IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN

Before Shri Sanjay Arora, AM &ShriAbyT.Varkey, JM

ITA No.870/Coch/2022: Asst.Year: 2007-2008

Ajit Associates Private Ltd. 3rd Floor, Puthuran Plaza KPCC Junction Ernakulam – 682 011. [PAN: AAGCA9157P]	vs.	The Deputy Commissioner of Income-tax, Corp.Cir.1(1) Kochi.
(Appellant)		(Respondent)

ITA No.884/Coch/2022: Asst.Year: 2007-2008

Good Homes Private Limited 3rd Floor, Puthuran Plaza KPCC Junction Ernakulam – 682 011. [PAN: AABCG0444L]	vs.	The Deputy Commissioner of Income-tax, Corp.Cir.1(1) Kochi.
(Appellant)		(Respondent)

Appellant by: Sri.A.Gopalakrishnan, CA
Respondent by: Smt.J.M.Jamuna Devi, Sr.AR

Date of Hearing: 18.05.2023		Date of Pronouncement: 11.08.2023

O R D E R

Per Sanjay Arora, AM:

This is a set of two appeals by two different assessees, against the appellate orders dated 28.06.2020 and 24.08.2020, disposing the appeals contesting its regular assessments under section 147 r.w.s. 143(3) of the Income-tax Act, 1961 (hereinafter 'the Act') dated 18.3.2015 and 29.3.2014 for assessment year (AY) 2007-2008, respectively. The background facts of both the cases being same, these are heard together, and are being disposed of *per*a common, consolidated order for the sake of convenience.

2. At the outset, it was observed that a delay of 679 days attends the filing of appeal in the case of GHPL. The condonation petition dated 02.9.2022, furnished along with the appeal memo, is accompanied by a sworn affidavit of even date by Sri.B.R.Ajit, it's Managing Director. It is averred therein that the appellant-company was unaware of the impugned order having been passed on 24.8.2020. The period was covered by the Covid-19 pandemic, when the State of Kerala was facing severe crises in terms of lockdowns and dislocation of services. The assessee was also operating with skeletal staff. It was only on 24.8.2022 that the appellant-company was telephonically informed of the impugned order by the office of the concerned Assessing Officer (AO).Immediate steps for redressal were taken by contacting the CA, the ld.counsel before the first appellate authority, and the appeal,engaging another counsel,filed on 02.9.2022. The said facts, which, to the extent they relate to Covid-19, are borne out by common knowledge,are not disputed by the Revenue. In fact, the bulk of the period of delay is covered by the blanket saving by the Hon'ble Apex Court per its *suo motu* petition in *Cognizance For Extension of Limitation*(in MA No. 21 of 2022, dated 10/1/2022). We under the circumstances find merit in the assessee's case and, accordingly, condone the delay,and admit the appeal.

Ajit Associates (P.) Ltd. (AAPL)

3. The assessee-company, in the business of real estate development, purchased lands in an Island along with two group companies, i.e., Beaver Estate Private Limited (BEPL) and Good Homes Private Limited (GHPL), with a view to develop the Island as per the master plan, and sell the developed lands thereafter, under the project named 'Silver Sand Island' (SSI),vide agreement dated 17.4.2001. The two group companies constructed a bridge between the main land and the Island, which was to be maintained by BEPL. The roads passing through the land were to be, as stated,built jointly by the three companies, bearing the cost in proportion to the ownership of land through which the roads passed, sharing the maintenance and

upkeep expenditure thereof amongst them in the same proportion. All the persons purchasing developed land in the Island, or otherwise requiring access thereto, were to doso on the basis of a 'right of way' allowed thereto on the payment of easement fee, which receipt was again to be shared amongst the three companies in the same ratio, i.e., 45:35:20 in favour of GHPL, BEPL, and the assessee (AAPL). During the financial year 2006-2007, i.e., the previous year relevant to AY 2007-2008, the assessee-company along with its Director, SriB.R.Ajit (BRA), sold lands in relation to which they had earned easement right fee, as discovered on survey u/s.133A in the case of BRA, at the business premises of the assessee-company on 21/12/2012. Notice u/s.148 was accordingly issued on 31.3.2014. The same was responded to by the assessee by filing a return of income on 17.5.2014 declaring nil income, claiming in fact capital loss at Rs.2,15,85,175, being the net of Rs.218.50 lakh, i.e., 20% share of the easement right fee (ERF), and the expenditure of Rs.434.35 lakhs, claimed as cost of improvement. The claim was negatived by the AO in the assessment proceedings. The building of roads; their maintenance; and allowing the right of way on payment of ERF, was all part of the assessee's business activity. There was no transfer of ownership or possession rights by the assessee to the buyers of the land and from whom ERF had been received. Reference toward this was made by the AO to Clause-1 of the Agreement dated 17.4.2001, reproducing it at page 4 of the assessment order. The receipt was a business receipt and income thereon, thus, business income. The assessee's alternative claim of being allowed the cost of improvement as a business deduction also could not be allowed in the absence of any supporting vouchers being furnished by the assessee, who had failed to produce the books of account, mandatory for their maintenance and audit, both under the Act and the Companies Act. The share of ERF (Rs.2,18,49,600) was, accordingly, assessed as business income. The assessee failing to improve it's case before it, the same was confirmed in appeal, for the same reasons, by the first appellate authority, who, though, allowed it credit for expenditure at 20% of the

claimed sum of rs. 434.35 lacs, reducing the income, assessed as of business, by that sum (rs. 86.87 lacs). Aggrieved, the assessee is in second appeal.

Good Homes Private Limited (GHPL)

4. The facts of the case are broadly similar, except that it required several notices u/s.142(1) by the AO, as indeed u/s.144 on 06.11.2013, and then again on 04.12.2013, for the assessee to file it's return of income, which it did on 25.3.2014, returning nil income. Needles to add, no books of account or supporting documents evidencing the expenditure claimed*qua* cost of land development were produced. On reading the assessment orders, we though observetwo major variations w.r.t. facts in the case of AAPL. One, that AAPL did not own any land. *Further, except for the Villa property and the consequent HUDCO loan, it was non-existent in the Silver Sand Island*. There were, accordingly, three rightful claimants of ERF, i.e., GHPL, BEPL and BRA (proprietor, Ajit Associates) in the ratio of 45:35:20. Even the villa project was the combined result of these three entities, who are therefore to be regarded as promoters, and allowed credit for the work done. The HUDCO loan to AAPL was against the land owned by BRA, guaranteeing the same. The interest thereon shall therefore stand to be borne by the three promoters. This, as per the AO, gets also supported by the order by the Munsif, Ernakulam Court in relation to a dispute on the usage rights over a private road built by the combined effort of the promoter group, which upheld three parties, i.e., GHPL, BEPL and Ajit Associates(a proprietary concern of BRA) as the necessary parties. No efforts were made by these three defendants at any time to implead AAPL in the suit. The work done by AAPL would though be reckoned in working out the cost of the development of land owned by the three promoter entities. The second major fact that comes to notice is that the project SSI could be divided into two phases, i.e., Phase-1, commencing 1979, when the first company (BEPL) was floated, up to 2005, and the second thereafter. The bulk of the land was purchased during the period 1981 to 1983. The land estimated as available on the island was 60 acres. As

there was a land ceiling, so that no entity could own more than 15 acres, BRA formed the said three companies. The project ran into administrative and financial problems almost from the word go. The government policy was under formulation, and there was no master plan for the island. The approvals were accordingly blocked by Greater Cochin Development Authority (GCDA) in 1981, and permission for development, granting a no objection, on compliance of stringent conditions, allowed only in December, 1984. The bridge connecting the island with the main land could not therefore progress, even as the interest on the loans taken for the purpose mounted. Besides, due to delayed approvals, the demand for land did not materialize. In fact, loans had to be taken to discharge old loans as well as service the interest thereon, causing major crises, with the threat of attachment from the creditors looming large. Distress sales, as to AWHO (Army Welfare Housing Organization) for sale of 426 cents of land in 1991, at Rs.10,000 per cent, as against the market price / circle rate of Rs.25,000 per cent, were made. ICDS, which had underwritten the loan from Syndicate Bank, attached the property (except to the extent given to HUDCO) in 1993-1994. *That is, the sale of property during this period was made only for survival, and for clearing loan and interest dues*. The period post 2005, which may be regarded as the second phase, provided the promoters an excellent opportunity to sell the property due to increased demand for real estate.New opportunities to purchase land also arose. As buying land in old (promoter) companies (PCs) would lead to their immediate attachment in view of their default status, three new companies (NCs) (i.e., Capvest Wealth Services Private Limited, Jeeva Vacations Private Limited and Elton Web Sales Private Limited), were promoted by the majority of the original promoters, purchasing land to the extent of 152 cents. It is during this time that the land in the main was sold, as for example 4.9 acre to M/s.MacCharles Private Limited, 3.1 acre to Backwaters Health Resorts Private Limited, to clear the debts and close the liabilities. Similarly, flats in Silver Heights Apartments were sold to several customers. A part

of the land purchased in the new companies was also sold immediately, realizing gains. The assessee-company sold 174.56 cents of land for Rs.1190.47 lakh, which had, being purchased in the years 1982 and 1983, costed itRs.92,956. That apart, it received it's share of ERF at Rs.205.20 lakh, which was from the new companies. The assessee in assessment also furnished estimate of the development and other costs, at Rs.14 crore and Rs.22.57 crore, i.e., at a total of Rs.36.57 cr., on 04.12.2013. This was later (31.01.2014) revised to Rs.38.76 crore, comprising development cost and other costs at Rs.22.05 cr. and Rs.16.71 cr. respectively. The AO adopted the development cost at Rs.14 cr. in view of the inconsistencies observed by him in the assessee's revised claim (refer para 4.16 of the assessment order). Taking the total cost accordingly at Rs.36.57 cr., which was allocated to the saleable land of 896.76 cents, yielded an average per unit cost of Rs.4,07,790, applying which led to a profit of Rs.477.70 lakh, computing the total income at Rs.682.90 lakhs.

This was confirmed in appeal, meeting the assessee's principal challenge of the income being in the nature of capital gains. The assessee's plea of the income being liable to be assessed, not in the hands of any one company, but in the hands of an Association of Persons (AOP), inasmuch as the business, irrespective of the ownership of land, was carried out jointly, was found by him as itself an admission of the receipt being in the nature of a business receipt. The Memorandum of Association (MoA) of the assessee-company clearly stated the business as of purchase and development of land, plots, real estate, and other business related to the real estate sector. The transactions were clearly commercial transactions of a business, with real-estate constitutingits stock-in-trade. Hence the second appeal.

5. Before us, it was submitted by Sri Gopalakrishnan, the learned counsel for the assessee, that the AO had accepted the cost estimate of development and other costs as furnished by the assessee. The sale amount is, again, undisputed. The only error, however, committed by him, and not rectified by the first appellate authority,

is in dividing the aggregate cost (i.e., development and other costs) of Rs.36,56,89,780, to arrive at the per unit cost, by 896.76 cents, i.e., the total land purchased, instead of 624.533 cents, being the saleable area, i.e., the land available for sale (part of which stands sold during the year), on deducting from the land purchased, that utilized for providing open area, lawns, internal roads, landscapes, loss of land due to litigation and attachment by FIs, etc. This was clearly an error on his part as, without doubt, while cost is incurred with reference to the total land area available, in computing the cost of the land sold or, where unsold, held in stock as at the year-end, the cost would be allocated to the land available for being sold. Reference was made by him to the following tabular chart forming part of the paper-book: (PB-1, pages 2, 3) Table A

Sl. No.	Particulars	Extent of land (in cents)	Total value (in Rs.)	Value of the land (per cent) (in Rs.)
1.	Total purchase of land	893.73	1,30,09.678.10	14,556.61
2.	Less:Property sold prior to 1996	89.39	13,01,171.60	14,556.61
3.	Balance	804.34	1,17,08,506.50	14,556.61
4.	Less:Land given for Joint Development and the project abandoned due to excessive cost	70.00	--	--
5.	Balance land available	734.34	1,17,08,506.50	15,944.19
6.	Total extent of land utilized for common purpose	109.81	--	--
7.	Balance extent available for sale	624.53	1,17,08,506.50	18,747.62
8.	Cost of development	624.53	36,56,89,780.00	5,85,541.16
9.	Total cost of land	624.53	37,73,98,286.50	6,04,288.78
10	Closing stock of land as on 31.03.2007	35.77	2,16,17,222.63	6,04,288.78
11	Cost of land sold	588.76	35,57,81,063.86	6,04,288.78
12	Sale value of land sold	588.76	36,30,11,533.00	6,16,569.63
13	Profit on sale of land	588.76	72,30,469.14	12,280.84

If only this is corrected, for which the matter be remanded back to the file of the AO, it would make the assessment largely in agreement with the facts of the case.

Continuing further, apart from the correction aforesaid, the Table also 'normalizes' the cost of land; its development; as well as it's sale value, different for each company, by aggregating the same for the different entities that had come together to execute the project, yielding an aggregate profit of Rs.72.30 lacs, which could be allocated to different companies in the ratio of the land sold by them. *This is being proposed*, he would continue, even as the individual companies had filed their separate returns of income, and which had accordingly been subject to assessments, including the impugned assessments, by the Revenue, for more than one reason. The joint land development justifies the uniformity in cost thereof, including interest on loans assumed for financing the project, across different entities. The joint land development makes irrelevant the identity of the monies applied therefor, i.e., with reference to the company which had supplied the capital – own or borrowed, for the same. Further, the lands were purchased in bits and parts, i.e., as and when a deal in its respect came to be finalized. The lands acquired by different entities were, thus, not contiguous, but spread over the entire area of nearly 9 acres. The project envisaged and being developed was over this area. Some entities would thus stand to 'loose' more of their land to the common areas, viz., open area, roads, lawns, etc., making variable the proportion of land purchased by them available for sale. A company with a larger proportion of it's land available for sale would stand to gain more from the common development, and the concomitant cost sharing arrangement, more than the one with a lower proportion in comparison, which could even result in a loss, as is indeed the case, and toward which he would refer to a chart (Table B, at PB-1, pg. 13). Thirdly, the sale price of land would also vary significantly, even as the development cost, due to its aggregation, becomes uniform, resulting in a distortion. This is as the land located in the vicinity of an open area or adjacent to the main road normally fetches a higher rate than the other. On being queried that the purchase rates of lands by different entities would also be correspondingly different, he explained that the

difference in land price came about on and with reference to the project layout, absent at the time of it's purchase during 1981-1983. Also, about 97% of the land cost, as apparent (see Table-A), is comprised of the development cost, rendering the purchase cost as marginal and, thus, irrelevant. Table-B is reproduced as under:

Name of the company	Extent of land sold in cents	Sale value per cent (in Rs.)	Sale value for the entire land (in Rs.)	Cost per cent including development cost (in Rs.)	Total cost of land sold (in Rs.)	Profit/loss per cent (in Rs.)	Total profit from sale of land (in Rs.)	Total loss from sale of land (in Rs.)
Good Homes Pvt.Ltd.	174.56	6,81,983	11,90,46,957	5,83,373	10,18,35,528	98,610	1,72,13,435	--
Beaver Estates Pvt.Ltd.	224.60	6,34,324	14,24,69,088	5,80,188	13,03,10,178	`54,136	1,21,58,910	--
Mr.BR Ajit	37.60	6,67,699	2,51,05,488	6,04,108	2,27,14,465	63,591	23,91,023	--
Capvest Wealth Management Services Pvt.Ltd.	100.50	4,97,512	5,00,00,000	6,47,188	6,50,42,408	-1,49,676	--	1,50,42,408
Elton Technologies Pvt.Ltd.	48.50	4,51,340	2,18,90,000	7,03,582	3,41,23,746	-2,52,242	--	1,22,33,746
Jeeva Vacation Resorts Pvt.Ltd.	3.00	15,00,000	45,00,000	5,85,582	17,56,745	9,14,418	27,43,255	--
Total	588.76	6,16,569.93	36,30,11,533	6,04,288.78	35,57,81,064	7,28,838	3,45,06,623	2,72,76,154
Net profit after setting off the loss	588.76					12,280.84		72,30,469

This led to what was called the concept of inter-company adjustment, to enable an equitable distribution of profit, i.e., on per unit (cent) basis, so that the excess profit of one company could be transferred to another. Netting ERF across companies and applying the uniform development cost of Rs. 5.86 lacs per cent, works to an average profit of Rs.12,280.84 per cent which, on being applied uniformly across different entities, would result in the following matrix: (PB-1, page 14)

Table C

Sl. No.	Name of the company	Extent of land sold (in cents)	Average profit to be allotted to the company per cent (in Rs.)	Total eligible profit for each company from the sale of land during the year (in Rs.)	Profit in the name of each company as per the sale deed without making intercompany adjustments (in Rs.)	Loss in the name of each company as per the sale deed without making intercompany adjustments	Excess profit to be transferred to the other companies to compensate for the loss (in Rs.)	Loss to be compensated by other companies to ensure that the average profit is earned by each company (in Rs.)
1.	Good Homes Pvt.Ltd.	174.56	12,280.84	21,43,744	1,72,13,435	--	1,50,69,692	--
2.	Beaver Estates Pvt.Ltd.	224.6	12,280.84	27,58,277	1,21,58,910	--	94,00,633	--
3.	Mr.BR Ajit	37.6	12,280.84	4,61,760	23,91,023	--	19,29,263	--
4.	Capvest Wealth Management Services Pvt.Ltd.	100.5	12,280.84	12,34,225	--	1,50,42,408	--	1,62,76,633
5.	Elton Technologies Pvt.Ltd.	48.5	12,280.84	5,95,621	--	1,22,33,746	--	1,28,29,367
6	Jeeva Vacation Resorts Pvt.Ltd.	3	12,280.84	36,843	27,43,255	--	27,06,412	--
	Total	588.76	12,208.84	72,30,469.14	3,45,06,623	2,72,76,154	2,91,06,000	2,91,06,000
	Net surplus				72,30,469			

The assessee's share would thus work to Rs.21,43,744, which may be accepted as it's income. In the alternative, he would continue, the entire income of Rs.72,30,469, i.e., on the real estate developed, assessed in the hands of an AOP, giving suitable directions to the AO, which is acceptable to all the individual companies and their managing director, Sri Ajit, himself a constituent thereof, and who have toward the same conveyed their consent vide affidavits on record.

Smt.Devi, the ld.Sr.DR, would, in response, rely on the orders by the Revenue authorities. She would though concede to the computational error pointed out by Sri Gopalakrishnan (GK) with reference to the denominator, for determining the cost of the land sold, inasmuch as the same is to be the land available for sale,

as against the land subject to development, as that utilized for common areas, etc., and thus not available for sale, had to be necessarily excluded.

The assessments of the other constituents, it was on inquiry clarified by Sh. GK, are outstanding with the first appellate authority. The matter, it was thus the common contention of the parties, inasmuch as the propositions being now mooted would require being examined, be restored to the file of the assessing authority for necessary verification and determination. *Qua* the assessments for AY 2009-10, also posted for hearing along with, it was again a common ground that they be adjourned for the present to enable an adjudication consistent with the current year inasmuch as the issues were largely common. The hearing was closed at this stage.

6. We have heard the parties, and perused the material on record.

6.1 The first thing we need to address is the head of income under which the income arising on the sale of developed property in SSI is assessable under the Act. In our clear view, the assessment as business income only is consistent with the facts and circumstances of the case. To be fair, the same was not even referred to, much less canvassed, before us. Grounds in its respect, however, stand taken in the appeal memo, which, being not withdrawn, explains, despite being not argued, our adverting thereto. A mere glance at the nature of work undertaken, cost of which stands claimed at Rs.14 crore as per the assessee's (GHPL) letter dated 04.12.2013, is sufficient to convince one of the assessee's claim as being wholly without merit. The same is toward development of an Island, entailing, *inter alia*, reclaiming land, connecting it with the main land by a bridge, providing necessary facilities, as roads, water, electricity, besides common infrastructure facilities, seeking approval from the Government of Kerala; in sum, to develop the Island as per it's Master Plan. In fact, the entire project, as also informed by Sri GK during hearing, is the brain child of Sri BRA, an architect of national repute, on whom several accolades and awards stand bestowed upon in his long and illustrious career for unique/creative buildings/structures. The Island was to be the first such, albeit

private, property in the country, a mini township so to speak, comprising a gated residential complex, villas, clubhouse, resorts, lawns, etc. spread over the area. The structures may or may not have been planned for being constructed by the group companies, i.e., could be jointly with a Developer, or by person/s purchasing the land for that purpose, viz. clubhouse, is another matter. It may well be that it had been planned to, or otherwise specific projects, i.e., development of land; villa project; bridge work, etc., be undertaken by the individual companies. Why, as it appears, AAPL – despite no land, actually undertook to set up a villa project (see para 3 of this order), with there being also reference to sale of Silver Heights Apartments (para 4).The said project could only have been upon securing land, even if for development purpose, from another. The project may not have taken off at the time and/or in the manner anticipated due to delayed approvals, resulting in increased costs, principally by way of interest on loans assumed for financing the project, is another matter. All this is, however, by itself sufficient for it to be regarded as a business venture with commercial interest. The assessee's claim in this regard only needs to be stated to be rejected. Why, the assessee, in the same breadth, itself states of the income being assessable as an AOP inasmuch as the project of land reclamation and development was jointly undertaken by the promoter companies, contradicting itself. Case law in the matter is legion, and the Revenue has in this regard rightly relied on decisions in *Raja J. Rameshwar Rao v. CIT* [1961] 42 ITR 79 (SC); *G Venkataswami Naidu & Co. v. CIT* [1959] 35 ITR 594 (SC) and *CIT v. M. Krishna Rao* [1979] 1 Taxman 33 (AP) [120 ITR 101].

6.2 The claim *qua* AOP, canvassed in the alternative, may be considered next. There is, to begin with, no legal basis to raise such a claim. The return/s of income have been, in all cases, filed by the individual company/entity; the source of income being the sale of land by it, passing a legal title to the buyer thereof, and/or ERF, which again arises only *qua* land owned and developed. The Revenue has only, accepting the assessee's stand, assessed it as it's income, with no material to the

contrary having been adduced or even found during survey. *Thereturn/swas not revised*. The claim of AOP was made *only in the case of GHPL*, at the first appellate stage, stating non-possibility of allocation of profit of the business, jointly undertaken, as the reason. *Would that mean that AAPL was not a part of the AOP, or does not consider it as so*? Needless to add, such issues arise only as there has been no delineation of the contribution by each of the members of the so-called AOP nor, resultantly, any sharing of profits or, as the case may be, losses arising from the stated joint venture. The returns in the two cases before us are under the head 'capital gains', as we understand it to be for other companies, claiming capital loss. *How could then, we wonder, the assessee claim it to be not his income if it is assessable, instead, as a business income*? The income, it stands to reason, would, rrespective of the head under which it is assessable, continue to be of the assessee only. There is, in fact, no claim, while returning capital gains, of the land development being undertaken, to whatever extent, by another/s, or jointly. The same is relevant as it is only the cost actually incurred that could be claimed toward the cost of improvement. Even in case of joint development, inasmuch as costs are shared jointly, and each entitled to sale proceeds of their separate land holdings, arises to them separately. It is only a cost sharing arrangement, whereby each is entitled to the cost borne by it. Income in case of joint development, would arise jointly, in the defined ratio; it being the principal driver of income. This would be irrespective of the head of income under which it is assessable. This is precisely what we meant when it is said that the change of the head of income would not change the person to whom the income arises. Development, where and to the extent made by another, as appears from the charge of ERF, would warrant a charge by another, and could be no reason for the income *per se* being not of the assessee. The same though may lead to computational issues. Further still, no return, even if u/s. 147, stands filed by a AOP, defining it's constituents and the areas of work to which the arrangement extends, specifying also the contribution envisaged by each

member, and it's share in the income/loss arising to the AOP. The Revenue, on the other hand, to initiate fresh proceedings in the case of AOP, must have material with it leading to the belief that the income from the project, is in fact assessable in the hands of a AOP, issuing notice u/s. 148(1) after recording reason/s in its respect. This is particularly relevant in the absence of any accounts/records; there being no such material, much less with the Revenue. *How could it then we wonder be faulted with for assessing the income so*?

On merits, except for a bald contention, nothing to evidence, at any stage, the joint undertaking of work. The minimum that the companies would do is to enter into a Joint Venture (JV) agreement, delineating the contours of the arrangement. A company can move only through it's Board of Directors, making and conveying it's decisions through their appropriate resolutions, of which there is no whisper, much less reliance. Even the agreement dated 17.4.2001, *which is the only Agreement referred to*, is conspicuous by its absence, even as the same forms the basis of the charge of ERF by one company to another, to which charge, explaining its rationale, reference was specifically made by Sh. GK during hearing. *The same is contrary to the claim of AOP*. We have already noted that it may well be that different companies were set up to undertake, or otherwise undertook, different parts of a composite project, viz. design and layout; structural design; bridge; internal roads; infrastructural facilities, etc., which appeals to business reason and management of work (refer para 3). The same are vastly different in character, i.e., in terms of the functional expertise and capabilities required therefor, with no correlation, or possibly so, with the extent of land owned by the respective companies, w.r.t. which the profit on the project (of land development) is stated would be divided, and which, rather, is admitted to be a device to beat the land ceiling. AAPL, for instance, constructing Villas on the land provided by BRA, with the two sharing the sale proceeds thereof, i.e., a joint venture between these two, is understandable, of which there is though nothing to suggest, nor even a contention,

much less evidence. On the contrary, as afore-noted, AAPL stands charged ERF, suggesting, if anything, the entities transacting with each other on an arm's length basis. The 3 new companies were formed much later, while the bulk of the development was in the initial years.

As it appears, therefore, the permission for land development for the entire area of 9 acres(see Table A) stands moved by one company as the lead company, in which case, the other companies, which get involved for extraneous or ancillary reasons, would outsource the development work, of which there is though no whisper. This would also be so even if they undertake separate works of development, with a view to bring home their separate functional expertise. In either case, it would lead to the question/issue of who pays whom, and how much, i.e., for the work done by any one, of which all others, or at least some of them, would be beneficiaries? There is though nothing to indicate that. The fund/loan requirement in each case would also be vastly different. For example, it would be much more for a housing project, as undertaken by AAPL. It would therefore require an agreement, predefining the basis for raising the charge by each one, for the work performed, on the beneficiaries thereof, of which there is, as afore-stated, no claim. The Approval/s sought by a company/s could throw light in the matter, particularly considering the stringent conditions stated as specified therein for being met, and which could be either singular, as in the case of single window clearance, or from different authorities. A joint venture, on the other hand, would necessarily require forming a common vehicle and proceeding on the basis of a common understanding between them (MoU), seeking approval in its capacity as the project developer; again, absent. This, besides forming the basis of the claim of an AOP, would, where so, also define the parameter/s on which profit on the project would stand to be allocated, which remains elusive; ownership of land, suggested as the proposed basis of division of profit on the project, being seriously flawed inasmuch as the same, by itself, has nothing to do with the development work, for which,

considering its variegated nature and profile, the parties would have come together. That is, the suggested basis runs counter to the concept of AOP, which could be given cognizance to only where there is a demonstrated basis and, further, evidence toward joint execution.

To put succinctly, adoption of a business model is imperative, of which there is no statement, much less material, with, further, nothing to exhibit joint execution of work. As it would appear to us, i.e., in the conspectus of the case, toward which though the companies not having their separate offices is no criterion, is that the entire work has been undertaken by principally one or, perhaps, two companies. The land purchased by the other companies is only to circumvent the limitation of ceiling, with development costs being paid by them to these developer companies by way of ERF, which thus assumes the nature of a development charge (DC) or fee. This gets endorsed by the returns filed by the individual companies for the relevant year, i.e., inclusive of ERF, claiming it as an expense for the company purchasing land, and income –which is offset against development expenditure, for the developer company, i.e., the payer and the payee respectively. That apart, all the companies selling land have returned the gain as their income, implying it being sold in one's own right, as under: Table D

Sl. No.	Name of the company	PAN	Extent of land purchased (in cents)	Extent of land sold (in cents)	Surplus from sale of land	Income assessed (in Rs.)			Income offered for assessment (in Rs.)
						Easement rights charges	Other income disallowances made in the assessment order.	Total income assessed	
1.	Good Homes Pvt.Ltd.	AABCG0444L	343	174.56	4,77,70,288	2,05,20,000	--	6,82,90,288	--
2.	Beaver Estates Pvt. Ltd.	AADCB0193M	318	224.6	5,08,26,390	1,59,60,000	--	6,67,86,390	--
3.	Mr.BR Ajit	AAPPA1312A	45	37.6	89,71,794	91,20,000	1,29,57,046	3,10,48,840	1,38,65,701
4.	Capvest Wealth Management Services Pvt. Ltd.	AACCC8942Q	134.73	100.5	1,58,30,000	--	--	1,58,30,000	1,52,47,100
5.	Elton	AABCE3698N	50	48.5	17,86,750	--	--	17,86,750	17,86,750

	Technologies Pvt. Ltd.								
6	Jeeva Vacation Resorts Pvt. Ltd.	AABCJ9338C	3	3	26,00,950	--	--	26,00,950	26,00,950
	Total		893.73	588.76	12,77,86,172	4,56,00,000	1,29,57,046	18,63,43,218	3,35,00,501

This, i.e., ERF, as a development charge, however, does not explain the repetitive transactions of purchase (more than 77 transactions of medium and small plots, from 1983 to 2006), and sale of land by the group companies, i.e., as a part of the SSI project (para 3.5/page 13 of the assessment order of GHPL). *What, we wonder, explains these transactions*? Why, again, then, was ERF not charged on these transactions of purchase and sale, or atleast on or after 17.4.2001, the date of the agreement; the development taking place since 1984? And, again, only *qua* transactions occurring in fy 2006-2007? Where, again, then, is the question of AOP, as being now canvassed. *It is the arrangement subsisting at the relevant time which is to be given effect to, and not one later found as more convenient or favourable.*

The claim of AOP is, quite clearly, without any factual or legal basis.

6.3 This, then, leads us to examine ERF further, i.e., more closely, even if we are constrained for want of the Agreement dated 17.4.2001, not on record. It (ERF) forms an integral part of the operating statement of each of the six entities, claimed as income in the hands of three PCs, i.e., the Promoter Companies, and as expense in the hands of three entities incorporated later (i.e., at Sr.Nos.4, 5 and 6 of Table-D). Clause 1 of the Agreement, reproduced at page 4 of the assessment order in AAPL (ITA No.870/Coch/2022), reads as under:

"The ownership and management of all common properties and facilities shall continue *in the above three entities* at least until 95% of all saleable properties are sold out as otherwise development of project as per master plan could not be smoothly conducted."

It was further provided that

"The road shall be used only for transportation of people and to transport goods as permitted by the three companies. If at <u>all</u> the *property through which the road passes* through is to be <u>sold</u> *to an outsider* to the parties to this agreement, it shall be done only with prior consent of all the parties to this agreement. Even then no right over the road

shall be transferred to any outsider. It shall remain with the Original title holders. The buyer of the land shall have only the using right over the road."(emphasis, ours)

As explained during hearing, as afore-noted (para 3), as indeed in the assessment order, the same is charged from *all persons*(i.e., other than the parties to the Agreement) purchasing land at the Island, being toward providing access thereto by using common facilities, including internal roads, and which, irrespective of which entity sells the property, is shared by the PCs in the ratio in which the lands through which the roads (or other common facilities) are built and, thus, consumed in the process, and which is in the ratio of 45:35:20 in favour of GHPL, BEPL and AAPL. This is as the said companies have foregone their lands for the project in that ratio. It is these companies which, therefore, are to be compensated, and in that ratio. The rationale and the purport of the charge, appealing at first blush, fails completely on scrutiny. Firstly, cl. 1, which is the only part of the Agreement before us, does not speak of any charge, but only of a prior consent of the parties to the Agreement, for the smooth conduct of the development work. Inasmuch as they have contributed their land toward common property and facilities, presumably in that ratio, having possessory rights in the stated ratio, their consent is required for any person who wishes to use the roads for transport, only which shall enable him access to his property. This would apply to other common facilities as well. Further, this consent, the purpose of which is thus the smooth conduct of the project work, is to remain in force till at least 95% of the total saleable area is sold. *Now, this, understandable indeed, does not speak of any fee being charged from those using these facilities, or even on purchase of property in the Island*.Continuing further, the said clause states of sale – to an outsider, implying any person other than the 3 entities (PCs) entitled to the charge, of the property through which the road passes. *How could that be as the road is a common area, since consumed, and necessarily so, for the development of the total area*? The same, thus, cannot be subject matter of sale, which, rather, is the assessee's grievance inasmuch as the AO had, in working the per unit cost, adopted the figure

of the total area, i.e., including common area, as against only that available for sale. Why, it is the land contributed for common area that informs ERF.

Furtherstill, this charge, i.e., *presuming* it being referable to the Agreement, shall arise to the PCs not from any outside party, either purchasing property at the Island or otherwise using common facilities thereat, but only from amongst themselves. The reason is simple. It is the three PCs which would in that case agree to compensate and, thus, stand to be compensated by, each other. *There is no question of any charge arising on this count from a third (outsider) person, as obtains, being paid/payable to the PCs by NCs or third parties buying land*. Companies, A, B and C, for example, contribute 10%, 20% and 30% (say) of their land to the common pool, the company contributing less (A) shall be liable to compensate the other two for their excess contribution, i.e., 10% and 20%, by B & C respectively, in the ratio of their excess contribution, i.e., 1:2. Rather, as we would think, the company/s contributing lower than the average ratio to the common area, which in the instant case works to 12.29% (109.81 cents / 893.76 cents – see Table A at para 5), would compensate those having contributed higher than the average ratio. This only would ensure an equitable distribution of the common area load, also fixing a suitable price therefor, which would correspond to the per unit development cost, if not also a reasonable margin thereon inasmuch as the excess land available to the lower contributing company would stand to be realized by it at the market rate, i.e., inclusive of a margin over cost. Why, a company contributing it's entire land to the development work (say), a possibility inasmuch as the same depends on the requirements of the project layout, would not stand to gain anything if the compensation is pegged only at cost, even as it's contribution for the project cannot be denied; it having, rather, contributed it's entire land for the purpose. It is thus only on margin being taken into account would it's contribution to the project recognized in the real, commercial sense of the term. No hard and fast rules in its respect, though, could be made, which is a

subject matter of agreement between the parties thereto. *This gives rise to another question, i.e., the manner of regulation of development prior to 17/4/2001, whereat the bulk of the development has taken place; rs. 20.39 cr. out of the total capital outlay of rs. 22.05 cr. on the project (i.e., as per the assessee's letter dated 31/1/2014), or over 92%, having been incurred prior to 2001*. Even if the parties have entered into an agreement later, i.e., in respect of the development work done earlier, it is only the parties having executed that workover the said period, in respect of their land, who would come together to arrive at a formal agreement *qua* the costs incurred or rights accrued thereto, if only to, given the inequitable manner in which the revenues from the project may stand to arise to them, provide for a uniform basis therefor, as indeed for the execution of work in a regulated manner. Reference in this context is also validly made to the 77 transactions referred to at para 6.2 while discussing the claim of AOP. We may though add, that all this would be of little consequence where all that the Agreement envisages is the consent of the parties to enable smooth conduct of operations, but surely arises, and stands to be addressed, where, as is the case, there is a charge of ERF by some companies to others. There is, further, as afore-stated, *no question of charge of ERF by the PCs to NCs,* either on purchase of land or otherwise, which would, as afore-explained, arise to the 3 PCs from amongst themselves. Contrary, however, to what stands stated, we observe (PB-2, pg. 25), *contribution to the common pool is neither in the stated ratio and, in fact, includes that by 2 of the 3 NCs as well,* as under: Table E

Sl. No.	Name	Total extent of land utilized for common purpose
1.	Good Homes Pvt. Ltd.	60.12
2.	Beaver Estates Pvt.Ltd.	13.96
3.	BR Ajit	--
4.	Capvest Wealth Management Services Pvt. Ltd.	34.23
5.	Elton Technologies Pvt.Ltd.	1.50
6.	Jeeva Vacation Resort Pvt. Ltd.	--
	Total	109.81

That is, the contribution of land to the common areas (109.81 cents/ Table A), is not by the 3 PCs, as referred to in cl. 1 of the Agreement dated 17/4/2001, and, in fact, involves a different set of companies, including the NCs! *The question of ERF being to the 3 PCs in the stated ratio, and as actually allowed, does not arise*! Further still, how does ERF arise to AAPL, returned by it at Rs. 2,18,49,600and, from whom? This is as it admittedly owns no land, as clarified per the assessment order of GHPL and, in fact, admitted by the assessee, for which reference be made to paras 4.3 (pgs. 18-19)& 4.17 (pg. 25) thereof, so that the further question of the same having been utilized for common area does not arise? Again, the quantum (rs. 218.50 lacs) thereof, reckoned at 20% of the total ERF, which stands to arise to BRA instead, which though reports it at rs. 91.20 lacs. *The charge of ERF, besides being against the theory of joint venture and, thus, AOP, the manner of its allowance is* de hors *and inconsistent with the provisions of the agreement dated 17.4.2001, to which the said charge ostensibly owes it origin*. No wonder the same is not part of the record, even as it would be so even for the reason that it was not specifically referred to during hearing (refer Rule 18(6) of the Income-Tax (AT) Rules, 1963).*All these contradictions and inconsistencies need to be explained*.

The second reason stated for the charge of ERF is the locational advantage of its land enjoyed by one company vis-à-vis the other, i.e., with reference to the project layout. *This is, again, incomprehensible*. The project layout is determined not by considerations as to which part of the land is owned or acquired by which entity, but by project considerations alone. As such, which part of the total land would be placed more favourably than the other, i.e., in terms of it's final sale value, itself determined by a variety of factors, and which are again themselves liable to vary with time, as indeed their relevance and, thus, weight, cannot be predicated, much less form the basis of one entity compensating the other. *It, after all, does not stand to gain at the expense of other for it to compensate it*. The only manner to mitigate the impact of this variance, to our mind, as also afore-stated, is

to form a separate vehicle, either incorporated, as a company, with a defined shareholding, or unincorporated, as a partnership, AOP, etc., for undertaking the project. Rather, the concept of ERF, as explained, was to place value on the 'right of way'. *The buyer of any land or property has an intrinsic right of way thereto, as otherwise the property itself cannot be accessed and, thus, put to use, so as to be of any value*. That is, is an integral part of the purchase/acquisition of any property. There is, accordingly, no question of it being valued separately. As such, even if, assuming so, some land has a better access – in view of the project layout, than another, which could well be, the same shall get factored into the value placed on it and, thus, its price, i.e., at which it is transacted, i.e., bought and sold. *A buyer being charged separately for the right of way or easement is thus beyond comprehension*. Yes, we are conscious that such a right is necessary not only for the buyer, but may also be for any Developer, entitling him access to the subject land for development. But these, and such issues, would only arise in the absence of any cohesion; each company working at cross purposes with another, and which is nobody's case and, rather, inconceivable as the companies are being promoted by the same set of people, with BRA being the central figure behind the project. This explains the concept of 'consent' by the developing entities, and is expected even in case the entities involved were not related. A road, after all, would be built only after laying the underground pipe for water, sewerage, and preferably also electricity and internet cable. That is, the individual companies involved in development, would have to necessarily work in tandem, i.e., in coordination, a prerequisite, and does not call for charge of ERF by one company to another. That is, the levy cannot ensure the said coordination, vital for the development, and is thus not consistent with the stated object of smooth conduct of operations. *Further, the 'consent', though, indicates of it being not a case of an AOP as no separate consents in that case would be required*.

We next proceed on the basis of ERF, borne out of conduct, being indeed a charge contemplated by the Agreement dated 17/4/2001. This is as land contribution for the common areas and, further, differentially by the PCs, is surely a valid basis for ERF, even as the same is, for the reasons discussed hereinbefore, inaptly termed so. It stands to arise by way of an *inter se* adjustment/charge arising to one (or more) company/s engaged in the project from the other/s, and which would surely form part of their operating statements, *and not from any outsider to the Agreement, i.e., just the opposite to what it purportedly states*! Though the extracted part of the Agreement is only in respect of 'consent', the same would, where the subject matter of the Agreement extends to the charge of ERF as well, as we presume – as otherwise reference thereto is of no relevance, it is only the parties obliged to seek consent for the easement right, which would pay it.It cannot be otherwise. *In fact*, it is the NCs which are paying ERF to the PCs. As explained, the same is as it is only where one has acquired a right, that it could transfer or grant it to another. Implying, therefore, that the NCs have charged the same from the buyers of the property therefrom, as indeed the PCs on sale of land to the outside buyers. And which, in either case, is not so. *Now, if land/property could be sold to a buyer without charge of ERF, why we wonder is the same charged or required to be, by the developer companies to one another*? The same, as discussed earlier, gets subsumed in the overall right that the buyer of property acquires on purchase thereof.

The charge of ERF, whichever way one may look at it, is wholly unexplained, besides being contrary to the concept of JV and, thus, an AOP, being now advanced. *The rationale for compensation by one company to another, as afore-stated, arises only where one gains or benefits at the expense of the other.* (also see para 6.4)

6.4 Next, we may consider the computational issues, i.e., in determining the profits of the two assessee-appellants in appeal before us. Before, however, we set

out to do so, we observe three issues which need to be accordingly addressed, clearing the ground as it were. The first and foremost is if the ERF, discussed hereinbefore, charged by the PCs to NCs and, accordingly, included in their income, while claimed as an expense in the case of the latter, is to be included in the computation of profit/loss of the different entities who acquired land at the Island and sold the developed land thereat.

Continuing with our discussion at para 6.3 in its respect, we find that the economic rationale spelt out for the ERF, i.e., to compensate one for the land committed to the common area, which could only be between the contributing companies *inter se*,is neither substantiated nor indeed borne out. The same, as it appears, then, is perhaps a device to either equalize profit, as discussed at para 6.2,or even to save stamp duty that would otherwise be attracted on the sale of land by one to another. There is, however, no concept of equalization of profit in accounts, the purport of which is to arrive at the correct income of the reporting enterprise, and which is also so of the Act, i.e., to bring the real income, subject to the provisions of the Act, to tax (*Poona Electricity Supply Co. Ltd. v. CIT* [1965] 57 ITR 521 (SC); *Southern Technologies Ltd. v. Jt. CIT* [2010] 320 ITR 577 (SC)), and it incidentally also explains the credence by the Act to the well accepted norms and principles of commercial accounting (*Challappalli Sugars Ltd. v. CIT* [1975] 98 ITR 167 (SC)). As afore-stated, it is only when one gains, i.e., in economic terms, at the expense of another, that a charge on some suitable parameter, from one to another, subject to an agreement in its respect – for income cannot be unilateral, arises. That is, a cause for charge obtains, constituting a valid basis for reckoning income as well as, correspondingly, expense. To put succinctly, the concept of profit equalization is only a manner of application or appropriation of profit, liable to be ignored, both from the income as well as the expense side w.r.t. the operating statement of the relevant entity.

At the same time, it may well be that ERF is conceived as a mechanism to save on stump duty inasmuch as it gets absorbed in the sale price, as is admittedly the case when an NC purchasing the land sells it to an outsider. This would, in that case, require a comparison of the price at which PC has sold land to NC, with that at which it has sold to an outsider. The sale in either case being of developed land, the price difference between the two would correspond to the ERF where it is indeed toward price of land, so charged to save on stamp duty. That is, it is only in a demonstrated case of ERF corresponding to the price differential, that an inference as to the same representing sale price and, thus, a part thereof, would follow. So conceived, the charge of ERF is understandable only where it is to the buyer thereof. *As we observe, however, the ERF paid by NCs to the PCs is on the land sold by the former and not on that purchased by them*. This is again not understood, as it is only on the purchase of the land, presumably developed, by the NCs from PCs, that a case for charge of a development fee may arise, and which would therefore be independent of whether the land purchased stands subsequently sold by it or is held as stock-in-trade, in which case it would stand to be valued at inclusive thereof.

The matter, as apparent, thus needs ample clarification. There having been no deliberation thereon during hearing, with in fact ERF being taken as part of the income statement, both for the payee and payer, the matter would accordingly require being restored back for adjudication afresh. It may well be argued that the same having been returned, and accepted by the Revenue, is not in dispute and, in any case, not an issue arising. Our concern in the matter, despite it being not apparently in dispute, is for the reason that where the same does not represent a valid charge, as is apparently the case, it is only a mechanism for transfer of profit of one concern to the another, which cannot be. Why, Sri.GK himself, despite the assessee-appellant's returning income, which includes loss, based on their operative data, would canvass for a uniform profit across all entities upon ignoring ERF,

implying it being a profit equalization 'charge'. That apart, it is well-settled, that it is the correct legal position that is relevant, and not the view that the parties may take of their rights in the matter: *CIT v. C. Parakh & Co. (India) Ltd.* [1956] 29 ITR 661 (SC);*Kedarnath Jute Mfg. Co. Ltd. v. CIT* [1971] 82 ITR 363 (SC).

The assessee's pleadings *qua* profit equalization, which we regard as the second preliminary issue, are for the same reason, to no avail. *A concomitant question is if the grant of easement rights to the buyer/(s) of land by way of a separate agreement, or otherwise forms part of the purchase deed, in either case, specifying its nature, as well as the amount charged in its respect.*

The third preliminary issue is the identity of the PCs. This is as while AAPL returns income inclusive of ERF, stated to accrue to it at 20% of the total (see para 3), i.e., at Rs.2,18,49,600, it is, in the case of GHPL, the second appellant before us, held by the AO to be not entitled thereto inasmuch as it owns no land (refer para 4). It is, on the other hand, BRA, proprietor, Ajit Associates, who owns land and, accordingly, entitled to 20% of ERF (taken at Rs.91.20 lacs), with the balance 80%, in either case, arising to GHPL and BEPL in the ratio of 45:35. Now how could this – clearly anomalous, be, to which, we are sorry to say, neither side drew our attention during hearing. If the income, and to whatever extent, by way of ERF, which is the sole income arising to AAPL for the current year, has accrued thereto, it has to be from one or more persons. *Who are they, and what are their contributions*? Further, there could be no grant of ERF by one to another without ownership of land *qua* which easement rights, out of the entirebundle of rights, signifying ownership, is granted. The situation becomes all the more perplexing as the assessee (AAPL), despite several grounds assumed by it, does not refute or deny being a recipient of ERF, and at the disclosed sum of Rs.218.50 lacs, but only the character thereof as capital and, alternatively, of it being allowed expenditure there-against. While the former is not, the latter, though valid, is untenable in the absence of any land for being developed.

6.5 We may next discuss the computational issues. As per the assessee, no issue in its respect survives, except for a change in denominator, substituting the total land area (896.76 cents) with the land area available for sale (588.79 cents), which aspect is unexceptional. That apart, we could not disagree more. We have already highlighted inconsistencies across the two assessments, i.e., of AAPL and GHPL, before us, as also internal inconsistencies. We further observe no finding *qua* the different aspects of the computation by the Revenue authorities, which could only be on the basis of evidence, absence of which marks the assessee's case. Why, the assessee/s itself, abandoning it's consistent stand, as indeed it's return of income, pleads for a uniform allocation of profit across different entities. We have already clarified, with reference to trite law, that it is the correct legal position that is relevant. We discuss our observations in the matter of computation, as under:

A. Land sold prior to 1996 (89.39 cents): The reduction of cost of development is at the average cost of it's purchase, and which cannot be, and has necessarily to be on the basis of actual cost of the land sold. Two, unless shown to be wholly and totally undeveloped, would require reduction of proportionate development cost as well. Besides being highly improbable inasmuch as the said time extends upto 1996, with bulk of the land acquisition having been completed in 1983, major works like reclamation of land and bridge connecting the mainland with the Island, were completed much prior thereto. To ease the tedium involved in working the proportionate development cost; we being conscious that no books of account have been maintained, the development cost can be tabulated (financial) year-wise, and the cost up to the year prior to the previous year of the sale or, better still, in addition, 50% of the cost incurred during the said financial year, can be regarded as the development cost in relation to the land sold during a particular financial (previous) year. That apart, i.e., exclusion of the actual cost of the land sold, computing it by including the cost of its development, we observe that 426 cents of land, on which 285 residential units were to be constructed, is stated to be sold to

AWHO in 1991, while the total land excluded as sold prior to 1996 is only 89.39 cents! (para 3). This needs to be clarified. And, similarly, the sale of Apartments.

B. Land abandoned due to excessive cost (70 cents):

As it appears, land was to be developed jointly with HUDCO which, however, was abandoned as the cost incurred, as well as likely to be, in completing the project, would exceed the revenue that standsto arise on it's sale, i.e., as per the agreement. The land stands rightly excluded inasmuch as it is not available for being sold, but, as in the case of (A) above, all costs in relation thereto, again taking the purchase cost at actuals, would stand to be determined and excluded. It could be that the creditors have, in exercise of their rights, appropriated the property, which could be by way of attachment, etc. The said costs, as incurred up to the date the project was abandoned, which would include interest on loans taken for the project, would stand to be excluded, i.e., net of the sum, if any, realized on sale/booking of flats/villas, inasmuch as that would represent the net cost incurred. This becomes relevant also for the reason that the quantum of loan, in proportion to the land area, is much higher so that the same may well be toward construction, since suspended. We are though not in any manner suggesting the same to be a capital loss; the exclusion being guided on the basis that it has no revenue implication for the current year. The loss, if returned, and subject to the expenditure being allowed in terms of the provisions of the Act, was surely liable to be assessed and carried forward, subject of course to the statutory limitation as to time. Further, we are conscious that the cost on the abandoned project may continue to be incurred thereafter and, being contractual, continue to be borne, as by way of interest on loans, i.e., even as the land, or the structure/s thereon, i.e., the underlying asset/s, stands appropriated. The same would firstly require reference to the terms of the loan contract, as indeed of sale, only with reference to which liability, if any, to the creditor, arise. There are in such cases instances where the buyers take over the project, negotiating further loans, or otherwise meeting the

balance cost. The cost incurred, to continue, would though be in the nature of a loss and, accordingly, stand to be allowed as business expenditure in the year of accrual, subject of course, to other provisions, as sec. 43B.The same cannot, though, be claimed as part of the cost of land development.

C. Interest Cost: A substantial part of the cost of development is comprised of interest cost, i.e., on loans contracted for the purpose of land development. The AO, as apparent from para 4.5-4.11of the assessment order (GHPL), vetted the figures returned by the assessee, so that the quantum of costs involved in its respect stand crystallized. However, the assessee has aggregated the entire borrowing costsince inception without reference to the following, deemed pertinent in the matter:

a). whether the same represents the normative cost of the project, or not;

b). whether it is interest on borrowing *per se*, or interest on interest;

c). whether the same, where in respect of loans from banks/FIs, stands paid or not;

d). where the provision of s. 194A, where applicable, is met or not.

It may be relevant to dilate on the matter. Accounting Standard (AS) 2 on 'Valuation of Inventories', issued by ICAI, the premier statutory body regulating the profession of accountancy in India, clarifies that the cost of inventory should comprise the cost of purchase; of conversion; and *other costs* incurred in bringing the inventory to its present location and condition. This, then, defines the basis for inclusion or otherwise of any cost as the cost of production or, as the case may be, development, so that any cost, on a question in its respect arising, is to be determined on the anvil of this test. Paras 11 and 12 of AS-2 are in respect of 'other costs', and read as under:

'Other Costs

11. Other costs are included in the cost of inventories only to the extent that they are incurred in bringing the inventories to their present location and condition. For example, it may be appropriate to include overheads other than production overheads or the costs of designing products for specific customers in the cost of inventories.

12. Interest and other borrowing costs are usually considered as not relating to bringing the inventories to their present location and condition and are, therefore, usually not included in the cost of inventories.'(emphasis, ours)

The foregoing, representing the usual accounting treatment, which has the approval of ICAI, may require some explanation. Interest cost is essentially a time cost of funds, i.e., a period cost. It would stand to be incurred even if no project work has been carried on during a particular period, or the work thereon is tardy or gets suspended, wholly or partially, for the whole or a part of the year, so that there is, during such period, no contribution toward bringing the required changes. The same, accordingly, is to be expensed for the period to which it relates. This explains the dictum of the AS afore-noted. The premise for the inclusion of interest on borrowed capital in the cost of production/development, on the other hand, is that time, to that extent, is necessarily required for production/development, i.e., to bring the subject goods to its current state of location and condition. *Clearly, therefore, the prescription for inclusion of interest cost on borrowed capital comes with an important caveat or condition*. That is, work, as per schedule, is carried out during the relevant period, representing a cost which, though for the relevant period, is yet essentially and normally consumed for the completion of the work of production/development. Thus, costs relatable to the period of suspension of work, which could be for several reasons, including non-availability of materials or other factor of production, or even funds, would have to be excluded. Interest cost on a stalled project does not add value thereto and, thus, is to be excluded, even as the same, being an incident of business, is liable to be claimed as a business expense for the relevant period. Even as, thus, a time cost, which therefore stands to be incurred regardless of whether the purpose for which the borrowing is assumed is actually used there-for during the relevant year, or the work actually carried on, so as to be regarded as part of the cost incurred to bring about the necessary changes, in progression toward that sought, it, where so, could be regarded as a part of the cost of production/development. Credence, thus, is given to time as the third

dimension for actualization of the process of production/development, which forms the basis of inclusion of interest cost.

AS-16, i.e., the AS on Borrowing Costs, specifically concerns this aspect. Some principles, delineated therein, deemed relevant, are reproduced as under:

Definitions

3. The following terms are used in this Standard with the meanings specified:

3.1 Borrowing costs are interest and other costs incurred by an enterprise in connection with the borrowing of funds.

3.2 A qualifying asset is an asset that necessarily takes a substantial period of time to get ready for its intended use or sale.

Explanation:

What constitutes a substantial period of time primarily depends on the facts and circumstances of each case. However, ordinarily, a period of twelve months is considered as substantial period of time unless a shorter or longer period can be justified on the basis of facts and circumstances of the case. *In estimating the period, time which an asset takes, technologically and commercially, to get it ready for its intended use or sale is considered.*

Recognition

6. Borrowing costs that are directly attributable to the acquisition, construction or production of a qualifying asset should be capitalized as part of the cost of that asset. The amount of borrowing costs eligible for capitalization should be determined in accordance with this Standard. *Other borrowing costs should be recognized as an expense in the period in which they are incurred*.

12. To the extent that funds are borrowed generally and used for the purpose of obtaining a qualifying asset, the amount of borrowing costs eligible for capitalization should be determined by applying a capitalization rate to the expenditure on that asset. The capitalization rate should be the weighted average of the borrowing costs applicable to the borrowings of the enterprise that are outstanding during the period, other than borrowings made specifically for the purpose of obtaining a qualifying asset. The amount of borrowing costs capitalized during a period should not exceed the amount of borrowing costs incurred during that period.

Commencement of Capitalization

14. The capitalization of borrowing costs as part of the cost of a qualifying asset *should commence when all the following conditions are satisfied*:

(a) expenditure for the acquisition, construction or production of a qualifying asset is being incurred;

(b) borrowing costs are being incurred; and

(c) activities that are necessary to prepare the asset for its intended use or sale are in progress.

Suspension of Capitalization

17. Capitalization of borrowing costs should be suspended during *extended periods in which active development is interrupted*.

Cessation of Capitalization

19. Capitalization of borrowing costs should cease when substantially all the activities necessary to prepare the qualifying asset for its intended use or sale are complete.

21. When the construction of a qualifying asset is completed in parts and a completed part is capable of being used while construction continues for the other parts, capitalization of borrowing costs in relation to a part should cease when substantially all the activities necessary to prepare that part for its intended use or sale are complete. (*emphasis, ours*)

To put things in context, if work on the bridge, an identifiable part of the project, is complete, or substantially so, capitalization of interest cost would cease. Reference to AS-16, being dedicated to borrowing cost, is made for another purpose as well. It may well be argued that to a construction project AS-7 (construction contracts), and not AS-2, applies. Though we do not set much store to this, sufficient to say that interest cost even as per this Standard is subject to the same governing principle of being recognized as an expense of the project to which it relates, and is carried over, as a part thereof, only where the cost is relatable to the work performed and, two, is liable to be recovered. In the instant case, the work is being undertaken as a project of real estate development, for sale, as and when the occasion arises, to an eligible buyer, being a member of the public, as developed land or, better still, together with construction thereon, for which though construction contract may have to be entered into for a whole or part of the construction, involving another contractor/developer. The sale of the villas to HUDCO, since abandoned, would fall in this category. The following paragraphs of the Standard are relevant in this regard:

Recognition of Contract Revenue and Expenses

21. When the outcome of a construction contract can be estimated reliably, contract revenue and contract costs associated with the construction contract should be recognized as revenue and expenses respectively by reference to the stage of completion of the contract activity at the reporting date. An expected loss on the construction contract should be recognized as an expense immediately in accordance with paragraph 35.

22. In the case of a fixed price contract, the outcome of a construction contract can be estimated reliably when all the following conditions are satisfied:

(a) total contract revenue can be measured reliably;

(b) it is probable that the economic benefits associated with the contract will flow to the enterprise;

(c) both the contract costs to complete the contract and the stage of contract completion at the reporting date can be measured reliably; and

(d) the contract costs attributable to the contract can be clearly identified and measured reliably so that actual contract costs incurred can be compared with prior estimates.

Recognition of Expected Losses

35. When it is probable that total contract costs will exceed total contract revenue, the expected loss should be recognized as an expense immediately.

Para 35 supra endorses our observations at para 6.5(B) above. We may now, given the framework, examine the assessee's claim of interest cost for capitalization, i.e., toward inclusion as cost of the qualifying asset, i.e., real estate being developed as part of it's trade for being, on completion of development, sold. Admittedly, the project got delayed, not by weeks or months, but years, witnessing cessation of work, which in turn entailed litigation costs as well as distress sales to close liabilities, including interest. *No wonder, Phase-I continued for 27 years.* It is, again, only understandable that stock held, upon completion of work, awaiting a 'correct' time in terms of sale value, for its realization, is, again, only a period (holding) cost and, thus, is to be expensed for the period to which it relates. There is no question of interest cost being capitalized, i.e., being carried over as a part of the project cost, from year to year. That is, except for the interest cost that arises on the application of loan for meeting the project cost, for which the work is being

actually carried out. As it appears to us, different loans have been taken by different companies, firstly, for the purchase of land and, two, for carrying out specific work thereon, i.e., *qua* a definite part or segment thereof, viz., building bridge, land reclamation, laying pipes, construction of roads, parks, etc. And which, where representing acontinuum, some time lag between these works could be reasonably ignored, i.e., adopting a practical stance, in consonance with the ground reality, for the exercise cannot be made or reduced to being fastidious about it. The same must however represent a continuum, the project progression agreeing, even if broadly, with the time line in its respect, viz. at the time of seeking approval, loans, etc. It is not unusual to therefore specify time lines in tentative terms, viz. 3-4 months, 6-8 months, 12-15 months, et. al. This is as some time loss is inevitable and, thus, broadly construed, regarded as normal. Time estimates usually factor this. We may here also clarify that there could be nevertheless, and in the interregunm, periods of suspension of work, as for example, awaiting an approval; arranging finance, etc., over which the project gets stalled. The interest corresponding to such periods of stalled work is to be excluded, including it, once again, on commencement or resumption of work. Loan repayment, as indeed of interest, are, as per the agreement, generally stipulated only upon the completion of the project, or in conformity with the cash inflows. Circumspection is the key, with a view to identify and segregate, given the project schedule and imperatives, what could be regarded as a normal time loss from that which could not be so regarded.

Then, there is the question of interest on interest. This obtains when interest is, for any reason, not paid. The interest gets loaded on to the principal, on which interest is applicable for the subsequent period at the same or enhanced rate, generally referred to as compounding. The same arises due to the failure to discharge the interest on borrowing. The question, therefore, is if it can be included as a part of the project cost inasmuch as, clearly, the sum on which it is charged does not represent a borrowing, but on the cost of borrowing. In our clear opinion,

it would qualify as so, where and to the extent it is for the period for which the interest on the principal sum (borrowing) is being capitalized. This is as the same only raises the in-effect interest cost, so that instead of being at 10% p.a. (say), it may amount to 11% p.a. (say), when reckoned on the initial borrowing. Needless to add, if the interest (on borrowing) is itself to be regarded as not representing a normative cost, so as to be capitalized, the question of capitalization of interest thereon does not arise.

Weare conscious that there is thus an increase in the effective interest cost which is being loaded to the project cost, while the project is to be capitalized at a capitalization rate. The said rate, as the reading of AS-16 would show, is the average borrowing rate for the different borrowings made for the project. Inasmuch as different loans are assumed at different times, and which may be at varying rates of interest and terms, the actual interest cost, on which there can be no quantitative prescription, i.e., once the purpose of the borrowing is the project, and for which it is actually applied, as incurred, would qualify for being included in the project cost, subject to the condition/s hereinbefore stated.

Further, we may, before proceeding further, also clarify that the allowance of interest on a loan from Banks/FIs, is w.e.f. 01.04.1989, i.e., fy 1988-89 onwards, subject to s.43B(d), so that it is, irrespective of the method of accounting followed, which for a company is statutorily mandated as accrual, is deductible only for the year in which the interest is actually paid. The interest, whether qualifying as a part of project or not, is to be therefore allowed only on its payment, i.e., for FY 1988-89 onwards. A detailed working in its respect is, therefore, warranted, segregating interest for each year, as indeed the payment made, i.e., towards principal or toward interest. A question may arise as to how the payment during a particular year is to be appropriated towards principal, interest thereon, or interest on interest. The same has to be necessarily as per the loan agreement. Where it is silent on this, inasmuch as unpaid interest stands to be included in the principal amount outstanding, i.e., for

reckoning interest for the subsequent period, normally charged quarter-wise, in our view the assessee can, at its option, regard it as against any. While it is relevant from the standpoint of deduction of interest, it is irrelevant from the perspective of the bank as each of the three components, i.e., loan, interest, and interest on interest, where unpaid, qualify as part of the amount on which the interest for the subsequent period is to be charged. It may have further clarified that it is the interest, which, subject to its qualifying in terms of the project being executed, falling within the normative time, would stand to be loaded on to the project cost.

D. Development Cost

The same has been adopted at Rs.36.57 crore in the assessment order, i.e., the figure advanced by the assessee during the assessment proceedings. Though later revised upward to Rs.38.76 cr., the same was not considered valid by the AO insofar as the revision upward of cost of Rs.14 cr., being to Rs.22.05cr., is concerned, and which has not been disputed by the assessee, who before us therefore claims the total project cost as not disputed at Rs. 36.57 cr. This is anomalous as the 'Other Costs' had been simultaneously revised downward by the assessee, i.e., from rs.22.57 cr. to rs.16.71 cr., forming part of rs.36.57 cr. and rs.38.76 cr. respectively, and which downward revision has been thus ignored by the AO. The question, it needs to be appreciated, is not the acceptance of a figure, or of it being higher or lower, but one which is correct and substantiated. We find no justification for the revision by the assessee nor, consequently, any discussion by the AO. An assessment under the Act is not in the nature of a *lis* between two parties, the AO and the assessee (see, inter alia,*Gadgil (S.S.) v. Lal & Co.* [1964] 53 ITR 231(SC))), but a proceeding for determining the correct income chargeable to tax, i.e., assessable under the Act, a public law, and which is also the purport of the appellate proceedings (*NTPC Ltd. v. CIT* [1998] 229 ITR 383 (SC)). In fact, even ignoring the assessee's first claim of Rs.48.35 cr., i.e., vide letter dated 04.12.2013, the revised figures, i.e., per letters dated 31/1/2014 and 25/3/2014,exhibit wide

variations, which need to be validated. The same is also important from the stand point of financing, i.e., how the same has been financed, inasmuch as it is an indicator of both, the time of incurring expense and its extent, particularly in the absence of accounts. Thirdly, the same are vastly different and, therefore, need to be explained. An expenditure, it may be appreciated, cannot be allowed on the basis of a statement, and has to be supported by some material, even if corroborative. The basis on which the same has been claimed has not been stated, more so in view of its constant revision.

E. General, Administrative and Maintenance Expenditure.

Being in the nature of an administrative overhead expenditure, so that it would be largely uniform across years, what, one wonders, explains the incurring of expenditure in the sum claimed for one year (AY 2007-2008), which suggests it being incurred, like-wise, for the preceding and succeeding years as well. The same, it may be appreciated, being a period cost, cannot be accumulated for being claimed as part of the project cost in the year of sale, but is to be expensed for the year to which it relates. The proscription of ss.40A(3)/(3A), 40(a)(ia), et.al, shall also obtain.

F. Sale Commission

Though surely not a part of the project cost, would definitely form part of expense on sales and, therefore, deductible, where shown to be incurred *bonafide*. As it appears, even the details of the payees have not been furnished. Further, it shall be subject to satisfying the postulate as to the mode of payment (s.40A(3)/(3A)); tax deduction at source (sec.40(a)(ia)), etc.

G. Repayment to Allottees

How could repayment of advance to allottees be regarded as an expense? The amount received advance, which would have to be shown to be sowith documents, is not ‘sale’, and its repayment cannot be regarded as reversal thereof.

It is, clearly, only in case of repayment of sums already accounted for as sale, could a claim of sale reversal, on cancellation of the agreement, follow. The onus on the assessee, particularly in the absence of accounts, is heavy, involving, in the very least, confirmation from the parties; matching cash flows, etc. The question of it qualifying as an expense, being a matter of supervening concern, would nevertheless obtain. The AO, at para 4.12of his order (in GHPL), observes the assesse to have not produced the relevant documents, and his working, on quantum, is also inconsistent with.

The AO shall examine these matters in the set aside proceedings. It is the inherent defect in the claims, we are afraid, that impels us, as the final fact finding authority, to consider them from the stand-point of a valid and reasonable assessment. A project, to cite an example, which may ordinarily take 3-4 (say), or perhaps even 5, years, drags on, for several reasons, for 27 years. Interest, as a part of the project cost is claimed for the entire period! Sale commission, to cite another, is claimed without identifying the payee or the sale to which it relates. It is this overarching concern for a reasonable assessment that leads us to examine the claim of ERF, even as the same stands duly returned and assessed; in fact been allowed as an expense in assessment of the payer, all of which though, without any finding!

In Sum

7. The several issues attending the appeals have been discussed, highlighting the relevance and the need for being addressed in arriving at the correct income chargeable to tax for the current year (AY 2007-08). The claims made, i.e., *qua* capital gains; ERF; AOP, are not sustainable in law; rather, mutually contradictory. In fact, as would be apparent, as indeed admitted during hearing, the claims *qua* the latter two were made only with a view to enable a reasonable assessment of income. We agree in principle; it being only the real income that is, subject to the provisions of law, to be brought to tax. This is precisely, as would be presently seen, what we have attempted to. There is no gainsaying, however, that the claims, to be

acceptable, are to be valid in law and, further, conform to process known to law. Why, even income assessed in the hands of another, much less returned, is nevertheless liable to be assessed in the hands of the right person. The AO cannot, without issuing a finding as to the person to whom the income in reality belongs, and which can only be on the basis of material in his possession, assess income arising to one in the hands of another, even if agreed to by the latter, or even both. Tax can only be levied under the authority of, and following the due process of, law.

The assessee's reliance on *CIT v. Malibu Estate Pvt. Ltd.* [2008] 298 ITR 72 (Del), inasmuch as the copy of the same stands appended to the assessee's written submissions, without though being adverted to during hearing, is misplaced. In the facts of that case, a township by the name 'Malibu Township', for which approval was sought, required a minimum of 100 acres, while the land ceiling wasat 28 acres. This led to five companies entering into a joint venture, with four of them giving power of attorney to the fifth, the respondent company. It’s request for apportioning the income in the ratio of land holdings(even as returned and accepted in the instant case), if not assessed as a AOP, was not accepted by the Revenue.All that the Hon'ble Court held that no infirmity having been found in the concurrent findings by both the appellate authorities, no substantial question of law arises. That is, affirms the matter as essentially factual. In fact, it is only on admission of a substantial question of law that an adjudication u/s.260A of the Act could follow *(Maharaja Amrinder Singh v. CWT* [2017] 397 ITR 752 (SC); *Santosh Hazari v. PurushottamTiwari* [2001] 251 ITR 84 (SC)).In the instant case, on the other hand, we have, even at this stage, no clue as to when, and by whom the Approval was sought, or even if the same was later amended to co-opt others. Why, as against seven entities, with the land ceiling of 15 acres, the total area developed is a mere 9 acres. Here it also needs to be appreciated that while the land ceiling in*Malibu Estate Pvt. Ltd.* (supra) was with reference to the township area, in the instant case the same is only w.r.t. land holding *per se*, i.e., without any

reference to any project. In fact, 3 of the 6 companies, stated to be a part of AOP, came up much later, i.e., after a time lag of 20 years, i.e., which itself was much after the work began, even as the bulk of the development was done in the initial years.

If indeed a joint venture, different entities with varied complementary capabilities, including financial, or even strengths supplementing each other, would have come together to execute the project, defining their functional roles, agreeing to share the resultant profit in a predefined ratio, of which there is no contention, much less evidence. Land ownership, or extent thereof, cannot be, as suggested, a basis for division of profits in such a case, which has necessarily to be on the basis of the pooling of efforts, including resources. Yes, land could be thrown in the common hotchpotch, forming a separate vehicle for the purpose. On the contrary, easement right fee is charged by the companies to each other, defeating the very concept of AOP, which would be so even if ERF is limited to consent only. It is, as afore-noted, only a subsisting arrangement that can be taken cognizance of and given effect to, while we find it to be canvassed only in the appellate proceedings *de hors* the material on record as well as the conduct of the parties, perhaps for the reason that it is perceived more beneficial in view of netting of the income and loss that otherwise stands to arise across different companies.

The claim of AOP fails for another, fundamental reason. That is, it does not arise as an issue in the instant proceedings. Returns stand filed by the appellant before us, as indeed by other group companies, returning income on the land purchased sold by them in their individual capacities. The same, unrevised, stand accepted as such. *Where, then, one wonders, is the scope for any difference or dispute*? Our *jurisdiction* in the instant proceedings extends to the validity or otherwise of the assessments under challenge, including quantum thereof. It is not open for us to direct the AO to frame an assessment in the hands of another, not

before us, nor indeed the constituents of the stated person. There is nothing to show joint execution, nor sharing of surplus or loss. Why, even in case of joint development, it is possible that the costs are agreed to be shared proportionately, i.e., in the ratio of land-holding, so that each earns profit or, as the case may be, incurs loss, in relation to it's land-holding. The income claimed to be arising and, accordingly, returned was by way of capital gain, i.e., on holding a capital asset, which is admittedly in the individual capacity.This is despite the fact that the value of the land gets fillip only due to its development and connectivity with the main land – again a form of development. There is, further, no doubt on the legality of the said sales, which result in the passing of legal title to the buyer of land. Merits apart, on which we have dealt with at length (para 6.2), the assessee seeks to raise a jurisdictional issue, precluded by both, statutory limitation, as well as the law on retraction. The only issue that could arise under the circumstances is the computational issue/s, including the head of income, as indeed we find it to be.Further still, it is only in case of the facts being undisputed, otherwise admitted, couldthelegal issue be raised for the first time. That apart, several inconsistencies in its case observed put pays the assessee's claim of an AOP. The issue of letters of consent (dated15.3.2023), filed with the Tribunal on 16.03.2023, seeking the assessment of income in the hands of the AOP consisting of all the seven entities, is not sustainable in law in the facts and circumstances of the case. A case, perhaps, could have been made out for an AOP comprising the two promoter companies, i.e., BEPL and GHPL, and BRA, while we observe no such claim at any stage, with each rather filing it's return, which was not revised, in individual capacity. There is, further, no sharing of the profits/losses, as was found in *Malibu Estate* (supra).

The assessee's claim *qua* ERF, which militates against the concept of AOP, is equally fraught. Its economic rationale, which only would justify it, remains elusive even after examining it from all angles. It speaks of consent, and not charge, much less of how it is arrived at. It is not, as presumed by us, a development fee levied by

the companies undertaking development work from those who bought developed land later, in some defined ratio, in which case it would find mention in the purchase deed and, in fact, is not required to be so charged as it would get factored automatically in the land price - which is only on account of it being developed, and which also takes into account the locational advantage of any piece of land, i.e., the second reason stated for its charge. Rather, so construed, whatever the nomenclature of the charge, it would stand to be realized from all the buyers, and not the group companies alone. And which in fact suggests it to be a mechanism to save on stamp duty, i.e., where the land is being transacted amongst the group companies, rationale of which, again, has not been explained. And, rather, is inconsistent, if not contradicts, the statement that the companies were set up only for the purpose of getting around the ceiling limitation, which also goes against the claim of AOP. The total land developed is less than 9 acres (900 cents), while the land ceiling is stated to be at 15 acres per company (entity). The charge - which on its premise of compensating for land contributed to the common areas, cannot be charged from an outsider party, as has been, and from a different set of companies, presenting a different ratio, i.e., not in agreement with what stands stated in its respect or as per the agreement.

The conceptual infirmities apart, the stated ratio does not obtain in reality (Table E), with a charge raised on NCs and, further, inextricably *not on the land purchased,* but on that sold, by them(PB-1, pg. 12)! None of the claims hold. Stated to arise on the basis of an agreement dated 17.4.2001, it is not shown to have been charged thereunder and, further, since then, even as the same ought to, where serving a purpose, be in vogue since inception; the bulk of the development being prior thereto. Why, 92 % of the cost stands incurred prior to 2001. Rather, it appears to be by way of a consent of the companies contributing their land to the common areas, a permission so to speak, toward smooth conduct of the operations, till the project is nearly sold out. *How, one wonders, levy of fee would ensure is*

smooth conduct of operations? Again, inexplicably, it is also found as arising to AAPL, even as it admittedly owns no land, so that the further question of any contribution of land by it does not arise and, two, in a sum - worked out, at the same ratio, much higher than that for BRA (proprietor Ajit Associates), who substitutes it. There are other anomalies as well. Our concern, however, for this, undisputed charge (ERF), duly returned and assessed - which explains our stating it as not in dispute, either between the parties to the agreement (payer and payee), or even between the parties before us, is not for the reason that the assessee(s) now wishes to retract therefrom, but if it does represent a valid charge, which we find as so *qua* the variable land contribution, in which case it would be by way of an *inter se* adjustment between the relevant companies (Table E), and would stand to be by way of one-time charge, constituting an expense and income for the payer and payee (enterprise) respectively. In fact, in either case, i.e., arising as a cost or as a credit, it would stand to be appropriated toward the cost of land. In fact, adjustment to this effect would also prevent the distortion of the operating statement of the relevant companies and, rather, *it is the not making of the adjustment in its respect that would tantamount to a transfer of profit/loss by one company to another*. It is, as afore-said, only when one gains at the expense of the other that a charge by the latter in its respect is called for, validating the same, irrespective of the name ascribed to it. That is, cannot survive if it is without an economic rationale, as is being now contended by the assessees before us, seeking it being disregarded in an attempt to equalize profit, for which, on the contrary, all that isrequired is to compute the aggregate cost, neutralizing it by applying it across different entities. That is, it does not, particularly in the absence of accounts, require either a charge of ERF, or being assessed as an AOP.

Continuing further, i.e., *qua* the computational issues, the development cost, of which there is in fact no record, is aggregated across all companies, for the entire land, and allocated to each in the proportion of land holding. This is as the same

could be regarded as a revenue expenditure only to that extent. Any cost incurred in excess of the proportionate land holding by any entity, would be for and on behalf of another and, therefore, recoverable from it. That is, on capital account. As afore-stated, this would obviate the need to raise any charge for ERF, or for the claim of an AOP, which even otherwise cannot be raised at this stage. The only aspect arising is a variable contribution, in terms of ratio, to the common pool by different companies (Table-B). The same, again, presents no issue as the saleable area, for each company, can be regarded as that available on the average, i.e., 87.71 % (100-12.29 / see para 6.3). Thus, for each sale made by any entity, the proportionate land cost allowed to it would be 1.14 (100/87.71) times the land sold. That is, for each 100 cents of land sold, the land cost set off would be corresponding to 114 cents. This would by itself distribute the common area load across different entities holding land in the proportionate ratio. The excess cost, if any, incurred by anyone would stand recoverable from the other. The aggregate cost, across all companies, spread over the total area available for sale (624.533 cents), adopting the common area load at 14% of the land sold, would thus operate to remove all inter-company variations in income arising due to lack of proper accounting, as indeed address the assessee's principal concern of distortion of profits across different companies which, in fact, is accentuated by the charge of ERF. All other inter-company adjustments, including ERF, are to be ignored, including the inter-company purchases/sales of land, be it developed, under-developed or undeveloped. Sure, the title to the buyer of the land flows from the seller thereof. We are not for a moment doubting the legality of the transaction. But only that the inter-company transactions remain wholly unexplained, nor has any profit prior to AY 2007-2008 been returned thereon, even as there have been, as pointed out by the Revenue authorities, numerous transactions. Besides, it shall present computational issue as the land may be fully or partly developed, necessitating allocation of development cost between the transacting companies,

unfeasible in the absence of any record; there being no claim in its respect. In fact, given a profile of the area contributed, categorizing it as A, B and C (say) in terms of locational advantage of the balance land (other than common), weights could be assigned thereto, and inter-company adjustment made, or directed to be, toward the second distortion for which ERF was reportedly conceived. There is, however, nothing on record *qua* the said disadvantage – which could be easily demonstrated in terms of differential sale value, for us to direct so; the entire case being based on bald statements, with there being nothing to even show of the entire area of 896 cents forming part of a single, composite area. In fact, as we see it, there being no evidence of any actual sharing of profits/losses, with, rather, the companies raising charge of ERF on each other, the claim in its respect, as indeed *qua* AOP, is guided principally by the motive to; the claim of capital gains failing, arrive at a reasonable estimate of profit/loss for each of the entities.

Needless to add, the cost as arrived at shall be constant across all the entities, who shall therefore, should they so desire, be allowed by the AO to act as interveners, adducing the material, if any, they wish to rely upon. The assessees before us shall, accordingly, also communicate this fact to the other companies.

In Conclusion

8. The assessments, in view of the foregoing, are restored back to the file of the assessing authority. We have, considering the indeterminate state of affairs, with the assessee's claims being both unsubstantiated and inchoate, construed the issue arising before us holistically, i.e., the income assessable, including the head under which it is, in the facts and circumstances of the case, i.e., in accordance with law, also addressing the additional grounds. The claim of AOP does not survive, being both untenable and without jurisdiction. As regards ERF, the assessee itself seeks it's disregard despite returning it. In our view, the same could hold only where the same is shown to represent an economic charge, i.e., where one gains at the expense of the other, while, that as presented bears anomalies, discussed in detail in

the order. We are conscious that assessments have been made in the group companies, assessing loss on account of ERF, and which, being undisputed, may have attained finality. That however would not detain us inasmuch as the said assessments are not before us and, two, it is only the correct legal position, and not the view of the parties in the matter, that would hold. If an assessee benefits under the circumstances, in view of the statutory limitation/s, so be it. The income arises as business income and, accordingly, is to be computed in accordance with the relevant provisions which, as observed, have been highlighted. The AO shall, where and to the extent contested, issue definite findings on each of the computational aspects, including ERF, and assess the total income in accordance with law after affording reasonable opportunity of hearing and to present it's case before him to the assessee. Retention of ERF by him would again require definite findings, meeting the issues raised herein in its respect. We decide accordingly.

9. In the result, the assessee's appeals are allowed for statistical purposes.

Order pronounced on August11, 2023 under Rule 34 of The Income Tax (Appellate Tribunal) Rules, 1963

Sd/-	Sd/-
(AbyT.Varkey)	(Sanjay Arora)
Judicial Member	Accountant Member

Cochin; Dated: August11, 2023
Devadas G*

Copy to:
1. The Appellant.
2. The Respondent.
3. The Pr. CIT concerned.
4. The Sr. DR, ITAT,
5. Guard File.

Asst.Registrar
Cochin.ITAT, Cochin