

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ
IN THE INCOME TAX APPELLATE TRIBUNAL,
"A" BENCH, AHMEDABAD
(CONDUCTED THROUGH VIRTUAL COURT AT AHMEDABAD)
BEFORE SHRI RAJPAL YADAV, VICE PRESIDENT
AND
SHRI WASEEM AHMED, ACCOUNTANT MEMBER

Sr. No.	ITA No.	Asstt. Year	Name of Appellant	Name of Respondent
1-4	ITA No.1913 to 1916/Ahd/2011	1992-93 to 1995-96	Kotel Properties Pvt. Ltd., GF-74, Avishkar Complex, Old Padra Road, Vadodara. PAN:AABCK9165A	I.T.O., Ward-1(4), Vadodara.
5-6	ITA No.1807-1808/Ahd/2011	1994-95 & 1995-96	I.T.O., Ward-1(4), Vadodara.	Kotel Properties Pvt. Ltd., PAN:AABCK9165A
7-8	ITA No.1917-1918/Ahd/2011	1992-93	Madhav Organizers Pvt. Ltd., GF-74, Avishkar Complex, Old Padra Road, Vadodara. PAN:AADCM3269P	I.T.O., Ward-1(4), Vadodara.
9-10.	ITA No.1919-1920/Ahd/2011	1994-95 & 1995-96	Madhav Organizers Pvt. Ltd., Vadodara. PAN:AADCM3269P	I.T.O., Ward-1(4), Vadodara.
11-12.	ITA No.1775-1776/Ahd/2011	1994-95 & 1995-96	I.T.O., Ward-1(4), Vadodara.	Madhav Organizers Pvt. Ltd., Vadodara. PAN:AADCM3269P

(Applicant)		(Respondent)
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Revenue by	:	Shri Virendra Ojha, CIT. D.R
Assessee by	:	Ms. Urvashi Shodhan, A.R

सुनवाई की तारीख/Date of Hearing : 09/08/2021

घोषणा की तारीख /Date of Pronouncement: 08/11/2021

आदेश/O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER :

The above captioned appeals have been filed by the different assessee and the revenue for different assessment years against the orders of Id. Commissioner of Income-Tax (Appeals) arising in the matter of assessment order passed under section 143(3) and 143(3) r.w.s. 147 of the Income tax Act 1961 (in short the 'Act') involving respective Assessment Years.

2. **The issue** raised by the different assessee is common in all the appeals filed by them in different assessment years. Therefore, these are clubbed together for sake of brevity, convenience and adjudication. For the purpose of the order, the facts stated in the appeal of the assessee bearing **ITA No. 1916/AHD/2011** for A.Y. 1995-96 are adopted for the purpose of adjudication. The assessee has raised the following grounds of appeal:

1. *The Ld. Commissioner of Income Tax (Appeals)-III, Baroda has grossly erred in law and in facts in holding that the directions of the Hon'ble ITAT by its order in I.T.A. No. 192/Ahd/1999 and 752/Ahd/1999 for the relevant year in deciding the appeal afresh do not entail jurisdiction to him. According to the Ld. CIT(A)-III, Baroda, the jurisdiction could be assumed only if the appellant's application was pending before the Settlement Commission. Since there was no application made by the appellant to the Settlement Commission, no valid and lawful jurisdiction could be exercised by him. The action of the Ld. CIT(A) in holding so is in defiance of the direction of the Hon'ble ITAT and that the Ld. CIT(A) ought to have decided the appeals afresh.*

2. *The Ld. Commissioner of Income Tax (Appeals)-III, Baroda has further erred in law and in facts in holding that the grounds of appeal as decided by his predecessor in Appeal No. CAB/IV-74/98-99 survive and that he was not required to adjudicate the appeals afresh for want of lawful jurisdiction.*

3. *The Ld. Commissioner of Income Tax (Appeals)-IV, Baroda has erred in law and in facts in not deciding the following grounds of appeal as directed by the Hon'ble Tribunal:*

1. *The Ld. CIT (Appeals) IV, Baroda has erred in law and in facts in upholding the action of the ACJT, Central 2, Baroda in disregarding the existence of various legally enforceable agreement with Madhav Organisers Pvt. Ltd., the project*

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consultant and booking agent while misinterpreting the modus operandi of the scheme of the Avishkar Project and therefore it deserves to be held that the appellant's modus operandi of the scheme is to be accepted and it is to be held that the status of the appellant being that of a mutual society no tax can be levied.

2. The Ld. CIT (Appeals)-IV, Baroda has erred in law and in facts in confirming the action of the ACIT, Central 2, Baroda in holding that the appellant is engaged in the business of real estate / construction and not a non-profit making entity and it is to be held that the appellant's entity is that of a non-profit making entity.

3. The Ld. CIT (Appeals)-IV, Baroda has erred in law and in facts in disregarding that the appellant is following the completed method of contracts basis for accounting and accordingly even if the profit is to be estimated / quantified and taxed the same can be recognized only when the project is completed and therefore it deserves to be held that considering the method of accounting employed and also the nature of the case (the profit of the scheme is to be determined only on completion of the project).

4. The Ld. CIT (Appeals)-IV, Baroda has erred in law and in facts while holding that the appellant is engaged in the business of construction has further erred in estimating the net profit @ 10% of the total receipts determined at Rs. 3,60,15,500/-. The addition of Rs. 36,01,550/- deserves to be deleted.

5. Your appellant craves liberty to add, alter, delete or substitute to any of the grounds of appeal herein above contained.

The Ld. CIT(A) may please be directed to adjudicate and decide the above grounds.

4. Your appellant craves liberty to add, alter, delete or substitute any of the grounds of appeal herein above contained.

3. The issue raised by the assessee in first and second ground of appeal is that the Ld. CIT-A erred in holding that he had no jurisdiction to adjudicate the issue afresh in line with the directions of Hon'ble ITAT given in ITA No. 192/AHD/1999 and 752/AHD/1999 on the reasoning that the appellant had not filed any application before the settlement commission. Accordingly, the grounds of appeal decided by his predecessor will prevail.

4. At the outset, we note that similar issue has been decided by the Hon'ble ITAT Ahmedabad Bench in the case of Chandrakanta Jashbhai Patel vs ITO in ITA No. 1912/AHD/2011 vide order dated 22-12-2014 where it was observed that the Ld. CIT-A had no jurisdiction to adjudicate the issue afresh due to the reason that the appellant has not filed any application before the Settlement Commission. Therefore, there is no question of having any order of Settlement Commission. Accordingly the Ld. CIT-A was unable to follow the direction given by the ITAT.

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For the sake of better understanding the relevant finding of the Hon'ble bench is reproduced hereunder:

“Since, there was no application to the Settlement Commission with regards to M/s Kotel Properties Pvt. Ltd. and M/s Madhav Organizers Pvt. Ltd., so, CIT(A) was handicapped to follow the same. Accordingly, appeal was dismissed”

4.1 The facts of the present case are identical to the facts of the case as discussed above, therefore, respectfully following the same the grounds of appeal of the assessee are hereby dismissed.

5. The interconnected issue raised by the assessee in ground No. 3 and its sub grounds Nos. 1 to 5 is that the learned CIT (A) erred in not appreciating the status of the assessee like a mutual benefit society and estimating the net profit of Rs. 36,01,550/- being 10% of the total receipts.

6. The facts in brief are that the assessee in the present case is a private limited company and engaged in the business of real estate as a builder/developer. The assessee was the owner of a piece of land located at old padra road Baroda wherein it started developing the residential-cum-commercial project in the year 1992 which was titled as 'AVISHKAR'.

6.1 There was the sister concern of the assessee namely Madhav Organisers Private Limited (in short MOPL) which was acting as the project consultant and the booking agent for the impugned project on behalf of the assessee. For this purpose, the assessee has executed the GPA in favour of MOPL. By virtue of the GPA, MOPL obtained all the rights to negotiate and book the sale of shops/flats on behalf of the assessee. Accordingly, MOPL was receiving the money on behalf of the assessee from the intending customers who were willing to buy the shops/flats. The money received by MOPL was subsequently passed on to the assessee which was utilized to meet the construction cost. However, the ownership of the land and the building under construction remained with the assessee only.

6.2 The assessee was following project completion method and therefore whatever amount was received by it was shown as trade advances received from MOPL. Likewise, the cost incurred was classified as capital working progress. Thus, the assessee in the year under consideration has not shown any income from its construction activity on the reasoning that its project was not completed.

6.3 There was a search and seizure operation under section 132 of the Act at the office premises of the assessee, MOPL and the directors of the companies who were common in majority, dated 23rd March, 1995. As a result of search various incriminating documents were found from the premises of Ashok C Patel which were depicting the fact that MOPL has received on money which was not recorded in the regular books of accounts. Likewise, there were certain incriminating documents showing the utilization of on money which were not recorded in the books of accounts. The year wise details of the on money stand as under:

A.Y.	Amount
1992-93	8,22,088
1993-94	31,67,270
1994-95	1,45,15,601
1995-96	1,28,37,963
	3,13,42,924

6.4 The fact of receiving the on money was duly accepted by the directors of the company including the director namely Shri Ashok C Patel who is a common director in both the companies i.e. assessee as well as MOPL in a statement furnished under section 132(4) of the Act.

6.5 However, the assessee, with respect to on money received, contended during the assessment proceedings that it had not received any on money. Therefore, it had no control of whatsoever on the money received by MOPL. Furthermore, the on money was not utilized in its business activities. As such, the on money was utilized by MOPL substantially. Likewise, the shareholders and the

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Board of Directors of the assessee company are different with the MOPL. Thus, the right person to tax the impugned on-money is the MOPL.

6.6 Without prejudice to the above, the assessee also contended that if on money is treated as the income of it, then the relief should also be given to it with respect to the sum of Rs. 98.5 lakhs out of such on money which was deposited in the bank account of MOPL before the date of search. Hence the said amount has been recorded in the regular books of account of MOPL which should also be deducted from the on money.

6.7 Likewise, the assessee submitted that there were expenditures incurred out of such on money as appearing in the seized documents which were self-explanatory. As such in the real estate field various authorization/approval from the Government Authorities is required and therefore frequently payments were made to obtain such approvals. Thus, such expenditures should also be deducted from on money. In other words, only the net income being real income of the assessee should only be considered for the purpose of the tax. As such, the entire gross receipt cannot be made subject to the addition to the total income of the assessee.

6.8 However, the AO disregarded the contentions of the assessee by observing that the relationship between the assessee and MOPL is of principal and agent. As such MOPL was acting as a consultant and a booking agent on behalf of the assessee. Furthermore, the on money was collected by MOPL in connection with the sale/booking of flats/units which were constructed by the assessee. Therefore, the assessee is the right person to tax such on money.

6.9 Regarding the deposit of Rs. 98.50 lakhs, the AO found that the amount was recorded under the head "member's Contribution". However, the assessee has not furnished the details of the parties/members from whom such amount was received. Similarly, the assessee has also not offered any income on the

accounted receipts. Furthermore, the details furnished by the assessee of accounted receipt, the said amount of Rs. 98.50 lacs was not included as accounted income. Thus, in the absence of the necessary details, the AO treated the same as unaccounted receipts of the assessee.

6.10 The AO also rejected the contention of the assessee for claiming the deduction of the expenditure incurred out of such on money by observing as under;

- a- That the assessee failed to furnish the details such as the name and addresses of the parties to whom the payments were made. Likewise, there was no evidence filed by the assessee that such expenses were incurred in connection with the construction activity. Furthermore, the expenditure relating to constructions have already been recorded in the regular books of accounts.
- b- That most of the expenses were incurred in cash in violation of the provisions of section 40A(3) of the Act.
- c- That some of the expenditures were incurred out of such on money for unlawful activities which is against the public policy.
- d- That certain expenditures which were capital in nature such as payments in cash out of the on money to acquire the shares from the previous directors, repaid the deposits to the previous depositors.
- e- That certain payments were made in advance to suppliers and labour contractors which were subsequently taken back after making payments through cheque.
- f- That non-furnishing of details and proper explanation to justify the claim of expenditure.

6.11 The AO thus was of the view that such expenditure does not substantiate that it is related to the business of the assessee. Thus, the AO in view of the above facts was of the opinion that no benefit can be extended to the assessee out of such expenditure. Hence the claim of expenditure made by the assessee was disallowed.

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In view of the above, the AO thus treated the amount of Rs. 1,28,37,963/- received in the year under consideration out of the total amount of on money of Rs. 3,13,42,924/- as income and added to the total income of the assessee on substantive basis. Similar amount, was also added in the hands of MOPL on protective basis.

6.12 In addition to the above, the AO also found the details of the payments of Rs. 79.61 lacs recorded in the loose papers were not accounted in the books of accounts. This fact was also admitted by the assessee. The AO required the assessee to explain the source of cash for the impugned payment. It was contended by the assessee that it has been paid out of the on money collected by MOPL. Therefore, the addition of such payments should be made in the hands of the MOPL.

6.13 However, the AO disagreed with the contention of the assessee by observing that the director namely Shri Ashok C Patel in the statement furnished under section 132(4) of the Act has already disclosed the utilization of the on money. In that disclosure, there was no payment as discussed above was made. Furthermore, the assessee has also not furnished the cash flow statement evidencing that such payments were made out of the on-money receipts. Therefore, the AO was of the view that the payments were made by the MOPL on the instruction of the assessee and treated the same as unexplained investment in the hands of the assessee. The AO also noted that a sum of Rs. 37,48,700/- out of the impugned payment of Rs. 79,61,125/- pertains to the A.Y. 1994-95 which has already been added to the total income during the assessment proceeding of that year. Thus, the AO, added the remaining amount of Rs. 42,12,425/- (Rs. 79,61,125/- minus Rs. 37,48,700/-) to the total income of the assessee as unexplained investment on substantive basis. Similar amount, was also added in the hands of MOPL on protective basis.

6.14 Besides the above, the AO further observed certain defects in the accounting of business activities of the assessee as detailed under:

- i. That the assessee being contractor/developer has to account for income on progressive method after considering the amount received against the booking of the flats/units irrespective of the fact whether the project was completed or not in the year under consideration. But the assessee has shown nil income in the year under consideration.
- ii. There was on money received by the assessee which were not recorded in the books of accounts. Therefore, the books of accounts maintained by the assessee were not depicting the correct income. As such the books of accounts were not complete.
- iii. The DVO has valued the cost of the project up-to March 1996 at Rs. 10,79,97,700/- whereas the assessee has shown the project cost in the books of accounts at Rs. 8,63,98,852/- only. Similarly, the DVO has valued the cost of construction for the year under consideration at Rs. 3,41,14,353/- whereas the assessee has shown the cost of construction for the year under consideration at Rs. 2,71,34,604/- only.
- iv. The assessee has not provided the quantitative details for the purchase of materials. The assessee is also not maintaining day-to-day stock register and the necessary details for the payment made to the labour contractors.

6.15 In view of the above the AO invoked the provisions of section 145(3) of the Act and rejected the books of accounts of the assessee. Further the AO found that the profit of the assessee should be 25% of the receipts shown in the books of accounts which is comparable with the other assessee engaged in similar line of business. Accordingly, the AO worked out the net profit of Rs. 56,48,087/- being 25% of gross receipts of Rs. 2,25,92,350/- and added the same to the total income of the assessee on substantive basis. Similar amount, was also added in the hands of MOPL on protective basis.

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6.16 In effect the AO framed the assessment under section 143(3) of the Act after making the addition as detailed under:

i.	Unaccounted money receipts	Rs. 1,28,37,963/-
ii.	Unexplained Payments	Rs. 42,12,425/-
iii.	Net Profit on accounted Receipts	Rs. 56,48,087/-

7. Aggrieved assessee preferred an appeal to the learned CIT (A).

8. The assessee before the learned CIT (A) besides reiterating the submissions made before the AO during the assessment proceedings, contended that on money receipts should be given the same treatment as given to the recorded receipts for the purpose of determining the taxable income. There were certain documents seized during the search proceedings wherein receipt of on money was recorded along with the expenditures. Once such document has been treated as a piece of evidence for the purpose of treating the on money as income of the assessee, the same piece of document has to be referred for the purpose of the expenses recorded therein. Thus, the AO should not expect other details with respect to the expenses recorded in the seized documents. Thus, the AO cannot pick and choose the information based on the seized documents which is suiting to the Revenue. As such, the seized documents should be taken into consideration as a whole in order to work out the taxable income. Thus, the expenditure recorded in the seized documents should be allowed as deduction. In this connection, the assessee has filed the details of the expenses amounting to Rs. 3,06,69,413/- and requested to allow the deduction of the same.

8.1 The assessee with respect to the applicability of the provisions of section 40A(3) of the Act for the expenses incurred in cash submitted that these expenses should be covered under the exceptions as provided under rule 6DD of the Income Tax Rules. Accordingly, no disallowance of the expenses recorded in the seized documents which were incurred outside the books of accounts can be made under the provisions of section 40A(3) of the Act.

8.2 Without prejudice to the above, the assessee submitted that the receipt shown in the seized documents represents the business receipts. Against such receipts the assessee has incurred the expenses. Therefore, the entire amount cannot be treated as income. In this regard various decisions have been taken by the Hon'ble Court by determining the income on estimated basis i.e. 10% of such receipts.

8.3 The learned CIT (A) during the proceedings observed that during the survey operation dated 11th October, 1994, and search operation the income from the on money was disclosed in the hands of MOPL. The same was the position even during the assessment proceedings. Furthermore, the assessee has never disputed the fact that income from the unaccounted on money should be treated as its income. It was also observed that both the assessee and MOPL are body corporates. Thus, it does not make any difference even the income is included in either of the hands. Likewise, the assessee was not in a position to recover the on money from MOPL legally, except the money which was in pursuance to the agreement entered between them. Thus, the learned CIT (A) directed to delete the income on account of the on-money receipts from the hands of the assessee and further directed to tax the same in the hands of MOPL.

8.4 The learned CIT (A) further observed that on money received was treated as income of the assessee which was based on the document found during the search. As per the learned CIT (A), the details of the expenses were also found during the search proceedings. Accordingly, the learned CIT (A) was of the view that both the receipt and the payment (expenditures) cannot be added simultaneously. If the revenue is believing the document found during the search depicting the receipt of money then the documents found depicting the payment should also be taken into account while calculating the income of the assessee. Thus, the learned CIT (A) was of the view that the assessee is entitled for the

deduction of the unaccounted expenditure which were recorded in the seized papers out of on money receipts.

8.5 The observation of the Id. CIT (A) stands as under:

- i. The claim of the assessee that Rs. 306 lacs expenses were made out of on money receipts of Rs. 313 lacs is evident from the details recorded in the seized paper. The AO has also referred in his order to such expenses of Rs. 256 Lacs and the expenditure of Rs. 50.88 lacs. Thus, the expenditure incurred out of the on money is evident from the records.
- ii. However, the finding of the AO can also not be doubted as the expenditures were incurred for illegal purposes, capital in nature and withdrawal of the money by the directors. The assessee has genuine reason not to provide the detailed explanation of the expenditure made as said expenditure were also including illegal payments.
- iii. In such a situation, income from on money should be estimated on particular percentage basis.

8.6 In view of the above the learned CIT (A) was of the opinion that the income of the assessee can be determined on some percentage basis with respect to unaccounted receipt/ on money. Thus, the learned CIT (A) applied the rate of 20% on year to year basis on the on money received by the MOPL in different assessment years. Thus, an amount of Rs. 25,67,593/- of Rs. 1,28,37,963/- determined and added to the total income of MOPL.

8.7 Regarding the unexplained payment of Rs. 42,12,425/- assessee submits that the said payments were made out of the on-money receipts as it was recorded on same set of seized papers. The assessee also submits the detailed explanations of these payments before the Ld. CIT-A.

8.8 The Id. CIT-A regarding the unexplained payment of Rs. 42.12 lacs noted that nothing has been brought on record that such payments were made other than out of the on-money receipts. Similarly, the date of receipts of on money and

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date of expenditure had not been recorded. Therefore cash flow statement could also not be possible to prepare. Thus the Ld. CIT-A, deleted the addition of unexplained payments/investment for the sum of Rs. 42,12,125/- made by the AO.

8.9 The assessee regarding the rejection of the accounts contended that there was no defect pointed out by the AO therein. Therefore, the books cannot be rejected.

8.10 The assessee regarding the accounted receipts submitted that it started its project in the year 1992 and it booked the flat at a very low rate. But by the time the project was under progress the cost of the project has gone high which will eventually result in negative income. The assessee also assailed that the margin prevailing in the similar kind of business vary from 6 to 10% only. The assessee submitted the following details in support of his contention:

<i>CITATION</i>	<i>Rate of N.P. determined</i>
<i>(a) Sainath Developers (Ahmedabad Tribunal) -unreported (Copy enclosed)</i>	<i>10%of the gross receipts.</i>
<i>(b) K.N. Amin (Ahmedabad Tribunal unreported followed in above case.</i>	<i>-do-</i>
<i>(c) Parain Anand Builders Pvt. Ltd. 59ITD 29 (Mum.)</i>	<i>25% on the gross receipts while observing that for determining the above composited 7.5% is considerable as relatable to recorded receipts</i>
<i>(d) Parain Anand Builders Pvt. Ltd. 59ITD 29 (Mum.)</i>	<i>15%</i>
<i>(e) Parain Anand Builders Pvt. Ltd. 59ITD 29 (Mum.)</i>	<i>8%</i>
<i>(f) Parain Anand Builders Pvt. Ltd. 59ITD 29 (Mum.)</i>	<i>6%</i>

8.11 The learned CIT (A) with respect to the profit estimated by the AO at the rate of 25% of the accounted receipt shown by the assessee found that the method adopted by the AO was incorrect. It is for the reason that the AO has taken the accounted receipt only of Rs. 2,25,92,350/- which was showing the full

payment received by the assessee against the units sold. As per the learned CIT (A), the AO should have taken the entire amount of receipt in the year under consideration which is at Rs. 3,60,15,500/- to work out the income of the assessee. However, the learned CIT (A) was not convinced with the rate adopted by the AO for determining the income at the rate of 25%. As per the learned CIT (A) such rate of income was on the higher side. Accordingly, the learned CIT (A) applied the estimated rate at the rate of 10% of the accounted money received by the assessee in the year under consideration. Thus, the addition of Rs. 36,01,550/- being 10% of Rs. 3,60,15,500/- was made to the total income of the assessee. Thus the ground of appeal of the assessee was allowed in part.

9. Being aggrieved by the order of the learned CIT (A) both the assessee and the Revenue are in appeal before us. The assessee is in appeal before us for the addition made by the learned CIT (A) for Rs. 36,01,550/- whereas the Revenue is in appeal against the deletion of the addition for Rs. 1,70,50,388/- (Rs. 1,28,37,963 and Rs. 42,12,425).

10. The grounds of appeal of the Revenue in **ITA number 1808/Ahd/2011** for A.Y. 1995-96 stand as under:

1. *On the facts and in the circumstances of the case and in law, the Id. CIT (Appeals) erred in deleting the addition of Rs. 1,28,37,963/- made on account of undisclosed 'on-money' receipts by holding that the income on 'on-money' has to be taxed in the hands of project consultant and booking agent, M/s.Madhav Organizers Pvt.Ltd.*
2. *On the facts and in the circumstances of the case and in law, the Id. CIT (Appeals) erred in deleting the addition of Rs.42,12,125/- on account of unexplained payment without appreciating that the expenditure as recorded in the seized material were unaccounted investment of the assessee company.*
3. *On the facts and in the circumstances of the case and in law, the Id. CIT (Appeals) erred in restricting the addition of 25% of the receipts made by rejecting the book results to 10% of the receipts.*
4. *The appellant craves leave to add to, amend or alter the above grounds as may be deemed necessary.*

11. The learned AR before us filed from pages 1 to 823 and contended that the rate of profit determined by the learned CIT (A) being 10% of the gross receipt is on the much higher side.

12. On the other hand, the learned DR before us filed a paper book running from pages 1 to 263 and contended that the assessee was the ultimate beneficiary of the on money as it relates to its real estate project. Thus, the same should be taxed in the hands of the assessee. Similarly, the expenditures recorded by the assessee in the seized papers outside the books of accounts are not allowable as deduction as they were incurred in violation of the provisions of section 40A(3) of the Act, being in the nature of capital expenditure and illegal expenditure.

13. Both the learned AR and the DR vehemently supported the order of the authorities below to the extent favourable to them.

14. We have heard the rival contentions of both the parties and perused the materials available on record. The facts of the case have already been elaborated in the preceding paragraph which are not in dispute. Therefore, for the sake of brevity and convenience, we are not inclined to be the same. From the preceding discussion, the following issue arises for our consideration:

- i. Whether the on money found during the search proceedings are liable to be taxed in the hands of the assessee or in the hands of MOPL.
- ii. Whether the expenditure incurred out of the on money should be adjusted against the on money received.
- iii. Whether the entire amount of on money should be included in the taxable income or some percentage of profit embedded therein should be worked out.
- iv. Whether the payment of Rs. 79,61,125/- was made from the unexplained sources.
- v. Whether the receipt shown by the assessee in the books of accounts of Rs. 3,60,15,550/- should be subjected to tax on percentage basis.

- vi. Whether the assessee is acting as a mutual concern and therefore there cannot be any tax liability on the assessee on mutuality concept.

14.1 Regarding the 1st question whether the on money found during the search proceedings are liable to be taxed in the hands of the assessee or in the hands of MOPL, we note that the assessee was in the activity of the construction of the impugned project. Similarly, the ownership of the project was also vested with the assessee only. The assessee has given authority to MOPL for the limited purpose i.e. project consultant and the booking agent. As per the arrangement between the assessee and MOPL, whatever amount is collected by MOPL on the booking of the flat was to be transferred to the assessee. However, MOPL was collecting on money without recording the same in the books of accounts. This on money collected had direct nexus with the business activity of the assessee. Whatever on money was collected from the customers, all of them were buying the property in the project of the assessee. Thus, what is transpired is this that the transaction with respect to which the on money was collected was related to the flats/shops which were constructed by the assessee. Therefore, in our considered view, this collection of the on money was not possible without the business activity of the assessee. Accordingly, it seems to us the substance of the transaction if viewed on the parameters of risk and reward, the on money belongs to the assessee. It is for the reason that the entire risk for constructing the project was undertaken by the assessee. In the construction project, there is an investment of huge money which was invested by the assessee. There was no investment made by MOPL in the construction project of the assessee. The role of MOPL was limited to the extent of booking the flats/shops on behalf of the assessee which was not possible without the project which was constructed by the assessee. Even if we see the seized documents, we find that most of the expenditures were incurred which were related to the construction activities barring one exception such as deposit of money in the bank account of MOPL. Thus, on these parameters, it appears that on money belongs to the assessee and therefore the same should be taxed in its hands.

14.2 However, at the same time it is also equally important to note that MOPL is a separate entity having its own legal existence. The assessee had no legal power to recover the on money received by MOPL from the customers. The question also arises which of the party was enjoying the on money. It is seen that a sum of Rs. 98.50 lakhs was transferred in the bank account of MOPL which is a significant amount. Had this money been belonging to the assessee, MOPL should not have deposited such amount in its bank account. Thus, if the transaction of on money is seen from the point of beneficial party, then MOPL is such party. Thus, it appears that nothing is wrong if the amount is brought to tax in the hands of MOPL.

14.3 Be that as may be, there are certain undisputed facts that both assessee and MOPL are related parties and chargeable to tax at the maximum marginal rate. Thus, effectively there is no loss to the revenue as far as the collection of taxes is concern after ascertaining the party in whose hand, the income needs to be taxed. In either of the case, the tax money will flow to the Government Exchequer. We also note that the Hon'ble Gujarat High Court in the case of PCIT vs Gujarat Gas Financial Services Ltd. reported in 233 Taxman 532 has held that there cannot be said that the service charge paid by the parent company to its sister concern company at unreasonable rate to evade income tax where both companies, parent company as well as sister concern company are assessed to income tax at maximum marginal rate.

14.4 The principles laid down by the Hon'ble Gujarat High Court as discussed above are based on different set of facts but the ratio laid down therein can be applied to the present facts of the case. Accordingly, we do not find any infirmity in the order of the learned CIT (A) in so far, the issue in whose hands the income has to be taxed. Hence, we direct that there cannot be any addition to the total income of the assessee on account of the receipt of on money discussed above. As such, such amount of on money is liable to be taxed in the hands of MOPL.

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14.5 The next controversy (2nd question) arises for our adjudication whether the gross amount of on money received should be subject to tax without allowing the deduction of the expenditure recorded in the seized documents. It is a fact on records that on money was reflecting in the seized documents. Such seized document was the basis of making the addition of such on money. It is also a fact on record that there were expenditures incurred against the on money as evident from the same set of seized documents. In our considered view these documents should be read as a whole. Such seized documents cannot be used as the basis for making the addition without giving the deduction of the expenses appearing in the seized documents. We note that the Hon'ble Supreme Court in the case of CIT vs S C Kothari reported in 82 ITR 794 held as under;

"If the business is illegal neither the profits earned nor the losses incurred would be enforceable in law. But, that does not take the profits out of the taxing statute. Similarly, the taint of illegality of the business cannot detract from the losses being taken into account for computation of the amount which can be subjected to tax as "profits" under section 10(1) of the Act of 1922. The tax collector cannot be heard to say that he will bring the gross receipts to tax. He can only tax profits of a trade or business. That cannot be done without deducting the losses and the legitimate expenses of the business. Thus, for the purpose of section 10(1) the losses which had actually been incurred in carrying on a particular illegal business must be deducted before the true figure relating to profits which had to be brought to tax could be computed or determined. As for "set-off" under section 24 of the Act, the High Court held that the loss sustained in the impugned contracts was liable to be set off against the profits from speculative transactions. Under Explanation 2 of proviso to section 24(1), speculative transactions means a transaction in which a contract for the purchase and sale of any commodity is periodically or ultimately settled otherwise than by actual delivery, etc. Now the contract has to be an enforceable contracts and not an unenforceable one by reason of any taint of illegality resulting in its invalidity. In the instant case contract in question were illegal and unenforceable on account of contravention of section 15(4) of the 1952 Act. The High Court was in error in considering that any set-off could be allowed in the instant case under the first proviso to section 24(1) which must be read with Explanation 2. Now, it would have to be determined whether the profits and losses were incurred in the same business even though that business involved the entering into contracts some of which, in the eye of the law, illegal. If the business of commission agency or forward business was the same in the which the profits were made and the loss was incurred, then in order to arrive at the figure which could be subjected to tax, the loss would have to be deducted from the profit. For this purpose, the matter was remitted back to the High court to decided this point."

In view of the above, we hold that the assessee (MOPL) is very much entitled for the expenses appearing in the seized documents against the on money

which was not recorded in the books of accounts like the expenses as discussed above.

14.6 The next controversy (3rd question) arises whether the income as reflecting in the on money can be determined based on some percentage basis. Admittedly, the money which have been treated on money is the business receipts. Therefore, the entire amount of on money cannot be treated as income. In this regard we note that the Hon'ble Gujarat High Court in case of Vijay Protein Ltd. vs. CIT reported in 58 taxmann.com 44 where the Hon'ble court held as under:

8. We are broadly in agreement with the view of the Commissioner of Income Tax (Appeals) as confirmed by the Tribunal. When the Assessing Officer had doubted the genuineness of the expenditure, he would require bringing to tax the profit element so avoided by the assessee. As noted, the Commissioner of Income Tax (Appeals) while limiting the additions, brought the assessee's declared gross profit ratio at the same rate as in the previous year which was even otherwise in tune with the percentage of the assessee's doubtful purchases.

14.7 The principles laid down by the Hon'ble Gujarat High Court as discussed above are based on different set of facts but the ratio laid down therein can be applied to the present facts of the case. Accordingly, we do not find any infirmity in the order of the learned CIT (A) so far, to determine the income of on money receipts on the percentage basis is concern. Now the next controversy with respect to the determination of percentage to be applied on the on money. In this regard we note that indeed, there is no standard jacket formula to work out the income embodied in the receipt of unaccounted money based on the documentary evidence in the given facts and circumstances. Thus, we are of the view that some element of guesswork is required to work out such income of the assessee. At the time of hearing the Id. DR has not brought anything on record against the finding of the Id. CIT-A. Thus we don't finding any infirmity in the order of Id. CIT-A in the light of the above stated facts and discussion.

14.8 Moving to the next controversy whether the payment of Rs. 79,61,125/- has been paid out of the unexplained sources. In this regard, we find that the learned CIT (A) has duly explained the payment made to the parties against the

expenses as recorded in the seized documents. In other words, there were certain expenses which were recorded in the seized documents. Likewise, the cash payment of such expenses were also recorded on the seized documents. As we have already held that the expenses were incurred out of the on money and therefore there cannot be any other addition with respect to the payment of such expenditure. At the time of hearing, the learned DR has not brought anything on record contrary to the finding of the learned CIT (A). Accordingly, we do not find any infirmity in the order of the learned CIT (A).

14.9 Now the controversy arises whether the receipt shown by the assessee in the books of accounts of Rs. 3,60,15,550/- should be subjected to tax on percentage basis. In this regard we note that the assessee is a builder and developing a residential cum commercial project. The Accounting Standard 7 provides to recognize the income on progressive method. But the Accounting Standard 7 namely Accounting for the Construction Contract is not applicable to a builder. The income of the assessee being a builder has to be recognized in pursuance to the provisions of Accounting Standard 9 namely Revenue Recognition. In holding so, we draw support and guidance from the judgment of Hon'ble Ahmedabad Tribunal in the case of ITO vs. Meeti Investment and Consultancy P. Ltd ITA No. 1714/AHD/2010 wherein it was held as under;

"We concur with the views of the Ld. CIT(A) that in the present case, the assessee was not a contractor but was a developer who awards contracts to different contractors for executing civil, electrical, plumbing work etc. Therefore, accounting standard in the present circumstances and facts of the case i.e. AS-7 cannot be made applicable. Accounting standard AS-9 which has been reproduced by the Ld. CIT(A) and has been discussed at pages 4-8 of his order is applicable in the present circumstances and facts of the case. Moreover, it has not been controverted by the Ld. DR appearing for the Revenue that the assessee had awarded the contractors to various other contractors. Also it has not been controverted that there is no construction activity carried out by the assessee during the year and there was a dispute of the parties who had filed civil suit in Mumbai civil court. The assessee had received the advances which are duly reflected in the balance-sheet of the assessee. There is no certainty of the Revenue recognition at this stage. Moreover, all the significant risks and the ownership at this juncture vest in the hands of the owner i.e. the assessee and they have not been transferred to the buyer or the proposed buyer. Therefore, in the circumstance and facts of the case, we find no infirmity in the order of Ld. CIT(A), which appears to be quite reasoned one and he has justified in reversing the order of the AO on the issue. Thus, ground No. 1 of the Revenue is dismissed."

14.10 One more aspect that requires our attention is that once the assessee has adopted the project completion method, then it has to be seen while deciding the issue on hand what is the fate of the income which has been offered by the assessee upon the completion of project? In other words, if the assessee has already offered to tax the income upon the completion of the project, then any addition made in the year under consideration will certainly lead to the double addition which is unwanted under the provisions of law. However, at the time of hearing none of the authorities has brought to our notice the status of the case of the assessee upon the completion of the project. However, we are not inclined to send the matter to the file of the AO for fresh adjudication in view of the fact that the appeals before us pertain to the Assessment Years 1992-93 to 1995-96 which are very old years. The substantial time has already been lapsed. On the top of it, learned AR also not made any effort in bringing out the fact for the profit declared by the assessee upon the completion of the project. As such, there was the limited prayer of the assessee before us to estimate the profit. Even before us the quantum amount on which percentage of profit should be applied was not brought to our notice whether it should be on Rs. 225 lakhs as or 360 lacs. Considering, the fact of double addition in the hands of the assessee, we are inclined only to take the gross receipt of Rs. 2,25,92,350/- for determining the income of the assessee on percentage basis.

14.11 We have already applied the rate of 10% somewhere in the preceding paragraph. Accordingly, we take the same rate and direct the AO apply percentage of profit on the gross receipt of Rs. 2,25,92,350/-. Hence the ground of appeal of the assessee is partly allowed whereas the ground of appeal of the revenue is hereby dismissed.

14.12 It is also pertinent to note that there was a ground raised by the assessee in the memo of appeal by stating that the assessee is working in the capacity of mutual organization having no profit motive. Therefore, based on the principles of

mutuality there cannot be any income in the hands of the assessee. However, at the time of hearing, we note that the learned AR has not made any argument on this issue. Accordingly, we are of the view that the same does not require any separate adjudication. Thus, the issue raised by the assessee becomes infructuous. Accordingly, we dismiss the same.

14.13 In the result the appeal filed by the assessee is partly allowed whereas the appeal filed by the Revenue is hereby dismissed.

Coming to ITA No. 1915/AHD/2011 an appeal by assessee for the AY 1994-95.

15. The assessee has raised the following grounds of appeal;

1. *The Ld. Commissioner of Income Tax (Appeals)-I, Baroda has grossly erred in law / and in facts in holding that the directions of the Hon'ble ITAT by its order in I.T.A. No. 988/Ahd/2001 and 1163/Ahd/2001 for the relevant year in deciding the appeal afresh do not entail jurisdiction to him. According to the Ld. CIT(A)-III, Baroda, the jurisdiction could be assumed only if the appellant's application was pending before the Settlement Commission. Since there was no application made by the appellant to the Settlement Commission, no valid and lawful jurisdiction could be exercised by him. The action of the Ld. CIT(A) in holding so is in defiance of the direction of the Hon'ble ITAT and that the Ld. CIT(A) ought to have decided the appeals afresh.*
2. *The Ld. Commissioner of Income Tax (Appeals)-III Baroda has further erred in law and in facts in holding that the grounds of appeal as decided by his predecessor in Appeal No. CAB/III-133/2000-2001 survive and that he was not required to adjudicate the appeals afresh for want of lawful jurisdiction.*
3. *The Ld, Commissioner of Income Tax (Appeals)-III, Baroda has erred in law and in facts in not deciding the following grounds of appeal as directed by the Hon'ble Tribunal:*
 1. *The Ld. CIT (Appeals) IV, Baroda has erred in law and in facts in upholding the action of the Asst. Commr. Of Income Tax, company Circle 1(3), Baroda in disregarding the existence of various legally enforceable agreement with Madhav Organisers Pvt. Ltd., the project consultant and booking agent while misinterpreting the modus operandi of the scheme of the Avishkar Project and therefore it deserves to be held that the appellant's modus operandi of the scheme is to be accepted and it's to be held that the status of the appellant being that of a mutual society no lax can be levied.*
 2. *The Ld. CIT (Appeals)-III, Baroda has erred in law and in facts in confirming the action of the Asst. Commr. Of Income Tax, Company Circle*

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1(3), Baroda in holding that the appellant is engaged in the business of real estate / construction and not a non-profit making entity and therefore suitable directions are deserved to be issued to hold that the appellant is a non-profit making entity being a mutual society and therefore no tax is levied.

3. The Ld. CIT (Appeals)-III, Baroda has erred in law and in facts in disregarding that the appellant is following the completed method of contracts basis for accounting and accordingly even if the profit is to be estimated / quantified and taxed, the same can be recognized only when the project is completed and therefore it deserves to be held that considering the method of accounting employed and also the nature of the case the profit of the scheme is to be determined only on completion of the project.

4. The Ld. CIT (Appeals)-III, Baroda has erred in law and in facts while holding that the appellant is engaged in the business of construction has further erred in estimating the net profit @ 10% of the total receipts determined at Rs. 2,93,00,000/-. This addition of Rs. 29,30,000/- deserves to be deleted.

5. Your appellant craves liberty to add, alter, delete or substitute to any of the grounds of appeal herein above contained.

The Ld. CIT(A) may please be directed to adjudicate and decide the above grounds.

4. Your appellant craves liberty to add, alter, delete or substitute any of the grounds of appeal herein above contained.

16. The issue raised by the assessee in the first and second ground of appeal is that the Ld. CIT-A erred in holding that he had no jurisdiction to adjudicate the issue afresh in line with the directions of Hon'ble ITAT given in ITA No. 988/AHD/2001 and 1163/AHD/2001 on reasoning that the appellant had not filed any application before the settlement commission. Accordingly the grounds of appeal decided by the predecessor will prevail.

17. At the outset we note that the issue raised by the assessee in its grounds of appeal for the year under consideration is identical to the issue raised by the assessee in ITA No. 1916/AHD/2011 for the assessment year 1995-96. Therefore, the finding given in ITA no. 1916/AHD/2011 shall also be applicable for the year under consideration i.e. A.Y. 1994-95. The appeal of the assessee for the A.Y. 1995-96 has been decided by us vide paragraph No. 4 of this order against the assessee. Hence, the ground of appeal filed by the assessee is dismissed.

18. The interconnected issue raised by the assessee in ground No. 3 and its sub grounds numbers 1 to 5 is that the learned CIT (A) erred in not appreciating the status of the assessee like a mutual benefit society and estimating the net profit of Rs. 29,30,000/- being 10% of the total receipts.

19. At the outset we note that the issue raised by the assessee in its grounds of appeal for the year under consideration is identical to the issue raised by the assessee in ITA No. 1916/AHD/2011 for the assessment year 1995-96. Therefore, the finding given in ITA no. 1916/AHD/2011 shall also be applicable for the year under consideration i.e. A.Y. 1994-95. The appeal of the assessee for the A.Y. 1995-96 has been decided by us vide paragraph No. 14 of this order by allowing the appeal in favour of the assessee in part. Hence, the ground of appeal filed by the assessee is partly allowed.

19.1 In the result, the appeal of the assessee is partly allowed.

Coming to ITA No. 1914/AHD/2011 an appeal by assessee for the AY 1993-94.

20. The assessee has raised the following grounds of appeal;

1. *The Ld. Commissioner of Income Tax (Appeals)-III, Baroda has grossly erred in law and in facts in holding that the directions of the Hon'ble 1TAT by its order in I.T.A. No. 191/Ahd/1999 and 751/Ahd/1999 for the relevant year in deciding the appeal afresh do not entail jurisdiction to him. According to the Ld. CIT(A)-III, Baroda, the jurisdiction could be assumed only if the appellant's application was pending before the Settlement Commission. Since there was no application made by the appellant to the Settlement Commission, no valid and lawful jurisdiction could be exercised by him. The action of the Ld. CIT(A) in holding so is in defiance of the direction of the Hon'ble ITAT and that the Ld. CIT(A) ought to have decided the appeals afresh.*
2. *The Ld. Commissioner of Income Tax (Appeals)-III, Baroda has further erred in law and in facts in holding that the grounds of appeal as decided by his predecessor in Appeal No. CAB/IV-94/98-99 survive and that he was not required to adjudicate the appeals afresh for want of lawful jurisdiction.*
3. *The Ld. Commissioner of Income Tax (Appeals)-III, Baroda has erred in law and in facts in not deciding the following grounds of appeal as directed by the Hon'ble Tribunal:*

1. *The Ld. CIT (Appeals) IV, Baroda has erred in law and in facts in upholding the action of the ACIT, Central 2, Baroda in disregarding the existence of various legally enforceable agreement with Madhav Organisers Pvt. Ltd., the project consultant and booking agent while misinterpreting the modus operandi of the schemed of the Avishkar Project and therefore it deserves to be held that the appellant's modus operandi of the scheme is to be accepted and it's to be held that the status of the appellant being that of a mutual society no tax can be levied.*
2. *The Ld. CIT (Appeals)-IV, Baroda has erred in law and in facts in confirming the action of the ACIT, Central 2, Baroda in holding that the appellant is engaged in the business of real estate / construction and not a non-profit making entity and it is to be held that the appellant's entity is that of a nonprofit making entity.*
3. *The Ld. CIT (Appeals)-IV, Baroda has erred in law and in facts in disregarding that the appellant is following the completed method of contracts basis for accounting and accordingly even if the profit is to be estimated / quantified and taxed the same can be recognized only when the project is completed and therefore it deserves to be held that considering the method of accounting employed and also the nature of the case the profit of the scheme is to be determined only on completion of the project.*
4. *The Ld. CIT (Appeals)-IV, Baroda has erred in law and in facts while holding that the appellant is engaged in the business of construction has farther erred in estimating the net profit @ 10% of the total receipts determined at Rs. 1,05,09,355/-. The addition of Rs. 10.50.935/- deserves to be deleted.*
5. **Your** *appellant craves liberty to add, alter, delete or substitute to any of the grounds of appeal herein above contained.*

The Ld. CIT(A) may please be directed to adjudicate and decide the above grounds.

4. *Your appellant craves liberty to add, alter, delete or substitute any of the grounds of appeal herein above contained.*

21. The issue raised by the assessee in first and second ground of appeal is that the Ld. CIT-A erred in holding that he had no jurisdiction to adjudicate the issue afresh in line with the directions of Hon'ble ITAT given in ITA No. 191/AHD/1999 and 751/AHD/1999 on reasoning that the appellant had not filed application before the settlement commission. Accordingly, the grounds of appeal decided by his predecessor shall prevail.

22. At the outset we note that the issue raised by the assessee in its grounds of appeal for the year under consideration is identical to the issue raised by the assessee in ITA No. 1916/AHD/2011 for the assessment year 1995-96. Therefore, the finding given in ITA no. 1916/AHD/2011 shall also be applicable for the year

under consideration i.e. A.Y. 1993-94. The appeal of the assessee for the A.Y. 1995-96 has been decided by us vide paragraph No. 4 of this order against the assessee. Hence, the ground of appeal filed by the assessee is dismissed.

23. The interconnected issue raised by the assessee in ground No. 3 and its sub grounds numbers 1 to 5 is that the learned CIT (A) erred in not appreciating the status of the assessee like a mutual benefit society and estimating the net profit of Rs. 10,50,935/- being 10% of the total receipts.

24. At the outset we note that the issue raised by the assessee in its grounds of appeal for the year under consideration is identical to the issue raised by the assessee in ITA No. 1916/AHD/2011 for the assessment year 1995-96. Therefore, the finding given in ITA no. 1916/AHD/2011 shall also be applicable for the year under consideration i.e. A.Y. 1993-94. The appeal of the assessee for the A.Y. 1995-96 has been decided by us vide paragraph No. 14 of this order by allowing the appeal of the assessee in its favour in part. Hence, the ground of appeal filed by the assessee is partly allowed.

24.1 In the result, the appeal of the assessee is partly allowed.

Coming to ITA No. 1913/AHD/2011 an appeal by assessee for the AY 1992-93.

25. The assessee has raised the following grounds of appeal;

- 1. The Ld. Commissioner of Income Tax (Appeals)-III, Baroda has grossly erred in law and in facts in holding that the directions of the Hon'ble ITAT by its order in I.T.A. No. 190/Ahd/1999 and 750/Ahd/1999 for the relevant year in deciding the appeal afresh do not entail jurisdiction to him. According to the Ld. CIT(A)-III, Baroda, the jurisdiction could be assumed only if the appellant's application was pending before the Settlement Commission. Since there was no application made by the appellant to the Settlement Commission, no valid and lawful jurisdiction could be exercised by him. The action of the Ld. CIT(A) in holding so is in defiance of the direction of the Hon'ble ITAT and that the Ld. CIT(A) ought to have decided the appeals afresh.*
- 2. The Ld. Commissioner of Income Tax (Appeals)-III, Baroda has further erred in law and in facts in holding that the grounds of appeal as decided by his predecessor in*

Appeal No. CAB/IV-95/98-99 survive and that he was not required to adjudicate the appeals afresh for want of lawful jurisdiction.

3. *The Ld. Commissioner of Income Tax (Appeals)-III, Baroda has erred in law and in facts in not deciding the following grounds of appeal as directed by the Hon'ble Tribunal:*
 1. *The Ld. CIT (Appeals) IV, Baroda has erred in law and in facts in upholding the action of the ACIT, Central 2, Baroda in disregarding the existence of various legally enforceable agreement with Madhav Organisers Pvt. Ltd., the project consultant and booking agent while misinterpreting the modus operandi of the schemed of the Avishkar Project and therefore it deserves to be held that the appellant's modus operandi of the scheme is to be accepted and it's to be held that the status of the appellant being that of a mutual society no tax can be levied.*
 2. *The Ld. CIT (Appeals)-IV, Baroda has erred in law and in facts in confirming the action of the ACIT, Central 2, Baroda in holding that the appellant is engaged in the business of real estate / construction and not a non-profit making entity and it is to be held that the appellant's entity is that of a nonprofit making entity.*
 3. *The Ld. CIT (Appeals)-IV, Baroda has erred in law and in facts in disregarding that the appellant is following the completed method of contracts basis for accounting and accordingly even if the profit is to be estimated / quantified and taxed the same can be recognized only when the project is completed and therefore it deserves to be held that considering the method of accounting employed and also the nature of the case the profit of the scheme is to be determined only on completion of the project.*
 4. *The Ld. CIT (Appeals)-IV, Baroda has erred in law and in facts while holding that the appellant is engaged in the business of construction has farther erred in estimating the net profit @ 10% of the total receipts determined at Rs. 22,86,730/-. The addition of Rs. 2,28,673/- deserves to be deleted.*
 5. *Your appellant craves liberty to add, alter, delete or substitute to any of the grounds of appeal herein above contained.*

The Ld. CIT(A) may please be directed to adjudicate and decide the above grounds.

4. *Your appellant craves liberty to add, alter, delete or substitute any of the grounds of appeal herein above contained.*

26. The issue raised by the assessee in first and second ground of appeal is that the Ld. CIT-A erred in holding that he had no jurisdiction to adjudicate the issue afresh in line with the directions of Hon'ble ITAT given in ITA No. 190/AHD/1999 and 750/AHD/1999 on the reasoning that the appellant had not filed application before the Settlement Commission. Accordingly, the grounds of appeal decided by his predecessor shall prevail.

27. At the outset we note that the issue raised by the assessee in its grounds of appeal for the year under consideration is identical to the issue raised by the assessee in ITA No. 1916/AHD/2011 for the assessment year 1995-96. Therefore, the finding given in ITA no. 1916/AHD/2011 shall also be applicable for the year under consideration i.e. A.Y. 1992-93. The appeal of the assessee for the A.Y. 1995-96 has been decided by us vide paragraph No.4 of this order against the assessee. Hence, the ground of appeal filed by the assessee is dismissed.

28. The interconnected issue raised by the assessee in ground No. 3 and its sub grounds numbers 1 to 5 is that the learned CIT (A) erred in not appreciating the status of the assessee like a mutual benefit society and estimating the net profit of Rs. 22,86,730/- being 10% of the total receipts.

29. At the outset we note that the issue raised by the assessee in its grounds of appeal for the year under consideration is identical to the issue raised by the assessee in ITA No. 1916/AHD/2011 for the assessment year 1995-96. Therefore, the finding given in ITA no. 1916/AHD/2011 shall also be applicable for the year under consideration i.e. A.Y. 1992-93. The appeal of the assessee for the A.Y. 1995-96 has been decided by us vide paragraph No. 14 of this order by allowing the appeal of the assessee in its favour in part. Hence, the ground of appeal filed by the assessee is partly allowed.

29.1 In the result, the appeal of the assessee is partly allowed.

Coming to ITA No. 1807/AHD/2011 an appeal by the Revenue for the AY 1994-95.

30. The Revenue has raised the following grounds of appeal;

- 1. On the facts, in law and in the circumstances of the case and in law, the Id. CIT (Appeals) erred in sustaining the order of erstwhile CIT(Appeals) wherein the Id.CIT(Appeals) had erred –*

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(i) *in restricting the addition of Rs. 66,08,401/- being 25% of the receipts made on account of net profit by rejecting book results to Rs. 29.30 lacs.*

(ii) *in deleting addition of Rs. 1,45,16,601/- on account of unaccounted 'on-money' receipts.*

(iii) *in deleting addition of Rs. 37,55,020/- on account of unexplained peak cash loan.*

(iv) *in deleting addition of Rs.37,48,700/- on account of unexplained investment/expenditure.*

(v) *in deleting addition of Rs. 80,62,470/- made on account of difference in cost of construction determined by the Valuation Officer and the cost recorded in the books of account.*

2. The appellant craves leave to add to, amend or alter the above grounds as may be deemed necessary.

31. The issue raised in ground No. (i), (ii) and (iv) of appeal by the Revenue is interconnected. Therefore, we have clubbed them together. The issue raised is that the Ld. CIT-A erred in restricting the addition up-to Rs. 29.30 lacs being 10% of gross receipts and deleting the addition of unaccounted on money and unexplained investment/ expenditure.

32. At the outset we note that, the issue raised by the Revenue is identical to the issue raised by it in ITA No. 1808/AHD/2011 for A.Y. 1995-96. Therefore, the finding given in ITA No. 1808/AHD/2011 for AY 1995-96 shall also be applicable for the year under consideration i.e. A.Y. 1994-95. The appeal of the Revenue has already been adjudicated along with the appeal of M/s Kotel Properties Private Limited bearing ITA No. 1916/AHD/2011 for the assessment year 1995-96 wherein the ground of appeal of the Revenue was dismissed. For the detailed discussion, please refer the relevant paragraph number 14 of this order. Thus, the ground of appeal raised by the Revenue is dismissed.

33. The issue raised in ground No. (iii) of appeal filed by the Revenue is that the Ld. CIT-A erred deleting the addition of Rs. 37,55,020/- on account of unexplained peak cash loan.

34. The AO during the assessment proceedings based on the seized documents found that the assessee has incurred/paid the interest expenses of Rs. 9,01,205/- on the money borrowed in cash. These transactions were not recorded in the regular books of accounts. Thus, the AO worked out the amount of cash loan taken by the assessee by taking the base rate of interest i.e. 24% and computed the loan of Rs. 37,55,020/-. Thus, the AO treated the same as unexplained income and added the same to the total income of the assessee on the substantive basis and further made the addition of the same in the hands of MOPL on protective basis.

35. Aggrieved assessee preferred an appeal to the learned CIT (A).

36. The Ld. CIT-A has deleted the addition made by the AO by observing that the amount of loan taken in cash was not recorded in the regular books of accounts. Therefore, such amount of loan is outside the purview of the provisions of section 68 of the Act. Furthermore, the contents of the seized documents are presumed to be true under the provisions of section 132(4A) of the Act. Therefore, the amount of loan against which the interest was paid cannot be treated as income of the assessee. Thus, the learned CIT (A) deleted the addition made by the AO.

37. Being aggrieved by the order of the learned CIT (A), the Revenue is in appeal before us.

38. Both the learned DR and the AR before us vehemently supported the order of the authorities below to the extent favourable to them.

39. We have heard the rival contentions of both the parties and perused the materials available on record. The addition in the present case was made by the AO on the basis of the documents seized during the search proceedings wherein the payment of interest was recorded. Accordingly, the AO computed the amount

of corresponding loan considering the rate of interest at 24% and treated the same as income. However, the learned CIT (A) was pleased to delete the same for the reasons as discussed above.

40. First of all, the question that arises for adjudication whether the loan amount represents the income of the assessee. The answer stands in negative. The loan cannot be treated as income. However, there is a presumption under section 68 of the Act which states that if any cash that is found in the books of accounts which has not been explained by the assessee with respect to the identity, creditworthiness and genuineness of transaction has to be treated as unexplained cash credit. The same shall be presumed as unexplained cash credit under section 68 and the same will be liable to be taxed. However, it is a fact on record that the impugned amount of interest as well as the amount of loan computed by the AO based on such interest, was not recorded in the regular books of accounts. Therefore, in our considered view the impugned amount of loan not recorded in the regular books of accounts cannot attract the provisions of section 68 of the Act. Hence, we do not find any reason to interfere in the finding of the learned CIT (A). Accordingly, we uphold the same. Likewise, on the same reasoning the income added by the AO on protective basis in the hands of MOPL is also liable to be deleted. Thus, the ground of appeal raised by the Revenue is dismissed.

41. The issue raised by the Revenue in ground no. (v) is that the Ld. CIT-A erred in deleting the addition of Rs. 80,62,470/- on account of difference in cost of construction determined by the DVO and recorded by the assessee in the books of account.

41.1 The AO during the assessment proceedings found that the assessee has incurred huge investment in the construction of the project namely "Avishkar". Accordingly, the AO in order to determine the actual value of the project of the assessee referred the matter to the DVO for the purpose of the valuation. The DVO determined the value of the project at certain amount which was not

matching with the valuation declared by the assessee in the books of accounts. As per the AO, the project of the assessee was undervalued by Rs. 80,62,470/- and therefore the AO treated the same as expenditure incurred out of the unexplained sources. The AO therefore added the sum of Rs. 80,62,470/- to the total income of the assessee on substantive basis and the same was added in the hands of MOPL on protective basis.

42. Aggrieved assessee preferred an appeal to the learned CIT (A). The assessee before the learned CIT (A) submitted that the valuation has been made by the DVO after considering the rates as fixed by the CPWD which cannot be adopted to the present facts of the case. It is for the reason that the valuation has been made by the DVO based on the estimates whereas the cost of construction declared in the books of accounts is on actual basis.

43. Such difference between the actual cost and the valuation done by the DVO was also computed in the assessment 1995-96 but there was no addition made by the AO qua to such difference. Therefore, the revenue should not make any addition for this year as well.

43.1 Once the addition has already been made by the AO on account of on money, there cannot be any further addition on account of difference in the cost shown in the books viz a viz the value determined by the DVO.

43.2 Once the books of accounts have been rejected, then there remains no scope to make any further addition after referring the same set of books of accounts.

43.3 The learned CIT (A) after considering the submission of the assessee deleted the addition made by the AO.

44. Being aggrieved by the order of the learned CIT (A) the Revenue is in appeal before us.

45. Both the learned DR and the AR before us vehemently supported the order of the authorities below.

46. We have heard the rival contentions of both the parties and perused the materials available on record. From the preceding discussion, we note that the AO has already made addition of different types to the total income of the assessee particularly on account of on money involved in the project and expenditures incurred in cash on the project. Thus, there cannot be any further addition based on the valuation report as discussed above. If it is done so, it would lead to the double addition to the total income of the assessee which is not desirable under the provisions of the Act. Hence, we do not find any reason to interfere in the finding of the learned CIT (A). Accordingly, we uphold the same. Likewise, on the same reasoning the income added by the AO on protective basis in the hands of MOPL is also liable to be deleted. Hence the ground of appeal of the revenue is dismissed.

46.1 In the result the appeal of the Revenue is dismissed.

Coming to ITA No. 1920/AHD/2011 in the case of Madhav Organizers Pvt. Ltd. an appeal by assessee for the AY 1995-96.

47. The assessee has raised the following grounds of appeal;

- 1 *The Ld. Commissioner of Income Tax (Appeals)-III, Baroda has grossly erred in law and in facts in holding that the directions of the Hon'ble ITAT by its order in I.T.A. No. 187/Ahd/1999 and 749/Ahd/1999 for the relevant year in deciding the appeal afresh do not entail jurisdiction to him. According to the Ld. CIT(A)-III, Baroda, the jurisdiction could be assumed only if the appellant's application was pending before the Settlement Commission. Since there was no application made by the appellant to the Settlement Commission, no valid and lawful jurisdiction could be exercised by him. The action of the Ld. CIT(A) in holding so is in defiance of the direction of the Hon'ble ITAT and that the Ld. CIT(A) ought to have decided the appeals afresh.*

- 2 *The Ld. Commissioner of Income Tax (Appeals)-III, Baroda has further erred in law and in facts in holding that the grounds of appeal as decided by his predecessor in Appeal No. CAB/IV-72/98-99 survive and that he was not required to adjudicate the appeals afresh for want of lawful jurisdiction.*
- 3 *The Ld. Commissioner of Income Tax (Appeals)-III, Baroda has erred in law and in facts in not deciding the following grounds of appeal as directed by the Hon'ble Tribunal:*
 1. *The Ld C/T (Appeals) IV, Baroda has erred in law and in facts in upholding the action of (he ACIT, Central 2, Baroda in disregarding the existence of various legally enforceable agreements with Kotel Properties P. Ltd, the Developer company while misinterpreting the modus operandi of the scheme of the Avishkar Project and therefore it deserves to be held that the appellant's modus operandi of the scheme is to be accepted and it's to be held that the status of the appellant being that of a mutual society no tax can be levied.*
 2. *The Ld CIT (Appeals) IV, Baroda has erred in law and in facts in confirming the action of the act/on of the ACIT, Central 2, Baroda in holding that the appellant has received on money of Rs. 1,28,37,963/- during on the presumption that the entire on money is received on the date of booking of flat/shop etc. despite the existing fact that the on money receipt is received in installments and not on the date of booking. This action of the ACIT. Central Circle 2. Baroda being erroneous requires to be held as incorrect.*
 3. *The Ld C/T (Appeals) IV, Baroda has erred in law and in facts in disregarding that for tax purposes the treatment given to recorded receipts only is to be given to unaccounted receipts also and accordingly if the recorded receipt are to be taxed in the year of completion the unrecorded receipts are also required to be taxed in the same year.*
 4. *The Ld C/T (Appeals) IV, Baroda has erred in law and in facts in holding that the addition of Rs. 25,67,593/- being 20% of on money receipts of Rs. 1,28,37,963/~ is to be taxed in the hands of the appellant in the year under consideration completely disregarding the fact that the various contractual obligations out of such receipts and they ought to be allowed and considering this the surplus out of such receipts can be taxed only when the project, which it was managing as consultant and agent, is complete.*
 5. *The Ld C/T (Appeals), Baroda has erred in law and in facts that of the on money as determined above the appellant has earned an income of Rs. 25,67,593/- being 20% of the total on money while disregarding the claim of the appellant that the on money to the extent of Rs. 304 lakhs is utilised/incurred as expense out of the total on money of Rs. 313 lakhs received upon the date of search and therefore the determination of income @ 20% is excessive and deserves to be deleted.*
 6. *The Ld. C/T (Appeals) IV, Baroda has erred in law and in facts in confirming the action of the ACIT, Central Circle 2, Baroda in making an addition of Rs. 82,060/-. The addition being contrary to facts and law deserves to be deleted.*
 - 7 *Your appellant craves liberty to add, alter, delete or substitute to any of the grounds of appeal hereinabove contained.*

The Ld. CIT(A) may please be directed to adjudicate and decide the above grounds.

4. *Your appellant craves liberty to add, alter, delete or substitute any of the grounds of appeal herein above contained.*

48. The issue raised by the assessee in the first and second ground of appeal is that the Ld. CIT-A erred in holding that he had no jurisdiction to adjudicate the issue afresh in line with the directions of Hon'ble ITAT given in ITA No. 187/AHD/1999 and 749/AHD/1999 on the reasoning that the appellant had not filed any application before the Settlement Commission. Accordingly, the grounds of appeal decided by his predecessor shall prevail.

49. At the outset we note that, the issue raised by the assessee has already been adjudicated along with the appeal filed by M/s Kotel Properties Private Limited in ITA No. 1916/AHD/2011 for the assessment year 1995-96 wherein the ground of appeal of the assessee was dismissed. For the detailed discussion, please refer the relevant paragraph No. 4 of this order. Thus, respectfully, following the same, the ground of appeal raised by the assessee is dismissed.

50. The next issues raised by the assessee in ground No. 3 and its sub grounds Nos. 1 to 5 are interconnected to each other. Therefore, we have clubbed them together for the sake of brevity and adjudication. The issues raised is that the learned CIT (A) erred in not appreciating the status of the assessee like a mutual benefit society and confirming various additions on protective basis.

51. At the outset we note that, the issue raised by the assessee has already been adjudicated along with the appeal filed by M/s Kotel Properties Private Limited in ITA No. 1916/AHD/2011 for the assessment year 1995-96 wherein the grounds of appeal of the assessee were partly allowed. For the detailed discussion, please refer the relevant paragraph No. 14 of this order. Thus, the grounds of appeal raised by the assessee are partly allowed.

52. The next issue raised by the assessee in ground No. 3 and its sub ground No. 6 is that the learned CIT (A) erred in confirming the addition of Rs. 82,060/- on account of unexplained cash in hand.

53. During the search operation cash of Rs. 82,060/- was found. Out of which cash of Rs. 75,000/- was seized. The AO in the absence of necessary information such as cash flow statement added the same of Rs. 82,060/- to the total income of the assessee under section 69A of the Act.

54. Aggrieved assessee preferred an appeal to the Ld. CIT-A who also confirmed the addition made by the AO.

55. Being aggrieved by the order of the Ld. CIT-A the assessee is in appeal before us.

56. The learned AR before us submitted that the impugned cash has already been considered as part of unaccounted receipts. Therefore, the same cannot be added to the total income of the assessee.

57. On the contrary, the learned DR before us vehemently supported the order of the authorities below.

58. We have heard the rival contentions of both the parties and perused the materials available on record. From the preceding discussion, we note that there was the cash found from the premises of the assessee during the search proceedings. The onus lies upon the assessee to explain the source of the same. However, we find that the assessee failed to offer the source of the same, therefore the addition was made by the AO which was subsequently confirmed by the learned CIT (A). At the time of hearing the learned AR has not brought anything on record about the source of cash. Accordingly we do not find any reason to interfere in the finding of the authorities below. Hence the ground of appeal of the assessee is dismissed.

58.1 In the result, appeal of the assessee is partly allowed.

Coming to ITA No. 1919/AHD/2011 and 1918/AHD/2011 and 1917/AHD/2011, appeals by assessee for the AY 1994-95, 1993-94 and 1992-93

59. At the outset, we note that the issues raised by the assessee are identical to the issues raised by the assessee in ITA No. 1920/AHD/2011 which we have decided in favour of the assessee vide paragraph Nos. 48 to 51 of this order. Therefore, the finding given in ITA No. 1920/AHD/2011 shall also be applicable for the year under consideration i.e. A.Y. 1994-95. Hence, the grounds of appeal filed by the assessee are partly allowed.

59.1 In the result, all the appeals of the assessee are party allowed.

Coming to ITA No. 1775/AHD/2011 an appeal by the Revenue for the AY 1994-95.

60. The Revenue has raised the following grounds of appeal;

1. *On the facts and in the circumstances of the case, the learned CIT(A) erred in sustaining the order of the erstwhile CIT(A) wherein the Id.CIT(A) had erred in law and on facts.*
 - (i) *In deleting the addition of ₹1,45,90,601/- on account of 'on money' receipts.*
 - (ii) *In deleting the addition of ₹37,55,020/- on account of unexplained peak cash loan.*
 - (iii) *In deleting addition of ₹41,08,402/- and holding that the same has been confirmed to some extent on substantive basis in the case of M/s.Kotel Properties Pvt.Ltd.*
 - (iv) *In deleting addition of ₹37,48,700/- on account of unexplained investment/expenditure.*
 - (v) *In deleting addition of ₹80,62,470/- made on account of difference in cost fo construction determined by the Valuation Officer and the cost recorded in the books of account.*
2. *The appellant craves leave to add, to amend or alter the above grounds as may be deemed necessary.*

Relief claimed in appeal

The order of the CIT(A) on the issues raised in the aforesaid grounds be set aside and that of the Assessing Officer be restored.

61. The 1st issue raised by the Revenue in ground No. 1 and its sub grounds number (i) is that the Ld. CIT-A erred in deleting the addition Rs. 1,45,90,601/- on account of on money receipts.

62. At the outset we note that, the issue raised by the Revenue has already been adjudicated along with the appeal of M/s Kotel Properties Private Limited bearing ITA No. 1916/AHD/2011 for the assessment year 1995-96 wherein the ground of appeal of the Revenue was dismissed. For the detailed discussion, please refer the relevant paragraph number 14 of this order. Thus, the ground of appeal raised by the Revenue is dismissed.

63. The next issue raised by the Revenue in ground No. 1 and its sub grounds number (ii) is that the Ld. CIT-A erred in deleting the addition of Rs. 37,55,020/- on account of cash loan.

64. At the outset we note that, the issue raised by the Revenue has already been adjudicated along with the appeal of M/s Kotel Properties Private Limited bearing ITA No. 1807/AHD/2011 for the assessment year 1994-95 wherein the ground of appeal of the Revenue was dismissed. For the detailed discussion, please refer the relevant paragraph number 39-40 of that order. Thus, the ground of appeal raised by the Revenue is dismissed.

65. The next issue raised by the Revenue in ground No. 1 and its sub grounds number (iii) is that the Ld. CIT-A erred deleting the addition of Rs. 41,08,402/- holding that addition made on substantive basis in the hands of KPPL.

66. At the outset we note that, the issue raised by the Revenue has already been adjudicated along with the appeal of M/s Kotel Properties Private Limited bearing ITA No. 1916/AHD/2011 for the assessment year 1995-96 wherein the ground of appeal of the Revenue was dismissed. For the detailed discussion,

please refer the relevant paragraph number 14 of that order. Thus, the ground of appeal raised by the Revenue is dismissed.

67. The next issue raised by the Revenue in ground No. 1 and its sub grounds number (iv) is that the Ld. CIT-A erred deleting the addition of Rs. 37,48,700/- on account of unexplained payments/investment.

68. At the outset we note that, the issue raised by the Revenue has already been adjudicated along with the appeal of M/s Kotel Properties Private Limited bearing ITA No. 1916/AHD/2011 for the assessment year 1995-96 wherein the ground of appeal of the Revenue was dismissed. For the detailed discussion, please refer the relevant paragraph number 14 of this order. Thus, the ground of appeal raised by the Revenue is dismissed.

69. The next issue raised by the Revenue in ground No. 1 and its sub grounds number (v) is that the Ld. CIT-A erred in deleting the addition of Rs. 80,62,470/- on account of undervalued the cost of construction.

70. At the outset we note that, the issue raised by the Revenue has already been adjudicated along with the appeal of M/s Kotel Properties Private Limited bearing ITA No. 1807/AHD/2011 for the assessment year 1994-95 wherein the ground of appeal of the Revenue was dismissed. For the detailed discussion, please refer the relevant paragraph number 46 of this order. Thus, the ground of appeal raised by the Revenue is dismissed.

71. In the result, the appeal of the Revenue is dismissed.

Coming to ITA No. 1776/AHD/2011 an appeal by the Revenue for the AY 1995-96.

72. The Revenue has raised the following grounds of appeal;

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1. *On the facts and in the circumstances of the case, the learned CIT(A) erred in sustaining the order of the erstwhile CIT(A) wherein the Id.CIT(A) had erred in law and on facts.*

(i) in partially deleting the addition of ₹1,02,70,370/- on account of 'on money' receipts.

(ii) In deleting the addition of ₹56,48,087/- on account of net profit on unaccounted receipts.

(iii) in deleting the addition of ₹42,12,425/- on account of unexplained payment.

The appellant craves leave to add, to amend or alter the above grounds as may be deemed necessary.

Relief claimed in appeal

The order of the CIT(A) on the issues raised in the aforesaid grounds be set aside and that of the Assessing Officer be restored.

73. The 1st issue raised by the Revenue in ground No. 1 and its sub grounds number (i) is that the Ld. CIT-A erred in deleting the addition of Rs. 1,02,70,370.00 representing on money receipts.

74. At the outset we note that, the issue raised by the Revenue has already been adjudicated along with the appeal of M/s Kotel Properties Private Limited bearing ITA No. 1916/AHD/2011 for the assessment year 1995-96 wherein the ground of appeal of the Revenue was dismissed. For the detailed discussion, please refer the relevant paragraph number 14 of this order. Thus, the ground of appeal raised by the Revenue is dismissed.

75. The next issue raised by the Revenue in ground No. 1 and its sub grounds number (ii) is that the Ld. CIT-A erred deleting the addition of Rs. 56,48,087/- on account of net profit in unaccounted on money receipts.

76. At the outset we note that, the issue raised by the Revenue has already been adjudicated along with the appeal of M/s Kotel Properties Private Limited

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bearing ITA No. 1916/AHD/2011 for the assessment year 1995-96 wherein the ground of appeal of the Revenue was dismissed. For the detailed discussion, please refer the relevant paragraph number 14 of this order. Thus, the ground of appeal raised by the Revenue is dismissed.

77. The next issue raised by the Revenue in ground No. 1 and its sub grounds number (iii) is that the Ld. CIT-A erred deleting the addition of Rs. 42,12,425/- on account of unexplained payment.

78. At the outset we note that, the issue raised by the Revenue has already been adjudicated along with the appeal of M/s Kotel Properties Private Limited bearing ITA No. 1916/AHD/2011 for the assessment year 1995-96 wherein the ground of appeal of the Revenue was dismissed. For the detailed discussion, please refer the relevant paragraph number 14 of this order. Thus, the ground of appeal raised by the Revenue is dismissed.

79. In the result, the appeal of the Revenue is dismissed.

80. In the combined result, the appeals filed by the different assessee in the case of Kotel Properties Pvt. Ltd and M/s. Madhav Organizers Pvt. Ltd **are partly allowed, whereas the appeals of the Revenue are dismissed.**

Order pronounced in the Court on 8/11/2021 at Ahmedabad.

Sd/-
(RAJPAL YADAV)
VICE PRESIDENT

Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER

Ahmedabad; Dated 8/11/2021
Manish/TC Nair

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण / DR, ITAT,
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

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उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad