

**IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT  
BEFORE SHRI PAWAN SINGH, HON'BLE JUDICIAL MEMBER AND  
DR. A. L. SAINI, HON'BLE ACCOUNTANT MEMBER  
(Physical Court Hearing)**

<b>Sl. No.</b>	<b>ITA No.</b>	<b>Asst. Year</b>	<b>Name of Appellant</b>	<b>Name of Respondent</b>
1.	284/SRT/2022	2016-17	The DCIT, Central Circle, Vapi	M/s. M. Poonam Developers, 9 <sup>th</sup> Floor, Fortune Square II, Daman Road, Chala, Vapi – 396191. <b>PAN: AAXFM9582G</b>
2.	285/SRT/2022	2018-19	The DCIT, Central Circle, Vapi	M/s. M. Poonam Developers, 9 <sup>th</sup> Floor, Fortune Square II, Daman Road, Chala, Vapi – 396191. <b>PAN: AAXFM9582G</b>
3.	286/SRT/2022	2019-20	The DCIT, Central Circle, Vapi	M/s. M. Poonam Developers, 9 <sup>th</sup> Floor, Fortune Square II, Daman Road, Chala, Vapi – 396191. <b>PAN: AAXFM9582G</b>
4.	318/SRT/2022	2017-18	The DCIT, Central Circle, Vapi	M/s. M. Poonam Developers LLP, 9 <sup>th</sup> Floor, Fortune Square II, Daman Road, Chala, Vapi – 396191. <b>PAN: AAFFL5526K</b>
5.	319/SRT/2022	2018-19	The DCIT, Central Circle, Vapi	M/s. M. Poonam Developers LLP, 9 <sup>th</sup> Floor, Fortune Square II, Daman Road, Chala, Vapi – 396191. <b>PAN: AAFFL5526K</b>
6.	320/SRT/2022	2019-20	The DCIT, Central Circle, Vapi	M/s. M. Poonam Developers LLP, 9 <sup>th</sup> Floor, Fortune Square II, Daman Road, Chala, Vapi – 396191. <b>PAN: AAFFL5526K</b>

<b>Sl. No.</b>	<b>Cross Objection No.</b>	<b>Asst. Year</b>	<b>Name of Assessee</b>	<b>Name of Respondent</b>
7.	12/SRT/2022 [arising in ITA No. 284/SRT/2022]	2016-17	M/s. M. Poonam Developers, 9 <sup>th</sup> Floor, Fortune Square II, Daman Road, Chala, Vapi – 396191. <b>PAN: AAXFM9582G</b>	The DCIT, Central Circle, Vapi
8.	13/SRT/2022 [arising in ITA No. 285/SRT/2022]	2018-19	M/s. M. Poonam Developers, 9 <sup>th</sup> Floor, Fortune Square II, Daman Road, Chala, Vapi – 396191. <b>PAN: AAXFM9582G</b>	The DCIT, Central Circle, Vapi
9.	14/SRT/2022 [arising in ITA No. 286/SRT/2022]	2019-20	M/s. M. Poonam Developers, 9 <sup>th</sup> Floor, Fortune Square II, Daman Road, Chala, Vapi – 396191. <b>PAN: AAXFM9582G</b>	The DCIT, Central Circle, Vapi

<b>Date of Hearing:</b>	09/05/2023
<b>Date of Pronouncement:</b>	26/06/2023
<b>Assessee by:</b>	Shri Ashish Pophare, CIT(DR) with Shri Vinod Kumar, Sr. DR
<b>Respondent by:</b>	Shri Hardik Vora, AR

## आदेश / ORDER

### PER DR. A. L. SAINI, AM:

Captioned six appeals filed by the Revenue and three Cross Objections filed by the assessee, pertaining to assessment years (AY) 2016-17, 2017-18, 2018-19 and 2019-20, are directed against the separate orders passed by the Learned Commissioner of Income Tax (Appeals), Surat [in short “the ld. CIT(A)”], which in turn arise out of separate assessment orders passed by the Assessing Officer under section 143(3) r.w.s. 147 of the Income Tax Act, 1961 [hereinafter referred to as the “Act”].

2. Three appeals are filed by the Revenue in case of M/s. M. Poonam Developers LLP and three appeals filed by Revenue in case of M/s. M. Poonam Developers (Firm). The various issues raised by the Revenue in these two sets of assessee’s appeals are common and identical, therefore since, the issues involved in all the appeals and cross objections are common and identical; therefore, these appeals and cross objections have been clubbed and heard together and a consolidated order is being passed for the sake of convenience and brevity. The facts narrated in ITA No.284/SRT/2022 for AY.2018-19 have been taken into consideration for deciding these appeals *en masse*.

3. Although, appeals filed by the Revenue and Cross objections filed by the assessee, contain multiple grounds of appeal, however, at the time of

hearing we have carefully perused all the grounds raised by Assessee and Revenue. We find that most of the grounds raised by the Revenue and Assessee are either academic in nature or contentious in nature. However, to meet the end of justice, we confine ourselves to the core of the controversy and main grievances of the Revenue and Assessee as well. With this background, we concise and summarise the ground of appeal of the Revenue as well as Assessee as follows:

(i) Ground Nos.1 to 3 raised by Revenue for AY.2016-17 in ITA No.284/SRT/2022, ground nos. 1 to 3 raised by the Revenue in AY.2018-19 in ITA No.285/SRT/2022, ground nos. 1 to 3 raised by Revenue in AY.2019-20 in ITA No.286/SRT/2022.

*“On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in restricting the addition of Rs.2,61,02,000/- made by the Assessing Officer on account of unaccounted on-money to Rs.20,88,160/- i.e. net profit @ 8% on the total ‘on money’ receipts of Rs.2,61,02,000/-. The Ld. CIT(A) also erred in not considering the decision of Hon’ble Jurisdictional High Court in the case of Jay Builder vs ACIT, 33 taxmann.com 62 (Guj.) and decision of Hon’ble ITAT, Ahmedabad in case of ACIT vs. Shoppers Buildcon Pvt Ltd., IT(SS)A No.312/Ahd/2018, dated 27.04.2022.”*

(ii) Ground nos. 4 to 5 raised by the Revenue for AY.2016-17 in ITA No.284/SRT/2022, grounds nos.4 to 5 raised by Revenue in AY.2018-19 in ITA No.285/SRT/2022, ground nos. 4 to 5 raised by Revenue in AY.2019-20 in ITA No.286/SRT/2022, ground nos.6 to 7 raised by Revenue in AY.2017-18 in ITA No.318/SRT/2022-Poonam Developers LLP, ground nos. 6 to 7 raised by Revenue in AY 2018-19 in ITA No.319/SRT/2022-Poonam Developers LLP, and ground nos. 6 to 7 raised by Revenue in ITA No.320/SRT/2022 for A.Y.2019-20- Poonam Developers LLP.

*“On the facts and in the circumstances of the case and in law the Ld. CIT(A) has erred in directing the assessing officer to give set off of the addition confirmed to the extent of Rs.20,88,160/- being profit @ 8% of the on money receipts, against the disclosure of Rs.25,00,000/- made by the assessee under IDS, 2016 on account of ‘sundry business receivables’ for assessment year 2015-16, ignoring the fact that there was no disclosure made by the assessee for the impugned assessment year i.e. 2016-17. The Ld. CIT(A) also erred in accepting the*

*submission of the assessee that an amount of Rs.25,00,000/- was shown in AY.2016-17 by way of passing journal entry out of the declaration made in IDS 2016 for AY.2015-16, there cannot be disclosure under IDS 2016 for future unaccounted income to be earned.*

(iii) Ground nos.6 raised by Revenue in AY.2018-19 in ITA No.285/SRT/2022.

*“On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred by giving direction to tax the ‘on-money’ receipt as regular business income and not to treat the same as unexplained cash credit under section 68 of the Act, which is to be taxed under the provisions u/s 115BBE of the Act, despite the fact that the assessee failed to substantiate the ‘on-money’ receipts.”*

(iv) Ground no.1 raised by the Revenue in ITA No.318/SRT/22 for A.Y.2017-18, ground No.1 raised by the Revenue in ITA No.319/SRT/22 for A Y 2018-19 and ground No.1 raised by the revenue in ITA No.320/SRT/2022 for A.Y. 2019-20.

*“On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in re-calculating the total on-money on booking of the flats during the year under consideration to Rs.1,60,26,408/- as against the ‘on-money’ calculated of Rs.9,57,99,600/- by the assessing officer on the basis of incriminating impounded material.”*

(v) Grounds of appeal No.2 to 5 raised by the Revenue in ITA No. 318/SRT/2022 for A.Y. 2017-18, ground Nos 2 to 5 raised by the Revenue in ITA No.319/SRT/2022 for A.Y. 2018-19, and ground Nos. 2 to 5 raised by the Revenue in ITA No.320/SRT/2022 for A.Y. 2019-20.

*“The Ld. CIT(A) erred in restricting the addition of Rs.9,57,99,600/- made by the Assessing Officer on account of unaccounted ‘on-money’ to Rs.24,03,961/- i.e. net profit @ 15% on the total re-calculated on money receipts of Rs.1,60,26,408/- (15% of Rs.1,60,26,408) without appreciating the fact that the partner of the sister concern firm M/s Poonam Developers admitted the receipt of money and failed to substantiate the claim of unaccounted expenditure incurred warranting set off of such expenses from the ‘on-money’ receipts. The Ld. CIT(A) also erred in not considering the decisions of the Hon’ble jurisdictional High Court in the case of Jay Builders vs ACIT, 33 taxmann.com 62 (Guj.) and CIT(A) further erred in misinterpreting the decision of Hon’ble ITAT in the case of Poonam Developers (sister concern of the assessee).”*

(vi) Ground nos. 8 to 9 raised by the Revenue in ITA No.319/SRT/2022 for AY.2018-19.

*“The Ld. CIT(A) erred in deleting the addition made by assessing officer on account of on-money receipt on commercial space shops of Rs.4,74,33,000/- by ignoring the fact that unaccounted cash component cannot be ignored in commercial shops. The CIT(A) also erred in deleting the addition ignoring the principles of “Human Probability Test” that is preponderance of probabilities which is applicable for Income Tax proceedings.”*

4. Cross-Objections of assessee in CO Nos. 12 and 14/SRT/22 are as follows:

*(i) On the facts and in circumstances of the case as well as law on the subject, the Ld. CIT(Appeals) has erred in confirming assessment order to the extent of wrongly relying upon the whatsapp chats and loose papers found at the premises during the course of survey and extrapolating the amount in random manner.*

*(ii) On the facts and circumstances of the case as well as law on the subject, the Ld. CIT(Appeals) has erred in partly confirming assessment order to the extent of confirming addition of profit on the basis of documents impounded during the survey proceedings without considering that it was only some rough calculation and not the proof of actual transaction taken place during the year.*

*(iii) On the facts and circumstances of the case as well as law on the subject, the Ld. CIT(Appeals) has erred in confirming assessment order to the extent of sole reliance on the statement recorded during the survey and without considering the evidences produced by assessee.*

*(iv) Assessee craves leave to add, alter or delete any ground(s) either before or in the course of hearing of the appeal.*

5. The grounds raised by the assessee in all cross-objections are similar and identical except variance of amount.

6. All the cross objections filed by the assessee are barred by limitation by 3 days. The assessee has moved a petition requesting the Bench to condone the delay. We heard the party on this preliminary issue. Having regard to the reasons given in the petition, we condone the delay and admit all the cross objections for hearing.

7. Now we shall take these above concise and summarised grounds of appeals of Revenue one by one. Summarised and concise ground No.(i) is reproduced below for ready reference:

(i) Ground No.1 to 3 raised by Revenue for AY.2016-17, in ITA No.284/SRT/2022, ground nos. 1 to 3 raised by the Revenue in AY.2018-19, in ITA No.285/SRT/2022, ground nos. 1 to 3 raised by Revenue in AY.2019-20 in ITA No.286/SRT/2022.

*“On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in restricting the addition of Rs.2,61,02,000/- made by the Assessing Officer on account of unaccounted on-money to Rs.20,88,160/- i.e. net profit @ 8% on the total on money receipts of Rs.2,61,02,000/-. The Ld. CIT(A) also erred in not considering the decision of Hon’ble Jurisdictional High Court in the case of Jay Builder vs ACIT, 33 taxmann.com 62 (Guj.) and decision of Hon’ble ITAT, Ahmedabad in case of ACIT vs. Shoppers Buildcon Pvt. Ltd., IT(SS)A No.312/Ahd/2018, dated 27.04.2022.”*

8. The facts of the case which can be stated quite shortly are as follows: The assessee is engaged in the business of construction and real estate and filed its return of income for A.Y 2016-17 on 20.09.2016 declaring total income at nil. A survey u/s 133A of the Act was conducted in M Poonam Group on 21.02.2018. During the course of survey proceedings, various incriminating documents were found and impounded. The case was reopened after taking approval from higher authorities and a notice u/s 148 was issued on 26.03.2021. In response to the notice u/s 148 of the Act the assessee has filed its return of income on 24.04.2021, declaring total income at Rs. Nil. Further, a notice u/s 142(1) of the Act was issued to the assessee on 01.06.2021 through ITBA portal along with reasons for reopening of assessment. The assessee-firm has undertaken a project named Orion Villa project. As per material available on record, it was observed by the assessing officer that in this project, total 133 units of individual row house of type A, B1, B2, B3, B4,C & C1 are being constructed and on verification of the Annexure BF-2 impounded, the details of on-money received by the assessee-firm in A.Y 2016-17 is as under:

<i>Villa Type</i>	<i>Cash receipt (in Rs) (Column B of page no 23 to 26 of Annex BF-2)</i>
<i>A</i>	<i>Rs.59,00,000/-</i>

B1	Rs.46,50,000/-
B2	Rs.1,10,02,000/-
B4	Rs.45,50,000/-
Total	Rs.2,61,02,000/-

These above incriminating documents were discussed by the assessing officer on page no.3 to 9 of assessment order. During the assessment proceedings, the assessing officer asked the assessee to explain the 'on-money' transaction. In response, the assessee submitted its reply before the assessing officer. However, the assessing officer rejected the reply of the assessee and observed that there were incriminating documents found and impounded during the course of survey proceedings. There is no dispute with regard to the fact of receipt of 'on-money' from sale of the units. This fact has been admitted by one of the partners of the assessee-firm, Mr. Rajesh Ahir who has categorically admitted and accepted in his statement during the course of survey proceedings that 2 columns against each of the party A and B, out of which column B represents cash i.e. 'on-money' and column A represents cheque. Accordingly, based on the incriminating material found during the course of survey proceedings and also based on the admission made, the actual receipts by the assessee amounting to Rs.2,61,02,000/- should be brought to tax for the year under consideration.

9. In this connection, the assessee has filed its detailed reply and written submission, which are reproduced below:

*"Only profit element can be added as against total receipts.*

*1. Merely on the basis of impounded materials total gross receipts received without taking into consideration the fact that only profit element out of the net receipts is chargeable to tax and not the gross receipts the proposed addition cannot be made. From the impounded material also it is clearly apparent that material gives details about gross receipts taken by assessee-firm. As far as receipts in the books are concerned, the same is duly given benefit of expenses. However, for no reason the receipts not stated in the books can be added on gross basis.*

*2. Your honour has proposed addition on the basis of certain books of account and loose papers, Whats App Chats found during the course of*

survey. Such material apparently were not complete record of the income or expenditure of the assessee. Therefore, the total income could not be properly calculated on the basis of such material. The receipts only represent the price received by the seller of the goods for the acquisition of which it has already incurred the cost. It is realisation of excess over the cost incurred which only forms part of the profit included in the consternation of sales. Income tax law is well settled that tax is required to be paid on net receipts after deducting expenses therefrom. Money receipts, where trading receipts receive as advance from the prospective buyers of flats cannot be taxed in entirety. Only net profit could be brought to tax and not gross receipts.

3. Jurisdictional High Court in the case of CIT vs. President Industries reported vide 258 ITR 654 (Guj) has held as,

“Having perused the assessment order made by the Assessing Officer, the order made by the Commissioner (Appeals) and the Tribunal, we are satisfied that the Tribunal was justified in rejecting the application under section 256(1). It cannot be a matter of an argument 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 priced received by the seller of the goods for the acquisition of which it has already incurred the cost. It is the realization 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 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 sale proceeds can be treated as income of the relevant assessment year answers by itself in the negative. The record goes to show that there is no finding nor any material has been referred to about the suppression of investment in acquiring the goods which have been found subject of undisclosed sales.”

4. Identically, in the case of CIT Vs. Gurubachhan Singh J. Juneja reported vide 302 ITR 63(Guj), it was held as,

“Hence, in absence of any material on record to show that there was any unexplained investment made by the assessee which was reflected by the alleged unaccounted sales the finding of the Tribunal that only the gross profit on the said amount can be brought to tax does not call for any interference. The Tribunal was, therefore, justified in deleting the addition of Rs.10,85,003/- made on account of unaccounted cash sales.”

5. In the decision recently decided by jurisdictional ITAT (Surat Bench) in the case of M/s Jay Kesar Bhavani Developers Pvt Ltd. vs. ITO reported vide 2020-TIOL-357-ITAT-Surat, under identical circumstances profit rate @ 6% was adopted and addition was restricted. The Tribunal observed as,

“In the light of above discussion, and respectfully following the judgments of Hon'ble jurisdictional High Court as discussed above and also of Tribunal, we of the considered opinion that Ld. CIT(A) was not justified in confirming

*the addition of entire on-money receipts amounting to Rs.4,72,02,368. Therefore, only estimated net profit is required to be taxed. We find that the assessee has shown net profit at 4.55% for the assessment year under consideration and 4.59% for A.Y 2010-11. Further, the Hon'ble High Court in the case of CIT Vs. Abhishek Corporation (supra) has upheld the net profit at 1.31% as declared by the assessee in that case. The net profit rate disclosed at 4.55% during the assessment year under consideration by the assessee in books of account and considering the facts that the project undertaken by the assessee comes under deduction of section 80IB(10) of the Act, hence, there may not be any intention to disclose the lower rate of profit. Considering these facts, and taking into account net profit in construction business, it would be reasonable to estimate 6% of net profit on total on-money receipts of Rs.4,72,02,368. Accordingly, the assessing officer is directed to tax net profit @ 6% on total on-money receipts of Rs.4,72,02,368. In view of these facts and circumstances the Ground No.4 to 6 of appeal are **partly allowed.**"*

*6.Also in the case of CIT vs. Neo Formulations Pvt. Ltd. reported vide 363 ITR 322, Hon'ble jurisdictional High Court has held as,*

*"This argument has two difficulties. Firstly, the Assessing Officer himself, as noted above, has recorded in the assessment order that there has been unaccounted purchases which needs to be constructed against the unaccounted sales. Even in the decision of this court in the case of President Industries (supra) the court was conscious of this angle when it observed as under (page 655):*

*"Therefore, unless there is a finding to the effect that investment by way of incurring the cost in acquiring the goods which have been sold has been made by the assessee and that has also not been disclosed. In the absence of such finding of fact the question whether the entire sum of undisclosed sale proceeds can be treated as income of the relevant assessment year answers by itself in negative. The record goes to show that there is no finding nor any material has been referred about the suppression of investment in acquiring the goods which have been found subject of undisclosed sales."*

*7.Secondly and equally importantly, the Assessing Officer with somewhat confusingly equated excess consumption of raw material and unaccounted sale of the finished product. It is not as if the excess consumption of raw material would automatically result into matching the value of the excess sale of the finished product. Unaccounted consumption of raw material would be used for manufacturing raw material which process would require, depending on the nature of the product, deployment of manpower and machinery, consumption of electricity and even other ingredients. Essentially, on the basis of the estimation of excess consumption of raw material the possible profit of the assessee would have to be worked out for making actual additions. In this background, we must view the observations of the Commissioner of Income-tax (Appeals), who while adopting the excess consumption of the unfinished product at 20 per cent of the gross sale applied the gross profit rate of 35 per cent, averaging three year of the gross*

*profit rate in the case of the assessee. Essentially, therefore, on the basis of the available material on record the Commissioner of Income-tax (Appeals) has attempted to tax the income of the assessee arising out of the unaccounted consumption of raw material which would result into unaccounted sales of the finished products.”*

*8.In the case of ITO vs. Sai Krupa Construction Co. reported vide 13 SOT 459, Mumbai Bench of ITAT has held as,*

*“The Commissioner (Appeals) had properly taken into account all the facts and circumstances for arriving at his conclusion. The total incomes estimated by the Assessing Officer for the assessment years under appeal appeared to be arbitrary. This was established from the fact that for the assessment year 1999-2000, while application of net profit rate of 15 per cent resulted into total income of Rs.10,46,778, the Assessing Officer had actually under assessed at Rs.6,15,397. This was a case, where regular books of account were not maintained. The Assessing Officer proceeded on the basis of papers found during the course of survey. Such papers apparently were not complete record of the income or expenditure of the assessee. Therefore, the total income could not be properly calculated on the basis of such papers. The Commissioner (Appeals) had rightly directed the Assessing Officer that the profits of the assessee’s business as a builder should be estimated by applying net profit rate of 15 per cent of the total consideration as per the sale agreements and also on the on-money received by the assessee. Thus, the net profit rate of 15 per cent could not be said to be on the lower side. Even section 44AD prescribes net profit rate of 8 per cent only in the case of an assessee engaged in the civil construction. Therefore, the Commissioner (Appeals) had decided the issue correctly. Hence, the appeals were to be dismissed [Pare 18]”*

*9.In the assessee’s case also, a sheet was found having details about receipts recorded in the books as well as unaccounted receipts. It is evident that details in the sheet are regarding gross receipts and not net receipts. From the perusal of audited accounts for the year under consideration, it is evident that the gross profit was reported at the rate of around 5% for the year under consideration as well as for subsequent 2 years. Accordingly profit of Rs.13,05,100/-, which is 5% of total alleged on-money receipts of Rs.2,61,02,000/- can be added at the most. However, adding entire amount of turnover is completely contrary to the different decisions of jurisdictional High Court and Tribunals and hence liable to be deleted.*

*10.Further, where assessee, engaged in construction business, is following project completion method, its income could be brought to tax only in year when sale deeds of units sold were registered even though sale consideration/advance might have been received earlier from buyer. For this proposition, we are relying on the decision of Hon'ble jurisdictional High Court in the case of CIT (Central), Surat v. Happy Home Corporation reported vide [2018] 94 taxmann.com 292 (Gujarat). SLP against the said judgment is also dismissed by the Apex Court.*

*11. In the given case, your honour has alleged on money on ad hoc basis, however it may kindly be noted that some units are not even booked or sold and no amount is mentioned against the same and in some cases only advance amount is received.*

*12. On the basis of the above detailed submission, the proposed addition may kindly deleted or reduced.”*

10. However, the assessing officer rejected the contention of the assessee and observed that the cash components (on-money) are not part of the business income and the same has never been disclosed in its books of accounts. The assessee has booked and claimed all the expenses in its books of account and only during the survey proceedings, the receipt of cash amount as on-money has come to the notice of the department. Mr. Rajesh Ahir, the partner of the assessee-firm has also accepted the fact and hence, there is no question arises to take only profit component on the on-money receipts. In view of the above, the assessing officer was of the view that amount received as on-money in cash of Rs.2,61,02,00/- by the assessee-firm in selling the Residential Row Houses in the name and style of Project Orion Villa is not recorded in its books of account for the year under consideration. The assessing officer also held that the assessee has failed to offer satisfactory explanation in respect of cash credits received against flats sold. In view of the above factual and legal position, a sum of Rs.2,61,02,000/- was added back by the assessing officer as unexplained money u/s 69A of the Act.

11. Aggrieved by the order of Assessing Officer, the assessee carried the matter in appeal before Ld. CIT(A), who has partly allowed the appeal of the assessee. Aggrieved by the order of Ld. CIT(A), the Revenue is in appeal before us.

12. Learned CIT-DR for the Revenue argued that during the course of survey proceedings, certain books of account and loose papers and

whatsapp chats were found and impounded. On perusal of the impounded material, it was seen that the assessee has received 'on-money' in the residential units where advances were received during the F.Y 2015-16 relevant to A.Y 2016-17. The assessee firm is engaged in the business of construction and has undertaken a project named Orion Villa project. As per material available on record, it is seen that in this project, total 133 units of individual row house of type A, B1, B3, B4, C and C1 are being constructed and on verification of the Annexure BF-2 impounded, the details of on-money received by the assessee-firm in A.Y 2016-17 is Rs.2,61,02,000/-. Therefore, on verification of impounded materials the actual receipts by the assessee firm was found at Rs.2,61,02,000/- and the same was treated as unexplained money. Thus, ld DR contended that since the assessing officer has passed a detailed and elaborate order, therefore addition made by the assessing officer should be upheld.

13. On the other hand, ld Counsel for the assessee argued that ld CIT(A) has passed a speaking order after considering findings of the assessing officer and submissions of the assessee, therefore such a reasoned order should be upheld.

14. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position. The ld CIT(A) noted that it is a fact which is not denied by the assessee that during the course of survey, incriminating material evidencing receipt of on-money relating to the impugned assessment year from project "Orion Villa" amounting to Rs.2,61,02,000/-were found. The said receipts are in cash which are not accounted in the regular books of account. This has been confessed by Mr. Rajesh Ahir, the partner of the assessee firm. Thus, once the receipt of on-money is accepted the same needs to be brought to tax additionally as the same have not been shown in the books of

account maintained by assessee. However, Id CIT(A) observed that the question arises is whether, such on-money has to be taxed fully or a portion of the on-money has to be taxed as income. The Id CIT(A) noted that in deciding the assessee's case for A.Y 2017-18 on identical facts, which was also completed taking into consideration the incriminating material found during the course of survey held that only 20% of such on-money receipts should be taxed as income. The findings of CIT(A) for A.Y 2017-18 in assessee's own case are as under:

*“5.2 The facts of the case have been carefully considered. This is undisputed fact that the Assessing Officer made additions of Rs.2,57,76,000/-, which is total gross receipts on sale of flats of the project, which is evident by the documents impounded and as mentioned in the assessment order by the Assessing Officer. The same has been categorically stated by one of the partner during the course of survey while recording his statement. Therefore, there is no doubt that the additions of total gross receipts have been made and not the profit amount. It has been held by the Hon'ble High Court of Gujarat in the case of CIT Vs President Industries reported vide 258 ITR 654 (Guj.), CIT Vs Gurubachhan Singh J. Juneja reported vide 302 ITR 63 (Guj.) & CIT Vs Neo Formulations Pvt. Ltd. reported vide 363 ITR 322 that only profit element is to be taxed and not the gross receipts. The same has been held by the Hon'ble ITAT, Ahmedabad & Hon'ble ITAT Mumbai in several cases which has been cited by the assessee in his submissions, as reproduced above. Keeping in view these facts, the Assessing Officer is not justified in making the additions of total gross receipts as on-money. Only profit element out of the gross receipts is to be taxed. The profit element in the builder activity is ranging from 8% to 20% and keeping in view the facts of the assessee's case, I am taking 20% as net profit of the total gross receipts as income of the assessee. Therefore 20% of Rs.2,57,76,000/- i.e. Rs.51,55,200/- additions are confirmed and remaining Rs.2,06,20,800/- are deleted. This ground of appeal is partly allowed.”*

15. Thereafter, the assessee filed appeal against the said order of CIT(A) for A.Y 2017-18 before the Hon'ble ITAT, Surat Bench. The Revenue also filed the appeal against the said order of CIT(A). The Hon'ble ITAT, Surat Bench on the facts and circumstances of the assessee's case held that only 8% of the on-money receipts should be brought to tax as income of the assessee firm and the appeal filed by the Revenue was dismissed. The findings of the Hon'ble ITAT, Surat Bench are as under:

*“11. We have heard both the parties and carefully gone through the submission put forth on behalf of the assessee along with the documents furnished and the*

case laws relied upon, and perused the fact of the case including the findings of the ld. CIT(A) and other materials brought on record. We note that Assessing Officer stated that assessee received “on-money” from customers on sale of flats (Villa), the details of the same are as follows:

Villa Type	No. of Villas	Amount of on-money receipt
A76	1	44,00,000/-
B1	4	46,50,000/-
B2	9	1,16,95,000/-
B4	9	50,31,000/-
	Total	2,57,76,000/-

The Assessing Officer further mentioned in para no.5.1 that there is no dispute with regard to the fact of receipt of “on-money” from sale of units. This clearly shows that amount of Rs.,2,57,76,000/- is business receipts, and since these are business receipts therefore these receipts are taxable as per the profit declared by the assessee in audited books of account. These facts have been admitted by one of the partner of the assessee-firm, Mr. Rajesh Ahir, who has categorically admitted and accepted in his statement during the course of survey proceedings that two column against each of the party A and B, out of which column B represents cash i.e, “on-money” and column A represent money received through cheque. The Assessing Officer mentioned these details on page no. 4,5 &7 of the assessment order. Hence it is proved by the facts stated by the Assessing Officer in the assessment order that additions of total gross receipts have been made and not the profit amount. However, on appeal by assessee, ld. CIT(A) restricted the addition to 20% net profit is very higher side as compared to net profit rate of assessee which ranges between 4% to 6%. The ld CIT(A) has to bring on record some material to justify the rate of profit estimated by him and the basis of such estimate. This has been so held by the Hon'ble Calcutta High Court in the case of Ranichera Tea Co. Ltd. 207 ITR 979. The ld CIT(A) has conterminous power, he can do what the Assessing Officer can do. The Assessing Officer cannot make a pure guess as has been held in the case of Dhakeshwari Cotton Mills reported in 26 ITR page 775. Moreover, he has determined the gross profit when for the purpose of computation of total income it is not the gross profit but net income which has to be added to the total income. The assessee own records are one of the factors which has to be considered and kept in mind while estimating the profit as has been held in the case of Delta Engineering Co reported in 186 ITR 383. Similar view have been taken in the case of Action Electricals (Delhi) reported in 258 ITR 188. The Allahabad High Court in the case of Shyam Bidi Works (Appeal No.64 of 2005 vide judgement dated 18<sup>th</sup> July 2014) has approved the action of the authorities wherein the rate of profit accepted in earlier years was adopted. Further it is the net profit and net income which has to be added and not the gross profit since indirect expenses are also incurred in the business. Lord Macnaghten, in the case of London County Council v. Attorney-General 1901 AC 26, 35-6(HL), 4 TC 265, 293 stated as follows:

*“Income Tax, if I may be pardoned for saying so, is a tax on income. It is not meant to be a tax on anything else. It is one tax, not a collection of taxes essentially distinct.”*

*Therefore, net profit is taxable income. Hence, considering the facts and circumstances of the case, we direct the Assessing Officer to compute the net profit @ 8% of the gross receipts. Since we have adjudicated the issue involved in assessee’s case, taking into account, the peculiar facts and circumstances, as narrated above, therefore, it is made clear that instant adjudication shall not be treated as a precedent in any preceding or succeeding assessment year.*

*12. In the result, appeal of ethe Revenue is dismissed whereas appeal filed by the assessee is partly allowed.”*

16. The Id CIT(A) analysed the judgment of Jurisdictional ITAT Surat in assessee own case, as mentioned above, and Id CIT(A) noted that it is clear that only 8% of the ‘on-money’ receipts were treated as income of the assessee by Hon'ble ITAT as against the 20% held by the CIT(A). The ITAT in its order for A.Y 2017-18 in the assessee’s own case have held that the rate of 8% is held to be the rate applicable to the assessee on the basis of peculiar circumstances and should not be held as a precedent for any preceding or succeeding assessment years. In the case of the assessee, the assessments have bene made from A.Y 2015-16 to 2019-20, on the basis of survey u/s 133A of the Act and during the course of the said survey, evidences of receipt of on-money were found and impounded. The additions in all these 5 assessment years have been made on the basis of incriminating material found during the course of survey. Therefore, the facts and circumstances which are applicable to A.Y. 2017-18 are applicable to the impugned assessment year also. The fact of the assessee’s case are totally identical to the facts of the A.Y 2017-18. Hence, following the decision of the Hon'ble ITAT for A.Y 2017-18 in assessee’s own case on identical facts, the Id CIT(A) directed the assessing officer to take 8% of on-money receipts as income of the assessee. The addition made to the extent of Rs.20,88,160/- (8% of Rs.2,61,02,000/-) was therefore upheld by

ld CIT(A). We have gone through the above findings of ld CIT(A) and noted that there is no infirmity in the conclusion reached by ld CIT(A), hence we confirm the findings of ld CIT(A).

17. Ground No.1 to 3 raised by Revenue for AY.2016-17, in ITA No.284/SRT/2022, ground nos. 1 to 3 raised by the Revenue in AY.2018-19, in ITA No.285/SRT/2022, ground nos. 1 to 3 raised by Revenue in AY.2019-20 in ITA No.286/SRT/2022 (in case of M/s Poonam Developers), are dismissed.

18. The Concise and summarised ground No.2 raised by the Revenue is reproduced below for ready reference:

“Ground nos. 4 to 5 raised by the Revenue for AY.2016-17 in ITA No.284/SRT/2022, grounds nos.4 to 5 raised by Revenue in AY.2018-19 in ITA No.285/SRT/2022, ground nos. 4 to 5 raised by Revenue in AY.2019-20 in ITA No.286/SRT/2022, ground nos.6 to 7 raised by Revenue in AY.2017-18 in ITA No.318/SRT/2022-Poonam Developers LLP, ground nos. 6 to 7 raised by Revenue in AY 2018-19 in ITA No.319/SRT/2022-Poonam Developers LLP, and ground nos. 6 to 7 raised by Revenue in ITA No.320/SRT/2022 for A.Y.2019-20- Poonam Developers LLP.

*“On the facts and in the circumstances of the case and in law the Ld. CIT(A) has erred in directing the assessing officer to give set off of the addition confirmed to the extent of Rs.20,88,160/- being profit @ 8% of the on money receipts, against the disclosure of Rs.25,00,000/- made by the assessee under IDS, 2016 on account of ‘sundry business receivables’ for assessment year 2015-16, ignoring the fact that there was no disclosure made by the assessee for the impugned assessment year i.e. 2016-17. The Ld. CIT(A) also erred in accepting the submission of the assessee that an amount of Rs.25,00,000/- was shown in AY.2016-17 by way of passing journal entry out of the declaration made in IDS 2016 for AY.2015-16, there cannot be disclosure under IDS 2016 for future unaccounted income to be earned.”*

19. We have heard both the parties. Facts of the group case have already been narrated by us in the above para no.8 to 10 of this order. Learned DR for the Revenue reiterated the findings of the assessing officer and stated

that set off of IDS declaration should not be allowed to the assessee. Whereas, Id Counsel defended the order passed by the Id CIT(A). The Id Counsel submitted that during the appellate proceedings, the assessee argued before the Id CIT(A) that he (assessee) has made a declaration under the Income Declaration Scheme of 2016, a total income of Rs.1,00,00,000/- as “sundry business receivables”. The said declaration has been made for A.Y 2015-16 for Rs.25,00,000/- and A.Y 2016-17 Rs.75,00,000/-. It was submitted that the assessee has only one project i.e. “Orion Villa” during the entire period of A.Y 2015-16 to 2019-20 and the declaration made by the assessee is towards the receivables from the said project, as assessee does not have any other source of income. Therefore, Id CIT(A) mentioned in his order that there is merit in the submission of the assessee. The IDS form filed shows that the declaration has been made against the business receivables and the ‘on-money’ receipts is from the said business and hence, the assessee is entitled for benefit of receivables declared in IDS 2016 for the declaration of Rs.25,00,000/- made for A.Y 2015-16 for which the credit of Rs.25,00,000/- can be given in the impugned assessment year. Based on this factual position, the Id CIT(A) directed the assessing officer to allow the benefit of income declared under IDS of for assessment year (A.Y.) 2015-16 amounting to Rs.25,00,000/-.

20. We note that Id CIT(A) held that Rs.20,88,160/- is taxable as additional income from business for the impugned assessment year, Vide para no. 17 of this order. However, the Id CIT(A) noted that after allowing the benefit of declaration under IDS, 2016 of Rs.25,00,000/-, no additional income need to be brought to tax. Therefore, we note that assessee is entitled for set off of IDS declaration and Id CIT(A) based on the facts narrated above, has rightly allowed the benefit of declaration under IDS, 2016. On a careful reading of the Ld.CIT(A) order and the findings thereon,

we do not find any valid reason to interfere with the decision and findings of the Ld.CIT(A) in holding that the assessee is entitled for the benefit of declaration under IDS, 2016 of Rs.25,00,000/-. In this connection ld Counsel also submitted written submission, which is reproduced below:

*“A survey u/s. 133A was conducted in M Poonam group on 21.02.2018 by the investigation wing, Vapi at 3 premises namely M Poonam Developers, M/s Lotus Infra and M Poonam Construction. Accordingly, cases of the appellant were selected for assessment / re-assessment and Ld. Assessing Officer made huge addition in all the years under consideration. Ld. CIT(A) has reduced addition. Both assessee and department have filed an appeal before Hon'ble Tribunal on below issue:*

- 1. Addition has been made on the basis of rough document for which no details of correlation is given by the Assessing Officer in the Assessment Order as well as before Ld. CIT(A) or Hon'ble this Tribunal. Addition has been made in different years solely on the basis of page no. 23 to 26 of Annexure BF-2 in whimsical manner without any evidences supporting the allegations and/or the calculations as to how the yearly figures are derived on the basis of impounded undated dumb documents.*
- 2. Without prejudice to the above ground, complete on-money receipts have been added to the total income of the appellant even when it is accepted that amounts found in the impugned documents are gross receipts and not net receipts and hence, the appellant is entitled to get the benefit of deduction of expenses.*
- 3. Further, percentage of profit is to be calculated on the basis of past books of assessee or other identical comparable firm of nearby area having same volume of transactions as assessee for same assessment year rather than simply relying on the previous decisions of Hon'ble Tribunal or High Court which is completely unconnected to the assessee having different assessment year, business scale and geographical location compared to that of the appellant. Even in case of assessee for A.Y.2017-18 (ITA No. 15/SRT/2021). Hon'ble this Bench has restricted the addition to 8% of the gross receipts.*
- 4. The appellant is rightly allowed to set off the amount declared in Income Disclosure Scheme (IDS) at the time when the firm as well as the project was at very initial stage against the profit on on-money received to avoid double taxation of same income.*
- 5. In the written submission filed by the Department, it is even accepted that the declaration made in the Income Disclosure Scheme, 2016 is under the head "Sundry Business Receivables" and hence, it is estimated income. Further, in the alleged years, the Assessing Officer has added undisclosed business income of same project only on the basis of estimation without having any substantial proof for receipt of on-money. Even otherwise, once amount of on-money receivable is*

taxed under Income Disclosure Scheme, 2016, the same amount cannot be taxed again at the time of its receipt.

6. Further, it was objected by the Department Representative that the disclosure has been made for A.Y. 2015-16 and 2016-17 but the set off has been claimed for A.Y. 2015-16 to 2019-20. However, the department has failed to consider the fact that it is not set off but at the most the receipt of amount receivable which has been accepted income in Income Disclosure Scheme, 2016 in earlier years. Accordingly, no set off is claimed but the only claim of the assessee is that the same amount cannot be taxed twice i.e. once at the time when the amount is determined as receivable and another at the time when the amount is actually received.

7. Further, circular no. 29 of 2016 was issued on 18.08.2016 by the CBDT in order to address doubts and concerns of the taxpayers. Its relevant extract is reproduced as under:

**"Question No.2:** Whether the amount declared under the Scheme for an earlier assessment year can be taken into account to explain the transaction(s) in the assessment proceedings for subsequent assessment year(s) ?

**Answer:** As per section 189 of the Finance Act, 2016, any declaration made under the Scheme shall not affect finality of completed assessments. However, in an assessment proceeding before the Assessing Officer for an assessment year subsequent to the year for which the income is declared under the Scheme, the income declared for an earlier assessment year can be taken into account to explain the transactions provided there is a nexus between the income declared and the transactions of the subsequent assessment year."

Hence, the Circular issued by the Ministry of Finance clearly says that the income disclosed under the Scheme for an earlier assessment year can be taken into account to explain the transactions in assessment proceedings for subsequent years. So, date of declaration is irrelevant as per circular.

In the case of the appellant, declaration has been made under the Income Declaration Scheme of 2016 of total income amounting to Rs.1,00,00,000/- as '**sundry business receivables**' for A.Y. 2015-16 and 2016-17. The appellant has only one project i.e. "Orion Villa" during the entire period of A.Y. 2015-16 to 2019-20 and the declaration made by the appellant is towards the receivables from the said project as appellant does not have any other source of income. The IDS form filed shows that the declaration has been made against the business receivables and the on-money receipts is from the said business and hence, as there is a direct nexus between the income declared in the IDS form and the income for the years under consideration, the appellant is entitled for benefit of receivables declared in IDS, 2016.

8. Appellant also relies on the decision of Hon'ble Tribunal, Kolkata Bench in the case of ACIT, Circle 2(1), Jalpaiguri vs Shri Bholanath Agarwal (ITA No.46/Kol/2021), wherein identical issue was under consideration and it was held that:

"14. As regards the claim of set off of Rs.1,09,02,880/- it is not disputed at the end of the Revenue that the assessee made a disclosure of undisclosed income in IDS, 2016 at Rs.1,09,02,880/- which is reflected in Form No. 1 issued by the Department placed at page 19-30 of the paper book and supports this claim of the assessee that for AY 2011 to 2015 it made a disclosure of Rs.1,09,02,876/- and paid due taxes thereon and since the said income was available with the assessee it has been rightly claimed as set off against the undisclosed stock surrendered during the course of survey and Id. CIT(A) has rightly appreciated the same in the light of the Sections 188 & 192 of the Finance Act, 2016 as well as Circular No. 29 of 2016 dated 18.12.2016 and thus, we confirm the finding of Id. CIT(A)."

On the basis of above short submission, it is prayed that the addition made by the Assessing Officer and partly confirmed by the Ld. CIT(A) may please be deleted or reduced."

21. The detailed findings and conclusion of the judgment of Co-ordinate Bench of Kolkata in the case of Shri Bholanath Agarwal, in ITA No.46/Kol/2021, order dated 04.01.2023, are reproduced below:

"8. We have heard rival contentions and perused the records placed before us. The Revenue is aggrieved with the relief granted by Id. CIT(A).

9. Ground nos. 1, 2 & 4 relate to addition made for undisclosed stock by Id. AO at Rs. 2,06,08,009/- which has been deleted by Id. CIT(A). This figure of alleged addition comprises of the following:

a) Additions made in the re-assessment proceedings for AY 2011- 12 at Rs. 92,03,181/-,

b) Disclosure made in IDS 2016 at Rs. 1,09,02,810/- &

c) Difference in stock at Rs. 5,02,028/-.

10. We notice that during the survey, statement was given by the assessee surrendering the undisclosed stock at Rs. 3,91,81,368/- . Ld. AO, on perusal of the income tax return observed that the assessee has failed to reflect the said undisclosed stock/income of Rs. 3,91,81,368/-. The assessee gave the following reply along with filing profit and loss account for the period from 01.04.2015 to 18.07.2015:

"Sir, during survey operation the Survey Team had found a total stock of Rs.4,22,11,880/- lying in the godown as on 17.07.15. The Survey Team had excluded a stock of Rs.30,30,432/- being disclosed stock as per books of account of Laxmi Cotton Industry. Your Assessee would like to submit that as per impounded books of account of Laxmi cotton Industry bearing identification mark no.BNA/2, Page 1 to 12, the entries was completed only up to 30.06.2015, laxmi Cotton Industry is a partnership firm in which your assessee is a one of the partners. Your assessee would like to state that the godown in which the stocks of his proprietorship concern, M/s.Agarwal Trading Co. and stocks of his partnership firm, Laxmi Cotton Industry are kept and stored in the same godown

having 3(three) different and distinct parts by way of brick wall partitions. In one part of the godown, the stocks of the assessee's proprietorship concern are kept and the raw material 7 finished goods of his partnership firm, Laxmi Cotton Industry are kept in the other two parts of the same godown. It is also pertinent to mention here that the impounded books as per BNA/2 were written and completed only up to 30.06.2015. The stocks of Rs.30,30,432/- of Laxmi Cotton Industry as per Page 12 of BNA/2 was also the stock as on 30.06.2015 as per books were written and completed only upto 30.06.2015.

The stock summary printed on 17.07.15 by the survey team putting date from 01.04.2015 to 11.07.2015 was auto generated print out from Tally software of the Laxmi Cotton Industry. As the books was completed up to 30.06.2015 in Tally software of the Laxmi Cotton Industry, naturally the stock summary so printed by the Department was for the period 01.04.2015 to 30.06.2015 and not 01.04.15 to 11.07.15.

The stock as on 17.07.2015 of the Laxmi cotton industry was for Rs.41,34,983/- as per tally software of the said partnership firm. A detail print out of stock summary as on 17.07.15 from tally software of Laxmi cotton Industry may please be found enclosed herewith. Your Honour may observe that the item and quantity of stocks remain same as per stock summary taken by the survey team on 17.07.2015 as per Page 12 of BNA/2. Hence, your honour is requested to exclude a sum of Rs.41,34,983/- being the stocks of Laxmi Cotton Industry.

Regarding balance stock of Rs.3,80,76,817/- found by the survey team as on 17.07.2015 at the premises of your assessee, your assessee would like to explain the same as follows:

The stock valuation drawn by the survey team as per Annexure-3, Page 1 was excessive. The assessee deals in various qualities of the same item, the rare of which varies quality wise. A detail valuation of stock as on 17.07.2015 from tally software of the assessee may please be found enclosed herewith. While the highest sales rate had been considered by the survey team to determine the value of stock as on 17.07.2015 (not purchase price), the stock summary generated from tally software has been considered average purchase value of stocks as on 17.07.2015. As the method of valuation adopted by the survey team was wrong as per accounting standard, the said value may please be ignored and the actual value of Rs.3,06,61,938.19/- may please be considered for the sake of justice. There is approxly same (higher) in quantity of stocks found by the survey team and considered in the stock summary generated from tally software by your assessee.

Regarding stock of Rs.3,06,61,938.19/- as on 17.07.2015, your assessee likes to produce his audited books of account for F.Y:15-16 and purchase & sale bills. There was a deficit investment of Rs.74,14,878.80 in the books of the assessee in comparison to the quantity and value of stocks held by him.

Sir, your assessee was reassessed on 19.02.2016 for ASST. Year 2011-12 by the Department and a total addition of Rs.92,03,181/- had been made by the Department on account of unexplained investment and unexplained income,

against which your assessee did not prefer any appeal. Your assessee had capitalized the said sum of Rs.92,03,181/- in his book of account as per recognized accounting standard and as per various verdict of Courts.

Your assessee had also made a disclosure of Rs.1,09,02,880/- under IDS on account of his undisclosed business income. The income of Rs.1,09,02,880/- so disclosed under IDS had also been capitalized by the assessee in his books of account. All taxes on undisclosed income of Rs.92,03,181/- and Rs.1,09,02,880/- have duly been paid from time to time and duly recorded in the regular books of the assessee. Your honour may find in the books of the assessee produced herewith that all the purchases and sales are duly recorded and there was no deficiency of cash or capital in the book of the assessee. Hence, no further addition should be made on account of undisclosed stock.”

11. Further, we notice that in the trading and profit & loss account for the period 01.04.2015 to 18.07.2015 the assessee has shown closing stock at Rs. 3,01,59,910/-. Now when the matter travelled before ld. CIT(A) the following reconciliation statement was filed by the assessee:

“Details of additions made by the Ld. A.O.:

Value of Stock as on 18.07.2015 (Survey) (Accepted by the Ld. A.O.) – Rs. 3,06,61,938/-

Source of Investments as explained by the Assessee

1) As per regular books of account (disclosed capital) (Accepted by the Ld. A.O.) – Rs. 1,00,53,929/-

2) Intangible addition made in Asst. Year 2011-12, capitalized – Rs. 92,03,181/-

3) Business income up to 31.03.2015, disclosed under IDS 2016, capitalized – Rs. 1,09,02,800/- Source of investments as explained by the assessee – Rs. 3,01,59,910/-

Additions made by the Ld. A.O.

(a) Difference in stock – Rs. 5,02,028/-

(Rs. 3,06,61,938 - Rs. 3,01,59,910)

(b) Intangible addition, capitalized (not allowed) – Rs. 92,03,181/-

(c) Disclosure under IDS, 2016, capitalized (not allowed) – Rs. 1,09,02,800/-

Total additions Rs. 2,06,08,009/-”

12. Ld. CIT(A) after considering these details, held as follows:

“4.2 Ground No. 2: Claim for get-off of Rs. 91,98,488/-:

It is seen from assessment order of the appellant u/s 147/143(3) dated 19.2.2016 for assessment Year 2011-12 that his case was reopened and an addition of Rs.85,63,527/-, being peak balance of undisclosed bank account and Rs.6,39,6543/- being profit on undisclosed business transactions (total additions for Rs.92,03,181/-) had been made. The appellant had claimed the benefit of set-off of Rs.91,98,488/- (addition of Rs.92,03,181/-minus expenses for attending hearings) in explaining the source of investment in undisclosed stocks found in survey. The AO had noticed that the reopening assessment for assessment year 2011-12 had been drawn on 19.2.2016, after the date of survey on 18.7.2015. So,

*the claim for set-off on account of additions vide assessment order dated 19.2.2016 against undisclosed stocks found much before that date on 18.7.2015 was not allowable. The AO had also stated in his order that the case law cited by the appellant was different than the fact of the case of the appellant.*

*The appellant before the AO and also at appellate stage has relied on the decision of Calcutta High Court in Balaram Saha vs. CIT, I.T. Appeal No. 319 of 2003, dated 19.04.2011. In his case a survey was conducted at appellant's business premises on 09.01.1997 and following impoundments of books and other documents, the assessments for previous assessment years 1995-96 and 1996-97 were reopened. In asst, year 1995-96 an intangible addition of Rs. 1,43,688/- and in assessment year 1996-97 an estimated addition of Rs. 8,19,704/- (reduced to Rs. 2,84,699/ in appeal) had been made. Both the additions had been made after the date of survey and the Calcutta High Court has allowed the claim of set off of the assessee to explain the discrepancy found in stocks in survey.*

*As the fact of the case of Balaram Saha vs. CIT squarely applies to the case of the appellant in hand, the claim of set-off of Rs.91,98,488/- is allowed and the addition of Rs.91,98,488/- is hereby deleted.*

*Ground No. 3: Claim for set-off of Rs. 1,09,02,880/-:*

*The appellant had declared his undisclosed incomes up to 31.3.2015 for Rs. 1,09,02,880/- under IDS 2016 and capitalized the said undisclosed income in his books of account for assessment year 2016-17. The AO has stated in his order that capitalization of the amount of disclosure made under the scheme IDS 2016 is not allowable u/s 188 of the Income Declaration Scheme 2016. The AO has further stated in his order that declaration is not admissible in evidence against declarant in the case of scrutiny assessment proceedings for the asst year 2016-17 u/s 192 of the Income Declaration Scheme, 2016. The AO has disallowed the claim of set-off of the appellant by further stating that the survey was conducted on 18.7.2015. whereas the declaration under IDS 2016 had been made on 23.9.2016.*

*I have gone through the sections of 188 and 192 of the Finance Act 2016, which reads as follows-*

*Section 188. The amount of undisclosed income declared in accordance with section 183 shall not be included in the total income of the declarant for any assessment year under the Income-Tax Act, if the declarant makes the payment of tax and surcharge referred to in section 184 and the penalty referred to in section 185, by the date specified under subsection (1) of section 187.*

*Section 192. Notwithstanding anything contained in any other law for the time being in force, nothing contained in any declaration made under section 183 shall be admissible in evidence against the declarant for the purpose of any proceeding relating to imposition of penalty, other than the penalty leviable under section 185, or for the purposes of prosecution under the Income-tax Act or the Wealth-tax Act 1957.*

*I find that the AO has misread the provisions of section 188 and 192 of IDS 2016 in disallowing the claim of the appellant. Circular No.29 of 2016, dated 18.12.2016 (F.No. 142/8/2016-TPL) reads as follows-*

*"Question No. 2: Where the amount declared under the scheme for an earlier assessment year can be taken into account to explain the transaction(s) in the assessment proceedings for subsequent years(s)?"*

*Answer: As per section 189 of the Finance Act, 2016, any declaration made under the Scheme shall not affect finality of completed assessments. However, in an assessment proceeding before the Assessing Officer for an assessment year subsequent to the year for which the income declared under the Scheme, the income declared for an earlier assessment year can be taken into account to explain the transactions provided there is a nexus between the income declared and the transactions of the subsequent year.*

*Question No. 12: In answer (b) to question No.6 of Circular No 17 of 2016 dated 20.5.2016, it has been stated that "person is barred from making a declaration under the Scheme in respect of an undisclosed income in which the survey was conducted". Please clarify?"*

*Answer: The clause (b) of answer 6 may be read as "In case of survey operation, the person is barred for making a declaration under the Scheme in respect of the previous year in which the survey was conducted. The person is, however, eligible to make declaration in respect of an undisclosed income of any other previous year".*

*The Circular issued by the Ministry of Finance clearly says that the income disclosed under the Scheme for an earlier assessment year can be taken into account to explain the transactions in assessment proceedings for subsequent years. So, date of declaration is irrelevant as per circular and also as per the ratio laid down by the jurisdictional High Court (Calcutta High Court) in-the case of Balaram Saha vs. CIT, I.T. Appeal No.319 of 2003, date 19.04.2011. In view of the Finance Act, 2016, Income Declaration Scheme 2016 and Circulars issued by Ministry of Finance, the appellant's claim for set-off of Rs. 1,09,02,880/- is hereby allowed and the addition of Rs. 1,09,02,880/- made by the AO is deleted."*

*13. Now, from perusal of the above details as well as the finding of ld. CIT(A) and the reconciliation statement submitted by the assessee, we find merit in the finding of ld. CIT(A) on considering the fact that firstly, regarding the set off of Rs. 92,03,181/- the addition was made in the hands of the assessee in the assessment order for AY 2011-12 vide order dated 19.02.2016 framed u/s 147 r.w.s. 143(3) of the Act. This assessment was completed after the date of survey i.e. 18.07.2015 but before the conclusion of the assessment proceedings for AY 2016-17. The said sum has been added in the hands of the assessee and the assessee had accepted the said addition by not challenging it before the higher appellate authority and thus, the same is deemed to be available with the assessee as a part of the undisclosed stock found during the course of survey. Also we find support to this proposition by the judgement of Hon'ble*

*Jurisdictional High Court in the case of Balaram Saha vs. CIT, I.T. Appeal No.319 of 2003, dated 19.04.2011. Therefore, ld. CIT(A) has rightly allowed the claim of set off of Rs. 91,98,488/- against the undisclosed stock.*

*14. As regards the claim of set off of Rs. 1,09,02,880/- it is not disputed at the end of the Revenue that the assessee made a disclosure of undisclosed income in IDS, 2016 at Rs. 1,09,02,880/- which is reflected in Form No. 1 issued by the Department placed at page 19-30 of the paper book and supports this claim of the assessee that for AY 2011 to 2015 it made a disclosure of Rs. 1,09,02,876/- and paid due taxes thereon and since the said income was available with the assessee it has been rightly claimed as set off against the undisclosed stock surrendered during the course of survey and ld. CIT(A) has rightly appreciated the same in the light of the Sections 188 & 192 of the Finance Act, 2016 as well as Circular No. 29 of 2016 dated 18.12.2016 and thus, we confirm the finding of ld. CIT(A).*

*15. As regards difference of stock of Rs. 5,02,028/-, we find that the books of accounts are not rejected by ld. AO and due to some calculation error, the said difference has arisen and as the assessee has shown closing balance as on 18.07.2015 at Rs. 3,01,55,910/- arrived at after considering various details of purchase, sales and expenses prepared after the completion of survey but before finalizing of books of accounts, which are duly audited and also considering the fact that statements given during the course of survey does not carry any evidentiary value as held by Hon'ble Apex Court in the case of CIT vs. S. Khader Khan & Sons. (2013) 352 ITR 480 (SC) and therefore, ld. AO before declining the claim of the assessee ought to have referred to any discrepancy or defect in the books of account.*

*16. Since the Revenue has failed to bring out any such fact on record, we hold that no addition was called for undisclosed stock at Rs. 5,02,028/-. Thus, to conclude, we hold that addition for undisclosed stock at Rs. 2,06,08,009/- has rightly been deleted and the finding of ld. CIT(A) is confirmed. Thus, ground nos. 1, 2 & 4 raised by the Revenue are dismissed.*

*17. As regards ground no. 3 for undisclosed cash of Rs. 8,24,000/- is found during the course of survey but not offered to tax in the income tax return, we notice that the assessee has claimed that after preparing the cash book and also considering the statement given during the course of survey, it was noticed that a total cash of Rs. 9,85,730/- was found by the survey team. Cash balance as per the cash book of the partnership firm M/s. Laxmi Cotton Industry was found of Rs. 1,61,733/-. Though the cash book of the sole proprietorship concern of the assessee M/s. Agarwal Trading Co. was also lying at the business premises wherein cash balance of Rs. 8,24,093/- was apparent in the cash book but due to stress and bewildered state of mind, the assessee failed to submit before the survey team about the status of cash in hand held with M/s. Agarwal Trading Co. and for this reason the difference of Rs. 8,24,000/- was offered to tax as excess cash. We, further, observe that while preparing the return of income and on the basis of audited financial statement, the assessee claimed that addition for all excess cash was wrongly made. Ld. AO did not accept the said contention. However, we find that ld. CIT(A) after considering that the books of accounts are*

not rejected, accepted the assessee's claim and rightly deleted the addition of Rs. 8,24,000/- observing as follows:

“4.1 Ground No. 1: Addition of Rs.8,24,000/-:

*During the course of survey proceedings, the appellant could not explain the source of cash of Rs.8,24,000/- and accepted it as his unexplained income. But, in assessment stage the appellant had explained the source thereof and claimed that he had a cash of Rs 8,24,093/- in his hand on the date of survey. He had produced his books of account showing the cash balance of Rs.8,24,093/- before the AO during assessment proceedings. The books had not been found unreliable by the AO and he had not rejected the books of the appellant. The Assessing Officer though accepted the entries in the books produced before him but had not accepted the explanation of the appellant for the reason that the said claim had been made for the first time before AO after a long period of time and the appellant had not lodged his claim at any time before assessment stage. The decisions of Courts cited by the AO are not relevant in the present case as no search and seizure operation had been conducted in this case. The Apex Court in CIT vs. S. Khader Khan & Sons. (2013) 352 ITR 480 (SC) has ruled that survey does not empower any I.T.O. to examine any person on oath and as such statement recorded u/s 133A has no evidentiary value and addition cannot be made merely on the basis of such statement. CBDT Instruction No. 286/2/2003 (Inv), dated 10.03.2003 also directs the lower authority that no addition should be made merely on the basis of statement of the assessee during survey.*

*Further, the ITAT Kolkata in Rohitaswa Das vs. Asst. CIT, ITA No. 1949/Koi/2017, dated 28.08.2019 where claim had been made first time during assessment proceeding that the stock taken during survey operation was not correct as the premise, in which the stocks were found, had been let out by the assessee to other person and the stock in the said premises was not belonged to the assessee. But, the assessing officer had not accepted the retraction made by the assessee during assessment. But, the ITAT relied on the decision of Apex Court in S. Khader Khan & Sons (Supra) and allowed the appeal of the appellant.*

*Now it is well settled position of law that confession made by the appellant during survey is not conclusive and it is open to the appellant to establish that the same was not true. Statements recorded in survey proceedings can be retracted in assessment proceeding, such statements cannot be the sole basis for making the addition. Where no defect in books of account is found in assessment, merely because an incorrect offer had been made by the appellant during survey, that cannot stop him to correct his mistake in assessment.*

*The appellant's explanation and books of account had not been rejected by the Assessing officer, but he was of the view that the statement recorded under oath during survey cannot be retracted at assessment stage. The Supreme Court of India in CIT us. S. Khader Khan & Sons has ruled that survey does not empower the ITO to examine any person on oath and the statement recorded u/s 133A has no evidentiary value.*

*Respectfully following the decision of the Apex Court, the addition made by the A.O. of Rs.8,24,000/- is hereby deleted and the ground of appeal is allowed.”*

18. Since ld. D/R could not controvert the finding of ld. CIT(A), we find no reason to interfere in the finding of ld. CIT(A) and therefore, dismiss ground no. 3 raised by the Revenue.

19. Other grounds are general in nature which need no adjudication.

20. In the result, the appeal filed by the Revenue is dismissed.”

Hence, based on above facts and circumstances, we sustain the order of the Ld.CIT(A) and reject the grounds raised by the Revenue.

22. In the result, Ground nos. 4 to 5 raised by the Revenue for AY.2016-17 in ITA No.284/SRT/2022, grounds nos.4 to 5 raised by Revenue in AY.2018-19 in ITA No.285/SRT/2022, ground nos. 4 to 5 raised by Revenue in AY.2019-20, in ITA No.286/SRT/2022, ground nos.6 to 7 raised by Revenue in AY.2017-18, in ITA No.318/SRT/2022, Poonam Developers LLP, ground nos. 6 to 7 raised by Revenue in AY 2018-19 in ITA No.319/SRT/2022, Poonam Developers LLP, and ground nos. 6 to 7 raised by Revenue in ITA No.320/SRT/2022 for A.Y.2019-20, Poonam Developers LLP, are dismissed.

23. The Concise and summarised ground No.3 raised by the Revenue is reproduced below for ready reference:

“(iii) Ground nos.6 raised by Revenue in AY.2018-19 in ITA No.285/SRT/2022.

*On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred by giving direction to tax the ‘on-money’ receipt as regular business income and not to treat the same as unexplained cash credit under section 68 of the Act, which is to be taxed under the provisions u/s 115BBE of the Act, despite the fact that the assessee failed to substantiate the ‘on-money’ receipts.”*

24. We have heard both the parties. Learned DR for the Revenue argued that ‘on-money’ should be taxable under section 115BBE of the Act, as such ‘on-money’ does not pertain to assessee’s business. On the other hand, ld Counsel for the assessee submitted that assessee has been taking stand right from the beginning that ‘on-money’ was received from the sale of flats

and said 'on-money' was received by the assessee during the normal course of business. Moreover, the Income Tax Authorities have recorded the statement of assessee, and in that statement the assessee had stated that he had received 'on-money' from the customers to whom the flats were sold. In addition to this, in the declaration under IDS, 2016 made by the assessee, the assessee has mentioned that he is making disclosure on account of 'on-money' received or to be received from the customers by selling flats of his particular project. Therefore, such 'on-money' should be assessed under the normal provisions of the Act and not under section 115BBE of the Act. For this proposition, we rely on decision of Gauhati Bench of Tribunal in case of Abdul Hamid V. ITO reported vide 117 Taxmann.com 986 (2020), wherein it was held as follows:

*“Our view is further fortified by the Judgment of the Coordinate Bench of Mumbai in the case of ACT Central Circle-13 Mumbaiv. Rahil Agencies, order dated 2.3 November, 2016 wherein it was held that section 115BBE does not apply to business receipts/business turnover. The findings of the Coordinate Bench are given below:*

*“We have considered rival contentions and found that by applying provisions of Section 115BBE the assessing officer has declined set off of business loss against income declared during the course of survey/search. The provisions of Section 115BE are applicable on the income taxable under section 68, 69, 69A, 69B, 69C or 69D of the Act. The income declared by the assessee is unrecorded stock of diamond found during the course of search. The assessee is in the business of diamond trade and such stock was part of the business affair of the company. Therefore, since income declared is in the nature of business income, the same is not taxable under any of the section referred above and accordingly section 115BBE has no application in case.”*

Therefore, considering the above facts such 'on-money' should be assessed under the normal provisions of the Act and not under section 115BBE of the Act, hence we agree with the findings of Id CIT(A).

25. In the result, Ground no.6 raised by Revenue in AY.2018-19, in ITA No.285/SRT/2022, is dismissed.

26. The Concise and summarised ground No.4 raised by the Revenue is reproduced below for ready reference:

“(iv) Ground no.1 raised by the Revenue in ITA No.318/SRT/22 for A.Y.2017-18, ground No.1 raised by the Revenue in ITA No.319/SRT/22 for A Y 2018-19 and ground No.1 raised by the revenue in ITA No.320/SRT/2022 for A.Y. 2019-20.

*“On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in re-calculating the total on-money on booking of the flats during the year under consideration to Rs.1,60,26,408/- as against the ‘on-money’ calculated of Rs.9,57,99,600/- by the assessing officer on the basis of incriminating impounded material.”*

27. We have heard both the parties. Facts of the group case have already been narrated by us in the above para no.8 to 10 of this order. Learned DR for the Revenue reiterated the findings of the assessing officer. Whereas, Id Counsel defended the order passed by the Id CIT(A).It is a fact which is not denied by the assessee that during the course of survey, incriminating material evidencing receipt of on-money relating to the impugned assessment year from project "Orion Villa" were found. Basically, all the calculation of sale and stock which are made on the said pages are done by taking the rate of Rs.2200/ per sq. ft. which is on the basis of the incriminating material found during the course of survey relating to the project executed by the assessee -LLP and on the basis of whatsapp images. This material and evidences showed the receipt of on-money on the bookings of flats/shops which were not shown in the regular books of accounts maintained. Thus, once the receipt of ‘on-money’ is accepted, which is evident from the incriminating material the same needs to be brought to tax additionally as the same have not been shown in the books of accounts maintained. We note that assessing officer in the impugned assessment year has made the addition of Rs.9,57,99,600/-. The total sale consideration worked out by the assessing officer is 45018 sq. ft. at the rate

of Rs.2200 per sq. ft. which comes to Rs.9,90,39,600/-. From the said amount, the assessing officer has reduced Rs.32,40,000/- being the sale receipts shown by the assessee and added Rs.9,57,99,600/-. However, this is the total sale price of the flats which includes the on-money. Therefore, Id CIT(A) observed that the entire amount of sale proceeds cannot be brought to tax as the assessee has shown the registered sale value of the said flats in the Profit & Loss account in the years in which sale deeds of the said flats are executed. In the impugned assessment year no sale deed has been executed and only some flats having area of 45,018 sq. ft, have been booked and entire amount of sale has been received. The assessing officer has not identified the particular flat which is booked during the impugned assessment year. The analysis of sales given by the assessee during the appellate proceedings suggests that the average registered value of the flats sold by the assessee is Rs.1844 per sq. ft. and the evidences found during the course of survey suggest that the flats are booked at the rate of Rs.2200 per sq. ft. Thus the average on-money received by the assessee is in the range of Rs.356/- per sq. ft. ( $Rs.2200 - Rs.1844 = Rs.356$ ). Thus the 'on-money' received by the assessee on booking of the flats having area of 45018 sq. ft. is of Rs.1,60,26,408/-and not Rs.9,57,99,600/- as determined by the assessing officer. We have gone through the above findings of Id CIT(A) and noted that there is no infirmity in the conclusion reached by Id CIT(A), hence we confirm the findings of Id CIT(A) and dismiss the grounds raised by the Revenue.

28. In the result, Ground no.1 raised by the Revenue in ITA No.318/SRT/22 for A.Y.2017-18, ground No.1 raised by the Revenue in ITA No.319/SRT/22 for A Y 2018-19 and ground No.1 raised by the revenue in ITA No.320/SRT/2022 for A.Y. 2019-20 are dismissed.

29. The Concise and summarised ground No.5 raised by the Revenue is reproduced below for ready reference:

“(v) Grounds of appeal No.2 to 5 raised by the Revenue in ITA No. 318/SRT/2022 for A.Y. 2017-18, ground Nos 2 to 5 raised by the Revenue in ITA No.319/SRT/2022 for A.Y. 2018-19, and ground Nos. 2 to 5 raised by the Revenue in ITA No.320/SRT/2022 for A.Y. 2019-20.

*“The Ld. CIT(A) erred in restricting the addition of Rs.9,57,99,600/- made by the Assessing Officer on account of unaccounted ‘on-money’ to Rs.24,03,961/- i.e. net profit @ 15% on the total re-calculated on money receipts of Rs.1,60,26,408/- (15% of Rs.1,60,26,408) without appreciating the fact that the partner of the sister concern firm M/s Poonam Developers admitted the receipt of money and failed to substantiate the claim of unaccounted expenditure incurred warranting set off of such expenses from the ‘on-money’ receipts. The Ld. CIT(A) also erred in not considering the decisions of the Hon’ble jurisdictional High Court in the case of Jay Builders vs ACIT, 33 taxmann.com 62 (Guj.) and CIT(A) further erred in misinterpreting the decision of Hon’ble ITAT in the case of Poonam Developers (sister concern of the assessee).”*

30. We have heard both the parties. Facts of the group case have already been narrated by us in the above para no.8 to 10 of this order. Learned DR for the Revenue reiterated the findings of the assessing officer. Whereas, Id Counsel defended the order passed by the Id CIT(A). In our ground no.4 the ‘on-money’ received by the assessee on booking of the flats having area of 45018 sq. ft. was restricted by Id CIT(A) to the tune of Rs.1,60,26,408/- from Rs.9,57,99,600/-. Therefore, now the question arises is whether, such ‘on-money’ has to be taxed fully or a portion of the on-money has to be taxed as income. The Id CIT(A) noted that his predecessor in deciding the case of M/s. M Poonam Developers (sister concern of the assessee LLP) for A.Y.2017--18 on identical facts, which was also completed taking into consideration the incriminating material found during the course of survey held that only 20% of such on-money receipts should be taxed as income. The findings of CIT(A) in the case of M/s M Poonam Developers (sister concern of the assessee LLP) for A.Y. 2017-18 are as under:

"5.2 The facts of the case have been carefully considered. This is undisputed fact that the Assessing Officer made additions of Rs.2,57,76,000/-, which is total gross receipts on sale of flats of the project, which is evident by the documents impounded and as mentioned in the assessment order by the Assessing Officer. The same has been categorically stated by one of the partner during the course of survey while recording his statement. Therefore, there is no doubt that the additions of total gross receipts have been made and not the profit amount. It has been held by the Hon'ble High Court of Gujarat in the case of CIT Vs President Industries reported vide 258 ITR 654 (Guj.), CIT Vs Gurubachhan Singh J. Juneja reported vide 302 ITR 63 (Guj.) & CIT Vs Neo Formulations Pvt. Ltd. reported vide 363 ITR 322 that only profit element is to be taxed and not the gross receipts. The same has been held by Hon'ble ITAT, Ahmedabad & Hon'ble ITAT Mumbai in several cases which has been cited by the assessee in his submissions, as reproduced above. Keeping in view these facts, the Assessing Officer is not justified in making the additions of total gross receipts as on-money. Only profit element out of the gross receipts is to be taxed. The profit element in the builder activity is ranging from 8% to 20% and keeping in view the facts of the assessee's case, I am taking 20% as net profit of the total gross receipts as income of the assessee. Therefore 20% of Rs.2,57,76,000/- i.e. Rs.51,55,200/- additions are confirmed and remaining Rs.2,06,20,800/- are deleted. This ground of appeal is partly allowed."

31. The Id CIT(A) also noted that M/s M Poonam Developers (sister concern of the assessee LLP) had filed appeal against the said order of CIT(A) for A.Y. 2017-18 before the Hon'ble ITAT, Surat Bench. The Revenue also filed the appeal against the said order of CIT(A). The Hon'ble ITAT, Surat Bench on the facts and circumstances of the M/s M Poonam Developers (sister concern of the assessee LLP) held that only 8% of the on-money receipts should be brought to tax as income of the assessee- firm and the appeal filed by the Revenue was dismissed. The findings of the Hon'ble ITAT Surat Bench are as under:

"11. We have heard both the parties and carefully gone through the submission put forth on behalf of the assessee along with the documents furnished and the case laws relied upon, and perused the fact of the case including the findings of the Id. CIT(A) and other materials brought on record. We note that Assessing Officer stated that assessee received "on-money" from customers on sale of flats (Villa), the details of the same are as follows:

Villa Type	No. of Villas	Amount of on-money receipt
A76	1	44,00,000/-
B1	4	46,50,000/-
B2	9	1,16,95,000/-

B4	9	50,31,000/-
	Total	2,57,76,000/-

The Assessing Officer further mentioned in para no.5.1 that there is no dispute with regard to the fact of receipt of “on-money” from sale of units. This clearly shows that amount of Rs.,2,57,76,000/- is business receipts, and since these are business receipts therefore these receipts are taxable as per the profit declared by the assessee in audited books of account. These facts have been admitted by one of the partner of the assessee-firm, Mr. Rajesh Ahir, who has categorically admitted and accepted in his statement during the course of survey proceedings that two column against each of the party A and B, out of which column B represents cash i.e, “on-money” and column A represent money received through cheque. The Assessing Officer mentioned these details on page no. 4,5 &7 of the assessment order. Hence it is proved by the facts stated by the Assessing Officer in the assessment order that additions of total gross receipts have been made and not the profit amount. However, on appeal by assessee, ld. CIT(A) restricted the addition to 20% net profit is very higher side as compared to net profit rate of assessee which ranges between 4% to 6%. The ld CIT(A) has to bring on record some material to justify the rate of profit estimated by him and the basis of such estimate. This has been so held by the Hon'ble Calcutta High Court in the case of Ranichera Tea Co. Ltd. 207 ITR 979. The ld CIT(A) has conterminous power, he can do what the Assessing Officer can do. The Assessing Officer cannot make a pure guess as has been held in the case of Dhakeshwari Cotton Mills reported in 26 ITR page 775. Moreover, he has determined the gross profit when for the purpose of computation of total income it is not the gross profit but net income which has to be added to the total income. The assessee own records are one of the factors which has to be considered and kept in mind while estimating the profit as has been held in the case of Delta Engineering Co reported in 186 ITR 383. Similar view have been taken in the case of Action Electricals (Delhi) reported in 258 ITR 188. The Allahabad High Court in the case of Shyam Bidi Works (Appeal No.64 of 2005 vide judgement dated 18<sup>th</sup> July 2014) has approved the action of the authorities wherein the rate of profit accepted in earlier years was adopted. Further it is the net profit and net income which has to be added and not the gross profit since indirect expenses are also incurred in the business. Lord Macnaghten, in the case of London County Council v. Attorney-General 1901 AC 26, 35-6(HL),4 TC 265, 293 stated as follows:

“Income Tax, if I may be pardoned for saying so, is a tax on income. It is not meant to be a tax on anything else. It is one tax, not a collection of taxes essentially distinct.”

Therefore, net profit is taxable income. Hence, considering the facts and circumstances of the case, we direct the Assessing Officer to compute the net profit @ 8% of the gross receipts. Since we have adjudicated the issue involved in assessee’s case, taking into account, the peculiar facts and circumstances, as narrated above, therefore, it is made clear that instant adjudication shall not be treated as a precedent in any preceding or succeeding assessment year.

*12. In the result, appeal of ethe Revenue is dismissed whereas appeal filed by the assessee is partly allowed.”*

32. Thus, Id CIT(A) held that from the above analysis it is clear that only 8% of the on-money receipts-were treated as income of the M/s. M Poonam Developers (sister concern of the assessee LLP) by Hon'ble ITAT as against the 20% held by the CIT(A). The ITAT have held that the rate of 8% is held to be the rate applicable to the M/s M Poonam Developers (sister concern of the assessee LLP) on the basis of peculiar circumstances and should not be held as a precedent for any preceding or succeeding assessment years. Hence, considering the decision of the CIT(A) and Hon'ble ITAT as reproduced above, the Id CIT(A) directed the assessing officer to take 15% of on-money receipts as income of the assessee. The addition made to the extent of Rs.24,03,961/- (15% of Rs.1,60,26,408/-) was upheld by Id CIT(A). We confirm the findings of Id CIT(A).

33. In the result, Grounds of appeal No.2 to 5 raised by the Revenue in ITA No. 318/SRT/2022 for A.Y. 2017-18, ground Nos 2 to 5 raised by the Revenue in ITA No.319/SRT/2022 for A.Y. 2018-19, and ground Nos. 2 to 5 raised by the Revenue in ITA No.320/SRT/2022 for A.Y. 2019-20, are dismissed.

34. The Concise and summarised ground No.6 raised by the Revenue is reproduced below for ready reference:

“(vi) Ground nos. 8 to 9 raised by the Revenue in ITA No.319/SRT/2022 for AY.2018-19.

*“The Ld. CIT(A) erred in deleting the addition made by assessing officer on account of on-money receipt on commercial space shops of Rs.4,74,33,000/- by ignoring the fact that unaccounted cash component cannot be ignored in commercial shops. The CIT(A) also erred in deleting the addition ignoring the principles of “Human Probability Test” that is preponderance of probabilities which is applicable for Income Tax proceedings.”*

35. We have heard both the parties. Facts of the group case have already been narrated by us in the above para no.8 to 10 of this order. Learned DR for the Revenue reiterated the findings of the assessing officer. Whereas, Ld Counsel for the assessee, argued that 'on-money' on commercial units amounting to Rs.4,74,33,000/-, has been computed by the assessing officer by taking the market rate. There is no specific impounding material referred by the assessing officer with reference to the 'on-money' received/receivable with reference to the shops/office space. The assessing officer has presumed that as the assessee has been taking 'on-money' on booking/sale of residential units, the assessee must be taking in fact higher on-money on commercial units. Accordingly, the assessing officer applied market rate as the basis for calculation of 'on-money' receipt. The incriminating material found relating to on-money is only with reference to residential units and not the commercial units. This aspect was raised by the assessee before the assessing officer during the course of assessment proceedings, but the assessing officer did not accept the contention of the assessee. Based on these facts, Id Counsel contended that Id CIT(A) has rightly deleted the addition.

36. We have considered the submission of Id DR and Id Counsel for the assessee. As regards the quantification of on-money receipt on commercial space is concerned, the same is not on the basis of any impounded / incriminating material found during the course of survey. The said estimation is done by the assessing officer purely on presumption that higher on-money the assessee has been receiving on commercial space when the evidences of on-money were found with reference to the residential space. Accordingly, the assessing officer has applied the market rate of commercial space to determine the quantum of on-money. However, the addition or computation of income cannot be made on the basis of

presumption or assumption. It has to be always on the basis of incriminating material or evidences found during the course of survey/search. Therefore, Id CIT(A) held that in the assessee's case, as the quantification of 'on-money' on commercial space of Rs.4,74,33,000/- was done by the assessing officer applying the market rate without any support of incriminating material, hence the same cannot be sustained. Hence, the additions made on 'on-money' of commercial space amounting to Rs.4,74,33,000/- was deleted by Id CIT(A). We have gone through the findings of Id CIT(A) and noted that conclusion reached by Id CIT(A) is correct. That being so, we decline to interfere with the order of Id. CIT(A) in deleting the aforesaid additions. His order on this addition is, therefore, upheld and the grounds of appeal of the Revenue are dismissed.

37. In the result, Ground nos. 8 to 9 raised by the Revenue in ITA No.319/SRT/2022 for AY.2018-19, are dismissed.

38. Now, we shall take, assessee's cross objection No.13/SRT/22, which is arising out of ITA No.285/SRT/2022, wherein the grounds of appeal raised by the assessee are as follows:

*“On the facts and circumstances of the case as well as law on the subject, the Id CIT(A) has erred in confirming addition of Rs.30,96,480/- made by the assessing officer by wrongly relying upon the whatsapp chats and loose papers found at the premises during the course of survey and extrapolating the amount in random manner.”*

39. We have heard both the parties. Learned Counsel for the assessee argued that assessing officer has wrongly relied upon the whatsapp chats and loose papers found at the premises of the assessee during the course of survey. The Id Counsel also pointed out that assessing officer made addition of Rs. 30,96,480/- by extrapolating the amount in random manner, which is based on surmise and conjecture and said addition is not based on any actual incriminating material. That is, no any incriminating material is

involved in making the addition of Rs. 30,96,480/- therefore, entire addition should be deleted. On the other hand, the Ld. DR for the Revenue has primarily reiterated the stand taken by the Assessing Officer, which we have already noted in our earlier para and is not being repeated for the sake of brevity. We note that addition of Rs. 30,96,480/- is part of 'on-money', received by assessee and considering the facts that said money may belong to assessee, therefore we confirm the order of Id CIT(A) and dismiss assessee's cross objection No.13/SRT/22.

40. In the result, the assessee's cross objection No.13/SRT/22, is dismissed.

41. In Cross-Objections Nos.12 and 14/SRT/2022, the assessee has raised similar and identical grounds of appeal, which are as follows:

*“(i) On the facts and in circumstances of the case as well as law on the subject, the Ld. CIT(Appeals) has erred in confirming assessment order to the extent of wrongly relying upon the whatsapp chats and loose papers found at the premises during the course of survey and extrapolating the amount in random manner.*

*(ii) On the facts and circumstances of the case as well as law on the subject, the Ld. CIT(Appeals) has erred in partly confirming assessment order to the extent of confirming addition of profit on the basis of documents impounded during the survey proceedings without considering that it was only some rough calculation and not the proof of actual transaction taken place during the year.*

*(iii) On the facts and circumstances of the case as well as law on the subject, the Ld. CIT(Appeals) has erred in confirming assessment order to the extent of sole reliance on the statement recorded during the survey and without considering the evidences produced by assessee.*

*(iv) Assessee craves leave to add, alter or delete any ground(s) either before or in the course of hearing of the appeal.”*

42. We have heard both the parties. We note that in Cross-Objections Nos. 12 and 14/SRT/2022, the assessee has raised similar and identical grounds of appeal and these cross objections are arisen out of ITA No.284/SRT/2022 for A.Y. 2016-17 and out of ITA No.286/SRT/2022 for A.Y. 2019-20 respectively. All these cross objections are supportive to the

order of Id CIT(A) and since we have confirmed the action of the Id CIT(A) therefore these cross objections have become infructuous and do not require adjudication.

43. In the result, these Cross-Objections Nos.12 and 14/SRT/2022, are dismissed.

44. In the combined result, appeals filed by Revenue, in ITA Nos. 284 to 286/SRT/2022, for AYs.2016-17, 2018-19 and 2019-20 and in ITA Nos.318 to 320/SRT/2022 for AYs.2017-18 to 2019-20 are dismissed whereas the assessee`s cross objection Nos.12, 13 and 14/SRT/22, are also dismissed.

Registry is directed to place one copy of this order in all appeals folder / case file(s).

Order is pronounced on 26/06/2023 in the open court.

**Sd/-**  
**(PAWAN SINGH)**  
**JUDICIAL MEMBER**

**Sd/-**  
**(Dr. A. L. SAINI)**  
**ACCOUNTANT MEMBER**

Surat / दिनांक/ Date: 26/06/2023

*SAMANTA*

**Copy of the Order forwarded to:**

1. The Assessee
2. The Respondent
3. The CIT(A)
4. Pr.CIT
5. DR/AR, ITAT, Surat
6. Guard File

// TRUE COPY //

By Order

Assistant Registrar/Sr. PS/PS  
ITAT, Surat