

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH: 'F: NEW DELHI)**

**BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER
AND
SHRI ANADEE NATH MISSHRA, ACCOUNTANT MEMBER**

**ITA No:- 2771/Del/2017
(Assessment Year: 2012-13)**

| | | |
|---------------------------------------|-----|---|
| ACIT, Circle- 21(1), New Delhi. | Vs. | M/s Resolve Estates Pvt. Ltd., B-24, Sector-3, Noida-201301. |
| PAN No: AADCR5093C | | |
| APPELLANT | | RESPONDENT |

Revenue by : Smt. Sushma Singh, CIT(DR)
Assessee by : Shri Himanshu Sharma. CA

ORDER

PER ANADEE NATH MISSHRA, AM

(A) This appeal by Revenue is filed against the order of Learned Commissioner of Income Tax (Appeals)-36, New Delhi, ["Ld. CIT(A)", for short] dated 27.02.2017 for Assessment Year 2012-13. The grounds of appeal are as under:

"1. On the facts and under the circumstances of the case, the Ld. CIT(A) has erred in law in deleting the disallowance of Rs. 57,75,20,560/- on account of land development cost without doing proper enquiry and detailed scrutiny of the materials available as per Delhi High Court judgment in the case of M/s Jansampark Advertising and Marketing (P) Ltd., ITA No. 525/2014 DT: 11/03/2015.

2. On the fact and under the circumstances of the case, the Ld. CIT(A) has erred in law in deleting the disallowance of Rs. 72,38,028/- on account of Bank Guarantee Commission, as the CBDT Notification No. 56/2012 DT: 31/12/2012 come w.e.f. 01.01.2013 without retrospective effect.

3. The appellant craves to be allowed to add any fresh grounds of appeal and/or delete or mend any of the grounds of appeal."

(B) Assessment Order dated 30.03.2015 passed under Section 143(3) of Income Tax Act, 1961 ("I.T. Act", for short) by the Assessing Officer ("AO", for short) wherein total income was determined of Rs. 59,12,61,710/- as against the returned income of Rs. 65,03,122/-. The relevant portion of the Assessment Order dated 30.03.2015 is reproduced as under:

2. The assessee has claimed to be engaged in business as promoters, developers, engineers, consultants, contractors for road highways, multiplexes, shopping malls, housing complex, colonies, building schemes etc.

3. During the course of assessment proceedings it was noticed that the assessee has shown a real estate sale of Rs.89,58,57,285/- during the financial year under consideration. It was noticed that cost of land (11.9438 acre) purchased in F.Y. 2007-08 was Rs.25,50,17,543/-. Cost of land (9.5491 acre) purchased in F.Y. 2010-11 was Rs.25,08,42,764/-. Cost of land (0.58125 acre) purchased during the year was Rs.1,83,24,503/-. Licence Fee paid to Director Town Country Planning, Chandigarh is shown as Rs. Total cost of purchase of land (21.4929 acre) is shown as Rs.2,85,98,120/-. Thus total cost of purchase and licence Fee is shown as Rs.55,27,82,930/- for 21.4929 acre land. To this cost of Development in F.Y. 2010-11 is shown as Rs.74,63,80,322/-. The cost of sales was reduced at Rs.88,21,33,842/- for land measuring 11.84375 acres. Thus the land measuring 9.64913 acre has been valued at Rs.41,70,29,410/- There is apparently a huge gap between the cost of sales worked out for 11.84375 acres of land and Inventory valuation of 9.64913 acres of land. The proportionate cost of land and licence fee on 11.84375 acre land which is sold come to Rs.30,46,13,282/- $(55,27,82,930/21.4929 \times 11.84375)$. The component of cost of development claimed by the assessee on this portion comes to Rs.57,75,20,560/- $(Rs.88,21,33,842- Rs.30,46,13,282)$. Thus the component of cost of development on balance 9.64913 acres comes to Rs.16,88,59,762/- $(Rs.74,63,80,322 - Rs.57,75,20,560/-)$. There was an apparent wrong claim of deduction on account of development cost claimed in the cost of land sold and required deeper scrutiny of the claim of the assessee company.

4. It was also noticed that the assessee did not attend the proceedings regularly and a show cause notice was initiated on 03.06.2014 u/s 271(1)(b). In response to the notice dated 16.01.2015 of the undersigned fixed for 28.01.2015 nobody attended. After telephonic reminders, Sh. Vikas Goyal CA & AR from Jain Praveen Kumar & Co. attended on 12.02.2015 and was asked to file the following details:

- Details of land purchase in sq mtrs/yards sale deed wise
- Details of development carried out alongwith documentary evidence regarding this
- Details of land sold and how cost of sales has been arrived at
- Copies of all agreements entered into with contractors regarding development either by self or through group companies.
- Copy of account of parties who have carried out the development work and copies of bills/invoices raised by them

- Why in the absence of no TDS the expenses should not be disallowed. This is with reference to the TDS of earlier years paid on 31.03.2012
- Copy of account of ERA landmark alongwith relevant bank account statement and financial & why provision of section 2(22)(e) are not applied
- Furnish ledger account on the next date of hearing in respect of all the transactions
- Purpose and utilization of bank guarantee and how the expenses has been treated?

5. The case was adjourned to 18.02.2015. No one attended thereafter. Sh. Vikas Goyal attended on 04.03.2015 after telephonic reminders given two times. The following order sheet entry was recorded on 04.03.2015:

Present Sh. Vikas Goyal on telephonic reminders given two times. Letter dated 25.02.2015 has been filed. The replies to the questions raised vide orders sheet entry dated 12.02.2015 are not satisfactorily replied and no attempt has been made to give details/documentary evidence in support of the claim of the assessee.

A final show cause notice is being given as to why not the matter be decided on the basis of material available on record.

The case was adjourned to 5/3/2015 at 11.00 a.m

The letter dated 25.02.2015 contains following submissions:

3. Note on Inventories.

Cost of Development: During the year under consideration the assessee company had not incurred any expenditure on development of the inventory. Therefore the detail documents required by your honour in this connection are not applicable in this connection.

Land Purchased:

During the year under consideration the assessee company had purchased land for Rs. 3,28,37,623/- (including cost of land, stamp duty, license fees and other printing charges) Details of which along with supporting documents and sale deed was furnished vide our letter dated 6.01.2015.

Payment made under Agreement: During the year under consideration the assessee company had made payment of Rs. 2,45,12,500/- to M/s Rupam Realty Pvt. Ltd. for payment under agreement for purchases of land. Copy of ledger account of which is enclosed herewith.

Again no one attended on 05.03.2015. Thereafter, Sh. V K Gupta CA attended on 17.03.2015 for seeking adjournment to file reply and on his request case was adjourned to 20.03.2015. On 20.03.2015 Sh. V K Gupta attended and filed letter dated 20.03.2015. The contents of letter dated 20.03.2015 are being reproduced as under:

Advance Given to Holding Company:-

The balance sheet of the assessee shows advance of Rs. 37,63,70,722/- in name of its holding company i.e. ADEL Landmarks Ltd. (formerly known as Era Landmarks Ltd.) Confirmation of account from holding company stating their address and PAN particulars are enclosed.

As asked by honour, during the year under consideration the company has made total sales amounting to Rs. 89,58,57,285/- on account of sale of Land to various parties. Detail of sale of land FSI made during the year along with documentary evidences are enclosed.

During the year the assessee company has sold certain land purchased and developed in preceding f.Y. Working of details of all the land sold with cost thereof with the inventory of land and other expenses viz development expenses, licences fee and other charges are enclosed.

6. It was evident that the assessee deliberately avoided the details relating to the development work done and claimed as deduction from the sale consideration despite being specifically asked about it. In order to bring it on record, as the limitation of 31st March was approaching near the following ordersheet entry was recorded:

Present Sh. V.K. Gupta filed letter dated 20.3.15 come discussed with him. The following issues raised from time to time and due to non-submission of details remained unanswered.

- Justification of market rate/ circle rate of transfer of FSI as there is no registered agreement between the parties.

- The funds given by M/s Optus Corona Developers are more than the sales declared. The sales made to parties are not substantiated by agreement.

- Development charges: Amounting to Rs. 74.63 crore have not been substantiated by details of work done area of work done & how it has been attributed to the area of FSI / land sold (cost of land sold against Sale of FSI)

- Details of expenses on which TDS u/s 194C was deducted and deposited as under:-

| Date of deduction | Date of deposit | TDS amount |
|-------------------|-----------------|------------|
| 31.1.2011 | 31.03.2012 | 1056795 |
| 28.2.2011 | 31.03.2012 | 1116397 |
| 31.03.2011 | 31.03.2012 | 1335432 |

has not been provided. The said expenditure in view of failure to deposit and evidence of deduction was not on allowable expenditure in A.Y. 2011-12 & in view of non-furnishing of requisite details in not an allowable expense u/s 37 the year under consideration.

- In the bank book filed by the assessee there is an entry of Rs. 5,13,00,000/- which is shown as refund of advance, but no details /evidence filed.

- As the matter is getting barred by limitation on 31.3.2015 and enough opportunity has been given to the assessee, the case has been finally discussion with the above observations/remarks.

- On specific request of the AR matter is finally adjourned till 6:00 P.M. today.

7. Thus on the request of counsel another opportunity was given and Sh. V.K. Gupta attended in the evening and filed letter dated 20.3.15 in response to the observation on the dated 20.03.2015 which was taken on record. The information provided vide letter is reproduced as under:

During the year the assessee company has sold certain land amounting to Rs. 89,58,57,285/- which were purchased and developed in preceding Fin Year. Working of details of all the land sold with cost thereof with the inventory of land and other expenses viz development expenses, Licenses fee and other charges were already submitted.

Your honour has pointed out that the assessee company has sold the land to Optus Corona Developers Pvt. Ltd. Amounting to Rs. 89.58 cr. Individually as per sale agreement FSI dated 22.03.2012, where as amount was received as per following details:-

| S.No. | Party Name | Amount Received | Remarks. |
|-------|-----------------------------------|-----------------|--|
| 1 | Corona Buildcon Pvt. Ltd. | 10,50,00,000/- | Received from Party on behalf of sale of Land to Optus Corona Developers P. Ltd. |
| 2 | Samayak Projects P. Ltd. | 17,00,00,000/- | Received from Party on behalf of sale of Land to Optus Corona Developers P. Ltd. |
| 3 | Optus Corona Developers Pvt. Ltd. | 62,08,57,285/- | Received from Party on behalf of sale of Land to Optus Corona Developers P. Ltd. |
| | Total | 89,58,57,285/- | |

In this connection it is submitted that land FSI was sold for Rs. 89.58 Cr. Optus Corona Developers Pvt. Ltd. Rather than sales made to all the above three parties. Payments were receive from above three parties total amounting to Rs. 89.58 crore on behalf Optus Corona Developers Pvt. Ltd. Pertains to the sales of land FSI only to Optus Corona Developers Pvt. Ltd. Vide Deed of sale agreement dated 22.03.2012 as such contention of your Honour is incorrect that the sales made to Optus Corona shown less than the amount receive, hence there is no discrepancies on this part and total sale value of land is Rs. 89.58 core correctly shown in P & L account.

2. In the preceding F.Y. 2010-11 the assessee company has incurred a sum of Rs. 74.63 towards development of land project which was shown under the head inventory of Rs 127.31 grouped under current assets as on 31.3.2011. These development expenditures were paid to M/s Era Infra Engineering Ltd. Details of these expenditures claimed showing area of land on which expenses incurred details of bills raised by developer M/s Era Infra Engineering Ltd. Along with the confirmation of account is enclosed. These expenses were paid after deducting TDS as per provisions of section 194C of the IT Act, copy of assessment order was also submitted in our earlier dates of hearing. During the year the assessee company has partly sold the developed land 11.84375 acre for Rs. 89.58 crore to M/s Optus Corona Developers Pvt. Ltd. As such there is no discrepancies on this part. It is also submitted that the no development expenses was incurred during the year under consideration.

3. Your honour has pointed out that during the year the assessee company has deposited the TDS u/s 194C as per following details:-

| Date of Deduction | Date of Deposit | TDS Amount | Remarks |
|-------------------|-----------------|-------------|--|
| 31.01.2011 | 31.03.2012 | 10,56,795/- | TDS was deposited for A.Y. 2011-12 on development Engineering Ltd. As per provisions of section 194C |
| 28.02.2011 | 31.03.2012 | 11,16,397/- | TDS was deposited for A.Y. 2011-12 on development Engineering Ltd. As per provisions of section 194C |
| 31.03.2011 | 31.03.2012 | 13,35,432 | TDS was deposited for A.Y. 2011-12 on development Engineering Ltd. As per provisions of section 194C |

Your honour has pointed out that in view of failure of evidence of deduction was not an allowable expenditure in A.Y. 2011-12 and in view of non submission of requisite details it is not allowable expenditure u/s 37 during the year under consideration.

In this regard it is submitted that the above TDS as pointed out by your honour were deducted in A.Y. 2011-12 on development expenditures paid to Era Infra Engineering Ltd. and deposited in the year under consideration.

Your honour has further pointed out that these expenditures are not allowable in A.y. 2011-12. In this regard it is submitted that the assessee company is engaged in the business of real estate projects, having inventory of land approx. Rs. 127.31 crores as on 31.03.2011. The company is purchasing lands and developing for real estate projects. Development expenditures were incurred during the A.Y. 2011-12 and capitalized with the cost of land (Inventory) and grouped under the head as current assets. TDS on this development expenditure was deducted and deposited in part in the same year and partly in subsequent F.Y. 2011-12. As the expenditures were not claimed in the P & L account and cost of development expenses were capitalized with the cost of land during that year, hence provisions of section 40(a) regarding disallowance of expenditures due to non deduction of TDS not applicable during A.Y. 2011-12. Further the matter was already been discussed during the course of assessment proceeding u/s 143(3) for the A.Y. 2011-12, for which order was already been submitted in our earlier dates of hearing. As such delay in deposit of TDS for the A.Y. 2011-12 is not covered purview of disallowance of expenditure of that year.

However, with regard to disallowance of the said expenditure during the A.Y. 2012-13, it is submitted that the assessee company purchasing lands and developing for real estate projects. Development expenditures were incurred during A.Y. 2011-12 is part and partial of the cost of land, which was sold during this year. Hence the contention of your honour that the development expenditure incurred is not allowable expenditure for A.Y. 2012-13 is incorrect as the land was developed for sale and the assessee company is engaged in this line only. As such there are no discrepancies on this part and all the expenses for which TDS was paid in this year are allowable expenditures and incurred exclusively for business purpose only.

4. Your honour has pointed out the justification of rates of sale of land as transfer of FSI during the year, even when no registration of sale was made.

In this regard it is submitted that during the year the assessee company has sold 11.84375 acres of land as FSI to Optus Corona Developers Pvt. Ltd. for Rs. 89.58 crore. The land was sold as FSI under

agreement of licence dated 22.03.2012 as right for development for residential projects. The assessee company has agreed to grand assign and transfer all the rights, title, entitlements and interest in development, construction and ownership of the total permissible FSI of 9,79,079 Sq. feet sanctioned by the Director General of Town and country planning. Since there was no transfer of ownership of land and only right for development of land was given to Optus Corona Developers Pvt. Ltd. hence no separate registration was done and rates of sale of land as FSI were made at applicable market rates. Since there was no registration of land, hence the circle rates are not applicable in this case.

Under the FSI agreement there is no transfer of ownership and only right is granted under licensing for development of land, as such there is no registration of land are applicable. Further the sale of FSI was made at applicable market rates. Hence the invoking of sale of FSI at circle rates do not applies in our case . Hence there is no discrepancies on this part.

5. During the year certain amounts were received from M/s Rupam Reality Pvt. Ltd. amounting to Rs. 5.13 crore. Your honour has asked to supply the evidence in respect of these receipts. In this connection it is submitted that the assessee company has received the amount from above party as refund of advance given for purchase of land. A details along with the copy of party M/s Rupam Reality Pvt. Ltd. in this regard was already been submitted vide our letter dated 25.02.2015. Copy of which are also enclosed.

8. The submissions of the assessee company have been considered but not found acceptable. Regarding the development work, the assessee has submitted only the details of bills raised by Era Infra engineering Ltd during F.Y. 2010-11, a copy of account of ERA infra Engineering Ltd. The details of development charges paid to Era Infra Engineering Ltd during F.Y. 2010-11 as stated by the assessee are being reproduced as under:

Details of development charges paid to Era Infra Engineering Ltd. A.Y 2011-12

| S.No. | Particulars | Dated | Job Work Amount |
|-------|-------------------------|------------|-----------------------|
| 1 | 1st RA Bill | 04.07.2010 | 266,347,795.69 |
| 2 | 2 nd RA Bill | 08.09.2010 | 304,601,391.00 |
| 3 | 3 rd RA Bill | 03.10.2010 | 32,929,880.00 |
| 4 | 4 th RA Bill | 07.11.2010 | 19,909,838.00 |
| 5 | 5 th RA Bill | 02.12.2010 | 35,909,989.00 |
| 6 | 6 th RA Bill | 22.01.2011 | 19,909,838.00 |
| 7 | 7 th RA Bill | 13.02.2011 | 46,881,752.00 |
| 8 | 8 th RA Bill | 16.03.2011 | 19,909,838.00 |
| | | | 746,380,321.69 |

DETAILS OF T.D.S. DEDUCTED & DEPOSITED by the assessee are also being reproduced as under:

| S.NO | NAME OF PARTY | UNDER SECTION | DATE OF DEDUCTION | DUE DATE OF DEPOSIT | ACTUAL DATE OF DEPOSIT | T.D.S. AMOUNT |
|------|----------------------------|---------------|-------------------|---------------------|------------------------|---------------|
| 1 | ERA INFRA ENGINEERING LTD. | 194C | 31.01.2011 | 07.02.2011 | 31.03.2012 | 1,056,795.00 |
| | | | 28.02.2011 | 07.03.2011 | 31.03.2012 | 1,116,397.00 |
| | | | 31.03.2011 | 15.05.2011 | 31.03.2012 | |
| | | | | | | |

9. Another effort was made by this office by giving opportunity to M/s Era Infra Engineering Limited which is a group company of the assessee company. Summon u/s 131 dated 20.03.2015 was issued to the Principal Officer to be present on 23rd day of March 2015 at 4.00 P.M with the following details:

- (i) **Confirmed copy of account of M/s Resolve Estate Pvt. Ltd for F.Y. 2010-11 & 2011-12.**
- (ii) **Copies of all bills/invoices raised for development work done for M/s Resolve Estate Pvt. Ltd. during the year F.Y. 2011-12.**
- (iii) **Copies of agreement entered into for development work with M/s Resolve Estate Pvt. Ltd.**
- (iv) **Detailed description of work done, with copies of agreement with the sub-contractor appointed and the bills raised by them.**
- (v) **Copies of procurement bills in respect of "Murrum" supplied and details of royalty paid to the State Govt., local authority in respect of that.**
- (vi) **Detailed chart of hiring agreements/vehicles/machine etc. used for claiming hire charge with their registration certification.**
- (vii) **TDS returns with annexures and details of parties in respect of TDS on sub contracts in respect of tax deducted by you during F.Y. 2010-11 & 2011-12.**

10. As no compliance was made to the above summon, one more opportunity was given by issuing another summon dated 23.03.2015 and this time opportunity was given to produce the details on 25.03.2015 at 4.00 P.M. Both the summons were duly served in the office of the company. None attended in response to the summon and the letter dated 23.03.2015 of this office. However, a postal reply vide letter dated 23.03.2015 was received on 25.03.2015 in this office which is being reproduced as under:

With reference to your summon u/s 131 dated 20.03.2015 regarding proceedings and asking for certain documents in case of M/s Resolve Estates Pvt. Ltd. for A.Y. 2012-13. Please find details as under:

1. Confirmation of account of M/s Resolve Estates Pvt. Ltd. for the F. Y. 2010-11 and 2011-12 are enclosed for your reference (Point No.1)

2. During the F. Y. 2011-12, we have not undertaken any development work on behalf of M/s Resolve Estates Pvt. Ltd., as such copies of invoices/bills raised, copy of agreement, description of work done and other relevant details in this regard are not applicable for the F.Y. 2011-12.

However, during the F. Y. 2010-11, we have done development work on land situated at Village Navada, Fatehpur, Sector-86, Gurgaon on behalf of M/s Resolve Estates Pvt. Ltd. amounting to Rs. 74,63,80,322/-. Party i.e. M/s Resolve Estates Pvt. Ltd. has deducted TDS on this development charges amounting to Rs. 1,49,27,608/-. (Point No. ii to vi)

3. With regard to submission of TDS return for the F.Y. 2010-11 and 2011-12, it is submitted that we have not deducted any TDS of M/s Resolve Estates Pvt. Ltd. during the F.Y. 2010-11 and 2011-12. Hence, TDS return with annexures for these periods are not submitting here.

(Point No.vii)

As all the requisites details and documents are submitting herewith before your honour, under the above facts we request your honour to please drop the matter of personal presence by withdrawing summon u/s 131.

11. The following statement of account and copy of account were furnished by M/s Era Infra Engineering Company pvt Ltd:

Statement of account for the period 01.04.2010 to 31.03.2011

Name of Party : Resolve Estates Pvt. Ltd.

| Vr Date | Particulars | Bill No./ CHQ No. | Date | Debit Amt. | Credit Amt. | Cl. Balance |
|------------|---|-------------------|------------|-------------|-------------|-------------|
| 31.12.2010 | Hiring CHS for Gurgaon Sector-86 | Hiring | 31.12.2010 | 266,347,796 | | 266,347,796 |
| 31.12.2010 | TDS 2% on hiring CHS for Gurgaon Sector-86 | Hiring | 31.12.2010 | | 5,326,956 | 261,020,840 |
| 31.12.2010 | Supply & filing work of murrum at Gurgaon Sec-86 | Filing | 31.12.2010 | 304,601,391 | | 565,622,231 |
| 31.12.2010 | TDS 2% on supply & filing work of murrum at Gurgaon Sec-86 | Filing | 31.12.2010 | | 6,092,028 | 559,530,203 |
| 31.01.2011 | Bill Agst supply and filing of murrum for the m/o Jan-11 | Jan-11 | 31.01.2011 | 32,929,880 | | 592,460,083 |
| 31.01.2011 | 2% TDS on Bill agst supply and filing of murrum for the M/o | Jan-11 | 31.01.2011 | | 658,598 | 591,801,485 |
| 31.01.2011 | Bill agst supply and filing for the | Jan-11 | 31.01.2012 | 19,909,838 | | 611,711,323 |

| | | | | | | |
|------------|--|--------|------------|------------|------------|-------------|
| | M/o Jan-11 | | | | | |
| 31.01.2011 | TDS on bill agst and filing for the m/o Jan-11 | Jan-11 | 31.01.2012 | | 398,197 | 611,313,126 |
| 28.02.2011 | Bill agst supply and filing of murrām for the m/o Feb-11 | Feb-11 | 28.02.2012 | 35,909,989 | | 647,223,115 |
| 28.02.2011 | TDS on bill agst supply and filing of murrām for the m/o Feb | Feb-11 | 28.02.2012 | | 718,200 | 646,504,915 |
| 28.02.2011 | Bill of hiring charges for the m/o Feb-11 | Feb-11 | 28.02.2012 | 19,909,838 | | 666,414,753 |
| 28.02.011 | 2% TDS on Bill of hiring charges for the m/o Feb-11 | Feb-11 | 28.02.2012 | | 398,197 | 666,016,556 |
| 31.03.2011 | Bill agst supply and filing of murrām for the M/o Mar-11 | Mar-11 | 31.03.2011 | 46,861,752 | | 712,878,308 |
| 31.03.2011 | TDS on bill agst supply and filing of murrām m/o Mar-11 | Mar-11 | 31.03.2011 | | 937,235 | 711,941,073 |
| 31.03.2011 | Bill of hiring charges for the m/o Mar-11 | 0 | 31.03.2011 | 19,909,838 | | 731,850,911 |
| 31.03.2011 | TDS on bill of hiring charges for the m/o Mar-11 | 0 | 31.03.2011 | | 398,197 | 731,452,714 |
| 31.03.2011 | Amount Recd AGT balance | X | 31.03.2011 | | 30,849,273 | 700,603,441 |
| 31.03.2011 | Amt Recd from Resolve estates | X | 31.03.2011 | | 50,000,000 | 650,603,441 |
| 31.03.2011 | Amt Recd from Resolve estates | X | 31.03.2011 | | 50,000,000 | 600,603,441 |
| 31.03.2011 | Amt Recd from Resolve estates | X | 31.03.2011 | | 50,000,000 | 550,603,441 |
| 31.03.2011 | Amt Recd from Resolve estates | X | 31.03.2011 | | 50,000,000 | 500,603,441 |
| 31.03.2011 | Amt Recd from Resolve estates | X | 31.03.2011 | | 50,000,000 | 450,603,441 |
| 31.03.2011 | Amt Recd from Resolve estates | X | 31.03.2011 | | 19,379,668 | 431,223,773 |

Statement of account for the period 01.04.2011 to 31.03.2012
Name of Party : Resolve Estates Pvt. Ltd.

| Vr Date | Particulars | Bill No./ CHQ No. | Date | Debit Amt. | Credit Amt. | Cl. Balance |
|------------|--|-------------------------|------------|--------------|----------------|--------------|
| 01.04.2011 | Opening Balance | | 01.04.2011 | 431,223,773, | | 431,223,773, |
| 23.07.2011 | Fund Recd from Resolve Estate Pvt. Ltd. | B | 23.07.2011 | | 48,000,000 | 383,223,773, |
| 23.07.2011 | Fund Recd from Resolve Estate Pvt. Ltd. | 23-Jul | 23.07.2011 | | 50,000,000 | 333,223,773, |
| 23.07.2011 | Fund Recd from Resolve Estate Pvt. Ltd. | 23-Jul | 23.07.2011 | | 50,000,000 | 383,223,773, |
| 25.07.2011 | Fund TRF to IDBI Bank from Resolve | 0 | 25.07.2011 | | 15,000,000 | 268,223,773 |
| 02.08.2011 | Fund Recd from Resolve Estate Pvt. Ltd. | 7 | 02.08.2011 | | 38,000,000 | 230,223,773 |
| 19.08.2011 | Ch Recd from Resolve Estate | A | 17.08.2011 | | 50,000,000 | 180,223,773 |
| 19.08.2011 | Ch Recd from Resolve Estate | A | 17.08.2011 | | 22,000,000 | 158,223,773 |
| 24.08.2011 | Fund recd from Resolve Estate | CH | 24.08.2011 | | 17,000,000 | 141,223,773 |
| 12.09.2011 | Fund recd from Resolve Estate | X | 12.09.2011 | | 99,000,000 | 42,223,773 |
| 16.09.2011 | Fund TRF to Resolve Estate Pvt. Ltd. | 0 | 16.09.2011 | 10,000,000 | | 52,223,773 |
| 17.09.2011 | Fund recd from Resolve Estate Pvt. Ltd. | X | 12.09.2011 | | 1,000,000 | 51,223,773 |
| 19.09.2011 | Fund TRF to Resolve Estate Pvt. Ltd. | 0 | 19.09.2011 | 5,000,000 | | 56,223,773 |
| 22.09.2011 | Fund TRF to Resolve Estate Pvt. Ltd. | X | 22.09.2011 | 10,000,000 | | 66,223,773 |
| 22.09.2011 | Fund TRF to Resolve Estate Pvt. Ltd. | Fund | 22.09.2011 | 10,000,000 | | 76,223,773 |
| 30.09.2011 | CHQ 20833 paid to Resolve Estate Pvt. Ltd. | X | 30.09.2011 | 50,000,000 | | 126,223,773 |
| 30.09.2011 | CHQ 20834 paid to Resolve Estate Pvt. Ltd. | X | 30.09.2011 | 50,000,000 | | 176,223,773 |
| 30.09.2011 | CHQ 20835 paid to Resolve Estate Pvt. Ltd. | X | 30.09.2011 | 50,000,000 | | 226,223,773 |
| 30.09.2011 | GHQ 20836 paid to | X | 30.09.2011 | 50,000,000 | | 276,223,773 |

| | | | | | | |
|------------|--|------|------------|------------|------------|------------|
| | Resolve Estate Pvt. Ltd. | | | | | |
| 30.09.2011 | CHQ 20837 paid to Resolve Estate Pvt. Ltd. | X | 30.09.2011 | 50,000,000 | | 326,223.77 |
| 30.09.2011 | CHQ 20839 paid to Resolve Estate Pvt. Ltd. | X | 30.09.2011 | 19,379,668 | | 345,603.44 |
| 30.09.2011 | CHQ 20840 paid to Resolve Estate Pvt. Ltd. | X | 30.09.2011 | 30,849,273 | | 376,452.77 |
| 12.09.2011 | RTGS recd from Resolve Estate Pvt. Ltd. | RTGS | 12.09.2011 | | 50,000,000 | 326,452.77 |
| 21.09.2011 | CHQ. Issued for Resolve Estate | 0 | 21.09.2011 | 10,000,000 | | 336,452.77 |
| 03.10.2011 | RTGS to UBI agt Resolve Estate Pvt. Ltd. | TR | 03.10.2011 | 10,000,000 | | 346,452.77 |
| 04.10.2011 | Fund TRF to Resolve Estate Pvt. Ltd. A/C-280 | | 04.10.2011 | 15,000,000 | | 361,452.77 |

12. The discussions made above and the conduct of both the assessee company as well as M/s Era Infra Engineering Pvt Ltd makes it clear beyond doubt that no effort was made on the part of these companies to furnish details necessary to establish the genuineness of expenses on account of Development Cost claimed in the books of account. Neither the copies of bills and invoices raised have been furnished, nor the details of development work done have been given. A substantial amount of development cost has been incurred between 31.12.2010 to 31.03.2011. Replies to the following questions raised time and again which are necessary to understand the nature of work done and justification of the same have been avoided:

- (i) Copies of all bills/invoices raised for development work done for M/s Resolve Estate Pvt. Ltd. during the year F.Y. 2011-12.
- (ii) Copies of agreement entered into for development work with M/s Resolve Estate Pvt. Ltd.
- (iii) Detailed description of work done, with copies of agreement with the sub-contractor appointed and the bills raised by them.
- (iv) Copies of procurement bills in respect of "Murram" supplied and details of royalty paid to the State Govt., local authority in respect of that.
- (v) Detailed chart of hiring agreements/vehicles/machine etc. used for claiming hire charge with their registration certification.
- (vi) TDS returns with annexures and details of parties in respect of TDS on sub contracts in respect of tax deducted by you during F.Y. 2010-11 & 2011-12.

The conduct of the assessee company proves beyond doubt that the transaction is nothing but a sham transaction. There is no actual work has been done but merely book entries were provided to enhance the cost of the project and to avoid payment of taxes by reducing the profit margin on the sale of FSI.

12.2 A perusal of accounts and the bank statement of the assessee company shows that the payments shown amounting to approximately 30 crores on 31.03.2011 was merely book entry and no actual payment was made. These entries were reversed and later on payments were made on 30.09.2011 as is evident from

the copy of account furnished for the F.Y. 2011-12. This shows that virtually no payment was made during the financial year 10-11 in which the alleged development cost was incurred. How the work amounting to Rs74.63 crores was carried out by the other company and why the book entry showing payment on 31st march 2011 to falsely reduce the creditors balance shows that the transaction is nothing but a sham transaction. There is no actual work has been done but merely book entries were provided to enhance the cost of the project and to avoid payment of taxes by reducing the profit margin on the sale of FSI.

12.3 Without prejudice to the above it is seen that the TDS was not deposited on the payments made as per the following details during the F.Y. 2010-11 but was rather deposited on 31.03.2012 on account of alleged Development work done by M/s Era Infra Engg. Pvt Ltd.

| <i>Date of deduction</i> | <i>Date of deposit</i> | <i>TDS amount</i> |
|--------------------------|------------------------|-------------------|
| 31.1.2011 | 31.03.2012 | 1056795 |
| 28.2.2011 | 31.03.2012 | 1116397 |
| 31.03.2011 | 31.03.2012 | 1335432 |

Therefore, in view of provisions of section 40(a)(ia) the amount relatable to the amount of TDS deducted but not deposited before filing of return cannot be allowed to the assessee as expenditure in the F.Y. 2010-11. The assessee has failed to justify its stand despite a specific query /show cause given on this point. The claim of entire expense as Development cost and adding it to the stock inventory during the F.Y. 2010-11 is not legally allowable. On the other hand the assessee has failed to justify the genuineness of transaction on account of failure to furnish necessary evidence during the year which has been elaborately discussed in the foregoing paragraphs of this office. Therefore, the same cannot be allowed to the assessee in the year under consideration also despite the payment being made in this year. On this count also the claim of the assessee to avail the amount of Development cost as expenditure during the year is unfounded.

12.4 The records for the A.Y. 2011-12 were perused the assessee has furnished the following reply relating to query of development expenses:

"During the year company has purchased an additional Land of Rs.25,08,42,764/- and has also incurred development expenses of Rs.74,63,80,322/-, which are shown under the head inventories. Party wise detail of Land purchased stating detail of stamp duty charges paid thereon and Party wise detail of development expenses is enclosed herewith.(Point no:25)"

Thus it can be seen that during the A.Y. 2011-12 also the assessee did not provide the details and evidence relating to the development work. The assessee has avoided in furnishing the details of the project, total estimated cost of the project, total estimated expenditure involved etc. Thus it is evident that the details regarding admissibility of Development expenditure, its genuineness and justification of the amount debited have not been furnished/explained during the A.Y 2011-12 also.

12.5 11.84375}. The component of cost of development claimed by the assessee on 11.84375 acre of land portion amounting to Rs.57,75,20,560/- as compared to the

component of cost of development on balance 9.64913 acres amounting to Rs.16,88,59,762/- {Rs.74,63,80,322 – Rs.57,75,20,560/-} is apparently wrong claim of deduction on account of development cost claimed in the cost of land sold. The assessee has not been able to substantiate its claim despite various opportunities given to it.

In view of the aforesaid discussion the alleged amount of Development Cost debited to the P&L account amounting to Rs. 74,63,80,322/- is being held as a Sham Transaction between group companies to defraud Revenue as the assessee has failed to substantiate its claim despite various opportunities given on the other hand the circumstantial evidences prove that these transactions are not genuine but merely book entries. Therefore amount of Rs.57,75,20,560/- claimed as Development Cost component on sale of land during the year is being disallowed and added back to the income of the assessee. The balance amount of Rs. 16,88,59,762/- being the component of development cost included in the Stock Inventory is also being disallowed and the stock inventory shall be valued after deducting this sham transaction amount component embedded in it.

For the reasons mentioned above, as the assessee has furnished inaccurate particulars of its income, penalty proceedings under section 271(1)(c) of the Income Tax Act are initiated against the assessee for which notice under section 274 of the Act is being issued separately.

(Addition : Rs.57,75,20,560/-)

13. Expenses on account of Bank Guarantee: The assessee has incurred and claimed deduction on account of Bank Guarantee commission amounting to Rs.72,38,028/-. The following details/submissions were made vide letter dated 25.02.2015:

"Purpose and Utilization of Bank Guarantee:-

During the said assessment year under consideration the total financial expenses incurred by the company amounts to Rs. 72,38,028/- on account of Bank charges incurred on Bank Guarantee. Detail of financial expenses incurred along with copy of ledger account has already been enclosed in our earlier proceedings. The company had paid bank guarantee charges for grant of licenses in respect of development works (Road, Sewers, water supply and horticulture) in proposed group housing colony to be set up on land measuring 12.843 acres at village Nawada, Fatehpur, Sector – 86 , Tehsil & District Gurgaon, Haryana. A detail note on this is enclosed herewith for your perusal. "

The reply of the assessee was considered but not found acceptable. The assessee has not deducted tax at source in respect of credit or payment of the aforesaid expenses. The following notification is being relied on:

January 4, 2013

*PRESS INFORMATION BUREAU GOVERNMENT OF INDIA
*** CBDT GRANTS EXEMPTION FROM TDS ON THE
PAYMENTS OF CERTAIN CATEGORIES TO MITIGATE
COMPLIANCE BURDEN ON BUSINESSES HELD BY
INDIVIDUALS, FIRMS OR CORPORATE ETC WHO ARE
USING THE FINANCIAL SERVICES OFFERED BY BANKS
New Delhi, January 4, 2013 To mitigate compliance burden on
businesses held by individuals, firms or corporate etc who are
using the financial services offered by banks, the Central Board
of Direct Taxes (CBDT) has issued a notification u/s 197A(1F)
granting exemption from tax deduction at source (TDS) on the
payments of certain categories. Payment towards bank
guarantee commission, cash management service charges,
depository charges on maintenance of Demat accounts,
charges for warehousing services for commodities and
underwriting service charges made to the banks which are
listed in the Second Schedule of the Reserve Bank of India Act,
1934 (excluding Foreign Banks) can be made without TDS with
effect from 1 st January 2013. The notification also facilitates
payment without TDS of credit/debit card commission on
transaction between the merchant establishment and acquirer
banks. This will also positively impact the use of plastic money
in the economy. The notification will obviate the uncertainties
about the applicability of specific TDS provisions*

14. The above notification makes it abundantly clear that without TDS the payment on account of bank guarantee commission can be made only w.e.f. 01.01.2013. As the assessee has failed to deduct tax on the amount of Rs.72,38,028/- on account of bank guarantee charges, the amount is being disallowed and added back to the income of the assessee. Even otherwise the bank guarantee charges/commission is for the upcoming

project of the assessee company which has yet to take off and the income from which has not started to generate. In view of this the amount had to be capitalized and could not have been allowed as Revenue expenditure.

For the reasons mentioned above, as the assessee has furnished inaccurate particulars of its income, penalty proceedings under section 271(1)(c) of the Income Tax Act are initiated against the assessee for which notice under section 274 of the Act is being issued separately.

(Addition : Rs.72,38,028/-)

15. In view of above, the income of the assessee company is computed as under

| | |
|---|---------------------|
| Net Taxable Income as declared by assessee in its Computation of Income (A) | 65,03,122 |
| Add: Development Cost disallowed as discussed above | 57,75,20,560 |
| Add: Disallowance of Bank Guarantee Commission | 72,38,028 |
| Taxable Income | 59,12,61,710 |

Assessed at income of Rs. 59,12,61,710/- .Issue ITNS-150. Issue demand notice and challan. Charge interest u/s 234B, & 234D accordingly, withdraw interest u/s 244A. Penalty proceedings u/s 271(1)(c) are being initiated separately .

(C) The Assessee filed appeal before the Ld. CIT(A). Vide impugned appellate order dated 27.02.2017, the Ld. CIT(A) allowed the Assessee's appeal and deleted the additions made by the Assessing Officer on account of disallowances of Development Cost (Rs.

57,75,20,560/-) as well as Bank Guarantee Commission (Rs. 72,38,028/-). The relevant portion of the aforesaid impugned appellate order dated 27.02.2017 of Ld. CIT(A) is reproduced as under:

3. The assessee has raised 9 grounds, the main being the AO has erred in law in disallowing entire development cost of ₹ 74,63,80,322/- on the project incurred by appellant in AY 2011-12. The AO has erred in law and on the facts in making addition of ₹ 72,38,028/- on account of disallowance of Bank Guarantee Commission alleging that the said expenditure is not an allowable expenses in respect of non deduction of TDS as per the provisions of I. T Act. The other grounds are related to these two issues.

4. The facts of the case are that the return of income was filed on 30.09.2012 vide e-filing declaring income under the normal provisions amounting ₹ 65,03,122/-. The case was decentralized & transferred to AO. The assessee is engaged in business as promoters, developers, engineers, consultants, contractors for road highways, multiplexes, shopping malls, housing complex, colonies, building scheme etc.

4.1. During the course of assessment proceedings, it was noticed by the AO that the assessee has shown a real estate sale of ₹ 89,58,57,285/- during the FY 2011-12. It was noticed that cost of land (11.9438 acre) purchased in FY 2007-08 was ₹ 25,50,17,543/-. Cost of land (9.5491 acre) purchased in FY 2010-11 was ₹ 25,08,42,764/-. Cost of land (0.58125 acre) purchased in FY 2011-12 was ₹ 1,83,24,503/-. Licence fee paid to Director Town Country Planning, Chandigarh for cost of purchase of land (21.4929 acre) is shown as ₹ 2,85,98,120/-. Thus total cost of purchase and license fee is shown as ₹ 55,27,82,930/- for 21.4929 acre land. To this cost of Development in FY 2010-11 is shown as ₹ 74,63,80,322/-. There was an apparent wrong claim of deduction on account of development cost claimed in the cost of land sold and required deeper scrutiny of the claim of the assessee company. On the queries raised, the assessee submitted on Cost of Development that during the year under consideration the assessee company had not incurred any expenditure on development of the inventory. Therefore the detail/documents required by the AO are not applicable in this connection.

Land purchased: During the year under consideration the assessee company had purchased land for ₹ 3,28,37,623/- (including cost of land, stamp duty, license fee and other printing charges). Details of which along with supporting documents and sale deed was furnished vide letter dated 06.01.2015.

During the year the assessee company has sold certain land amounting to ₹ 89,58,57,285/- which were purchased and developed in preceding FY. Working of details of all the land sold with cost thereof with the inventory of land and other expenses viz development expenses, license fee and other charges were already submitted. In the preceding F.Y. 2010-11, the assessee company has incurred a sum of ₹ 74.63 towards development of land project which was shown under the head inventory of ₹ 127.31 grouped under current assets as on 31.03.2011. These development expenditures were paid to M/s. Era Infra Engineering Ltd. Details of these expenditures claimed showing area of land on which expenses incurred details of bills were

raised by developer M/s. Era Infra Engineering Ltd. These expenses were paid after deducting TDS as per provisions of section 194 C of the I.T Act, copy of assessment order was also submitted. During the year the assessee company has partly sold the developed land 11.84375 acre for ₹ 89.58 crore to M/s. Optus Corona Developers Pvt. Ltd. As such there is no discrepancies on this part. It is also submitted that no development expenses was incurred during the year under consideration. The AO has pointed out that in view of failure of evidence, deduction was not an allowable expenditure in AY 2011-12 and in view of non submission of requisite details, it is not allowable expenditure u/s. 37 during the year under consideration. In this regard, it was submitted by the assessee that the TDS as pointed out was deducted in AY 2011-12 on development expenditures paid to Era Infra engineering Ltd. and deposited in the year under consideration. Development expenditures were incurred during the AY 2011-12 and capitalized with the cost of land (Inventory) and grouped under the head as current assets. TDS on this development expenditure was deducted and deposited in partly in the same year and partly in subsequent FY 2011-12. As the expenditure were not claimed in the P & L account and cost of development expenses were capitalized with the cost of land during that year, hence provisions of section 40(a) regarding disallowance of expenditure due to non deduction of TDS are not applicable during the AY 2011-12. Further, the matter has already been discussed during the course of assessment proceedings u/s. 143(3) for the AY 2011-12 for which order was already been submitted in our earlier dates of hearing. As such delay in deposit of TDS for the AY 2011-12 is not covered purview of disallowance of expenditure of that year. However, with regard to disallowance of the said expenditure during the AY 2012-13, it is submitted that the assessee company purchasing lands and developing for real estate projects. Development expenditures were incurred during AY 2011-12 is part and parcel of the cost of land, which was sold during this year. Hence, the contention that the development expenditure incurred is not allowable expenditure for AY 2012-13 is incorrect as the land was developed for sale and the assessee company is engaged in this line only. As such there are no discrepancies on this part and all the expenses for which TDS was paid in this year are allowable expenditures and incurred exclusively for business purpose only.

The submissions of the assessee company were considered but not found acceptable by the AO. He noted that regarding the development work, the assessee has submitted only the details of bills raised by Era Infra Engineering Ltd. during FY 2010-11. Summon u/s. 131 dated 20.03.2015 was issued to the Principal Officer of M/s. Era Infra Engineering Ltd. which is a group company of the assessee company. The reply was reproduced as under:

"With reference to your summon u/s. 131 dated 20.03.2015 regarding proceedings and asking for certain documents in case of M/s. Resolve Estate Pvt. Ltd. for AY 2012-13. Please find details as under:

- i. Confirmation of account of M/s. Resolve Estate Pvt. Ltd. for the FY 2010-11 and 2011-12 are enclosed for your reference (point no. i)
- ii. During the FY 2011-12, we have not undertaken any development work on behalf of M/s. Resolve Estates Pvt. Ltd. as such copies of invoice/bills raised, copy of agreement description of work done and other relevant details in this regard are not applicable for the FY 2011-12.
However, during the FY 2010-11, we have done development work on land situated at Village Navada, Fatehpur, Sector-88, Gurgaon on behalf of M/s. Resolve Estate Pvt. Ltd. has deducted TDS on this development charges amounting to ₹ 1,49,27,608/-."

The AO noted that the conduct of both the assessee company as well as M/s. Era Infra Engineering Pvt. Ltd. makes it clear beyond doubt that no effort was made on the part of these companies to furnish details necessary to establish the genuineness of expenses on account of Development Cost claimed in the books of account. Neither the copies of bills and invoices raised have been furnished, nor the details of development work done have been given. A substantial amount of development cost has been incurred between 31.12.2010 to 31.03.2011. The conduct of the assessee company proves beyond doubt that the transaction is nothing but a sham transaction. There is no actual work has been done but merely book entries were provided to enhance the cost of the project and to avoid payment of taxes by reducing the profit margin on the sale of FSI. A perusal of accounts and the bank statement of the assessee company shows that the payments shown amounting to approximately 30 crores on 31.03.2011 was merely book entry and no actual payment was made. These entries were reversed and later on payments were made on 30.09.2011 as is evident from the copy of account furnished for the FY 2011-12. This shows that virtually no payment was made during the FY 2010-11 in which the alleged development cost was incurred. How the work amounting to ₹ 74.63 crore was carried out by the other company and why the book entry showing payment on 31.03.2011 to falsely reduce the creditors balance shows that the transaction is nothing but a sham transaction. Without prejudice to the above it was seen by the AO that the TDS was not deposited on the payments made as per the following details during the FY 2010-11 but was rather deposited on 31.03.2012 on account of alleged development work done by M/s. Era Infra Engg. Pvt. Ltd. Therefore, in view of provisions of section 40(a)(ia) the amount relating to the amount of TDS deducted but not deposited before filing of return cannot be allowed to the assessee as expenditure in the FY 2010-11. The assessee has failed to justify its stand deposit a specific query/show cause given on this point. The claim of entire expenses as Development cost and adding it to the stock inventory during the FY 2010-11 is not legally allowable. On the other hand the assessee has failed to justify the genuineness of transaction on account of failure to furnish necessary evidence during the year. Therefore, the same cannot be allowed to the

assessee in the year under consideration also despite the payment being made in this year. On this count also the claim of the assessee to avail the amount of development cost as expenditure during the year is unfounded.

The records for the AY 2011-12 were perused by the AO & it was noted that the assessee has furnished the following reply relating to query of development expenses.

"During the year, company has purchased an additional land of ₹ 25,08,42,764/- and has also incurred development expenses of ₹ 74,63,80,322/-, which are shown under the head inventories. Party wise detail of land purchased stating detail of stamp duty charges paid thereon and party wise details of development expenses is enclosed herewith."

Thus it can be seen that during the AY 2011-12 also, the assessee did not provide the details and evidences relating to the development work. The assessee has avoided in furnishing the details of the project, total estimated cost of the project, total estimate expenditure involved etc. Thus it is evident that the details regarding admissibility of development expenditure, its genuineness and justification of the amount debited have not been furnished/explained during the AY 2011-12 also.

In view of the aforesaid discussion the alleged amount of development cost debited to the P & L account amounting to ₹ 74,63,80,322/- was held as a Sham Transaction between group companies to defraud Revenue as the assessee has failed to substantiate its claim despite various opportunities given. On the other hand, the circumstantial evidences prove that these transactions are not genuine but merely book entries. Therefore, amount of ₹ 57,75,20,560/- claimed as development cost component on sale of land during the year is being disallowed and added back to the income of the assessee. The balance amount of ₹ 16,88,59,762/- being the component of development cost included in the stock inventory is also being disallowed and the stock inventory shall be valued after deducting this sham transaction amount component embedded in it.

4.2. The AO noted that the assessee has incurred and claimed deduction on account of bank guarantee commission amounting to ₹ 72,38,028/-. No tax was deducted by the assessee. The reply of the assessee was considered but not found acceptable by AO. The assessee has not deducted tax at source in respect of credit or payment of the aforesaid expenses. The notification dated 04.01.2013 was relied upon by the AO. The notification makes it abundantly clear that without TDS the payment on account of bank guarantee commission can be made only w.e.f. 01.01.2013. As the assessee has failed to deduct tax on the amount of ₹ 72,38,028/- on account of bank guarantee charges, the amount was disallowed and added back to the income of the assessee. Even otherwise the bank guarantee charges/commission is for the upcoming project of the assessee company which has yet to take off and the income from which has not

started to generate. In view of this, the amount had to be capitalized and could not have been allowed as revenue expenditure. Aggrieved, the assessee is in appeal.

5. During the appellate proceedings, assessee made submissions on both the issues. The appellant is engaged in the business of real estate business.

5.1. The appellant had purchased land at sec 86, Gurgaon in the preceding years. The company had inventory of land approx ₹ 126.63 crores as on 01.04.2011. The said land had been shown as an inventory in the balance sheet of the company in the preceding years and has been carried forward as opening stock as on 01.04.2011. The appellant company had incurred development expenditure of ₹ 74,63,80,322/- in the preceding AY 2011-12 i.e. in FY 2010-11. These development expenditure were incurred on account of land scrapping, land filling, land levelling, road development, plotting etc. However, the AO raised doubt about these development expenditure and was insisting for those details and documents which was not subject matter of the assessment proceedings of the relevant AY. He thus, alleged that the appellant and contractor M/s. Era Infra Engineering Ltd. were not cooperative in providing the details/documents in respect of development work carried out in earlier year. He also issued notices u/s. 148 for AY 2011-12 based on assessment order of AY 2012-13.

It is very strange to note that how the AO can treat the cost incurred in the earlier years as bogus in absence of any contrary evidence or proof, keeping view the fact that the same has already been assessed and accepted in the earlier year AY 2011-12 in the assessment proceedings framed u/s. 143(3) of the Act. It is further submitted that M/s. Era Infra Engineering Ltd. is engaged in the business of civil construction from past twenty years and have turnover of around 3000 crore from civil construction contracts. This company is public limited company and had taxable income of around ₹ 250 crore. The charges paid by our company are income for this company and had been included by them in their books of accounts during the relevant year and had paid taxed thereon. Since, both the companies are taxpaying companies, therefore, there is no leakage of revenue. As regards another allegation to late deposit of TDS, it is submitted that our company had deducted TDS of ₹ 1,49,27,606/- on this development expenditure. Out of said TDS, the company had deposited major amount of TDS amounting ₹ 1,14,18,984/- on or before 31.03.2011 i.e. in the preceding AY 2011-12 year. However, due to shortage of funds, the company could not deposit the TDS amounting to ₹ 35,08,624/- which was deposited later on in AY 2012-13. The AO alleged that since the TDS was not deposited within the prescribed time limit as prescribed is not allowable u/s. 40(a)(ia) of the Act. Your honour may note that the company had deposited TDS of ₹ 35,08,624/- on 31.03.2012 i.e. in AY 2012-13 i.e. in the concerned AY and thus, the claim of expenditure is allowable in AY 2012-13. The AO is wrong in holding that the expenditure is not allowable u/s. 40(a)(ia) of the Act in view of late deposit of tax.

5.2. The AO also disallowed amount of Bank Guarantee commission amounting to ₹ 72,38,028/- incurred by the appellant on account of non deduction of TDS. Since, the appellant has paid bank guarantee commission to bank and as per the provisions of section 194A(3)(III) of the Act, there is no liability to deduct TDS on charge paid to bank, no TDS was deducted by appellant. Further, as regards the amount of commission covered under the provisions of section 194H, it is submitted that bank guarantee commission is not a commission paid to any agent and as such there is no relationship of principal and agent on which provisions of section 194H are applicable. On this issue, there is a departmental circular issued by CBDT on 04.01.2013 which grants exemption from TDS on the payment towards bank guarantee commissions, cash management service charges, depository charges on maintenance of Demat accounts, charges for warehousing for commodities and underwriting service charges made to the bank which are listed in the second schedule of the Reserve Bank of India Act 1934 w.e.f. 01.01.2013. This circular was issued to mitigate litigation and to obviate the uncertainties about the applicability of TDS provision on payments mentioned above. Thus, this circular is clarificatory in nature. However, while framing assessment the AO has disallowed the bank guarantee commission charges on account of non deduction of TDS stating that exemption is available from 01.01.2013 and not on earlier payments.

As regards, another observation of AO that the expenditure is for upcoming project and thus is of capital nature, it is submitted that AO has passed this observation without going into the facts of the case. It is submitted that the appellant company has given bank guarantee to Haryana Development Authority for grant of licenses in respect of Development works (Roads, Sewers, water supply and Horticulture) on land at village Nawada, Fatehpur, Sector-86, Tehsil & District Gurgaon, Haryana. Since this land has already been sold, the expenditure related to that is allowable business expenditure as per section 37 of the I.T Act, as such there is no discrepancy. The observation is misconceived and not tenable in law.

5.3. It was also submitted that, the assessment of the company for AY 2011-12 was first framed u/s. 143(3) vide order dated 22.03.2013 by DCIT, Central Circle 8, New Delhi in which no adverse inference was drawn in this respect. Further, the case of the company was reopened u/s. 148 and then completed u/s. 147/143(3) of the Act vide order dated 29.12.2016. The AO though accepted the claim of the company towards development cost but disallowed the expenditure of ₹ 17,54,31,200/- on account of late deposit of TDS u/s. 40(a)(ia). Copy of orders were enclosed.

6. I have gone through the assessment order, grounds of appeal, submission made by the assessee, assessment order for AY 2011-12 and order u/s. 147 r.w.s 143(3) for AY 2011-12. There are two issues on which the assessee has filed appeal. The first addition is of

₹ 74,63,80,322/- by disallowing the development cost pertaining to AY 2011-12 and the other disallowance of ₹ 72,38,028/- on account of non deduction of TDS on Bank Guarantee Commission.

6.1. After going through all the relevant details, it is seen that the basic fact is that expenditure of ₹ 74,63,80,322/- was pertaining to FY 2010-11 i.e. AY 2011-12 and not to the AY 2012-13 which is under consideration. The AO has also at various places mentioned that the amount pertains to AY 2011-12. It is therefore not understood as to how the amount was disallowed in AY 2012-13. Further, the assessee's case was scrutinised u/s. 143(3) for AY 2011-12 in which the issue was already enquired into. This is clear by what the AO has noted in para 12.4 of the assessment order where he has mentioned that the records for the AY 2011-12 were perused and the reply of the assessee has also been quoted in which it is mentioned that party-wise details are enclosed. The AO then goes on to mention that in AY 2011-12 also, the assessee did not provide the details and evidences. It is not clear how this conclusion has been reached in view of what he himself as quoted. In order u/s. 143(3), no additions was made on this issue.

6.2. The assessee has enclosed in his submission during the appellate proceedings, the reasons for issue of notice u/s. 148 for the AY 2011-12 dated 21.03.2016. It is noted that the AO has replicated the whole assessment order of AY 2012-13 in the reasons. In para 12 of the reasons, the AO mentions that

"In view of the facts narrated above which were discussed in the Assessment order for the AY 2012-13, it is clear that the assessee has not disclosed fully & truly all material facts necessary for its assessment for the AY 2011-12 and wrongly debited the development cost amounting to ₹ 74,63,80,322/- which was held as a Sham Transaction to the cost of land during the FY 2010-11 relevant to the AY 2011-12. It was also seen that the TDS was not deposited on the payments made to the group companies during the FY 2010-11 but was rather deposited on 31.03.2012 on account of alleged development work done by M/s. Era Infra Engineering Pvt. Ltd. Therefore, in view of provisions of section 40(a)(ia), the amount relatable to the amount of TDS deducted but not deposited before filing of return cannot be allowed to the assessee as expenditure in the FY 2010-11. Even after providing due opportunities, the assessee was not able to justify the same. I have therefore, reasons to believe that income of ₹ 74,63,80,322/- introduced as bogus expenditure in the return of income for AY claimed as cost of development in the AY 2011-12 has escaped assessment."

6.3. Thus, it is seen that in order u/s. 143(3), the expenditure was accepted by the AO. Then, the AO wrongly added the amount in AY 2012-13 and also reopened the assessment for

AY 2011-12 on the same issue. Obviously, the same amount cannot be added substantively in two AYs. The basis of this action is therefore not understood. Further, the order u/s. 148 for AY 2011-12 dated 29.12.2016 was submitted by the assessee and perused by me. The AO has held as under:

"3. During the course of assessment proceedings for AY 2012-13 in the case of the assessee company, the AO had issued queries regarding the development cost of ₹ 74,63,80,322/- included in the opening stock of inventory of land. The assessee did not furnish any satisfactory reply or supporting evidence thereof. The AO also stated that the assessee had not deposited the TDS deducted as such payment before 31.03.2012 and hence such cost was not an allowable deduction of expenditure for AY 2011-12. On the basis of the reasons recorded, the AO after obtaining approval of the competent authority, issued notice u/s. 148 of the Act on 29.03.2016."

"3.4. I have considered the reply filed by the assessee. Upon perusal of details of TDS deducted on development work, it is observed that TDS amounting to ₹ 35,08,624/- was deposited by the assessee only after the specified due date. The assessee claims that no expenditure was claimed on such work during the year. However, this does not appear to be correct. The assessee has in its profit & loss account reported this expenditure but thereafter capitalized these expenses to the cost of land. In view of this, it is held that provisions of section 40(a)(ia) of I.T Act are applicable for not depositing the TDS deducted before the specified due date of filing of return of in course. Accordingly, expenses to the tune of ₹ 17,54,31,200/- are disallowed out of development cost u/s. 40(a)(ia) of I.T Act and since corresponding amount shall also be deducted from the amount capitalized to land and reported as part of closing stock of land, there is no change in income assessed."

On the issue of development charges, the submission of the assessee was accepted and no portion of the disputed ₹ 74,63,80,322/- was disallowed.

~~6.4.~~ Thus, overall it is seen that the issue of the expenditure of ₹ 74,63,80,322/- was examined twice for the relevant AY 2011-12, once during the normal scrutiny proceedings u/s. 143(3) dated 22.03.2013 and then again u/s. 147 r.w.s. 143(3) dated 29.12.2016 and no disallowance of ₹ 74,63,80,322/- was considered appropriate to be added to total income. The assessee has also shown that the amount was reflected in the income of the payee M/s. Era Infra engineering Ltd. Thus, there is no loss of revenue to the department. The amount can therefore, not be disallowed in AY 2012-13 as it does not pertain to this year & has been duly examined in relevant AY 2011-12. The addition made is therefore deleted.

6.5. The AO made the disallowance u/s. 40(a)(ia) of the Act, on the ground that the appellant company did not deduct TDS on the payment of Bank Guarantee Commission to its

banker. The CBDT notification no. 56/2012 dated 31.12.2012, on this issue clarifies that no deduction is required to be made on commission paid to bank on guarantee commission. In the case of Kotak Securities Ltd. vs DCIT (2012) 14 ITR (Trib.) 0495, the Hon'ble Mumbai, ITAT held that "definition of expression 'commission or brokerage', in Explanation to section 194H, is stated to be exclusive, it does not really mean anything other than what has been specifically stated in the said definition. Further, it was observed that the transaction of bank guarantee commission is not a transaction between principle and agent to attract tax deduction requirements u/s. 194H. In the light of the judicial pronouncement referred above and the facts of the case, it is held that the appellant was not liable to deduct TDS on bank guarantee service charges and other charges. The CBDT notification is merely clarificatory in nature and to mitigate future litigation on the issue. Therefore, the disallowance made by the AO within the meaning of section 40(a)(ia) of the Act is deleted. "

(C.1) This present appeal has been filed by Revenue against the aforesaid impugned appellate order dated 27.02.2017 of Ld. CIT(A). At the time of hearing before us, the Learned Commissioner of Income Tax (Departmental Representative) ["Ld. CIT(DR)", for short] strongly defended the order of the Assessing Officer and read out relevant portions of the Assessment Order to support of the addition made by the Assessing Officer. On the other hand, the Leaned Authorized Representative ("Ld. AR", for short) for the Assessee relied on the aforesaid impugned appellate order dated 27.02.2017 of the Ld. CIT(A).

(D) We have heard both sides and perused the materials available on records. As far as first ground of appeal, relating to disallowance of Rs. 57,75,20,560/- on account of Land Development Cost is concerned, we find that the Ld. CIT(A) has deleted this addition holding that the amount was reflected in the income of the payee, M/s Era Infra Engineering Ltd. ("EIEL", for short) and concluded that there was no loss of Revenue to the Department. The Ld. CIT(A) has further observed that the amount does not pertain

to this year. However, on perusal of the impugned appellate order dated 27.02.2017 of the Ld. CIT(A), we find that it is silent on how the treatment of the amount by the payee EIEL in the books of account of EIEL becomes a material consideration in deciding the allowability of the expenditure in the hands of the assessee. Regardless of how the amount is treated by the payee in their books of accounts, what is determinative of allowability of the expenditure in the hands of the payer is whether the payment qualifies as a deduction in the hands of the assessee as per law. The impugned appellate order dated 27.02.2017 of the Ld. CIT(A) is non-speaking on this crucial aspect. Secondly, the impugned appellate order dated 27.02.2017 of Ld. CIT(A) is a non-speaking order as far as how the Ld. CIT(A) concluded that the amount does not pertain to this year. The detailed facts and circumstances narrated by the Assessing Officer in the Assessment Order, and the elaborate discussion in the Assessment Order on its non-allowability as per law, has not been rebutted by Ld. CIT(A) satisfactorily. Thus, we find that the order of the Ld. CIT(A) is a non-speaking order on her crucial observation that the amount does not pertain to this year. Though Ld. CIT(A) has stated that the matter was examined in the Assessment Year 2011-12, she has failed to pass a speaking order on how, the fact that it was examined in the Assessment Year 2011-12, precludes the Assessing Officer from examining the matter in Assessment Year 2012-13 and from making the disallowance in Assessment 2012-13. The detailed discussion in the Assessment Order once again not been adequately dealt with and rebutted by the Ld. CIT(A) and the impugned appellate order dated 27.02.2017 of Ld. CIT(A) is a non-speaking order in this regard.

(D.1) In view of the foregoing, we are of the view that the Ld. CIT(A) should decide this issue afresh and pass a fresh appellate order, which should be a speaking order in all materials respects. Accordingly, we set aside this issue to the file of the Ld. CIT(A) with the direction to decide the issue afresh through a speaking order in accordance with law.

(E) The second ground of appeal pertains to disallowance of Rs. 72,38,028/- on account of Bank Guarantee Commission. The amount was disallowed by the Assessing Officer on the ground that this amount was required to be capitalized and could not have been allowed as Revenue expenditure. This ground of disallowance and the resulting addition has not been dealt with by the Ld. CIT(A) in her impugned appellate order dated 27.02.2017. The Ld. CIT(A) has deleted this addition on the ground that disallowance under Section 40(a)(ia) of I.T. Act was not warranted. The Ld. CIT(A) took notice of CBDT Circular No. 56/2012 dated 31.12.2012 on this issue. However, the fact remains that the disallowance was not made by the Assessing Officer by taking recourse to Section 40(a)(ia) of I.T. Act; and instead, the addition was made on the ground that it was capital expenditure. The impugned appellate order dated 27.02.2017 of Ld. CIT(A) is silent of this aspect and is a non-speaking order on the issue whether the amount in question was a revenue expenditure or a capital expenditure. Thus, even in respect of the aforesaid disallowance of Rs. 72,38,028/-; we find that impugned appellate order dated 27.02.2017 of Ld. CIT(A) is silent on crucial aspect of the matter. Therefore, we set aside this issue also to the file of the Ld. CIT(A) with the direction to decide the issue afresh through a speaking order in accordance with law.

(F) In the result, both the issues raised in the two grounds of appeal are restored to the file of the Ld. CIT(A) to decide this issue afresh in accordance with law through a fresh order which should be a speaking order in all materials respects. For statistical purposes, appeal is partly allowed.

Order pronounced in the open court on 16.01.20.

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

Sd/-
(ANADEE NATH MISSHRA)
ACCOUNTANT MEMBER

Dated: 16.01.20
Pooja/-

Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT NEW DELHI

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| Date of dictation | |
| Date on which the typed draft is placed before the dictating Member | |
| Date on which the typed draft is placed before the Other Member | |
| Date on which the approved draft comes to the Sr. PS/PS | |
| Date on which the fair order is placed before the Dictating Member for pronouncement | |
| Date on which the fair order comes back to the Sr. PS/PS | |
| Date on which the final order is uploaded on the website of ITAT | |
| Date on which the file goes to the Bench Clerk | |
| Date on which the file goes to the Head Clerk | |
| The date on which the file goes to the Assistant Registrar for signature on the order | |
| Date of dispatch of the Order | |