IN THE INCOME TAX APPELLATE TRIBUNAL "H" BENCH, MUMBAI

BEFORE SHRI ABY T. VARKEY, JM AND SHRI OM PRAKASH KANT, AM

आयकर अपील सं/ I.T.A. No.1970/Mum/2021
(**निर्धारण वर्ष** / Assessment Year:2018-19)

K. Raheja Pvt. Ltd. Raheja Tower, Plot No. C-30, Oppo. SIDBI, Bandra Kurla Complex, Bandra (E), Mumbai-400051.	**बनाम**/ Vs.	DCIT Central Circle-4(2) Room No.1918, Air India Building, Nariman Point-400021.

आयकर अपील सं/ I.T.A. No. 2218/Mum/2021
(**निर्धारण वर्ष** / Assessment Year:2018-19)

DCIT Central Circle-4(2) Room No.1918, Air India Building, Nariman Point-400021.	**बनाम**/ Vs.	K. Raheja Pvt. Ltd. Raheja Tower, Plot No. C-30, Oppo. SIDBI, Bandra Kurla Complex, Bandra (E), Mumbai-400051.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACK1949H		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Assessee by:	Shri Vijay Mehta
Revenue by:	Smt. Neelam Shukla (DR)

सुनवाई की तारीख / Date of Hearing: 17/06/2022
घोषणा की तारीख /Date of Pronouncement: 03/08/2022

आदेश / O R D E R

PER ABY T. VARKEY, JM:

These are cross appeals preferred by the assessee and the Revenue against the order of the Ld. CIT(A)-52, Mumbai dated 08.09.2021 for the A.Y.2018-19.

2. The grounds of appeal raised by the assessee are as under: -

Assessee Grounds

"1. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in upholding the amount of addition pertaining to option

premium received from Hypercity Retail Ltd. (Hypercity) on sale of 20 flats as the income in the hands of the appellant to the extent of Rs.10,67,26,046/- despite holding that the option agreement between the appellant and Hypercity is a normal business transaction and not a sham transaction. The appellant humbly prays before your honour that the said addition be deleted.

The appellant craves to add, alter, amend or omit any of the grounds of appeal before or during the hearing of the appeal."

3. The grounds of appeal raised by the Revenue are as under: -

"1. Whether on the facts and circumstance of law, the Ld. CIT(A) has erred in deleting the addition amounting to Rs.98,28,36,362/- and failed to appreciate that the appellant had created and entered into sham transactions with group entity with the sole purpose of diverting revenue accruing to the assessee on account of sales of residential units.

2. Whether on the facts and circumstances in case of law, the Ld. CIT(A) has erred in restricting the disallowance u/s 14A of the I. T. Act to the extent of exempt income received by the assessee during the year under consideration without appreciating the Circular No.5 of 2014 dated 11.02.2014 of CBDT."

4. Ground No. 1 of both the appeals of the assessee and the Revenue are inter-connected and is therefore being taken up together. Briefly stated, the facts of the case are that, the assessee is a private limited company engaged in the business of real estate development, constructing residential & commercial buildings and trading in shares. Further, the assessee has earned income by way of house property income, business income and income from other sources during the year under consideration. On 30.11.2017, a search and seizure action u/s 132 of the Act was carried out upon the K Raheja Group including

the assessee. This relevant year is therefore the year of search in the case of the assessee. In the course of search, statement of one Mr. M. Jasrapuria was recorded u/s 132(4) of the Act. In the course of his deposition, he was asked to explain as to why 60% of the revenue on sale of flats from the residential project –'Artesia' had not been recognized in the books of accounts, to which he had stated that these sales did not fulfill the criteria laid down in Guidance Note No. 23 issued by the Institute of Chartered Accountants of India ('ICAI'). He accordingly, sought time to furnish the working of revenues to be recognized on the basis of factual data. In the course of post search enquiries, the assessee had submitted an estimated working on 30.01.2018 regarding the projected costs expected to be incurred and the expected revenues which shall be recognized along with other expected earnings/revenues from other businesses during the FY 2017-18. Thereafter, the assessee had filed its return of income u/s 139(1) of the Act on 30.10.2018, wherein it declared NIL total income and book loss of Rs.53,71,05,725/-. In the course of assessment, the AO initiated enquiries into the manner of revenue recognition and required the assessee to explain as to why the revenues from sale of flats should not be recognized from AY 2015-16 and onwards, to which the assessee furnished a letter dated 04.12.2019, wherein the criteria for revenue recognition followed by the company was explained and it was demonstrated that the conditions set out in Para 5.3 of the Guidance Note No. 23 issued by the ICAI had not been

cumulatively met in AYs 2015-16 to 2017-18 and therefore no revenue was recognized in those years. It was only when the conditions were fulfilled in AY 2018-19, that the revenues corresponding to the sale of flats were recognized in the Profit & Loss Account of the assessee. The basis for recognition of revenue in AY 2018-19, as submitted by the assessee, was as follows:

Table 1:

Particulars	***Amount as on 31.03.2018***
Total Carpet Area Sq.ft (A)	*6,31,810*
BUDGETED	
Land Cost	*2,87,35,80,265*
Construction Cost	*15,66,51,53,277*
Borrowing Cost	*4,91,86,09,609*
Total (B)	***23,45,73,43,151***
Cost Per Sqft (G)	***37,127***
ACTUAL	
Land Cost	*2,87,35,80,265*
Construction Cost	*8,15,84,99,634*
Borrowing Cost	*3,15,02,43,446*
Total Project Cost (C)	***14,18,23,23,345***
ACTUAL	
Carpet Area (Sqft) (D)	*1,58,126*
Sales value (E)	*6,60,63,70,000*
Parameters as per revised Guidance Note 23	
% of Completion of Work ***(C/B) (F)***	*60.46%*
% of area Sold For determining Revenue Recognition ***(D/A)***	*25.03%*
Sale Amount on Revenue Recognition ***(E x F)***	*3,99,42,15,153*

Cost on Revenue Recognition ***(G x D x F)***	*3,54,94,77,576*
Gross Profit	***44,47,37,577***
Less: ICDS Impact	*(7,17,56,213)*
Profit Offered in COI of the year	***37,29,81,364***

5. When enquired by the AO as to why the initial working submitted on 30.01.2018 (before the Investigation Authorities) should not be considered, the assessee explained that it was an estimated working prepared prior to close of the year and therefore it should be ignored. Appreciating the said submission, the AO did not take cognizance of the initial estimated working furnished on 30.01.2018.

6. The AO thereafter noted that the assessee had entered into option agreement for sale of twenty (20) flats in the project –'Artesia' with its group entity, M/s Hypercity Retail Pvt Ltd ('HRPL'), in terms of which, HRPL was given an option to purchase these flats at a pre-determined price on a future date, in lieu of interest-free adjustable option deposits placed with the assessee. According to the AO, however, the price fixed in the option agreement was on the lower side. The AO noted that in the subsequent years, HRPL had assigned/surrendered these options to intending/actual buyers against an option premium for which a tripartite agreement was executed between the actual buyer, HRPL, and the assessee. According to the AO, this agreement was a device to divert part of the sale consideration to HRPL, which would have otherwise accrued to the assessee. The AO noted that HRPL had derived aggregate revenues of

Rs.175.15 crores from sale of these twenty (20) flats. The AO accordingly show caused the assessee to explain as to why the entire sale consideration received by HRPL upon sale/assignment of options to these buyers, should not be treated as the income of the assessee. In response, the assessee furnished a detailed explanation, which the AO has extensively reproduced at Pages 7 to 15 of the assessment order. This reply of the assessee was not acceptable to the AO. The AO held that, the transaction with HRPL was a way to divert profits and shift the consideration received on sale of flats from the books of the assessee to HRPL. The AO, therefore, added the revenues realized by HRPL on sale of these flats to third parties, i.e. Rs.175.15 crores to 'Sales Value' declared by the assessee. Accepting all other figures and parameters set out in the working of the assessee [*Table – 1 above*], the AO only substituted the revenues to Rs.835 crores [*660 crores + 175.15 crores*] in place of Rs.660 crores declared by the assessee and accordingly re-worked the profit to be recognized under the percentage completion method in the relevant AY 2018-19 in the following manner:

Table 2:

Particulars	***31,03,2018 (Sq.ft)***
Total Carpet Area Sq.ft	*6,31,810*
Budgeted	
Land Cost	*2,87,35,80,265*
Construction Cost	*15,66,51,53,277*
Borrowing Cost	*4,91,86,09,609*

Total	*23,45,73,43,151*
Actual	
Land Cost	*2,87,35,80,265*
Construction Cost	*8,15,84,99,634*
Borrowing Cost	*3,15,02,43,446*
Total Estimated Project Cost	*14,18,23,23,345*
Actual	
Carpet Area (Sq.ft)	*1,58,126*
Sales Value	***8,35,01,89,684***
Percentage of completion of Work	
% of completion of work	*60.46%*
% of Area sold for determining Revenue Recgn.	*25.03%*
Sale Amount on Revenue Recognition	***5,04,85,29,551***
Cost on Revenue Recognition	*3,54,94,77,576*
Gross Profit	***1,49,90,51,975***
Less: Offered in COI	***44,47,37,577***
Balance	*1,05,43,14,398*
Less: ICD Impact	*(7,17,56,213)*
Balance to be offered to tax	***98,25,58,185***

7. In view of the above calculation, the AO accordingly added further sum of Rs.98,25,58,185/- to the total income of the assessee. Aggrieved by the aforesaid action of the AO, the assessee preferred an appeal before the Ld. CIT(A). On appeal, the Ld. CIT(A) after examining the facts of the case, held that the option agreements entered into by the assessee with HRPL was acceptable and not sham. The relevant findings of Ld. CIT(A) are as under:

> "5.11 The assertion made by the appellant that option agreements are acceptable mechanism to introduce funds into a real estate project from desirous investors is found to be acceptable. Block investment in realty

projects are acceptable financing model. For the investor, the flat provides necessary security of capital and for the builder, it provides low cost capital for his project. Hence, such option agreements indeed present market reality for generating low cost finance and transferring some of the risk of the project to these investors as there remains a risk that these flats may not be sold over long period of time. The AO's blanket inference that the intention of such a scheme is to shift profits from one entity to another is not found tenable and is rejected."

8. Before the Ld. CIT(A), the assessee also contended that, it had sufficient brought forward losses, which could have otherwise been set-off against the profit alleged to be diverted, and therefore there was no purpose served to the assessee by shifting profits, and therefore the observation made by the AO that this arrangement was meant to reduce tax liability of the assessee was untenable. The Ld. CIT(A), however, did not find this line of argument to be acceptable. Having held so, the Ld. CIT(A), however, did not countenance the action of the AO in disregarding HRPL and treating it as a pass through entity to assess the entire revenues of Rs.175.15 crores derived by it from the sale/assignment of the flats under the option agreements, as and by way of income of the assessee. The relevant portion of the order is as follows:

"5.13 On this issue, the claim of the assessee is that the AO has disregarded the corporate structure and has treated the appellant and Hypercity as one entity by ordering to tax the amount which the assessee has never received. It is the assessee's claim that Hypercity is a subsidiary of Shopper's Stop Limited which is a company listed on stock exchange and has its own independent Board and hence the AO could not have ignored the separate legal corporate structure while dealing with the transaction.

5.14 The above contention is examined. In the assessment order, the AO has proceeded to treat Hypercity as a pass through entity by treating the option agreements as a sham and has accordingly treated the entire turnover as the turnover of the appellant. In my view, the transaction between the two parties here is a transaction between two related parties as majority stake in both these entities are owned by the same promoters and hence while the transaction cannot be denied, there is an onus on the appellant to demonstrate the arm's length nature of the transaction. It has already been held earlier that transactions of such option assignment arrangement are a market reality and are undertaken to meet fund requirements as well as transfer risks. Hence, to this extent, the AO's action has not been held as correct. But, the claim of the assessee that the AO could not examine the transaction value in light of either commercial expediency or independent legal/corporate structure is not found tenable and is rejected. The AO was fully competent to examine whether the flats had been transferred to the other party a prevailing rates or not.

……

5.18 The assessee further claims that it had entered into an option agreement with Hypercity which allowed Hypercity either to exercise its right to purchase the flat at the pre-determined rate or to assign its right to a third party. Once Hypercity had transferred its right to a third party for a consideration, the income arising out of such consideration could not be taxed in the hands of the assessee. What can be taxed in the hands of the assessee is real income and not notional income. The claim made by the assessee is found tenable to the extent as the structure entered into by the assessee with Hypercity has not been found to be a sham..."

9. The Ld. CIT(A) appreciated that, HRPL had contributed capital of more than Rs.104 crores to the assessee by way of option deposits in the course of the project, and that it had indeed assumed risks related to the project and thus the option agreement, subsequent sale of flats and consequent revenues derived by HRPL could not be doubted. However, according to the Ld. CIT(A), since the assessee

and HRPL were related parties, the AO was entitled to examine the reasonableness of the transaction value agreed in the option agreement and the onus was on the assessee to demonstrate that the said transaction had been conducted on arm's length principle. The Ld. CIT(A) took note of the assessee's contention that the option prices were commensurate with the prevailing ready reckoner rates for stamp duty purposes, but according to him, the residential project undertaken by the assessee was 'high-end' and therefore the value of the option prices of these flats ought to have been much higher than the ready reckoner rates prevailing for stamp duty purposes. The relevant findings of the Ld. CIT(A) are as follows:

> "5.14 …However, the key question to be considered is whether the option agreement itself was made at prevailing market price on the date of such agreement. No doubt that the appellant would have entered into such agreement with a third party at market price. If it is noted that the agreement was at a price lower than the prevailing market price, it is required to be presumed that any prudent businessman could not have entered into such transaction at lower than market price. Hence, the understatement of consideration in the hands of the appellant on account of such lower consideration in the option agreement would be liable to be treated as additional turnover which should have accrued to the appellant.
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> ….
>
> 5.26 On this issue, the assessee has placed considerable stress on the fact that the option price is higher than the ready reckoner prices of the Municipal Corporation and hence, are justifiable. In my view, the ready reckoner prices do not provide any basis for determining market value of flats sold by the appellant. The flats sold by the appellant are luxury flats with very high-end amenities. In its submission which is reproduced at page 7 (para 3 of the assessee's submission), the assessee itself describes the

project as iconic, designed by international designers and one of the finest lifestyle projects undertaken by the appellant. The prices of these flats in subsequent years clearly indicate that the prices of these flats are much higher than the ready reckoner prices. During the course of hearing, the appellant was asked to explain whether its own prices were linked to ready reckoner prices. No such evidence has been produced before me to demonstrate such relationship. The sale prices of the assessee's flats are significantly higher than the ready reckoner prices as the assessee deals in high end flats which command high premium and which carry significantly higher costs. There being no relationship between the market price of the assessee's flats and the ready reckoner values, the claim made by the assessee that the option agreement values are justified because they are higher than the reckoner values is not found acceptable.

5.27 However, it is also noted that Hypercity has indeed contributed over Rs.104 crore to the appellant as option deposit. By doing so and by entering into an agreement with the assessee, it has indeed assumed a part of the risk related to sale of flats. As such, it is entitled to a part of the profits for such capital contribution and assumption of risk. Such reward to Hypercity can only be determined on the basis of a transfer price to be determined based on the market value of the flats from which option agreements have been entered into by the two parties. There is nothing on record to indicate availability of market price prevailing at the time of entering into of the MOU by the parties. "

10. Before the Ld. CIT(A), the assessee had also contended that similar option agreements had been executed with other unrelated parties and therefore the option agreement agreed between the assessee and HRPL should not be doubted. The Ld. CIT(A) chose to not take cognizance of the same, citing failure on part of the assessee to provide similar MOU entered into with an independent party. The Ld. CIT(A), at Para 5.28 of the appellate order observed that, HRPL after entering into the option agreement, in FY 2009-10, had assigned

the option to buy one flat, being Flat No. 1401 in the project - 'Artesia' admeasuring 2490 sq. ft., to a third party buyer at per square feet rate of Rs.30,522/- in the next FY 2010-11. This according to Ld. CIT(A), was a suitable benchmark rate to determine the arm's length price of all twenty (20) flats, whose actual option prices were in the range of Rs.27,000 to Rs.30,000 per square feet in FY 2009-10. The relevant observations made by Ld. CIT(A) in this regard, is as follows:

> 5.28 It is noted that the MOUs have been entered into on 25th March, 2010. This also represents a period when the prices of real estate in Mumbai were more or less constant. It is noted that one of the flats under this agreement has been transferred to a third party in March 2011. It is also noted that the assessee had hardly received any significant option advance till such time. In my view, such third party transfer price represents a good representative market value in respect of the appellant's flats. The value at which this flat has been transferred needs to be adopted as a market value for determining the option price in respect of all the 20 flats for which agreement was entered into by the two parties.

11. Pegging the benchmark option price at Rs.30,522/-, the Ld. CIT(A) recomputed the arm's length revenues of the assessee from the sale of these twenty (20) flats and accordingly re-worked the income of the assessee for AY 2018-19. The relevant working is found at Para 5.33 of the appellate order, which for the sake of convenience, is reproduced below:

> "5.33 Based on the above computation, the income of the assessee for the AY 2018-19 is computed as below:

Particulars	**Amount as on 31.03.2018**
Total Carpet Area Sq. ft (A)	6,31,810
BUDGETED	
Land Cost	2,87,35,80,265
Construction Cost	15,66,51,53,277
Borrowing Cost	4,91,86,09,609
Total (B)	23,45,73,43,151
COST PER Sq. ft (G)	37,127
ACTUAL	
Land Cost	2,87,35,80,265
Construction Cost	8,15,84,99,634
Borrowing Cost	3,15,02,43,446
Total Project Cost (C) Refer (Annexure III)	14,18,23,23,345
ACTUAL	
Carpet Area (Sq ft) (D)	1,58,126
Sales Value (E)	6,90,15,76,891
Parameters as per Revised Guidance note 23	
% of Completion of Work (C/B) (F)	60.46%
% of Area Sold for determining Revenue Recognition (D/A)	25.03%

Sales Amount on Revenue Recognition (E x F)	4,17,26,97,412
Cost on Revenue Recognition (G x D x F)	3,54,94,77,576
Gross Profit	62,32,19,836
Less: ICDS Impact	(7,17,56,213)
Net Profit	55,14,63,623
Less: Offered in COI	44,47,37,577
Balance	10,67,26,046

12. Accordingly, out of the total addition of Rs.98,25,58,185/- made by the AO, the Ld. CIT(A) deleted addition to the extent of Rs.87,58,32,139/- and confirmed the balance sum of Rs.10,67,26,046/-. Aggrieved by the order of the Ld. CIT(A), both the assessee and Revenue are now in appeal before us.

13. We have considered the rival arguments made by both the parties, perused the orders of the AO and the Ld. CIT(A), and the paper book filed on behalf of the assessee. The issue before us, is the acceptability of the option agreement entered into by and between the assessee and HRPL, for purchase of twenty (20) flats in residential project – 'Artesia', and the option prices agreed therein. The case of the Revenue is that, this agreement was a sham transaction, which was only meant to divert profits from the assessee to HRPL. The Ld. DR Smt Neelam Shukla appearing on behalf of the Revenue filed a

written submission in support of the same. According to her, the assessee was unable to demonstrate the need and urgency for entering into the option agreement with HRPL at such low option prices. The Ld. DR discussing the terms of the agreement has claimed that they were vague and that there was no rationale or basis for arriving at the option price. The Ld. DR has cited two instances, which according to him, revealed that HRPL had made substantial gains from which it could be inferred that the option price agreed upon by the assessee was on the lower side. On the other hand, the Ld. AR Shri Vijay Mehta appearing for the assessee vehemently contended that the agreement between the assessee and HRPL was acceptable and a commercially prudent business transaction, which is a regular occurrence in the real estate business. He submitted that the entire approach of the Revenue was flawed as it suffered from hind-sight bias and that the Revenue had failed to consider the circumstances, market conditions, etc. prevailing at the material time when the option agreement was entered into. The Ld. AR has also filed written note in support of its case, along with rebuttals to the submission furnished by the Ld. DR appearing for the Revenue. The contentions raised by both the parties have been discussed and dealt with in detail in the succeeding paragraphs.

14. Before we proceed to deal with the rival contentions, let us first examine the relevant option agreement in question and also the background facts and circumstances leading to such agreement. We find that, the assessee company, in the instant case, had launched a residential project – 'Artesia' in Worli, Mumbai, whose title certificate was issued on 06.05.2009. The proposed development was subject to approvals and clearances from the Municipal Corporation of Brihanmumbai. In the meantime, the assessee had begun marketing the said residential project and in FY 2010-11, the assessee was only able to obtain bookings for two (2) flats in the proposed development. In the same year, the assessee entered into an agreement with its associate entity, HRPL in terms of which the latter was given a pure irrevocable option to purchase twenty (20) flats in this project. Copy of a sample option agreement along with supplementary agreement is found placed at Pages 32 to 70 of the paper book. On conjoint reading of these agreements, it is noted that Clause (3) of the Original Agreement sets out the details of the proposed flat which would be constructed at the proposed project along with the Option Price viz., the price at which the option holder i.e. HRPL could purchase the said flat. Once HRPL would exercise this option, the assessee was bound to execute Agreement for Sale of the proposed flat. The relevant terms and conditions of the said Option is as follows:

"Proposed Flat

3. The Option Holder desires to acquire an option to purchase a residential flat(presently bearing number 1) situate on the 19th floor in the proposed residential section of the proposed building to be constructed by the Developer. The proposed flat shall tentatively admeasure approximately 2490 square feet carpet area subject to the final area being determined only on the receipt of final approvals from the statutory authorities (hereinafter referred to as "the Flat"). The price of the flat will be Rs.7,20,00,000/- (Rupees seven crore twenty lacs only) subject to the variation, if any, (due to variation in the carpet area) in proportion to the variation in the aforesaid tentative carpet area with the carpet area determined on the receipt of final approvals from the statutory authorities ("Option Price"). The developer has agreed to be bound on the exercise of the option by the Option holder, to agree to sell the flat to the Option Holder for the consideration and on the terms stated herein and will be set out by the Developer in the standard Agreement for Sale of the flats in the building."

15. By letter dated 30th December 2010, the assessee and HRPL had acknowledged the revision in the projected carpet area of the flat and consequent revision of option price, which was captured in Clause (D) of the Supplemental Agreement dated 4th March 2014. The relevant Clause reads as follows:

"By letter dated 30th December, 2010 ["said Letter"] the Parties inter alia recorded the revised terms and conditions as agreed on that date, as also the then protected carpet area of the said 4 BHK Flat No. 1901 on the 19th Floor (the flat remaining the same, but with the revised area) ["proposed Apartment"] as tentatively admeasuring 334.91 sq. mtrs. Equivalent to 3605 sq. ft. carpet area, subject to final plans that may be approved by MCGM. Accordingly, and as provided in Clause 3 of the said MOU read with the said Letter, the price of the proposed Apartment No. 1901 is fixed at Rs.10,43,00,000/- ["the revised Fixed Price"], subject to further proportionate variation in the price commensurate with increase or decrease in carpet area, if any, as per the final plans that may be approved by

MCGM. The Parties agree that the said Letter (read with the said MoU) has fixed the Revised Fixed Price for the proposed Apartment, as on the date of the said Letter. The Option Holder has deposited Rs.99,00,000/- till date as part of the Option Deposit under the said MOU read with the said Letter. As also paid Rs.7,49,068/- as Service Tax thereon. Clause 29 of the said MOU entitles the Option Holder to a one time right to assign and transfer the option rights under the said MOU to a third party, after expiry of 12 months from the date of the MOU."

16. It is noted from Clause (8) of the original Agreement that, the option holder was required to a place deposit with the assessee, to retain the right to exercise the option to purchase the flat and enable the Developer to reserve the said flat. The schedule and conditions for payment of option deposit as agreed between the assessee and HRPL are as follows:

"Deposits

8. The Option Holder shall deposit the following amounts (subject to proportionate variation commensurate with variation in carpet area, if any) with the Developer as refundable deposits (free of interest), to retain the right to exercise the option to purchase the Flat, and to enable the Developer to reserve the flat for exercise of the option at the aforesaid Option Price, upto the expiry of the option period during which the option is available to the Option Holder. The schedule and conditions for payment of option deposit is as under:

(a) Rs.25,00,000/- Initial option deposit paid on execution hereof;

(b) Rs.27,50,000/- to be deposited within a period of one week from the date of intimation of submission of plans for approval to the authorities;

(c) Rs.27,50,000/- to be deposited within a period of one week from the date of intimation of commencement of work;

(d) Rs.80,00,000/- to be deposited on expiry of 3 months from the aforesaid date of intimation of commencement of work;

(e) Rs.80,00,000/- to be deposited on expiry of 6 months from the aforesaid date of intimation of commencement of work;

(f) Rs.80,00,000/- to be deposited on expiry of 9 months from the aforesaid date of intimation of commencement of work;

(g) Rs.80,00,000/- to be deposited on expiry of 12 months from the aforesaid date of intimation of commencement of work;

(h) Rs.80,00,000/- to be deposited on expiry of 15 months from the aforesaid date of intimation of commencement of work;

(i) Rs.80,00,000/- to be deposited on expiry of 18 months from the aforesaid date of intimation of commencement of work;

(j) Rs.80,00,000/- to be deposited on expiry of 21 months from the aforesaid date of intimation of commencement of work;

(k) The balance amount of Rs.80,00,000/-, (subject to variation in the option price of the flat as mentioned in clause 7 above) to be deposited upon the intimation of completion of the building."

17. The above terms of payment were also revised in the Supplementary Deed dated 04.03.2014, which were as follows:

"7. The Option Holder has agreed that in consideration for grant of the option, the Option Holder shall deposit Rs.10,43,00,000/- (Rupees Ten Crores Forty Three Lakhs Only) with the Developer in keeping with the understanding as set out in the said Letter (read with the said MOU), as an Option Deposit, to enable the Option Holder to reserve the Option Holder's right to exercise the option to acquire the proposed Apartment and to bind the Developer to reserve the proposed Apartment for exercise of the option at the Fixed Price (upto the expiry of the Option Period during which the option shall be available to the Option Holder). The Option deposit is/shall be paid in installments as follows:-

(i) Rs.1,06,49,068/- received by the Developer from the Option Holder prior to execution hereof as follows:-

Rs.25,00,000/- received on 25.03.2010

Rs.27,50,000/- received on 02.05.2011

Rs.27,50,000/- received on 06.05.2013

Rs.1,55,788/- received on 20.08.2013

Rs.24,74,280/- received on 20.12.2013

Rs.19,000/- received on 06.01.2014

The aforesaid amounts have been received with applicable service tax, which has been paid by the Developer to the Authorities.

(ii) Rs.1,41,00,000/- was due and payable prior to execution hereof

(iii) Rs.1,25,05,000/- to be paid on or before 20.07.2014

(iv) Rs.52,15,000/- to be paid on or before 20.09.2014

(v) Rs.52,15,000/- to be paid on or before 20.11.2014

(vi) Rs.52,15,000/- to be paid on or before 20.01.2015

(vii) Rs.52,15,000/- to be paid on or before 20.04.2015

(viii) Rs.52,15,000/- to be paid on or before 20.07.2015

(ix) Rs.52,15,000/- to be paid on or before 20.10.2015

(x) Rs.52,15,000/- to be paid on or before 20.01.2016

(xi) Rs 52,15,000/- to be paid on or before 20.04.2016

(xii) Rs.52,15,000/- to be paid on or before 20.07.2016

(xiii) Rs 52,15,000/- to be paid on or before 20.10.2016

(xiv) Rs.52,15,000/- to be paid on or before 20.01.2017

(xv) Rs.52,15,000/- to be paid on or before 20.04.2017

(xvi) Rs.52,15,000/- to be paid on or before 20.07.2017

The Option Holder shall pay service tax as may be specified by the Developer along with each of the aforesaid installments to be received from The Option Holder.

The Option Holder shall be entitled to the rights reserved herein, only if and subject to the Option Holder having paid the Option Deposit as aforesaid within the time as provided hereinabove. On the Option Holder exercising the option to acquire the proposed Apartment, the Option Deposit shall stand adjusted towards the earnest money (equivalent to 20% of the agreed Fixed Price) and towards on account payment for acquiring the proposed Apartment at the time of execution of the Agreement."

18. From the above, it is thus noted that HRPL had placed refundable deposits with the assessee to obtain an option to purchase the proposed flat, which would be constructed by the assessee, at a pre-determined option price. It is further observed from Clause (19) of the Original Agreement that the assessee was entitled to create charge on the plot of land and/or the building (including the proposed flat whose option was granted) and that the option holder could not object to the same. It was only when the option was sought to be exercised and the Agreement for Sale would be executed, that the assessee was required to vacate the charge in relation to the said flat. The relevant Clause (19) is as follows:

"Title & Sanctions

19. The Option Holder has inspected and been given a copy of the Title Certificate dated 6th May, 2009 relating to the leasehold land (and the said Title Certificate shall be Annexed to the Agreement for Sale), and has

accepted and is satisfied about the title of the Developer and the entitlement to develop the said property. The Option Holder shall not be entitled to question or raise queries relating to the title, or entitlements of the developer. The Option Holder has inspected all title documents relating to the Developer's right relating to the municipal leasehold land, and has been informed to the status of approval, conditions, encumbrances, mortgages and other relevant issues and accepts and is aware of all facts relating thereto, including:-

(1) Equitable mortgage in favour of Housing Development Finance Corporation Ltd. in respect of the said plot of land;

(2) Rents, premium, transfer charges, renewal, redevelopment, change of user and other terms conditions and policies of MMC (Estates) and relating to the municipal lease of the said plot;

(3) Mutation of records in favour of Developer by MMC (Estates);

(4) Parking lot, amenity space and road setback areas to be handed over to MMC (in keeping with the policy, rules and regulations as may be inforce from time to time);

(5) Approvals, renewals & sanctions from various statutory authorities yet to be obtained; including from MMC (Estates), MMC (Building Proposals), MOEF etc.

The Developer is and shall be entitled to create charge on the said plot of land and/ or the building (including the said Flat and the parking space) to which the Option Holder does not and shall not object provided that, In the event the option to purchase the said Flat is exercised and the Agreement for Sale is executed then the Developer undertakes to vacate the charge, then existing if any, on the said Flat and the parking space prior to handling over its possession to the Purchaser."

19. The above clause was not amended in the Supplemental Agreement dated 04.03.2014. It is thus noted that, the option deposit placed by HRPL was unsecured. Hence, if the assessee proposed to

obtain a loan against the land/building of Project – 'Artesia', it was entitled to create charge on the flat for which purchase option had been given to HRPL. Accordingly, in such an event, the first charge over the flat, whose purchase option was obtained by HRPL from the assessee, would be with the Bank/FI. Hence, in case the project got delayed or mired in litigation or it did not turn out to be successful, then the Bank/FI would have the lien over the proposed development to recover their respective dues and the status of HRPL would be that of an 'unsecured creditor'.

20. Clause (28) of the Original Agreement read with Clause (19) of the Supplemental Agreement also makes it clear that this document grants a pure and irrevocable option given to HRPL and that it is not an Agreement for Sale. By placing interest-free unsecured deposits with the assessee, HRPL was only able to secure the right to exercise the option to acquire the flat at a later date. Clause (29) of the original agreement provided HRPL with the right of assignment of option. In terms of the said clause, the option holder, after expiry of 12 months from the date of the agreement, was entitled to assign and transfer its rights and benefits under this option agreement in favour of a third party, subject to fulfillment of all obligations by the third party.

21. As noted earlier, the project – 'Artesia' had not received approvals/clearances from the Municipal Corporation on the date of the option agreement. Accordingly, Clause (22) of the Original

Agreement included a termination clause, in terms of which, HRPL was entitled to terminate the MOU, if the assessee failed to obtain necessary sanctions within twelve months and/or the extended period, as agreed upon. Correspondingly, if HRPL defaulted in payment of option deposits, as agreed upon in Clause (8) of the MOU, the assessee had the right to terminate the agreement. Upon termination at the instance of either parties, the assessee was required to refund the option deposits to HRPL. This Termination Clause is noted to have been amended by the Supplemental Agreement dated 04.03.2014, wherein primarily the right of termination given to the option holder on account of assessee's failure to obtain requisite approval was omitted, as the certificate of commencement (dated 27.05.2013) had since been obtained. The amended Termination Clause read as follows:

> "17. This Option MOU shall stand terminated and the right to exercise the option shall come to an end and stand relinquished in the earliest of the following events:-
>
> (a) By Option Holder's failure to pay any part of the Option deposit within the time provided in this Option MOU, on expiry of 15 days' notice of demand from the Developer;
>
> (b) Upon expiry of 30 days from Option Holder's exit notice in writing to the Developer (without any clause);
>
> (c) Upon expiry of 30 days' notice in writing from the Option Holder to the Developer, if the said Documents are not provided by the Developer to the Option Holder on or before 30th December, 2014;

(d) If the option to acquire is not exercised by the Option Holder within the said Period of 30 days (from and after Developer has provided the said documents to the Option Holder);"

22. Clause (30) of the Original Agreement stated that, in the event, HRPL did not exercise the option and sought to surrender it and obtain refund of the deposits placed with the assessee, then the assessee was required to refund the deposit to the option holder along with interest, as may be mutually agreed between the parties. This, however, was amended in the Supplemental Agreement by way of revised Clause (18), which removed the requirement to pay interest on refund. Instead it was clarified that only the option deposit shall be refunded (without any interest or claim), save and except for the event of Termination provided in Clause (17) (c) & (d) *[already reproduced above]*, in which a mutually agreeable compensation may be paid by the assessee. The relevant Clause (18) read as under:

"18. On expiry or termination of this Option MOU, the Option Holder shall have no claims or rights of any nature in relation to the proposed Apartment or against the Developer, save and except for refund of the Option Deposit paid to the Developer (in the event provided in Clause 17(c) and (d) of this Option MOU and mutually agreeable compensation ['Compensation'] which shall be in keeping with the reasonable market price as on the date of termination); subject to the Option Holder having complied with the obligation of making payments as set out in this Option MOU without any delay or default). It is hereby clarified that the said Compensation shall become payable as aforesaid only in the event of termination under Clause 17(c) or (d) above, and not otherwise. No interest shall be payable on any deposits in event of termination under Clause 17(a) and (b) above. Such refund of deposit (and Compensation, if any), subject to deduction of tax at source, if applicable as per rules, shall be payable only

against a confirmation letter from the Option Holder, that the Option Holder has no claim, dispute or right of any nature whatsoever in or relating to the proposed Apartment or the said MOU/ the said Letter/this option MOU or against the Developer on any account whatsoever. On tender of the refund of the deposit (and such Compensation, if any) by the Developer to the Option Holder, the Developer shall be fully and absolutely entitled to deal with or sell the proposed Apartment in any manner whatsoever in its sole discretion, without any claim, objection or obstruction by the Option Holder and without further reference to or recourse by the Option Holder."

23. Upon examination of the agreements between the assessee and HRPL and the terms & conditions contained therein, it is thus noted that in the year 2010, HRPL had acquired an option to buy flats in the proposed development, which would be constructed by the assessee, in lieu of which it had placed adjustable interest-free security deposit. It is noted that, at the material time, when this agreement was entered into, even approval/clearance from the local authority for commencement of construction was pending. Further, this option deposit was neither secured nor did it give HRPL any right to specific performance. It was only an irrevocable option and not an Agreement for Sale. It is only when the option is exercised that an Agreement for Sale would be executed. If the option was not exercised or surrendered at the instance of the option holder, i.e. HRPL, the assessee was required to only refund the principal security deposit, without any interest, damages or additional claim thereon. It was only if the assessee failed to provide the documents, as agreed upon, to HRPL, which would result in termination of the agreement, that

compensation would become payable by the assessee to HRPL, over and above the security deposit. However, it is noted that there was no definitive manner provided for calculation of compensation and instead it was to be based on mutually agreeable terms.

24. We thus note that, HRPL was a financial investor, who had participated by contributing capital in the form of interest-free adjustable security deposit and thereby obtained the right over twenty (20) flats in the proposed development to be undertaken by the assessee. This is noted to be a business transaction, wherein HRPL had assumed risk of its capital qua the proposed development. If the proposed development got completed and the flat prices increased, then HRPL would make profit from sale/assignment of such options. In case the project got delayed or mired in litigation or that the expected sale prices did not commensurate with option price, it would result in surrender of option by HRPL, with only recourse to obtain refund of principal deposit from the assessee.

25. In view of the above facts, the first aspect which requires our consideration is, whether the terms and conditions of the above option agreement entered into by and between the assessee and HRPL is commercially prudent and thus acceptable. In this regard, the Ld. AR pointed out that, such option agreements were a common phenomenon in the real estate industry. He submitted that, the real estate business

requires an enormous amount of capital to carry on the projects, has high gestation periods and requires substantial working capital. He also submitted that the customers prefer to buy ready-to-move in projects rather than under-construction projects to avoid risks of delayed completion, regulatory issues, escalation costs, etc. The real estate developers are, however, keen to sell to-be constructed or under-construction properties for twin reasons, (a) it acts as a seal of approval to the sale-ability of the project, (b) the interest-free advances received upon bookings ease the liquidity position, mitigates interest burden, reduces the requirement of borrowings, as it acts as working capital for construction costs to be incurred. Hence, there are financial investors in the real-estate industry, who provide interest-free capital for a proposed project and in lieu thereof, these investors secure a right/option over the proposed construction at pre-agreed prices. If the project turns out to be successful at a later date, the investor earns a profit on its capital investment from the uptick/increase in the price of such constructed spaces. However, if the project gets stalled or delayed or is unsuccessful, then these investors can only seek refund of their capital/deposit invested, which is either refunded with or without interest, depending upon the terms agreed upon. In such a transaction, the financial investor is also faced with a risk of loss of capital/deposit, as the same is generally unsecured. As noted at *Para 7* above, such an arrangement, was noted by the Ld. CIT(A) to be an acceptable financial model in the real

estate industry.

26. The Ld. DR for the Revenue in her written submissions noted that such agreements were indeed in vogue, but according to her, just because such arrangements are common, it would not validate the transaction between the assessee and HRPL. According to the Ld. DR, the assessee did not demonstrate its urgent need for low-cost capital in as much as according to her, the assessee had sufficient own funds and therefore there was no useful purpose served by entering into such option agreements with HRPL and thereby forfeiting expected future profits. The Ld. DR also highlighted the fact that the assessee had advanced significant loans to related parties in FY 2010-11 and therefore she questioned the fund requirement, as claimed by the assessee, and the necessity for the assessee to enter into such option agreements. The relevant submissions put forth by the Ld. DR in this regard, is as under:

> "3.1 Merely because certain arrangements are in vogue do not by itself give a stamp of valid business arrangement to the transaction in the case of any entity without reference to the business circumstances in which the entity is in the given time. The claim of the assessee that the option arrangements have been entered into to avail the much needed low cost capital by the assessee warrants examination if the assessee actually needed it and if so did the transaction actually provided the capital to the assessee as per arrangement.
>
> 3.2 A perusal of the balance sheet of the assessee indicates that the assessee was itself flush with money and that itself has provided about Rs. 135.23 crs

of loan to 'Pvt. Companies in which Director is a Director or Member' and a further loan of Rs.10.56 crs to 'Public Company in which Director is a Director' [refer Schedule J to the Balance sheet for the year ending 31st March 2010 vide pge.09 of the Paper Book(PB) submitted on 09/09/2022] No other loans except for Overdraft from banks is seen from the same. As can be seen from balance sheet there are no major loan liability of assessee but in fact assessee has traditionally been in practice of advancing huge sums of loans to the concerns where directors are co-directors or have substantial interest in those concerns. Thus urgent need for low cost fund necessitating forfeit of substantial future profits for little or no money is NOT emanating from the same. In fact it would be necessary to identify the parties that have been the recipients of these loans to ascertain the true nature of the arrangements under consideration."

27. To this, the Ld. AR pointed out that the above analysis undertaken by the Ld. DR to doubt the genuineness of the option agreement was based on irrelevant considerations. In the first instance, he argued that no such allegation had been made by the AO in the assessment order and therefore it was wholly impermissible for the Revenue to make out a new case at this stage. He further contended that, the need of funds for business and the manner in which the businessman chooses to raise it, is solely the prerogative of the businessman and that the Revenue cannot place itself in the shoes of the businessman and dictate as to how the businessman ought to run its operations or raise funds. Inviting our attention to the Balance Sheet for the FY 2009-10 [*Page 1 of the paper book*], the Ld. AR pointed out that, the assessee had substantial borrowings as against its own capital and reserves and therefore the assessee was already saddled with substantial borrowing costs. Hence, according to him,

the financial model adopted by the assessee for raising funds by way of interest-free deposits from HRPL by entering into option agreements was a commercially expedient transaction as not only was (a) the company able to raise substantial funds without any cost or interest, but at the same time, (b) the company also ensured commitment for sale of twenty (20) flats upfront in their proposed development, construction of which was yet to begin at that material time. As far as the loans advanced by the assessee was concerned, he pointed out that these loans were given to sister concerns in the course of real estate business which carried commercial rate of interest and therefore the advancement of such loans did not have any bearing on the present issue at hand.

28. Having examined the rival contentions on this aspect, we note from the records that, in FY 2009-10, the assessee had existing borrowings to the tune of Rs.327 crores as against own capital and reserves of Rs.20.48 crores, which carried commercial rates of interest. The borrowing costs for FY 2010-11 are noted to be in excess of Rs.44.24 crores. These borrowings stood increased to Rs.750 crores in FY 2017-18. Hence, we find force in the argument of the Ld. AR that, this fund-flow position demonstrated the assessee's need to raise low cost funds and mitigate additional interest burden. We also agree with the Ld. AR that this option agreement was a commercially expedient transaction as it enabled the assessee to obtain interim

funding in the form of interest-free deposits with embedded option, for its project without interest/cost and it also indirectly secured the commitment from HRPL to buy twenty (20) flats in their proposed development, whose construction had not even commenced by then, and whose sales/bookings until then was sluggish (*assessee had only obtained two other bookings until FY 2010-11*). Further, the fact that HRPL, a reputed company and a subsidiary of M/s Shoppers Stop Ltd, chose to participate in this proposed development, enhanced the bankability of the project. It was also pointed out to us that, the option price agreed in 2010 was commensurate with the prevailing market value for stamp duty purposes and therefore it was not a case that the option to acquire twenty (20) flats was given to related party, HRPL at understated values. On the issue of loans of Rs.135.23 crores advanced by the assessee to its sister concerns, it is noted that they were given in the course of business and were interest bearing, and on which the assessee had derived interest income to tune of Rs.25.67 crores. On the other hand, the interest-free deposits with embedded option received from HRPL were not only interest-free but also did not entail any cash outflow. On conspectus of these facts, we agree with the finding of the Ld. CIT(A) in holding the option agreement between the assessee and HRPL to be commercially expedient and thus acceptable.

29. The next argument [*Para 3.3 of his written submissions*] raised

by the Ld. DR, was that the option deposits received from HRPL in the initial years were only to the tune of Rs.11 crores and that the option deposits aggregating to Rs.104 crores only accumulated with the assessee in the later years, when the sales had picked up, which further raised serious doubt on the genuineness of option agreement. In the rebuttal, the Ld. AR pointed out that the option deposits were received in the manner and schedule as agreed in the agreement and therefore the suspicion of the Ld. DR was factually unfounded.

30. We note that, it is not in dispute that, although the option agreements were entered into in 2010, the necessary approval/clearance to commence construction was received only in FY 2013-14. The terms of the option agreement manifestly lays down the installment schedule for payment of option deposits. We note that it is not the case of the Revenue that the option deposits were not paid to the assessee within the time lines as agreed upon. Understandably, until the construction work began, there was little need of funds by the assessee. It was only when the certificate for commencement of construction was received on 27.05.2013, that the actual requirement for working capital arose, and until then the assessee had admittedly been able to secure interest free option deposits from HRPL to the tune of Rs.48.66 crores (upto FY 2013-14) against twenty (20) flats. Having regard to these facts, even this doubt raised by the Ld. DR regarding the staggered manner of payment of option deposits, is

found to be untenable.

31. Apart from the above reasons, we are also unable to countenance the action of the Ld. DR in questioning the necessity and purpose for entering into option agreement, on the premise that, it is the assessee's prerogative to decide the manner in which it wants to run its business and the Department cannot replace the wisdom of the assessee. The Revenue cannot decide or dictate as to how an assessee should conduct its business or maximize its profits. It is by now well settled in law that, the Revenue cannot step into the shoes of the businessman for determining reasonableness and business expediency. Hence, the Ld. DR could not have questioned the necessity, purpose and manner of raising of funds by the assessee, in the form of option deposits from HRPL, as it was outside the domain and jurisdiction of the Revenue. The reliance placed by the Ld. AR of the assessee on the following decisions is found to be justified.

32. The Hon'ble Delhi High court in the case of **CIT vs Dalmia Cement (P) Ltd (254 ITR 377)** has observed as under:—

> "7. It is to be noted that, in the present case, the question that has been raised by the revenue is not one relating to the expenditure being not for the purposes of the business. It is the question of an appropriate amount which would have been paid as commission. In fact, the Assessing Officer himself has allowed to the extent of Rs. 4,35,854 holding, inter alia, "the payment of Rs. 1.75 per M.T. to Cement Distributors Ltd. is very much on the excessive

side". This in our view was impermissible within the framework of section 37. The jurisdiction of the revenue is confined to deciding reality of the expenditure, namely, whether the amount claimed as deduction was factually expended or laid down and whether it was wholly and exclusively for the purpose of the business. The reasonableness of the expenditure could be gone into only for the purpose of determining whether, in fact, the amount was spent. Once it is established that there was a nexus between the expenditure and the purpose of business, the revenue cannot justifiably claim to put itself in the armchair of a businessman or in the position of the board of directors and assume the said role to decide how much is a reasonable expenditure having regard to the circumstances of the case. We need not go into any hypothetical issue in this case in view of the accepted position that the factum of services rendered by CDL has not been refuted by the revenue. It needs no reiteration that the settled position in law is that no businessman can be compelled to maximise his profits. The obvious answer to the first question is in the affirmative, in favour of the assessee and against the revenue."

33. The Hon'ble Supreme Court in the case of **S.A. Builders Ltd. Vs CIT(A) (288 ITR 1)** at para 34 of the order has observed as under:—

"34. We agree with the view taken by the Delhi High Court in CIT v. Dalmia Cement (Bharat) Ltd. [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, we have to see the transfer of the

borrowed funds to a sister concern from the point of view of commercial expediency and not from the point of view whether the amount was advanced for earning profits."

34. The Hon'ble Supreme Court in the case of **CIT Vs Rajan Nanda (349 ITR 8)**, has observed as under: —

"25. After giving our due and thoughtful consideration to the submissions of the parties of both sides, we feel that the assessee has been able to make out a case in its favour and order of the Tribunal does not call for any interference. We are persuaded by the following reasons in support of this view of ours:
(i) to (v) ** ** **

(vi) Once the legal provisions and the outlook of Department itself based on such legal provisions permit the assessee to have the tax planning of this nature, and the course of action taken by the assessee is permissible under law, the argument of colourable device cannot be advanced by the Revenue. When expenditure of this nature is treated 'business expenditure' per se by the Department itself, there cannot be any question of raising the issue of want of business expediency. The learned counsel for the respondent is right in his submission that the Department could not sit on the armchair of the assessee and decide as to whether it was appropriate on business expediency for the assessee to incur such an expenditure or not. If the transaction is otherwise valid in law and is a part of tax planning, merely because it has resulted in reduction of tax, such expenditure cannot be ignored raising the issue of underlying motive of entering into this type of transaction. Various judgments cited by the learned counsel for the respondents clearly get attracted to this Court."

35. The Hon'ble Punjab & Haryana High Court in the case of **CIT Vs Rockman Cycle Industries (P.) Ltd. (331 ITR 401)** has observed

as under:—

> '23. In view of our aforesaid discussion and pronunciation of law, as referred to above, the question referred for consideration by the larger Bench can very well be answered by opining that the Assessing Officer or the appellate authorities and even the courts can determine the true legal relation resulting from a transaction. If some device has been used by the assessee to conceal true nature of the transaction, it is the duty of the taxing authority to unravel the device and determine its true character. However, the legal effect of the transaction cannot be displaced by probing into the "substance of the transaction". The taxing authority must not look at the matter from their own viewpoint but that of a prudent businessman. Each case will depend on its own facts. The exercise of jurisdiction cannot be stretched to hold a roving enquiry or deep probe.'

36. In all the above judgments, we note that the Courts have time and again observed that, whether the transaction is expedient for the purpose of business has to be looked at by the Income-tax Authorities from the view-point of the assessee as a prudent businessman and not from the armchair of the AO. The Courts have observed that it is the assessee who knows its business. It is its success or failure in the business, which is material to it. It is not for the income-tax authorities to suggest, or advice, or to presume or surmise as to the expedience of the transaction. For the aforesaid reasons, we hold that the Ld. DR could not have questioned the commercial necessity for the assessee to have entered into the option agreements with HRPL.

37. The next line of reasoning given by the Ld. DR in support of

the AO's order was that, the option prices agreed in the option agreement was abysmally low. This according to her was evident from the fact that the loss of revenues to the assessee by awarding options to HRPL, did not commensurate with the cost of option deposits, had the same been raised by the assessee from the market by way of regular borrowings. She thus questioned the benchmarking exercise carried out by the Ld. CIT(A), as according to her, the Ld. CIT(A) had missed the critical factors that the reward to HRPL ought to have been in proportion to capital contributed and risks assumed. According to her, HRPL had earned a return of Rs.175.15 crores on its investment/deposit of Rs.104 crores, which showed that the option prices in the option agreement was highly skewed in favour of HRPL. The Ld. DR submitted that such low option prices were agreed upon with the sole purpose to divert profits from the books of the assessee. The relevant submissions made by the Ld. DR in this regard, is as follows:

> "4. Be that as it may, a perusal of the arrangement reveals that the transaction has been made on the basis of very vague terms on lump-sum basis with no basis for arriving at the price determined in each of the flat agreed to be sold. Of the two flats whose option agreements have been examined by the CIT(A)/submitted by assessee, the flat bearing no 1401 has been sold as per square feet carpet area @ 27,430/- [on the basis of the working in pt.5.29 of the CIT(A) order.
>
> The option price to HRIPL is 6.83 crs for this flat with carpet area of 2490 sq.ft. while flat no.1901 has been sold @28,915/-[As per sample option agreement submitted as part of the PB did. 08/06/2021-page 34 of the PB. The

original option price is Rs.7.20 crs for a flat with carpet area of 2490 sq.ft along with 2 parking lots and other amenities included -page 36 of the PB] The reason or basis for the variation is not emanating from agreements nor the submissions. Similar would be the situation in case of other flats. The transaction is with it associate concern, it perforce mandates that the transaction be examined with reference to whether the transaction is as per open market terms or not. The rates at which final transactions have been made allowing returns at the rate in excess of 200-300% of its deposits glaringly indicate that it was not so. The normal practice is to sell on built up area basis. By assigning the flats on carpet area basis, the rate has been further suppressed drastically as regards the option agreements is concerned. It is further seen that the rate also subsumes the two parking lots that as per normal business practice, are sold separately or commensurate amounts loaded into per square feet rate.

4.1 The decision of the CIT(A) to compare per square feet rate to arrive at the market rate wide para 5.29 of his order misses the critical factors identified by the CIT(A) himself vide para 5.27 wherein he himself ruled that reward to HRIPL should be in proportion to the capital contributed and risk assumed. But in the final decision to consider the rate compared on the basis of the flat 1401 ignores both these elements.

4.2 As stated earlier the initial amount received was only five crores from 20 flats. In the case of flat 1401 that has been considered by the Ld. CIT(A) for determining the market rate, the final sale price has been Rs.7.6 crs as against the option price of Rs.6.83 crs. Out of this only the initial payment of Rs.25 lakhs has been made by HRIPL). Thus, for an initial contribution of mere 25 lacs, HRIL has been gifted a profit of Rs.77 lacs in just one year. This is 308% return on the initial deposit of the actual amount of Rs.6.83 crs agreed as investment. The business under consideration is not gambling business and no other business offers such return elsewhere in the market leave alone in real estate market. As regards the risk, as has been stated by the CIT appeal and undisputedly also, the agreed rates are abysmally low by any market standard especially in case of a reputed builder as assessee.

5. From the sample option agreement (flat 1901) provided by the assessee, it is seen that as per option agreement terms at section 8(page 37 of the submission) the timeline for deposit of various amounts is given. As per the same,

substantial amounts should have been paid by HRIPL between the period of initial agreement in March 2010 and the date of supplemental agreement that is March 2014 i.e.04 years. The schedule of payments as per pt.08 of the sample option agreement vide 37-38 of the PB is as below:

SI. No.	Amount	Agreed time of payment
1	25,00,000	At the time of the execution of option agreement
2	27,50,000	To be deposited within one week from the date of intimation of submission of plans for the approval to the authorities.
3	27,50,000	To be deposited within one week from the date of intimation of commencement of work
4	80,00,000	3 months from the date of intimation of commencement of work
5	80,00,000	6 months from the date of intimation of commencement of work
6	80,00,000	9 months from the date of intimation of commencement of work
7	80,00,000	12 months from the date of intimation of commencement of work
8	80,00,000	15 months from the date of intimation of commencement of work
9	80,00,000	18 months from the date of intimation of commencement of work
10	80,00,000	21 months from the date of intimation of commencement of work
11	80,00,000	Plus balance as per subject to variation of option price of the flat upon intimation of the completion of the building.

However as is noted in the supplemental agreement, the total payment received till the date of signing of the supplementary agreement is a mere 99 lakhs. Refer Pt. D of the supplemental option as per page 52 of the PB]. The timelines of these payment are also not clear, whether they are as per the terms or at the fag end/just before executing the supplementary agreement. From the summary

of submission of the assessee in CIT(A) order in pt.4 [page 8/64 of the CIT(A) order] it is seen that this has been sold within an year of the supplementary agreement (at option price of 10.43 crs) has been sold to another party (Archstone) @ 24.52 crores. Thus for a mere 99 lacs, HRIPL has been gifted with the profit of 17.326 crs as per original option agreement and 14 crore vis a vis the supplemental option, out of the total sale transaction. A return of 17 times on a mere 99 lakhs investment (as per original investment)]. This agreement defies any prudent / commercial logic seen in case of transactions between independent parties in the open market.

5 The option agreement entered by assessee with its associate concern by virtue of absence of any basis or uniformity with regards to financial terms of option agreement cannot be considered as valid market practice. These option agreements are custom-made, unique to the assessee and associate Enterprises not practice with any third-party in its business transaction. The fact that for a pittance, assessee has gifted profit to its sister concern to the tune of 300 to 400% of its initial corpus amount clearly indicate that it is not a normal business practice but a deliberate carefully conceived tax planning strategy on a long-term basis.

6 The fact that each of option agreement entered into by assessee with its associate concern is as per market condition has to be examined individually for each of the flats. Generalizing amount on the basis of one flat will not help in arriving at the same, because in none of the proceedings so far is it clearly emanating as to what is the amount of actual sale consideration received with regard to each of the flat and the amounts lent with reference to each of the flats to consider if the flats have been sold at the market rate or at comparable market condition or not. The prevalent market rates of fund as well as the flats that are the fundamental basis for considering the validity and so the acceptability of the arrangements is missing in the CIT(A)'s order nor emanating from the submissions of the assessee till date. In view of all the above, it is submitted that the decision of the CIT(A) vide his order dtd.08/09/2021 may be rejected and the action of the assessing officer on this issue be upheld."

38. To this, the Ld. AR first pointed out that the entire exercise,

which has been conducted by the Ld. DR, suffered from hindsight bias, as the Revenue is presuming by standing and looking back in FY 2017-18 that, the assessee and HRPL, could have successfully predicted this highly positive outcome of the project – 'Artesia' back in FY 2009-10, when they entered into the option agreement. He argued that the correct manner to ascertain the reasonableness of the option price, was to examine the same in light of the circumstances and position prevailing at the time when the assessee and HRPL had entered into this option agreement in FY 2009-10. He pointed out to us that, there was an ongoing global recession precipitated from the Lehman Brothers crisis in the relevant FY 2009-10, and more particularly the real estate market was reeling from the fallout of this global recession. Hence, there was a significant loss of faith amongst customers in the real-estate developers and even the market was highly sluggish. Even the Banks/FIs were highly cautious in funding new projects. There was little to no demand for real estate amongst end-customers and even then, such customers wanted to invest only in completed projects and not in to-be constructed or under construction projects. The Ld. AR submitted that, in FY 2009-10, when HRPL entered into the option agreement with the assessee for acquiring twenty (20) flats in the proposed development – 'Artesia', HRPL had assumed significant risks back then. He pointed out that, not only were the option deposits placed by HRPL interest-free, but were unsecured as well. He submitted that in 2010, neither HRPL nor the

assessee could have said with conviction that the proposed development would be completed within time, and that it would also be successful and that the constructed spaces would derive the prices/value, which it ultimately did in later years. The Ld. AR thus submitted that at that material time in 2010, had it been any other unrelated party, similar option agreement would have been negotiated with reference to the prevailing ready reckoner rates, which was in fact the benchmark for arriving at the option price of HRPL. The Ld. AR submitted that, it was only because the risk undertaken by HRPL in 2010 got significantly rewarded in the later years that the Revenue was now questioning the pricing of option in hindsight. Had the project got delayed or stuck in regulatory issues/litigation or the project would have yielded lower sales price, then the Revenue would not have questioned the option pricing. He argued that all these external factors could not have been accurately predicted in 2010 and therefore this line of reasoning given by the Revenue to hold that the agreement had been executed with the intent to divert profits, was not tenable both on facts as well as in law. Assailing the benchmarking exercise carried out by Ld. CIT(A) and also the Ld. DR in his written submissions, the Ld. AR first contended that this benchmarking exercise did not have any sanction of law. He further pointed out that, even the market conditions, terms of contract, nature of transaction, etc. of the comparison being undertaken by the Revenue was materially different and therefore the benchmarking analysis of both

the Ld. CIT(A) and the Ld. DR ought to be rejected. The relevant portions of the rebuttal submitted by the Ld. AR is as follows:

"*Submissions of the assessee :*

….

6. In the FY 2010-11, the assessee was hardly able to market any of the flats. It is evident that before the deal with Hypercity, the assessee was able to market only 2 flats; i.e to Flat No.2701 and 2702 to Universal Polymer and Mukul Deora (Pg No.73 of PB). Most importantly it must be noted that the assessee was not able to book a single flat in a long span of 2 years after the option agreement with Hypercity (Pg No.73 of PB) and one of the reason attributable for the same can be the effect caused by the Lehman Brothers crisis.

7. Booking of the flats at an early stage of the project is recognized method of raising resources and even the Hon'ble CIT(A) has held the same. A copy of the sample Option Agreement for Flat No. 1901 has been enclosed at Pg No. 32-70 of the PB. Similar agreements were entered for all the flats. This establishes the practice of booking the flats through option agreements. As on 31.03.2018, the total option deposit received by the assessee was Rs 318 crores which was Rs 5.61] crores as on 31.03.2010. The assessee has enclosed balance sheets at the relevant dates in the PB and the relevant pages for reference are Pg No. 10 & 22.

8. The option agreements for 20 flats with Hypercity have been entered for flats at 14th floor to the 21st Floor in the range of Rs 24,500 to Rs 28,155 per sq ft. Attention is drawn to Pg No.74 of the PB. As mentioned in the above paragraphs, these transactions were entered on 25.03.2010. Just before the option agreements were entered with Hypercity, the assessee entered into option agreement for 2 flats on the 27th Floor, one with Universal Polymers and the other with Mukul Deora at the comparable rate at which the transaction was done with Hypercity. The transaction with these two third parties was done at the rate of Rs. 34,000 per sqft since the flats were on the 27th Floor whereas the flats of Hypercity were on the 14" to 21% Floor. Thus, the difference of rate is partly attributable towards floor rise. The difference in the rate is in the range of Rs. 6,000 to Rs. 10,000 per

sqft and at the same time the difference in the floors is 6 to 13 floors. One more crucial reason of the rate difference is that Hypercity had booked 20 flats at one time and thus was eligible for a bulk discount whereas the transaction with the third party was only of 1 flat each. Once it is established that the rate at which the flats are sold to Hypercity at the comparable rate at which it was sold to third parties, all allegations and arguments become completely irrelevant and academic in nature.

Rebuttals to written submissions of Ld. DR :

4. Paragraph no. 4 to 4.2 – lumpsum price charged to Hypercity and huge profit made by Hypercity

The assessee has agreed to sale its flats at lumpsum price to Hypercity as well as all its other customers. These are negotiated prices after long discussions with the customers and keeping in mind the market conditions. The difference between the prices of 2 flats is because of the difference in the floor. In fact, this observation of the Department shows the hypersensitivity of Department in examining the minutest pricing difference. Its needs to be appreciated that the business dealings are not done with mathematical and clinical precision but the same are done based on the demand and supply position.

The rate of return has been calculated based on the payments made till the date of second sale, which is illogical. Not all the flats have been sold immediately. One cannot ignore the risk and reward undertaken by Hypercity.

Most importantly, the assessee has entered into similar agreement with other parties and the prices are comparable. Once, that is established, nothing else survive.

Flat no. 1401 was purchased at Rs. 6.83 crores by Hypercity and sold after one year at Rs. 7.60 crores. Earning 10% margin in one year, after taking risk of committing purchase transaction tn an under-construction building, is not unusual. Anyone who is reasonably acquainted with real estate market in the city of Mumbai would vouch for this.

5. Paragraph no. 5- payments in respect of flat no. 1901

All the payments in respect of flat no. 1901 has been received from

Hypercity as per the terms of agreement.

This allegation has not been made by any authority below. This is a fresh case made out by the ld. D.R.

If Hypercity has not made the payment because of delay in obtaining approval from the local authority by the assessee so as the case with the other customers. There is absolutely no separate treatment given to any customers. The details of Payments received from all the customers are available on page no. 73.

None of the authorities below have alleged that the agreements are not uniform. The allegations made are without any supporting.

6. Paragraph no. 6

The amount of actual consideration received with regard to each flat is available on pg. no. 73 and pg. no. 75 of the paper book."

39. Having examined the submissions of both the parties, we first find it necessary to recapitulate the facts of the case. The admitted facts are that, the option agreement with HRPL was entered into in 2010 when the project-'Artesia' had not even taken off. In fact, the construction only commenced after expiry of more than three years viz., in FY 2013-14. Hence, we agree with the Ld. AR that, the ultimate fate of the project, whether it would be well received by the end-customers, or whether expected revenues would be achieved was completely unknown at the material time, when the option agreement was entered into. It is also a known fact that the year 2010 fell within the global recession period and therefore the prevailing market conditions in that year could not be compared with later years. We thus note that, in the year 2010, when the funds were contributed by

HRPL in pursuance to the option agreement entered into with the assessee, in the form of unsecured interest-free security deposit, it carried significant risk. As noted earlier, the termination of option agreement ordinarily only entailed refund of principal without any interest or compensation. Even if the agreement was terminated due to default by Developer, then also the compensation payable was not definitive but subject to mutually agreeable terms. Hence, had the proposed development not turned out as successful as it did, and had things gone south, i.e. the markets would not have revived after the recession seen by the realty sector, the project was further delayed or the assessee-developer defaulted or that the expected sales were not achieved, then HRPL was not only faced with the risk of loss of reward on the capital but it risked losing the capital itself. We thus agree with the Ld. AR that, the correct approach to determine the reasonableness of the option price was in light of the then prevailing market conditions, facts and circumstances in the year 2010. The approach advocated by the Ld. CIT(A) and Ld. DR by back-calculating the alleged arm's length price of options, by pegging it to the actual sales price/value achieved in the later years, indeed suffered from hindsight bias and was therefore inherently flawed. For this, we gainfully refer to the following observations made by this Tribunal at Hyderabad in the case of **DQ (International) Ltd Vs ACIT (72 taxmann.com 142)**.

> "We are in agreement with the above findings of the Bangalore Bench that the valuation method adopted for determining the future years cannot be replaced with actuals down the line, the valuation will go either way. When it goes to north, the revenue may adopt the same time, when it goes to south, the assessee may adopt, there won't be any consistency. What is important is the value available at the time of making business decision. It should be left to the wisdom of the businessman, he knows what is good for the organization. No doubt, 'IP" was sold to "AE". The method adopted should be consistent and should be documented to review in the future. The review does not mean replacing the projection with actuals. It is the rational of adopting the values for making decision at the point of time of making decision. When the values are replaced subsequently, it is not valuation but evaluation i.e. moving the post of result determined out of projections. The revenue is doubting the valuation because the actual revenues were favourable. In rational decision making, the actual results are irrelevant."

40. Although the said decision was rendered in the context of valuation of IPRs, but the ratio laid down therein is held to be applicable in the facts of the instant case.

41. Although we do not subscribe to the basis of benchmarking of the Ld. CIT(A) and Ld. DR, but we agree with the Ld. CIT(A) to the extent that, it was necessary for the assessee to demonstrate that the option price agreed upon with HRPL was reasonable, having regard to the prevailing market conditions that existed then. It is noted that, the Ld. CIT(A) in his appellate order, had pegged the arm's length price of all the twenty (20) option agreement with reference to the rate at which HRPL had sold/assigned one of the Flat No. 1401 to an unrelated party in the next financial year succeeding the year of option

agreement. The Ld. DR, on the other hand has claimed that the prices at which HRPL assigned/sold its respective options to third parties in later years should be taken as the arm's length price for the options granted in FY 2009-10 and consequent thereto, the entire revenues derived by HRPL should be assessed in the hands of the assessee. We however do not countenance this benchmarking exercise of both the Ld. CIT(A) as well as the Ld. DR, for the primary reason that this so-called benchmarking analysis undertaken by them is not backed by any provision of law. It is not the case of the Revenue that, the transaction between the assessee and HRPL qualifies as 'specified domestic transaction' under Section 92B of the Act, so as to undertake a qualitative transfer pricing analysis. It is also not the case of the Revenue that, the transaction is hit by the rigors of Section 40A(2) of the Act which would then empower the AO to look at the reasonableness of the expenditure/payment. Instead, according to us, the only relevant provision in this factual context, was Section 50C/43CA of the Act, in terms of which the property being land or building or both, could not have been transferred in 2010 at prices lower than the prevailing market value for stamp duty purposes. If so done, then the actual consideration would be substituted with the market value for stamp duty purposes and shall be deemed to be the revenue of the assessee. As already noted earlier, the option price agreed in 2010 was commensurate with the prevailing market rate for stamp duty purposes and therefore it cannot be said that the option

prices agreed upon were understated. Even the Ld. DR has been unable to refute this fact. From the details of flat sold by the assessee [*Page 74 of paperbook*], it is observed that the assessee had sold several flats in 2015, which inter alia comprised of a flat sold for Rs.58,323/sq. ft. and another flat sold for Rs.72,900/sq. ft. Going by the logic propounded by the Revenue, since the price of the flats in the same project, which was sold in the same month of the same year, was at variance, the sale price of Rs.58,323/sq. ft., negotiated and agreed with third party, ought to be substituted with higher sale price of Rs.72,900/sq. ft. This however has neither been done by the AO nor is this the position of law. In our considered view, a seller of an immovable property is not required to compare the prices at which different flats are sold to different parties. Instead, the only exercise, which is to be carried out, is to ascertain whether the agreed sale consideration is equal to or higher than the prevailing market value for stamp duty purposes, at the time of agreement. Hence, if the prevailing stamp duty value is not higher than the agreed sale price (Rs.58,323/sq. ft.), then the actual sale consideration has to be accepted and it cannot be substituted with any other deemed value (Rs.72,900/sq. ft.). Having regard to the aforesaid facts and position of law, in our considered view therefore, neither the AO nor the Ld. CIT(A) could not have substituted the option price agreed between the assessee and HRPL with any other value, save for the ready reckoner rate, which, as already noted, was commensurate with the option

price.

42. Even otherwise, for the sake of completeness, we deem it fit to examine the benchmarking analysis undertaken by the Ld. CIT(A) as well as the Ld. DR. It is noted that, the Ld. CIT(A) had cited the instance of Flat No. 1401 assigned/sold by HRPL to an unrelated party to benchmark the option price of all twenty (20) flats. According to the Ld. CIT(A), HRPL had acquired the option for Flat No. 1401 for a price of Rs.27,429/sq. ft. which was sold to a third party for Rs.30,522/-/sq. ft. in FY 2011-12. This sale price of Rs.30,522/-/sq. ft. was held to represent suitable arm's length price for benchmarking the price of all twenty (20) flats, whose option to buy was acquired by HRPL from the assessee in FY 2009-10. Ex-facie, it is noted that, there was a timing difference between the date of option agreement and date of sale/assignment of option for Flat No. 1401 by HRPL (which was more than a year), and therefore, according to us, it is to be ascertained as to whether this timing difference had any material bearing on the arm's length pricing of the option. Before us, the assessee has placed the complete details of flats sold in the project – 'Artesia'. Perusal of the same reveals that the flats in the same project had been sold in 2012 & 2013 in the price range of Rs.42,000-45,000/sq. ft., whereas similar flats were sold in 2015 for price as high as Rs.72,900/sq. ft. We thus note that, when the price variance between the sale value agreed with unrelated parties in a time span of

two years was as high as 72%, appropriate timing adjustment was indeed required to be made in the analysis undertaken by Ld. CIT(A). Hence, having regard to the foregoing, the differential of 10% [(30,522-27,429)/30,522] between the price of option agreed between assessee and HRPL in 2010 vis-à-vis the price of option at which HRPL sold it to an unrelated party in 2011 could easily be attributed to timing difference and in that view of the matter, on the given facts, the option price cannot be said to be lower or understated. We thus hold that the benchmarking conducted by the Ld. CIT(A), to ultimately confirm addition to the extent of Rs.10,67,26,046/-, was unjustified.

43. The Ld. DR, on the other hand, has also cited the instance of Flat No. 1401 assigned/sold by HRPL to an unrelated party, but to contend that HRPL had made a profit of 308% from this option agreement in a year's time, which according to him, showed that all the option prices as originally agreed upon was on lower side. We however find this calculation of the Ld. DR to be flawed. As noted above, the assessee had entered into the option agreement with HRPL for Flat No. 1401 for a price of Rs.27,429/sq. ft., which in turn, had assigned/sold this option after one year for Rs.30,522/sq. ft., resulting in profit of 11% [(30,522-27,429)/27,429] in a span of one year, and not 308% as alleged by the Ld. DR. Moreover, as noted in the preceding paragraph, the increase in price of the flats over the years

was substantial (as high as 72% between 2013 and 2015) and therefore this gain of 11% derived by HRPL in a span of one year cannot be viewed with suspicion.

44. It is further observed by us, that the majority of the profit of Rs.175.15 crores made by HRPL from the other nineteen (19) flats was over a span of 50 to 92 months and therefore the action of the Revenue in picking and choosing one single instance of Flat No. 1401 to allege that, HRPL made substantial profits in a short span of time, cannot be countenanced. It is further noted that, similar option agreements had also been entered into by the assessee with several other third parties, who also had paid option deposits, in similar manner, as that of HRPL, the details of which are noted to be placed at Page 73 of the paper book. We note that, the Revenue has neither disputed nor questioned these option agreements entered into by the assessee with other third parties, whose terms and conditions are noted to be similar to that of the option agreement between the assessee and HRPL. From the details placed before us, it is noted that, the option deposits received from all third parties taken together upto FY 2011-12 were in fact lower (Rs.5.54 crores) in comparison to HRPL (Rs.11 crores). Hence, when similar option agreements entered into under uncontrolled circumstances with unrelated parties have not been doubted, then according to us, the suspicion raised by the Revenue on the option agreement between assessee and HRPL, just

because HRPL is an entity associated to the assessee which derived substantial return on the option deposits from this arrangement, is held to be factually perverse. For this, we may gainfully refer to the following observations made by the Hon'ble jurisdictional Bombay High Court in the case of **CIT Vs Mehta (P) Ltd (220 CTR 148)**:

> "5. As regards the contention of the revenue that the three concerns/ companies were under the control and management of the same group of persons and, therefore, warranted application of principles initiated in McDowel& Co. Ltd.'s case (supra), we are of the view that such a contention in the absence of any material in support thereof should be outright rejected. It is argued by the assessee before all the authorities that the said three companies are independent and acted as such at arm's length. In fact, SCCIL is a listed company. This contention of the assessee is accepted by CIT(A) who has reached a finding of fact that the amounts received by Maharana Mills from the Banks and financial institutions and from SCCIL were utilised in purchasing new machinery which was also installed and it is not the allegation of the Assessing Officer that these funds were misappropriated by the directors or were frittered away. CIT(A) have, therefore, reached a finding of fact that the guarantee given by Agrima was genuine. This finding of fact is also accepted by the Appellate Tribunal. In view of these concurrent findings of fact, we see no reason as to why we should interfere with the said finding of fact.
>
> 6. In view thereof we are of the view that except for making a bare allegation that the entire exercise of giving guarantee by Agrima to SCCIL was collusive and only to book losses on the ground that the companies have common directors and were under the same management, the revenue has failed to produce any material in support of their case that the guarantee given by Agrima was not genuine. Only because some directors were common one cannot reach to a serious conclusion that the entire transaction was collusive and colourable only to book losses.

7. In view of the above we answer the above question raised in the appeal against the revenue and in favour of the assessee. The appeal stands dismissed with no order as to costs."

45. We also find merit in the submissions of the Ld. AR that differences in option prices and the prices at which sales were made by HRPL to ultimate buyers in later years was attributable to several factors viz., timing differences, different market conditions, difference in floor etc. As noted earlier, the year 2010 was a period of recession and therefore the prevalent market conditions significantly varied in comparison to 2013 and onwards, when the recession had subsided and the markets were gaining momentum. It is also noted that, HRPL had bulk-booked twenty (20) flats, that too at a point of time when even the requisite clearance/approval from local authority was pending. Hence, the price negotiated by HRPL for twenty (20) flats could not be compared with a single flat sold to an unrelated party. It was also demonstrated by the assessee that the prices varied depending upon the floor-level of the flat. For instance, the flat at 5th floor was sold to unrelated party at Rs.37,832/sq. ft. in 2017, whereas flat at 28th floor was sold in 2015 at a price of Rs.72,903/sq. ft. Hence, the pricing of flats at different floors could not be compared. It is also noted that, HRPL was only an investor, whose ultimate motive was to sell/assign these options to willing customers at a profit. Hence, unlike other customers of the assessee, who are part of the assessee's Business to Customer (B2C) market, HRPL was a customer of the

assessee's Business to Business (B2B) market, wherein the assessee was required to not only allow adequate margin to HRPL to meet its own sales, marketing & distribution costs but also derive profits from selling/assigning the options. It is also noted that, HRPL is a subsidiary of a publicly listed company, M/s Shoppers Stop Ltd, which has an independent board and public shareholding as well. We thus find force in the submission of the Ld. AR that, irrespective of the fact that HRPL was an associate entity, the independent Board of HRPL would have had negotiated a competitive price for investing in twenty (20) flats of the proposed development to be undertaken by the assessee, particularly when the construction of the project was yet to begin.

46. On totality of the above facts and circumstances, we do not find merit in the benchmarking analysis undertaken both by Ld. CIT(A) and Ld. DR. We also find the averments made by the Ld. DR in her written submissions to be untenable.

47. The Ld. AR appearing on behalf of the assessee has also demonstrated before us that, it was also not the case, that by entering into this option agreement, the assessee had shifted profits to HRPL thereby reducing its tax liability. It is not in dispute that, both the assessee and HRPL are assessed in the status of 'company' at the same applicable tax rates. It is also not the case of the Revenue that

HRPL did not credit the revenues derived from sale/assignment of options as income in its books of accounts. From Page 76 of the paperbook, it is noted that the assessee had brought forward losses to the tune of Rs.156 crores from earlier years. Hence, even taking into account the addition of Rs.98 crores made by the AO, there were sufficient losses available with the assessee to set-off such addition and also carry forward remaining losses to future years, and hence it did not result in creation of any tax liability upon the assessee. Although, we agree with the Ld. CIT(A) that, this fact alone cannot be a decisive factor to decide the acceptability of the option agreement, but having regard to the overall facts and circumstances of the case as already discussed in the foregoing, this fact pointed out by the Ld. AR does have persuasive value.

48. For the reasons set out above, therefore, the addition of Rs.98,25,58,185/- made by the AO is held to be unjustified both on facts and in law. Accordingly, the Ground No. 1 of the appeal of the assessee is allowed and the Ground No. 1 of the appeal of Revenue is dismissed.

49. Ground No. 2 of the appeal of the Revenue is against the deletion of further disallowance of Rs.1,78,177/- made by the AO u/s 14A of the Act. Facts in brief are that the assessee has earned dividend income of Rs. 4,10,266/- and the assessee had made suo-moto

disallowance of Rs. 4,10,266/-. The AO, by invoking provisions of Rule 8D(2)(iii) computed disallowance of Rs.5,88,383/-. After allowing the credit of suo-moto disallowance, the net disallowance of Rs.1,78,177/- was made by the AO. The Ld. CIT(A) allowed the appeal of the assessee by holding that the disallowance u/s 14A was to be restricted to the extent of exempt income, by following the decision of the Hon'ble Supreme Court in the case of **Pr.CIT Vs State Bank of Patiala (99 taxmann.com 286)**.

50. Having heard rival submissions and perusing the material on records including the impugned order, we do not find any infirmity in the order of Ld.CIT(A) deleting the further disallowance made by the AO u/s 14A of the Act. Accordingly, Ground no. 2 of the appeal of the Revenue is dismissed.

51. In the result, the appeal of the assessee is allowed and the appeal of the Revenue stands dismissed.

Order pronounced in the open court on 03/08/2022.

Sd/-	Sd/-
(OM PRAKASH KANT)	**(ABY T. VARKEY)**
लेखा सदस्य / ACCOUNTANT MEMBER	**न्यायिक सदस्य/JUDICIAL MEMBER**

मुंबई Mumbai; दिनांक Dated : 03/08/2022.
Vijay Pal Singh, (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,

सत्यापित प्रति //True Copy//

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