

**IN THE INCOME TAX APPELLATE TRIBUNAL,  
MUMBAI BENCH “D”, MUMBAI**

**BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER  
AND  
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER**

**ITA Nos.1961, 1962, 1963, 1964, 1965 & 1966/M/2022  
Assessment Years: 2009-10, 2010-11, 2011-12, 2012-13, 2013-14  
& 2014-15**

Mr. Moreshwar Krushna Baria, B-11/12, Sheetal Apartments, Chalpeth Road, Post Agashi, Tal Vasai, Dist. Thane, Maharashtra – 401 301 <b>PAN: ABSPB1365N</b>	Vs.	ACIT, Central Circle-3, Thane 6 <sup>th</sup> Floor, A-Wing, Ashar IT Park, Road No.16Z, Wagle Estate, Thane (W)-400 604
(Appellant)		(Respondent)

**ITA Nos.2217 & 2218/M/2022  
Assessment Years: 2013-14 & 2014-15**

Dy. Commissioner of Income Tax, Central Circle-3, Thane Room No.11, A-Wing, 6 <sup>th</sup> Floor, Ashar IT Park, Road No.16Z, Wagle Industrial Estate, Thane (W)-400 604	Vs.	Mr. Moreshwar Krushna Baria, B-11/12, Sheetal Apartments, Chalpeth Road, Post Agashi, Tal Vasai, Dist. Thane, Maharashtra – 401 301 <b>PAN: ABSPB1365N</b>
(Appellant)		(Respondent)

**Present for:**

Assessee by : Shri Subodh Ratnaparkhi, A.R.  
Revenue by : Smt. Riddhi Mishra, CIT D.R.

Date of Hearing : 21 . 06 . 2023

Date of Pronouncement : 28 . 06 . 2023

## ORDER

### Per Bench:

Aforesaid cross appeals bearing common question of law and having identical grounds are being taken up for disposal by way of composite order in order to avoid repetition of discussion.

2. Appellant Mr. Moreshwar Krushna Baria (hereinafter referred to as the assessee) by filing aforesaid appeals for A.Y. 2009-10 & 2010-11 sought to set aside the impugned orders even dated 10.06.2022 passed by the passed by the National Faceless Appeal Centre(NFAC) [Commissioner of Income Tax (Appeals), Delhi] (hereinafter referred to as CIT(A)) on identical grounds except the difference in amount of addition/disallowance (grounds of A.Y. 2009-10 are taken for the sake of brevity) on the ground that:

*“The Hon. CIT(A) erred in upholding the addition of Rs.99,15,000/- as unexplained expenditure as per section 69C/69B of the IT Act 1961, not appreciating that the appellant had sufficient source of funds for incurring such expenditure and that such source was supported by documents seized in the course of search action u/s 132 and therefore the addition was not justified and bears to be deleted.”*

3. The assessee by filing aforesaid appeals for A.Y. 2011-12, 2012-13, 2013-14 & 2014-15 sought to set aside the impugned orders even dated 10.06.2022 passed by the Ld. CIT(A) on the identically worded grounds except the difference in amount of addition/disallowance (grounds of A.Y. 2011-12 are taken for the sake of brevity) inter-alia that:

*“1. The Hon. CIT(A) erred in holding booking advances of Rs.24,00,000/- received in cash against proposed sale of premises to be the revenue of the appellant and determining 45% of such advances, amounting to Rs.10,80,000/- to be the income liable for tax for the year under appeal, not appreciating the arguments that such revenue had*

*not arisen in the year under appeal, considering the facts of the transaction and the method of accounting regularly followed by the appellant and therefore income in respect of these advances was not required to be estimated and consequently no addition was called for. The addition of Rs.10,80,000/- upheld by the Hon. CIT(A) on the above count may kindly be deleted.*

2. *Without prejudice, the Hon. CIT(A) erred in determining 45% of booking advances of Rs.24,00,000/-, to be income of the appellant, not appreciating that profit element in such advances would never exceed 20% and therefore determination of income @ 45% of such advances was excessive and consequent excess addition required to be deleted.”*

4. Apart from ground No.1 & 2 which are identical to the earlier years the assessee has taken one extra ground No.3 in A.Y.2013-14 & 2014-15 challenging the impugned order passed by the Ld. CIT(A) inter-alia that:

#### **Ground from A.Y. 2013-14**

*“The Hon. CIT(A) erred in confirming the addition of Rs.45,85,000/- by holding the appellant to have received cash loan of Rs.45,85,000/- from one Mr. Ratan Siroya as per seized page no. 29 of bundle no.4/Party A-5, not appreciating that such amount was not received by the appellant in the year under appeal nor constituted income of the appellant liable for tax.”*

#### **Ground from A.Y. 2014-15**

*“The Hon. CIT(A) erred in confirming addition of Rs.4,52,64,000/- being amount received in cash towards proposed sale of FSI to M/s. Mangal Morya Developers, as per seized page no. 69 of bundle no. 24/Party A-5, not appreciating the argument that the proposed transaction had got cancelled and part of the advance amount was refunded to the said party through banking channels and there being no sale of FSI, no income on account of the above transaction arose in the year under appeal and therefore addition was required to be deleted.”*

#### **ITA No.1961 & 1962/M/2022 of A.Y. 2009-10 & 2010-11 respectively filed by the Assessee**

5. Briefly stated facts necessary for consideration and adjudication of the issues for A.Y. 2013-14 at hand are : assessee

filed return of income declaring total income of Rs.26,660/- & Rs.7,71,470/- for A.Y. 2009-10 & 2010-11 respectively. Thereafter, pursuant to the notice issued under section 153A of the Income Tax Act, 1961 (for short 'the Act') the assessee filed return of income declaring an income of Rs.5,81,595/- & Rs.15,71,042/- for A.Y. 2009-10 & 2010-11 respectively. The Assessing Officer (AO) after declining the contentions raised by the assessee assessed the income at Rs.10,49,660/- & Rs.3,28,29,790/- by framing assessment under section 143(3) read with section 153A for A.Y. 2009-10 & 2010-11 respectively. Before the Ld. CIT(A) the assessee claimed that he was having opening cash in hand of Rs.2,00,00,000/- in A.Y. 2009-10 on account of funds received by the assessee in the earlier year as loan from Shri Babubhai Patel/Shri Ghanshyam R. Shah which fact is supported by the seized paper No.1 to 4 of bundle No.1, party A-5 and sought the credit of Rs.2,00,00,000/- in the cash flow statement prepared by the AO. The Ld. CIT(A) after thrashing the facts rejected the grounds raised by the assessee by returning following findings:

*49. I have considered the submissions made by the appellant and the relevant seized documents. The seized documents suggest that the appellant has received an amount of Rs.1,00,00,000/- from Mr. Bhagubhai Patal on 02/04/2004 and another Rs.1,00,00,000/- from Mr. Bhagubhai Patel on 05/05/2004. Out of this amount, a payment of Rs.25,00,000/- was made to Mr. Bhagubhai Patel on 10/06/2005. In this manner, the appellant had received an amount of Rs.1,75,00,000/- from Mr. Bhagubhai Patel in FY 2004-05. Also, the appellant has received an amount of Rs.25,00,000/- from Shri Ghanshyam R. Shah on 05/10/2005. These seized documents clearly suggest that the amounts were received in the F.Y. 2004-05 and F.Y. 2005-06. The appellant has not filed any evidence substantiating that the said cash was kept with him since then and was available for making payments during F.Y. 2008-09 corresponding to A.Y. 2009-10. I tend to agree with the observations of the Assessing Officer in the remand report that it is practically not possible to keep such a huge amount of cash idle without deriving any benefit out of same. Considering the totality of facts of the case, I am of the opinion that the benefit of Rs.2,00,00,000/-*

*as opening cash in hand as claimed by the appellant cannot be given and accordingly, same is rejected.”*

6. The Ld. A.R. for the assessee challenging the impugned findings returned by the Ld. CIT(A) contended that the cash flow statement drawn by the AO in assessment order is showing the opening balance for drawing the cash flow statement as nil whereas as per seized record the assessee had funds to the tune of Rs.2,00,00,000/- prior to 01.04.2008 which was also shown as opening balance in hand as on 01.04.2008 and as such the credit thereof has been wrongly denied by the AO as well as the Ld. CIT(A).

7. Undisputedly credit for opening cash in hand to the tune of Rs.2,00,00,000/- with the assessee is supported by the seized material paper No.1 to 4 of bundle No.1 party A-5 which is available at page 164 to 167 of the paper book. It is also not in dispute that no such application of cash prior to 01.04.2008 has been pointed out by the AO in the remand report.

8. In the backdrop of the aforesaid undisputed facts when we examine the impugned findings returned by the Ld. CIT(A) in the light of the aforesaid undisputed facts, the Ld. CIT(A) has denied the credit of Rs.2,00,00,000/- claimed by the assessee being the opening balance as on 01.04.2008 on the sole ground that it is practically not possible to keep such a huge amount of cash idle without deriving any benefit out of the same.

9. The Ld. D.R. for the Revenue by relying upon the order passed by the Ld. CIT(A), in order to repel the argument addressed by the Ld. A.R. for the assessee contended that seized document

available at page 166 of the paper book viz. A-5 bundle-1 shows that the assessee has received an amount of Rs.1,00,00,000/- each from Shri Babubhai Patel on 02.04.2004 & 05.05.2004 and out of which an amount of Rs.25,00,000/- was paid to Shri Babubhai Patel on 10.06.2005 thus the assessee has received an amount of Rs.1,75,00,000/- from Shri Babubhai Patel in F.Y. 2004-05 and further the assessee has received an amount of Rs.25,00,000/- from Shri Ghanshyam R. Shah on 05.10.2005, however, there is not an iota of evidence brought on record by the assessee if the assessee has ever paid interest on the said amount of Rs.2,00,00,000/- to Shri Babubhai Patel and Shri Ghanshyam R. Shah and that cash flow statement of the intervening period of F.Y. 2004-05 to F.Y 2008-09 has also not been brought on record to prove the fact that the amount was actually received and remained available with the assessee through out the intervening period and as such it is the distorted version of the assessee to evade the taxes.

10. The Ld. A.R. for the assessee to repel the aforesaid argument addressed by the Ld. D.R. for the Revenue contended that since the assessee has admitted the seized material which found reference of Rs.2,00,00,000/- he was not required to produce any evidence.

11. In order to examine the argument addressed by the Ld. Authorized Representatives of the parties to the appeal we would advert to cash flow statement drawn by the AO in para 10.8 of the assessment order which is extracted for better appreciation as under:

A.Y.	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16
<b>Opening balance</b>	0	0	0	5394915	0	10301234	70S3S913

<b>Undisclosed income during the year [inflow]</b>	<b>0</b>	<b>0</b>	<b>19401000</b>	<b>903337S</b>	<b>44279212</b>	<b>114238850</b>	<b>6929399</b>
<b>Fund available</b>	<b>0</b>	<b>0</b>	<b>19401000</b>	<b>15428290</b>	<b>44279212</b>	<b>124540084</b>	<b>77768J12</b>
<b>Less:</b>							
<b>(1) Drawings</b>	<b>6130000</b>	<b>11037S85</b>	<b>3340085</b>	<b>-4746945</b>	<b>10463314</b>	<b>251Q74QB</b>	<b>19799307</b>
<b>(2) Land payment</b>	<b>4000000</b>	<b>15600000</b>	<b>6001000</b>	<b>8022075</b>	<b>7000000</b>	<b>6450000</b>	
<b>(3) Expenses (as discussed in Para</b>	<b>50000</b>	<b>5420734</b>	<b>3665000</b>	<b>12322273</b>	<b>16514664</b>	<b>22143763</b>	<b>10646234</b>
<b>Total outflow</b>	<b>10230000</b>	<b>32058319</b>	<b>13006085</b>	<b>15597403</b>	<b>33977978</b>	<b>537Q1171</b>	<b>30445S41</b>
<b>(Deficit)/Exc ess of Fund</b>	<b>(10230000J</b>	<b>(32058319)</b>	<b>6394915</b>	<b>(169113]</b>	<b>10301234</b>	<b>70838913</b>	<b>47322771</b>

12. Perusal of the aforesaid cash flow statement drawn by the AO shows that every single entry of cash receipt/payment has been shown in the same as per seized document except for amount of Rs.2,00,00,000/- claimed by the assessee in his possession having been borrowed from Shri Babubhai Patel and Shri Ghanshyam R. Shah.

13. When we examine the argument addressed by the Ld. CIT D.R. that the assessee has not produced any cash flow statement of the intervening period from F.Y. 2004-05 to 2008-09 and no interest is shown to have been paid in the light of the facts brought on record by the AO through investigation which is undisputed fact on record that apart from transactions recorded in the seized material the AO has not made any investigation. Even during the remand report the AO has not investigated the fact if

application of the cash amount of Rs.2,00,00,000/- has already been made by the assessee prior to 01.04.2008. The assessee was not required to prove the negative by bringing on record accounts books of the earlier period prior to 01.04.2008, which was never requisitioned by the AO during the assessment proceedings as well as remand proceedings. The AO has also not proved on record if the amount of Rs.2,00,00,000/- borrowed by the assessee prior to 01.04.2008 has been applied in any business activities by the assessee thus not available with him as opening cash in hand as on 01.04.2008.

14. Furthermore, when the AO has relied upon each and every entry qua the cash payment of Rs.4,70,73,075/- on the basis of seized document he is not empowered to make a pick and choose by recording the entry beneficial to the Revenue and ignoring the remaining entries pertaining to the amount of Rs.2,00,00,000/-.

15. The co-ordinate Bench of the Tribunal in case of DCIT vs. Kanakia Hospitality (P) Ltd. 179 ITD 1 held that the contents of a seized document are to be read as a whole and it is not permissible to the AO to accept and reject the same on his own whims and fancies.

16. Moreover, when the entire case of the Revenue is based upon the seized document which is otherwise admitted by the assessee denying a benefit of a particular entry to the assessee is not permissible which would amount to questioning the seized documents otherwise relied upon by the Revenue to make the entire additions. So we are of the considered view that the assessee is entitled for credit of the cash of Rs.2,00,00,000/- available with him

as on 01.04.2008 and as such the AO is directed to give the credit to the assessee by giving the benefit of opening balance of Rs.2,00,00,000/- as on 01.04.2008 for A.Y. 2009-10 & 2010-11. So ground No.1 of A.Y. 2009-10 & 2010-11 is decided in favour of the assessee.

**ITA Nos.1963, 1964, 1965 & 1966/M/2022 of A.Y. 2011-12, 2012-13, 2013-14 & 2014-15 respectively filed by the assessee**

**Ground Nos.1 & 2 of A.Y. 2011-12, 2012-13, 2013-14 & 2014-15**

17. Undisputedly assessee in AY's 2011-12, 2012-13, 2013-14 and 2014-15 received cash advance from customer as "on money" tabulated as under:-

Asst. yr.	Amount of advance	Income considered by Hon. CIT(A) @ 45%
2011-12	Rs. 24,00,000/-	Rs. 10,80,000/-
2012-13	Rs. 1,15,21,000/-	Rs. 51,84,450/-
2013-14	Rs. 4,21,45,000/-	Rs. 1,89,65,250/-
2014-15	Rs. 3,61,76,500/-	Rs. 1,62,79,425/-

18. The Ld. CIT(A) has passed the similar orders in all the aforesaid years making estimated additions. The AO has brought to tax 100% of the "on money" receipts, whereas the Ld. CIT(A) restricted the said addition to 45% of the "on money" receipts by granting deduction for expenses incurred in cash as is evident from seized documents. The Revenue has challenged the impugned order passed by the Ld. CIT(A) pertaining to AY 2013-14 only on the ground that "Ld. CIT(A) has erred in "estimating 45% of "on money" receipt by the assessee as undisclosed income on the ground that assessee has failed to furnish reliable, cogent and corroborative documentary evidence to prove and substantiate the cash claimed to have been incurred for real estate business and that the estimation of 45% of the "on money" made by the Ld. CIT(A)

is adhoc, arbitrary and as such not sustainable; that the Ld. CIT(A) has erred in allowing deduction of cash expenses of Rs. 28,90,625/- against the “on money” received by assessee on sale of FSI to M/s Kapcon Ventures that too without any cogent and reliable evidence.

19. It is also undisputed fact on record that the assessee has consistently been following completed contract method of accounting for recognizing revenue from this real estate projects.

20. At the same time assessee has challenged the impugned order passed by Ld. CIT(A) in holding booking advances taken by the assessee for AY 2011-12 to 2014-15 in cash against the proposed sale of premises to be the revenue of the assessee by the determining 45% of the such advances to be the income liable for tax for the year under appeal and without prejudice assessee also challenged the determining of 45% booking advances to be the income of assessee by not appreciating the fact that profit element in such advances would never be more than 20% and such determining of income at 45% of such advances was excessive which is liable to be deleted.

21. In the back drop of the aforesaid facts the question arises for determination in the case, “as to whether 100% of the “on money” receipt is liable to be brought to tax”, and second question arises is, “as to whether the Ld.CIT(A) has erred in restricting the addition to 45% of the “on money” receipt by the granting deduction for expenses incurred in cash as evidenced by the seized records”, and thirdly that, “as to whether determining of income at the rate of 45% of such “on money” advances is excessive and is liable to be

reduced to 22.50% of the “on money” receipt as has been held by Tribunal in case of sister’s concern of assessee namely M/s. Ameya Builders and Property Developers and M/s. Magnates Enterprises.

22. Regarding the aforesaid argument Ld. AR for the assessee has not pressed ground no.1, “that the entire addition sustained by the Ld.CIT(A) by determining the income at the rate of 45% of such advances is liable to be deleted”, rather pressed the ground no.2, which is without prejudice, “that in view of the order passed by the Tribunal in sister concern case of the assessee determining income on such advances at the rate of 22.50%.

23. The Ld. AR for the assessee challenging the impugned addition of 45% made by the Ld. CIT(A) by the determining income at 45% of “on money”/such advances contended that in such cases only the profit element embedded in the “on money” and not the entire receipts as recorded in the seized documents is to be assessed as undisclosed income and relied upon the decisions rendered by the Hon’ble High Courts and Tribunal viz.....

1. CIT vs. Balbirsingh Maini, 398 ITR 531 (SC)
2. DCIT Vs. Shiv Sai Developers, 134 ITD 445 (mum) (2011)
3. Hasmukhlal M. Parikh vs. CIT, 37 ITR 359 (Bom) (1959)
4. CIT vs Shah Construction Co. Ltd 237 ITR 814 (Bom) (1999)
5. CIT vs. Ashaland Corporation, 133 ITR 55 (Guj) (1981)
6. Deputy Commissioner of Income Tax vs. Rajiv A. Shah, 12 SOT 84 (Mum) (2007)

24. The Ld. AR for the assessee further contended that in the case of sister’s concern of the assessee namely M/s Ameya Builders and property developers and M/s Magnet Enterprises income component of “on money” receipt is determined by the Tribunal at 22.50% of “on money” receipt.

25. However, on the other hand the Ld. DR for the revenue in order to repel the argument address by Ld. CIT(A) contended that under the provisions contained u/s 153(A), it is nowhere mentioned that we can go for estimation rather entire “on money” receipt is to be declared as income, particularly when assessee has not disputed the “on money” receipt as is evident for the seized document. The Ld. DR for the revenue further contended that Ld. CIT(A) has erred in estimating 45% of “on money” and further contended that assessee in its own case has already accepted the 46% of the “on money” receipt. However, the same is also estimated by the Ld. CIT(A).

26. We have perused the impugned order passed by the Ld. CIT(A) who has thrashed the facts in the light of the case law applicable thereto returned the following findings.

*“We noticed that the assessee belongs to the Ameya group and hence the same modus operandi has been followed in all the group concerns. The co- ordinate bench has estimated the income on the on-money received by the assessee @ 22.50%. We notice that the principle to assess only income component of the on-money receipts followed by the Ld CIT(A) in the present cases and by the co-ordinate bench in the case of Ameya Builders & Property Developers (supra) finds support from the decision rendered by Hon'ble jurisdictional Bombay High Court in the case of The CIT vs. Kardda Constructions P Ltd (Income tax Appeal (L) No.1960 of 2012 dated 25<sup>th</sup> February, 2013), wherein it was held as under:*

*"In this appeal by the revenue for assessment year 2009-10 following question of law has been framed for our consideration.*

*Whether on the facts and in the circumstances of the case and in law the Tribunal was justified in deleting the addition made by the Assessing Officer of Rs.71,67,000/- being unaccounted cash receipts found during the time of search action by accepting the explanation of the assessee that the unaccounted cash receipts of Rs.71,67,000/- found at the time of search were booking advances collected by the assessee from its customers and were part of sale consideration declared by the assessee at the time of sale of flats after the date of search?*

2) *The Tribunal by the impugned order upheld the finding of fact recorded by the CIT(A) that receipt of Rs.71,67,000/- was part of the sale consideration of the flats sold by the respondent assessee and the same has to be taxed in the year in which the assessee has recorded the sale of flats. The objection of the revenue is that amount of Rs.71,68,000/- found in cash has to be taxed in the year in which cash was received by the respondent assessee and not in the year the sale of the flats took place. The Tribunal records a fact that there is no dispute that unrecorded entries of cash found with the respondent assessee were in respect of sale of flats and forming part of consideration for sale of flats. Further the names of the buyers of the flats and the cash receipts from the buyers were also found during the course of the search. In these circumstances, on the basis of the finding of fact that cash receipts were undisputedly in respect of sale of flats and the same were offered to tax in the year in which flats were sold that the appeal of the revenue before the Tribunal was dismissed.*

3) *Since the decision of the Tribunal is essentially based on a concurrent finding of fact, we see no reason to entertain the proposed question of law.*

4) *Accordingly, the appeal is dismissed with no order as to costs."*

*Accordingly, following the decision rendered by the Hon'ble Bombay High Court in the above said case, we hold that the entire amount of on-money receipts cannot be subjected to tax and only the income component therein is assessable. We noticed that the co-ordinate bench has estimated the income @22.50% of the "on money" receipts in the above cited group concern's case. Accordingly, we are of the view that, in the instant cases also, the income can be estimated @ 22.50% of the on-money receipts. Accordingly, we modify the orders passed by Ld CIT(A) on this issue in all the three years and direct the AO to estimate the income "on money" receipts @ 22.50% in all the three years. Accordingly, revenue's contention on this issue is rejected in both the years."*

27. Hon'ble High Court of Allahabad in the case of Lalchand Gopaldas (supra) held that "under the income tax act only income is assessable and not a mere receipt" . Similarly Hon'ble High Court of Gujrat in Panna Corporation (supra) vide deciding the identical issue upheld the findings returned by Tribunal that "entire sale could not have been added as income of the assessee but only to the extent of estimated profit embedded in the sales for which the net

profit rate was adopted entailing addition of income on the suppressed amount of sales”. Similar view has been taken by the Hon'ble Madhya Pradesh High Court in case of Manmohan sadany (supra) that entire sale proceeds of the assessee should not be added in his income and that the Tribunal has erred in doing so. After discussing all these decisions estimated the income at the rate of 45% of unaccounted cash receipt, which is not acceptable to assessee as well as revenue.

28. The Ld. AR for the assessee contended that in the real estate business the profit element cannot be more than 20% and relied upon the order passed by the co ordinate bench of Tribunal in assessee's sister concern case of Ameya Builders and property developers (supra) and M.s Magnate enterprises also wherein 22.50% “on money” receipt has been estimated.

29. We have pursued the order passed by the co ordinate bench of Tribunal in the case of Ameya Builders and property developers sister concern of the assessee, operated part of the which is as under:-

*“17. We note that the Assessing Officer had accepted the fact that the expenses were incurred in cash but had denied deduction for the same by holding that the Assessee has failed to show that the provisions of Section 30 to 36, 37 and/or 40A(3) of the Act have been complied with. The Assessing Officer had, in paragraph 8.25 of the Assessment Order, distinguished the decisions cited by the Assessee during the assessment proceedings holding that in the cases cited, the income was computed on percentage basis or ratio basis whereas in present case the unaccounted sale and expenditure has been worked out based on the seized documents. However, in our view, given the facts and circumstances of the case, it cannot be said that in the income of the Appellant has not been estimated. The income of the Appellant has been estimated by the Assessing Officer after taking into account the information/material gathered. In our view, where income has estimated on the basis of information/material gathered, as is the situation in the present case, an Assessee cannot be deleted to a*

*possession worse than in a case where income has estimated on ad-hoc basis, say in a case where an Assessee chooses not to furnish relevant document/details or not to participate in the assessment proceedings, and the estimate is made on ad-hoc basis any supporting information/details. A perusal of the decision relied upon by the Assessee during the course of hearing (placed at pages 15 to 38 of the Compendium of Cases) shows that estimation of profits as ad-hoc percentage of the cash receipts has been accepted. In the case of Bhalchandra Trading Pvt. Ltd. Vs. DCIT: [ITA No. 2977/Mum/2017, dated 25.02.2021] and ACIT Vs. Om Constructions [ITA No. 6234/Mum/2012, dated 09.01.2015] 12% of the cash receipts from sale of flats was accepted as profit element liable to tax. Similarly, in ACIT Vs. M/s Sahakar Developers [ITA No. 6235/Mum/2012, dated 30.01.2017] 17% of the cash receipts were accepted as profit element liable to tax. In the aforesaid cases the assessee was not required to establish that the provisions of Section 30 to 36, Section 37 and/or Section 40A(3) were complied with. In our view, in the present case the Assessee is on a better footing as the profits have been estimated on the basis of documents/information which indicates that expenses were incurred by the Assessee. However, while estimating taxable profits the fact that an assessee has not recorded all transactions in the books of accounts and has not maintained proper documents supporting incurring of expenditure can surely be taken into consideration and a higher profit rate could be adopted keeping in view the facts and circumstances of the case, and the nature of income/business of assessee. In this regard, we note that the CIT(A) has accepted the contention of the Assessee that only profit element embedded in cash receipts can be brought to tax by placing reliance on the decisions of the Hon'ble High Courts in the case of Lalchand Gopaldas Vs. CIT: 48 ITR 324 (All), DCIT Vs. Panna Corporation: Tax Appeal 323 & 325 of 2000 (16.06.2012) (Gujarat High Court) and CIT Vs. PD Abrahm: 20 Taxmann.com 823 (Ker). The CIT(A) has also taken into consideration the abovesaid decisions of Mumbai Bench of the Tribunal in the case of Bhalchandra Trading Pvt. Ltd. (supra), Om Constructions (supra) and Sahakar Developers (supra). We have perused the aforesaid judgments/decisions wherein it has been held that only profit element embedded in cash/on-money receipts could be brought to tax in the hands of the Assessee. Therefore, we find no infirmity in the order passed by the CIT(A) to the extent that the CIT(A) holds that only profit element embedded in the cash receipts is liable to be taxed in the hands of the Assessee. In view of the aforesaid, we reject the contention of the Revenue that entire cash receipts should be brought to tax.*

*18. This takes us to the issue of computation of profit element. The CIT(A) has concluded that 45% of the on-money receipts are the profit element liable to tax in the hands of the Assessee. The relevant extract of the decision of CIT(A) reads as under:*

*“33. In the present case, the appellant contends that the profit element out of the 'on-money should be computed by applying*

*the rate of 20%. However, no reasonable basis for adopting this figure of 20% has been given by the appellant. The appellant has attempted to justify this percentage on the basis of net profit percentage declared by it in the Income Tax Returns filed for the A.Y. 2009-10 to 2015-16 which ranges between 8.48% to 25.75%. The huge unaccounted 'on-money' uncovered during search is sufficient evidence that the Net Profit being returned was grossly suppressed. Another basis given by the appellant for adopting the rate of 20% is the profit rate on the basis of seized documents, in the case of M/s Jupiter Constructions. However, the said argument is also incorrect because in the case of M/s Jupiter Constructions (sister concerns of the appellant), my predecessor has finally estimated the income @ 46% of unaccounted receipts. Therefore, the profit rate of 20% as argued by the appellant cannot be applied.*

*34. In the present case, the total cash receipts for the period AY 2009-10 to 2015-16 as discussed earlier in this order. after modification as per the remand report comes to Rs. 36,20,77,167/- The cash expenses on stamp duty and registration charges comes to Rs. 4,06,84,117/- Other cash expenses as quantified earlier in this order as per modifications suggested in the remand report comes to Rs. 16,11,23,822/- Thus, the profit on cash transactions comes to Rs. 16,02,69,228/- (36,20,77,167-4,06,84,117-16,11,23,822). Thus, the net profit ratio on cash transactions comes to 44.27%. So, this profit ratio can be an indication to be used for estimating the income embedded in the 'on-money' received by the appellant. It may here be mentioned that the appellant has claimed that some of the expenses recorded in the seized documents pertain to other group concerns, in that situation, the net profit of the appellant should be higher than 44.27% as computed above. It may also be mentioned that in the case of sister concern of the appellant namely M/s Jupiter Constructions, my predecessor has finally estimated the income @ 46% of unaccounted receipts. It is a well settled legal principle that the net profit rate estimated in the sister concerns, engaged in the similar business, can also be taken as basis for estimating the net profit rate in other group concerns. Therefore, keeping in view the facts of the case in entirety and the proposition laid down by various High Courts as discussed above, the Assessing Officer is directed to take 45% of the "on-money as the appellant's income for each year, rather than treating the entire amount (as reduced by the stamp duty and registration charges) as suppressed income." (Emphasis Supplied).*

*19. On perusal of the above we can see, that while estimating the profit at the rate of 45% the CIT(A) has taken into account the Stamp Duty & Registration Charges as well as Other Expenses computed on the basis of ceased material by the Assessing Officer and which have been*

*accepted to have been incurred in cash. However, the CIT(A) has not considered the expenses incurred in cash for purchase of land. We note that while estimating the amount of cash receipts from the Promoters the payments made in cash for purchase of land have been taken into account and deficit of INR 1,75,13,115/- for the Assessment Year 2009-10 has been considered as cash receipt [as noted by the CIT(A) in paragraph 7 of the order and computed in paragraph 10.4 of the Assessment Order]. In our view, since payments in cash for purchase of land were not taken into consideration by the CIT(A), the aforesaid deficit estimated for the Assessment Year 2009-10 and included in cash receipts on the assumption that such payment towards purchase of land were made in cash should also be excluded from cash receipts. The exclusion of the aforesaid amount of INR 1,75,13,115/- from cash receipts results in reduction of net profit ratio as computed by CIT(A) to around 39.43%. During the hearing it was contended on behalf of the Assessee that the Assessee was engaged in construction of housing for low income group at Virar, Palghar. The actual expenses incurred in cash were more than those recorded in material ceased. The Assessee had disclosed healthy net profits in the range of 8.48% to 25.75% for the Assessment Year 2009-10 to 2015-16. On the basis of the aforesaid, it was submitted by the Learned Authorised Representative for Assessee that the net profit rate of 20% be adopted. We note that the CIT(A) had stated that the profits declared by the Assessee range from 8.48% to 25.75% for Assessment Year 2009-10 to Assessment Year 2015-16. Thus, for the Assessment Year 2009-10 to 2015-16, the maximum net profit rate declared by the Assessee was 25.75%. The average of the profit for the Assessment Year 2009-10 to 2015-16 comes to around 14.15% whereas it has been contended on behalf of the Assessee that rate of 20% be adopted for determining the profit element embedded in cash receipts. Keeping in view the facts and circumstances of the case, and to meet the ends of justice we hold that 22.5% of on-money receipts would be fair estimate of profit element which should be brought to tax in the hands of the Assessee.”*

30. Perusal of the finding returned by the co ordinate bench of Tribunal in the case of Ameya Builders and property developers (supra) shows that the facts of the present case are replica of assessee's sister concern case, which was also arisen out of search and seizure operation and proceeding u/s 153A were initiated and issue of estimating the “on money” was there which has been decided by relying upon the case law decided by various High Courts and co ordinate bench of Tribunal as well as by keeping in view the profit shown by the assessee for AY 2009/10 to 2015/16

in the range of 8.48% to 25.75% and thereafter estimated the profit element on the “on money” receipt at the rate of 22.50%. The Ld. DR of the revenue has not brought on record any case law to repel the argument addressed by the Ld. A.R. in order to distinguish the case law relied upon by the assessee, having been rendered by the co-ordinate bench of Tribunal in assessee's sister concern case in the identical facts and circumstance of the case. Co-ordinate Bench of Tribunal in assessee's another case of sister concern case namely Magnate Enterprises Vs ACIT in ITA Nos.1987, 1988 & 1989/Mum/ 2022 for AYs 2012-13, 2013-14 and 2014-15 pronounced on 30.05.2023, decided the identical issue by following the decision rendered by Hon'ble Bombay High Court and directed the AO to estimate the income “on money” receipt at the rate of 22.50% by returning following findings.

*“33. In the present case, the appellant contends that the profit element out of the 'on-money should be computed by applying the rate of 20%. However, no reasonable basis for adopting this figure of 20% has been given by the appellant. The appellant has attempted to justify this percentage on the basis of net profit percentage declared by it in the Income Tax Returns filed for the A.Y. 2009-10 to 2014-15 which ranges between 4.68% to 11.11% The huge unaccounted 'on-money uncovered during search is sufficient evidence that the Net Profit being returned was grossly suppressed. Another basis given by the appellant for adopting the rate of 20% is the profit rate in the case of M/s Jupiter Constructions on the basis of seized documents in that case. However, the said argument is also incorrect because in the case of M/s Jupiter Constructions (sister concerns of the appellant), my predecessor has finally estimated the income @ 46% of unaccounted receipts. Therefore, the profit rate of 20% as argued by the appellant cannot be applied.*

*34. In the present case, the total cash receipts for the period AY 2009-10 to 2014- 15 as discussed earlier in this order, after modification as per the remand report comes to Rs. (9,22,42,501). The cash expenses on stamp duty and registration charges for these six years comes to Rs. 75,50,064/-. Other cash expenses as quantified earlier in this order as per modifications suggested in the remand report for AY 2009-10 to 2014-15 comes to Rs. 4,81,06,916/-. Thus, the profit on cash transactions comes to Rs. 3,65,85,521/- (9,22,42,501- 75,50,064-*

4,81,06,916). Thus, the net profit ratio on cash transactions comes to approximately 40%. Here, it may be mentioned that the appellant himself has submitted that some of the expenses mentioned in the seized documents has been considered by the Assessing Officer as the expenses of M/s M. Baria Developers but in reality, those papers pertain to other group entities. In this situation, the net profit rate of the appellant will be higher than the profit rate of 40% (approx.) as computed above.

35. In the case of sister concern of the appellant namely M/s Jupiter Constructions, my predecessor has finally estimated the income @ 46% of unaccounted receipts. In the appeals of other sister concern of the appellant namely M/s Ameya Builders and Property Developers, I have estimated the income @ 45% of unaccounted cash receipts. It is a well settled legal principle that the net profit rate estimated in the sister concerns, engaged in the similar business, can be taken as basis for estimating the net profit rate in other group concerns. Therefore, keeping in view the facts of the case in entirety and the proposition laid down by various High Courts as discussed above, and the profit rate estimated in the case of other group concerns involved in the same business, the Assessing Officer is directed to take 45% of the 'on-money' as the appellant's income for each year, rather than treating the entire amount (as reduced by the stamp duty and registration charges) as suppressed income.”

31. So following the order passed by co ordinate bench of Tribunal in assessee's sister concern cases as discussed in the proceeding para we restrict the addition made by the Ld. CIT A at 45% to 22.50% in AY 2011/ 12 to AY 2014/ 15. The AO is directed to estimate the income accordingly.

32. Now the next question arises for the determining in this case is as to in which year 22.50% “on money” receipt is to be brought to tax. This issue has also been decided by the co-ordinate Bench of Tribunal in case of Ameya Builders and property Developers and M/s. Magnate enterprises (supra) assessee's sister concern cases by returning following findings.

“12. The next issue relates to the year in which the income from on-money receipts is assessable to tax. We noticed that the AO has assessed the entire on-money receipts in the year of receipt itself and the Ld CIT(A) has held that the income element estimated by him is also

*assessable in the year of receipt only. The assessee is disputing the said decision of Ld CIT(A). We notice that an identical issue has been adjudicated by the co-ordinate bench in the above said case of Ameya Builders & Property Developers (supra) and it has been held as under:-*

*“20 The next issue that arises for consideration is the year in which 22.5% of on-money receipts should be brought to tax.*

*.....*

*24. We have considered the rival submissions and perused the material on record pertaining to this issue. We note that the paragraph 7.26 of the Assessment Order, the Assessing Officer has rejected the contentions raised by the Assessee holding. Before the CIT(A) the it was contended on behalf of Assessee that “on money” receipts were offered to tax in the subsequent year The CIT(A) rejected has observed that the Assessee has not substantiated that “on money” receipts were offered to tax in subsequent assessment years However, in appellate proceedings before us the Ld Authorised Representative for the Assessee reiterated the submission that Assessee has offered the on-money receipts to tax in subsequent years and has provided the above details. The on-money receipts offered to tax by the Assessee in the subsequent assessment years have been accepted by the Revenue. It is settled legal position that same income cannot be taxed twice. We have allowed already held that only the profit element consisting of 22.5% of on- money recipes can be brought to tax (as opposed to the entire “on money” receipts as contended by the Revenue). Accordingly, we restrict the addition under consideration for the Assessment Year 2012-13 to 22.5% of INR 1,90,71,000/- being the balance amount of “on money” receipts not offered to tax by the Assessee till the date and the same shall be taxed in the year of sale of flats booked by the Assessee.”*

*We notice that the co-ordinate bench has taken the view that the income portion of the on-money is assessable in the year in which the sale of concerned flat is declared by the assessee. This is based on simple logic. When a product sold, then the sale consideration of that product can be brought to tax in the year of sale only. In the instant cases, the on-money is received towards sale consideration only, i.e., it is part of sale consideration only and hence the same can be taxed in the year in which sale of flats is declared, i.e.. taxability of cash component (on-money) and cheque component will go-together. Accordingly, following the above said order of the co-ordinate bench, we set aside the order passed by Ld CIT(A) on this issue in all the three years and direct the AO to assess the income portion of the on-money receipts in the year in which the sale of flat is accounted for by the assessee, i.e., both the cheque component and on-money component should be assessed in the same year.”*

33. By following the order passed by co ordinate bench of Tribunal and keeping in view of the facts that the Revenue department has already accepted the project completion method of accounting in earlier years and subsequent years, this income has to be taxed in the years of completion.

34. The contention of the Ld. DR for the Revenue in this regard that since the “on money” receipt is not recorded in the books of account it has to be taxed in the year of receipt, is not sustainable having been misconceived as entire receipt is based on the seized documents which have been admitted by the assessee and shown in the return of income filed in response to the notice issue u/s 153A of the Act of respective years as per account method already accepted by the Revenue.

35. In view of above discussion the ground no 1 of AY 2011-12, 2012-13, 2013-14 and 2014-15 raised by the assessee is dismissed and ground no 2 for AY 2011-12 to AY 2014-15 raised by the assessee are partly allowed. At the same time ground no.1 and 2 raised by the revenue in AY 2013-14 and 2014-15 are dismissed.

**Ground No.3 of ITA No. 2218/M/2022 for A.Y. 2014-15 filed by the Revenue**

36. The Revenue by raising ground No.3 challenged the allowability of deduction of cash expenses to the tune of Rs.28,90,625/- against “on money” received by the assessee on sale of FSI to M/s. Kapcon Ventures without appreciating the fact that there was no cogent and reliable evidence to prove and substantiate such expenses claimed to have been incurred towards the land with the “on money” for the project qua which FSI was sold.

37. The Ld. D.R. for the Revenue by relying upon the order passed by the AO contended that when the assessee has not brought on record any evidence to prove and substantiate alleged cash expenses claimed to have been incurred towards the land with the “on money” for the project qua which FSI was sold to M/s. Kapcon Ventures deduction of cash expenses to the tune of Rs.28,90,625/- are liable to be disallowed.

38. However, on the other hand, the Ld. A.R. for the assessee by relying upon the order passed by the Ld. CIT(A) contended that when the entire findings have been returned by the AO as well as by the Ld. CIT(A) on the basis of seized record, admitted by the assessee there was no option for the assessee to produce any evidence.

39. We have perused the impugned findings returned by the Ld. CIT(A) qua ground No.3. Undisputedly the AO has made an addition of Rs.1,52,28,676/- on account of disallowance of claim of expenses on the ground that the assessee has not filed any supporting evidence such as identity, PAN, address of payee whether TDS deducted or not.

40. However, the Ld. CIT(A) duly thrashed the facts and on the basis of seized document, which have been admitted by the assessee allowed, pro-rata deduction by returning following findings:

*“110. Coming to the claim of the deduction amounting to Rs.1,52,28,676/-. The appellant has given the breakup of this amount as under:*

- |  |                    |
|--|--------------------|
| <i>i. Land Cost (page no. 19/bundle no.1/party A-5)</i>    | <i>51,00,000/-</i> |
| <i>ii. Land Cost (page no. 45/bundle no. 34/party A-5)</i> | <i>49,00,000/-</i> |

iii. Other cost (as per cash flow statement)	52,28,676/-
<b>Total</b>	<b>1,52,28,676/-</b>

*The appellant has claimed that the said expenses are reflected in the seized documents and thus should be allowed as deduction. During the appellate proceedings, the AR of the appellant was requested to specify the seized documents in which the "other costs" amounting to Rs. 52,28,676/- is getting reflected and how these costs are related to the project at S. No. 35 and 36, Agashi Virar, Dist. Thane. However, the AR of the appellant could not specify the seized documents wherein such cost of Rs. 52,28,676/- is reflected. In the absence of same, the claim of the appellant that the cost of Rs. 52,28,676/- is related to sale of FSI cannot be accepted and accordingly, the said claim is rejected."*

41. Perusal of the aforesaid findings returned by the Ld. CIT(A) apparently shows that when the entire addition in the year under consideration is on the basis of seized document there was no question of producing any evidence by the assessee. More particularly the total sale consideration qua this transaction was of Rs.6.81 crores out of which the assessee has paid Rs.1,00,00,000/- in cash as per agreement of sale dated 25.10.2012 available at page 308 to 333 of paper book-II.

42. Furthermore, from the seized document available at page 307 of the paper book only cash amount of Rs.1,00,00,000/- was given. It is also proved from the seized document No.53/bundle 24/party A-5 that buildings were to be constructed on the said land and FSI in building No.2 was to be sold to M/s. Kapcon Ventures as per seized document No.69/bundle 24/party A-5 and FSI for building No.1 was to be sold to M/s. Mangal Morya Developers. By examining all these facts the Ld. CIT(A) attributed cash component corresponding to 37,000 sq. ft. of FSI in building No.2 which was to be sold to M/s. Kapcon Ventures accordingly allowed the deductions against the total sale consideration declared by the

assessee during the year under consideration on pro-rata basis to the tune of Rs.28,90,625/- as against claim of deduction made by the assessee to the tune of Rs.1,00,00,000/-. So when the entire case is rested on the seized documents which have been admitted/corroborated from the record examined by the AO viz. agreement to sale, books of account etc. there was no option for the assessee to bring on record evidence to claim the deduction. So the Ld. CIT(A) has rightly allowed the deduction to the tune of Rs.28,90,625/- on the basis of seized material on pro-rata basis. So we find no scope to interfere into the findings returned by the Ld. CIT(A).

**Ground No.3 of ITA No.1966/M/2022 for A.Y. 2014-15 filed by the Assessee**

43. The assessee by raising ground No.3 challenged the addition of Rs.4,52,64,000/- being the amount received in cash towards proposed sale of FSI to M/s. Mangal Morya Developers as per seized paper No.69 of bundle 24/party A-5 on the ground that the Ld. CIT(A) has not considered that the proposed transaction had got cancelled and part of the advanced amount was refunded to the said party through banking channel and there was no sale of FSI and as such no income on account of transaction in question has arisen in the year under consideration.

44. The Ld. CIT(A) decided this issue against the assessee by returning following findings:

*“118. I have considered the submission made by the appellant. The issue to be examined is at which point of time, the cash receipts which are admittedly unaccounted in the regular books of accounts, on the peculiar facts and circumstances of present case, may partake the character of 'income'. The AO has mentioned that the cash receipts are*

*admittedly outside the books of accounts and they are neither accounted sale proceeds nor accounted advances. Once a transaction or a part of the transaction is outside the books of accounts, it cannot be assessed as per the method of accounting regularly followed by the assessee. The Income tax Act has given an inclusive definition of income as per Sec. 2(24) of the Act. The Supreme Court in CIT v Karthikeyan (G.R) (1993) 201 ITR 866 (SC) has held that the purpose of the inclusive definition is not to limit the meaning but to widen its net, and the several clauses therein are not exhaustive of the meaning of income, even if a receipt did not fall within the ambit of any of the clauses, it might still be income if it partakes of the nature of income. The I.T. Act (Sec. 145) provides that income chargeable under the head Profits and Gains of Business or Profession or Income from Other Sources shall be computed in accordance with either cash or mercantile system of accounting regularly employed by the assessee. Income is brought to tax either on accrual basis or on receipt basis, as per the method of accounting regularly employed by the assessee. The issue therefore is, can the income detected during the course of search and survey be treated differently from the income earned from business in the ordinary course.*

*119. As per the provisions of section 5(1)(b) of the Act, when income accrues or arises or is deemed to accrue or arise to an assessee during the previous year, it is to be taxed in that year. The relevant yardstick is the time of accrual or arisal for the purpose of taxation, viz., in order to be chargeable, the income should accrue or arise to the assessee during the previous year. There should be a right to receive the income on a particular date. In the case of the appellant, the receipt in cash in respect of sale of FSI of the nature of "on money", was a complete transaction in itself, as the same was not entered in the books of accounts. The appellant assessee on receipt of the cash had full control over the money. There is no evidence of any associated liabilities to such cash receipts. The rate at which the FSI is shown to be booked is indicative of the fact that the committed liabilities are only towards the cheque considerations and that the cash component of the consideration have already been materialized. As the appellant had not disclosed the cash in books of accounts, it could not have been assessed, had there been no search leading to detection. Under these circumstances, the cash receipts had taken the character of 'income' for the appellant, as the appellant had complete ownership over the cash receipts without any associated liabilities. Thus, in peculiar facts of present case, it is held that there are two taxable events' for this transaction of sale as per the document seized under reference. The cash transaction which is out of the books and the cheque transaction which is as per the regular books. In the case under consideration, as far as cash receipts are concerned, accrual of income has taken place on account of receipt of unaccounted cash by the appellant. So, there is no justification of any kind to postpone its taxation.*

120. The appellant has relied on certain case laws for the proposition that the advance received against proposed sale would be chargeable to tax in the year of sale and not in the year of receipt of such advance. As indicated above, it is held that the cash portion of the receipt was complete transaction in itself as no entries were made in regular books of accounts and therefore it was not linked to any liability of future. Without prejudice to the above, the decisions relied by the appellant are examined as under.

120.1 It is claimed that in the case of Shiv Sai Developers 134 ITD 445 (Mum) 2011 the jurisdictional Mumbai tribunal held that the amount received as earnest money as advance as per seized MOU even though not recorded in books of accounts, could not be treated as income in the year where the transfer of land had not taken place. In this case there was conclusive evidence in the form of a memorandum of understanding which was found during the course of search which revealed that the assessee had received cash against the transaction of sale of land which was not recorded in the books of account. In this case the assignee of the MOU, namely M/s Hara Shiddha Developers confirmed during survey that it had made a payment of Rs. 1.51 Crore to the assessee in cash. In the case of the appellant however, there is no ownership from the party of who paid cash to the appellant. The appellant too has not provided any such confirmation. The source of such cash being undisclosed, and the same being not recorded in the books of the appellant, clearly gives it a character of income as and when received. Thus, the reliance on this decision of the Mumbai ITAT is not on similar facts.

120.2 In the case of Hasmukhlal M. Parikh 37 ITR 359 (Bom) 1959 it is claimed that Bombay High Court held that only the profit and gain out of amount received could be chargeable to tax and this principle would not apply to amounts left in deposits. In this case the Hon. Bombay High Court held that when sale proceeds, gross or net, are received by the assessee, evidently sec. 4 is immediately attracted, and the income, profits and gains embedded therein became chargeable to tax, but this principle will not apply to an amount left in deposit with the assessee for due performance of a contract which amount is subsequently appropriated towards the price on the execution of a sale deed. In the case of the appellant, it is seen that on receipt of cash, there is no due performance of a contract which is relatable to the said cash receipts. The cash receipts have no corresponding liability or contract for performance. The existence of any responsibility on receipt of cash is neither discernible from the seized documents nor claimed on behalf of the appellant. Accordingly, the entire receipts in cash partake the character of income or profits.

120.3 The appellant has also relied on the decision of Bombay High Court in the case of Shah Construction Co. Ltd. 237 ITR 814 (Bom) 1999. It is stated that in this case, taking on contracts, it was held that amounts received as advance against subsequent performance of work

would not partake the character of income till such amounts were adjusted in future bills. This judgment of Bombay High Court has been distinguished in the case of *Yash Raj Films Ltd. (2017) 184 TTJ (Mumbai) 741* wherein the Hon. Court held that as per the provisions of s. 5(1)(b), when income accrues or arises or is deemed to accrue or arise to an assessee during the previous year, it is to be taxed in that year. In the case of the appellant as well the receipt of cash without any liability of due performance gives rise to income in the year of receipt.

120.4 In the case of *CIT vs. Asha Land Corporation 133 ITR 55 (Guj) 1981* where advance was received for sale of plot, it was held that such amount would be liable to tax only on completion of transaction of sale and not at the time of receipt of advance. The facts of the case are very different from the facts of the case of the appellant under consideration. In the cited case of *Asha Land Corporation*, the total sum of Rs.2,13,772 received by the assessee from the society was credited to the trading account in the previous year relevant to the asst. yr. 1971-72. The question which arose for consideration was whether the receipt of the amount of Rs.2,13,772 represents the assessee's income earned in the said year. The relevant year of account is the calendar year 1970. Thus, this is not a case where receipts were not part of the books of accounts. The reliance placed by the appellant on this case is therefore misplaced.

120.5 In the case of *Rajiv A. Shah 12 SOT 84 (Mum) 2007*, it was claimed that the court held that the income from sale of shares would be taxable in the year of receipt on entire consideration and not when the advance amounts were deposited with the solicitor. In this case, the Hon. Court itself has held that the event for transfer of shares is different from the event for transfer of immovable property. The reliance placed on the decision is misplaced and not on similar facts.

120.6 Thus, the decisions of the courts relied upon by the appellant are not acceptable on facts and circumstances of the case.

121. The appellant has further argued that the deal was later cancelled and no FSI was sold to M/s Mangal Morya Developers. In this connection, it may be mentioned that the appellant has not filed any copy of agreement cancelling the said transaction nor any confirmation from M/s Mangal Morya Developers that the said deal was cancelled, has been filed. Thus, the claim of the appellant that deal did not finally materialize is clearly an afterthought. Further, there is no claim of the appellant either during the course of the assessment or in appeal that there was any expenditure incurred by the assessee which was relatable to such cash receipts. In such situation, the whole of the cash receipts amounting to Rs. 4,52,64,000/- is taxable as income of the current assessment year. Considering the totality of facts, the addition of Rs. 4,52,64,000/- made by the assessing officer is upheld. The ground No. 5 raised by the appellant is **DISMISSED**.

45. The Ld. A.R. for the assessee challenging the impugned findings returned by the Ld. CIT(A) contended that no doubt cash amount of Rs.4,52,64,000/- was received by the assessee qua the proposed sale of FSI to M/s. Mangal Morya Developers as per seized document No.69 of bundle No.24/party A-5 but the transaction has never been matured rather cancelled and the amount was refunded to the proposed vendee. The Ld. A.R. for the assessee further contended that post search an entire amount was shown in the account books.

46. However, on the other hand, to repel the arguments addressed by the Ld. A.R. for the assessee the Ld. D.R. for the Revenue contended inter-alia that there is no agreement for sale of such FSI to M/s. Mangal Morya Developers and huge amount of Rs.6.63 crore out of which Rs.4.52 crore was claimed to be paid by cash cannot be believed; that even there is no cancellation of such contract alleged to have been entered into between the assessee and the M/s. Mangal Morya Developers; that the assessee has only returned the cheque amount of Rs.2.11 crore and there is not even a whisper if amount of Rs.4.52 crore alleged to have been taken as cash was ever returned; that there is no confirmation of receipt of any such amount by M/s. Mangal Morya Developers; and that the assessee cannot be allowed to take advantage of his own wrong.

47. When we examine the impugned findings returned by the Ld. CIT(A) in the light of the aforesaid arguments addressed by the Ld. A.Rs for the parties to the appeal, we are of the considered view that the entire claim of the assessee qua making payment of cash of Rs.4.52 crore to M/s. Mangal Morya Developers for sale of

FSI, which is 60% of the total alleged sale consideration of the sale of FSI, is in the air without bringing on record any agreement entered into with M/s. Mangal Morya Developers at the time of receiving alleged payment of Rs.4.52 crore nor there is any cancellation deed. In any business transaction it is humanly not possible if such a huge amount is received by the assessee in cash for sale of right in immovable property by way of FSI and then cancelled the same without any writings between the parties.

48. The assessee's claim of returning the entire amount is also not correct as per record because assessee has only returned Rs.2.11 crore by way of cheque through banking channel which it had received. Even any such confirmation from the M/s. Mangal Morya Developers qua the alleged transaction and cancellation thereafter has not been brought on record. When there is not an iota of document brought on record by the assessee after receipt of Rs.4.52crore from M/s. Mangal Morya Developers from alleged sale of FSI nor the assessee has claimed any expenditure incurred relatable to such cash receipts the contentions raised by the Ld. A.R. for the assessee are not sustainable. So in these circumstances, we find no scope to interfere into the aforesaid findings extracted in the preceding para returned by the Ld. CIT(A), hence ground No.3 is determined by the assessee.

49. In view of what has been discussed above;

- (i) Appeals bearing ITA Nos.1961 & 1962/M/2022 for A.Y.2009-10 & 2010-11 filed by the assessee are allowed.

(ii) Appeals bearing ITA Nos.1963, 1964, 1965 & 1966/M/2022 for A.Y. 2011-12, 2012-13, 2013-14 & 2014-15 filed by the assessee are partly allowed.

(iii) Appeals bearing ITA Nos.2217 & 2218/M/2022 for A.Y. 2013-14 & 2014-15 filed by the Revenue are dismissed.

**Order pronounced in the open court on 28.06.2023.**

**Sd/-  
(GAGAN GOYAL)  
ACCOUNTANT MEMBER**

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

Mumbai, Dated: 28.06.2023.

\* Kishore, Sr. P.S.

Copy to: The Appellant  
The Respondent  
The CIT, Concerned, Mumbai  
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.