

IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH KOLKATA

**BEFORE SHRI RAJPAL YADAV, VICE PRESIDENT
AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER**

**IT(SS)A No.111/Kol/2014
Assessment Year: 2008-09**

Shyam Sundar Patodia 188/1G, Manicktala Main Road, Kolkata-700054. (PAN: AFOPP0215K)	Vs.	Deputy Commissioner of Income-tax, Central Circle-VIII, Kolkata.
(Appellant)		(Respondent)

&

**ITA No.1247/Kol/2014
Assessment Year: 2008-09**

Deputy Commissioner of Income-tax, Central Circle- VIII, Kolkata.	Vs.	Shyam Sundar Patodia 188/1G, Manicktala Main Road, Kolkata-700054.
(Appellant)		(Respondent)

&

**IT(SS)A No.112/Kol/2014
Assessment Year: 2010-11**

Shyam Sundar Patodia 188/1G, Manicktala Main Road, Kolkata-700054.	Vs.	Deputy Commissioner of Income-tax, Central Circle-VIII, Kolkata.
(Appellant)		(Respondent)

&

**ITA No.1248/Kol/2014
Assessment Year: 2010-11**

Deputy Commissioner of Income-tax, Central Circle- VIII, Kolkata.	Vs.	Shyam Sundar Patodia 188/1G, Manicktala Main Road, Kolkata-700054.
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Miraj D. Shah, Advocate
Revenue by : Shri Abhijit Kundu, CIT, DR

Date of Hearing : 01.06.2023
Date of Pronouncement : 23.08.2023

ORDER**PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:**

All these captioned cross appeals filed by the assessee and revenue are against the order of Ld. CIT(A)- Central-1, Kolkata vide Appeal No. 196/CC-VIII/CIT(A)C-1/13-14 dated 31.03.2014 (for AY 2008-09) and No. 195/CC-VIII/CIT(A)C-1/13-14 dated 31.03.2014 (for AY 2010-11) against the assessment order of DCIT, Central Circle-VIII, Kolkata, Ward-6(3), Kolkata u/s.153A r.w.s.143(3) of the Income-tax Act, 1961 (hereinafter referred to as the "Act"), dated 04.09.2013 for AY 2008-09 and u/s. 143(3) for AY 2010-11, respectively.

2. These are cross appeals for the two assessment years i.e. AYs 2008-09 and 2010-11 by both, the assessee and the department. The issue involved in these set of four appeals is common, relating to the addition made by the Ld. AO in respect of real estate transactions of sale of flats whereby income has been assessed in the hands of the assessee, which is claimed by the assessee not to have accrued to him and, therefore, ought to have been excluded from the assessment. Another issue is raised by the department in AY 2008-09 on the applicability of section 40A(3) which also relates to expenditure incurred in respect of the same real estate transactions, alleged to have been paid in cash. For

the purpose of clarity, revised grounds taken by the assessee and the revenue in their respective appeals are reproduced as under:

2.1. Revised grounds of appeal of assessee in IT(SS)A No. 111/Kol/2014 for AY 2008-09

“1. For that the additions made without any incriminating material found in the premises of the assessee cannot be sustained and the same should be deleted.

2. For that the additions relating to other group entities cannot be made in the hands of the assessee, there is no estoppels in law hence such addition should be deleted.

3. For that the income from sale of flats can only accrue in the hands of the owners of the flat and not in the hands of the assessee. Hence all such addition should be deleted.

4. For that the income on account of part sale proceed of flat can only be assessed in the year in which the flat was completed and handed over to the flat owners and not in the year of receiving advance hence the additions be deleted.

5. For that income cannot be assessed merely because the same is offered to tax in the return of income and hence income which did not accrue during the year or did not accrue to the assessee should be excluded from the assessment order.

6. Without prejudice to the above that the deduction of Rs.2,04,60,000 was wrongly restricted to Rs.1,49,00,000. The entire amount be allowed as deduction in computing income of the assessee.

7. Without prejudice to the above that the deduction of Rs.32,00,000 was wrongly rejected. The entire amount be allowed as deduction in computing income of the assessee.

8. For that the addition of Rs.34,00,000 was wrongly upheld. The addition is uncalled for and the same be deleted.

9. For that the addition of Rs.63,86,000 was wrongly upheld. The addition is uncalled for and the same be deleted.

10. Without prejudice to the above that telescoping of the addition be allowed against expenditure/application for the purpose of computing the income.

11. For that the presumption u/s 292C of the I T Act 1961 was in favor of the assessee and hence all the deduction/ claims be allowed as per law.

12. For that the interest u/s 234A of the IT Act 1961 can be imposed only till the filing of return and hence the excess interest levied be deleted.

13. For that the interest u/s 234B/C of the IT Act 1961 was charged in excess of what is provided in law and hence the same be restricted and recomputed as per law. “

2.2. Revised grounds of appeal of revenue in ITA No. 1247/Kol/2014 for AY 2008-09

“1. Whether on the facts and +in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the disallowance of expenditure of Rs. 81,00,000/- towards payments to PS Housing, as compensation money in cash, as claimed by the assessee.”

2. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the disallowance of expenditure of Rs. 50,00,000/- made in cash for the sake of boundary wall, as claimed by the assessee.

3. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in restricting the addition of Rs.2,04,60,000/- to Rs. 55,60,000/- only after allowing the expenditure of Rs. 1,49,00,000/-, claimed to have been paid to land lord and encroachers.”

4. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in not considering the applicability of Section 40A(3) on the above mentioned transactions.”

2.3. Revised grounds of appeal of assessee in IT(SS)A No. 112/Kol/2014 for AY 2010-11.

“1. For that the additions made without any incriminating material found in the premises of the assessee cannot be sustained and the same should be deleted.

2. For that the additions relating to other group entities cannot be made in the hands of the assessee, there is no estoppels in law hence such addition should be deleted.

3. *For that the income from sale of flats can only accrue in the hands of the owners of the flat and not in the hands of the assessee. Hence all such addition should be deleted.*
4. *For that the income on account of part sale proceed of flat can only be assessed in the year in which the flat was completed and handed over to the flat owners and not in the year of receiving advance hence the additions be deleted.*
5. *For that income cannot be assessed merely because the same is offered to tax in the return of income and hence income which did not accrue during the year or did not accrue to the assessee should be excluded from the assessment order.*
6. *Without prejudice to the above that the addition of Rs.1,02,47,900 in the hands of the assessee is uncalled for and unjustified and illegal and hence the same be deleted.*
7. *Without prejudice to the above that the deduction of Rs.1,00,00,000 in the hands of the assessee is uncalled for and unjustified and illegal and hence the same be deleted.*
8. *Without prejudice to the above that the deduction of Rs.46,21,900 was wrongly rejected. The entire amount be allowed as deduction in computing income of the assessee*
- 9 . *Without prejudice to the above that telescoping of the addition be allowed against expenditure/application for the purpose of computing the income.*
11. *For that the presumption u/s 292C of the I T Act 1961 was in favor of the assessee and hence all the deduction/ claims be allowed as per law.*
12. *For that the interest u/s 234A of the IT Act 1961 can be imposed only till the filing of return and hence the excess interest levied be deleted.*
13. *For that the interest u/s 234B/C of the IT Act 1961 was charged in excess of what is provided in law and hence the same be restricted and recomputed as per law. “*

2.4. Ground of appeal of revenue in ITA No. 1248/Kol/2014 for AY 2010-11:

“1. That on the facts and circumstances of the case the Ld. CIT(A) has erred in deleting the addition of gross receipts of Rs.3,59,94,966/- in cash from sale of flats by the assessee.”

3. As aforesaid, since the issues are common, we will take up the appeal for AY 2008-09 to deal with the facts of the case. Brief facts as culled out from the records are that assessee is engaged in the business of manufacture and export of electrical and electronic switch gear assemblies and other allied items. This business is carried on under the name and style of M/s. Venus Control & Switchgear Pvt. Ltd. wherein he is the Managing director. Assessee is also into the business of real estate which is done under the name and style of M/s. Patodia Real Estate & Builders Pvt. Ltd. wherein he is one of the directors.

3.1. A search and seizure operation was carried out on 23.02.2010 at the residence of the assessee and his family members at 188/1G, Maniktola Main Road, Kolkata-700054 including the operation of locker No. D-293 and H-503 with Corporation Bank, Manicktola Branch in the name of the assessee and his wife Smt. Manju Patodia. In the course of search and seizure operation, assessee had made a disclosure of Rs.7.50 Cr. on behalf of his family members and group concerns, in his statement u/s. 132(4), recorded on 07.04.2010. While submitting the break up of undisclosed income before DDIT (Inv.) Unit-III(3), Kolkata, it stood at Rs.7,50,46,220/-.

3.2. Notices u/s. 153A were issued and served on the assessee. Assessee filed his return in response to notice u/s. 153A, reporting total income for AY 2008-09 at Rs.6,07,607/-. In the course of assessment proceedings, assessee filed an application u/s. 245C(1) of the Act before the Settlement Commission for the assessment years 2004-05 to 2010-11 which was rejected. Another application was moved by the assessee before the Settlement Commission which was allowed to be proceeded

u/s. 245D(1) wherein the sum disclosed was of Rs.7,61,69,532/-. However, Settlement Commission treated this second application filed by the assessee as “not invalid” by passing an order u/s/. 245D(2C) dated 17.02.2012. In the said order, Settlement Commission abated the proceedings and opined that it would be for the department to decide “to whose hand and how its income needs to be taxed since applicant did not make a full and true disclosure of his income and has also not given the manner in which the undisclosed income was generated and hence, not a fit case for settlement.”

3.3. Consequent to the rejection by the Settlement Commission, assessee furnished his revised return including the income which was disclosed before the Settlement Commission. Break-up of income reported in the said revised return for AY 2008-09 is as under:

- (i) Income from salary Rs.4,10,400/-
- (ii) Income from other sources Rs.3,12,207/- (Rs.38,958/- was shown in the original return and additionally disclosed Rs.2,73,249/-).
- (iii) Additional income disclosed Rs.4,46,09,088/-.

3.3.1. Further break-up for additional income disclosed in the revised return is as under:

- (i) For deposits in undisclosed bank accounts and other outgoings - Rs. 15,69,088/-.
- (ii) Income from real estate (Net) - Rs.3,78,40,000/-,
- (iii) Undisclosed payment for purchase of Gurgaon land - Rs.50,00,000/-,
- (iv) Expenditure on foreign tour for self and son - Rs.2,00,000/-,

Thus, totalling to Rs 4,46,09,088/-.

3.3.2. Computation of additional income of Rs.3,78,40,000/- from real estate business included by the assessee in the revised return is tabulated as under:

Description	IM No.	Page No.	Amount	Amount
Consideration money received by cash in respect of sale of property no. 156A Manicktalla Main Road	VCS/44	9, 32, 37, 38, 39, 40, 41, 43, 44, 85, 93, 115, 174		7,46,00,000
Less:				
Paid to PS Housing as compensation money in cash	VCS/44	93, 115, 174, 85, 37, 9	81,00,000	
Amount paid for boundary wall in cash	VCS/44	93, 115, 85, 9	50,00,000	
Amount paid for commission	VCS/1, 6 & 16	16, 5, 10	32,00,000	
Amount paid to land lord and Encroachers in cash	VCS/45	1 to 10	2,04,60,000	3,67,60,000
TOTAL				3,78,40,000

3.3.3. Ld. AO while dealing with the issue in respect of income from real estate transactions as tabulated above, did not allow the deduction claimed by the assessee of Rs.3,67,60,000/- relating to compensation money paid to P. S. Housing amount paid for boundary wall, commission and payment to landlord and encroachers, all of which made in cash.

3.4. While dealing with this issue, ld. AO further noted that there is an outstanding amount of Rs.34,00,000/- from Mani Square Pvt. Ltd. and Rs.63,86,000/- due from S. K. More (HUF) which was not included while computing the income from real estate, tabulated above. Non-inclusion of the two amounts on the premise that mercantile system of accounting is followed by the business concerns was not accepted by the Ld. AO. He thus, added these two amounts to the total income of the assessee in

respect of real estate transactions, holding it as gross receipt from sale of flats.

3.5. Ld. AO thus, computed the income of assessee from real estate business as under:

Description	Amount (in Rs.)	Amount (in Rs.)
Consideration money received by cash in respect of sale of property no. 156A Manicktalla Main Road		7,46,00,000
Add:		
Amount due from M/s Mani Square Pvt. Ltd.	34,00,000	
Amount due from S. K. More (HUF)	63,86,000	97,86,000
Less:		
Paid to PS Housing as compensation money in cash	NIL	
Amount paid for boundary wall in cash	NIL	
Amount paid for commission	NIL	
Amount paid to land lord and Encroachers in cash	NIL	NIL
TOTAL		8,43,86,000

3.6. To arrive at the amount of addition towards income from real estate business, ld. AO gave credit for undisclosed income on account of real estate activity already reported by the assessee in his revised return, amounting to Rs.3,78,40,000/-. He thus, arrived at an additional income of Rs.4,65,41,000/- for the purpose of making addition to the total income of the assessee (Rs.8,43,86,000/- - Rs.3,78,40,000/-). Aggrieved, assessee went in appeal before the Ld. CIT(A).

4. Before the Ld. CIT(A), summary of additions which were disputed were as under:

Description	Amount (Rs)
Paid to PS Housing as compensation money in cash	✓ 81,00,000/-
Amount paid for boundary wall in cash	✓ 50,00,000/-
Amount paid for commission	✗ 32,00,000/-
Amount paid to land lord and encroachers in cash	✗ 2,04,60,000/-
Amount due from Mani Square Ltd	(allowed) (confirmed) ✗ 34,00,000/-
Amount due from S.K.More HUF	✗ 63,86,000/-
Total	4,65,46,000/-

4.1. Ld. CIT(A) has dealt with each of the issue in detail by referring to the seized material as well as the details and written submission furnished by the assessee, all of which has been elaborately discussed in his order. While disposing of the first appeal, Ld. CIT(A) has given relief in respect of amounts paid as compensation money to P. S. Housing and that paid for boundary wall. Also, partial relief has been given of Rs.1,49,00,000/- out of Rs.2,04,60,000/- for amount paid to landlord and encroachers, the balance of Rs.55,60,000/- has been confirmed. Amount paid for commission and the outstanding from Mani Square Ltd. as well as S. K. More & Son, HUF has been sustained for the addition made by the Ld. AO. Thus, appeal of the assessee was partly allowed. Aggrieved, both assessee and revenue are in cross appeals before the Tribunal.

5. Before us, Ld. Counsel at the outset, referred to para 8.1 of the assessment order for AY 2008-09 to put forth the correct state of facts in respect of the real estate business for which additions have been made in the hands of the assessee. Ld. Counsel has strongly contested on the real income theory and that no tax can be imposed on the assessee on the basis of estoppels. According to him, equity is outside the purview of tax laws. Assessee is liable to pay tax only upon the taxable income. In doing so, according to Ld. Counsel, the AO cannot assess income of the assessee for an amount which is not taxable, though shown by the

assessee in his return. According to him, where a person is taxed wrongfully, he is entitled to be relieved of it, in accordance with law. Ld. Counsel asserted that AO can and he must tax the right person and the right person alone which according to him, is the person who is liable to be taxed according to the law in respect of the particular income.

5.1. To substantiate this claim made by the Ld. Counsel, he read out para 8.1 and para 8.2 containing the factual observations noted by the Ld. AO in the course of assessment. The same are extracted below for ease of reference.

8.1. The assessee entered into the Real Estate Business by purchasing a plot of land measuring 131 cottahs, 4 chhattacks, 12 sq.ft. at 156A, Maniktalla Main Road, Kolkata – 700 054, registered on 18.01.2007 with a consideration of Rs. 5,35,99,333/-. The real estate business was carried out through as many as 19 front companies which acquired the said plot of land. It is seen from the seized documents especially one with I.D. Mark VCS/44 that this plot of land was handed over to M/s Mani Square Pvt. Ltd. for development under a Development Agreement executed on the same date of purchase i.e. on 18.01.2007. In terms of this agreement, 50% of the developed space (1,25,000 sq.ft.) excluding car parking space was to be handed over to Shri Shyam Sundar Patodia in his capacity, as the representative of the said land owners 19 companies. In terms of the Development Agreement, an amount of Rs. 6 crores was received from M/s Mani Square Pvt. Ltd. as Security Deposit by the 19 companies. It was also mutually agreed upon that out of the 19 companies, the Mani Group would take over the management of 9 companies as the entire shareholding was to be transferred to the promoters of Mani Group. The management of the 9 companies was taken over by Mani Group after the said Development Agreement. It is seen from the application before the Settlement Commission as well as return filed u/s 153A that the assessee has shown following year-

wise breakup of receipts from his business of real estate, which were not shown in the original return of income.

Sl. No.	A.Y.	Receipts
1.	2008-09	7,46,00,000/-
2.	2009-10	60,00,000/-
3.	2010-11	2,31,62,270/-
	Total	10,37,62,270/-

8.2. From the seized documents, it is evident that the assessee has received cash against the sale of flats from the following intending purchasers:

Sl. No.	Unit No.	Name of the Purchaser	Relevant A.Y.	Cash transaction found from seized materials but not shown in the Books (in Rs.)	Reference of seized materials
(1)	(2)	(3)	(4)	(5)	(6)
1	NA	Mani Square Ltd. (Including covered and uncovered garage space in 24 Nos. each)	2008-09	84000000	VCS 44/93
2	NA	Sambhu More	2008-09	9900000	VCS 44/6,30
	NA	Sambhu More	2008-09	6386000	VCS 44/11
3	NA	Ranjan Podder	2010-11	400000	VCS 5/28
	NA	Ranjan Podder	2010-11	500000	VCS 1/27
4	2DB	Deepak & Rinku Chhajer	2010-11	705500	VCS 4/12
5	2DC	Subodh & Sunita Chhajer	2010-11	6600000	VCS 4/11
6	3DB	Sanjay & Suchi Rungta	4 Flats were allotted to Rungta family and cash was received collectively irrespective of allottee of flats.		
7	5DB	Anup & Anita Rungta	2010-11	13116200	VCS 23/32
8	6DB	Kanta Rungta	4 Flats were allotted to Rungta family and cash was received collectively irrespective of allottee of flats.		
9	3DC	Sandeep & Archana Rungta	2010-11	2500000	VCS 6/13
10	5UA	Anita Jalan	2010-11	3613100	VCS 23/19
11	12UC	Aiay Kr. Mohta	2010-11	2356770	VCS 2/12
12		Aiay Kr. Mohta	2010-11	3618600	VCS 23/19
TOTAL				133696170	

The assessee was asked to explain why the unaccounted receipts in cash from sale of flats should not be taken at Rs. 13,36,96,170/- instead of Rs. 10,37,62,270/-. The assessee was also asked to furnish the details of flat owners including their names, areas of flats, rates and purchase considerations.

5.2. From the above, Ld. Counsel pointed out that real estate business was carried out through nineteen companies which had acquired a plot of land at 156A, M. M. Road, Kolkata measuring 131 cottahs 4 chittaks and 12 sft. The said land was purchased by nineteen companies through a registered deed dated 18.01.2007 at Rs.5,35,99,333/-. These nineteen companies entered into agreement dated 18.01.2007 with the developer, Mani Square Pvt. Ltd. for development of the said land and construction of the proposed building complex by the said developer. In terms of this agreement, 50% of the developed space i.e. 1,25,000 sq. ft. was to be handed over to the assessee in his capacity as the representative of the said land owners i.e. nineteen companies. From these facts, ld. Counsel asserted that Ld. AO himself has taken note of the actual and correct facts relating to real estate business which was carried out by the nineteen companies in agreement with the developer, Mani Square Pvt. Ltd.

5.3. According to the Ld. Counsel, role of assessee was in the representative capacity only. The Income from real estate business has wrongly and under mistaken belief, been included in the hands of the assessee which ought to be corrected, even though assessee has included the same in his revised return filed in response to notice u/s. 153A of the Act, post rejection of second application made before the Settlement Commission. Ld. Counsel also pointed out from the table in para 8.2 of

the assessment order (extracted above) wherein Ld. AO observed that assessee has received cash against the sale of flats from the purchasers. In this respect, he submitted that against the name of the purchaser Mani Square Pvt. Ltd., the amount of cash transaction found from seized material but not shown in the books is stated as Rs. 8.40 Cr. for the seized material inventorised as VCS 44/93. According to the Ld. Counsel, this transaction with Mani Square Pvt. Ltd. was undertaken between itself i.e. Mani Square and the nineteen companies who are the owner of the said plot of land and not the assessee. Thus, Ld. Counsel reiterated that when and how this income accrued and what are the consequences that follow from accrual of income is well settled. Accrual must be real, taking into account the actuality of the situation. Whether an accrual has taken place of income must, in appropriate cases, be charged on the imposition of real income theory.

5.4. According to him, in determining the question whether it is hypothetical income or whether real income has materialized or not, the correct set of facts have to be taken into account. For this assertion, he placed reliance on the decision of Hon'ble Supreme Court in the case of State Bank of Travancore Vs. CIT (1986) 158 ITR 102 (SC). He further placed reliance on the decision of Hon'ble jurisdictional High Court of Calcutta in the case of CIT Vs. Bhaskar Mitter (1994) 73 Taxman 437 (Cal), according to which, "*there is no estoppel by conduct against law nor is there any waiver of the legal right as much as the legal liability to be assessed otherwise than according to the mandate of the law. It is always open to an assessee to take the plea that the figure, though shown in his return of total income, is not taxable in law*". He also placed reliance on the decision of Sail DSP VR Employees Association 1998 Vs. Union of India (2003) 262 ITR 638 (Cal) wherein it was held that "*what is*

not otherwise taxable cannot become taxable because of admission of the assessee nor there can be any waiver of the right otherwise admissible to the assessee in law. Chargeability is not dependent on the admission of or waiver by the assessee. Chargeability is dependent on the charging section, which needs to be strictly construed.”

5.5. To emphasize on the doctrine of estoppels, Ld. Counsel placed reliance on the decision of Modern Malleables Ltd. Vs. CIT 199 Taxman.331 (Cal) wherein the Hon’ble Court had dealt with the issue of alleged deliberate and fictitious entry in the accounts. In this respect, the Hon’ble Court opined that *“even if we assume for the sake of argument that it was a case of deliberate and fictitious entry, it is the duty of the Income-tax Authority to find out the real nature of the transaction behind the said entry and to pass appropriate order of assessment in accordance with law. Merely because the assessee had made a wrong or even inventorized entry in the accounts, such fact cannot be a ground for accepting such wrong or fictitious entry”*. Hon’ble Court thus held, *“it is well known that the doctrine of estoppel is not applicable against the statute. If a particular income is not taxable under the Income-tax Act, it cannot be taxed on the basis of estoppel or any other equitable doctrine.”* Ld. Counsel thus, strongly asserted that assessee has been wrongfully taxed in respect of income from real estate business though part of which has been included by himself in the revised return filed in response to notice u/s. 153A of the Act and part of it has been added by the Ld. AO. According to him, assessee is undoubtedly entitled to be relieved of such wrongful taxation in accordance with the provisions of law.

6. Per contra, Ld. CIT, DR asserted that assessee himself has filed revised return of income pursuant to rejection of second application filed before the Settlement Commission and included the undisclosed income therein. According to him, assessee is the ultimate beneficiary even though the transactions have been stated to be entered into between the nineteen companies and the developer i.e. Mani Square Pvt. Ltd. Ld. CIT DR submitted that assessee is one of the director and key person of the group, other directors were his wife and son which shows that the entire affair of the companies and the group were controlled by the assessee. He also submitted that assessee has not raised this plea before the Ld. CIT(A) that additions made in the hands of the assessee are relating to the other group entities and not the assessee which is being raised for the first time before the Hon'ble Bench and, therefore, the contention now raised for the first time is not tenable.

6.1. In respect of applicability of section 40A(3) for the payments made in cash Ld. CIT DR submitted that assessee has claimed certain payments while computing the income from real estate business which have been made out in cash and, therefore, are to be disallowed u/s. 40A(3). Ld. CIT DR referred to the paper book including a written submission containing in total, 158 pages, placed on record.

7. We have heard the rival contentions and perused the material available on record and carefully gone through the submissions made before us. We note that assessee has filed his revised return in response to notice u/s. 153A pursuant to rejection of his second application before the Settlement Commission wherein he included certain portion of undisclosed income which was offered before the Settlement Commission relating to the real estate business. In the course of

assessment, Ld. AO has made additions in respect of real estate business income, for that portion which the assessee has claimed as deduction or allowance. Assessee has made detailed submission in respect of the seized material explaining each of the entries made therein forming part of the order of Ld. CIT(A).

7.1. At the same time, from the perusal of the assessment order, especially para 8.1 and 8.2, we note that Ld. AO has captured the facts relating to the conduct of real estate business by nineteen companies and assessee's role in the capacity of representative only. These factual observations are contrary to the additions made by the Ld. AO in respect of income from real estate business in the hands of the assessee, who is an individual. However, there is nothing on record from where it is discernible that correct income in respect of real estate business has been assessed in the hands of the nineteen companies under the provisions of the Act. There is nothing on record to understand what is the status of these nineteen companies and whether any substantive or protective addition has been made in their case or whether they have been held to be shell companies whereby the corporate veil has been lifted/pierced to make the addition in the hands of the assessee.

7.2. We do find force in the submissions made by the Ld. Counsel on the real income theory and doctrine of estoppels supported by the judicial precedents discussed above which are not reiterated for the sake of brevity. We also cannot negate the important factual details surfaced out by the Ld. CIT DR whereby assessee is the ultimate beneficiary since either he or his spouse or son are the directors in the companies which have been claimed to conduct the real estate business. Lifting of the corporate veil is an important aspect which cannot be ignored. Further,

in respect of assessment year 2010-11, Ld. AO has made an estimation to make an addition in respect of undisclosed income against sale of flats which also forms part of the same real estate business. In this respect, Ld. AO has made an addition on estimate basis for gross receipt from sale of flats holding it as unaccounted receipt.

8. Considering the facts on record and the discussion made above, we find it proper to remit the matter back to the file of Ld. AO for de novo assessment in respect of the additions made in the hands of the assessee for income from real estate business more particularly in view of the facts stated by the Ld. AO in para 81. And 8.2 of the impugned order. Ld. AO is directed to ascertain the status of nineteen companies as well as the developer Mani Square Pvt. Ltd. to satisfy himself in respect of their respective assessments for the undisclosed income which has been added correctly in the hands of the assessee pursuant to the seized material on record.

9. While remitting the matter back to the file of Ld. AO, we are aware of the provision of section 292C of the Act which creates a legal fiction whereby in case of search and seizure, contents of seized material are presumed to be true unless rebutted by the party claiming contrary. We note that the term used in section 292C is "may be presumed". The said term implies that presumption is rebuttable. The term 'rebut' means 'to disprove'. In other words, unless contrary is proved, what is stated in the seized documents has to be presumed to be true and thus, provisions of section 292C do not confer discretionary power on the department to presume or not to presume the correctness of seized documents. In the present case, seized material was found from the possession and control of the assessee during the course of search and by legal fiction presumed

u/s. 292C, it had to be drawn that the said documents belong to the assessee and the contents thereof were true unless disproved by cogent evidence. The onus to prove that what is apparent from its seized material is not real, is on the party which claims it to be so. We further observe that when a conclusion has been reached on an appreciation of a number of facts, whether i.e. sound or not, must be determined, not by considering the weight to be adjudged to each single fact in isolation, but by assessing the cumulative effect of all the facts in their setting as a whole. Hence, we consider it proper for de novo assessment owing to the factual observations made by the Ld. AO in respect of conduct of real estate business vis-à-vis the addition made by him in the hands of the assessee.

9.1. Also, it is worth noting that ground raised by the revenue in respect of applicability of section 40A(3) for disallowance of expenditure made in cash, we find that these are also in respect of deductions claimed by the assessee while computing the income from real estate business. Accordingly, grounds taken by both the assessee and the revenue in their respective appeals are allowed for statistical purposes as in terms of observations and directions stated above.

10. Since the matter is restored to the file of AO for fresh adjudication in terms of finding and observation made here, we are not expressing any view on the merit of the case so as to limit the assessment procedure before the AO. The observation made herein by us in remanding the matter back to the file of Ld. AO will not impair or injure the case of the revenue nor will it cause any prejudice to the defense or explanation of assessee. Needless to mention that AO shall give sufficient opportunities to the assessee and the assessee shall also avail the same.

11. Since the issue involved in assessment year 2010-11 are similar relating to the real estate business income assessed in the hands of the assessee on the same stated set of facts, the observations and findings given by us in AY 2008-09 apply *mutatis mutandis* to this year also. Accordingly, both the appeals of the assessee and the revenue are allowed for statistical purposes.

12. In the result, all the appeals of the assessee as well as the revenue are allowed for statistical purposes.

Order pronounced in the open Court on 23rd August, 2023.

Sd/-
(Rajpal Yadav)
Vice President

Sd/-
(Girish Agrawal)
Accountant Member

Dated: 23rd August, 2023

JD, Sr. P.S.

Copy to:

1. The Appellant:
 2. The Respondent
 3. CIT(A)-7, Kolkata
 4. CIT ,
 5. DR, ITAT, Kolkata Bench, Kolkata
- //True Copy//

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata