return of income by the holding company.* *Where money was received for commencement of business for which part of profit (45%) was parted away by the assessee to the financier instead of paying interest to him on the funds provided by him, transaction was not held as a colourable device. Hon'ble Karnataka High Court in Commissioner of Income-tax vs. V. G. Siddartha [2010] 322 ITR 0365 - (Kar) held that:* *"When the Revenue has accepted the return filed by M/s. Mysore Amal-gamated Coffee Estates P. Ltd., we are of the opinion, that the Revenue cannot reject the return filed by the assessee, on the ground that it is a sham and colourable transaction. If the transaction is held to be a sham and colourable transaction, the Revenue cannot treat the said transaction as genuine so far as it relates to one assessee and rejected the same in case of the other assessee. When both of them are parties, the transaction of both the parties should have been rejected by the Revenue."*
3.	*The holding company was already paid interest cost towards deployments of funds and hence adequately compensated.*	*It is incorrect to presume that relationship between, the assessee and the holding company was limited to the relationship of borrower and lender only. The assessee was floated as a special purpose vehicle by the holding company to complete the contract of construction of CWG village. It was holding company's responsibility to* *(i) arrange the infrastructure, finance and*

		manpower *(ii) to keep the contractee i.e., DDA appraise of the development and ensure fulfillment of the terms of contract* *(iii) to stand as a guarantor before DDA and the financial institution* *(iv) the contract was awarded on the basis of goodwill of the holding company and fulfillment of technical qualification in the bid which, only holding company possessed.. The assessee was a newly created and hence could not boast of experience and technical qualification required to bid in the contest* *(v) Bid security and reserve price could only be provided by the holding company* *(vi) Net worth required to compete in the bid could be possessed only by the holding company* *(vii) Only holding company was capable of fulfilling post bidding compliance as stated above (In the statement of facts)* *Further, the cost of capital provided by the holding company to the assessee was not commensurate with the market rate. The rate of interest on which money could be borrowed ranges from 15% to 24% whereas the holding company charged only a nominal rate ranging from 5% to 7%, Hence, it is incorrect to draw inference that holding company was adequately compensated.*
4.	*The manner of accounting treatment of the said sum of Rs. 1,05.90.46,740 is also dubious as much as the same has been reduced from the turnover instead of debiting it separately in the P./L account.*	*The sum of Rs. 1,05,90,46,740 is not expenditure and hence could not have been debited in the P/L account. It is not a charge on profits. It is not a division of income. It is sharing of revenue between two co-workers. One is handling the execution of project and other is handling finances and guarantees which is equally essential in the successful completion of the project. Sharing of Revenue is diversion by a superior title. They could have shared out of net profits but it is for the businessmen to decide the terms at which they intend to*

		proceed. There is nothing illegal in sharing the revenue. They could have even shared the contract interse and completed the part of the project. The sharing of the income and therefore a debit to the P/L account is not the only basis available to the businessmen to settle their terms. Therefore, it is not acceptable to hold the terms of settlement between assessee and holding company as dubious particularly when there is no material to doubt its genuineness.
5.	*The said amount has been, shown as liability in the books at the end of the year and therefore there is no movement of funds.*	*It has no consequence over the genuineness of the agreement or revenue sharing between the assessee and its holding company. Whether payment is actually made in. the current year fully or partly or no payment is made this year will not have any effect on the legal relationship as per the agreement dated 07.04.2008. Even where expenditure is claimed against profits what is required to show is that liability has arisen and. claim of the other party has accrued. In mercantile system of accounting, the point of time at which income or liability accrues is the point at which income has to be charged or claim of expenditure has to be allowed.*
6.	*The revenue shared at 25% is not only excessively high but also not backed by rendition of tangible services.*	*What is to be considered is the value of the guarantee and risk under taken by the holding company and utilization of its technical competence and initial security in bid furnished to the DDA. Without involvement of the holding company in the consortium, the project could not have been won from the DDA. While stating the facts above, we have already highlighted as to what services have been, rendered and what role the holding company has played prior to bidding and after bidding. At the cost of repetition, it is submitted that the holding company had played following role:* *(i) Pre-bidding stage* *i. Bid security of Rs.10 crs to be deposited* *ii. The bidder should have a net worth of Rs.100 crs*

		iii. The reserve price for the bid was Rs.300 crs *(ii) Post-bidding stage* *i. Technically qualified bidder to provide 25% of the quoted upfront amount less any bid security (EMCPL bid Rs 321 crs)* *ii. Technically qualified bidder to provide balance 75% of the quoted upfront amount within 3 days of award of the bid (EMCPL bid Rs 321 crs)* *iii. Technically qualified bidder to provide performance guarantee of Rs.400 crs.* *iv. Seed capital/working capital for the project where estimated cost was Rs.1550 crs to Rs.1650 crs*
7.	*Holding company does not take responsibility for any loss or default committed by assessee during the course of execution or completion of the project.*	*The holding company is giving the guarantee to the financial institutions and DDA. Then any loss incurred by the assessee which finally translates into non-repayment of loan to the financial institutions due to the project remaining incomplete resulting into failure of agreement with DDA; then the guarantee given by the holding company would be forfeited and which can cause irreparable damage to its finance and reputation therefore, it is incorrect to say that the holding company has not taken any responsibility for loss incurred by the assessee. It is not the sharing of the profit and loss, but it is the taking total responsibility of meeting out the loss to the Financial Institutions or to the DDA on account of failure on the part of the assessee company in successful completion of the project.*
8.	*For getting finance for execution of the project the assessee has compromised its entire profits which it would have earned from the project.*	*In fact, it is other way round. If the holding company wanted to get the project in its name and execute it personally it could have done so and hold the entire profit to itself. By creating the assessee, it is the holding company which has practically compromised profits by sharing 75% of the revenue with the assessee. If the entire revenue would have come to the coffers of the holding company, then the profits*

		arising from the project would have been, absorbed by accumulated losses and holding company would not have to pay any tax. In fact, by creating this structure, the holding company has paved the way for paying taxes.
9.	*Interest payment (on finance provided by holding company to the assessee) is deliberately kept low @ 5 to 7 %) to camouflage revenue sharing with clear intention of wiping off the profits of the assessee by adjusting brought forward losses of the holding company.*	*The holding company being a major share holder, it has charged lower rate of interest. Nothing could have prevented the holding company to charge the interest at market rate of 15% - 24% and could have still shared the revenue. The revenue sharing is on account of the guarantees and overall risks undertaken by the holding company on failure of the Assessee, either on in-completion of the project, or delay in the project, or incurring of losses, or failure to collect revenue by disposing of flats or due to some other reasons. Since the assessee did not have assets and it was the net worth of holding company, on whose guarantee, the DDA & financial institutions were satisfied, the revenue sharing by the holding company was even otherwise, justifiable. It is not for charging the lower rate of interest and thereafter compensating it by revenue sharing, but it is the case of taking risk and guarantees and arranging the finance and taking risk therefore, the holding company shared the revenue.* *In fact, the creation of the assessee but for commercial expediency has pave the way for payment of taxes, which could have otherwise avoided, if the project was to be completed by the holding company on its own.*
10.	*The transaction is hit by provisions of Section 40a(2)(b).*	*Relied on the ld. CIT (A)'s order.*

11.	*The ld. DR relied on the case of Chamundi Winary and Distillery in ITA 155/2016 (Karnataka HC)- Diversion of income by transfer of overriding title at source*	*Case specific. Even the Court reiterated that the issue depends upon facts and circumstances of each and individual case whether in those circumstances it would amount to a diversion of income by overriding title at source. No law has been laid down which can be applied to other cases.*

46. Heard the arguments of both the parties and perused the material available on record.

47. We find that the assessee is under the obligation to part away with the source of income to the holding company and it was not its volition alone, to give away the revenue that could have been otherwise accrued to them. An agreement entered into by the holding company with the assessee for providing financial security cover and to part away 25% sales proceeds was clearly a case of division of source of income between the holding company and the assessee. The flats to be constructed, by the assessee company were the source of income and the holding company had created a lien over 25% for a quid pro quo thereof and therefore took away 25% shares from the sale proceeds. It is not a case that the entire sale proceeds of flats and therefore, the income there from would have accrued to the assessee and 25% thereof had been applied or given away by the assessee to the holding company. The assessee acts as a collector of revenue for the holding company of the receipt to the extent of 25% of the sale proceeds. The 25% belongs to the holding company by virtue of the contributions made and the agreement entered.

48. The relevant judgments relating to diversion of income by overriding tile are as under:

"In CIT vs. Sitaldas Tirathdas [1961] 041 ITR 0367 (SC) Hon'ble Apex Court held that, an obligation] to apply income in a particular way before it was received or before it was accrued or arisen to the assessee, results in diversion of income; but where there is an obligation to apply an income which has accrued or arisen or received, it would amount to merely apportionment of income. It observed as under:

> *"In our opinion, the true test is whether the amount sought to be deducted, in truth, never reached the assessee as his income. Obligations, no doubt, there ape in every case, but it is the nature of the obligation which is the decisive fact. There is a difference between an amount which a person is obliged m apply out of his income and am amount which by the nature of the obligation cannot be said to be a part of the income of the assessee. Where by the obligation income is diverted before it reaches the assessee, it is deductible; but where the income required to be applied to discharge an obligation after such income reaches the assessee, the same consequence, in law, does not follow, it is the first hind of payment which can truly be excused and not the second. The second payment is merely an obligation to pay another a portion of one's own income, which has been received and is since applied. The first is a case in which the income never reaches the assessee, who even if he were to collect it, does so, not as part of his income, but for and on behalf of the person to whom it is payable. In our opinion, the present case is one in which the wife and children of the assessee who continued to be members of the family received a portion of the income of the assessee, after the assessee had received the income as his own. The case is one of application of a portion of the income to discharge an obligation and not; a case in which by an overriding charge the assessee became only a collector of another's income."*

In Dalmia Cement Ltd. v. CIT [1999] 104 Taxman 97/237 ITR 617 (SC) assessee-owner of factory had, by an agreement dated 24.07.1962, agreed to sell same to 'M' and agreement, provided that profit from factories from 30.09.1962 would be for benefit of transferee on completion of sale transaction, though actual transfer of

factory had taken place on 30.09.1964, income pertaining to period 01.10.1962 to 30.09.1964 could not be assessed in assessee's hands as it stood diverted by overriding title. It. held that if there is an agreement before the sale transaction takes place to the effect that this transaction will go to the account of another person and not to the account of assessee company, then, the income would stand diverted by an overriding title as a matter of fact, even before the accrual. The Hon'ble Apex Court held as under:

"Held, reversing the decision of the High Court, that the profits stood diverted to the purchaser in terms of and in. accordance with the agreement dated July 24, 1962, read with the supplemental agreement dated November 2, 1962, and the date of actual transfer of the factory in question which, in fact, had taken place on September 30, 1964, did not alter the situation. The income stood diverted by an overriding- title as a matter of fact even before the accrual. There was no question of enabling the assessee to retain the profit in its own hand, after the "sale agreement". The sale transaction had taken place and by reason of the event and in terms of the provisions of the agreement, the question of tracing the profit in the hands of the assessee did not and could not arise. In any event profits of a business do not accrue from day to day but at the end of the accounting year. Profits were ascertained on September 30, 1964, when the property was transferred and as such for the year 1965-66 the question of profit accruing to the assessee did not arise. Section 60 has its application only to a case where income accrues to the transferee but the income-earning asset or source of income remains with the transferor. In this case, the very existence of the agreement to transfer dated July 24, 1962, ruled out and totally excluded the application of section 60. There appeared to be clear inconsistency between the assessment of capital gains on the transfer of the factories on the one hand and the finding of accrual of income since the computation of capital gains were affected by treating the gross amount of consideration as the sale price. The Income-tax Officer thus by implication accepted the profits as belonging to the transferee and not the transferor-otherwise, the net amount paid alone ought to have been taken as the sale price. The High Court's judgment, therefore,

not only suffered from apparent inconsistency but on a totality of the situation was inherently Contradictory. The profits arising from the working of the two cement factories situated in Pakistan for the year October 1, 1962 to September 30, 1963, and for the year October 1, 1963 to September 30, 1964, were not taxable in the hands of the assessee-company."

The Hon'ble Kerala High Court in Sarala Devi (K.) (Smt.) Vs. Commissioner of Income-tax 1996 222 ITR 211 (Ker) held that it nature of obligation which is a decisive factor. It held as under:

"In order to determine whether there has been a diversion of income by overriding title the true test is whether the amount Sought to be deducted, in truth, never reached the assessee as his income. Obligations, no doubt, there are in every case, but it is the nature of the obligation which is the decisive fact. There difference between an amount which a person is obliged to apply out of his income and an amount which by the nature obligation cannot be said to be a part of the income of the assessee. Where by the obligation income is diverted before, it reaches the assessee, it is deductible; but where the income is required to be applied to discharge an obligation after such income reaches the assessee, the same consequence, in law, does not follow. It is the first kind of payment which can truly be excused and not the second. The second payment is merely an obligation to pay another a portion of one's own income, which has been received and is since applied. The first is a case in which income never reaches the assessee, who even if he were to feet it, does so, not as part of his income, but for and on behalf of the person to whom it is payable."

49. From the facts of the case, it can be said that where a superior title is created before any income accrues or arises, it would be the diversion of income by overriding title but where there is no obligation attached and income is applied as per assessee's own choice after it accrues, it will not be a case of diversion by superior title as no superior title existed. In diversion, there is no earmarking by the assessee of a particular income but a charge is created upon his property being source of income. A

charge created voluntarily for own purpose cannot be claimed as diversion. If there is an obligation before an income accrues and the assessee is under compulsion to discharge his obligation, it would be a case of diversion by superior title but, where there is no compulsion and no pre-existing obligation, but it is assessee's choice to create an obligation on himself either before income received, accrues of arisen or thereafter, it would only be a case of application of income. A compulsion at source imposed by a third party is necessary to create a superior title. Just because diverted income is collected by the assessee himself for and on behalf of the beneficiary; it cannot be inferred that it was only an application and not diversion. In the instant case, the assessee has been obligated by virtue of the agreement to divert the income at source and also for the contributions made by the holding company. Thus, we hold that the revenue sharing agreement entered with the holding company by the assessee is diversion of income by overriding title. The revenue's contention that the entire transaction is sham and aimed at only to divert the income to EMLL cannot be said to be correct based on the facts and the judicial pronouncements. We have considered the contributions by the holding company which is as under:

Pre-bidding

a) Bid security of Rs. 10 crores to be deposited

b) The bidder should have a net worth of Rs. 100 crores

c) The reserve price for the bid was Rs. 300 crores

Post-bidding

d) Technically qualified bidder to provide 25% of the quoted upfront amount less any bid security (EMCPL bid Rs 321 crs)

e) Technically qualified bidder to provide balance 75% of the quoted upfront amount within 3 days of award of the bid (EMCPL bid Rs. 321 crores)

f) Technically qualified bidder to provide performance guarantee of Rs. 400 crores

g) Seed capital / working capital for the project where estimated cost was Rs. 1550 crores.

Date	*Amount in INR*	*Purpose*
03-M-07	*25,50,00,000*	*Amount Paid for DDA as Earnest Money for Commonwealth Game Village*
04-Aug-07	*60,37,50,000*	*amount Paid for DDA Selection of Project Developers for construction of residential Project of Commonwealth Games Village-*
04-Aug-07	*60,00,00,000*	*amount Paid for DDA Selection of Project Developers for construction of residential Project of Commonwealth Games Village-*
14-Jun-07	*10,00,00,000*	*Amount Paid for submission of the RFP for Residential Project Commonwealth Games, 2010 Village.*
02-Jul-07	*44,75,00,000*	*Amount Paid for DDA as Earnest Money for Commonwealth Game Village*
05-Sep-07	*20,37,50,000*	*Advance Paid for DDA for Commonwealth Game*
Total	*221,00,00,000*	

50. Further, in accordance with bid the requirement, EMLL paid original bid amount along with a bank guarantee of Rs. 400 crores which was also arranged by EMLL by providing corporate guarantee. Detail of loan raised and bank guarantee provided is as under:

Lender	*Project Loan (INR in crores)*	*Bank Guarantee Facility (INR in crores)*	*Total Credit Facility*	*Security given to Lenders*
State Bank Of India	*150*	*300*	*450*	*Assignment of Development Right and Corporate Guarantee of EMLL Land*
State Bank:. Of Patiala	*. 50*	*50*	*100*	
HDFC Ltd.	*50*	*-*	*50*	
HSBC	*-*	*50*	*50*	*Corporate Guarantee of EMLL Land*
Total	*250*	*400*	*650*	

51. Thus, keeping in view the entire factum of the case, we hereby hold that the payment made to EMLL is obligatory and diversion of income by overriding title. The revenue contention that this is a sham transaction cannot be accepted in view of the contribution made by the EMLL and also keeping in view that the amounts have been duly offered to taxation in their respective entities. The ground no. 3 of the appeal of the revenue is dismissed and ground no. 2 of the appeal of the assessee is allowed.

52. The ground no. 4 of the revenue appeal: The assessee has challenged the addition made by the AO by treating the Interest Income as income from 'Other Sources' instead of income from Business' thereby not allowing the assessee to reduce the same from the project cost. The AO in his assessment order has alleged that interest has been netted off against project cost which is not permissible hence it should be taxed under head Income from 'Other Sources'.

53. The facts taken from the record are as under:
The assessee has shown a sum of Rs.2,33,47,117 as interest income which has been reduced from total cost incurred upto March 2009 at Rs.917,16,70,049 leaving net expenditure at Rs.914,83,22,932 upto March 2009.

54. The Assessing Officer has taken a view that such netting is not permissible as interest income has to be separately shown under head "Income from Other Sources". The Assessing Officer relied on the decision of Hon'ble Delhi High court in Commissioner of Income-tax Vs. Shri Ram Honda Power Equip(2007) 289 ITR 475 (Dei) and on the Special bench of ITAT in Lal Sons enterprise 89 ITD 25 (Del). The Assessing Officer admits that the said decision was given in the context of computation of deduction under section 80HHC however the ratio laid down in those

decisions is clear in as much as interest income from surplus funds parked in FDRs / Investments is assessable under the head income from "Other sources".

55. Before us during the arguments, the ld. DR strongly supported the case of the revenue and further relied on the Tuticorin Alkali Chemicals & Fertilizers Ltd. Vs Commissioner Of Income Tax (1997) 141 CTR 387 (SC). She argued that the interest income has no nexus with the business and therefore has to be assessed under the head income from 'other sources'.

56. The ld. AR argued that the assessee company is a SPV floated for the purpose of one project which has no funds of its own and all the funds have been provided by the holding company with interest. He argued that since a part of the same funds were deposited in the bank as FDR and investment the direct nexus is established. Hence, it should be treated as part of business income.

57. Heard the arguments of both the parties and perused the material available on record. We have gone through the order of the ld. CIT (A) while dealing with this issue. The relevant part is as under:

> *"The appellant reduced the cost of project by the amount of interest income earned through temporary deployment of loans/revenues in FDRs. If the said amount is charged to tax under the head other sources, the interest expenditure will increase and the business income of the appellant would get reduced accordingly. The only business of the appellant company is the CGV project and all funds are raised for and realized from this project only. Therefore, temporary deployment of funds in financial investments and income generated therefrom is inextricably linked to and a by-product of the business of the appellant. Therefore, such income is to be treated as part of business income of the appellant. There is no basis or justification to charge such income under the head other sources. Further, there would not be any impact on the taxable income of the appellant as either the income under the*

head 'income from business' will decrease or the increased business loss will be set off against 'income from other sources' u/s 71. Accordingly, these grounds of appeal are allowed. The addition made is deleted."

58. Having considered the facts of the case, Sections 56, 57 and the provisions relating to Section 28, Section 36 & 37, and the provisions of Section 71 of the Income Tax Act, 1961 and the judgments on the issue, we hereby hold that in the instant case where the assessee is taxed at the maximum marginal rate, the addition would be revenue neutral. Hence, we decline to interfere with the logical order of the ld. CIT (A).

59. In the result, the appeals of the assessee are allowed and the appeals of the revenue are dismissed.

Order Pronounced in the Open Court on 26/12/2019.

Sd/-	Sd/-
(H. S. Sidhu)	**(Dr. B. R. R. Kumar)**
Judicial Member	**Accountant Member**

Dated: 26/12/2019
Subodh

Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR