

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

BEFORE SHRI VIKAS AWASTHY (JUDICIAL MEMBER)  
AND  
SHRI AMARJIT SINGH (ACCOUNTANT MEMBER)

ITA No. 1848/Mum/2020- A.Y. 2013-14  
ITA No. 1454/Mum/2021- A.Y. 2011-12  
C.O. No.79/Mum/2022 (Arising out of ITA No.120/Mum/2021)  
(Assessment Year 2014-15)

M/s Kapstone Construction Pvt Ltd 702, Natraj, M.V. Road Junction, W.E. Highway, Andheri (E), Mumbai-400 069 <b>PAN : AACCK3513F</b>	vs	Deputy Commissioner of Income-tax, Central Circle-2(4), Mumbai Room No.802, 8 <sup>th</sup> Floor, Old CGO Annex Bldg, M.K. Road, Mumbai- 400 020
<b>APPELLANT/CROSS OBJECTOR</b>		<b>RESPONDENT</b>

ITA No. 119/Mum/2021 - A.Y. 2013-14  
ITA No. 120/Mum/2021 - A.Y. 2014-15  
ITA No. 1525/Mum/2021- A.Y. 2011-12

Deputy Commissioner of Income-tax, Central Circle-2(4), Mumbai Room No.802, 8 <sup>th</sup> Floor, Old CGO Annex Bldg, M.K. Road, Mumbai-400 020	vs	M/s Kapstone Construction Pvt Ltd 702, Natraj, M.V. Road Junction, W.E. Highway, Andheri (E), Mumbai-400 069 <b>PAN : AACCK3513F</b>
<b>APPELLANT</b>		<b>RESPONDENT</b>

Assessee represented by	Shri Naresh Kumar
Department represented by	Smt. Madhumalti Ghosh, CIT DR / Shri Tejinder Pal Singh Andn, Sr.DR

Date of hearing	16/01/2023
Date of pronouncement	23/02/2023

## **ORDER**

### **PER : Shri Amarjit Singh (Accountant Member):**

These six appeals comprise three appeals by the Revenue and 2 appeals and also a cross objection filed by the assessee against different orders of the Ld.CIT(A). Since common issue on similar facts are involved, therefore, we take cross appeals in ITA No.1848/Mum/2021 & 119/Mum/2021 for A.Y. 2013-14 as lead cases and the findings will be applied to other cases also, wherever it is applicable.

### **ITA No.1848/Mum/2021 (Assessee's Appeal) & ITA No.119/Mum/2021 (Revenue's Appeal) – A.Y. 2013-14**

2. Facts in brief are that return of income declaring total loss at Rs.10,72,09,211/- was filed on 30<sup>th</sup> September, 2013. The case was subjected to scrutiny assessment and notice under section 143(2) of the Act was issued on 03/09/2014. The assessee company is engaged in the business of development of residential project during the year under consideration. Further facts of the case are discussed while adjudicating the grounds of appeal.

### **GROUND 1 (sole ground in assessee's appeal)**

3. Ground 1 being sole ground in assessee's appeal and ground 1 in Revenue's appeal is common that it pertains to disallowance of purchases made from holding company under section 40A(2) amounting to Rs.27,81,25,000/-.

4. The facts pertaining to this issue are that during the course of assessment, the Assessing Officer observed that assessee had purchase transaction of Rs.74,81,25,000/- with its holding company. On query, the assessee company explained that it had sold residential saleable area of 'Rumtomjee Urbania' project at Thane measuring 85,500 sq.ft. in A.Y. 2012-13 to its associated company, 'Keystone Realtors Pvt Ltd' against which it had received consideration of Rs.47 crores. It was also submitted that as per clause 10(B) of the allotment letter both parties (purchaser and seller) had agreed that in case the project gets approval from CRZ (Coastal Regulatory Zone) authorities, which was pending until then, the assessee will have the right to acquire back this area of 85,500 sq.ft. at mutually agreed price. Further, the CRZ approval in respect of the above mentioned project, CRZ approval was received on 18/05/2012. Thereafter, the assessee company bought back this built up area of 85,500 sq.ft. from Keystone Realtors Pvt Ltd on 15/12/2012 for a consideration of Rs.74,81,25,000/-. However, the Assessing Officer was of the view that appreciation in the price in just two years was practically unfeasible and stated that assessee failed to explain why an excess payment of Rs.27,81,25,000/- was paid by the assessee. Therefore, the Assessing Officer treated the payment of Rs.27,81,25,000/- made by the assessee as excessive and unreasonable payment to its holding company and the

same was disallowed under section 40A(2) of the Act. Aggrieved, the assessee filed appeal before the Ld.CIT(A). The Ld.CIT(A) held that since the expenditure of Rs.27,81,25,000/- has not been claimed and debited to the P&L Account, but rather to WIP, the same should have not been disallowed by the Assessing Officer under section 40A(2) of the Income-tax Act, 1961 towards the payment made to a sister concern company M/s Keystone Realtors. Since the amount has been taken to closing work-in-progress, no separate addition is warranted in the hands of the assessee at this stage; however, closing WIP has to be reduced by the said amount. Further aggrieved, both the Revenue as well as the assessee are in appeal before us.

5. Before us, the Ld.Counsel for the assessee submitted that re-purchase of the area previously sold was done at fair market price, at an arm's length price, therefore, same should not have been questioned by the Assessing Officer. The Ld.Counsel further submitted that once project was approved by the CRZ authorities, its prices get appreciated in market. The Ld.Counsel also submitted that assessee has not actually debited the purchase price of Rs.74,81,25,000/- to the P & L Account, but the same has been shown in the closing work-in-progress, therefore, the Ld.CIT(A) held that since expenditure has not been debited to the P&L Account, but taken to closing work-in-progress, therefore, addition of Rs.27,81,25,000/- was not warranted in the hands of the assessee. The Ld.Counsel further contended that the decision of the Ld.CIT(A) that closing WIP is to be reduced by this amount is not justified looking to the facts of the case. On

the other hand, the Ld.DR has supported the order of the Assessing Officer.

6. Heard both sides and perused the materials on record. Without reiterating the facts as elaborated above in this order, the assessee had disputed the decision of the Assessing Officer in adding the difference in the sale and purchase price at Rs.27,81,25,000/-. The assessee also submitted that repurchase of the area after granting approval by the CRZ authorities was done by the assessee at fair market price. The assessee had bought back the entire area of 85,500 sq.ft. for a sum of Rs.70,81,25,000/- which worked out about Rs.8,700/- per sq.ft. of residential saleable area in its proposed residential building known as 'Rumtomjee Urbania' project at Thane from Keystone Realtors Ltd for a consideration of Rs.74 crores.

7. We have also perused the copy of letter of allotment placed in the paper book wherein as per clause 10(B) both the parties had agreed that in the event the company gets CRZ approval in respect of 'Rumtomjee Urbania' project at Thane, then the company reserves its right to acquire the said area from the allottee at the price mutually agreed between the parties. The assessee company has also explained before the lower authorities alongwith relevant supporting documents that assessee company was also developing another project Azzaino which was situated at 'Rumtomjee Urbania' project at Thane wherein the assessee company had sold 19 flats in December, 2001 with the average sale rate of Rs.8,997 per sq.ft. Similarly, in the month of December, on 15/12/2012, the assessee company has re-purchased the residential saleable area from

Keystone Realtors Pvt Ltd @ Rs.8,750/- per sq.ft. From these facts assessee company has demonstrated that it has repurchased the residential saleable area at the rate which were prevailing in the market for purchase of residential saleable area in the open market to the customers. The assessee company has also submitted the rate of apartments over a period of time. The assessee has also provided the sale rate of different apartments over a period of time which are as under:-

N o.	Name of the customer	Project	Flat No.	Carpet Area	Saleable Area	Date of Booking	Date of Registration	Agreement Value	Saleable Rate
1	Sndhya Pophale	Azzaino-F	2904	696	1,120	31/07/2018	24/12/2018	1,29,57,520	11,564
2	Chaitanya Dube	Azzaino-E	3606	698	1,124	25/05/2020	10/06/2020	1,24,38,040	11,069
3	Sameer Yelambka	Azzaino-K	1203	600	966	26/02/2020	19/03/2020	99,02,814	10,252
4	Shanta Talukdar	Aurelia	2108	611	996	16/03/2020	unregistered	1,08,56,992	10,901
5	Satish Kumar Sharma	Aurelia	203	612	998	14/03/2020	unregistered	1,08,78,992	10,901
6	Anurag Thakurta	Atelier-A	2003	553	776	26/11/2015	15/12/2015	95,56,500	12,315
7	Cyrus Savakshaw Jasawalla	Atelier-B	101	554	831	31/03/2016	16/06/2016	1,29,66,838	15,604
8	Pinak Mitra	Atelier-C	102	554	831	05/12/2015	14/01/2016	95,56,500	11,500
9	Manisha Sandip Pdenekar	Atelier-D	603	558	831	27/02/2017	23/03/2017	94,91,050	11,421
10	Union Bank of India	Accura-A	2102	624	932	03/12/2014	27/11/2014	1,08,77,589	11,871
11	Kaikushroo Ardeshir Nejadkary	Accura-B	3201	624	932	20/12/2014	24/12/2014	1,13,83,649	12,214
12	Union Bank of India	Accura-C	3204	640	963	26/11/2014	27/11/2014	1,12,22,391	11,654
13	Union Bank of India	Accura-D	2202	640	1,011	26/11/2014	27/11/2014	1,15,60,370	11,436
14	Nikhat Nizamuddin Shaikh	Athena-A	2702	670	1,015	13/09/2011	21/12/2011	83,22,000	8,199
15	Praveen Dixit	Athena-B	2503	849	1,290	02/05/2011	25/05/2011	1,05,29,370	8,162
16	Virbhan Pahlajira	Athena-C	1602	849	1,290	30/12/2010	10/06/2011	83,83,410	6,499

	i Gurbani								
17	Ketan Vishnu Mirchan dani	Athen a-D	25 03	856	1,311	10/09/ 2011	13/10/201 1	1,11,28,528	8,489

8. After referring to the registered agreement of sales made in the project 'Azzaino' which was also situated at 'Rumtomjee Urbania'. The assessee has demonstrated that assessee has re-purchased the residential saleable area at the rate which was prevailing in the market for purchase of residential saleable area in the open market to the customer.

9. In the light of above facts and circumstances, we consider that decision of Assessing Officer to add the difference in sale price of repurchase price is not justified inspite of the fact that assessee has not debited the purchase amount in the P&L Account is not justified. Even the decision of Ld.CIT(A) in reducing the difference amount in the WIP is not justified without contrary disproving the facts and material brought on record by the assessee as discussed supra in this order. In view of the above, the decision of the Ld.CIT(A) to reduce the difference amount of Rs.27,81,25,000/- is a not justified as the Ld.CIT(A) neither controverted the relevant supporting material furnished by the assessee as referred above nor considered that Assessing Officer has not referred the case to the DVO for valuation. Therefore, the ground of the Revenue is dismissed and that of the assessee is allowed.

**GROUND 2 OF REVENUE'S APPEAL – DELETION OF ADDITION ON ACCOUNT OF INTEREST COST OF Rs.10,65,59,776/- TO BE BOOKED IN WORK-IN-PROGRESS OUT OF TOTAL DISALLOWANCE OF RS.13,83,39,728/-.**

10. During the course of assessment, the Assessing Officer noticed that assessee has incurred finance cost of Rs.22,20,73,136/- out of which Rs.8,37,33,408/- has been allocated to those contract of which, the construction has been completed. The Assessing Officer further noticed that assessee had debited the balance amount of Rs.13,83,39,728/- as revenue expenditure in the P&L Account. On query, the assessee explained that it has capitalized finance cost of Rs.8,37,33,408/- on the basis of percentage completion method of accounting and in the P&L Account, it has debited a sum of Rs.13,83,39,728/- as revenue expenditure. The assessee further submitted that it had followed accounting policy for recognition and capitalization of borrowing cost which was as per Accounting Standard-16 (AS-16) "Borrowing Costs". However, the Assessing Officer observed that assessee has failed to justify the claim of finance cost as revenue expenditure and that principle of matching concept of the income and expenditure has not been followed by the assessee and also that provisions of section 37 have not been complied with by the assessee. Therefore, Assessing Officer has disallowed the entire amount of interest of Rs.13,83,39,728/- debited by the assessee.

11. The assessee filed appeal before the Ld.CIT(A). After perusal of the submission of the assessee, as reproduced at pages 35 to 53 in the order of the Ld.CIT(A), the Ld.CIT(A) observed that assessee had not apportioned the Finance Cost in accordance with its submission and percentage completion method followed by it. The Ld.CIT(A) has reproduced the interest cost apportionment made by the assessee project-wise at page 54 of his order. The assessee claimed that it had

debited interest expenses to P&L Account only Rs.7,07,53,253/- after considering interest income of Rs.6,78,80,170/-. Therefore, the assessee submitted before the Ld.CIT(A) to restrict the disallowance of interest expenses to the amount of Rs.3,12,36,515/-. Therefore, the Ld.CIT(A) has agreed with the working of the assessee except in respect of project 'Landward', 'AzzianoD', etc. as per the Table shown at page 56 in the order of Ld.CIT(A) since work on these projects was not started and no Revenue offered in respect of these projects. Accordingly, after apportioning the interest in the ratio of percentage of projects completed, the Ld.CIT(A) has disallowed the interest to the amount of Rs.3,17,79,952/-. The Ld.CIT(A) held that expenditure in the nature of interest should be apportioned in the ratio of revenue recognized or the progress of the project which would give a true and correct picture of project, which has been offered over several years like in the case of the assessee. Therefore, out of disallowance of Rs.13,83,39,728/- as interest made by the Assessing Officer, an amount of Rs.31,77,99,952/- was confirmed and balance was directed to be deleted.

12. Heard both sides and perused the materials on record. The assessee had incurred total financial expenses of Rs.22,20,73,136/- and debited an amount of Rs.13,83,39,725/- as revenue expenditure in the P&L Account. The balance amount of Rs.8,37,33,408/- has been taken to capital work in progress. The assessee has been following 'project completion method of account' in accordance with the "Accounting Standard-7" and revenue were shown in the account on the basis of percentage of project completed as on 31<sup>st</sup> March of the year.

13. The assessee has submitted that finance cost is attributed towards the cost of the project in accordance with the Accounting Standard-16 in respect of "Borrowing Cost. The assessee has calculated the fund utilization towards projects as per project cash flow prepared by the assessee company. The finance cost was allocated to all the projects which have been financed by way of borrowing cost. During the year under consideration, the assessee has offered revenue of Rs.107.13 crores against which interest cost of Rs.13.83 crores was charged to P&L account. The Assessing Officer had not doubted the genuineness of interest cost which was debited to P&L Account. The finance cost is to be considered in accordance with the prescribed "Accounting Standard-16 – Borrowing Cost" in the Financial statements. The Assessing Officer has failed to provide any relevant basis for rejecting such interest cost claimed in the P&L Account. In view of the facts and circumstances, we do not find any error in the decision of the Ld.CIT(A) in restricting such allowance after taking into consideration the project percentage method followed by the assessee.

**GROUND 3 : DELETION OF ADVERTISEMENT EXPENSES OF Rs.7,61,97,384/-**

14. During the course of assessment, the Assessing Officer noticed that assessee has debited selling cost of Rs.10,65,80,572/- to the P&L Account. On query, the assessee explained that selling and marketing expenses are incurred by the assessee company irrespective of whether a project is completed or not. It was also explained that these expenses were not associated with any particular project. Therefore, capitalizing

the same under the project and treating the same as a part of the project is not justified. However, the Assessing Officer has not agreed with the submission of the assessee and disallowed an amount of Rs.7,61,97,384/- on account of selling cost stating that these expenses were attributable to the future income. Therefore, the same was to be capitalised. Assessee filed appeal before Ld.CIT(A). The Ld.CIT(A) has allowed the ground of the assessee.

15. Heard both the sides and perused the material on record. ". It is noticed from the break up of selling cost that an amount of Rs.6,56,07,562/- pertained to advertisement and publicity expenses and the remaining expenses are pertained to Brouchers and Pamphlets, commission and brokerage, fair and exhibitions, etc. The assessee also submitted that as per Accounting Standard-7, the selling cost does not form part of the construction cost and development cost, i.e. work in progress for the year under consideration. Therefore, following and complying with AS-7, the selling cost should not form part of work in progress. During the course of assessment and appellate proceedings, the assessee explained that the expenditure incurred were in the nature of advertisement, pamphlets, fares and exhibition, sales promotion, etc. which cannot be linked with the progress of the project and anyway it was also submitted that the expenditure has actually been incurred during the year. Therefore, this expenditure was allowable under section 37 of the Act. The Assessing Officer has not explained that how this expenditure can be apportioned as per the progress of the project without considering the fact that most of the selling and marketing expenses were incurred by

the assessee company irrespective of whether a project was ongoing or otherwise. In the light of above facts, we do not find any error in the decision of Ld.CIT(A). Therefore, this ground of appeal of the Revenue is also dismissed.

16. In the result, assessee's appeal is allowed and the appeal of the Revenue is dismissed.

**ITA NO.120/MUM/2021 (REVENUE'S APPEAL)- A.Y. 2014-15 & GROUND 2 OF CROSS OBJECTION NO.79/MUM/2022 FILED BY THE ASSESSEE – A.Y. 2014-15**

**REVENUE'S GROUND 1 : DELETION OF INTEREST COST & GROUND 2 IN CROSS OBJECTION FILED BY THE ASSESSEE.**

17. At the outset, a delay of 158 days in filing cross objection by the assessee has been reported. The assessee submitted an affidavit alongwith application stating that there was delay in filing the cross objection because because of wrong advice by the tax advisor. Thereafter, his counsel, Shri Naresh Kumar, who represent before the ITAT advised the assessee to file the cross objection against the departmental appeal.

18. Heard both sides. After considering the facts reported by the assessee in the affidavit that there was delay in filing the cross objection because of wrong advice given by the tax advisor. Vide affidavit the assessee submitted that its Tax Advisor at the time when department filed appeal had advised not to file cross objection as it was a departmental appeal. However, its counsel as referred above has advised the assessee to file a cross objection, who represent before the ITAT. We have also considered the judgement of Hon'ble Supreme Court in the case

of Collector, Land Acquisition vs MST Kattiji & Others – Civil Appeal No.460 of 1987 dated 19/02/1987 wherein it was held “sufficient cause for the purpose of condonation of delay should be interpreted with a view to do even handed justice on merit in preference to the approach which scuttles a decision on merit”. We are of the considered opinion that there is a bonafide reason for not filing the cross objection in time. Accordingly, we condone the delay and admit the cross objection to decide the issues on merit.

19. This ground has been decided by us in favour of the assessee in ITA No.119/Mum/2021. The facts and circumstances being identical, the decision already arrived at for A.Y. 2013-14 shall apply mutatis mutandis to this year also. The ground of the Revenue and cross objection filed by the assessee are dismissed.

**REVENUE’S GROUND 2 : DELETION OF DISALLOWANCE OF ADVERTISEMENT EXPENDITURE**

20. This ground has been decided by us in favour of the assessee in ITA No.119/Mum/2021. The facts and circumstances being identical, the decision already arrived at for A.Y. 2013-14 shall apply mutatis mutandis to this year also. The ground of the Revenue is dismissed.

**GROUND 3 IN REVENUE’S APPEAL & GROUND 2 IN CROSS OBJECTION FILED BY ASSESSEE.**

21. Ground 2 of assessee’s cross objection that Ld.CIT(A) has erred in not restricting the disallowance under section 14A to the extent of exempt

income whereas the Revenue challenged the deletion of disallowance under section 14A to the tune of Rs.16,06,92,062/-.

22. During the course of assessment proceedings, the Assessing Officer noticed that assessee company has earned dividend income of Rs.38/- which was claimed as exempt. The Assessing Officer further noticed that assessee company has debited an amount of Rs.67,45,09,046/- as interest on loan debited to the P&L Account as finance cost. Further, the assessee company has shown total investment at Rs.4,56,61,80,450/- in the balance-sheet. Therefore, the Assessing Officer has computed disallowance under section 14A read with rule 8D to the tune of Rs.18,35,22,966/-. The assessee filed appeal before the Ld.CIT(A). The Ld.CIT(A) restricted the disallowance to Rs.1,14,15,452/- holding that same was offered by the assessee before him.

23. The assessee filed the Cross Objection mainly countering that the Ld.CIT(A) has erred in not restricting the disallowance under section 14A to the extent of exempt income. The Cross Objection was grossly delayed to the extent of 158 days.

24. After going through the material on record, it is observed that the assessee is seeking to rake up the issue for which they have accepted the findings as regards their tax liability. The assessee had declared the income in the return of income after making suo motu disallowance under section 14A read with rule 8D(2)(iii) to the amount of Rs.1,14,15,452/-. The Assessing Officer has further made disallowance under section 14A as per Rule 8D(2)(ii) of Rs.17,21,07,541/-. Before the Ld.CIT(A) in its grounds of appeal vide Form No.35 assessee had filed appeal against disallowance

of Rs.17,21,07,541/- under section 14A made by the Assessing Officer. The total disallowance under section 14A after including suo motu disallowance of Rs.1,14,15,452/- and Rs.18,35,22,966/- as per para 8.9 of the assessment order. Before the Ld.CIT(A), the assessee submitted that it had voluntarily disallowed an amount of Rs. 1,14,15,542/- which was more than the exempt income, therefore, no further disallowance should have been made.

25. In accordance with the claim of the assessee, the Ld.CIT(A) has deleted the entire new addition of Rs.17,21,07,514/- made under section 14A by the Assessing Officer.

26. It is evident from the material as discussed supra that assessee, altogether taken a new issue in the Cross Objection which was not subject matter of appeal before the Ld.CIT(A) even when it was not a subject matter before Assessing Officer in the assessment proceedings. Therefore, this Cross Objection is not maintainable, hence dismissed. Ground 3 of the Revenue also stands dismissed.

27. In the result, appeal filed by the Revenue is dismissed.

**ITA No.1454/Mum/2021 (Assessee's Appeal)- A.Y. 2011-12 & ITA NO.1525/MUM/2021 (REVENUE'S APPEAL)**

**GROUND 1: REOPENING OF ASSESSMENT UNDER SECTION 147 OF THE ACT**

28. These grounds pertain to issue of notice under section 148 of the Act that original assessment was completed under section 143(3) of the Act and assessment under section 143(3) read with section 147 of the Act was completed merely on the basis of change of opinion.

29. The facts in brief are that assessment under section 143(3) of the Act was completed on 31/03/2013 assessing total income at Rs.6,61,44,315/-. Subsequently, the case of the assessee was reopened under section 147 of the Act on the ground that it had paid interest on borrowed funds for projects carried on by it and the borrowed funds were nothing but project funds having direct nexus with the project carried out by the assessee. The interest expenses ought to have been disallowed and added to the work in progress of the assessee. Therefore, the Assessing Officer passed order under section 147 read with section 143(3) on 22/11/2018 determining total income at Rs.16,48,43,390/- after making disallowance of interest cost amounting to Rs.9,86,99,074/-.

30. Regarding challenging the reopening under section 147 of the Act, the Ld.CIT(A) has dismissed the appeal of the assessee holding that Assessing Officer was fully justified in forming a broad opinion that some income relating to the assessee had escaped assessment. The Ld.CIT(A) held that Assessing Officer has followed the due process of law in respect of issue of notice under section 148 of the Act. The Ld.CIT(A) also held that it was not a case of change of opinion as no opinion was formed in original assessment under section 143(3) in respect of interest on borrowed funds for projects carried on by the assessee company and the borrowed funds were nothing but project funds, have direct nexus with the projects carried out by the assessee. The Ld.CIT(A) also stated that it was not a case of definite and specific opinion made by the Assessing Officer regarding interest on borrowed funds for projects in the assessment made under section 143(3) of the Act.

31. Heard both sides and perused the material . The assessee submitted that the issue regarding administrative expenses and finance cost were examined at the time of original assessment under section 143(3).

32. The Ld.Counsel has referred the following judicial pronouncements:-

1. Jashan Textile Mills (P) Ltd vs DCIT & Ors 284 ITR 0542 (Bom)
2. Precilion Holdings Ltd vs DCIT (Bom) Writ Petition No.3342 of 2018
3. Idea Cellular vs DCIT & Ors (Bom) 301 ITR 0407
4. CIT vs Kelvinator of India Ltd (SC) 320 ITR 0561

33. We have perused the aforesaid judicial decisions referred by the Ld.Counsel. In the case of Jashan Textiles Mills the issue in the reopening was that of transfer price shown by the assessee whereas the assessee had already disclosed the basis on which the market price had been arrived at since 1994-95.

34. In the case of Precilion Holdings Ltd during the scrutiny assessment under section 143(3) the Assessing Officer had already examined the entire issue after raising multiple queries as elaborated at para 8 of the judgement.

35. In the case of Idea Cellular Ltd the Assessing Officer had raised several queries on several occasions and all the queries were answered in the original assessment.

36. In the case of CIT vs Kelvinator of India Ltd, the Hon'ble Supreme Court held that Assessing Officer has power to reopen the assessment

under section 147 provided there is tangible material to come to the conclusion that there is escapement of income.

37. In this regard, it is noticed that neither before the Ld.CIT(A) nor before us the assessee has furnished copies of details of any letter or notice under section 142(1) issued by the Assessing Officer calling for any details regarding apportionment of interest expenses in accordance with the Accounting Standards 7 & 16 (AS 7 & 16). Even the assessee has not submitted any details / letter filed before the Assessing Officer in respect of allocation of interest expenses incurred for the loan taken for the construction of the project. The assessee has referred only the financial statements together with the auditor's report for the year ended 31/03/2021 wherein under Schedule 16 simply construction cost mentioned and further details of finance cost was mentioned under Schedule 19 in the form of interest and bank charges in a general manner. Nowhere any details has been submitted at the time of original assessment in the context of AS-7 & 16 so that it can demonstrate apportionment of interest cost in the ratio of revenue recognized on project completion basis. We observe, simply, the copy of audit report in the form of financial statements furnished before the Assessing Officer is not sufficient to form the requisite belief. The Hon'ble Delhi High Court in the case of Consolidated Photo & Finvest vs ACIT (2006) 281 ITR 394 (Del) held that Explanation 1 to the Proviso of section 147 makes it clear that production of account books or other evidence from which the Assessing Officer can with due diligence discover material evidence would not

necessarily amount to disclosure within the meaning of the Proviso that stipulates an extended period of limitation for action in the cases where the escapement arises out of the failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment.

38. We have also considered the case law as cited by the Ld.Counsel but they are not applicable to the facts and circumstances of the present case as the *para materia* content in those cases are different from the *para materia* content in the present case. Therefore, we do not find any merit in the legal ground raised by the assessee and, therefore, dismissed.

## **GROUND 2**

39. Ground 2 of the assessee is that no notice under section 143(2) was issued.

40. We have heard both sides on this issue and perused the materials on record. Regarding no notice under section 143(2) of the Act was served after filing of return of income on 18/04/2018 pursuant to notice issued under section 148 of the Act, the assessee contended that in this regard it had filed additional ground of appeal before the Ld.CIT(A). On perusal of the assessment order, it is found that Assessing Officer has categorically mentioned at para 3 of the assessment order passed under section 143(3) r.w.s. 147 that notice under section 143(3) dated 31/03/2018 was issued to the assessee alongwith a letter dated

25/07/2018. In this regard, the Ld.Counsel has filed a copy of remand report called upon by the CIT(A) dated 11/03/2020 wherein the Assessing Officer has claimed that notice under section 143(2) was issued on 25/07/2018, however, copy of the same was not traced so far. In this regard, we have noticed that Ld.CIT(A) has not adjudicated this ground of appeal filed by the assessee.

41. The assessee has also not filed any rectification application before the Ld.CIT(A) for not adjudicating this ground of appeal. We further notice that looking to the fact that Assessing Officer has categorically incorporated in the assessment order that notice under section 143(2) has been issued. Therefore, it is required to verify the evidence of serving of this notice upon the assessee which has not been called upon by the Ld.CIT(A) in the remand report.

42. In view of the above facts and circumstances we restore this ground of appeal to the file of the Ld.CIT(A) for adjudication which was remained to be adjudicated as discusses supra in this order.. This ground of appeal is allowed for statistical purpose.

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

**GROUND 1 OF REVENUE VIDE ITA NO.1525/MUM/2021**

44. This ground has been decided by us in favour of the assessee in ITA No.119/Mum/2021. The facts and circumstances being identical, following decision already arrived at shall apply mutatis mutandis to this ground also.

45. In the result, the appeal filed by the Revenue is dismissed.

46. Resultantly, appeals filed by the assessee are partly allowed; cross objection filed by the assessee is partly allowed and the appeals filed by the Revenue are dismissed.

Order pronounced in the open court on 23<sup>rd</sup> February, 2023

Sd/-	sd/-
(VIKAS AWASTHY)	(AMARJIT SINGH)
<b>JUDICIAL MEMBER</b>	<b>ACCOUNTANT MEMBER</b>

Mumbai, Dt : 23<sup>rd</sup> February, 2023

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**प्रतिलिपि अग्रेषित Copy of the Order forwarded to :**

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त(अ)/ The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR,  
ITAT, Mumbai
6. गार्ड फाइल/Guard file.

BY ORDER,

//True Copy//

Dy./Asstt. Registrar) ITAT, Mumbai