आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ

IN THE INCOME TAX APPELLATE TRIBUNAL,
'' C'' BENCH, AHMEDABAD

BEFORE Ms. SUCHITRA KAMBLE, JUDICIAL MEMBER
And
SHRI WASEEM AHMED, ACCOUNTANT MEMBER

आयकर अपील सं./**ITA Nos. 2213-2214/AHD/2018**
निर्धारण वर्ष/Asstt. Years: 2011-2012 & 2012-2013

M/s. Pushkar Corporation, 27, Nakshatra Arcade, IOC Road, Chandkheda, Ahmedabad. C/o. M.S. Chhajed & Co. "Kamal Shanti" Besides Bank of Baroda, Nr. Sardar Patel Under Bridge, Naranpura, Ahmedabad-380014. **PAN: AALEP1840Q**	Vs.	D.C.I.T., Central Circle-1(4), Ahmedabad.

And

आयकर अपील सं./**ITA Nos. 2345-2346/AHD/2018**
निर्धारण वर्ष/Asstt. Years: 2011-2012 & 2012-2013

D.C.I.T., Central Circle-1(4), Ahmedabad.	Vs.	M/s. Pushkar Corporation, 27, Nakshatra Arcade, IOC Road, Chandkheda, Ahmedabad. C/o. M.S. Chhajed & Co. "Kamal Shanti" Besides Bank of Baroda, Nr. Sardar Patel Under Bridge, Naranpura, Ahmedabad-380014. **PAN: AALEP1840Q**

(Applicant)		**(Respondent)**

Assessee by	:	Shri M.S. Chhajed, A.R
Revenue by	:	Shri A.P. Singh, CIT.D.R with Shri V.K. Mangla, JCIT, D.R

सुनवाई की तारीख**/Date of Hearing : 31/10/2022**
घोषणा की तारीख **/Date of Pronouncement: 21/12/2022**

आदेश/O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned cross appeals have been filed at the instance of the Assessee and the Revenue against the order of the Learned Commissioner of Income Tax (Appeals)-11, Ahmedabad arising in the matter of assessment order passed under s. 143(3) of the Income Tax Act, 1961 (here-in-after referred to as "the Act") relevant to the Assessment Years 2011-2012 & 2012-13.

First, we take up the appeal of Revenue bearing ITA No. 2345/AHD/2018 for AY 2011-12

2. The Revenue has raised following grounds of appeal:

1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in restricting the addition on account of sale of land to 20% of the addition on account of sale of land, as the profit en the transaction, and granted relief of Rs. 9,30,80,000/- only.

2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in granting the relief to the assessee without there being any specific ground of appeal seeking to tax only a part of the unaccounted income of Rs.11,63,50,000/-.

3. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in presuming that the assessee must have paid on-money in cash for purchasing the plots sold, without there being any evidence in this regard found during the search action or led by the assessee.

4. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in not appreciating that even if unaccounted cash was paid to acquire the plots sold, the same would not be allowed as deduction u/s 40A{3) or such unexplained expenditure would be liable to be added to the assessee's income u/s 69C.

5. On the facts and in the circumstances of the case and in law, the Ld. CIT{A) has erred in law and on facts in deleting addition of unexplained expenditure of Rs. 64,96,000/-.

6. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) ought to have upheld the order of the A.O.

7. It is, therefore, prayed that the order of the Ld. CIT(A) be set aside and that of the A.O. be restored to the above extent.

3. The inter-connected issue raised by the Revenue in ground Nos. 1 to 4 is that is that the learned CIT-A erred in restricting the addition up-to 20% of the addition made by the AO on account of unaccounted income of Rs. 11,63,50,000/- received on sale of land.

4. The facts in brief are that the assessee in the present case is a partnership firm and engaged in the business of real estate, particularly in land dealings. The assessee for the year under consideration has filed its return of income dated 7th of September 2011 declaring an income of ₹ 13,39,270.00 only. The case of the assessee was selected under scrutiny under the module of CASS and accordingly a notice under section 143(2) of the Act was issued dated 6th August 2012 by the AO which was followed by the notices issued under section 142(1) of the Act on different dates. While the scrutiny proceedings were under the progress, there was a search conducted under section 132 of the Act on 13/06/2013 at Sohom group including the key person of the group namely Shri Narendra J Patel who is also a partner of the assessee firm. During the course of search and seizure operation, there were found certain loose papers running from pages 1 to 242 which were inventoried as Annexure 2. The loose paper bearing page No. 242 was containing the details of the lands sold by the assessee. The detail of sale of land is extracted below:

Date	*S. No.*	*Area (Sa. Mts.)*	*Amount*	*Date*	*S. No.*	*Area (Sq. Mts.)*	*F.P*	*Area (Sq. Mts.)*	*Amount*
10/11/09	*315*	*5059*	*15949556*	*29/03/11*	*315 & 318*	*6274*	*89/1*	*3764*	*22500000*
10/11/09	*318*	*9915*	*27646444*	*20/05/11*	*315 & 318*	*8700*	*89/2*	*5220*	*35000000*
Total (A)		*14974*	*43596000*			*14974*		*8984*	*57500000*

13/04/10	*389/1*	*18413*	*43031280*	*19/10/11*	*389/1*	*18413*	*167/1*	*7548*	*Stock*
Total(B)		*18413*	*43031280*			*18413*		*11048*	*275000000*
06/04/10		*4856*	*15609920*	*14/12/10*	*316*	*4856*	*90*	*2914*	*18000000*
Total (C)		*4856*	*15609920*			*4856*		*2914*	*18000000*
Total (A)+(B)+(C)		*38243*	*102237200*			*38243*		*22946*	*103000000*

4.1 Besides the above, there were recovered certain other loose sheets bearing page Nos. 1 to 16 wherein the cash transactions related to the lands sold by the assessee were also recovered from the premises of Shri Narendra J Patel. Likewise, Shri Narendra J Patel in the statement furnished under section 132(4) of the Act dated 12th July 2013 has also admitted that there were cash and cheque transactions recorded in the impugned loose sheets in the coded form.

4.2 Similarly, the copies of the sale deeds of the land sold by the assessee as discussed above were also found in the course of the search and seizure operation under section 132 of the Act conducted at the premises of M/s Sohom group.

4.3 In addition to the above, a search was also conducted at the residential premises of Shri Yogendra A Sarkar including various premises of Sarkar group on 12th July 2013. Shri Yogendra A Sarkar is the key person of the Sarkar group who is also partner in the assessee firm. In the course of the search proceedings, loose paper bearing page No. 42 of Annexure A1, containing the unaccounted cash transactions with respect to the sale of the lands made by the assessee, was also found. Shri Yogendra A Sarkar, in the statement furnished under section 132(4) of the Act dated 13th July 2013, has also admitted that the right side of the loose sheet bearing No. 42 of annexure A1 appears to be written by him. The contents of the loose sheet bearing No. 42 of annexure A1 has been extracted by the AO on page 5 of the assessment order.

4.4 From the statement of Shri Narendra J Patel, Shri Yogendra A Sarkar and loose sheet bearing No. 42 of annexure A1, it was transpired that there was an

element of cash involved in the Sale Transaction of lands carried out by the assessee. Furthermore, on comparison of the loose papers bearing page No. 42 of the Annexure-A1 with the sale deeds, certain facts were emerged as observed by the AO which are detailed as under:

Noting on Top Left Portion of Page No.42 of Annexure A-1		
(1)	*(2)*	*(3)*
Amount	*Narration*	*Description*
9,36,46	*Mavjibhai 4502X 20.8*	*Land parcel admeasuring 4,502 Sq Yards was sold by M/s.Pushkar Corporation at the rate of Rs.20,800 i.e at the total sale price of Rs.9,36,46,000. Against the above total sale price of Rs.9,36,46,000, the sale document was registered at the sale price of Rs.2,25,00,000. Thus, while M/s Pushkar Corporation received Rs.2,25,00,000 in cheque for sale of the above piece of land Rs.6,50,00,000 was received by it in cash. Land is sold to M/s.Rameshwar Developers in which Shri Mavjibhai Lungariya is on of the partners*
7,11,46	*Expense*	
6,50,00	*Cash*	
Noting on Bottel Left Portion of page NO.42		
Amount	*Narration*	*Interpretation*
6,97,00 *Manubhai 3495X 20* *1,80,00* *Dastavej* *51,700* *350* *5,13,50* *Dalali* *Cash*		*Land parcel admeasuring 3,495 Sq Yards was sold by M/s.Pushkar Corporation at the rate of Rs.20,000 i.e at the total sale Price of Rs.6,97,00,000. Against the above total sale price of Rs.6,97,00,000 the sale document was registered at the sale price of Rs.1,80,00,000. Thus, while M/s.Pushkar Corporation received Rs.1,80,00,000 in cheque for sale of the above piece of land, Rs.5,13,50,000 was received by it in cash. The land is sold to M/s.Siddhi Vinayak Developers in which M/s.HMP Infrastructure Pvty. Ltd. is one of the partners (32% share). Shri Manubhai Patel and his wife are the*

	Directors of M/s.HMP Infrastructure Pvt. Ltd with each having 50% of shareholding.
Noting on Right Side of Page No.42	
Amont *Narration*	*Interpretation*
14,67,57 *6245 X 23.5*	*Land parcel admeasuring 6,245 Sq Yards was sold by M/s.Pushkar Corporation at the rate of Rs.23,500 per Square yards i.e at the total sale price of Rs.14,67,57,00. The land is sold to M/s.Kunjan Corporation at the registered document price of Rs.3,50,00,000. Thus, the unaccounted cash payment of Rs.11,17,57,500 is made to M/s.Pushkar Corporation by M/s. Kunjan Corporation.*

5. Based on the above, the AO was of the view that there was the involvement of element of cash amounting to ₹ 22.80 crores in the impugned Sale Transaction of Land made by the assessee which was not recorded in the books of accounts. According to the AO the impugned transaction of land deals were pertaining to the year under consideration as well as in the subsequent assessment year. The transaction of the cash element pertaining to the year under consideration was of ₹ 11,63,50,000/- out of the total element of cash of ₹ 22.80 crores and the balance amount of Rs. 11,17,57,500/- was pertaining to the immediate succeeding assessment year i.e. 2012-13. Accordingly, the AO issued show cause notice to the assessee proposing to make the addition of Rs. 11,63,50,000/- to the total income of the assessee.

5.1 The assessee in response to such show cause notice submitted that the addition has been proposed by the AO based on the documents found during the course of search at the 3rd Parties premises and therefore such addition can be made in the assessment proceedings under section 153C of the Act. According to the assessee, the proceedings for the year under consideration under section 143(3) of the Act shall abate by virtue of the provisions of section 153C of the Act.

6. However, the AO was not satisfied with the contention of the assessee on the reasoning that there was no notice issued under section 153C of the Act and therefore, the question of abatement of the proceedings under section 143(3) of the Act does not arise. Likewise, there was the information received from the DIT office about the land transaction dealings carried out by the assessee without the seized materials. In the absence of seized materials, there was no possibility of recording the satisfaction as required under the provisions of section 153C of the Act.

6.1 On merit, the AO also observed that there was no submission in response to the show cause notice issued to the assessee wherein the addition was proposed for ₹ 11,63,50,000/- representing the element of cash received against the sale of lands by the assessee. In view of the above the AO made the addition of ₹ 11,63,50,000/- representing the element of cash which was not accounted in the books of accounts received against the sale of lands. Likewise, the addition of ₹ 64,96,000/- was also made to the total income of the assessee representing the unexplained expenses incurred by it. In effect, the addition of Rs.11,63,50,000/-and ₹ 64,96,000/- was made to the total income of the assessee.

7. Aggrieved assessee preferred an appeal before the Ld. CIT-A

8. The assessee before the learned CIT-A contended that the AO has framed the assessment under section 143(3) of the Act without affording the necessary opportunity to place its contention. The time was available to make the reply in response to the show cause notice issued dated 11 March 2014, till 24th of March 2014 but the AO has made the assessment order dated 21st of March 2014 which is against the principles of the natural justice.

9. The AO in the present case has passed the assessment order under section 281B of the Act which evidences that seized documents belong to the assessee and therefore the assessment should have been framed under the provisions of section

153C of the Act whereas the assessment has been framed by the AO under the provisions of section 143(3) of the Act and therefore the assessment framed by the AO is not sustainable. As such, the AO by passing the order under section 281B of the Act has recorded the satisfaction required in the proceedings under section 153C of the Act. Furthermore, the case of the assessee was selected under CASS but there was no addition made based on the reason for selection of the scrutiny assessment. As such the assessment was framed after making the addition based on the loose sheet found during the course of search and seizure operation at the premises of the partner of the assessee. According to the assessee, the right course of action for the revenue was to frame the assessment under section 153C of the Act which has not been adopted for the year under consideration.

10. The assessee further contended that there was survey operation under section 133A of the Act carried out at the premises of the assessee but nothing of incriminating nature was found during the survey representing the element of cash received on the sale of impugned lands. As such, the entire addition was made by the AO merely on the basis of the loose paper recovered from the premises of the partner of the firm which was not corroborated by any other documentary evidence. The assessee further contended that document recovered from the premises of the partner of the assessee represents the dumb document which does not belong to it (the assessee). The assessee made the submission as under:

a) Such documents do not contain the name and address of the assessee firm.
b) Such documents do not contain Initials/ signature of the assessee firm.
c) Such documents are not in the handwriting of the concerned person of the assessee firm.
d) Such documents do not mention the cash received by the assessee firm.
e) Search parties have also not stated anywhere that such documents are related to assessee firm.

10.1 Therefore, such documents are dumb documents and addition made on the basis of such documents should not be sustained.

10.2 During the course of search as well as post search, statements of various persons were recorded but none of the person whose statement was recorded alleged that the impugned seized documents relate to the assessee or assessee has received on money on sale of lands. Shri Manu Patel (on behalf of M/s siddhivinayak Developers) and Shri Miavijbhai Lungaria (on behalf of M/s Rameshwar Developers) in their statement dated 22/11/2013 admitted that they have entered into the financial transactions with Shri Bipin Bhai Patel who is the partner of assessee firm and paid Rs. 1,80,00,000/- and Rs. 2,25,00,000/-through the banking channel in respect of purchase of land. Further they have stated they are not aware about the transaction recorded on loose page bearing no. 42 of annexure A-1 found from the premises of Shri Yogendra A sarkar. However, the Revenue has not recorded the statement of any authorized person of the firm M/s Kunjan Corporations so as to establish that the assessee has received any element of cash against the transfer of impugned lands.

10.3 Shri Yogendra A Sarkar in his statement recorded on 23/07/2013 stated that noting on the left side of page no. 42 of Annexure A-1 seized from his premises, was not in his handwriting, based on which additions were made by the AO. As such, it was never admitted by Shri Yogendra A Sarkar that any element of cash was received by the firm/assessee against the transfer of the impugned lands.

10.4 Both Shri Narender J Patel and Shri Yogendra A Sarkar, are the partner of assessee firm but the Key partners of the assessee firm were Shri Bipinbhai D Patel and Shri Kamalbhai Jethwani. This fact is corroborated by the statement of buyer of the alleged lands that they dealt with Shri Bipinbhai for the impugned land transaction deals and not with Shri Narender J patel and Yogendre A sarkar. Similarly, the bank accounts were operated by only Bipinbhai , Kamalbhai Jethwani or Shri Rajesh P shah.

10.5 The assessee also submitted that similar addition for unaccounted payment of cash was also made in the hands of the buyers namely M/s Siddhivinayak developers and M/s Rameshwar developers in the assessment framed under section 153C of the Act. But such additions were deleted by the ld. CIT(A) vide order dated 22-03-2017 and 21-03-2017 respectively on technical count by observing that the proceedings under section 153C of the Act were invalid. Likewise, similar addition of Rs. 11,17,57,500/- on account of unaccounted payment of cash was made in the hands, in the assessment framed under section 153C of the Act, in the case of M/s Kunjan Corporation which was deleted by the ld. CIT(A) vide order dated 16-02-2018 by holding that the document bearing No. 42 of Annexure-1 is a dumb document.

10.6 Likewise, the AO has made addition of Rs. 64,96,000/- on account of unexplained expenditure without calling for any explanation for the same from the assessee. As such, the AO has not issued any SCN in respect to such addition on account of unexplained expenses. There is no material evidence available with the AO to make such addition. As such the addition has been made on the basis of presumption, surmise and in arbitrary manner. The assessee without prejudice to the above also contended that if any expense has been incurred to earn unaccounted income, then the same should be allowed as expenses.

10.7 The assessee without prejudice to the other submission placed before the Ld. CIT(A), alternatively submitted that sale proceeds computed by the AO is 5 times more than the purchase cost recorded in the books of accounts whereas the holding period of such land is ranging from 6 months to 1.5 years, thus such increase in price of lands is not possible in this short span of time. If it is assumed on money was received on sale of land, then on money must have been paid for purchase of land. Hence, the entire amount of on money cannot be treated as income without considering on money paid on purchase of land. As such, the assessee should also be allowed the benefit of deduction of the on money which the assessee purportedly have paid.

11. The learned CIT-A called for the remand report from the AO who in turn submitted that it is clear from the assessment order that there were, time to time, notices issued to the assessee to provide sufficient opportunities.

12. The AO in the remand report with respect to the applicability of section 153C of the Act pointed out that he has already rejected the contention of the assessee in the assessment order by explaining the reason for the same. As such, there cannot be any assessment under section 153C of the Act.

12.1 The AO also pointed out that the assessee furnished the submissions after the close of assessment proceeding and therefore the same were not considered during the assessment proceedings. Be that as it may be, the paper book furnished before the CIT(A) for consideration of additional evidence is merely reproduction of chronological of assessee's correspondence with the department which has already been place on record. Thus, as per the AO, the assessee has not been able to rebut the clinching evidences emanating from the assessment order and therefore the assessment order framed under section 143(3) of the Act should be sustained.

13. In rejoinder, the assessee submitted that the AO failed to rebut all the submission made by it during the remand proceedings. The assessee further reiterated the submissions as made before the Ld. CIT(A) in the preceding paragraph.

14. The Ld. CIT(A) after considering the assessment order, submission of the assessee and remand report of AO observed certain facts as detailed below:

i. That the original assessment was carried out after issuing valid notice u/s 143(2) as well as 142(1) of the Act. There was no prohibition under the provisions of law while using the materials found during the search/ survey proceeding in the assessment framed under section 143(3) of the Act.

ii. The contents of the loose paper bearing page no. 42 of annexure-A found from the residential premises of the partner of the assessee namely Shri Yogendra A sarkar were corroborated by the actual transfer of the property based on the sale deed which are available on record. Similarly there was admission by Shri Yogendra A sarkar in his statement that noting on such loose paper is partly in his own handwriting. Therefore this document has evidentiary value.

iii. The Loose paper found from the premises of the partner of the firm cannot be considered as third party as he is representing the case of the firm. The AO made addition after the correlating the loose paper transaction with actual transaction. The transaction mentioned in loose paper is similar to the actual registered sale deed. This is not a con-incidence that the area, name of the dealer and registered value got matched. Therefore, there is correlation between the same i.e. seized documents and actual sale deed.

iv. The explanation given by Shri Yogendra A sarkar that the half loose paper written is in his handwriting but other half in someone else's handwriting seems to be illogical and cannot be accepted. Further, the seized material needs to be read as whole and not partially to suits one's advantages. Therefore, the documents found from the premises of the partner specifically link with the actual transaction, thus such document cannot be treated as dumb documents. Furthermore, the onus lies on the assessee to establish that contents mentioned on such loose papers do not belong to it or do not co-relate to the actual transactions.

v. It was also observed that the addition in the hands of buyers of the land were deleted by CIT (A) for different reasons. As such, the addition in the hand of M/s Rameshwar developers and siddhivinayak developers are deleted on technical ground that such addition cannot be subject matter of assessment order passed under section 153C of the Act. However, in case of M/s Kunjan corporation the addition was deleted by Ld. CIT(A) by observing that documents were found at the premises of third party,

whereas in the present case, the loose paper was found at the premises of partner of the assessee firm.

vi. During the course of search, no incriminating material was found other than sale of alleged lands, therefore no addition made in respect of other land.

vii. It was also observed that the increase in the land price within a short span of time by 5 to 6 times does not seems to be possible. If the on money receipt by assessee is treated as income of the assessee, then the profit shall be 500% to 600% of the Purchase cost which is not generally possible.

14.1 In view of the above, the ld. CIT(A) estimated the income at 20% of on money receipt of Rs. 11,63,50,000/- and deleted the unexplained expenses of Rs. 64,96,000/- for the reason that the income has been determined on estimated basis and therefore no separate addition of expense is required to be made. Thus the learned CIT-A allowed the ground of appeal of the assessee in part.

15. Being aggrieved by the order of the learned CIT-A, both the assessee and the Revenue are in appeal before us. The assessee is in appeal against the confirmation of the addition made by the learned CIT-A for ₹ 2,32,70,000/- whereas the revenue is in appeal against the deletion of the addition made by the AO for Rs. 9,95,76,000/- only.

16. The Assessee in ITA No. 2213/Ahd/2018 for AY 2011-12 has raised the interconnected grounds of appeal:

1. The Ld.CIT(A) has erred in law and on facts in upholding assessment order passed by Ld. that inspite of that assessment order was passed in violation of principal of natural justice

2. The Ld.CIT(A) has erred in law and on facts in upholding the assessment order passed u/s 143(3} of the Act by the Ld. A.O. after recording satisfaction that documents belongs to appellant firm seized during the search operation is valid.

3. The Ld. CIT(A) has erred in law and on facts in upholding addition of alleged receipt of On money/ income of Rs.2,32,70,000/-.

4. The appellant craves liberty to add. amend, alter or modify all or any grounds of appeal before final appeal.

17. The learned AR before us filed a paper book running from pages 1 to 229 and 1 to 206 for the AYs 2011-12 and AY 2012-13 respectively and further a common paper book running from page nos. 1 to 71 for both years was filed and contended that the assessee was not afforded reasonable opportunity of being heard as well as the submissions made by the assessee were not considered by the AO during the assessment proceedings. Thus, in the absence to reasonable opportunity to the assessee, the assessment order should have been quashed.

17.1 The assessment should have been framed under section 153C of the Act as the addition has been made based on the basis of documents found from the premises of the 3rd party. However, the AO has erred in framing the assessment under section 143(3) of the Act.

17.2 The learned AR also contended that there was no document of incriminating nature was found suggesting that the assessee has received unaccounted money except the loose papers found from the premises of the 3rd party where the name of the assessee was not appearing. As such the document found from the premises of third-party represents the dumb document. There was also a survey operation under section 133A of the Act at the premises of the assessee but no document representing the receipt of on money was found. Thus, it was contended by the learned AR that no addition of whatsoever is warranted in the present case.

18. On the contrary, the learned DR before us submitted that the addition was made by the AO based on the seized documents which is a vital piece of evidence and the same cannot be ignored as the seized document was containing the information of incriminating nature. It was also contended by the learned DR that the assessment was pending under the provisions of section 143(3) of the Act which was the abated assessment year and the materials found in the course of search has been used while making the addition to the total income of the assessee. As

such the AO has rightly framed assessment under section 143(3) of the Act being abated assessment year.

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

19. We have heard the rival contentions of both the parties and perused the materials available on record. From the preceding discussion we note that the following controversies arise for our adjudication:

i. Whether the assessment was framed by the AO without affording the opportunity of being heard to the assessee.

ii. Whether the assessment was to be framed under the provisions of section 153C of the Act instead of the assessment framed by the AO under the provisions of section 143(3) of the Act.

iii. Whether the gross amount of unaccounted cash element was to be considered as income of the assessee instead of 20% of such unaccounted cash element as worked out by the learned CIT-A

iv. Whether the documents on which the Ld.CIT (A) relied are dumb documents.

19.1 Regarding the issue No. 1, the facts are like this that the show cause notice was issued by the AO dated 11 March 2014 proposing to make the addition of ₹11,63,50,000/- representing the receipt of unaccounted money on the sale of lands with the direction to the assessee to make reply within 10 days from the receipt of notice. According to the assessee the notice was received by it dated 12 March 2014 and therefore time limit allowed for making the reply was expiring on dated 22 March 2014 which was the Saturday and 23rd March was Sunday. Thus, the assessee was able to make reply only on 24 March 2014. As such the assessee has made the reply on 24th of March as well as on 26th of March 2014. Admittedly, the assessment was framed by the AO dated 21st of March 2014. Thus, it appears from the above

chronological dates of events that the assessee was not afforded sufficient opportunities to make the reply of the show cause notice as discussed above. Be that as it may be, we find that the assessee has made the submissions before the learned CIT-A as additional evidences which were duly considered and admitted by him after calling the remand report from the AO and the rejoinder of the assessee. Thus in such facts of circumstances, it cannot be alleged that the sufficient opportunity was not afforded to the assessee in the proceedings before us by the lower authorities. Hence, we decide the impugned question against the assessee and in favour of the revenue.

19.2 The next controversy arises whether the assessment was to be framed under the provisions of section 153C of the Act in place of the assessment framed by the AO under section 143(3) of the Act. In this regard, we find that following conditions are pre-requisite for assuming valid jurisdiction under section153C of the Act.

(a) During the search, certain documents/material have been seized/found;

(b) The Assessing Officer of the person on whom search has been conducted is satisfied that the documents/material seized/found belong to any other person;

(c) The Assessing Officer of the person searched, after arriving at the aforesaid satisfaction, hands over the documents/materials seized/found relating to such other person to the Assessing Officer having jurisdiction over such other person;

(d) The Assessing Officer of such other person, on receipt of such documents/material found/seized shall proceed under section 153C of the Act

19.3 In the case on hand, the AO of the search party has not recorded any satisfaction by holding that the documents seized in the course of search were belonging to the assessee. Likewise, there was no satisfaction recorded by the AO of the assessee as mandated under the provisions of section 153C of the Act. As such, in the given case, there was the proceedings under section 143(3) of the Act

which were pending when the AO received the information directly from the office of the income tax investigation about the unaccounted money received on the sale of lands as discussed above. The AO upon receiving the information has used such information while framing the assessment under section 143(3) of the Act after issuing SCN regarding the use of such information. In fact, it was not possible for the AO to initiate the proceedings under section 153C of the Act in the absence of the procedures prescribed under the provisions of section 153C of the Act which was not followed. The contention of the learned AR that the AO has recorded the satisfaction in the order passed under section 281B of the Act is devoid of any merit. It is for the reason that, the proceedings under section 281B and the assessment proceedings specified under section 153C of the Act are entirely different and independent to each other. Thus, this argument will be of no help to the assessee.

19.4 At this juncture, it is not out of place to mention that in the later assessment years i.e. AY 2013-14 and 2014-15, the proceedings were initiated under the provisions of section 153C of the Act whereas in the case on hand the proceedings were completed under the provisions of section 143(3) of the Act. In this regard, we note that there was the satisfaction recorded by the AO of the search party as well as the AO of the assessee for those particular assessment years. As such, the due procedure was duly adopted as prescribed under the provisions of section 153C of the Act in the assessment year 2013-14 and 2014-15 whereas in the assessment before us, such procedure was not followed. Thus the contention of the learned AR is devoid of any merit. Thus the impugned question is decided against the assessee and in favour of the revenue.

20. The next controversy arises whether the addition has been made by the authorities below based on the dumped documents. It is seen that during the course of Search and Seizure actions, voluminous documents are seized which may also include numerous loose papers, diaries, note pads which may contain rough calculations, vague notings, scribbling and jottings etc. There may be instances where such documents may be also non- speaking so far as that

such documents may not decipher with certainty or may be not at all, as the case may be, the following:-

(*i*) Whether such document contains some transaction subjected to tax and consequently bears the tax liability.

(*ii*) If yes, taxability in whose hands?

(*iii*) The year of taxability of such income.

(*iv*) The rate and amount of tax

20.1 It is pertinent to mention that a charge of tax can be levied based on such a document only is such document is a speaking one in itself or becomes a speaking once if read in conjunction to some other corroborative evidence found during the course of search or post search investigation. In the case on hand, there is no ambiguity to the fact that such documents recovered from the premises of Shri Narendra J Patel and Shri Yogendra A Sarkar. Based on the search documents seized, it was found that it is containing certain information's such as area of the plot and the amount of stamp duty which was duly decoded by the AO which was matching with the sale deeds of the lands shown by the assessee. Furthermore, the partner of the assessee namely Shri Yogendra A Sarka has duly admitted that part of the contents of the seized documents was written by him. As such, the seized document has to be read as a whole, it cannot be read in piecemeal according to the benefit of the party. Accordingly, we hold that the contents recorded in the seized documents are correct. Thus the impugned question is decided against the assessee and in favour of the revenue.

20.2 Regarding the contention of the ld. AR that the addition was made in the hands of the buyers of the properties were deleted by the higher authorities, in this regard we note that there was no information brought on record that any appeal was preferred before the ITAT by the revenue against the deletion by the learned CIT (A). Moreover, we find that the addition has been deleted by the learned CIT-A on technical account as well as considering the seized document as dump

document in the hands of the respective parties. However, we note that the document which was seized was containing the information of incriminating nature from the perspective of the assessee and the same was recovered from the partner of the assessee who is closely connected. Thus, no inference can be drawn against the assessee based on the finding in relation to 3rd parties by the income tax authorities having jurisdiction over them. Thus the impugned question is decided against the assessee and in favour of the revenue.

20.3 The last controversy arises whether entire amount of element of cash represents the unexplained income of the assessee or there should be some percentage of profit to work out the taxable income of the assessee embedded in the unaccounted receipt.

20.4 It is necessary to note certain facts which are as under. The lands in dispute were purchased by the assessee in the recent past at certain value, which was sold subsequently at a very high value as evident from the seized document which has resulted huge profits to the assessee. The brief summary for the cost of purchase, sale value based on registered document/ seized documents and the return on investments is contained on pages 97-98 of the ld. CIT-A order.

20.5 From the details contained on pages 97-98 of the ld. CIT-A order, if we treat the amount recorded in the seized document as the actual sale value than the percentage of profit earned in respect of purchase value of the assessee stands at more than 400% of purchase cost which is very high in the real estate business activities in such short span of time. At this juncture it is pertinent to note that such high percentage of profit is certainly difficult to achieve under the standard facts and circumstances but it is not impossible to achieve such high rate of return in this short period of time except under some special circumstances. However, there is coming nothing on record indicating such special circumstances which compelled the assessee to have earned such high rate of profit within the short span of time. As such, such high rate of profit, all depends upon some special facts and

circumstances but nothing has been referred to such facts and circumstances so as to justify such high rate of return/profit in the assessment order. Therefore, we are reluctant to draw any conclusion that the assessee has earned such high rate of profit within short span of time. As such, it appeals to us that the way the assessee has suppressed the sales value, the assessee same way has also suppressed the purchase value of the impugned lands. In simple words, the assessee should have incurred cost on the purchase of lands which was not recorded in the books of accounts. However, there is no information emanating from the order of the authorities below that there was any cost incurred which was not recorded in the books of accounts of the assessee except for the minor amount of Rs. 64,96,000/- only.

20.6 Thus, in such facts and circumstances, is it advisable to draw any presumption that the assessee might have incurred unaccounted cost which was not recorded in the purchase of the impugned land. It is for the reason that such high rate of profit within the short span of time barring exceptional facts and circumstances which are absent in the given case, is not possible under the standard facts and circumstances.

20.7 Without prejudice to the above, there is no ambiguity to the fact that the assessee is in the business of real estate and therefore it has offered the income under the head business and profession. Thus, it is implied that the unaccounted receipt of money shown by the assessee represents the business receipts. In this regard we note that the Hon'ble Courts time and again has held that the business receipts cannot be made subject to tax on gross basis. It is for the reason that, there cannot be any business receipt without having corresponding cost. As such it is presumed that if the assessee has not accounted the receipt of the business then the assessee must have also not accounted the business expenses in its books of accounts. In holding so, we draw support and guidance from the judgments/ orders as detailed below:

20.8 The Hon'able Gujarat High Court in the case of CIT Vs president industries reported in 124 taxman 654 has observed that:

> *"The amount of sales by itself cannot represent the income of the assessee who has not disclosed the sales. The sales only represent the price received by the seller of the goods for the acquisition of which it has already incurred the cost. It is the realisation of excess over the cost incurred that only forms part of the profit included in the consideration of sales. Therefore, unless there is a finding to the effect that the investment by way of incurring cost in acquiring goods which have been sold has been made by the assessee and that has also not been disclosed, the question whether entire sum of undisclosed sales proceeds can be treated as income, answers by itself in the negative"*

20.9 Further, the ITAT Ahmedabad the case of Greenfield Reality P ltd. Vs. ACIT bearing ITA no IT(SS)A No. 289, 290, 291 and 292/Ahd/2018 vide order dated 21-02-2020 has observed as under:

> *"Therefore, after going through the well reasoned order of the ld.CIT(A),and in the light of judgment of Hon'ble jurisdictional High Court in the case of Panna Corporation (supra) as well as Koshor Mohanlal Telwala (supra), we are of the view that only element of income embedded in the on-money received by the assessee for booking of flats/shops in "VesuProject" is required to be assessed in its hand in all these years"*
>
> *Next question arose, what is the element of income involved in this on-money. On one hand, the assessee is showing income at 8%, on the other hand, the ld.CIT(A) is estimating it at 20%. It is pertinent to observe that section 144 of the Income Tax Act provides discretion in the AO to pass best judgment when an assessee failed to appear before him, and to submit requisite details. In other words, it provides power in the AO to estimate an income of the assessee. We deem it appropriate to take note the relevant part of this section. It reads as under:*
>
> *18. For exercising the best judgment, section 144 of the Income Tax Act provide the guidance to the ld.AO. This section reads as under:*
> *"144. [(1)] If any person—*
> *(a) fails to make the return required [under sub-section (1) of section 139] and has not made a return or a revised return under sub-section*
> *(4) or sub-section (5) of that section, or*
> *(b) fails to comply with all the terms of a notice issued under sub-section*
> *(1) of section 142 [or fails to comply with a direction issued under sub-section (2A) of that section], or*
> *(c) having made a return, fails to comply with all the terms of a notice issued under sub-section (2) of section 143, the [Assessing] Officer, after taking into account all relevant material which the [Assessing] Officer has gathered, [shall, after giving the assessee an opportunity of being heard, make the assessment] of the total income or loss to the best of his judgment and determine the sum payable by the assessee on the basis of such assessment :*
>
> *[Provided that such opportunity shall be given by the Assessing Officer by serving a notice calling upon the assessee to show cause, on a date and time to be specified in the notice, why the assessment should not be completed to the best of his judgment : Provided further that it shall not be necessary to give such opportunity in a case where a notice under sub-section (1) of section 142 has been issued prior to the making of an assessment under this section.] [(2) The provisions of this section as they stood immediately before their*

amendment by the Direct Tax Laws (Amendment) Act, 1987 (4 of 1988), shall apply to and in relation to any assessment for the assessment year commencing on the 1st day of April, 1988, or any earlier assessment year and references in this section to the other provisions of this Act shall be construed as references to those provisions as for the time being in force and applicable to the relevant assessment year.]"

19. It is pertinent to note that that section 144 would suggest that in order to estimate income, learned Assessing Officer has to exercise his discretion which should be in consonance with best of his judgment. We are conscious of the fact that in various authoritative pronouncements, it has been propounded that in making a best judgment assessment, the Assessing Officer must not act dishonestly or vindictively or capriciously. He must make, what he honestly believe to be a fair estimate of the proper figure of assessment and for this purpose he must be able to take into consideration, local knowledge, reputation of the assessee about his business, the previous history of the assessee or the similarly situated assessee. It is also pertinent to mention that judgment is a faculty to decide matter with wisdom, truly and legally. Judgment does not depend upon the arbitrary, caprice of an adjudicator, but on settled and invariably principles of justice. Thus, in a best judgment, even if, there is an element of guess work, it should not be a wild one, but shall have reasonable nexus to the available material and circumstances of each assessee. 20. During the course of hearing, we have confronted the ld.counsel for the assessee to show the basis for estimating income at 8%. Similarly, we have confronted the ld.CIT-DR as to how the figure of 20% should be taken up. The ld.counsel for the assessee drew our attention towards page nos.50-51 of the paper book wherein the assessee has kept he details of receipts received through account payee cheque as well as received cash in the booking of flats as well as shops. In the case of Koshor Mohanlal Telwala (supra) the Tribunal has observed that 8% profit offered by the assessee on the alleged gross receipts of on-money received in cash is fair and reasonable. This figure was construed as fair and reasonable by taking guidance from section 44AD of the Act, wherein it was provided by the Legislature that in case an assessee is engaged in civil construction, and if gross receipts emains under a particular slab, then such assessee needs not to maintain books of accounts, and its profit can be assumed at 8%. though this special provision is not applicable in the present case, because gross receipts exceeded the turnover provided under section 44AD, but again we are required to find out a reasonable percentage of income which could have been alleged as earned by the assessee out of such gross receipts. This formation of opinion at the end of the Tribunal met the approval of Hon'ble Gujarat High Court in the case of Koshor Mohanlal Telwala (supra). As against this, the AO has not collected any data either from other assessees who are engaged in this line of business, and who have developed identical projects. We have perused the finding of the ld.CIT(A) also, but the ld.CIT(A) has also not mentioned any attending circumstances for harbouring a belief that 20% could have been earned from this activity. Thus after taking guidance from the judgment of Hon'ble Gujarat High Court in the case of Koshor Mohanlal Telwala (supra), we deem it proper that the assessee has rightly disclosed the profit element embedded in the gross profit at 8%. Accordingly, we allow the ground of appeal raised by the assessee, and hold that profit which has been directed to be adopted by the ld.CIT(A) at 20% of the alleged turnover should be taken at 8%. The income of the assessee is to be computed thereafter. Consequently, ground no.2 and 3 raised by the Revenue in the Asstt.Years 2012-13, 2013-14 and 2014-15, and ground nos.1 to 3 in the asstt.Year 2015-16riased by the Revenue are rejected.

20.9 ITAT Mumbai in the case of Ekta Housing Pvt Ltd Vs DCIT bearing ITA no 1732-1733/MUM/2019 vide order dated 24-05-2021 has observed that:

"We are of the considered view that no infirmity arises from the order of the CIT(A) who drawing support from the judicial pronouncements that were relied upon by the assesseee before him, had concluded, hat the addition as regards the on-money received by the

assessee was to be made to the extent of the income element embedded in such receipts and the entire amount of on-money could not have been added in the hands of the assessee. We, thus, agreeing with the consistent view taken in the aforesaid judicial pronouncements, therein respectfully follow the same, and thus, finding no infirmity in the view taken by the CIT(A), uphold the same. "

We shall now advert to the grievance of the assessee that the CIT(A) had erred in estimating the income element embedded in the on-money of Rs. 29 lac received by the assessee@20% of such receipt, which is on higher side, and the same should have been estimated @12% of the amount of such on-money receipt as was offered by the assessee. Insofar the quantification of the income element embedded in the on-money received by the assessee is concerned, we find that it was the claim of the assessee that the same in all fairness be taken @12% of the said receipts as was offered by it. However, the CIT(A) being of the view that the assessee could not substantiate the very basis for estimating the income element embedded in the on-money receipts @12% thus, held a conviction that the same could reasonably be taken @20% of the said receipts. Admittedly, both the assessee and the CIT(A) had resorted to an estimation of the income element embedded in the on-money receipts, which we are afraid in neither case is backed by any basis or reasoning. As observed by us hereinabove, the Hon"ble High Court of Gujarat in the case of Dy.CIT Vs. Panna Corporation (2012) 82 CCH 266 (Guj),had held, that for the purpose of estimating the income element embedded in the on-money receipts what should be estimated as a reasonable profit out of such receipts must bear an element of estimation. Admittedly, the quantification of the income element embedded in the on-money receipts has to be on the basis of a process of estimation, but then, there has to be to the extent possible some logical reasoning explaining the basis for arriving at such estimate. As is discernible from the order of the CIT(A), it was the claim of the assessee company that its group concerns which had approached the Income-Tax Settlement Commission (for short "ITSC") had offered for tax the income element embedded in the on-money received by them @15% of such receipts and the same had been accepted by the commission. However, the CIT(A) was of the view that the percentage of profit offered by the group concerns before the ITSC and accepted by the latter was applicable only to the cases before the commission and was in no way binding on the other case which were not before it. At the same time, it was observed by the CIT(A) that the percentage of profit offered by the group concerns before the ITSC and accepted by the latter could be taken as a guiding factor. In the backdrop of the aforesaid observation of the CIT(A), we are of the considered view that she in all fairness for the purpose of estimating the income element embedded in the on-money receipts could have safely taken it at the same figure i.e @15% of the amount of on money receipts as was accepted by the ITSC. Our aforesaid conviction is all the more supported by the fact that no reason or logic had been given by the CIT(A) for taking the income element embedded in the on-money receipts@20%. We, thus, are of the considered view that the net income element embedded in the on money receipts can safely be taken in the case of the captioned assessee @15% of the amount of the on-money receipts. The Ground of appeal No. 2 raised by the assessee is partly allowed in terms of our aforesaid observations.

20.10 In view of the above, on the finding of unrecorded sales of an assessee some reasonable percentage may be taken as the net income and not the whole of the sales. Section 44AD speaks of minimum 8% net profit in estimation of a scheme. As per accepted accounting principles the cost of sales has to be deducted from sales while computing profits. The Ahmedabad Tribunal in the case of M/s Green field Realty Pvt. Ltd. (supra) has adopted 8% reasonable profit of unaccounted

receipt in identical facts and circumstances, therefore we hold that 8% of unaccounted receipt shall be reasonable profit which is liable to be taxed.

20.11 Before concluding the above finding, a question also arises in our mind whether the unaccounted expenses incurred by the assessee in cash shall be subject to the provisions of section 40A(3) of the Act in the given facts and circumstances. Admittedly, the assessee has not claimed any deduction in the profit and loss account, the payment of which is in excess of the limit specified under the provisions of the Act. Thus, the question of making the disallowance under the provisions of section 40A(3) of the Act in the given facts and circumstances does not arise. In view of the above, the ground of appeal of the revenue is hereby dismissed whereas the ground of appeal of the assessee is partly allowed.

21. Regarding the deletion of the addition made by the learned CIT (A) for ₹ 64,96,000.00 on account of unexplained expenses, in this regard at the outset at the outset we note that the income of the assessee with respect to the unaccounted receipt has already been determined on estimated basis. Therefore, there cannot be any addition of the unaccounted expenditure separately. Accordingly, the ground of appeal of the revenue is hereby dismissed.

22. The issue raised by the Revenue in ground no. 5 is that the Ld. CIT(A) erred in deleting the addition made by AO on account of unexplained expenses of 64,96,000/- only.

22.1 At the outset, we note that the impugned issue raised by the Revenue has already been decided against the revenue vide paragraph No. 21 of this order. Accordingly, the ground of appeal of the Revenue is hereby by dismissed.

22.2 The issue raised by the Revenue in ground No. 6 & 7 are general in nature and therefore we dismiss the same.

22.3 In the result, the appeal of the revenue is hereby dismissed.

Now coming to Assessee's appeal bearing ITA no. 2213/AHD/2018 for AY 2011-12

23. The Assessee has raised the following grounds of appeal

1. The Ld.CIT(A) has erred in law and on facts in upholding assessment order passed by Ld. that insprte of that assessment order was passed in violation of principal of natural justice

2. The Ld.CIT(A) has erred in law and on facts in upholding the assessment order passed u/s 143(3} of the Act by the Ld. A.O. after recording satisfaction that documents belongs to appellant firm seized during the search operation is valid.

3. The Ld. CIT(A) has erred in law and on facts in upholding addition of alleged receipt of On money/ income of Rs.2,32,70,000/-.

4. The appellant craves liberty to add. amend, alter or modify all or any grounds of appeal before final appeal

24. The interconnected issue raised by the assessee in ground no. 1 to 3 is that the Ld. CIT(A) erred in confirming the addition of Rs. 2,32,70,000/- being 20% of alleged receipt of on money instead of deleting the same in entirety.

25. At the outset, we note that the issue raised by the assessee has been adjudicated along with Revenue's ground of appeal in ITA No. 2345/Ahd/2018 where we have decided the issue vide paragraphs no. 20 of this order against the Revenue and partly in favour of assessee. For detailed discussion, please refer the aforementioned paragraph of this order. Hence, the ground of appeal raised by the assessee is hereby Partly Allowed.

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

Now coming to Revenue's appeal bearing ITA No. 2346/AHD/2018 for AY 2012-13

26. The Revenue has raised the following grounds of appeal:

1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in restricting the addition on account of sale of land to 20% of the addition on account of sale of land, as the profit on the transaction, and granted relief of Rs,8,94,06,000/-.

2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in granting the relief to the assessee without there being any specific ground of appeal seeking to tax only a part of the unaccounted income of Rs.11,17,57,500/-.

3. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in presuming that the assessee must have paid on-money in cash for purchasing the plots sold, without there being any evidence in this regard found during the search action or led by the assessee.

4. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in not appreciating that even if unaccounted cash was paid to acquire the plots sold, the same would not be allowed as deduction u/s 40A(3) or such unexplained expenditure would be liable to be added to the assessee's income u/s 69C.

5. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) ought to have upheld the order of the A.O.

6. It is, therefore, prayed that the order of the Ld. CIT(A) be set aside and that of the A.O. be restored to the above extent.

27. The sole issue raised by the Revenue in its grounds of appeal is that the ld. CIT (A) erred in restricting the addition up to 20% of the addition made by the AO on account of unaccounted income of Rs. 11,17,57,000/- received on sale of land.

27.1 At the outset, we note that the issue raised by the Revenue in its grounds of appeal for the AY 2012-13 is identical to the issue raised by the Revenue in ITA No. 2345/Ahd/2018 for the assessment year 2011-12. Therefore, the findings given in ITA No. 2345/Ahd/2018 shall also be applicable for the year under consideration i.e. AY 2012-13. The appeal of the Revenue for the assessment 2011-12 has been decided by us vide paragraph No. 20 of this order against the Revenue. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2011-12 shall also be applied for the year under consideration i.e. AY 2012-13. Hence, the grounds of appeal filed by the Revenue are dismissed.

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

Now coming to Assessee's appeal bearing ITA no. 2214/AHD/2018 for AY 2012-13

28. The interconnected issue raised by the assessee in ground Nos. 1 to 3 is that the Ld. CIT(A) erred in confirming the addition of Rs. 2,23,51,500/ being 20% of alleged receipt of on money.

29. At the outset, we note that the issue raised by the assessee in its grounds of appeal for the AY 2012-13 is identical to the issue raised by the assessee in ITA No. 2213/Ahd/2018 for the assessment year 2011-12. Therefore, the findings given in ITA No. 2213/Ahd/2018 shall also be applicable for the year under consideration i.e. AY 2012-13. The appeal of the assessee for the assessment 2011-12 has been decided by us vide paragraph No. 20 of this order partly in favour of the assessee. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2011-12 shall also be applied for the year under consideration i.e. AY 2012-13. Hence, the ground of appeal filed by the assessee is partly allowed.

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

31. In the combined results the appeals of the Revenue bearing ITA Nos. 2345-2346/Ahd/2018 for A.Ys 2011-12 & 2012-13 are **dismissed** and the appeal of the Assessee bearing ITA Nos. 2213-2214/Ahd/2018 for A.Ys. 2011-12 & 2012-13 are **Partly allowed.**

Order pronounced in the Court on 21/12/2022 at Ahmedabad.

Sd/-	**Sd/-/**
(SUCHITRA KAMBLE)	**(WASEEM AHMED)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

(True Copy)

Ahmedabad; Dated 21/12/2022
Manish