

आयकर अपीलीय अधिकरण "B" न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, MUMBAI

श्री राजेश कुमार लेखा सदस्य एवं श्री अमरजीत सिंह, न्यायिक सदस्य समक्ष ।
BEFORE SRI RAJESH KUMAR, AM AND SRI AMARJIT SINGH, JM

आयकर अपील सं./ ITA No. 7440/Mum/2019

(निर्धारण वर्ष / Assessment Year 2011-12)

आयकर अपील सं./ ITA No. 7533/Mum/2019

(निर्धारण वर्ष / Assessment Year 2012-13)

आयकर अपील सं./ ITA No. 7534/Mum/2019

(निर्धारण वर्ष / Assessment Year 2013-14)

आयकर अपील सं./ ITA No. 7535/Mum/2019

(निर्धारण वर्ष / Assessment Year 2014-15)

आयकर अपील सं./ ITA No. 7536/Mum/2019

(निर्धारण वर्ष / Assessment Year 2015-16)

The Dy. Commissioner of Income Tax, Central Circle 7(2), R.No. 655, Aayakar Bhavan, M.K. road, Mumbai-400 020	बनाम/ Vs.	M/s Man Global Ltd. 101, Man House SV Road Vile Parle West, Mumbai-400 056
(अपीलार्थी / Appellant)		(प्रत्यर्थी/ Respondent)
स्थायी लेखा सं./PAN No. AACCM2980J		

प्रत्याक्षेप सM./ CO No.81/Mum/2021

(Arising in ITA No. 7440/Mum/2019 for AY 2011-12)

प्रत्याक्षेप सM./ CO No.82/Mum/2021

(Arising in ITA No. 7533/Mum/2019 for AY 2012-13)

प्रत्याक्षेप सM./ CO No.83/Mum/2021

(Arising in ITA No. 7534/Mum/2019 for AY 2013-14)

प्रत्याक्षेप सM./ CO No.84/Mum/2021

(Arising in ITA No. 7535/Mum/2019 for AY 2014-15)

प्रत्याक्षेप सM./ CO No.85/Mum/2021

(Arising in ITA No. 7536/Mum/2019 for AY 2015-16)

M/s Man Global Ltd.	बनाम/	The Dy. Commissioner of
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101, Man House SV Road Vile Parle West, Mumbai-400 056	Vs.	Income Tax, Central Circle 7(2), R.No. 655, Aayakar Bhavan, M.K. road, Mumbai-400 020
(अपीलार्थी / Appellant)		(प्रत्यर्थी/ Respondent)
स्थायी लेखा सं./PAN No. AACCM2980J		

आयकर अपील सं./ ITA No. 7438/Mum/2019

(निर्धारण वर्ष / Assessment Year 2011-12)

आयकर अपील सं./ ITA No. 7439/Mum/2019

(निर्धारण वर्ष / Assessment Year 2012-13)

आयकर अपील सं./ ITA No. 7532/Mum/2019

(निर्धारण वर्ष / Assessment Year 2013-14)

The Dy. Commissioner of Income Tax, Central Circle-7(2), Room No. 655, Aayakar Bhavan, M.K. Road, Mumbai-400 020	बनाम/ Vs.	M/s Merino Shelters Pvt. Ltd. 101, Man House, S.V. Road, vile Parle (W), Mumbai-400 056
(अपीलार्थी / Appellant)		(प्रत्यर्थी/ Respondent)
स्थायी लेखा सं./PAN No. AAECM3394E		

प्रत्याक्षेप सM./ CO No.86/Mum/2021

(Arising in ITA No. 7438/Mum/2019 for AY 2011-12)

प्रत्याक्षेप सM./ CO No.87/Mum/2021

(Arising in ITA No. 7439/Mum/2019 for AY 2012-13)

प्रत्याक्षेप सM./ CO No.88/Mum/2021

(Arising in ITA No. 7532/Mum/2019 for AY 2013-14)

M/s Merino Shelters Pvt. Ltd. 101, Man House, S.V. Road, vile Parle (W), Mumbai-400 056	बनाम/ Vs.	The Dy. Commissioner of Income Tax, Central Circle-7(2), Room No. 655, Aayakar Bhavan, M.K. Road, Mumbai-400 020
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(अपीलार्थी / Appellant)		(प्रत्यर्थी/ Respondent)
स्थायी लेखा सं./PAN No. AAECM3394E		

प्रत्याक्षेप सM./ CO No.89/Mum/2021

(Arising in ITA No. 7526/Mum/2019 for AY 2009-10)

प्रत्याक्षेप सM./ CO No.90/Mum/2021

(Arising in ITA No. 7527/Mum/2019 for AY 2010-11)

प्रत्याक्षेप सM./ CO No.91/Mum/2021

(Arising in ITA No. 7528/Mum/2019 for AY 2012-13)

प्रत्याक्षेप सM./ CO No.92/Mum/2021

(Arising in ITA No. 7530/Mum/2019 for AY 2013-14)

आयकर अपील सं./ ITA No.7409/Mum/2019

(निर्धारण वर्ष / Assessment Year 2015-16)

Man Industries (India) Ltd. 101 Man House SV Road Vile Parle West, Mumbai-400 056	बनाम/ Vs.	The Dy. Commissioner of Income Tax, Central Range 7(2), Mumbai Room No.655, 6 th Floor, Aayakar Bhavan, M.K. Road, Mumbai-400 020
(अपीलार्थी / Appellant)		(प्रत्यर्थी/ Respondent)
स्थायी लेखा सं./PAN No. AAACM2675G		

आयकर अपील सं./ ITA No. 7526/Mum/2019

(निर्धारण वर्ष / Assessment Year 2009-10)

आयकर अपील सं./ ITA No. 7527/Mum/2019

(निर्धारण वर्ष / Assessment Year 2010-11)

आयकर अपील सं./ ITA No. 7528/Mum/2019

(निर्धारण वर्ष / Assessment Year 2012-13)

आयकर अपील सं./ ITA No. 7530/Mum/2019

(निर्धारण वर्ष / Assessment Year 2013-14)

आयकर अपील सं./ ITA No. 7529/Mum/2019

(निर्धारण वर्ष / Assessment Year 2014-15)

आयकर अपील सं./ ITA No. 7531/Mum/2019

(निर्धारण वर्ष / Assessment Year 2015-16)

The Dy. Commissioner of Income Tax, Central Range 7(2), Mumbai	बनाम/	Man Industries (India) Ltd. 101 Man House SV Road Vile
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Room No.655, 6 th Floor, Aayakar Bhavan, M.K. Road, Mumbai-400 020	Vs.	Parle West, Mumbai-400 056
(अपीलार्थी / Appellant)		(प्रत्यर्थी/ Respondent)
स्थायी लेखा सं./PAN No. AAACM2675G		

आयकर अपील सं./ ITA No. 7482/Mum/2019

(निर्धारण वर्ष / Assessment Year 2015-16)

The Dy. Commissioner of Income Tax, Central Circle 7(2), R.No. 655, Aayakar Bhavan, M.K. road, Mumbai-400 020	बनाम/ Vs.	M/s M Concepts Retails LLP 101, Man House, S.V. Road, Vile Parle (W), Mumbai-400 056
(अपीलार्थी / Appellant)		(प्रत्यर्थी/ Respondent)
स्थायी लेखा सं./PAN No. AASFM0946R		

अपीलार्थी की ओर से / Appellant by	:	Shri Nirav Mehta, AR
प्रत्यर्थी की ओर से / Respondent by	:	Shri Vinay Sinha, CIT DR

सुनवाई की तारीख / Date of hearing:	15.11.2021
घोषणा की तारीख / Date of pronouncement:	25.11.2021

आदेश / ORDER

राजेश कुमार, लेखा सदस्य /
PER RAJESH KUMAR, AM:

The above titled appeals have been preferred by the Revenue and different assesseees against different orders of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment years 2009-10 to 2015-16. Since all these appeals pertain to the same group and also covered by the same search with most of the issues being, therefore all these appeals are being decided by this consolidated order for the sake of brevity and



convenience. First of all we shall take up Revenue's appeal and cross objection by Man Global Ltd for A.Y.2011-12.

ITA No.7440/Mum/2019 & CO No. 81/Mum/2021

2. In the Revenue's appeal the revenue has challenged the deletion of addition on account of bogus purchases to the tune of 87.50% whereas in the cross objection the assessee has challenged the jurisdiction to make addition in an unabated assessment year without incriminating material found during search besides challenging the merits. Therefore we will first adjudicate the cross objection by the assessee.

CO No. 81/Mum/2021(Assessee's CO):

3. The registry has pointed out delay of 78 days in filing the cross objections. However, we note that there is no condonation of delay as the Hon'ble Bombay High Court and Hon'ble Supreme Court has extended the limitation during the covid period. The ground raised by the assessee in the cross objections are as under:

"1. On the facts and in the circumstances of the case, the CIT(A) erred in confirming addition/disallowance which are not on the basis of incriminating material found during the course of search proceedings. These addition is beyond the scope of assessment framed u/s 153A of the Income tax Act, 1961 and hence deserved to be deleted.

2. On the facts and in the circumstances of the case, the CIT(A) erred in confirming disallowance of 12.5% of Assessee's purchase from M/s Karma Ispat Limited. The disallowance is not justifiable and deserves to be deleted.



3. On the facts and in the circumstances of the case, the CIT(A) erred in confirming disallowance under section 14A of the Act of Rs.23,03,070/-. The disallowance is not justifiable and deserves to be deleted.

4. The respondent craves leave to add, alter, amend and/or withdraw any ground or grounds of cross objections either before or during the course of hearing of the same."

4. The facts in brief are that the assessee filed the return of income on 30.09.2011 declaring total income of Rs.1,34,37,790/-. The Assessee is engaged in the Real Estate Business. The assessee has developed two projects called MAN Opus and Shanti Sadan. A search under section 132 of the Act was conducted in case of the Man Group of Companies including the appellant assessee on 10.12.2014. Notice u/s 153A was issued to the assessee on 25.01.2016 which was complied with filing of return of income on 16.06.2016 declaring same income as was declared in the return of income filed originally. Thereafter statutory notices were issued and duly served upon the assessee. Finally the assessment under section 143(3) r.w.s. 153A of the Act was framed vide order dated 26.12.2016 at a total income of Rs.3,68,63,798/- by making additions under section 14A of the Act of Rs.23,03,070/- and on account of bogus purchases from M/s. Karma Ispat Ltd. 2,11,22,938/-. Aggrieved assessee challenged the assessment order before the Id CIT(A) on jurisdictional issue as well as on merit.

5. The Id. CIT(A) dismissed the appeal of the assessee on jurisdictional issue that AO has no jurisdiction to make

addition to the total income in an unabated assessment year with incriminating materials seized during the search. The Id. CIT(A) after taking into consideration the contentions of the assessee dismissed the legal issue by observing and holding as under:

“7.2 The submissions of the Learned Counsel have been carefully considered. It is the contention of the Learned Counsel that during the course of search no incriminating material was found. Therefore, the provisions of section 153A are not applicable nor does the AO has jurisdiction to make the additions in the order passed u/s. 153A which are not pertaining to any undisclosed income or seized material. The assessee had relied on various case laws as could be seen from the submissions to support its stand.”

6. The Id. AR vehemently submitted before the bench that that during the course of search no incriminating material in the form of books of accounts/documents or any unexplained money, bullion, jewellery or any other valuable asset was found pertaining to the assessment year under consideration. The Id. AR submitted that since instant assessment year under consideration has attained finality on the date of search as there was no pending assessment on the date of search. Thus the assessment has not abated for the purpose of section 153A of the Act. The Id. AR submitted that under the provisions of section 153A of the Act the powers/jurisdiction of the AO is very limited in respect of unabated assessment years. In other words the Id. AR argued that the jurisdiction of the AO to make addition is confined to the additions based upon the incriminating materials found during search and not otherwise. The Id. AR submitted that since no incriminating documents/materials were found

during the course of search with respect to bogus purchases and expenses claimed u/s 14A in respect of exempt income, the addition made by the AO lack jurisdiction. So far as the addition on account of bogus purchases is concerned, the ld. AR submitted that during the course of survey proceeding in the case of Karma Ispat Limited in the month of March 2010, it was found that said entity was providing accommodation bills to various parties and only on that basis the addition towards bogus purchases were made without any incriminating material found during the course of search proceedings in the of assessee during the search.

7. Therefore the AO has no jurisdiction to addition in respect of bogus purchases and disallowance u/s 14A of the Act. The ld counsel for the assessee, therefore, submitted that the ld. Assessing Officer has simply gone beyond the scope of the provisions of section 153A of the Act which comes into operation only after a search has been carried out u/s 132 of the Act and to assign powers to the Income-tax authorities for a specific purpose only i.e. for unearthing concealed income. Hence the order passed u/s 153A is bad in law and deserves to be quashed.

8. In view of above, it is evident that the findings and reasoning of Assessing Officer are not supported by any evidence or material found during the course of search proceedings. In support of its contentions the ld AR strongly relied on the following decisions



- a) Commissioner of Income-tax (Central)-III vs. Kabul Chawla [2015] 61 taxmann.com 412 (Delhi).
- b) The Hon'ble Delhi High Court further dealt with its decision in the case of CIT v/s Anil Kumar Bhatia (24 taxmann 98)
- c) CIT v. Continental Warehousing Corporation (Nhava Shava) Ltd. [SLP (Civil) No. 18446/2018] dated 09.07.2018
- d) CIT v. Continental Warehousing Corporation (Nhava Shava) Ltd. & Other [374 ITR 645 (Bom)]
- e) PCIT v. Meeta Gutgutia [96 taxmann.com 468 SC]
- f) PCIT v. Meeta Gutgutia [395 ITR 526 (Del)]
- g) PCIT v. Meeta Gutgutia [96 taxmann.com 468 SC]
- h) PCIT v. Meeta Gutgutia [395 ITR 526 (Del)]
- j) CIT Vs. Saumya Construction Pvt Ltd (Tax appeal No. 24 of 2016) dated 14th March 2016, (Guj)
- k) Pr. Commissioner of Income Tax-3 V/s Anil Bholabhai Patel Dated-30/08/2017. (Guj)

9. The AR also submitted that no addition can be made on the basis of statement recorded during search or enquiries made during post search period. In the following cases decision the Hon'ble Gujarat High Court has held that if no incriminating material is gathered during the course of search, then addition cannot be made even on the basis of statement of director recorded post search proceedings. The case of assessee is far better wherein no evidence in support of additions have been found either during search proceedings or during post search proceedings. Hence order passed u/s 153A is bad in law and deserves to be quashed:

- (a) Pr. Commissioner of Income Tax Vadodara-1 V/s RSA DIGI Prints Dated-06/09/2017.
- (b) Principal Commissioner Of Income Tax V/s Sanghvi Fincap Ltd. Dated-20/02/2018.
- (c) Principal Commissioner of Income Tax- 2 V/s Kamlesh Prahladbhai Modi. Dated- 18/04/2018.
- (d) Sunrise Finlease (P.) Ltd. reported in 89 taxmann.com 1.

10. The ld AR also submitted that statement recorded during the course of search is not an incriminating materials per se unless corroborated by other substantive materials. In defence of his arguments the ld DR relied on certain decisions namely i) PCIT v. Best Infrastructure (India) Pvt. Ltd. & Ors. [397 ITR 82 (Del)] ii) CIT v. Harjeev Aggarwal [290 CTR 263 (Del)] iii) PKSS Infrastructure Pvt. Ltd. v. DCIT and vice-versa (Mum ITAT) [ITA No. 5680-5681/Mum/2018 and 5802-5803/Mum/2018] dated 29.11.2019 and iv) Geetanjali Space Pvt. Ltd. v. DCIT [ITA No. 782/Mum/2019] dated 31.05.2019

11. Finally the ld AR prayed before the bench that in light of the foregoing facts and circumstances and various decisions, the order of ld CIT(A) may be set aside and the AO may be directed to delete the addition.

12. The ld DR on the other hand relied heavily on the order of AO submitting that the search was conducted on the assessee when it came to light during the course of survey and search on Karma Ispat Ltd that this entity is engaged in providing accommodation entries. The ld DR submitted that it is only during search u/s 132 of the Act conducted on 21.07.2011 wherein Mr. Rajesh Mehta MD of Karma Ispat Ltd admitted that Karma Ispat Ltd. has been engaged in providing bogus accommodation entries also. The ld DR argued that this was further cemented by the fact which was confirmed by the director of the assessee company. During

the course recording of statement u/s 132(4) of the Act Shri Ramesh Mansukhani Director of Man Group who has in principle agreed that the purchases were unsubstantiated. The ld DR contended that this is enough incriminating to make the additions. The ld DR submitted that taking into account the circumstances evidences and statements of directors of Karma Ispat Ltd , statement of the Chairman of Man Group, the AO made the additions and therefore the legal ground raised by the assessee was rightly dismissed.

13. We have heard the rival contentions of both the parties and perused the materials as placed before us including the decisions as cited above. The undisputed facts are that on the date of search the assessment for the current assessment year was not pending and therefore it has attained finality and thus it was unabated on the date of search. It was also undisputed that except the statement recorded u/s 132(4) of the Act of director of Karma Ispat Ltd as well as Director of Man Group of Industries there was no incriminating materials which was seized during search to back the additions. Therefore the AO has no jurisdiction to make addition in an unabated assessment year without there being incriminating materials and accordingly the jurisdiction of the AO can not be justified. The case of the assessee is squarely covered by the a series of decisions as discussed below:

a) Commissioner of Income-tax (Central)-III vs. Kabul Chawla [supra) wherein it has been held that in case unabated assessment no addition can be made without incriminating materials seized during search. With reference to the power of Ld. Assessing Officer to make addition u/s 153A, in absence of any incriminating material found during the course of search, the High Court has made the following observation:

"34. The argument of the Revenue that the AO was free to disturb income decors the incriminating material while making assessment under Section 153A of the Act was specifically rejected by the Court on the ground that it was "not borne out from the scheme of the said provision" which was in the context of search and/or requisition. The Court also explained the purport of the words "assess" and "reassess", which have been found at more than one place in Section 153A of the Act as under:

"26. The plea raised on behalf of the assessee that as the first proviso provides for assessment or reassessment of the total income in respect of each assessment year falling within the six assessment years, is merely reading the said provision in isolation and not in the context of the entire section. The words 'assess' or 'reassess' have been used at more than one place in the Section and a harmonious construction of the entire provision would lead to an irresistible conclusion that the word assess has been used in the context of an abated proceedings and reassess has been used for completed assessment proceedings, which would not abate as they are not pending on the date of initiation of the search or making of requisition and which would also necessarily support the interpretation that for the completed assessments, the same can be tinkered only based on the incriminating material found during the course of search or requisition of documents."

b) In CIT v. Continental Warehousing Corporation (Nhava Sheva) Ltd. (2016) 374 ITR 645 (Bom)(HC) wherein it was held that no addition can be made in respect of assessments which have become final on the date of search if no incriminating material is found during search.

c) Similar ratio has been laid down by the various Hon'ble High Courts in the decisions as cited by the ld AR.

14. We also find merit in the contentions of the ld AR no addition can be made on the basis of statement recorded during search or post search enquiries. In the following decisions the Hon'ble Gujrat High Court has held that if no incriminating material is gathered during the course of search, then addition cannot be made even on the basis of statement of director recorded post search proceedings.

(a) Pr. Commissioner of Income Tax Vadodara-1 V/s RSA DIGI Prints Dated- 06/09/2017.

(b) Principal Commissioner Of Income Tax V/s Sanghvi Fincap Ltd. Dated-20/02/2018.

(c) Principal Commissioner of Income Tax- 2 V/s Kamlesh Prahladbhai Modi. Dated- 18/04/2018.

(c) Sunrise Finlease (P.) Ltd. reported in 89 taxmann.com 1.

The case of Assessee is far better wherein no evidence in support of additions have been found either during search proceedings or during post search proceedings. Hence order passed u/s 153A is bad in law and deserves to be quashed.

14.1. Further we find merit in the contentions of the ld A.R. that statement recorded during search do not constitute incriminating material as the same can not be said to be found during the course of search but is recorded to elicit more information/explanation of the searched person on the incriminating documents/gold/jewellery found during search. Therefore after perusing the material on record and considering rival contentions and also the decisions cited before us, we are of the considered view that a statement recorded during the course of search can not be considered an incriminating material in order to make addition in an unabated assessment year. The case of the assessee is supported by the decisions of the co-ordinate bench of the Tribunal namely i) PCIT v. Best Infrastructure (India) Pvt. Ltd. & Ors. [397 ITR 82 (Del)] ii) CIT v. Harjeev Aggarwal [290 CTR 263 (Del)] iii) PKSS Infrastructure Pvt. Ltd. v. DCIT and vice-versa (Mum ITAT) [ITA No. 5680-5681/Mum/2018 and 5802-5803/Mum/2018] dated 29.11.2019 and iv) Geetanjali Space Pvt. Ltd. v. DCIT [ITA No.782/Mum/2019] dated 31.05.2019

14.2. Therefore, this is an undisputed position of law that in case of unabated assessment year, no addition can be made in absence of any incriminating material found during the course of search. In view of the above facts and circumstances of the case and various decisions as discussed above, we are inclined to set aside the order of Ld.

CIT(A) on this issue and direct the AO to delete the additions as being without valid jurisdiction. The ground No.1 is allowed.

15. The issues raised in ground no. 2 & 3 are on merits of the additions made towards bogus purchases and u/s 14A of the Act. Since we have allowed the appeal of the assessee on jurisdictional/legal issue, the ground no. 2 and 3 are not being adjudicated.

16. The cross objection of the assessee is allowed.

ITA No. 7440/Mum/2019(Revenue's Appeal)

17. The revenue has challenged the deletion of addition by Id CIT(A) to the extent of 87.50% of the bogus purchase as against the 100% addition made by the AO. Since we have allowed the appeal of the assessee on the legal by holding that the jurisdiction of the AO to make addition is invalid. Consequently the appeal of the revenue becomes infructuous and is accordingly dismissed.

18. In the result the cross objection by the assessee is allowed and appeal of the Revenue is dismissed.

**ITA No. 7533/Mum/2019 &
CO No.82/MUM/2021 AY 2012-13**

19. The grounds raised by the assessee in the cross objections are reproduced below:

"1. On the facts and in the circumstances of the case, the CIT(A) erred in confirming addition to the extent of 25% of on money receipts of Rs.742.20 lacs worked out on the basis of seized material. The addition is not justifiable and deserves to be deleted in toto.

2. On the facts and in the circumstances of the case, the CIT(A) erred in confirming addition on account of disallowance under section 14A of the Act of Rs.62,887/-. The disallowance is not justifiable and deserves to be deleted.

3. The respondent craves leave to add, alter, amend and/or withdraw any ground or grounds of cross objections either before or during the course of hearing of the same."

20. On the facts and in the circumstances of the case, the CIT(A) erred in confirming addition on account of disallowance under section 14A of the Act of Rs.62,887/-. The disallowance is not justifiable and deserves to be deleted.

21. The issue raised in the first ground of appeal is against the order of CIT(A) partly upholding the order of AO on the issue of on-money by directing to apply 25% as against the 100% added by the AO. The revenue in its cross appeal has challenged the part deletion of addition on account of on money to the extent of 75%.

22. As stated above the assessee is engaged in the Real Estate Development. The Assessee has developed two projects called MAN Opus and Shanti Sadan. The assessee filed the return of income on 29.09.2012 declaring an income of Rs.83,56,370/-. Following search a notice u/s 153A of the Act was issued on 25.01.2016 and was complied by the assessee by filing return of income on 28.07.2016 declaring an



income of Rs.1,47,46,370/- thereby declaring an additional income of Rs.63,90,000/-.During the course of search and seizure operation a hard disk and excel sheets were seized from the residential premises of Mr. Vinod Tiwari, a part time accountant of Man Global Limited (a real estate company) the details whereof in Excel sheet is field Master Paper book page no. 65 to131. The said hard disk contained excel sheet having rough noting and jottings of receipts and payments. During the course of search proceedings and post search proceedings various statements on oath were taken under section 132(4)/131 of the Income Tax Act copies whereof are filed Master paper book page no. 1 to 23. The Man group has vide letter dated 31/03/2015 filed before the DDIT (Inv.) Mumbai a tentative entitywise and year wise bifurcation of receipt on the basis of excel sheet and notings & jottings found during the course of search proceeding. It was clearly mentioned in the said letter that the exact yearwise and entitywise disclosure cannot be quantified at this stage. The entitywise and year wise disclosure of receipt given vide letter dated 31/03/2015 was just tentative. As per the said letter, the details and bifurcation of the entitywise receipts are extracted below for ready reference:

(Rs. In lacs)

Sr. No.	Name of the parties	A.Y. 2015-16	A.Y. 2014-15	A.Y. 2013-14	A.Y. 2012-13	Total
1	Man Infraprojects	-	760	720	1020	2500



	Limited					
2	Man Industries (India) Limited	914	--	--	--	914
3	M/s M Concepts Retail LLP	170	-	5	50	225
4	M/s Merino Shelter Pvt. Ltd.	515	135	--	--	650
5.	M/s Man Global Limited	1173	688	605	639	3115
	Total	2772	1583	1340	1709	7404
6	Less: Purchase wrongly accepted as bogus purchase					914
7	Total receipt as per letter dated 31/03/2015					6489
8	Less Receipt of JCM Group i.e. Man Infraprojects Limited					2500
9	Total receipt of RCM Group					3990

23. The A.O. has worked out total receipts on the basis of said alleged "Excel Sheet" which is extracted as under for ready reference:

Rs. In lacs						
Sr . No .	Name of the parties	A.Y. 2015-16	A.Y. 2014-15	A.Y. 2013-14	A.Y. 2012-13	Total
1	Man Industries (India)	640.49	747.57	397.10	418.25	2203.41

	Limited					
2	M/s M Concepts Retail LLP	0.14	0.15	4.32	46.65	51.56
3	M/s Merino Shelter Pvt. Ltd.	95.72	85.00	306.24	163.20	650.16
4	M/s Man Global Limited	589.64	171.17	410.75	426.00	1597.56
	Total	1325.99	1003.89	1118.41	1054.40	4502.69

24. The A.O. after comparing receipt worked out as above vis-à-vis bifurcation of receipt given vide letter dated 31.03.2015. The addition of Rs.3,62,11,000/- (i.e. Rs.426.00 lacs receipt as per A.O's working Less Rs.63.99 additional income offered to tax in return filed under section 153A of the Act) is added on substantive basis. Further the difference between the Assessee's receipts bifurcation as per letter dated 31/03/2015 and receipt as per A.O.'s working i.e. Rs.2,12,99,000/- is added on protective basis. Thus the assessment under section 143(3) r.w.s. 153A of the Act was framed vide order dated 26.12.2016 at a total income of Rs.7,23,19,260/- by making additions namely on money cash receipt Rs.3,62,11,000/- on substantive basis, on money cash receipts on protective basis Rs.2,12,99,000/- and disallowance u/s 14A Rs.62,887/-.



25. During the course appellate proceedings, the ld CIT(A) partly allowed the appeal of the assessee by directing the AO to estimate the income by applying a profit 25% on the on-money after taking into account the contentions of the assessee that the excel sheets in question contained many irregularities, mistakes and duplicate entries. Further the on money receipts and payment mentioned in excel sheets other than scrap sales belonged to the real estate operation of Man Group. It was also submitted that two group entities i.e. Merino Shelter Pvt. Ltd and Man Global Pvt. Ltd. are engaged in the real estate business. The ld CIT(A) also called a remand report from the AO as regards the various contentions of the assessee that excel sheets contained wrong and duplicate entries. Thereafter after taking into account the remand report and contentions of the assessee the ld CIT(A) reworked the on money which comes to Rs.7,42,20,000/- for the instant year and directed the AO to apply 25% on money of Rs.7,42,20,000/-. The operative part of ld CIT(A) order is reproduced for ready reference as under:

“8.15 After considering all facts on records and submissions made I am of the considerate view that entire on-money other than scrap should belong to real estate operations, further the working submitted by the appellant is the substantial evidence stating that the cash was received by the appellant in the real estate transactions and hence should be considered in the appellant's hands. Considering the facts of the case and carefully going through the submissions, addition determined in case of appellant as follows :

Particulars	A.Y. 2015-16	A.Y. 2014-15	A.Y. 2013-14	A.Y. 2012-	Total



					13	
	Disclosure of gross on money receipts by MAN Group	1325.99	1003.89	1053.40	1054.41	4437.68
Less:	Contra entries as per submission dated 31.03.2015 to Investigation wing.	202.51	269.58	(107.18)	82.80	447.71
Less:	On money receipt considered in Merino Shelters Pvt Ltd	95.72	85.00	306.24	163.20	650.16
Less:	On money receipt considered in M Concepts Retail LLP	0.14	0.15	4.32	46.96	51.57
Less:	On money (Scrap) to be considered in Man Industries (India) Limited	96.45	-	3.00	19.25	116.90
	Balance on money Receipt to be considered in Man Global Ltd	932.97	649.16	847.02	742.20	3171.35

8.16 I have examined the contention of the AO that entire cash receipts on account of on money should be treated as taxable income without allowing any expenditure there from. I have also examined various documents, replies, rejoinders, charts and final submissions etc. given during the appellate proceedings and taken note of applicant's assertion of justifying that only profit embedded in such receipts would be taxable as an income. The Hon'ble ITAT, Mumbai in the case of Prime Developers Vs. DCIT has held that the entire sales proceeds of the assessee should not be added to its income and a reasonable estimate of expenses needs to be made considering the nature of business of the assessee. Thereafter, the Hon'ble ITAT has made an addition of 17.08% of gross on money receipts and the same has also been upheld by Hon'ble Bombay High Court in ITA No. 2452 of 2013. I have also considered the decision of Hon'ble Bombay High Court in case of Lodha Group of Companies - Writ Petition No. 2562 of 2015 pronounced on 17-02-2017 wherein the Hon'ble Jurisdictional Court has agreed with the findings of Hon'ble Income Tax Settlement Commission (ITSC) of not taxing the entire on money and considering the net profit percentage of 22%. The Hon'ble court has also considered the provisions of section 37 and section 40A(3) and not disturbed the finding of ITSC.

8.17 Considering all the aspects and facts of the case, net profit percentage has to be applied in the present case. The appellant has not kept company wise / project wise details of expenses incurred in cash and hence a reasonable percentage of profit out of such cash receipts should be considered for estimating the income. In view of the facts and circumstances of the case it is felt that estimating the profit at 25% of on money receipts of Rs.742.20 Lakhs would meet the ends of justice. The appellant has offered 10% net profit on gross on money receipts as per the on money disclosure by them in the return of income filed u/s 153A and the same shall be reduced from the above working adopted. Therefore, this ground of appeal is **PARTLY ALLOWED.**"

26. At the outset the 1d AR submitted that the aforesaid year wise and entity wise working of on money receipts done by the CIT(A) was not disputed either by the appellant assessee Group or by the revenue. The aforesaid year wise and entity wise bifurcation is duly accepted as such. The 1d. AR submitted that the Ld. CIT(A) has determined on money cash receipts belonging to the assessee at Rs.742.20 lacs and directed to restrict the addition to the extent of 25% of

Rs.742.20 lacs as against additions of Rs.3,62,11,000/- on substantive basis and Rs.2,12,99,000/- on protective basis respectively. The ld. AR referred to the appellate order and pointed out that ld. CIT(A) has held that only profit embedded in alleged on money cash receipts is to be taxed which was a perfect finding by the ld CIT(A) and further directed the AO to estimate the profit rate @25%. The department is in appeal challenging the relief allowed by ld CIT(A) to the assessee by allowing 75% of the on money towards expenses with allegation that the nature and allowability of the expenses found in excel sheets could not be verified besides challenging the expenses in cash do not qualify for deduction under section 40A(3) of the Act. The ld AR invited the attention of the bench to the statement of Shri Ramesh Chandra Mansukhani and submitted that in first statement only, Shri Ramesh C Mansukhani spoke about inconsistencies, duplicity and irregularity found in Excel sheets prepared and maintained by Mr. Vinod Tiwari. The ld AR submitted that in first statement only Shri Ramesh C Mansukhani made it clear that entries reported in Ms Excel sheet inter alia included expenditure of Man group and additional income would be offered after claim of expenditure in due course. The ld AR also brought to our notice payments by the assessee as per the said excel sheets. Therefore, ld AR prayed that in view of what is stated hereinabove the additional income found from the seized material should be

taxed net of expenditure. In defense of his arguments, the ld AR relied on the following decisions:

- a) CIT(A) Vs. Abhishek Corporation in ITA No. 15 of 2003.
- b) Commissioner of Income-tax v. Samir Synthetics Mill reported in [2010] 326 ITR 410 (GUJ.)
- c) Commissioner of Income-tax v. President Industries [2002] reported in 1024 TAXMAN 654 (GUJ.).
- d) M/s Prime developers Vs. DCIT, CC – 33 in ITA no. 175 to 178 / M /210 and 321 to 324/M/2010
- e) M/s Ekta Housing Pvt. Ltd Versus Dy. Commissioner Of Incometax- Central Circle 6(2) Mumbai And (Vice-Versa), Dy. Commissioner Of Incometax-Central Circle 6(2), Mumbai Versus M/S Ekta World Pvt. Ltd; And M/S Pahli Hill Developers Versus Dy. Commissioner Of Incometax-Central Circle 6(2), Mumbai And (Vice-Versa) - 2021 (5) Tmi 950 - Itat Mumbai
- f) Income Tax] (Central) 4, Mumbai Versus Income Tax Settlement Commission (Itsc)] Additional, M/S. Lodha Developers Pvt. Ltd. And Others 2017 (2) Tmi 861 - Bombay High Court
- g) Deputy Commissioner of Income Tax, Central Circle – 6(2) Mumbai Vs. Adarsh Industrial Estate (P)(ltd – (2021) 130 taxmann.com 142 (Mumbai – Trib)
- h) M/s Bhalchandra Trading Pvt. Ltd. Vs. Dy CIT Central Circle – 6(2) Mumbai in ITA no. 2977 and 2978 / Mum / 2019
- i) Jay Builder Vs. ACIT Circle – 6(2) – (2013) 33 taxmann.com 62 (Gujarat).
- J) Dhanlaxmi Builder Vs. DCI Central 3 Mumbai in ITA No. 504 & 505 / Mum/2009.

27. Summing up his arguments the ld. AR submitted that the disclosure made during the course of search proceedings was receipts net of expenditure and the gross receipts as per the excel sheets were never offered to tax on gross basis. The ld AR stated that it is only profit embedded to the receipts should be taxed and was rightly done by the ld CIT(A). The AR re-iterated that the year wise and entity wise receipts re-worked out by the CIT(A) reached finality as the same was neither disputed by the Revenue nor by the assessee. On the issue of application of 25% on the on money, the ld AR vehemently argued that the profit estimated by the CIT(A) @

25% of gross receipts is relatively on higher side in view of the fact that the profit earned by the assessee against its Real estate project is 4.45% as noted at page no. 9 by CIT(A) in the appellate order. The ld AR therefore prayed before the bench that considering the same, profit ratio of 25% estimated by the CIT(A) is exorbitant and may be restricted to only profit actually being earned by the Assessee company.

28. The ld DR, per contra, submitted before the bench that the order of ld. CIT(A) is wrong as the ld CIT(A) has wrongly allowed the relief of 25% of the on Money to the assessee towards the expenses by holding that only profit can be brought to tax and not the entire on money. The ld AR submitted that incriminating material/documents were found during the course of search on the assessee in the form of hard disk and excel sheets which contained the jottings/notings qua cash transactions by the group entities including the assessee. The ld AR submitted that once the incriminating material is found during search then there is question of allowing any deduction from that on money towards expenses incurred as assessee has already accounted for the expenses in the regular books. The ld DR therefore prayed that the order of CIT(A) is wrong and against the facts on records and therefore the same may be set aside on this issue and AO's order may be restored.

29. We have heard the rival contentions and perused the materials on records including the appellate orders and

decisions cited before us. We note that during the course of search a hard disc and some excel sheets were found and seized which contained the notings/jottings qua the some receipts and payments which according the assessee were relating the real estate projects. Even during the course of recording of statement u/s 132(4) of the Act Shri Ramesh Chandra Mansukhani director of the assessee admitted the fact of having received on money from real estate projects and stated that out of the said on money the assessee has incurred expenses on the project also. Mr. Ramesh Chandra Mansukhani stated that the net income from on money after reduction of expenses incurred shall be offered to tax as additional income and accordingly filed the return of income by declaring additional income of Rs.63,90,000/- over and above regular income declared in the original return of income. The AO estimated the income on account of on money of Rs.3,62,11,000/- on substantive basis beside making addition in respect of other cash receipts on protective basis of Rs.2,12,99,000/- and added the same to the income besides making addition u/s 14A of the Act . In the appellate proceedings ld CIT(A) after taking into account the remand report re-calculated the year wise and entity wise on money receipts which was not disputed either by the assessee group or by the revenue. The Ld. CIT(A) estimated the on money cash receipts belonging to the assessee of Rs.742.20 lacs and directed to restrict the addition to the extent of 25% of on money receipt of Rs.742.20 lacs by

holding that the allowance for expenses has to be made from on money as against additions of Rs.3,62,11,000/- and Rs.2,12,99,000/- respectively. Now the assessee has challenged the estimation of income on money at @ 25% whereas the revenue has challenged the allowance given by the ld CIT(A) to the tune of 75% towards expenses on the ground that nature and allowability of the expenses found in excel sheets could not be verified beside challenging the expenditure in cash not qualifying for deduction under section 40A(3) of the Act. We have considered the facts of the case and rival contentions and certainly agree with the findings of ld CIT(A) that entire on money can not be taxed and it is only profit embedded in on money is to be taxed . We note that assessee's average profit from real estate business from AY 2012-13 to 2015-16 is 4.45%. Now the contentions of the assessee is that the estimation of income in respect of on money has to be based on some realistic basis that has to be on the basis of profit ratio of the assessee and should not be estimated arbitrarily as done by the CIT(A). Before arriving at final conclusion we would like to discuss the decisions relied by the ld AR which are discussed as under:

- (i) In the case of CIT(A) Vs. Abhishek Corporation in ITA No. 15 of 2003 , Hon'ble Gujrat High Court has upheld the order of the tribunal wherein it has been held that in case of on money only profit has

to be added to the income of the assessee and not the entire undisclosed receipt

- (ii) In the case of **Commissioner of Income-tax v. Samir Synthetics Mill (supra)**, the Hon'ble Gujarat High Court has held as under:

"Where assessee could not even be able to reconcile production, sales and closing stock although specific opportunity was provided by Assessing Officer, addition was justified on account of suppression of sale consideration but only to the extent of profit [In favour of assessee]

As a result of search by the Excise Department in the business premises of the assessee, various discrepancies were noted in the production of the assessee. The assessee could not even be able to reconcile the production, sales and the closing stock although the specific opportunity was provided by the Assessing Officer. Accordingly addition to the assessee's income was made on account of suppression of sale consideration.

Held that, the addition was justified on account of suppression of sale consideration but only to the extent of profit."

- (iii) The Hon'ble **Gujarat High Court** has given **similar decision in case of Commissioner of Income-tax v. President Industries (supra)**. The relevant extract from the judgment is reproduced herein under:

"Section 69B, read with section 256, of the Income-tax Act, 1961 - Undisclosed investments - Assessment year 1994-95 - Whether amount of sales by itself cannot represent the income of the assessee who has not disclosed the sales - Held, yes - During survey it was found that assessee had not disclosed certain sales in books of account - Whether Tribunal was justified in holding that unless there was a finding that investment by way of incurring cost in acquiring goods which had been sold, had been made by assessee and that had also not been disclosed, only net

profits embedded in sales, and not wholesale proceeds itself, would be treated as undisclosed income of assessee - Held, yes"

- (iv) In case of M/s Prime developers Vs. DCIT, CC(Supra), the coordinate bench has held that entire sales proceeds of the Assessee should not be added to the income and reasonable estimate of expenses need to be made considering the nature of business of the Assessee. Thereafter, Hon'ble ITAT has made an addition of 17.08% of the gross on money receipts. The said decision of Mumbai Tribunal is also upheld by the Bombay High Court in ITA No. 2452 of 2013. The head note of decision of Bombay High Court is reproduce as under:

Taxable profits of the Project 'Prime Mall' by adopting net profit of 17.08% of the total gross sales - Held that:- We find that the Revenue seeks to substitute the estimated net profit arrived at by the Tribunal with a new figure of net profit. This without in any manner showing that the estimate arrived at by the Tribunal in the impugned order is perverse. It is a settled position of law that in estimated net profit arrived at by the authorities is a question of fact and if the material on record does support the estimate arrived at by the Tribunal then it does not give rise to any substantial question of law (see CIT v/s. Piramal Spinning and Weaving Mills Ltd. 1979 (10) TMI 45 - BOMBAY High Court). In this case, we find that the net profit estimated at 17.08% is a very possible view on the facts found. No substantial question of law

Tribunal directing the Assessing Officer to allow deduction towards remuneration and interest, even in case of estimated net profit - Held that:- There can be no quarrel with the submissions of Mr. Kotangale. In any event, the Assessing Officer would need to redetermine the book profits of the respondent-assessee as a consequence of the impugned order of the Tribunal. At that stage the ceiling provided under Section

40(b) of the Act would also be considered while allowing deduction on account of remuneration and interest paid to the partners. No substantial question of law

- (v) In Case Of M/S Ekta Housing Pvt. Ltd Versus Dy. Commissioner Of Incometax- Central Circle 6 (2), Mumbai And (Vice-Versa) , Dy. Commissioner Of Incometax-Central Circle 6 (2), Mumbai Versus M/s. Ekta World Pvt. Ltd; and M/s Pahli Hill Developers vs. Dy. Commissioner of Income tax-Central Circle 6(2), Mumbai and (vice-versa)(supra). In this case the Mumbai Tribunal has directed to restrict addition on account of on money receipts to 15%.
- (vi) In the case of Principal Commissioner Of Income Tax] (Central) 4, Mumbai Versus Income Tax Settlement Commission (ITSC)] Additional, M/s. Lodha Developers Pvt. Ltd. And Others (supra)– in the said decision the Hon’ble Bombay High Court agreed to the finding of Income Tax Settlement Commission of not taxing the entire on money. Further the Hon’ble High Court has also considered the provisions of Section 37 and 40A(3) of the Act and not disturbed the finding of ITSC.
- (vii) In the case of Deputy Commissioner of Income Tax, Central Circle – 6(2) Mumbai Vs. Adarsh Industrial Estate (P) Ltd.(supra) the coordinate bench has applied 12% on on-money to assess

income embedded therein in case of Assessee builder.

- (viii) Similarly, in case of M/s Bhalchandra Trading Pvt. Ltd. Vs. Dy CIT Central Circle – 6(2) , the coordinate bench has directed to restrict the addition to the extent of 12% of on money receipts.
- (ix) The Hon'ble Gujarat High Court in case of Jay Builder Vs. ACIT Circle – 6(2) (supra) has laid the similar ratio. The head note of said decision is as under:

“Where assessee received on money while selling properties and Tribunal substantially accepting contention of assessee that not entire on money received but only profit element could be taxed in its hands and sustained addition at rate of 15 per cent of on money received by assessee, appeal by assessee against order of Tribunal did not survive.”

- (x) In the case of Dhanlaxmi Builder Vs. DCI Central 3 Mumbai (Supra), the coordinate bench held that 8% net profit of the gross on money receipt is considered to meet the end of justice.

30. Considering the facts of the assessee vis a vis the ratio laid down by various judicial forums as discussed above we are of opinion that in view of the profit margin of the assessee from the real estate business, it would meet the ends of justice if a rate of 12.50% is applied on the on money. Accordingly the order of the ld CIT(A) is modified and AO is directed to apply profit rate of 12.50% on the on money.

Consequently the ground no 1 in the assessee cross objection is **partly allowed**.

31. In the revenue appeal, the part deletion of addition to the extent of 75% of the on money is challenged besides challenging the allowability of cash expenses u/s 40A(3). Since we have allowed the ground 1 raised in the cross objection by the assessee, the appeal of the revenue becomes infructuous and is accordingly dismissed.

32. The issue raised in the 2rd ground in the cross objection by the assesses against the confirmation of addition of Rs. 62,887/- as made by the AO u/s 14A of the Act towards earning of exempt Income without any incriminating material found during search.

33. The issue is similar to one as decided by us in ground no, 3 in CO: 81/Mum/2021 A.Y. 2011-12 (supra) wherein we have decided that AO has no jurisdiction to make addition in absence of incriminating materials in an unabated year. Therefore our decision in ground no. 3 in CO: 81/Mum/2021 would, mutatis mutandis, apply to ground no. 2 in the present cross objection as well. Consequently ground no. 2 is allowed.

ITA No.7534/Mum/2019 & CO 83/Mum/2021AY2013-14
ITA No.7535/Mum/2019 & CO 84/Mum/2021AY 2014-15
ITA No.7536/Mum/2019 & CO 85/Mum/2021AY2015-16

34. The issue raised in ground no. 1 in CO No.83, 84 & 85/Mum/2021 is similar to one as decided by us in ground no. 1 in CO 82/Mum/2021 A.Y.20012-13. Therefore our decision in ground no. 1 in CO 82/Mum/2021 A.Y.20012-13 would, mutatis mutandis, apply to ground no.1 in CO Nos.83, 84 & 85/Mum/2021 and accordingly the order of CIT(A) is modified and AO is directed to apply a profit rate of 12.50% on the on money. The ground 1 in the above three cross objections in AY 2013-14 to 2015-16 is **partly allowed**.

35. The issue raised in ground no .1 in revenue appeals no. ITA No.7534, 7435 & 7436 /Mum/2019 is similar to one as decided by us in ground no. 1 in 7533/Mum/2019 A.Y.20012-13. Therefore our decision in ground no. 1 in 7533/Mum/2019 A.Y.20012-13 would ,mutatis mutandis, apply to ground no. 1 in ITA No.7534, 7435 & 7436 /Mum/2019 and accordingly the appeals of the revenue in AY 2013-14 to 2015-16 in AY 2013-14 to 2015-16 become infructuous and are accordingly is dismissed.

ITA No.7538/Mum/2019 & CO:86/Mum/2021AY 2011-12
ITA No.7539/Mum/2019 & CO 87/Mum/2021AY 2012-13
ITA No.7532/Mum/2019 & CO 88/Mum/2021AY2013-14

36. The issue raised in ground no.1 in CO No.86/Mum/2021 is similar to one as decided by us in ground no. 1 in CO 81/Mum/2021 A.Y.20011-12. Therefore our decision in ground no. 1 in CO 81/Mum/2021 A.Y.20011-12 would, mutatis mutandis, apply to ground no.

1 in CO 86 /Mum/2021 and accordingly the order of CIT(A) is set aside by holding that this being unabated assessment year on the date of search and therefore AO has no jurisdiction to make addition in absence of any incriminating materials found during search. The ground 1 is allowed.

37. The issues raised in ground no.2 is on merit and against the order of ld CIT(A) partly sustaining the addition to the extent of 12.50% of bogus purchases. Since we have allowed the appeal of the assessee on jurisdictional/legal issue, the ground no. 2 is not being adjudicated.

38. Accordingly, the cross objections of the assessee are allowed.

39. In ITA No.7438/Mum/2019 AY 2011-12, the revenue has challenged the deletion of addition by ld CIT(A) to the extent of 87.50% of the bogus purchases as against the 100% addition made by the AO. Since we have allowed the appeal of the assessee on the legal issue by holding that the jurisdiction of the AO to make addition is invalid. Consequently the appeal of the revenue becomes infructuous and is accordingly dismissed.

40. The issue raised in ground no. 1 in CO 87 & 88/Mum/2021 is similar to one as decided by us in ground no. 1 in CO 82/Mum/2021 A.Y.20012-13. Therefore our decision in ground no. 1 in CO: 82/Mum/2021 A.Y.20012-13

would, mutatis mutandis, apply to ground no. 1 in CO 87 & 88/Mum/2021 and accordingly the order of CIT(A) is modified and AO is directed to apply a profit rate of 12.50% on the on money. The ground 1 in the above two cross objections in AY 2012-13 to 2013-14 is allowed.

41. The issue raised in ground no. 1 in revenue appeals no. **ITA No.7539 & 7432 /Mum/2019** is similar to one as decided by us in ground no. 1 in 7533/Mum/2019 A.Y.20012-13. Therefore our decision in ground no. 1 in 7533/Mum/2019 A.Y.20012-13 would, mutatis mutandis, apply to ground no. 1 in ITA **No.7539 & 7432 /Mum/2019** and accordingly the appeals of the revenue in AY 2012-13 & 2013-14 become infructuous and are accordingly is dismissed.

42. The ground 2 raised by the revenue in ITA No. 7539 & 7432/Mum/2019 is against the order of ld CIT(A) deleting the addition as made by the AO book profits u/s 115JB on account of on money.

43. According to the AO the on money has not been shown by the assessee in the books of accounts which have prepared in accordance with Companies Act and Income Tax Act. Thus the profit has not been calculated as per companies Act. Therefore the AO came to the conclusion that the book profits need to be recalculated as the on money has not been

included in the book profits and accordingly addition was made to the book profits.

44. The assessee challenged the order of AO before ld CIT(A) and ld. CIT(A) allowed the appeal of the assessee on this issue by holding that the decision relied upon by the AO in the case of Rishiroop Rubber International Ltd Vs DCIT ITA No. 6689/Mum/2010, is not applicable to the present case as there is no fraud happened or misrepresentation or investigation undertaken. The ld CIT(A) allowed the appeal of the assessee by following the decision of the Hon'ble Apex court in the case of Appollo Tyres Ltd Vs CIT 255 ITR 273(SC) wherein it has held that the AO while assessing a company for income-tax under section 115JB of the Act can not question the correctness of the profit and loss account prepared by the assessee-company and certified by the statutory auditors of the company as having been prepared in accordance with the requirements of Parts II and III of Schedule VI to the Companies Act.

45. At the outset the ld AR submitted that that for the purpose of section 115JB the A.O. has considered the Profit & Loss Account which is prepared under the provisions of the Companies Act, therefore adjustments, if any, could be made are only for those items which are prescribed in section 115JB of the Act. The ld AR submitted that no other adjustment can be made to arrive at the book profit as per

the provision of section 115JB of the Act. It is undisputed fact that the accounts of the assessee were prepared in accordance with the part II and Part III of Schedule – IV of the Companies Act 1956, which is further certified by the statutory auditors. The accounts of the assessee were also accepted as such by the A.O. and therefore any adjustment that can be made in the book profit are only with regards to those items as provided in the clause (a) to (ha) of the Explanation appended to section 115JB of the Act. The ld AR argued that no adjustment has been prescribed or provided in section 115JB of the Act as regards to the on money receipts, bogus commission etc. as added by the by A.O. to the book profits. The AO has no power to tinker with the accounts of the assessee and hence the adjustment made by the A.O. to the book profit are erroneous and may kindly be deleted. In defence of his arguments the ld AR relied on the following judicial pronouncements:

- A) Apollo Tyres Ltd. Vs Cit [2002] 255 Itr 273 (Sc),
- B) Malayala Manorama Co. Ltd. Vs. Cit, [2008] 300 Itr 251 (Sc),
- C) The Cit Vs M/S Nhpc Ltd. 2018 (4) Tmi 47 – P&H

46. The ld AR therefore prayed that the order of CIT(A) being very reasoned and in accordance with the ratio laid down in various decisions as referred to above and may kindly be upheld on this issue by dismissing the appeal of the assessee.

47. The ld DR on the hand submitted that the AO has correctly made addition to the book profit in respect of on

money received by the assessee which was shown in the books of accounts. Thus the books of accounts prepared and audited by auditors do not show the correct book profit and needs to be adjusted accordingly. The ld DR submitted that how the book profits can be correct when the amount of receipts is not shown fully but understated resulting into understatement of book profit. The ld DR submitted that this is certainly misrepresentation on the part of the assessee and book profits need to be recalculated. The ld DR argued that the AO has correctly applied the decision of the tribunal in the case of *Rishiroop Rubber International Ltd Vs DCIT (supra)*. The ld DR therefore prayed that the order of ld CIT(A) may be reversed and that of AO may be restored.

48. After hearing the rival contentions and perusing the material on records we find that the AO has increased the book profits by amount of on money. Now the issue before us whether AO has jurisdiction to change the book profits when the books are prepared in accordance with the requirements of Part II and III of Schedule VI of the Companies Act and certified by the statutory auditors with no adverse reporting on any issue. We have perused the appellate order passed by ld CIT(A) by following the decision of the Hon'ble Apex Court in the case of *Appollo Tyres Ltd Vs CIT(Supra)* wherein it has been held that AO while assessing a company for income-tax under section 115J of the Income-tax Act can not question the correctness of the profit and loss account prepared by the



assessee-company which are certified by the statutory auditors of the company as having been prepared in accordance with the requirements of Parts II and III of Schedule VI to the Companies Act. Similarly in the case of Malayala Manorama Co. Ltd. Versus CIT, Trivandrum (Supra), the Hon'ble Apex Court has held that in respect of a company consistently charging depreciation in its books of account at the rates prescribed in the Income-tax Rules, the Income Tax Officer has no jurisdiction under section 115J of the Income Tax Act, 1961 to rework net profits by substituting the rates prescribed in Schedule XIV of the Companies Act, 1956 and no addition should be made to book profits u/s 115JB of the Act. Further decision of Rishiroop Rubber International Ltd Vs. DCIT (supra) relied upon by A.O., the facts are totally different than the facts of assessee. In the case of Rishiroop Rubber International Ltd there was question of accounting of depreciation on dismantled assets as per the provision of Companies Act and Accounting standard – 6. It is not out of place to submit that the coordinate bench in the case of Rishiroop Rubber International Ltd has allowed the A.O. to rewrite the book profit under section 115JB of the Act in following two cases namely i) if it is discovered that profit & Loss account is not drawn up in accordance with Part II and Part III of Schedule IV to the companies Act, however, the Assessing Officer cannot disturb the Net Profit as shown by the assessee where there are no such allegation, fraud, misrepresentation but

only a difference of opinion as to whether particulars amount should be property shown in the profit and loss account or in the Balance sheet, ii) if accounting policies, accounting standards not adopted for preparing such accounts and method, rate of depreciation which have been incorrectly adopted for preparation of profit and loss account laid before the Annual General meeting. In our considered view none of the aforesaid conditions laid down by the tribunal gets fulfilled in the case of the assessee. Therefore we are inclined to uphold the order of Id CIT(A) by dismissing the appeal of the revenue. Consequently ground no 2 in both the appeals of the revenue are dismissed.

**ITA No.7482/Mum/2019 Assessment Year: 2015-16
(Revenue's Appeal)**

49. The ground raised by the revenue is reproduced as under:

“Whether on the facts and circumstances of the case snf in laws , the Id. CIT(A) erred in deleting the addition of Rs. 1,69,86,000/- on protective basis without appreciating the fact that the substantive addition has not yet been confirmed and accepted by the assessee and there is possibility of revenue loss in case substantive addition is deleted by higher authorities.”

50. The facts in brief are that the assessee is engaged in the business of retailing of readymade garments and furniture. A search under section 132 of the Act was conducted in case of the Assessee on 10.12.2014. During the course of search and seizure operation, a hard disk and some excel sheets, having rough noting and jottings of receipts and payments, were

seized from the residential premises of Mr. Vinod Tiwari, a part time accountant of Man Global Limited (a real estate company). During the course of search proceedings and post search proceedings various statements on oath were taken under section 132(4)/131 of the Income Tax Act. As stated elsewhere in this order, the Man group has vide letter dated 31.03.2015 before the DDIT (Inv.), Mumbai furnished tentative assessee wise and year wise bifurcation of receipt on the basis of excel sheets found during the course of search proceeding. It was clearly mentioned in the said letter that the exact year – wise and assessee wise disclosure could not be quantified at this stage. The assessee wise and year wise disclosure of receipt given vide letter dated 31.03.2015 was just tentative. The said details has been given in para 22 supra. The A.O. has compared receipt worked out as above vis a vis bifurcation of receipt given vide correspondence dated 31/03/2015. The addition of Rs.14,000/- was made by AO based upon above referred Excel Sheets on substantive basis and _difference between the A.O.'s receipt and receipt as per the Appellant's letter dated 30.12.2015 Rs.169.86lacs (170 – 0.14) lacs was added on protective basis. Assessment under section 143(3) r.w.s. 153C of the Act was framed on 29/12/2016 at a total income of Rs.1,59,87,586/-.

51. In the appellate proceedings, the 1d CIT(A) observed that total receipt as per excel sheets i.e. 3990 lacs was duly

taxed in the case of Man Group of entities including alleged receipt of Rs.169.86 added on protective basis by the A.O. Therefore the ld CIT(A) has given a finding of fact that the *protective addition of Rs. 1,69,86,000/- being on money received has been confirmed substantively in the case of M/s Man Global Limited for A.Y. 2015 – 16*. Therefore, this addition made on protective basis is deleted.

52. After hearing the rival contentions and perusing the material on records in the appellate order including the charts of on money calculation filed by the assessee, calculated by the AO and reworking thereof by ld CIT(A), we note that the substantive addition has been confirmed @ 12.50% of the on money in the hand Man Global Ltd in AY 2015-16 and thus the protective addition was rightly deleted by the ld CIT(A). We further note that in on money as reworked by ld CIT(A) has been accepted both by the assessee as well as revenue and we have directed the AO to assess the on money @ 12.50%. Therefore we are inclined to uphold the order of ld. CIT(A) by dismissing the appeal of the revenue.

ITA No. 7526/Mum/2019 & CO No. 89/MUM/2021
Assessment Year: 2009-2010

CO No.89/Mum/2021 (Assessee's CO)

53. The grounds raised by the assessee are as under:

“1. On the facts and in the circumstances of the case, the CIT(A) ought to have deleted addition of Rs.52,50,000/- made on account of unaccounted cash receipt from scrap sales.

2. On the facts and in the circumstances of the case, the CIT(A) ought to have deleted disallowance under section 14A of the Act amounting to Rs. 31,42,069/-. The disallowance is not justifiable and deserves to be deleted in toto

3. The respondent craves leave to add, alter, amend and/or withdraw any ground or grounds of cross objections either before or during the course of hearing of the same."

54. The assessee has challenged in ground no. 1 the order of CIT(A) confirming the addition made by the AO without any incriminating materials found during search in an unabated assessment year.

55. The facts in brief are that the assessee filed the return of income on 29.09.2009 declaring an income of Rs.37,21,96,759/-. A notice under section 153A of the Act was issued on 23.03.2016 after search on the assessee on 10.12.2014. Assessment under section 143(3) r.w.s. 153A of the Act was made on 28.2.2017 wherein the A.O. has assessed income at Rs.37,79,55,871/- by making three additions namely; i) on account of scrape Sale - Rs.52,50,000/, ii) disallowance out of commission payment - Rs.25,57,30,506/- and iii) disallowance u/s 14A of the Act - Rs.31,42,069/-.

56. Against the Assessment order, the Assessee has filed an appeal before the CIT(A). The Ld. CIT(A) has vide order dated 27.09.2019 allowed the substantial relief to the Assessee. Disallowance of Commission expenditure of Rs.25,57,30,506/- was deleted. Further as regards to the addition on account of scrap sale of Rs.52,50,000/-, Ld.



CIT(A) deleted the income since the assessee had offered additional income in the return of income filed under section 153A of the Act.

57. At the outset the ld AR submitted that the additions made by the AO were without jurisdiction as these addition were not on the basis of incriminating material found during search proceedings. The Assessee submitted that d in the form of books of accounts/documents or any unexplained money, bullion, jewellery or any other valuable asset was found to doubt the commission payment made by the Assessee company. This proved that as a result of the search carried out u/s 132 in the case of the assessee, no material or evidence was found to justify addition made by Assessing Officer on account of Commission payment. The material relied upon by the A.O. i.e. letter of M/s Kala Gas Services is not incriminating material. The letter was part of CLB Petition filed in October-2012 and is certainly a public Document. At the time of original assessment proceedings, the alleged letter is part of Public document. The then A.O. has determined the assessed income under section 143(3) of the Act after both the petitions of CLB were filed, which proved beyond doubt that alleged letter is not incriminating material. In addition to this the ld AR submitted that a superior authority, the Ld. CLB has after considering the alleged letter has rendered the order in favor the assessee company and has held that it has not siphoned off any

funds. All the funds which interalia included commission payment were incurred for the business purpose only which left no scope for any adverse inference to be drawn in this regards. It is therefore submitted that the ld. Assessing Officer has simply gone beyond the scope of the provisions of section 153A of the Act which comes into operation only after a search has been carried out u/s 132 of the Act and to assign power to the Income-tax authorities for a specific purpose only i.e. for unearthing concealed income. The following facts will prove that the analogy on which addition on account of Foreign Commission is made in case of Assessee is not supported by any incriminating material found during the course of search and hence order passed u/s 153A is bad in law and deserves to be quashed. In view of above, it is evident that the observation of AO is not supported by any evidence or material found during the course of search proceedings.

58. The issue raised in ground no. 1 above is identical to one as decided by us in CO No.81/Mum/2021AY 2011-12, therefore our decision in Co No.81/Mum/2021AY 2011-12 would ,mutatis mutandis, apply to ground no. 1 as well. Accordingly we set aside the order of CIT(A) on this issue by holding that AO has no jurisdiction u/s 153A to make additions without incriminating materials found during search. Resultantly all additions made by the AO are directed to be deleted. Ground no. 1 is allowed.

59. The issues raised in ground no. 2 & 3 are on merit of the additions made towards unaccounted scrap sales of Rs.52,50,000/- and disallowance of Rs.31,42,069/- u/s 14A of the Act. Since we have allowed the appeal of the assessee on jurisdictional/legal issue, the ground no. 2 and 3 are not being adjudicated.

60. The cross objection of the assessee is allowed

ITA No.7526/Mum/2019

61. The revenue has three grounds in its appeal. In 1st and 2nd ground the revenue has challenged the deletion of disallowance of commission paid overseas whereas in the 3rd ground the revenue has challenged deletion of scrap sales. Since we have allowed the appeal of the assessee on the legal /jurisdictional issue by holding that the AO has no jurisdiction to make additions without incriminating materials in an unabated assessment year and consequently additions made will not survive. Consequently the appeal of the revenue becomes infructuous and is accordingly dismissed.

ITA No. 7527/Mum/2019 & CO No. 90/Mum/2021 A.Y.

2010-11:

CO:90/Mum/2021

62. The issue raised in ground no. 1 is identical to one as decided by us in CO No.81/Mum/2021AY 2011-12,

therefore our decision in Co No.81/Mum/2021AY 2011-12 would ,mutatis mutandis, apply to ground no. 1 as well. Accordingly we set aside the order of CIT(A) on this issue by holding that AO has no jurisdiction u/s 153A to make additions without incriminating materials found during search. Resultantly all additions made by the AO are directed to be deleted. Ground no. 1 is allowed.

63. The issues raised in ground no. 2 & 3 are on merit of the additions made towards unaccounted scrap sales of Rs.19,00,000/- and disallowance of Rs.20,00,000/- u/s 14A of the Act. Since we have allowed the appeal of the assessee on jurisdictional/legal issue, the ground no. 2 and 3 are not being adjudicated.

64. The cross objection of the assessee is allowed

ITA No. 7527/Mum/2019

65. The revenue has three grounds in its appeal. In 1st ground the revenue has challenged the deletion of disallowance of commission paid overseas whereas in the 2nd ground the revenue has challenged deletion of scrap sales. Since we have allowed the appeal of the assessee on the legal/jurisdictional issue by holding that the AO has no jurisdiction to make addition without incriminating materials in an unabated assessment year and consequently additions made will not survive. Consequently the appeal of the revenue becomes infructuous and is accordingly dismissed.

ITA No. 7528/Mum/2019 & CO No. 91/Mum/2021 A.Y.**2012-13:****CO No.91/Mum/2021**

66. The issue raised in ground no. 1 is identical to one as decided by us in CO No.81/Mum/2021AY 2011-12, therefore our decision in Co No.81/Mum/2021AY 2011-12 would ,mutatis mutandis, apply to ground no.1 as well. Accordingly we set aside the order of CIT(A) on this issue by holding that AO has no jurisdiction u/s 153A to make additions without incriminating materials found during search. Resultantly all additions made by the AO are directed to be deleted. Ground no. 1 is allowed.

67. The issues raised in ground no. 2 & 3 are on merit of the additions made towards unaccounted scrap sales of Rs.19,25,000/- and disallowance of Rs.20,00,000/- u/s 14A of the Act. Since we have allowed the appeal of the assessee on jurisdictional/legal issue, the ground no. 2 and 3 are not being adjudicated.

68. The cross objection of the assessee is allowed

ITA No. 7528/Mum/2019

69. The revenue has three grounds in its appeal. In 1st ground the revenue has challenged the deletion of addition, on account of on money of Rs.4,18,25,000/- and in the 2rd ground the, revenue has challenged allowing telescoping of

19,25,000/- on a/c of scrap sales against additional income offered by the assessee whereas in ground no. 3 and 4 the revenue has challenged deletion of overseas commission to Alpine Enterprises LLC and payment of service charges to Man Overseas Metal DMCC respectively. Since we have allowed the appeal of the assessee on the legal by holding that the AO has no jurisdiction to make addition without incriminating materials in an unabated assessment year and consequently additions made will not survive. Consequently the appeal of the revenue becomes infructuous and is accordingly dismissed.

**ITA No. 7530/Mum/2019 and CO No.92/MUM/2021
Assessment Year: 2013-14**

CO No. 92/MUM/2021

70. The issue raised in ground no. 1 is against the order of CIT(A) upholding the jurisdiction of the AO to make addition in the assessment framed u/s 153A when there is no incriminating material seized during the year. At the time of hearing the ld AR did not press this ground and therefore the ground no. 1 is dismissed as not pressed.

71. The issue raised in ground no. 2 is against the order of CIT(A) upholding the jurisdiction of the AO to make addition in respect of scrap sale of Rs.3,00,000/-. At the time of hearing the ld AR did not press this ground for the reason that telescoping has been allowed by the ld CIT(A) against the

additional income offered in the return of income filed in response to notice u/s 153 A of the Act and therefore the ground no. 2 is dismissed as not pressed.

72. The issue raised in the ground no.3 is against the order of CIT(A) upholding the addition of Rs.5,00,000/- as made by the AO u/s 14A of the Act.

73. During the course of proceedings u/s 153A of the Act, the A.O. noted that the assessee has earned exempt income of Rs.5,46,19,353/- on account of dividend on Shares and Mutual funds during the year while the assessee has disallowed suo-motto Rs.1,61,24,031/- under section 14A of the Act which is not in accordance with Rule 8D of the Act whereas the disallowance in the original return of income was Rs. 1,66,24,031/-. Accordingly the AO called upon the assessee as to why the Rule 8D should not be invoked to calculate the disallowance. The AO however rejected the disallowance made by the assessee and was calculated by the AO at Rs.1,76,24,031/- and Rs.15,00,000/- was disallowed and added to the income of the Assessee.

74. In the appellate proceedings, the Id CIT(A) partly allowed the appeal of the assessee by deleting the disallowance to the extent of Rs.10,00,000/- out of total disallowance of Rs.15,00,000/- made by the AO. The Id. CIT(A) has upheld disallowance to the extent of Rs.5,00,000/- by observing that in the original return of income the assessee has suo-motto

disallowed Rs.1,66,24,000/- whereas in the return in response to notice u/s 153A, the assessee disallowed only Rs.1,61,24,000 which is less by Rs.5,00,000.- The ld CIT(A) noted that AO calculated the disallowance at Rs.1,76,24,000/- which was typo error. So on this basis the ld CIT(A) deleted the addition to the tune of Rs.10,00,000/- and confirmed Rs. 5,00,000/-.

75. The ld AR submitted before us that no proportionate interest disallowance u/s 14A of the Act is called for when assessee has sufficient interest free funds available for making investments yielding tax free income. The Assessee states that it has sufficient interest free fund available with it to cover aforesaid investments hence no disallowance u/s 14A can be made. The chart of own funds vis a vis investments in tax free securities is extracted below:

Particulars	Amount as on 31/3/2013
Share capital	2988,35,275
General Reserve & Surplus	68244,47,135
Total interest free funds	4,12,32,82,410
Closing Investments considered for 14A	10,55,59,000

76. It can be seen from aforesaid details that as assessee had sufficient interest free funds, proportionate disallowance

of interest expenditure is not justified. The AR relied on following decisions in defense of his arguments:

- a) PCIT v. Sintex Industries Ltd. [2018] 93 taxmann.com 24 (SC)
- b) CIT v. Reliance Utilities and Power Ltd. (313 ITR 340);
- c) CIT V/s Suzlon Energy Limited. 215 Taxman 272 (2013)
- d) HDFC Bank Ltd Vs. DCIT – 2(3), Mumbai & Others, [2016] 383 ITR 529,

77. The ld Ar submitted that in view of facts of the assessee and judicial decisions as referred to above, for the purpose of disallowance u/s 14A, only net interest expenditure if any is required to be considered. The ld AR argued that in present case, there is positive income only and hence disallowance of proportionate interest expenditure is unwarranted and deserves to be deleted. The ld AR submitted that credit may be allowed towards the proportionate interest expenditure disallowed in return of income.

78. After hearing both the sides and perusing the material on records, we find that the assessee's own interest free funds are far more than the investments in shares and mutual funds and therefore the presumption is that the assessee has made investments out of own funds and not interest bearing funds. The case of the assessee is squarely covered by the decision of jurisdictional High court in the case of CIT v. Reliance Utilities and Power Ltd and HDFC Bank Ltd Vs. DCIT (supra) wherein it has been held that where the assessee's own funds are more than the investments made in securities yielding exempt income, then the presumption has to be made that the assessee has invested in the

said securities out of own funds. Therefore the order of ld CIT(A) is set aside on this issue and AO is directed to delete the disallowance. We would like to make it clear that this is ground raised before us and therefore we are allowing relief to the assessee over and above that. Ground no. 3 is allowed.

79. The cross objection by the assessee is allowed.

ITA No. 7530/Mum/2019 (Revenue Appeal)

80. The revenue has challenged the deletion of addition of Rs.3,97,10,000/- by ld CIT(A) as made by the AO on account of on money.

81. The facts in brief are that according to the AO the bifurcation given by the assessee before the investigation wing was incomplete and it had only surrendered Rs.74 Cr as against Rs.78 Crores surrendered during search. Accordingly the AO added Rs.397.10 lacs to the income of the assessee. Further the said working was never shared with assessee and it did not have any proper basis. The receipts bifurcation given vide letter dated 31/03/2015 was tentative and not final as has been submitted elsewhere in this order.

82. During the course appellate proceedings it was explained to the Ld. CIT (A) that the excel sheet in question contained many irregularities and duplicate entries. Further the on money receipts and payment mentioned in excel sheet other than scrap sales belongs to the real estate operation of Man Group. Two entities i.e. Merino Shelter Pvt. Ltd and Man

Global Pvt. Ltd. are engaged in the real estate business. Considering the submissions of the assessee, made during the course of the appellate proceedings, the findings given by the A.O. remand report called for during the first appellate proceedings, the CIT (A) has reworked the total on money receipts as given in para no. 25 supra. The said year wise and entity wise working of on money receipts finalized by the CIT(A) was not disputed either by the assessee group or by the department. On the basis of aforesaid bifurcation of total receipts which is not disputed by the department, the 1d CIT(A) gave a findings of fact that that impugned receipt of Rs.397.10 lacs is duly taxed on substantive basis in case of Man Global Pvt. Ltd. in para no. 8.10 of the appellate order and further noted that any further addition in case of assessee will amount to double taxation of single receipts and not justifiable and thus allowed the appeal of the assessee on this issue.

83. After hearing the rival contentions and perusing the materials on records we find that that the on money recalculated by the 1d CIT(A) was accepted by the assessee as well as by the revenue. As per the said working the 1d CIT(A) recorded a finding of fact that the said amount has been taxed in the hands of group entity M/S Man global Ltd and any further addition will result in double addition resulting into double taxation which is not permitted under the Act. We have also perused the records before us along with the

working of on money done by the ld CIT(A) and do not find any infirmity in the appellate order. We are therefore upholding the order of ld CIT(A) by dismissing the ground no 1 raised by the revenue.

84. The issue raised in the 2nd ground of appeal is against the order of ld CIT(A) allowing the addition on account of scrap sale to be adjusted against the additional income offered to tax in return of income filed under section 153A of the Act thereby allowing telescoping thereof.

85. The facts in brief are that the A.O. has made addition of Rs.3,00,000/- on account of under-invoicing of scrape sales. The addition is confirmed by the CIT(A) vide para 9.2. of the appellate order however considering the additional income of Rs.5,00,000/- offered to tax in return of income filed in response to notice issued under section 153A of the Act, the CIT(A) has allowed the benefit of telescoping to the assessee in para no. 9.3 of the appellate order. It is pertinent to state that the additional income was offered to tax to just buy peace of mind and was not for any particular issue. Having considered the facts on records and rival contentions, we do not find an infirmity in the order of Ld. CIT(A) who has correctly allowed the telescoping. Accordingly the order of ld. CIT(A) is upheld in this issue by dismissing the ground no. 2 of the revenue's appeal.



86. The issue raised in the 3rd ground of appeal is against the deletion of addition Rs.3,61,48,001/- as made by the AO on account of commission paid to M/s. Alpine Enterprise LLC.

87. The facts in brief are that during the year under consideration the assessee has paid / provided commission of Rs.3,61,48,001/-to the Alpine Enterprise L.L.C for rendering various services in UAE in connection with the export to M/S Abu Dhabi Gas Industries Ltd., UAE. Accordingly the AO called upon the assessee to justify the commission payments. In order to justify the payment of commission, the assessee furnished the copy of invoice for commission, copy of contract entered between assessee and agent, copy of Form A2 – Application for payment other than imports and remittances, copy of Declaration-cum-undertaking under S.10(5), chapter III of the Foreign Exchange Management Act, 1999, copy of Form 15CA and payment proofs through banking channel after compliance with all FEMA and RBI Regulation and proofs of commission being within the limits approved by RBI. The assessee also submitted before the AO that commission payment was in connection with overseas supply order as majority of its business is to overseas customers in Oil and Gas Sector based in Middle East. As per general terms & condition, the assessee is to manufacture and supply of pipes from its factory situated in India to the port of overseas



customer's country and in certain cases till the customer's project site. As per business expediency, the assessee in the normal course of business, hires the agents based on geographical area and also project specific requirements as the case may be, who not only procured order for assessee but also provides the market analysis, indicative prices, and competitor's strategies. The agent also ensures to arrange for tender documents and assist in bidding to procure order, to collect project completion certificates, renders logistic support for ensuring safe delivery of pipes, as the case may be. The assessee submitted that in Middle East countries, in most of cases, the assessee does not have direct contacts with the agencies releasing the supply orders and therefore assessee must have local agents/intermediaries in order to procure order and enhance assessee's presence in the region. Therefore, the Company had appointed M/s Alpine Enterprise LLC as its agent to provide various services as stated herein above. The agent has been providing various marketing services from many years and the assessee has been paying commission on export sales to M/s Alpine Enterprise L.L.C. regularly based on terms and conditions agreed with it. The payments were made out of commercial expediency. The assessee also submitted that similar expenses by way of commission expenditure was consistently allowed in the earlier assessment years even in the scrutiny proceeding and therefore on the principle of consistency also these are allowable as there is no change in facts and

circumstances in the current year vis a vis earlier years. However, the AO disallowed the commission on the ground that that M/s Kala Gas Company has vide its letter dated 5th May 2011 stated that it did not know the two companies M/s Alpine Enterprise LLC and M/s Sun Overseas Trading and have had no business relationship with them of any nature. Accordingly commission paid to M/s Alpine Enterprise LLC and M/s Sun Overseas Trading in connection with the sale made to M/s Kala Gas Company cannot be accepted. The assessee also submitted that the alleged letter was part of the petition filed by Mr. J C Mansukhani, brother of the Chairman Mr. Rameshchandra Mansukhani of the Company before the Company Law Board (CLB) against the Company and its Chairman vide petition no. 72/397-398/CLB/MB/2012/603 filed in October-2012. Therefore, it is an official document filed by the then director of the Company who is in dispute with the Chairman of the Company. The alleged letter was not at all obtained or was addressed to the Company but the same was obtained by Mr. J. C. Mansukhani for the reason best known to him and only to put Company into trouble and drag the Company into unnecessary litigation. Further, the Mumbai bench of Hon'ble Company Law Board in its judgment dated 31.05.2013 has reconfirmed its decision given on 12.09.2011 (in the petition no. 78/2010 filed in October 2010 by Mr. J C Mansukhani, brother of the Chairman of the Company before the Company Law Board (CLB) against the Company and its Chairman Shri

R C Mansukhani, in favour of the Company and Chairman of the Assessee company Shri, Ramesh Mansukhani. Order of Company Law Board dated 12.09.2011 was submitted during the course of Assessment Proceeding. All these contentions did not find favour with the AO and he disallowed and added the amount of commission of Rs.3,48,61,001/- to the income of the assessee.

88. In the appellate proceeding, the ld CIT(A) allowed the appeal of the assessee on this by holding the assessee has filed all evidences in support of its claim before the AO. The ld CIT(A) noted that the commission payment was made in connection overseas supply orders as majority of its business is to overseas customers in Oil and Gas Sector based in Middle East. Ld CIT(A) also noted that as per business expediency, the in the normal course of business hires the agents based on geographical area and also project specific requirements as the case may be, who not only procures order for assessee. The ld CIT(A) also observed that the payments were made out of commercial and business expediency as these agents used to provide the market analysis, indicative prices, and competitor's strategies beside ensuring to arrange for tender documents and assist in bidding to procure order, to collect project completion certificates, renders logistic support for ensuring safe delivery of pipes, as the case may be. The ld CIT(A) also appreciated the fact that the assessee was not having contact

or physical presence in countries in Middle East and in most of the cases, the assessee does not have direct contacts with the agencies releasing the orders and assessee must have local agents/intermediaries in order to procure orders and enhance assessee's presence in the region. Therefore, the assessee had appointed M/s Alpine Enterprise LLC as its agent to provide various services as stated herein above. The agent has been providing various marketing services from many years and the assessee has been paying commission on export sales to M/s Alpine Enterprise L.L.C. regularly based on terms and conditions agreed with it. The payments were made out of commercial expediency. The ld CIT(A) also recorded a finding that the commission paid was within the standard norms of the industry and even the company law Board in a petition by the Director Mr. J. C. Mansukhani has held that the assessee has not siphoned off money by paying these commission and these were paid for genuine business requirements of arranging exports to UAE. Hence there is no scope to doubt the commission payment on the basis of letter of M/s Kala Gas Company already dealt by "CLB" in petition of Mr. J.C. Mansukhani.

89. The ld DR submitted before the bench that the commission payment was rightly disallowed by the AO after the overseas clients to whom the assessee exported material has denied any link with the agents to whom the commission has been paid. The ld DR submitted that mere fact that the

commission is paid after complying with all the statutory formalities and paid through banking channel would not ipso facto prove the genuineness of the commission. With regards the order of Company Law Board on the issue of siphoning off money in the form of commission payment, the DR argued that the genuineness of the commission has to be judged by the AO from the income tax perspective and not by any other authority. Therefore while relying heavily on the order of AO, the Id DR prayed that the order of Id CIT(A) may be set aside by restoring the order of AO on this issue.

90. Having heard both the sides and perusing the material on records including the various evidences filed by the assessee and order of Company Law Board on the very issue of commission, we find that commission payment was made by the assessee to agents for facilitating the exports orders and to comply with the formalities is genuine and can not be doubted. We note that the assessee has furnished before the AO all evidences including the permission from RBI and FEMA. The only basis for disallowing the commission was the letter from the overseas customer M/S Kala Gas Company dated 5.5.2011 stating that it did not know the two companies M/s Alpine Enterprise LLC and M/s Sun Overseas Trading and have had no business relationship with them of any nature and thus the commission paid to M/s Alpine Enterprise LLC and M/s Sun Overseas Trading in connection with the sale made to M/s Kala Gas Company

was disallowed. We also note that said letter was part of the petition filed by Mr. J C Mansukhani, brother of the Chairman Mr. Rameshchandra Mansukhani of the Company before the Company Law Board (CLB) against the Company and its Chairman vide petition no. 72/397-398/CLB/MB/2012/603 filed in October-2012 and it is an official document filed by the then director of the Company who is in dispute with the Chairman of the Company. The Company Law Board decided the issue in favour of the assessee and the operative part is reproduced as under for your ready reference purpose:

"The respondent have categorically replied in their sur-rejoinder to the each and every averment. The moneys which the petitioner alleged to be siphoned off was not utilized by the 3rd respondent individually for his sole benefit or to his family members but spent for the benefit of the Company and its business affairs. Hence, I do not find any substance in the allegation and the same are after thought and completely baseless. Accordingly the issue is answered."

91. It is clear from the above that Company Law board had specifically held that the Assessee is not involved into any siphoning off the funds and all payment including payments towards the commission alleged by the brother of the Chairman of the assessee company Mr. J. C. Mansukhani was spent for the benefit of the assessee and its business affair. Hence there is no scope to doubt the commission payment on the basis of letter of M/s Kala Gas Company already dealt by "CLB" in petition of Mr J.C. Mansukhani. It is also noteworthy that in the year under consideration, the commission was paid for exports made to M/S Abu Dhabi

Gas Industries Ltd. and not to Kala Gas Co, however, the A.O. without applying the mind has only referred the letter from Kala Gas Co. without appreciating fact that in AY 2013-14 there is no sale to Kala Gas Co. The AO on the basis of addition made in AY 2009-10 on alleged letter of Kala Gas Co. also made disallowance in AY 2013-14 without appreciating the facts correctly that there is no export to Kala Gas Co. We note that similar payment of commission has been allowed by the revenue in the earlier years and therefore even on the principal of Consistency, impugned addition on account of Export Commission can not be sustained. Besides the commission paid was in line with the practice in the industry. We observe that even the giant of the industry Jindal Saw Ltd and Welsoun Corp Ltd has even paid similar commission for export sales. Therefore we have no reasons to deviate from the conclusion drawn by Id CIT(A) on this issue who has passed a very reasoned and speaking order after following various decisions order namely S.A. Builders Ltd Vs CIT (2007)158 TAXMAN 74(SC) and CIT Vs Suzlon Energy Ltd (2013)33 taxmann.com151(Guj). Therefore the order of Id. CIT(A) is upheld by dismissing the ground no.3 of revenue's appeal.

92. The issue raised in the 4th ground of appeal is against the order of CIT(A) deleting the addition of Rs.48,84,570/- as made by the AO on account of Service charges paid to Man Overseas DMCC/-.

93. During the assessment proceeding, the AO notice that the assessee has paid Rs.48,84,570/- as service charges to Man Overseas DMCC/-. The AO noted that activities of the assessee were through brokers and agents appointed by the foreign company with which the assessee had business transactions and as such no additional services are required. The A.O. has observed that the assessee failed to prove clearly nexus between the services provided by overseas entity and the business activity of the Assessee. The assessee submitted before the AO that these service charges were paid to Man Overseas Metals DMCC under an agreement and copy of Service agreement executed with Man Overseas metals DMCC was also furnished before the AO by pin pointing the specific clauses in the agreement for services to be rendered by Man Overseas Metals DMCC. The service agreement was executed for the ease of the assessee's business transactions in UAE. Man Overseas Metals DMCC is having requisite skills and abilities and the assessee has hired its services for the ease of its business transaction. M/s Man Overseas Metals DMCC is not commission agent of the Assessee. Detailed description of its services were mentioned in service agreement. The major demand for the company's project is from Gulf countries and it is very important to have presence in that region to secure new orders, help in execution of orders and strengthening relationship with customers which will be helpful in getting more business opportunities in the region. Many companies have set up offices / branches in

Dubai for the very same region being a hub for business activities and controlling the business for the entire Middle East. As a result, to ensure smooth business operation and prompt and satisfying customer service, the services are hired. Hence the payment was made for these services as per the agreement executed in this regard. However the AO was not satisfied with the explanation of the assessee and disallowed the service charges of Rs.48,84,570/-.

94. The Id CIT(A) allowed the appeal of the assessee after taking into account the various contentions of the assessee by observing and holding as under:

“11.2 I have considered the order passed by the Id. AO and submissions of the appellant. The Id. AO has not considered the documentary evidences submitted by the appellant. He has also not considered the fact that although the major work is done by the agents the representatives of the appellant need to visit the customers and their offices, Also the fact presented by appellant that it has huge export turnover to oil companies and all oil companies have their offices in Dubai cannot be ignored. Therefore, it becomes imperative for appellant to have an office in the country through where its major turnover is being generated.

11.3 Now, it is important to consider provision of section 37 of the Act which reads as under:

37. (1) Any expenditure (not being expenditure of the nature described in sections 30 to 36 [**] and not being in the nature of capital expenditure or personal expenses of the assessee), laid out or expended wholly and exclusively for - the purposes of the business or profession shall be allowed in computing the Income chargeable under the head "Profits and gains of business or profession",

11.4 Three fold conditions prescribed under section 37 of the Act get duly fulfilled in the case of Appellant as under:

- (i) The service charge was paid in connection to the sale of the Appellant for current year and hence is Revenue expenditure.

(ii) |The expenditure was incurred for any personal purpose. The AO has not stated that the money is spent for the personal purpose.

(iii) The expenditure indeed incurred wholly and exclusively for the purpose of business of the Appellant. The Appellant has furnished the documents viz. agreement for service, bank payment proof and the payment of service charge Is essential looking at export turnover of the company in Middle East region also that It Is 100% subsidiary of the company.

11.5 It has been consistently held in decisions relating to Section 37 that the expression “for the purpose of business” Includes expenditure voluntarily Incurred for commercial expediency. The expression “commercial expediency* & an expression of wide import and includes such expenditure a6 &@ prudent businessman incurs for the purpose of business. The expenditure may not have been incurred under any legal obligation, but yet it is allowable as a business expenditure if it was incurred on grounds of commercial expediency. In this case the AO has not verified whether the service charges paid was for commercial expediency.

11.6 I also agree with the view taken by the Delhi High Court In CIT vs. Dalms Cement (Bhart) Lid. (2002) 254 ITR 377 that once it is established that there was nexus between the expenditure and the purpose of the business (which need not necessarily be the business of the assessee itself), the Revenue cannot justifiably claim to put itself in the arm-chair of the businessman or in the position of the board of directors and assume the role to decide how much Is reasonable expenditure having regard to the circumstances of the case. No businessman can be compelled to maximize its profit. The income tax authorities must put themselves in the shoes of the assessee and see how a prudent businessman would act. The authorities must not look at the matter from their own view point but that of a prudent businessman. As already stated above, I have to see the payment of service charges from the point of view of commercial expediency. Also the id. AO has not disallowed the service charges paid in AY 2014-15 and AY 2015-16 thereby contradicting his own stand.

11.7 Considering the provision of section 37 of the Act and decision of Apex Court in the case of S.A. Builders Ltd. v. Commissioner of Income-tax (Appeals), Chandigarh (2007] 158 TAXMAN 74 (SC) and Hon’ble Gujrat High Court in case of CIT V. Suzion Energy Ltd. (2013) 33 taxmann.com 151 (Gujrat), [2013] 354 ITR 630, the appellant’s claim of payment service charges of Rs.48,84,570/- is allowed. Hence, this ground of appeal is ALLOWED.”

95. We note after hearing both parties and perusing the material on records including service agreement and

evidences filed by the assessee. We note that the service charges were paid for rendering miscellaneous services under service agreement entered into with that party. The clauses of service and fee clause is extracted for ready reference as under:

“1. Services

MIL is engaging Man Overseas who has the requisite skills and abilities and experience in rendering services viz., Promoting & Marketing the products of MIL, Arranging visas for various employees of MIL, Arranging meeting of MIL with its customers in UAE, Representing MIL before various Judicial and Quasi - Judicial authorities, liaising with various clients of MIL in UAE, obtaining tender for various orders making all the arrangement for the meting including travelling within UAE etc.,

3. Fees and Expenses

For the services rendered by Man Overseas under this Agreement, MIL will make payments of AED 9,00,000/- per annum to Man Overseas. This shall be exclusive of the actual cost incurred by Man Overseas exclusively for and on behalf of MIL while performing its duties under this agreement.”

96. It is clear from the above that nature of services as covered in the service agreement are not rendered by the agents and Id CIT(A) has given a specific finding on this aspect. The services include viz., Promoting & Marketing the products of MIL, arranging visas for various employees of MIL, arranging meeting of MIL with its customers in UAE, representing MIL before various Judicial and Quasi - Judicial authorities, liaising with various clients of MIL in UAE, obtaining tender for various orders making all the arrangement for the meting including travelling within UAE etc. There is no iota of evidence to show that the payment of



service represented only accommodation entry or was only a paper transaction. There is also no evidence to show that the amount of service charges came back to the assessee in any form. Since the assessee has given full details of service charges, i.e. service agreement, payment details etc., the transactions of payment of service charges as well as the aspect of rendering services by Man Overseas Metals DMCC were fully verifiable. As per the binding agreement the assessee has paid Service charges. The payments were made after making compliance of all RBI and FEMA regulations in this regard. We also note that that total turnover of the Assessee for A.Y. 2013-14 is of Rs.15,40,91,99,878/- and the payment is just Rs.48,84,570/-. Hence % of alleged charges comes to just 0.03%. Considering the materiality aspect there is no scope to doubt the genuineness and commercial expediency of the impugned service charges. If the assessee could offer Rs.1540/- Crores of turnover and profit of Rs.142/- crores then it is hypothetical, to assume that the assessee has taken accommodation entry of Rs.48,84,570/- which is just 0.03% of total turnover to avoid the payment taxes and thereby invited long drawn litigation. The expression "commercial expediency" is an expression of wide import and includes such expenditure as a prudent businessman incurs for the purpose of business. The case of the assessee finds support from the decision of Hon'ble Apex Court in the case of S.A. Builders Ltd. v. Commissioner of Income-tax (Appeals),

Chandigarh (2007] 158 TAXMAN 74 (SC) wherein the Hon'ble court has held that the AO can not decide what is right for the business and decide what are the expenses to be incurred for the business. We note that Id CIT(A) has dealt with the issue regarding the allowability of service charge in para no. 11 of the appellate order. Considering the provisions of section 37 of the Act and decision of Supreme Court in case of S.A. Builders Ltd Vs. Commissioner of Income Tax (Appeals) and reasoned order of CIT(A) we are inclined to uphold the order of CIT(A) on the issue of service charges by dismissing the ground no.4 of the revenue's appeal.

97. The issue raised in the 5th ground of appeal is against the deletion of addition as made by the AO to the book profits u/s 115JB of the Act. The issue raised is similar to one as decided by us in ground no.2 in revenue's appeal in ITA No.7539 & 7432/Mum/2019 from para no.42 to 48 supra wherein we have upheld the order of Id CIT(A) by dismissing the ground raised by the revenue. Our decision on this issue would, mutatis mutandis, apply to ground no.5 of this appeal as well. Accordingly the ground no.5 is dismissed.

98. The issue raised in the 6th ground of appeal is against the deletion of addition of Rs.1,68,96,638/- by CIT(A) as made by the AO on account of Depreciation of claimed on account of premium.

99. During the course of Assessment Proceeding the A.O. observed that the assessee has made excess payment to the bond holder to the extent of Rs.12,40,33,655/- and accordingly depreciation on capitalized premium amounting to Rs.1,68,96,338/- was claimed by the assessee. The AO during the assessment proceedings noted that depreciation on the excess payment made to FCCB holders can not be allowed and added the same to the income of the assessee.

100. The 1d CIT(A) allowed the appeal of the assessee by observing that the AO has not disputed the fact that the withholding tax is paid actually paid by the Assessee. Further it is also not a case wherein the assessee has recovered withholding tax from the bond holder. The payment made by the assessee is its business decision and accordingly the payment in question should be allowed.

101. After hearing the parties and material placed before us, we note that the assessee has redeemed FCCB and paid total premium of 1,12,05,07,097/- by grossing up the amount by withholding tax. In other words the TDS deducted and deposited by the assessee on behalf bondholders was treated as part of that. Besides we note that claim was in accordance with section 195A of the Income Tax Act, 1961 as the Company paid withholding tax of Rs.12,40,33,655/- by the grossing up the amount of premium and paid Rs.112,05,07,097/- as premium on redemption of FCCB to

bondholder. We also note that it has been provided in the section 195A itself which is extracted below:

“In a case other than that referred to in sub-section (1A) of section 192, where under an agreement or other arrangement, the tax chargeable on any income referred to in the foregoing provisions of this Chapter is to be borne by the person by whom the income is payable, then, for the purposes of deduction of tax under those provisions such income shall be increased to such amount as would, after deduction of tax thereon at the rates in force for the financial year in which such income is payable, be equal to the net amount payable under such agreement or arrangement.”

101.1 We note that the case of the assessee is squarely covered by the decisions in the case of Commissioner of Income Tax V. Standard Polygraph Machines (P) Ltd. (2002) 124 taxman 669 (Madras High Court) and ACIT 2(1) V. M/s. BOB Card Ltd. ITA No. 7660/Mum/2011 – Tribunal, Mumbai wherein the issue has been decided in favour of the assessee. We therefore respectfully following the ratio laid down in the above decision uphold the order of Id. CIT(A) by dismissing the ground no.6 of the Revenue’s appeal.

ITA No. 7529/Mum/2019 (A.Y 2014-15)

102. The grounds raised by the Revenue are as under:

“1. Whether on the facts and circumstances of the case and in the law, the Ld. CIT(A) erred in deleting the addition of Rs.7,47,59,000 as alleged receipt of on money without appreciating the fact that the AO had done extensive study and investigation of the excel extracts of the seized Hard Disc to arrive at the figure of Rs.747.59 Lakhs which is clearly specified in the assessment order.

2. Whether on the facts and circumstances of the case and in the law, the Ld. CIT(A) erred in deleting the addition made to the 115JB income without appreciating the fact that Apex Court in the case of Apollo Tyres Ltd has decided the issue in favor of the revenue.”

103. The facts in brief are that after search on the assessee on 10/12/2014, an assessment under section 143(3) r.w.s. 153A of the Act was framed on 29/12/2017 by the AO making an addition of Rs.7,24,14,600/- on account of on money on the basis of hard disc seized from the premises of M/S Man Global Ltd. The ld CIT(A) in the appellate proceedings, deleted the addition on the ground that the on money has been taxed in the hand of another group concern M/S Global Ltd on substantive basis as noted by the ld CIT(A) in para 8.9 of the appellate order. As has been mentioned above yearwise and entity wise working of on money receipts finalized by the CIT(A) was not disputed either by the Assessee Group or the department. The aforesaid year wise and entity wise bifurcation is duly accepted as such. In this background our decision on the grounds of appeal are as follows.

104. The issue raised in ground no .1 is similar to one as decided by us revenue's appeal in ITA No.7430/Mum/2019 A.Y.2013-14 (supra) upholding the order of ld CIT(A) on this issue. Therefore our decision would, mutatis mutandis, apply to ground 1 of this as well. Accordingly the ground no. 1 is dismissed by upholding the order of ld CIT(A).

105. The issue raised in ground no .2 is similar to one as decided by us in revenue's appeal in ground no. 2 in ITA No.7539 & 7432/Mum/2019 in para 42 to 48 supra

upholding the order of Id CIT(A) on this issue. Therefore our decision would, mutatis mutandis, apply to ground of this as well. Accordingly the ground no. 2 is dismissed by upholding the order of Id CIT(A).

ITA No. 7531/Mum/2019 (Revenue's appeal) A.Y. 2015-16 & ITA No.7409/MUM/2019 (Assessee's appeal) A.Y. 2015-16

ITA No.7531/Mum/2019

106. The grounds raised by the Revenue are as under:

"1. Whether on the facts and circumstances of the case and in the law, the Ld. CIT(A) erred in deleting the addition of Rs.6,40,49,000 as alleged receipt of on money without appreciating the fact that the AO had done extensive study and investigation of the excel extracts of the seized Hard Disc to arrive at the figure of Rs.640.49 Lakhs which is clearly specified in the assessment order.

2. Whether on the facts and circumstances of the case and in the law, the Ld CIT(A) erred in allowing the commission paid to M/s. Alpine Enterprises LLC, without appreciating the fact that M/s. Alpine Enterprises LLC was found to be owned by Shri Lavin Mnasukhani, who was the nephew of Shri Ramesh Chandra Mansukhani and Jagdish Chandra Mansukhani, the Chairman and Director of Man Group.

3. Whether on the facts and circumstances of the case and in the law, the Ld. CIT(A) erred in deleting the addition made to the 115JB income without appreciating the fact that Apex Court in the case of Apollo Tyres Ltd has decide the issue in favor of the revenue.

4. Whether on the facts and circumstances of the case and in the law, the Ld. CIT(A) erred in deleting the addition of Rs.4,57,46,796 on account of G.P. on additional bogus purchase without appreciating the fact that Ld CIT(A) has himself confirmed the addition made by the AO on account of bogus purchases made by the assessee from M/s Harmony Exim Pvt Ltd which clearly indicates that the assessee company was engaged in making accommodation entries for evading tax."

107. The issue raised in ground no.1 is similar to one as decided by us in ITA No.7430/Mum/2019 A.Y.2013-14

(supra) upholding the order of ld CIT(A) on this issue. Therefore our decision would, mutatis mutandis, apply to ground 1 of this as well. Accordingly the ground no. 1 is dismissed by upholding the order of ld CIT(A).

108. The issue raised in ground no.2 is against the order of ld CIT(A) deleting the addition of Commission paid to M/s. Alpine Enterprises LLC. As we have decided the similar in ground no.3 in ITA No.7530/M/2019 A.Y.2013-14 (supra) in assessee's own case wherein we have dismissed the appeal of the revenue by upholding the order of ld. CIT(A). Therefore, our decision would, mutatis mutandis, apply to ground of this as well. Accordingly the ground no. 2 is dismissed by upholding the order of ld CIT(A).

109. The issue raised in ground no.3 is against the order of ld. CIT(A) deleting the addition as made by the AO to book profit u/s 115JB of the Act. Since we have decided similar issue in in ground no.2 in revenue's appeal in ITA No.7539 & 7432/Mum/2019 from para no.42 to 48 (supra) by upholding the order of ld CIT(A). Therefore our decision would, mutatis mutandis, apply to ground no.3 of this appeal as well. Accordingly the ground no.3 is dismissed by upholding the order of ld CIT(A).

110. The issue raised in 4th ground of appeal is against the deletion of addition of Rs.4,57,46,796/- by ld CIT(A) as made

by the on account G.P. addition on purchase from M/s Harmony Exim Pvt. Ltd.

111. The facts in brief are that during the course of assessment the A.O. has observed that during the year the assessee has made total purchases of Rs.1,45,44,11,852/- (net amount of Rs.1,38,51,53,187/- + MVAT Rs.6,92,58,665) from M/s Harmony Exim Pvt. Ltd. Out of total purchase, Rs.9,14,75,919/- is for manufacturing purposes whereas remaining purchases of Rs.136,29,35,993/- were for trading purposes. During the course of search proceedings, a survey was also conducted at office premises of Harmony Exim Pvt. Ltd. and statement of Shri Ajay Singhal who provided entries to the assessee was recorded on 11.10.2014. Mr. Ajay Singhal admitted in his statement that he was issuing bogus bills to Man Industries (I) Ltd. from his concern M/s. Harmony Exim Pvt. Ltd. without supplying actual material and received a commission of Rs.0.25%. A statement was also recorded under section 132(4) of Shri Sachin Surekha on 11.12.2014 and 12.12.2014 during the course of search proceedings on Man group and it was found that Shri Sachin Surekha was mediator for arranging bills to M/s. Man Industries (I) Ltd. Similarly a statement was recorded under section 132(4) of Shri Dilip Chokra and Shri Ashok Kumar Gupta of CFO of Man group on 13.12. 2014. Shri Ashok Kumar Gupta was confronted with other statements recorded during search and survey in which he stated that material of

Rs.9,15,00,000/- was never received and even confirmed that no physical material has been received at the plant from M/s. Harmony Exim Pvt. Ltd. On the basis of this, the AO came to the conclusion that M/s. Harmony Exim Pvt. Ltd. provided sales bills to the assessee of Rs.9,14,75,919/- crores against which no materials were received. Besides, the assessee could not provide any transport receipts or freight receipts in support of purchases. Accordingly, AO came to the conclusion that material purchased from M/s. Harmony Exim Pvt. Ltd. was not genuine. The AO noted that assessee is in the business of manufacturing and hence received accommodation entries and thus inflated the purchases. Accordingly, the AO rejected the books of accounts of the assessee under section 145(3) of the Act and added the entire purchases of Rs.9,14,75,919/- to the income of the assessee. The AO with regard to the remaining purchases of Rs.136,29,35,933/- which were made for trading purposes and did not come to the plant of the assessee, the AO observed that these purchases were also not fully genuine and after computing the average GP of the assessee which ranged between 1% to 2% came to the conclusion that the estimated GP of 5% would be sufficient to cover up all the leakages of revenue and accordingly calculated the estimated profit @5% which comes to Rs.6,81,46,796/-. Out of this, assessee has already offered Rs.2,24,00,000/- to tax and therefore remaining profits Rs.4,57,46,796/-

(Rs.6,81,46,796-2,24,00,000) was added to the income of the assessee.

112. In the appellate proceedings, the ld CIT(A) deleted the addition of Rs.4,57,46,796/- after taking into account the contentions made by the assessee by observing and holding as under:

“9.6 The fact that the assessee had made purchases for manufacturing and for trading purposes is not disputed by the AO. While the purchases for manufacturing to the extent of Rs.9,14,75,919/- have been admitted as bogus by both the parties, this is not so with the trading purchases. Both, Shri. Ajay Singhal, Shri. Sachin Surekha have confirmed that these are genuine sales made to the appellant. The appellant has also confirmed that these purchases are genuine. The purchases have been recorded in the books and corresponding sales have also been recorded which should not be proved to be false. The AO has rejected the books' of account of the assessee only on the presumption that the purchases are non-genuine. While it is admitted that the assessee did indulge in getting some accommodation entries, it cannot be presumed that the entire purchases made by the assessee are bogus. Specially, when the corresponding sales are also recorded and profit also declared, on the same. As the estimation of additional profit on the alleged bogus purchases is merely on presumptions and suspicions, the same cannot be upheld. In the other case where GP has been estimated, there was no confirmation from the seller party or the sellers could not be located. But in this case, both the parties have confirmed to the transactions and therefore, estimating of additional GP is not warranted. The addition made by the AO is deleted. This ground of appeal is **ALLOWED.**”

113. The ld DR submitted before the bench that during the course of search on the assessee and survey on Harmony Exim Pvt. Ltd., as is clear from the statements recorded u/s 132(4) and 133A and 131 of the Act of various key persons as stated above, all the purchase were not genuine. The ld DR submitted that the subsequent retraction by Shri Ramesh Chandar Mansukhani vide statement dated 09/12/2016 that

these purchases were genuine is an after thought and was planned to evade the action of the department. The DR strongly objected to the findings of Id CIT(A) on the issue that purchases of Rs.1,36,29,35,933/- were genuine and not disputed by any of persons whose statements were recorded. The Id DR contended that the statements were matching earlier however these were contradicted by Ramesh Chandar Mansukhani vide statement dated 09/12/2016 by filing various evidences. The Id DR therefore prayed that the order of Id CIT(A) deleting the addition of Rs.4,57,48,001/- may kindly be reversed and order of the AO may be restored.

114. The Id AR submitted before the bench that statements of Shri Ajay Shingal was recorded during the course of survey proceedings. It is submitted that the statement recorded on oath during the survey cannot be the sole basis for taking adverse view against the Assessee. Section 133A of the Act does not empower any income tax authorities to examine any person on oath, hence any such statement lacks evidentiary value and any admission made during the survey cannot by itself be made the basis of addition unless some backed by some substantive materials as held in the case of CIT vs Khader Khan Son 352 ITR 480 (SC).

115. As regards to the statement dated 13.12.2016 the Id AR submitted that vide said statement, Mr. Ajay Shingal has confirmed that out of total sales to M/s Harmony Exim Pvt.



Ltd., Sales of Rs.145,44,11,852/- were genuine sale and sale of Rs.9,14,75,919/- represented just sale bill. Hence both the statements of Mr. Ajay Shingal is contradictory. Vide statement dated 11/12/2014, he has alleged that sales of Rs.145,44,11,852/ were sale without actually delivery of goods. As against that vide statement dated 13/12/2016, he has accepted that sales of Rs.145,44,11,852/- were genuine sales to Man Industries (India) Limited. Hence both statements are contradictory and cannot be relied upon.

116. The ld AR submitted that the Assessee has duly furnished the confirmation of account of M/s Harmony Exim Pvt. Ltd accepting to have made sales to the assessee and has received consideration through the regular banking channel. In addition to this, the ld AR stated that the ld. A.O. failed to provide an opportunity to cross examine Mr. Ajay Singhal before drawing adverse inference against the assessee on the basis of impugned statements. Any addition on the basis of third party statement without giving an opportunity of being heard is bad in law and deserved to be deleted as has been held in catena of judicial rulings which includes following namely (i) Hon'ble Gujarat High Court in case of commissioner of Income Tax Vs. Chartered Speed Pvt. Ltd vide Tax Appeal No: 126 of 2015 dated 3/03/2015, (ii) CIT vs. Eastern Commercial Enterprises 210 ITR 103 and (iii) Commissioner of Income Tax Vas. Sunita Dhadda 2018 (3) TMI (1610). Then ld AR submitted that besides Chairman

Shri Ramesh Chandar Mansukhani vide statement dated 09/12/2016 has furnished detailed rebuttal and also filed evidences in the form of stock register, confirmation by vendor of goods, consumption reports etc., which were suffice to explain the genuineness of purchase made from M/s Harmony Exim Pvt. Ltd. The evidences and further clarification by the chairman of the assessee company proved beyond doubt that statement of Dilip Chokra was given under distress and undue pressure consequent to extensive search proceedings without verification of facts of the case and cannot be relied upon. On the allegation of the A.O. that vide statement dated 13/12/2014 Shri Ramesh Chandra Mansukhani has accepted that purchases from M/s Harmony Exim Pvt. Ltd. of Rs.9,14,75,919/- crores is unsubstantiated purchase whereas in the statement dated 09.12.2016 the stated the purchases as genuine. The ld AR stated that the detailed explanation was given by the chairman of the assessee. On account of extensive search proceedings and continuous recording of statement under section 132 of the Act, the chairman of the assessee Shri Ramesh Chandar Mansukhani was under the state of trauma and distress. Shri Ramesh Chandara Mansukhani has not verified the facts regarding purchases made Harmony Exim Pvt. Ltd. Under these circumstances he has accepted the statement of Shri Ashok Gupta and offered to disclose purchases of Rs.9,14,75,919/- lakhs as additional income. However, the transaction of Purchases from Harmony Exim

Pvt. Ltd was verified in detail. Accordingly detailed explanation was given later on vide statement dated 09/12/2016 wherein Shri Ramesh Chandra Mansukhani has explained that purchases from Harmony Exim Pvt. Ltd were genuine purchases, delivery against the purchase received and these purchases were consumed in manufacturing process. The A.O. has relied upon statement recorded during the course of search proceedings i.e. on 13/12/2014. Detailed clarificatory statement of Shri Ramesh Chandra Masukhani dated 09/12/2016 recorded on oath was grossly ignored by A.O. without pointing any defects or without bringing any corroborative evidence to substantiate that the purchases from M/s Harmony Exim Pvt. Ltd. were bogus purchase. The Ld. A.O. fails to consider the following documents / explanation submitted by the assessee to prove the genuineness of purchase transaction from M/s Harmony Exim Pvt. Ltd., which clearly proved prejudicial mindset of A.O. Confirmation of account of Harmony Exim Pvt. Ltd wherein they have duly accepted to have sold goods to the assessee was also produced. The ld AR submitted that following documents were filed to prove the purchases by the assessee:

- (i) Copies of bank statements
- (ii) Copies of VAT returns of the Assessee as well as Vendor of the goods in question.
- (iii) Copies of lorry receipts, transportation receipts etc. furnished by the Assessee.
- (iv) Copy of stock registers
- (v) Copies of inspection report and consumption report

- (vi) The fact that the purchases were consumed in manufacturing process and resultant finished goods were sold fully. Stock purchased for trading was sold out fully and resultant profit was offered to tax.
- (vii) Mostly importantly, the detailed explanation furnished by Shri Ramesh Chandra Mansukhani vide statement on oath recorded on 09/12/2016.

117. The ld AR contended that sole reliance to statement of the Chairman recorded during the course of search proceeding cannot constitute basis since it was already retracted and that the assessing officer has not found any independent material other than the statement. Hence impugned addition relying to the statement is not justifiable. As regards to the validity of statement given by Shri Ramesh Chandar Mansukhani on 09/12/2016 the Assessee relies to the following judicial pronouncements:

- (i) Commissioner of Income-tax, Karnataka Vs. Shri Ramdas Motor Transport Ltd. [2015] 55 taxmann.com 176 (Andhra Pradesh)
- (ii) Manjit Singh Vs. Assistant Commissioner of Income-tax, Circle (iv), Amritsar* [2017] 85 taxmann.com 210 (Amritsar - Trib.)
- (iii) Deputy Commissioner of Income-tax Vs Narendra Garg & Ashok Garg (AOP) [2016] 72 taxmann.com 355 (Gujarat)
- (iv) Kailashben Manharlal Chokshi v. Commissioner of Income-tax [2008] 174 Taxman 466 (Gujarat)

118. The ld AR finally submitted that in view of the above facts the order of ld CIT(A) in respect of deletion of estimated addition 4,57,48,001/-may kindly be upheld by dismissing ground no. 4 of the revenue's appeal.

119. After hearing the arguments of both the sides and perusing the material on records including the impugned order of the ld CIT(A), we find that the purchases of

1,36,29,35,933/- were not at all disputed and it was accepted by assessee as well as supplier that these supplies were in fact made to the assessee and have been further sold off. We note that ld AO estimated the profits by treating the purchases as not fully genuine for which there were corresponding sales. We also note that the assessee has produced the following evidences before the authorities below as well as before us to prove the genuineness of the purchases:

“Ledger account of M/s Harmony Exim Private Limited

1. Bank statement reflecting the payment made to Harmony Exim Pvt. Ltd
2. Delivery challans of M/s Harmony Exim Pvt. Ltd.
3. Annual accounts of M/s Harmony Exim Pvt. Ltd for F.Y. 2014 – 15
4. Relevant extract from VAT return filed by the Assessee wherein purchase made from M/s Harmony Exim Pvt. Ltd was duly disclosed.
5. Relevant extract from VAT return of M/s Harmony Exim Pvt. Ltd wherein sale to the Assessee was duly disclosed.
6. Copies of Bank statement of Harmony Exim Pvt. Ltd giving the particulars of amount received from the Assessee
7. Confirmation of account of M/s Harmony Exim Pvt. Ltd.
8. Invoice copies in respect of purchase made by M/s Harmony Exim Pvt. Ltd corresponding to sale made to the assessee”

120. Thus it is clear from the above that materials purchased was sold and stock tally was also produced before the AO as well as CIT(A). The AO has relied on solely on the statement recorded during search and survey without bringing any substantive evidences on records. As is clear from the evidences filed by the assessee, the AO has not pointed out any defect or deficiency in those evidences. We find merit in the arguments of the ld AR that statements recorded on oath during the survey cannot be the sole basis for taking adverse

view against the assessee and has no evidentiary value as held by the Hon'ble Apex Court in the case CIT vs Khader Khan Son (Supra). Similarly the statement made u/s 132(4) also has no evidentiary value unless some materials is there on the record to corroborate the same. The case of the assessee find support from the case Commissioner of Income-tax, Karnataka Vs. Shri Ramdas Motor Transport Ltd. (Supra) wherein it has been as under

"Section 132, read with section 37(1) of the Income-tax Act, 1961 - Search and seizure (Statement under section 132(4)) - Assessment year 1984-85 - Assessing Officer relied upon a statement recorded under section 132(4) from managing director of assessee company, disallowed deduction towards commission and brokerage on sale of automobile parts - Whether Explanation to section 132(4) is retrospective in nature - Held, yes - Whether since statement recorded under section 132(4) had been retracted and revenue did not press into service any other supporting material, assessee was entitled for deduction towards commission and brokerage - Held, yes [Para 22] [In favour of assessee]"

121. In view of these facts and circumstances and judicial decisions as discussed above we find that ld CIT(A) has taken correct view after taking into accounts facts on records and accordingly the order of ld CIT(A) is upheld by dismissing the ground no.4 of the revenue appeals.

ITA No. 7409/MUM/2019(Assessee's Appeal)

122. The ground raised by the assessee is as under:

"The learned Commissioner of Income Tax (Appeals) - 49, Mumbai erred in confirming the addition of Rs.9,14,75,919/- made by the learned Dy. Commissioner of Income Tax, Central Circle - 7 (2), Mumbai on account of raw materials purchased from M/s. Harmony Exim Pvt Ltd by treating it as bogus purchases."

123. The issue raised is against the confirmation of addition of Rs.9,14,75,919/- by Id CIT(A) as made by the AO on account of non genuine purchases. The facts qua this addition has also been discussed while in ground no 4 of the cross appeal. The AO made the addition on the basis of statement of some employees of the Man group and also Chairman of the Company Shri Ramesh Chandra Mansukhani who latter on retracted from his statement. While searching Man Group, a supplier of materials M/s. Harmony Exim Pvt. Ltd was surveyed and statements were recorded u/s 133A and 131 of the Act as discussed above while deciding the ground no 4 in the cross appeal of the Revenue. Accordingly the AO called upon the assessee to prove the genuineness of the purchases and also required the assessee to furnished evidences in support of its claim. We note that the assessee filed the following documents to prove the purchases:

- i. Ledger account of Harmony Exim Pvt. Ltd.
- ii. Copy of Store issue report wherein HR coil purchase from M/s Harmony Eximp Pvt. Ltd. were shown to be issued for production / manufacturing of spiral pipes
- iii. Copy of inspection report was also filed before AO
- iv. Copy of lorry receipt in respect of goods transported from Mumbai to Anjar
- v. Stock register showing month wise receipt and consumption of HR Coil.

124. We also note on the basis of records before us that the assessee had purchased the said materials 2093.335 MT of HR coil amounting to Rs.9,14,75,919 (i.e. 89743813 + CST 1732106) for manufacturing of Spiral Pipes at its Anjar Plant.

The said material was utilized for manufacturing of Spiral Pipes in respect of sales order received from following parties for their project called “SAUNI YOJNA”:

1. NCC Limited
2. SPML Limited

124.1 We also note that the corresponding sales were duly credited to Profit & Loss account of current year and resultant profits were duly offered to tax which leaves no scope for any adverse inference to be drawn in this regard. However the AO was not satisfied with the explanation of assessee and disallowed and added the entire purchases made for manufacturing purposes of Rs.9,14,75,919/- to the income of the assessee.

125. The 1d CIT(A), in the appellate proceeding, dismissed the appeal of the assessee on this ground that both the parties and their employees whose statement were recorded during search and survey has admitted that no materials have either been sold physically or received in the assessee's plant by observing and holding as under:

126. We have heard the rival parties and perused the materials on records. Undisputed facts are that the assessee as well as M/S Harmony Exim Pvt. Ltd have admitted to fact that these were accommodation entries only and no physical delivery of materials were made to the assessee. However the assessee filed various documents viz. Ledger account of Harmony Exim Pvt. Ltd, copy of Store issue report wherein

HR coil purchase from M/s Harmony Exim Pvt. Ltd. were shown to be issued for production / manufacturing of spiral pipes, copy of inspection report was also filed before AO, copy of lorry receipt in respect of goods transported from Mumbai to Anjar and stock register showing month wise receipt and consumption of HR Coil. Under these circumstances the only possibility is that though the purchases are held to be bogus but certainly the purchases were made from some other source in the grey market. Such purchases can not be ruled out as the materials were used in the manufacturing process, the inspection report whereof was on the records and stock register showing monthwise receipt and consumption of materials. So under these circumstances it is settled position now that entire alleged bogus purchases can not added to the income of the assessee as it would affect the profits of the assessee unrealistically and unreasonably. Therefore under such circumstances only profit margin on those bogus purchases can at the most be added. Accordingly we set aside the order of ld CIT(A) on this issue and direct the AO to apply a profit rate of 5% on the bogus purchases of Rs.9,14,75,919/-. The appeal of the assessee is **partly allowed**.

127. In the result, all the appeals of the Revenue are dismissed and cross objections of the assessee in CO Nos.81, 86, 87, 88, 89, 90, 91, 92/M/2021 are allowed whereas cross objections of assessee in CO No.82, 83, 84, 85/M/2021 and



the appeal of the assessee in ITA No.7409/Mum/2019 are partly allowed.

Order pronounced on 25.11.2021

Sd/-

(अमरजीत सिंह / AMARJIT SINGH)
(न्यायिक सदस्य/ JUDICIAL MEMBER)

Sd/-

(राजेश कुमार /RAJESH KUMAR)
(लेखा सदस्य / ACCOUNTANT MEMBER)

मुंबई, दिनांक/ Mumbai, Dated:

सुदीप सरकार, व.निजी सचिव /Kishore, Sr.PS

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

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

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai