

IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH: KOLKATA
[Before Shri Sanjay Garg, Judicial Member & Shri Rajesh Kumar, Accountant Member]

I.T.A. No. 2094/Kol/2017
Assessment Year : 2010-11

M/s Salarpuria Properties Pvt. Ltd. (PAN: AAGCS 8492 P)	Vs.	DCIT, Circle-1, Kolkata
Appellant		Respondent

I.T.(SS).A. Nos. 42 to 44/Kol/2019
Assessment Years : 2010-11 to 2012-13

M/s Salarpuria Properties Pvt. Ltd. (PAN: AAGCS 8492 P)	Vs.	ACIT, CC-3(2), Kolkata
Appellant		Respondent

I.T.(SS).A. Nos. 54 to 57/Kol/2019
Assessment Years : 2013-14 to 2016-17

M/s Salarpuria Properties Pvt. Ltd. (PAN: AAGCS 8492 P)	Vs.	ACIT, CC-3(2), Kolkata
Appellant		Respondent

I.T.(SS).A. Nos. 64 to 67/Kol/2019
Assessment Years : 2010-11, 2014-15 to 2016-17

ACIT, CC-3(2), Kolkata	Vs.	M/s Salarpuria Properties Pvt. Ltd. (PAN: AAGCS 8492 P)
Appellant		Respondent

C.O. Nos. 42 to 45/Kol/2019
(Arising out of IT(SS)A Nos. 64 to 67/Kol/2019)
Assessment Years : 2010-11, 2014-15 to 2016-17

M/s Salarpuria Properties Pvt. Ltd. (PAN: AAGCS 8492 P)	Vs.	ACIT, CC-3(2), Kolkata
Cross-objector		Respondent

Date of Hearing	14.03.2022
Date of Pronouncement	10.05.2022
For the Appellant	Shri Siddharth Jhajharia, A.R Shri Sujoy Sen, A.R
For the Respondent	Shri Amal Kumar, CITDR

ORDER

Per Shri Rajesh Kumar, AM:

The above cross-appeals filed by the assessee as well as by the revenue are directed against the orders passed by the Ld. Commissioner of Income Tax (Appeals)-Kolkata (hereinafter referred to as the Ld. CIT(A)) all even dated 06.02.2018 for AY 2010-11 to 2016-17. The assessee has also filed the cross-objections against the appeals of the revenue for AY 2010-11 and AY 2014-15 to 2016-17 respectively supporting the orders of the ld CIT(A).

2. First we shall take up the Assessee's appeal in ITA No. 2094/Kol/2017 for AY 2010-11. The Grounds of appeal raised by the assessee are as under:

1. *For that in view of the facts and circumstances of the case the Ltd. CIT(A) was wholly wrong & unjustified in confirming the disallowance made by the A.O of the assessee's claim of deduction of Rs. 6,81,07,687/- u/s 801 A(4)(iii) of the Act based on the Audit Report u/s 801 A(4)(7) in respect of the Industrial Park " Salarpuria Touchstone " on the sole ground that the assessee company failed to furnish the CBDT Notification in support of such claim.*

The arbitrarily actions of both the A.O and the Ld. CIT(A) may kindly be reversed and the deduction u/s 80IA(4)(iii) may kindly be directed to be allowed in full.

2. *For that in view of the facts and circumstances of the case the Ltd. CIT(A) was wholly wrong & unjustified in confirming the disallowance of the deduction of Rs. 6,81,07,687/- u/s 80IA(4)(iii) without considering the facts that since filing of the Application on 15.12.2006 under the I.P scheme. 2002 before the concerned Authority all the requisite papers & documents were periodically*

filed and all the formalities were observed to obtain the approval u/s 801 A(4)(iii) and in that event the assessee company cannot be legally deprived of the said deduction merely due to the failure of the CBDT to issue the Notification for no fault of the assessee.

3. *For that in view of the facts and circumstances of the case the Ltd. CIT(A) was wholly wrong & unjustified in directing the A.O to verify the TDS data in the ITD system and allow, if found correct, the assessee's claim of TDS of Rs. 9,68,352/- which was not allowed in the assessment, instead of issuing a clear direction to the A.O to straightway allow the TDS credit of Rs. 8,30,070/- at least on the basis of the TDS certificates and other relevant papers filed before him identifying which particular TDS amounts were disallowed in the assessment.*

4. *For that in view of the facts and circumstances and your petitioner being fully eligible for MAT credit of taxes of the earlier assessment years (i.e A.Ys 2006-07 to 2009-10) amounting to Rs. 16,77,72,220/- admissible u/s 115JAA, the AO may kindly be directed to allow such credit even though such ground was not raised before the Ld. CIT(A).*

5. *For that in view of the facts and circumstances of the case the Ltd. CIT(A) was wholly wrong & unjustified in not allowing the Ground no. 4 of the Appeal relating to the excess levy of interest of Rs. 17,433/- u/s 234C of the Act (Rs. 18,51,093/- levied by the A.O Less Rs. 18,33,660/- offered by the assessee company).*

6. *For that in view of the facts and circumstances of the case the Ltd. CIT(A) was wholly wrong & unjustified in not allowing the Ground no. 5 of the Appeal relating to the granting of interest u/s 244A of the Act as the assessee is entitled to on the amount of Refund claimed in the Return.*

7. *For that your petitioner craves the right to put additional grounds and / or to alter / amend / modify the present grounds before or at the time of hearing.*

3. The issue raised in ground no. 1 & 2 is against the order of Ld. CIT(A) upholding the order of AO wherein the deduction claimed by the assessee u/s 80IA(4)(iii) of the Income Tax Act, 1961 (hereinafter referred to as the Act) in respect of profits from industrial park known as "Salarpuria Touchstone" has been rejected on the ground that the assessee has failed to furnish the CBDT notification qua the said Industrial Park.

3.1. The facts in brief are that the assessee has filed return of income on 9.10.2010 which was revised on 27.12.2010. The return was processed u/s 143(1) of the Act accepting the returned income. Thereafter the case of the assessee was selected under scrutiny and statutory notices were duly issued and served upon the assessee. During the assessment proceedings, the AO noticed that the assessee has claimed deduction u/s 80IA at Rs. 31,82,31,912/- as well as deduction u/s 80IB at Rs. 57,47,32,064/-. Accordingly, the AO called upon the assessee to produce the books of accounts, bills and vouchers with details as to the said claim of deduction u/s 80IA and 80IB of the Act besides audit reports in Form No. 10CCB. The AO called upon the assessee to furnish the copies of notification issued by CBDT in respect of its claims u/s 80IA & 80IB of the Act however the same could not be produced in respect of industrial park known as “Salarpuria Touchstone” whereas the notification was duly produced in respect of Salarpuria G.R. Tech Park, Phase-II. For the sake of ready reference the details of deductions u/s 80IA and 80IB of the Act during the year as given below:

Deduction u/s 80IA

Salarpuria G.R. Tech Park, Phase-II, Deduction u/s 80(IA) Rs. 25,01,24,225/-

Salarpuria Touchstone ***Deduction u/s 80(IA) Rs. 6,81,07,687/-***

Deduction u/s 80IB

Salarpuria Sanctity ***Deduction u/s 80(IB) Rs. 48,89,64,524/-***

Salarpuria Serenity ***Deduction u/s 80(IB) Rs. 8,57,67,540/-***

Accordingly the AO came to the conclusion that deduction of Rs. 6,81,07,687/- as claimed u/s 80IA of the Act in respect of “Salarpuria Touchstone” cannot be allowed in absence of the notification of CBDT and consequently the same was rejected by the AO in the assessment framed u/s 143(3) of the Act vide order dated 26.03.2013.

3.2. The aggrieved assessee assailed the order of AO before the Ld. CIT(A). The Ld. CIT(A) dismissed the appeal of the assessee on this issue by upholding the order

of AO on the ground that the industrial park of the assessee i.e. Salarpuria Touchstone was not notified by CBDT/competent authority as mandated under the Act. The Ld. CIT(A) has referred to the provision of section 80IA(4)(iii) of the Act and finally held that there is no infirmity in the order of AO in rejecting the claim of the assessee u/s 80IA of the Act as the assessee has failed to furnish the notification issued by CBDT/competent authority in respect of Salarpuria Touchstone industrial park.

3.3. We have heard the rival parties and perused the material on record. The undisputed facts are that the assessee has set up four industrial parks in respect of which the deductions u/s 80IA and 80IB of the Act have been claimed as per details given (supra). Needless to mention that the assessee is entitled to claim deduction u/s 80IA & IB of the Act provided the Industrial Park is notified by the Central Govt under Industrial Park Scheme, 2008. The assessee has furnished the notifications issued by CBDT in respect of all the projects except "Salarpuria Touchstone" in respect of which the assessee has claimed deduction u/s 80IA to the tune of Rs. 6,81,07,687/-. According to the assessee, the competent authority has not notified the Industrial Park despite assessing having applied for the approval of the project and thereafter moving several communications to the competent authority following up and requesting for the notification of the said Industrial Park. We note that the assessee has also filed a writ petition before the Hon'ble Karnataka High Court seeking the direction to CBDT/competent authority to bring out a notification in respect of Salarpuria Touchstone and the Hon'ble Karnataka High Court was also pleased to give certain directions to competent authority in respect of above Industrial Park however again due to the failure of competent authority to follow the directions of Hon'ble Karnataka High Court, another writ petition was filed by the assessee before the Hon'ble Karnataka High Court seeking necessary directions to the competent authority which is pending for adjudication. Undisputedly till date the project has not been notified by the competent authority which was a pre-condition for grant of deduction u/s 80IA (4) of the Act. Under these circumstances, we are of the view that the deduction u/s

80IA(4) of the Act of Rs. 6,81,07,687/- in respect of Salarpuria Touchstone park cannot be allowed. However, in case the Hon'ble High Court decides the issue favorably and the project is notified in future by the competent authority, then the assessee may approach the AO for grant of relief/deduction 80IA(4) of the Act and the AO will be bound to amend the order accordingly. Subject to above observations, this issue is decided against the assessee. Accordingly, ground nos. 1 & 2 are dismissed with the above observations.

3.4. The issue raised in ground no. 3 is against the order of Ld. CIT(A) not allowing the relief in respect of TDS of Rs. 1,38,282/- being the short credit allowed by the AO by restoring the issue back to the file of AO with the direction to allow the TDS on the basis of TDS certificates.

3.5. The facts in brief are that the total TDS claimed by the assessee in the return of income was Rs. 9,68,352/- whereas the AO has allowed the credit of TDS to the tune of Rs. 8,30,070/- thereby claim has been short allowed by Rs. 1,38,282/-. The Ld. CIT(A) has restored to the issue back to the file of AO to examine and allow the claim on the basis of TDS certificates.

3.6. After hearing both the parties and perusing the materials on records, we are inclined to direct the AO to allow the credit of TDS of Rs. 1,38,282/- to the assessee after verifying the TDS certificates and other evidences as may be furnished by the assessee in respect of its claim. Accordingly the ground no. 3 is allowed for statistical purposes.

3.7. The issue raised in ground no. 4 is in respect of allowability of MAT credit of taxes of earlier years from AY 2006-07 to 2009-10 amounting to Rs. 16,77,72,220/- u/s 115JAA of the Act.

3.8. After hearing the rival parties and perusing the facts on records as placed before us we are convinced that the assessee is entitled to credit of MAT as per the provisions of the Act. However the said claim has been made for the first time before us and therefore involves verification of facts at the end of the AO. Accordingly we restore this issue back to the file of AO with the direction to decide the issue as per the provisions of the Act by doing necessary verification after affording a reasonable opportunity of hearing to the assessee. Accordingly ground no. 4 is allowed for statistical purposes.

3.9. The issue raised in ground nos. 5 & 6 is consequential and therefore need no adjudication. Accordingly, the appeal of the assessee is allowed for statistical purposes.

4. Now we shall adjudicate the assessee's appeal in **IT(SS)A No. 42/Kol/2019** as well as revenue's appeal in **IT(SS)A No. 64/Kol/2019** and assessee's **Cross Objection** in **C.O. No. 42/Kol/2019** for **AY 2010-11**. The ground raised by the assessee in IT(SS)A No. 42/Kol/2019 are as under:

1. *For that in view of the facts and in the circumstances, the Ld. CIT(A) erred in not adjudicating the validity of order u/s 153A/ 143(3) and in view of the facts and in the circumstances such action of the Ld. CIT(A) is bad in law and in view of the facts and in the circumstances it may be held accordingly.*

2. *Without prejudice to Ground No. 1 above, the Ld. CIT(A) erred in not appreciating the fact that in absence of any incriminating material the order so passed u/s 153A/143(3) was bad in law and in view of the facts and in the circumstances it may be held accordingly.*

3. *Without prejudice to Grounds No, 1 & 2 above, the Ld; CIT(A) erred in directing the AO to follow the adjudication of appeal in the original order u/s 143(3) when the issues in such order u/s 143(3) had merged with the order so passed u/s 153A/ 143(3) and in view of the facts and in the circumstances it may be held accordingly.*

4. *Without prejudice to Grounds No. 1, 2 & 3 above, the Ld. CIT(A) erred in not appreciating the fact and the law that since the order so passed u/s 143(3) was unabated, no addition could have been made in the order u/s 153A/143(3) and the Ld. CIT(A)'s vague direction to the AO is bad in law and in view of the facts and in the circumstances it may be held accordingly.*

5. *Without prejudice to Grounds No. 1, 2, 3 & 4 above, the Ld. CIT(A) erred in not directing and not adjudicating himself on the deduction u/s 80IA(4)(iii) for Rs. 6,81,07,687/- on the Industrial Park named "Salarpuria Touchstone" and such action of the Ld. CIT(A) is bad in law and in view of the facts and in the circumstances it may be held accordingly.*

6. *Without prejudice to Grounds No. 1, 2, 3 & 4 above, the Ld. CIT(A) erred in not adjudicating on the disallowance of Rs.1,15,630/- on account of membership, subscription & donation and in view of the facts and in the circumstances such action of the Ld. CIT(A) is bad in law and in view of the facts and in the circumstances it may be held accordingly.*

7. *For that your petitioner craves die right to put additional grounds and / or to alter / amend / modify the present grounds at the time of hearing.*

4.1. The issue raised in ground nos. 1 to 4 is against the order of Ld. CIT(A) not adjudicating the issue of validity of assessment order passed by AO u/s 143(3) read with Section 153A of the Act on the ground that the assessment being unabated on the date of search and therefore ,AO has no jurisdiction to make additions without any incriminating material found during the course of search.

4.2. The facts in brief are that a search and seizure operation u/s 132 of the Act was conducted on Salarpuria Group on 15.03.2016. The assessee filed original return of income on 09.10.2010 which was revised on 27.12.2012. Thereafter the case of the assessee was selected for scrutiny and assessment was framed u/s 143(3) of the Act vide order dated 26.03.2013. Accordingly on the date of search, this is an unabated assessment as it has already attained finality in terms of provisions of Section 153A of the Act. Post search, the AO issued notice u/s 153A of the Act which was complied with by the assessee by filing a return of income on 18.10.2017 declaring total income

of Rs. 18,85,80,920/-. Thereafter the statutory notices were duly issued and served upon the assessee and finally the assessment was completed vide order dated 31.12.2017 passed u/s 143(3) read with Section 153A of the Act, assessing the income at Rs. 29,68,07,360/- by making various disallowances and additions.

4.3. The assessee assailed the order of AO before the First Appellate Authority by challenging the jurisdiction of the AO to make additions. On jurisdictional issue, the assessee has assailed the assessment order on the ground of lack of jurisdiction of the AO to make additions in an unabated assessment on the date of search as there were no incriminating materials found and seized during the course of search. The Ld. CIT(A) dismissed the appeal of the assessee on this issue by rejecting the contentions of the assessee as regards the jurisdiction of the AO to make addition in an unabated assessment year by observing the holding as under:

“ It is seen that most of the additions made in this order are repeat of additions made in the order passed u/s 143(3). The AO has been directed to follow the adjudication in the appeal order passed as a result of original order u/s 143(3), therefore the AO has not made any fresh addition. Further on the issues on which AO has made fresh addition the assessee has been granted relief in this order. Therefore, in my view there is no need to adjudicate these grounds are hereby dismissed.”

4.4. The Ld. A.R vehemently submitted before us that the Ld. CIT(A) has grossly erred by not deciding the legal/jurisdictional issue raised by the assessee qua the authority of AO to make additions in an unabated assessment year on the date of search. The Ld. A.R. submitted that the instant assessment has already attained finality vide order dated 26.03.2013 passed u/s 143(3) of the Act whereas the search was conducted on 15.03.2016. The Ld. A.R. ,on the basis of these facts, submitted that the assessment has not abated on the date search and therefore in order to make additions in an unabated assessment there have to be incriminating searched materials found during the course of search otherwise the AO has no jurisdiction to make any such additions. The Ld. A.R. in defense of his arguments relied on the following decisions:

a) *Veerprabhu Marketing Pvt. Ltd. vs. CIT (2017) 73 Taxman 149 (Cal HC)*

- b) *Bishwanath Goridia vs. DCIT (2016) 76 taxmann.com 81 (Kol-ITAT)*
- c) *CIT vs. Continental Warehousing Corporation (Nhava Seva) Ltd. (2015) 89 taxmann.com (Mum)*
- d) *CIT vs. Kabul Chawla (2015) 61 taxmann.com 412 (Del) [SLP dismissed by Hon'ble Supreme Court]*
- e) *Pr. CIT vs. Devangi Alias Rupa (2017) 394 ITR 184 (Guj)*
- f) *CIT vs. Mita Gutgutia (2016) 82 taxmann.com 287*
- g) *PCIT vs. Salasar Stock Broking Pvt. Ltd.- GA No. 1929 of 2016 ITAT No. 264 of 2016 dated 24.08.2016.*

The Ld. A.R. submitted before the Bench that in view of the settled legal position that in absence of any incriminating searched materials , the additions made by the AO in an unabated assessment year are without any valid jurisdiction. The Ld. A.R. therefore submitted that the assessment so framed by the AO u/s 143(3) read with Section 153A may kindly be quashed.

4.5. Per contra , the ld. D.R. relied on the orders of authorities below by submitting that as per the provisions of section 153A of the Act the six assessment years prior to the date of search have to be re-assessed based on the findings of the search team as well as findings of the AO during assessment proceedings. The DR submitted that if the addition is to be restricted to the incriminating materials found during search, then the provisions of search would be rendered otiose as the AO can not make addition even qua any wrong done by the assessee in the books of accounts which has come to the notice of the AO but qua which no incriminating documents were found in search proceedings. The ld DR ,therefore, submitted that the legal issue raised by the assessee may kindly be dismissed.

4.6. After hearing the rival contentions and perusing the materials on record as placed before us , we note that search was conducted on 15.3.2016 on Salarpuria group of companies including the assessee and its directors. It is undisputed that the

assessment was framed in the instant assessment year vide order dated 26.03.2013 and thus it had attained finality on date of search and would be an unabated assessment on the date of search in terms of provisions of section 153A of the Act. It is settled legal position that in order to make addition in an unabated assessment on the date of search, there has to be incriminating material found during search as laid down in various decisions as cited by the assessee's counsel supra. After carefully analyzing the facts of the acts and after the perusal of assessment order, we find that there is no reference at all by the AO to any such incriminating material found during search. The various additions were undisputedly made on the basis of observation of the AO during assessment proceedings for which were no incriminating materials found during search. The additions made inter alia include disallowance u/s 14A, disallowance of interest on service tax & TDS, disallowance of donation, membership and subscription and loss on sale of fixed assets etc. the case of the assessee is squarely supported a series of decisions as decided by various judicial forums which have laid down the same ratio namely PCIT vs. Meeta Gutgutia (supra), CIT vs. Kabul Chawla, and CIT vs. Continental Warehousing Corporation (Nhava Sheva) Ltd. Under these facts and circumstances and respectfully following the ratio as laid down in the above decisions, we hold that the additions have been made without any incriminating material found during the course of search and, therefore cannot be sustained. The legal and jurisdictional grounds raised by the assessee are allowed.

The legal issue raised by the assessee in ground nos. 1 to 4 is allowed.

4.7. Since we have allowed the assessee's appeal on legal issue, the other grounds raised by the assessee on merit are not being adjudicated and left open to be decided later on if need arises for the same at the later stage.

4.8. In view of our decision on the legal issue in assessee appeal, the cross appeal filed by the revenue becomes infructuous and is accordingly dismissed. Similarly the cross-objection filed by the assessee supporting the order of Ld. CIT(A) on certain issues also become infructuous and is dismissed.

5. Now we shall take assessee's appeal in **IT(SS)A No. 43 & 44/Kol/2019 for AY 2011-12 & 2012-13.**

5.1. The legal issue raised in these appeals is identical to one as decided by us in IT(SS)A No. 42/Kol/2019 for AY 2010-11 supra. Accordingly our decision in IT(SS)A No. 42/Kol/2019 would, *mutatis mutandis*, apply to these appeals as well. Consequently these appeals of the assessee are allowed on legal issue.

6. We shall adjudicate now the assessee's appeal in **IT(SS)A No. 54/Kol/2019 for AY 2013-14.**

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

1. *For that in view of the facts and in the circumstances, the Ld. CIT(A) erred in not appreciating the fact that the issue of notice u/s 153 A and the consequent order by the AO u/s 153A/143(3) is without jurisdiction and as such order passed by Ld. CIT(A) and the AO is wholly illegal & invalid and in view of the facts and in the circumstances it may be held accordingly.*

2. *Without prejudice to Ground No. 1 above, the Ld. CIT(A) erred in not appreciating the fact that in absence of any incriminating material the order so passed by the AO u/s 153A/143(3) is bad in law and the AO could not made such addition in the impugned order and according the order so passed by the AO and affirmation of such order by Ld. CIT(A) is bad in law it may be held accordingly.*

3. *For that in view of the facts and in the circumstances, the Ld. CIT(A) erred in confirming the action of the AO in not granting deduction u/s 80IA(4)(iii) in respect of the project namely "Salarpuria Touchstone" and in view of the facts and in the circumstances it may be held accordingly.*

4. *Without prejudice to Ground No. 3 above, the disallowance so made by the AO in respect of deduction u/s 80IA(4)(iii) for the project “Salarpuria Touchstone” is bad in law especially in absence of incriminating material and in view of the facts and in the circumstances it may be held accordingly.*

5. *For that your petitioner craves the right to put additional grounds and / or to alter / amend / modify the present grounds at the time of hearing.*

6.2. The issues raised in ground nos. 1 & 2 are not pressed at the time of hearing and therefore the same are dismissed as not pressed.

6.3. The issue raised ground no. 3 & 4 is against the order of Ld. CIT(A) confirming the action of AO in not granting the deduction u/s 80IA(4)(iii) in respect of industrial park known as “Salarpuria Touchstone”. We have already decided the identical issue in ITA No. 2094/Kol/2017 for AY 2010-11 wherein dismissed the appeal of the assessee on this issue with a rider that in case the writ petition pending before the Hon’ble Karnataka High Court is decided favourably, the assessee can approach the AO for grant of deduction u/s 80IA(4) of the Act and AO is bound to amend the order accordingly. Consequently, the ground nos. 3 & 4 are dismissed with the above observations. The appeal of the assessee is dismissed.

7. Now we shall take the Assessee’s appeal in **IT(SS)A Nos. 55 to 57/Kol/2019 for AY 2014-15 to 2016-17.**

7.1. The issues raised in ground nos. 1 & 2 in AY 2014-15 and 2015-16 are not pressed at the time of hearing by the Ld. Counsel of the assessee. Accordingly ground nos. 1 & 2 are dismissed in both these years.

7.2. The issue raised in ground nos. 3 & 4 in AY 2014-15 and 2015-16 and in ground nos. 1 & 2 in AY 2016-17 are against the order of Ld. CIT(A) upholding the order of AO on the issue of rejection of deduction u/s 80IA(4)(iii) in respect of profits from industrial park known as “Salarpuria Touchstone” which is identical to one as decided by us in ITA No. 2094/Kol/2017 for AY 2010-11. Accordingly our decision in

ITA No. 2094/Kol/2017 would, *mutatis mutandis*, apply to these appeals as well. Consequently the ground no. 3 and 4 are dismissed. However the AO will amend the order granting the deduction the AO in case outcome of the writ petition before the Hon'ble Karnataka High Court comes in favour of the assessee.

7.3. Vide ground no. 3 in IT(SS)A No. 57/Kol/2019 for AY 2016-17, the assessee has challenged the order of Ld. CIT(A) upholding the order of AO in making the addition of Rs. 1,48,053/- u/s 69 of the Act as unexplained expenditure which was not pressed at the time of hearing by the counsel of the assessee and is accordingly dismissed as not pressed.

8. We shall take up the Revenue's appeal in IT(SS)A No. 65/Kol/2019 for AY 2014-15 and assessee's cross-objection in C.O. No. 43/Kol/2019 for AY 2014-15.

8.1. The issue raised in ground no. 1 by the revenue in its appeal is against the deletion of addition of Rs. 10,05,218/- by the Ld. CIT(A) as made by the AO u/s 14A of the Act read with Rule 8D(2)(ii) of the Income Tax Rules, 1962.

8.2. The facts in brief are that the assessee has advanced Rs. 8.14 Cr as advance to related parties which were duly reported in the audit Report for the year ended 31.03.2014. The assessee has also borrowed Rs. 147.09 Cr and the advances/share application money was paid out of loan funds. Besides no allotment of shares was made to the assessee no any refund was granted. According to the AO that part of the interest on the loan taken by the assessee which related to the investments in the related/group entities is not allowable as per the provisions of section 36(1)(iii) of the Act as interest was not incurred for the purpose of business wholly and exclusively but to earn dividend and long term capital gain on shares. Accordingly the AO calculated the proportionate interest at Rs. 10,05,218 to be disallowed u/s 14A r.w.r. 80D2(ii) and added the same to the income of the assessee.

8.3. The Ld. CIT(A) allowed the appeal of the assessee on the ground that there is no exempt income during the year by following the decision of Hon'ble Calcutta High Court in the case of *REI Agro Ltd. in 144 ITD 141 (Cal)* whereby the Hon'ble Court has affirmed the decision of Hon'ble Tribunal reported in 144 ITD 141 and also the decision of the Hon'ble Apex Court in *Maxopps Investments Ltd. 402 ITR 640 (SC)*.

8.4. After hearing the rival parties and perusing the material on record. We find that during the year the assessee has not earned any exempt income. The ld. Counsel of the assessee took us through the audited balance sheet for the year ended on 31.03.2014 to show that there is no exempt income during the year. Besides the Ld. Counsel of the assessee also argued that sum of the share capital reserve and surplus are far more than the investments made by the assessee and therefore no disallowance can be made in consonance with the ratio laid down by the Hon'ble Apex Court in the case of *Max India Ltd. reported in (2018) 402 ITR 640 (SC)*. After perusing the order of Ld. CIT(A) in the light of the decisions as discussed above, we do not find any infirmity in the appellate order and accordingly ground nos. 1 of the revenue's appeal is dismissed.

8.5. The issue raised in ground no. 2 is against the deletion of addition of Rs. 1,87,34,612/- by the Ld. CIT(A) as made by the AO u/s 14A of the Act read with Rule 8D(2)(ii)& (iii) of the Income Tax Rules, 1962.

8.6. Facts in brief are that the assessee has huge investments in shares and securities. The assessee has not made any disallowance u/s 14A of the Act relating to earning of exempt income as the assessee has not earned any exempt income during the year. Accordingly the AO issued notice a show cause as to why the disallowance should not be made u/s 14A read with Rule 8D(2)(ii)&(iii) of the Rules as the assessee has made investments in shares to earn dividend income. The assessee replied the show cause notice by submitting that during the year the assessee has not earned any exempt

income from these investments and therefore no disallowance is called for. The contention of the assessee was not accepted by the AO and he disallowed to the tune of Rs. 1,87,34,612/- comprising of Rs. 1,33,35,312/- under Rule 8D(2)(ii) and Rs. 53,99,300/- under Rule 8D(2)(iii) of the Rules and added the same to the income of the assessee.

8.7. In the appellate proceedings, the Id CIT(A) deleted the disallowance of Rs. 1,87,34,612/- on the same reasoning as discussed in para 7.3 supra that there is no exempt income.

8.8. We have already decided the similar issue in ground no. 1 in para 7.4. wherein we have decided that no disallowance is to be made in case of no exempt income from equity shares and securities. Therefore our decision would ,mutatis mutandis, apply to ground no. 2 also. Resultantly ground no. 2 in revenue appeal is dismissed.

8.9. The issue raised in ground no. 3 is against the deletion of addition of Rs. 2,36,454/- which was made by the AO on account of bad debts during the year.

8.10. The facts in brief are that the AO upon perusal of profit and loss account observed that the assessee has charged Rs. 2,31,881/- on account of sundry balances written off and Rs. 4,573/- on account of stock written off during the year which were not allowable as the assessee has failed to prove the claim with documentary evidences.

8.11. The Ld. CIT(A) allowed the appeal of the assessee on the basis of details/evidences filed by the assessee. The Ld. CIT(A) noted that the amount written off by the assessee were qua the rent which was not realized by the assessee and has been written off. Similar was position with regards to stocks which were not serviceable and were also written off during the year.

8.12. After hearing the rival parties and perusing the material on record, we note that sundry balances were written off by the assessee including unserviceable stocks to the tune of Rs. 2,36,454/- which were apparently arising in normal course of business or pertaining to amounts receivable and therefore the assessee is entitled to charge the same against the profits during the year in terms of ratio laid down in T.R.F Ltd. reported in 323 ITR 397 (SC). We therefore do not find any infirmity in the order of Ld. CIT(A) and accordingly ground no. 3 raised by the revenue is dismissed.

8.13. The issue raised in ground no. 4 by the revenue is against the deletion of addition of Rs. 72,93,646/- as made by the AO on account of on money received upon sale of flats.

8.14. Facts in brief are that during the course of search, some documents/evidences were found which contained information/entries in respect of on money received on sale of flats by some group companies. The searched team also recorded statement of head cashier Shri Kavindra Kumar Mishra and two junior accountants Miss Shwetha and Miss Veena u/s 132(4) of the Act in which they admitted that the cash used to come to the accounts section which were handed over to the head cashier. Similarly statement of other employees were also recorded who admitted that cash used to be received and handed over to Shri Kavindra Kumar Mishra. Besides these general statements, the AO also relied on the customer application form of Shri William Joseph Subash found during the course of search by the searched team and the said application form was related to sale of flat in Sattva Gold Project which belonged to group company M/S Salarpuria Developers Pvt Ltd. a group company. The AO extracted this form on page no. 25 of the assessment order. The AO also referred to the statement of Shri Vijay Kumar Agarwal, the key person in the group who admitted the fact of having on money and offered Rs. 55 crores app. on account of on money during the course of proceedings. The said person furnished the details of amounts surrendered in the hands various group companies details of which are filed at page

no 90 of the PB. The AO also referred to the seized document No. SDPL/43 seized during the course of search from the office of Sattva Developers Pvt. Ltd.. The said documents appeared at serial no 17 in the Panchnama in the name of Sattva Builders Pvt Ltd and Sattva Realtors Pvt Ltd. File No. A/SDPL/43 a copy of which is filed at page no. 157. The AO noted that the sale price of flats in respect of two projects namely Gold Summit and Laurel Heights belonging to Sattva Developers Pvt Ltd. were shown at lower price in comparison to the sale price with flats at the same floor and same date. The AO, finally after comparing various sale agreements, came to the conclusion that the assessee has sold the flats at a differential prices in its Melody project and accordingly a show cause notice was given to the assessee on the basis of information's gathered by the AO from aforesaid documents and sample customer application related to Sattva Gold as to why the on -money should not be calculated and added to the income of the assessee. The show cause was replied by the assessee by filing written submissions objecting to be addition on account of on-money as there were no incriminating material found during search relating to the assessee's project and whatever was documents seized by the search team were belonging to other group companies and there can be no addition on the basis of extrapolation ,conjectures and surmises. The contentions of the assessee did not find favour with the AO and he calculated the amount of on-money at Rs. 72,93,646/- by working out average sale price and after making some allowances at 5 to 10% as given on page no. 35 of the assessment order and added the same as unexplained cash credit to the income of the assessee in the assessment framed u/s 143(3) r.w.s. 153A of the Act.

8.15. In the appellate proceedings, the Ld. CIT(A) deleted the addition by observing that nothing incriminating was found during search relating to assessee's projects and in respect of incriminating documents found in respect of group companies, the group has made a declaration of Rs. 55 Crores app. The ld CIT(A) noted that group has filed settlement petition before Settlement Commission disclosing income of Rs. 55 Crores and the settlement petition have been disposed by the Settlement Commission.

The Ld. CIT(A) also noted that there is no mention of any on money in the statements recorded of various employees such as Shri Kavindra Kumar Mishra, Miss Shwetha and Miss Veena being received in respect of Salarpuria Properties Pvt. Ltd. and thus allowed the appeal of the assessee on this issue by observing and holding as under:

“I have perused the contention of both the sides. In the submission made by the Ld. A.R. he has stated that there is not a single instance pointed out by the AO to show that the assessee has received cash on sale of properties in other projects. Further, the assessee company has made declaration of Rs. 55 crores for the group. The assessee group entities have filed settlement petition disclosing income of Rs. 55 crores and the settlement petition have been admitted by Hon’ble Settlement Commission. In the statement recorded of Shri Kavindra Kumar Mishra, Miss Shweta and Miss Veena, it is nowhere mentioned that they used to receive cash for project related to M/s Salarpuria Properties Pvt. Ltd. The only tangible evidence on the issue of on-money receipt could possibly be page nos. 32 and 33 of the assessment order which mentions various dates on which flats have been sold at a discount of 20% compared to another flat in the same project on the same month. The A.R has countered this point by stating that rates could vary depending on location of flats, floor, terms of payment, internal fittings etc. Therefore I agree that while this is a strong lead indicating possibility of on-money receipt, however, on the basis of this evidence alone it cannot be concluded that the assessee must have received on –money on sale of properties in this company. There is no admission of any customers u/s 133(6) or u/s 131 to corroborate the hypothesis.

In view of the above, the addition made for on-money receipt cannot be sustained and therefore ground no. 11 and 12 is allowed.”

8.16. The Ld. D.R vehemently submitted before the Bench that the Ld. CIT(A) has wrongly deleted the addition as made by the AO on the basis of evidences gathered during the course of search and also on the basis of statements recorded of various employees during the search which proved that the assessee has been receiving on-money on sale of flats. The Ld. D.R. argued that the AO has analyzed the information in the form of seized documents, statements recorded during the search and sample application form of Shri William Joseph Subash as well as incentive payments to the employees who effected sales in the market and came to the conclusion that the assessee has received on-money. The Ld. D.R. stated that it is apparent from the sale agreement entered into by the assessee in respect of Melody project that they were glaring variations in the sale deeds and therefore the AO has rightly made the addition on the basis of calculation chart as appended on page 35 of the assessment order. The

Id DR argued that the Ld. CIT(A) while allowing the relief to the assessee has only relied on the theory that these additions were based upon extrapolation, surmises and conjectures whereas this is not so as the AO has analyzed all these documents. The ld. D.R also referred to the sample application form in respect of Sattva Gold Project which related to Shri William Joseph Subash and submitted that there were lot of overwriting and cuttings in the amounts mentioned in the said form which also testified that these documents were altered and amended so that the lesser price than actual selling price could be accounted for in the books. The Ld. D.R. submitted that even the promoters of the assessee Mr. Bijay Kumar Agarwal admitted to have accepted the cash from the customers upon sale of flats albeit no specific documents in respect of Melody project were found during the course of search but it is customary that such practice of receiving on-money on sale of flats is prevalent in the real estate market and therefore the order of Ld. CIT(A) on this issue needs to be set aside and that of the AO may kindly be restored.

8.17. Per contra, the ld. A.R, while negating the arguments as presented by the Ld. D.R. and supporting the order of Ld. CIT(A), submitted that the AO has only presumed that the assessee was receiving money from the customers over and above the amounts what have been shown in the books of accounts. The Ld. A.R. argued that the AO has referred to the documents which pertained to other group companies and also to statements recorded u/s 132(4) of the Act. The Ld. A.R. contended that the addition was made only on the basis of presumptions and extrapolations on the basis of documents which belonged to other group companies and on the basis of statements recorded u/s 132(4) of the Act however there being no documents recovered except list of flats sold which duly accounted for in the books of accounts of the assessee in respect of Melody project as well as no specific statement was given by the employees in respect of the said project to the effect that the assessee has received on-money on sale of flats. The Ld. A.R. also argued that the AO has just presumed that the assessee has been receiving on-money even without bothering to summon the buyers and

examining whether they gave on money on the purchase of flats. Thus the requisite enquiries which the AO was supposed to conduct have not been made. The Ld. A.R specifically referred to the materials as referred to by the AO in the assessment order which formed the basis of addition on account of on-money. The Ld. A.R. referred to page nos. 8 to 24 which comprised of statements of various employees whereas page no. 25 was a sample application form duly filled in respect of Sattva Gold Project which did not belong to the assessee and its income belonged to Salarpuria Developers Pvt. Ltd. which is the group company. The ld AR stated that on further on a perusal of said form it can be seen that there were minor alterations which same could not be presumed as incriminating materials in any manner more so in the hands of the assessee and therefore cannot be held to be incriminating material in any manner. Similarly on page no. 6, the AO referred to the sales incentive paid to various dealers/brokers but again no particular material/document has been brought on record which testified the fact of assessee having received on-money in respect of Melody project. The Ld. A.R. submitted that the AO only referred to cash found in the various entities at the time of search however overlooked the fact the said cash belonged to those group companies and on the basis of said cash and has extrapolated on money in the hands of the assessee. The Ld. A.R. referred to page 27 to 31 where the AO has reproduced the statement of Managing Director of assessee company wherein Mr. Bijay Kumar Agarwal offered Rs. 55 crores in various group companies and not in the assessee company. The Ld. A.R. then referred to page no. 35 of the assessment order where the AO concluded that the addition made on Melody project and there was no particular evidences even in respect of said project finally the Ld. A.R. prayed before the Bench that extrapolation on the basis of sale rates of various units of the project and making addition on the said basis is arbitrary and without any basis and was rightly deleted by the Ld. CIT(A). The Ld. A.R. submitted that addition on hypothetical basis without any corroborative and incriminating material cannot be sustained and in defense of the argument relied on the following decisions:

- i) *CIT vs. Dolphin Builders pvt. Ltd. - 365 ITR 420 (MP)(Pg 10)*
- ii) *Fort Project Pvt. Ltd. vs. DCIT- 63 DTR 145 (Kol)*
- iii) *Savaliya Buildcon vs. DCIT- ITA No. 401/Ahd/2014 dated 30.06.2019 (Pages 31 & 34)*
- iv) *CIT vs. C.J. Shah & Co.- 246 ITR 671 (Bom)(page 59)*
- v) *Manisquare Ltd.-83 ITR 241 (Kol) (Pg 295)*

The Ld. A.R. also submitted that any addition was made on the basis of statement and surrender without any corroborative material on record of the AO the said addition is unequal and has to be deleted by relying on the following decisions:

- i) *Best Infrastructure Ltd.- 84 taxmann.com 287 (Del)*
- ii) *Shri Saurabh Mittal-ITA No. 16/JP/2018*
- iii) *SRM Securities Ltd.- ITA No. 7825/Del/2018*

Finally the Ld. A.R. prayed before the bench the ground of the revenue may kindly be dismissed by upholding the order of Ld. CIT(A).

8.18. We have heard rival submission and perused the material on record. The undisputed fact of the case, the search was conducted on 15.03.2016 on the assessee and group companies and during the course of search certain documents were seized and statement of various employees including managing director was recorded. It is undisputed that no specific material was found during the course of search in respect of Melody project which belong to the assessee in respect of which the AO has made addition of Rs. 72,93,646/- on account of on-money received by the assessee on sale of flats. We note that various statements recorded of employees and also of the managing director. The fact of the case, on-money having been received was admitted and accepted however this was a general statement and no specific corroborative material has found during the course of search. We also note that the managing director of the assessee company made a surrender of Rs. 55 crores in various group companies which was duly offered to tax by filing a settlement petition which has been accepted

by the settlement commission. Needless to say that the said surrender was made having regards and having considered the material found during the course of search. The AO while making the addition on account of on-money has referred to general statement made by the employees and managing director and also a sample application form of Sattva Gold Project which was extracted by AO on page 25 of assessment order which was overwriting and having cuttings on the amounts received by the assessee but it is also undisputed that the said project did not belong to the assessee and belong to Salarpuria Developers pvt. Ltd. and has been referred to while making the assessment of the said group companies and necessary addition has been made on the basis of said sample form. The Ld. A.R. referred to the incriminating material as referred in the assessment order and explained that the said document did not contain anything pertaining to assessee. The Ld. A.R. referred to the Panchanama prepared the name of Sattva Builders Pvt. Ltd. and Sattva Realters Pvt. Ltd. and serial No. 17 vide No. SDPL/43 page 71 to 67 which contained the customer with rate in respect of Melody project and submitted that the amounts as per the said list is duly disclosed and shown in the books of account of the assessee. The Ld. A.R. submitted that the flats were sold at lower rates depending on the location of the flats, ventilation and Vastu etc but in no case below the value as per stamp authority. We note that the amounts as referred to in the documents found during search and as referred by the AO in the assessment order are fully accounted for in the books meaning thereby that material as seized papers during search was duly accounted in the books of account and therefore the said documents in no way can be treated as seized incriminating material. We also find at page 90 of the paper book the additional income offered to tax amounting to Rs. 55 crores in the name of six group entities in various years commencing from AY 2009-10 to 2016-17 and observed that it does not contain or mention the name of the assessee. Therefore the act of AO in extrapolating the income on account of sale of flats. It just cannot be sustained as there was no incriminating/corroborative material brought on record. In our considered view, the

income has to be assessed on the basis of evidences and not on the basis of conjecture and surmises. We also note that the AO has not been bothered to issue summon 131 and issue notice u/s 133(6) to various customers who bought flats in the assessee company. Under these circumstance, on-money has calculated by the AO it just based on estimation and extrapolation and has rightly been deleted by the Ld. CIT(A).

8.18. We have perused the decision relied upon by the Ld. Counsel for the assessee and found them to be squarely applicable to the assessee's case in the case of CIT vs. Dolphin Builders Pvt. Ltd. (supra). The Hon'ble Madhya Pradesh High Court has held that no addition can be made on the basis of doubt unless there is material to prove the receipt of on-money by the assessee. Similarly the addition made on the basis of statement without any corroborative material cannot be sustained as has been held in the case of Best Infrastructure India Pvt. Ltd.(supra), Shri Saurabh Mittal(supra)and SRM Securities Ltd.(supra). Considering the facts of the cases, in the light of the decisions as mentioned and discussed earlier, we are inclined to uphold the order of Ld. CIT(A) and dismiss the appeal of the revenue.

8.19. The assessee has filed cross objection supporting the order of Ld. CIT(A) on various issues on which the Ld. CIT(A) has allowed the appeal. Since we have dismissed the appeal of the revenue therefore the cross objection filed by the assessee becomes infructuous and is accordingly dismissed.

9. Now we shall adjudicate the **Revenue's appeal in IT(SS)A No. 66/Kol/2019 for 2015-16 and assessee's cross objection in C.O No. 44/Kol/2019 for AY 2015-16.**

9.1. The issue raised in the various grounds of appeal by the revenue are similar as decided by us in IT(SS)A No. 65/Kol/2019 for AY 2014-15. Accordingly our finding in IT(SS)A No. 65/Kol/2019 would *mutatis mutandis* apply so this appeal of the revenue is dismissed. The cross-objections raised by the assessee supporting the order

of Ld. CIT(A) on various issues which have been challenged by the revenue. Since we have dismissed the appeal of revenue and cross objection filed by the assessee becomes infructuous and is accordingly dismissed.

10. Revenue's appeal in IT(SS)A No. 67/Kol/2019 for AY 2016-17 and assessee's Cross-objection in C.O. No. 45/Kol/2019 for AY 2016-17

10.1. The issue raised in ground no. 1 and 2 in this revenue's appeal is identical. In ground nos. 2 to 4 in IT(SS) A NO. 65/Kol/2019 would *mutatis mutandis* apply so this appeal of the revenue is dismissed. The cross-objection raised by the assessee supporting the order of Ld. CIT(A) on various issues which has been challenged by the revenue since we have dismissed the appeal of revenue and cross objection filed by the assessee becomes infructuous and is accordingly dismissed.

11. In the result, assessee's appeal in ITA No. 2094/Kol/2019 for AY 2010-11 is partly allowed for statistical purpose, assessee's appeal in IT(SS)A No. 54,55,56 & 57/Kol/2019 from AY 2013-14 to 2016-17 are dismissed and assessee's appeal in IT(SS) A Nos. 42,43 & 44/Kol/2019 for AY 2010-11 to 2012-13 are allowed. All the appeals of the revenue and all the cross-objections of the assessee are dismissed.

Order is pronounced in the open court on 10th May, 2022

Sd/-
 (Sanjay Garg)
 Judicial Member

Sd/-
 (Rajesh Kumar)
 Accountant Member

Dated: 10th May, 2022

SB, Sr. PS

*ITA No. 2094/Kol/2017
IT(SS)A Nos. 42 to 44/Kol/2019
IT(SS)A Nos. 54 to 57/Kol/2019
IT(SS)A Nos. 64 to 67/Kol/2019
C.O. Nos. 42 to 45/Kol/2019
(Arising out of IT(SS)A Nos. 64 to 67/Kol/2019)
AY: 2010-11 to 2016-17, 2010-11, 2014-15 to 2016-17
M/s Salarpuria Properties Pvt. Ltd.*

Copy of the order forwarded to:

1. Appellant- M/s Salarpuria Properties Pvt. Ltd., Laha Paint House, 3rd Floor No. 7, Chittaranjan Avenue, Kolkata-700072.
2. Respondent – DCIT, Circle-1, Kolkata
3. The CIT(A)- , Kolkata
4. Pr. CIT- , Kolkata
5. DR, Kolkata Benches, Kolkata (sent through e-mail)

True Copy

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata