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

BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER

ITA Nos.6191 to 6194, 6204 & 6033 /Mum/2019
(A.Ys. 2008-09, 2009-10, 2011-12 to 2014-15)

DCIT Circle 3(3)(1) Room No. 609, 6th Floor, Aayakar Bhavan, M.K. Road, Mumbai – 400020	Vs.	M/s S.D. Corporation Pvt. Ltd., S.P. Centre, 41/44, Minoo Desai Marg, Colaba, Mumbai – 400005
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AADCS4496C		
Appellant	..	Respondent

Appellant by :	Mahita Nair
Respondent by :	Dharmesh Shah & Dhaval Shah

Date of Hearing	21.07.2023
Date of Pronouncement	30.08.2023

आदेश / O R D E R

Per Amarjit Singh (AM):

All these six appeals filed by the revenue for different assessment years are directed against the different orders of ld. CIT(A)-8, Mumbai. Since, these appeals are based on common issue on identical facts, therefore, for the sake of convenience these appeals are adjudicated together by taking the ITA No. 6033/Mum/2019 as a lead case and its finding will be applied mutatis mutandis to the other appeals wherever applicable.

ITA No. 6033/Mum/2019

The grounds of appeal filed by the Revenue as follows: -

"1. Whether on the facts and circumstances and in law, the Hon'ble ITAT was justified, in holding that reopening of assessment was due to change of opinion, when, the same was on appreciation of facts on records, in the light of information received, leading to formation of belief, that income had escaped assessment and consequent reopening of assessment in accordance with the provisions u/s 147?

2. Whether on the facts and circumstances of the case and in law, the Ld.CIT(A) was justified in reversing the action of the AO in reducing the WIP (Inventory) and restoring the original inventory by placing reliance on the decision of Hon'ble Tribunal dated 17.11.2017 in the case of Shri Nilesh J. Thakur [Prop: M/s. PRS Developers] without appreciating that the said decision of the Hon'ble Tribunal was not accepted by the Department and further appeal filed before the Hon'ble Bombay High Court?

3. Whether on the facts and circumstances of the case and in law, the Ld.CIT(A) was justified in reversing the action of the AO in reducing the WIP (Inventory) and restoring the original inventory by placing reliance on the decision of Hon'ble Tribunal dated 17.11.2017 in the case of Shri Nilesh J. Thakur [Prop.: M/s. PRS Developers] without appreciating that the transactions of the assessee company with Shri Nilesh J. Thakur are bogus as neither the assessee company nor Shri Nilesh J. Thakur had submitted documentary evidences regarding their association with each other through partnership or through appointment as consultant/agent/any other relationship?

4 Whether on the facts and circumstances of the case and in law, the Ld.CIT(A) was justified in reversing the action of the AO in reducing the WIP (Inventory)and restoring the original inventory by placing reliance on the decision of Hon'ble Tribunal dated 17.11.2017 in the case of Shri Nilesh J. Thakur [Prop.: M/s. PRS Developers] without appreciating that the amount paid to Shir Nilesh J. Thakur cannot be considered as professional fees as the latter had not filed his service tax return and there is no evidence with regard to rendering of services which is an admitted fact on oath by Shri Nilesh J. Thakur?

5. The appellant prays that the order of CIT(A) on the above grounds be set aside and that of Assessing Officer be restored.

6. The appellant craves leave to amend, alter, delete or add grounds which necessary may be necessary.

2. The fact in brief is that return of income declaring total income at Rs. 327,53,979/- under normal provisions and Rs.28,86,86,883/- under the provisions of Sec. 115JB of the Act was filed. The return filed was subject to scrutiny assessment and assessment u/s 143(3) of the Act was finalised on 30.12.2010 assessing the total income at

Rs.355,36,574/- under normal provision of the Act and book profit at Rs.28,94,57,820/- was computed u/s 115JB of the Act.

3. The assessee company is engaged in the business of builder and developer. During the year under consideration the assessee has made payment of Rs.31,67,50,000/- towards project consultancy charges to M/s PRS Developers, a proprietorship concern of Shri N.J. Thakur. The AO further stated that assessment proceeding in the case of Shri N.J. Thakur was completed ITO Ward 25(1)(4) and found that M/s PRS Developer has shown the amount of Rs. 31.61 crores received from the assessee as advances towards the development of project at Samtanagar Kandivli (East) Mumbai whereas the assessee has claimed that these payments were made towards professional fees for development of Samtanagar project. The assessee has included this amount in its work-in-progress relating to Samtanagar project.

4. Subsequently, on the basis of information received from the ITO, Ward 25(1)(4) Mumbai the assessment in the case of the assessee was reopened by issuing of notice u/s 148 of the Act on 25.03.2012 on the basis of following reasons:

> *2. In this case the ITO-25(1)(4), Mumbai vide his letter dated 25-04- 2012 received in this office on 02-05-2012 intimated in respect of certain payments made by the assessee company towards professional fees to M/s. PRS Developers (Proprietor Shri Nilesh J. Thakur), assessed with him. In the said letter the ITO reported that in the course of assessment proceedings for A.Y 2008-09 in the case of Shri Nilesh Janardhan Thakur (Proprietor of M/s. PRS Developers), it came to light that the aforesaid party is in receipt total amount of Rs.31,67,50,000/- from the assessee company on various dates. Further, the said party accounted such receipts as advances towards the expenses related to the development works at Kandivali project in the capacity of a partner of S.P. Group, however, the assessee company accounted such payments as 'professional fees' and TDS was also made while making such payments. The ITO in the course of assessment proceedings made third party enquiries with the assessee company and accordingly, held that the assessee company though made substantial payments to M/s. PRS Developers (Prop. Shri Nilesh J. Thakur), do not have any documentary evidences to substantiate the claim of availing any services from the said party. Importantly, the ITO in his letter categorically reported that the said entity has no business activity for rendering such services and has no partnership with SP Group. Apart from the above, it*

was also reported by the ITO that the said expenditure was booked by the assessee company in the profit and loss account and loaded to the value of WIP for which the assessee company has no supportings. Moreover, the ITO after examination of all the information collected by way of issue of notices u/s.133(6) and u/s.131 of the Act came to the conclusion that such payments made by the assessee company to such entity is on account of some other and unknown reasons which has no business exigency.

3. From the above fact it is evident that the assessee company paid an amount of Rs.31,67,50,000/- to M/s. PRS Developers (Prop. Shri Nilesh J. Thakur), towards professional fee, however, do not have any documentary evidences to substantiate its claim of availing any services from the said entity. Importantly, the assessee company simply made the aforesaid amounts without raising bills/ invoices by the said entity, which clearly indicates doling out of interest bearing funds for non-business purpose. Thus, prima facie the assessee company namely M/s. S.D. Corporation Ltd, has inflated expenditure in the garb of such non-genuine expenses in the form of professional fees for which the assessee has no documentary evidences in its possession. Since the assessee has debited such non-genuine expenditure in the accounts and thereby increased the WIP, which has a direct impact over the profits of such project also. The assessee follows percentage completion method for recognizing revenue from various projects. It is therefore clear on the above facts that some percentage of this bogus expenditure has been debited to the profit and loss account thereby reducing the taxable profits. Apart from the above, source of funds in the hands of the assessee have to be examined for these payments of Rs.31,67,50,000/-, Interest bearing funds diverted for non-business purpose/ bogus expenditure would result in disallowance of proportionate interest expense.

4. Thus, it can be said that the assessee's books of account contain entries in respect of non-genuine expenses which has direct impact over the interest bearing funds, which have been deployed for non-business purposes. Therefore, I have reason to believe that income for the year under consideration has escaped assessment within the meaning of section 147 of the I. T. Act, 1961. Hence, notice u/s.148 issued to the assessee."

5. The assesse has objected the reopening of the assessment vide letter dated 12.02.2013 as under:

"1. We had filed the return of income u/s139(1) of Income Tax Act, 1961. The assessment order was passed u/s.143(3) of Income Tax Act, 1961. Thereafter, we received a notice u/s.148 of Income Tax Act, 1961. In response to the said notice we had filed the return of income.

2. You have provided us the reasons for reopening the assessment. The issue raised in the reasons is regarding the transactions with M/s. PRS Developers. It is alleged that the expenditure incurred in respect of transaction with M/s. PRS Developers is non genuine expenses. It is also alleged that these expenditure are bogus and has been debited to profit & loss account thereby reducing the taxable profit. It is also stated that sources of funds in the hands of the assessee has to be examined for these payments and interest bearing funds are diverted for non-business

purpose/bogus expenditure and this would result in disallowance of proportionate interest expenditure.

3. *We submit that we had made the payment to M/s. PRS Developers for the services provided by them in respect of our project situated at Samtanagar, Kandivali. The said project is at initial stage. All the expenditure relating to the said project including the payment made to M/s. PRS Developers amounting to Rs.316,750,000/- is capitalized and no part of the said expenditure is debited to profit and loss account. In view of this the allegation made in the reasons itself is not justified as no claim of deduction has been made in respect of payments to M/s. PRS Developers while computing the taxable income for A.Y.2008-09.*

4. *As regards the issue of disallowance of interest, also we submit that no part of the interest relate to payments made to M/s. PRS Developers is claimed as deduction in computing taxable income for A.Y.2008-09.*

5. *We submit that issue of notice u/s. 148 is bad in law and the initiation of the reassessment proceedings is not justified. The basic conditions of section 147 are to be satisfied before the notice is issued u/s.148. Section 147 provides that if the Assessing Officer has reason to believe that income chargeable to tax has escaped assessment for any assessment year, then he may assess or re-assess such income by issue of notice u/s. 148. The basic conditions for issue of notice u/s.148 is there should be escapement of income chargeable to tax. On the facts of the case and which is substantiated through documents & evidences, we have not made any claim of expenditure while computing taxable income in respect of the payments made to M/s. PRS Developers. The fact is evident from the details of the expenditure which is capitalized in AY 2008-09 in respect of Samta Nagar Project. The company has undertaken various projects. The company has paid interest on loans taken in the course of business. The interest expenditure is allocated to various projects based on the expenditure in the said project. The interest relating to the residential projects viz. The Imperial and the Rehab project is only debited to profit & loss account. The interest attributable to the other Projects is added to the cost of those projects and shown as part of work in progress and the same is not claimed as deduction in computing taxable income. The interest of Rs. 119,459,390/- is allocated to Samta Nagar project in A. Y 2008-09 and while allocating this interest the total expenditure in the Samta Nagar project as on 31/03/2008 is considered, which includes the payment made to M/s. PRS Developers is also capitalized and not claimed as deduction in computing taxable income and to this extent also there is no escapement of income.*

6. *We submit that there has to be direct nexus between the information in the possession of the Assessing Officer and his belief that income has escaped assessment. There should be a real and a concrete evidence available with the Assessing Officer to form an opinion to believe that there is an escapement of income. We submit that based on the facts of the case, at the time when notice u/s.148 is issued, you did not have any material, which could have made you believe that income has escaped assessment. We further state that from the evidence and data which is produced at the time of original assessment as well in this proceedings, clearly prove that no part of the payment made to M/s. PRS*

Developers or the attributable interest on such payment is debited to profit & loss account and claimed as deduction.

7. *Without prejudice to what is stated above, we state that the allegation that the expenditure is non genuine or bogus is not justified.*

8. *We had availed the services from M/s. PRS Developers and have made the payment of professional fees to them amounting to Rs.316,750,000/- We are enclosing herewith the following documents in support of our claim that the payment for the services availed by us is genuine.*

a. Copy of agreement.

b. Details of the payments made
c. Copy of account of M/s. PRS Developers in the books of account
d. Appointment letter
e. Vouchers for the payment of professional fees.
f. Details of tax deducted at source.

9. *We further state that we deny the allegation of M/s. PRS Developers that he was our partner in the projects and he does not have any proof or evidence in support of his claim. The payments are made to him in respect of the professional services rendered by him and for no other purpose.*

10. *We are enclosing herewith the breakup of the total expenditure incurred for Samta Nagar project as on 31/03/2008. The total expenditure is Rs. 1,400,089,074/- This includes the payment to M/s. PRS Developers amounting to Rs.316,750,000/- which is also evident from the details which is submitted to you. We are also enclosing herewith the working of the interest which is allocated to different projects which includes the Samta Nagar project. For the purpose of allocation of interest, the total expenditure incurred for Samta Nagar project amounting to Rs.1,400,089,074/- is considered which itself proves that interest attributable to the payment to M/s. PRS Developers is also considered."*

6. The AO has rejected the objection filed by the assessee as under:

"i. The assessment has been reopened within a periods of four years. Hence, in view of the judgment of the Hon'ble Supreme Court in Court in the case of CIT v. Kelvinator of India Ltd. [2010] 320 1TR 561 (SC), I am acting within jurisdiction while reopening the assessment on the basis of "tangible material" in my possession from which I came to the conclusion that there is an escapement of income from assessment.

ii. In the instant case, during the original assessment proceedings, no query was raised by the then Assessing Officer in respect of genuineness of payments made to Shri Nilesh Janardhan Thakur and his concerns and no reference of this issue is there in the original Assessment order. Hence, this is not a case where the Assessing Officer sought to review his earlier findings, nor is case of 'change of opinion'.

iii. I am in possession of 'tangible material' in form of information received from ITO 25(1)(4), assessment order passed by him for A.Y. 2008-09 in the case of shri Nilesh Janardhan Thakur and order of Ld. CIT(A) confirming his action. Based on this information and further after examining this vis-à-vis case records of the assessee for A.Y. 2008-09, I formed 'reason to believe' that income of the assessee for the Assessment Year under consideration has escaped the assessment to the extent of interest paid and allowed on borrowed funds diverted to the concerns of Shri Nilesh Janardhan Thakur for apparently non- business purpose.

iv. The expression "reason to believe in Section 147 has been construed in the judgment of the Supreme Court in Rajesh Jhaveri Stock Brokers Pvt. Ltd. (2007) 291 ITR 500, to mean a cause or justification. However, at the stage when the assessing officer reopens an assessment, it is not necessary that the material before him should conclusively prove or establish that income has escaped assessment. A reason to believe at the stage of reopening is all that is relevant. It was held that, "reason" and "reason to believe" signifies that the Assessing Officer has caused or justification to know or suppose that income has escaped and it does not mean that Assessing Officer should have ascertained the facts by legal evidence or conclusion. At the stage of notice, the only question is whether there was relevant material on his reasonable person could have formed a requisite to belief. Whether material could conclusively proved the escapement is not the concern at that stage. This is so because, the formation of belief by Assessing Officer is within the realm of subjective satisfaction". In the instant case, it is evident from the facts narrated above that I have sufficient cause and justification for reopening the case of the assessee for the A. Y. 2008-09.

v. In a recent order dated January 10/11, 2013, the Hon'ble jurisdictional High Court of Bombay in the case of M/s Export Credit Guarantee Corporation of India Itd. Vs. The Additional Commissioner of Income Tax and others in Writ Petition No. 502 of 2012 held that when an assessment is sought to be reopened within a period of four years of the end of the relevant assessment year, the test to be applied is whether there is tangible material to do so. What is tangible is something which is not illusory, hypothetical or a matter of conjecture. From any stretch of imagination it cannot be said that the material in the form of information from the ITO 25(1)(4) is illusory, hypothetical or a matter of conjecture". Hence I was well within my jurisdiction while reopening the assessment of the assessee based on the information shared by the other assessing authority.

vi. The contention of the assessee that reopening of assessment on the basis of information received from other Assessing Officer tantamount to 'borrowed satisfaction' is not maintainable, as the ITO 25(1)(4) has just passed on information regarding transactions of the assessee with the concems of Shri Nilesh Janardhan Thakur to me for necessary action at my end and it is me who formed 'reason to believe' based on this new information in his possession and after examining this vis-à-ins case records of the assessee for the concerned year.

vii. In most part of the objections filed by the assessee for reopening the assessment is focused on merits of the issue. In my considered opinion, this is not proper stage to go into the merits of the issues. The sole question pending before me is that whether I was in limits of my powers conferred upon me by the provisions of section 147 and 148 while reopening the assessment of the assessee; and merits of the issues can be dealt with during the course of proceeding subsequently.

viii. The Gujarat HC in the case of Gruh Finance Ltd.243 ITR 482 held that reassessment proceedings can be initiated on the issues wherein mistake had occurred and observed as under- 'It is true that even after the amendment in the provisions of section 147 of the Income-tax Act, 1961, a mere change of opinion, ipso facto, would not confer or empower the Assessing Officer to embark upon a reassessment exercise. Notwithstanding that, power to make assessment or re-assessment within four years of the end of the relevant assessment year would be attracted even in cases where there has been complete disclosure of all relevant facts upon which the assessment might have been based at the first instance, but for or in case of a mistake, as per amended provisions of section 147 of the Income-tax Act.'

ix. In the case of Dr.Amin's Pathalogy Laboratory Vs. P.N. Prasad JCIT (252 ITR 673), the Bombay High Court has held as under-

> *"After the introduction of changes with effect from April 1, 1989, the scope of reassessment has been widened. After the amendment, the only restriction put in the section is "reason to believe". That reason has to be a reason of a prudent person. That reason should be fair and not necessanly due to failure of the assessee to disclose fully or partially some material facts relevant for assessment. That, if any item has escaped from assessment which was otherwise includible within the assessment and the Assessing Officer notices it subsequently by his own investigation or by reason of some information received by him, one cannot say that it constitutes change of opinion."*
>
> *"Under Explanation 1 to the proviso, mere production of account books from which material evidence could have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the proviso. Therefore, mere production of the balance-sheet, profit and loss account or account books will not necessarily amount to disclosure within the meaning of the proviso. In the present case, the facts show that the Assessing Officer overlooked the afore-stated item. That, he noticed it subsequently. That, at the time of passing the original order of assessment, he could not be said to have opined on the above item. Therefore, there was no change of opinion."*

x. In a recent decision the Hon'ble High Court Of Delhi in the case of Commissioner of Income-tax v. Nova Promoters & Finlease (P) Ltd. [18 taxmann.com 217 (Delhi)] [2012] held that at stage of issuing notice under section 148 merits of matter are not relevant and Assessing Officer at that stage is required to form only a prima facie belief or opinion that income chargeable to tax has escaped assessment and once that stage

is crossed and reassessment proceedings are set in motion, material on basis of which requisite belief was formed by Assessing Officer has to be appraised and examined.

xi. The Hon'ble High Court Of Madras in the case of M/s Tamil Nadu Petroproducts Ltd. v. Commissioner of Income-tax [11 taxmann.com 311 (Mad.)] [2011] held that while dismissing the writ petition filed by the assessee against reopening its assessment for A.Y. 2001-02 u/s 148 that since it was open to assessee to produce records and satisfy assessing authority that there was no suppression of true and full accounts while submitting original return, proceedings initiated for reassessment could not be quashed at threshold.

xii. The Hon'ble ITAT Chandigarh Bench 'A' held in the case of Shri Vikrant Dutt Chaudhary v. Assistant Commissioner of Income tax, Panchkula' [12taxmann.com 359 (Chd.)] [2011] that the main provisions of section 147 authorize and permit the Assessing Officer to assess or re-assess income chargeable to tax if he has reason to believe that income chargeable to tax for the relevant assessment year has escaped assessment. The relevant Para of this judgment is quoted verbatim hereunder.

"The word 'reason' in the phrase 'reason to believe' in section 147 would mean cause or justification. If the Assessing Officer has cause or justification to know or suppose that income has escaped assessment, he can be said to have reason to believe that income chargeable to tax has escaped assessment. The expression reason to believe' cannot be held to mean that the Assessing Officer should have finally ascertained the facts giving rise to his formation of belief by legal evidence, What is contemplated by section 147 is the prima facie belief by the Assessing Officer that income chargeable to tax has escaped assessment. In order to test the validity of initiation of proceedings under the main provisions of section 147, only one aspect has to be considered and that is whether there was relevant material or reasonable ground on the basis of which a reasonable person could have formed the requisite belief. Whether those materials and grounds would conclusively prove the escapement of income is not the concern at the initiation stage. This is so because the formation of belief by the Assessing Officer is within the realm of his subjective satisfaction. Tested on the aforesaid principles, the action of the Assessing Officer in initiating the proceedings under section 147 on the basis of the report of the ADIT (Inv.) and other materials available with him was in order as the information given by the ADIT (inv.) or the materials available with him on record could not be said to be irrelevant. It also could not be said that the initiation of proceedings under section 147/148 was motivated by suspicion, rumour or gossip. In this view of the matter, the validity of the proceedings initiated by the Assessing Officer under section 147/148 was to be upheld.

6. Thus it is held that the objection raised by the assessee is not correct and are hereby rejected by this speaking order and accordingly the decision of Hon'ble Supreme Court in the case of G. K. N. Driveshafts has been O complied. Therefore, the proceeding have rightly been initiated u/s.147 of the 17. Act, 1961 on the basis of the reasons recorded after taking into account the facts,

circumstances and the law involved in the case and the notice u/s 148 of the 1. T. Act, 1961 has been validly issued as per law."

3. After disposing off the assesee's objection for re-opening the assessment, statutory notices u/s 143(2) of the Act dated 25-02-2013 has been issued and served on the assessee. Further notice u/s.142(1) of the Act has also been issued and served on 15-03-2013. In response, Shri Dilip Lakhani, CA & AR, duly authorized by the assessee company, attended the assessment proceedings and furnished the details and explanation called for from time to time."

7. The assessing officer has referred the findings of ITO, Ward 25(1)(4) pertaining to the assessment order made in the case of Shri N.J. Thakur for assessment year 2008-09 that Shri N.J. Thakur has shown the amount received from the assesse as sundry creditors in his un-audited balance sheet. After referring the information received the AO stated that assessee has made payment to Shri N.J. Thakur towards professional fees as consultancy charges after deducting TDS for development of project at Samtanagar, however, neither Shri N.J. Thakur nor assessee has submitted any documentary evidences regarding their associations with each other through partnership or through appointment as consultant/agent/any other relationship. The assessing officer of Shri N.J. Thakur stated that amount received from the assessee cannot be considered as professional fees since he has not filed any service tax return and there was no evidence with regard to rendering of services by him to the assesse M/s S.D Corporation Pvt. Ltd. Therefore, ITO, Ward 25(1)(4) was of the view that Shri N.J. Thakur was not engaged in any business or professional activities and the amount received from assessee M/s S.D. Corporation Pvt. Ltd. was brought to tax in the hands of Shri N.J. Thakur under the head income from other sources.

8. The assessing officer has referred the findings of the ITO Ward 25(1)(4) in the case of Shri N.J. Thakur wherein he stated that claim of the assesse S.D. Corporation Pvt. Ltd. that the payment to Shri N.J.

Thakur was in the nature of fees was not acceptable as neither Shri N.J. Thakur nor the assessee has submitted any documentary evidences regarding rendering the services of the Shri N.J. Thakur for S.D. Corporation Pvt. Ltd. The assessing officer of Shri N.J. Thakur also stated that assessee S.D. Corporation Pvt. Ltd. has confirmed that they have paid fees to Shri N.J. Thakur after deducting tax but at the same time has not provided any documentary evidences regarding receipt of any professional services from the assessee. Therefore, assessing officer of Sh. N.J. Thakur was of the view that amount paid by M/s S.D. Corporation Pvt. Ltd. to Shri N.J. Thakur was clearly in the nature of revenue receipt in the hands of Shri N.J. Thakur but both the parties has not submitted any documentary evidences of rendering of services by Shri N.J. Thakur for the assessee, therefore, the amount was treated as income of Shri N.J. Thakur under the head income from other sources.

9. After taking into consideration the above facts the assessing officer observed that there was contradiction between the claimof the assessee and the claim of Sh. N.J. Thakur as the assesse claimed that payment of Rs.311,67,50,000/- was made towards professional fees for development of Samtanagar project whereas Sh. N.J. Thakuar has shown that the amount was shown as advances towards the development of project at Samtanagar. Therefore, the AO held that no deduction out of the same can be allowed either as expenditure or allowed to be capitalised under the head work-in-progress. Accordingly, capital work-in-progress of that project was reduced by the said amount.

10. Aggrieved, the assesse filed the appeal before the ld. CIT(A). The ld. CIT(A) has allowed the appeal of the assessee after referring the decision of coordinate bench of the ITAT, Mumbai vide ITA No. 3738 &

3739/Mum/2013 dated 17.11.2017 for assessment year 2008-09 and 2009-10 in the case of Shri N.J. Thakur that the ITAT held that the amount received as consultancy charges by Shri N.J. Thakur was genuine and the payment made by the assessee to M/s PRS Development was for business purpose only. The relevant part of the decision of CIT(A) is reproduced as under:

"3.2.3 This ground of appeal is against AO reducing the payment of. Rs.31,67,50,000/-, from construction Work in Progress (WIP) of Samta Nagar project During the re-assessment proceedings, the AO observed that the assessee has made payment of Rs.31,67,50,000/- towards project consultancy charges to M/s PRS Developers, a proprietorship concern of Shri Nilesh J Thakur. The same has not been debited in its P & L Account but was included in its Work in Progress relating to Samta Nagar Project.

3.2.4 The AO has observed that neither Shri Nilesh J Thakur and nor the assessee have submitted a single documentary evidence regarding their association with each other through any partnership or through appointment as a consultant/agent/ any other relationship. While going through the order, I find the AO discussing only the appellate order of CIT(A) and assessment order passed by ITO-25(1)(4) Mumbai in the case of Shri. Nilesh J Thakur and thereafter, deciding the case on the basis of some arm-chair arguments Finally, the AO has concluded that the payment made to M/s PRS developers is not for the purposes of business and held that no deduction out of the same can be allowed either as expenditure or allowed to be capitalized under the head "Work in Progress" either. Accordingly, the AO has reduced the capital work in progress of Samta Nagar project to the tune of Rs.31,67,50,000/-.

3.2.5 find that Hon'ble ITAT, Mumbai vide its order No. 1.T.A No.3738/Mum/2013 and I.T.A No.3739/Mum/2013 dated 17.11.2017 for A.Y.2008-09 and 2009-10 respectively, in the case of Shri. Nilesh J Thakur, has held the advances received by Shri Nilesh J Thakur from M/s SD Corporation Pvt Ltd to be genuine, which automatically means that the advances made by the appellant in the instant case are also genuine. The relevant extract of the said order is reproduced here as follows: -

> *"36. We have heard both the parties, perused material available on record and gone through the orders of authorities below. The factual matrix of the case which leads to the impugned addition are that the assessee has received a sum of Rs.95 crores from SDCL. Out of the said amount, the assessee has received a sum of Rs.31,67,50,000 during the financial year relevant to AY 2008-09. The assessee has shown amount received from SDCL under the head 'current liabilities'. The AO made addition on the ground that amount received from SDCL is not for the purpose of providing consultancy services, but for some unknown purposes. The AO came to the conclusion based on his own findings. According to the AO, the assessee does not have required experience and expertise in providing consultancy services. The AO further, observed*

that the assessee has not been able to prove providing any kind of services to SDCL. The assessee also was not able to prove incurring of any expenditure in relation to providing of consultancy services. Therefore, he opined that amount received from SDCL is not for the purposes of providing consultancy services, but for some unknown reasons. It is the contention of the assessee that he had entered into a formal agreement with SDCL for providing consultancy services as per which he agreed to provide consultancy services for their project. The assessee further contended that the terms and conditions of the consultancy services has been clearly set out in the agreement dated 29-08-2008. As per clauses 4(a) to 4(m), the nature of services to be provided has been illustrated. The clause 5 of the agreement clearly says the fees to be payable. All these facts goes to prove an undoubted fact that he had received amount from SDCL for providing consultancy services. The assessee further contended that the AO has conducted independent enquiry during the course of assessment proceedings by calling for various details from SDCL for which the company has filed all necessary details and also confirmed to have paid amount to the assessee. The company has deducted tax at source @ 10% on total amount paid. All these facts have been filed before the AO. The AO has conveniently ignored evidences filed to make addition purely on surmises and conjectures without bringing any cogent evidence to prove that the impugned amount is received for other than consultancy services.

37. The AO has made addition on the ground that the assessee has failed to prove providing any consultancy services to SDCL. The AO further observed that the assessee being a novice man does not have required experience and, therefore, cannot provide consultancy service to a corporate giant like SDCL. According to the AO, the assessee has failed to provide any evidence to prove existence of consultancy agreement between the company and the assessee and also failed to prove incurring of any expenditure towards consultancy services. Therefore, he opined that the amount received from SDCL is not for the purposes of providing consultancy services but for some unknown reasons. We do not find any merit in the findings of the AO for the reason that additions cannot be made to any receipts, merely on the basis of surmises and conjectures on the basis of conduct of the assessee. If the AO wants to tax a particular receipt as income of the assessee, then, he should bring on record material evidence to suggest that a particular receipt is taxable within the parameters of the law. 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. Therefore, the issue to be decided in the given facts and circumstances of the case is whether amount received from SDCL is taxable in the hands of the assessee, if so, under what head of income. The AO has taxed the gross receipts received from SDCL under the head 'Income from other sources'. The AOs findings are based on the theory of probabilities. The AO has not brought out any materials to show that the impugned receipt is income of the assessee. On the other hand, the assessee has filed all evidences to prove amount received from SDCL is for providing consultancy services. The assessee also filed necessary evidence to prove expenditure incurred in relation to providing consultancy services. The evidences filed by the assessee in the form of appointment letter issued by SDCL dated 07-02-2007 and further consultancy agreement entered into between the parties on 29-08-2008

clearly goes to prove the undoubted fact that there existed a service agreement between the parties and that SDCL has paid consultancy fee. The agreement filed by the assessee has narrated the nature of service to be provided. In fact, SDCL has accepted before AO during the assessment proceedings that the assessee has provided consultancy services. We further notice that SDCL also deducted tax at source @ 10% on total payments. All these facts lead to an undoubted conclusion that the AO has made addition merely on the basis of conjectures and surmises without there being any material to show that amount received from SDCL is income of the assessee. Therefore, we are of the view that the AO was incorrect in treating the amount received from SDCL as income of the assessee under the head 'Income from other sources'.

38. Having said so, let us examine whether the assessee is able to prove expenditure incurred in relation to his business activity of providing consultancy services to SDCL. The assessee claims to have incurred various expenditure in relation to work executed for SDCL which has been filed before the AO. The assessee further contended that because he is following project completion method for recognising revenue from the work, whatever expenditure incurred for the project has been shown under WIP, pending recognition of revenue. The assessee further contended that during the financial year relevant to AY 2008-09, he has incurred various expenditure which have been debited to P&L account in PRS Developers & PRS Enterprises. The AO has conveniently ignored evidences filed by the assessee to make addition towards gross receipts received from SDCL.

39. No doubt, the assessee has proved beyond doubt the impugned receipt from SDCL is for the purposes of providing consultancy services. The assessee also filed certain evidences to prove various expenditures incurred in relation to consultancy services. Income cannot be earned without incurring any expenditure. Income and expenditure are two faces of a single coin. To earn income, necessary expenditure has to be incurred for providing consultancy services. The assessee has filed his financial statements as per which various expenditures have been incurred. If the AO is not satisfied with the details filed by the assessee to prove the expenditure, the total expenditure incurred for earning income cannot be doubted. It is now well settled that if the AO is making best judgement assessment, he should make an intelligent, well founded estimate. Such estimate must be based on adequate and relevant materials. The mere fact that the material placed by the assessee before the assessing authority is unreliable does not empower those authorities to make an arbitrary order. The power to make assessment on the basis of best judgement is not an arbitrary power. If the AO is not satisfied with the evidence filed by the assessee to prove the expenditure, he should have proceeded to estimate the income from the activity of the assessee on best judgement. In this case, the AO has taxed gross receipts without allowing deductions for expenditure incurred by the assessee. Since there is always nexus between income generated and expenditure incurred, levying tax on gross receipts without allowing any deduction for expenditure is arbitrary. The Ld. Senior Counsel for the assessee submitted that the assessee has recognised revenue on project completion method, therefore, if at all the income from the activity of the assessee is to be recognised during the relevant financial year, a

reasonable profit may be estimated from the gross receipts. We find merits in the arguments of the assessee for the reason that total receipts cannot be taxed as income of the assessee. The assessee has incurred various expenditures which have been debited to his P&L Account. Though, the assessee claims to have incurred various expenditures, failed to file complete details of expenditures incurred, to the satisfaction of the AO. Under these circumstances, what needs to be done is reasonable estimates of net profit from the business, taking into account the facts & circumstances. In this case, the assessee is in the business of providing consultancy services. In the case of professional and consultancy services, section 44AD provides for taxation of income from profits and gains of profession on presumptive basis. Though, provisions of section 44AD strictly not applicable to the present case, the analogy provided under the said provisions can be taken as basis for determining the profit. In the cases of profession, profit ranging from 10% to 25% is reasonable. Therefore, taking into account overall facts and circumstances of the case, we deem it appropriate to direct the AO to estimate net profit of 20% on total gross receipts received from SDCL. We order accordingly."

3.2.6 Since the Hon'ble ITAT Mumbai in the case of Shri Nilesh J Thakur has found The mount received as consultancy charges by Shri Nilesh J Thakur as genuine, the issue regarding payment to Nilesh Thakur now stands settled The Hon'ble bench has discussed and taken in to cognizance the agreement entered in to between Shri Thakur and the appellant company and has held categorically that the payments made to M/s PRS Developer, prop Nilesh Thakur is for business purposes only Therefore, the action of the AO in reducing the WIP by the amount of payment made to M/S PRS Developers, prop. Nilesh Thakur, namely, Rs.31,67,50,000/-, is hereby reversed and the AO is directed to allow the capitalization of the said amount as WIP of Samta Nagar Project. For the identical reasons, the finance charges disallowance of Rs 2.96 crores in respect of payments made to M/s PRS Developers, prop Nilesh Thakur, is also not sustainable. Respectfully following the order of the Tribunal, the AO is directed to allow the same as well to be capitalized as WIP of Samta Nagar Project.

3.2.7 In view of the above discussion and decision of Hon'ble Jurisdictional Tribunal, the action of the AO of reducing the WIP (Inventory) is hereby reversed and the original inventory is restored. The total work in progress for Samta Nagar project is to be computed as shown by the appellant in its books and the same should be allowed to be carried forward. These grounds are allowed."

11. During the course of appellate proceedings before us the ld. D.R in respect of reopening of the assessment submitted that assessing officer has not conducted any inquiry in respect of consultancy payment made by the assesse to Shri N.J. Thakur. He further submitted that there was tangible material in the form of letter received from ITO, Ward 25(1)(4) in the case of Shri N.J. Thakur and the case of the assessee was reopened within 4 years. He further mentioned that Shri N.J. Thakur

has not shown the amount received from assessee as income but shown it as advance without raising any invoices upon the assessee. The ld. D.R also contended that ld. CIT(A) has incorrectly set aside the proceeding u/s 147 on the basis of order of ITAT in the case of M/s Shappoorji Pallonji & Co. Ltd. as the facts in the case of assesse are different from the case of M/s Shappoorji Pallonji & Co. Ltd.

12. On the other hand, the ld. Counsel submitted that in the case of Shappoorji Pallonji & Co. Ltd. the same letter was received from ITO Ward 25(1)(4) and ITAT has set aside the reopening proceedings.

13. The ld. D.R on merit relied on the order of assessing officer.

14. On the other hand, ld. Counsel relied upon the order of CIT(A) and order of ITAT passed in the case of Shri N.J. Thakur vide ITA No. 3738 & 3739/Mum/2013 dated 12.10.2017.

15. Heard both the sides and perused the material on record. The ld. CIT(A) held that reopening of the assessment as unsustainable after referring the decision of ITAT, Mumbai vide order ITA No. 5765 & 5676/Mum/2013 for assessment years 2008-09 and 2009-10 dated 10.04.2015 in the case of Shappoorji Pallonji & Co. Ltd. In this regard, we find that in the case of M/s Shappoorji Pallonji & Co. Ltd. certain payment amounting to Rs.43,50,00,000/- were made by M/s Shappoorji Pallonji & Co. Ltd. to shri N.J. Thakur proprietor of M/s PRS Developer by way of advances. The amount advanced by M/s Shappoorji Pallonji & Co. Ltd. to Shri N.J. Thakur was duly reflected in the audited account under the head advances for land and Shri N.J. Thakur could not perform in terms of appointment letter therefore a suit was filed before the Hon'ble Bombay High Court against Shri N.J. Thakur by M/s Shappoorji Pallonji & Co. Ltd. and a decree was passed in favour of

Shappoorji Pallonji & Co. Ltd. by the Hon'ble High Court the facts of the payment were duly mentioned in the suit/plaint filed before the Hon'ble High Court. M/s Shappoorji Pallonji & Co. was having common pool of funds i.e own funds and borrowed funds and at the time of advancing excess funds were available in comparison to advanved money. Therefore, benefit of decision of Hon'ble Supreme Court in the case of Munjal M. Corporation Vs. CIT and decision of Hon'ble Bombay High Court in the case of Reliance Utilities and Buyer Ltd. were given wherein it was held that where the capital and profit are more than the interest free funds advanced, then it has to presume that interest free advances were given out of interest free capital available.

However, the assessment in the case of the assesse was reopened as the assessee claimed that payments were made to Sh. N.J. Thakur proprietor of M/s PRS Developers towards professional fees for development of Samta Nagar Project. However, during the course of assessment proceedings carried out in the case of Sh. Nilesh J. Thakur by the ITO Ward 25(1)(4) Mumbai it was found that such payment received from the assessee was shown as advances received towards the development of project at Samata Nagar Kandivali (E) Mumbai and the assessee company did not have any documentary evidences to substantiate the claim of availing any services of the said party. Further Shri N.J. Thakur could not substantiate that the amount was received for rendering any service since no invoice has been issued by Shri N.J. Thakur to M/s S. D. Corporation Pvt. Ltd. Therefore, we consider that there is tangible material in the case of the assesse in the form of assessment order of ITO, Ward 25(1)(4) made in the case of Shri N.J. Thakur which reflected different facts on which relevant material was not submitted during the course of original assessment proceedings. Therefore, we find the decision of ld. CIT(A)in treating the reopening

assessment as unsustainable is not justified. Therefore, the ground no. 1 of the revenue is allowed.

Grounds No. 2 to 4 of Appeal: (Reducing WIP by the Consultancy Payment)

16. During the course of appellate proceedings before us the ld. Counsel submitted paper book stating that during the course of original assessment proceedings a letter dated 07.12.2007 as appointment of M/s PRS Developer was issued vide which Shri N.J. Thakur was appointed as project consultant in respect of development of Samtanagar project consisting of various societies/buildings Kandivali (East) Mumbai in occupation of 2,00,000 sq. meter (approx.) of land, Plot at C.T.S. No. 837 to 840,55,56 consisting of 1784 tenements approximately. The various terms and conditions were mentioned in the letter regarding carrying out negotiation with committee member of the respective societies securing their consent demolishing their existing and dilapidated tenements and structure and to secure their consent for Re-Development project. The extract of the same is reproduced as under:

> *"i. To carry out and negotiate with the committee members of the respective societies and the said occupants/members of the said federation for securing their consent to demolish their existing and dilapidated said tenements and structures along with the tenements therein and premises and to secure their consent for Re-Development Project of the said plot of land by demolishing the existing said tenements and structures forming part of the said property described in the First Schedule hereunder written.*
>
> *ii. To arrange for the vacant possession of the entire Plot by removing the dwellers /occupants and to provide alternate accommodation.*
>
> *iii. To make arrangement and ensure that the appropriate resolutions are passed in respect of the appointment of the said Developer for the redevelopment of the said plot of land.*

iv. To ensure the redevelopment of the said plot of land by demolishing the existing said tenements and structures duly accepted by the said occupants/members.

v. The Consultant will ensure that Special General Meeting of the members of the Federation is convened and cur appointment as Developer is confirmed and accepted to develop the entire property.

vi. To ensure that the committee members of the said federation expeditiously approve the draft Development Agreement sent to them and executes the Final Development Agreement with the said Developer.

vii. To secure the consent of the said occupants of the said federation for the redevelopment scheme in favor of the said Developer.

viii. To ensure that the committee members of the said federation executes Inevocable Power of Attorney in favor the said Developer.

ix. To handover vacant and peaceful possession of the said Plot of Land for the implementation of the redevelopment scheme free from all encumbrances and to do all such acts, deeds and things necessary to be done for the implementation of the redevelopment scheme by the said developer and/or their associates/agents/employees.

x. To mediate between the Developer and the said federation vis a vis other interested parties and developers and the said occupants/members of the said federation in respect and for proper implementation and completion of the said redevelopment scheme of the said plot of land along with the said tenements and structures and the said premises.

xi. To make all such necessary acts in order to get all the plans submitted to the Municipal Corporation of Greater Mumbai and/or the respective Competent Authority, sanctioned and approved from time to time."

17. Further he also referred confirmation letter dated 07.12.2007 received from M/s PRS Developer and also referred copy of consultancy agreement executed with M/s PRS Developer dated 29.03.2008 wherein various terms and conditions of the consultancy agreement was mentioned. The relevant part of the agreement is as under:

"1. The terms of this agreement shall be till the completion of the project and/or as determined herein whichever is earlier.

2. In continuation with the appointment letter dated 7th December, 2007, the Developer hereby appoints the Consultant to perform the functions/obligations and the Consultant accepts the said appointment and agrees to perform the obligations/covenants mentioned herein below on such terms and conditions as set out hereinafter.

3. The parties confirm, adopt and reiterate the terms, conditions covenants mentioned in the letter of appointment dated 7th December, 2007 and the same shall be treated as an integral part of this agreement.

4. The Consultant agrees that over and above the obligations mentioned in the letter of appointment dated 7th December, 2007, the said Consultant accepts, confirms and agrees to do all such further acts, deeds and things necessary for implementation of the redevelopment scheme in favour of the said Developer including: -

a) Assist in facilitating 2.5 F.S.I. to (EWS/LIG/MIG).
b) To obtain conveyances of structures in favour of societies
c) To obtain No dues certificate from the Estate Department (MHADA).
d) To assist in Demarcation of plan and Area Correction.
e) To obtain Survey from city survey office.
f) To assist in Relocation of RG, PG, Hospital, Post Office, Bus Depot.
g) To assist in obtaining Land Lease for both Rehab and Sale component on completion of project.
h) To assist in Conversion of HIG Buildings (12) to MIG.
i) To assist in obtaining approval of Layout from MHADA.
j) To assist in obtaining permission for Transit Camp.
k) To assist in issuance of various correspondences from MHADA to other Financial Institutions situated on the plot.
l) To assist in such other and further works etc. as may be required by the said Developer during the Implementation of the said Project.
m) To negotiate and acquire the rights/interests of any third party builder/developer if any in the project.

5. The Developer shall pay to the consultant as Fees / Charges a lump sum amount of Rs. 95,00,00,000/- (Rupees Ninety Five Crore only) which has been agreed upon by the parties. The mode of the payment shall be decided by the parties mutually keeping in view the stages of the work completed and/or planned by the Consultant. The payment shall be inclusive of all applicable taxes, duties, levies etc. and subject to deduction of TDS and other relevant taxes.

18. The ld. Counsel also referred the detail and copies of documents placed in paper book which were furnished before the AO during the course of assessment proceedings.

19. The ld. Counsel also referred the decision of ITAT Mumbai in the case of Shri N.J. Thakur Vs. ITO Ward 25(1)(4) vide ITA No. 3738 & 3739/Mum/2013 wherein at para 39 the ITAT held that Shri N.J. Thakur has proved beyond doubt that the amount received from the

assesse was for the purpose of providing consultancy services. It is also mentioned that Sh. N.J. Thakur also filed certain evidences to prove various expenditure incurred in relation to consultancy services. The ITAT also stated that Shri N.J. Thakur has filed his financial statement as per which various expenditure have been incurred. The relevant extract of the decision of ITAT Mumbai in the case of Shri N.J. Thakur is reproduced as under:

> *"36. We have heard both the parties, perused material available on record and gone through the orders of authorities below. The factual matrix of the case which leads to the impugned addition are that the assessee has received a sum of Rs.95 crores from SDCL. Out of the said amount, the assessee has received a sum of Rs.31,67,50,000 during the financial year relevant to AY 2008-09. The assessee has shown amount received from SDCL under the head 'current liabilities'. The AO made addition on the ground that amount received from SDCL is not for the purpose of providing consultancy services, but for some unknown purposes. The AO came to the conclusion based on his own findings. According to the AO, the assessee does not have required experience and expertise in providing consultancy services. The AO further, observed that the assessee has not been able to prove providing any kind of services to SDCL. The assessee also was not able to prove incurring of any expenditure in relation to providing of consultancy services. Therefore, he opined that amount received from SDCL is not for the purposes of providing consultancy services, but for some unknown reasons. It is the contention of the assessee that he had entered into a formal agreement with SDCL for providing consultancy services as per which he agreed to provide consultancy services for their project. The assessee further contended that the terms and conditions of the consultancy services has been clearly set out in the agreement dated 29-08-2008. As per clauses 4(a) to 4(m), the nature of services to be provided has been illustrated. The clause 5 of the agreement clearly says the fees to be payable. All these facts goes to prove an undoubted fact that he had received amount from SDCL for providing consultancy services. The assessee further contended that the AO has conducted independent enquiry during the course of assessment proceedings by calling for various details from SDCL for which the company has filed all necessary details and also confirmed to have paid amount to the assessee. The company has deducted tax at source @ 10% on total amount paid. All these facts have been filed before the AO. The AO has conveniently ignored evidences filed to make addition purely on surmises and conjectures without bringing any cogent evidence to prove that the impugned amount is received for other than consultancy services.*
>
> *37. The AO has made addition on the ground that the assessee has failed to prove providing any consultancy services to SDCL. The AO further observed that the assessee being a novice man does not have required experience and, therefore, cannot provide consultancy service to a*

corporate giant like SDCL. According to the AO, the assessee has failed to provide any evidence to prove existence of consultancy agreement between the company and the assessee and also failed to prove incurring of any expenditure towards consultancy services. Therefore, he opined that the amount received from SDCL is not for the purposes of providing consultancy services but for some unknown reasons. We do not find any merit in the findings of the AO for the reason that additions cannot be made to any receipts, merely on the basis of surmises and conjectures on the basis of conduct of the assessee. If the AO wants to tax a particular receipt as income of the assessee, then, he should bring on record material evidence to suggest that a particular receipt is taxable within the parameters of the law. 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. Therefore, the issue to be decided in the given facts and circumstances of the case is whether amount received from SDCL is taxable in the hands of the assessee, if so, under what head of income. The AO has taxed the gross receipts received from SDCL under the head 'Income from other sources'. The AOs findings are based on the theory of probabilities. The AO has not brought out any materials to show that the impugned receipt is income of the assessee. On the other hand, the assessee has filed all evidences to prove amount received from SDCL is for providing consultancy services. The assessee also filed necessary evidence to prove expenditure incurred in relation to providing consultancy services. The evidences filed by the assessee in the form of appointment letter issued by SDCL dated 07-02-2007 and further consultancy agreement entered into between the parties on 29-08-2008 clearly goes to prove the undoubted fact that there existed a service agreement between the parties and that SDCL has paid consultancy fee. The agreement filed by the assessee has narrated the nature of service to be provided. In fact, SDCL has accepted before AO during the assessment proceedings that the assessee has provided consultancy services. We further notice that SDCL also deducted tax at source @ 10% on total payments. All these facts lead to an undoubted conclusion that the AO has made addition merely on the basis of conjectures and surmises without there being any material to show that amount received from SDCL is income of the assessee. Therefore, we are of the view that the AO was incorrect in treating the amount received from SDCL as income of the assessee under the head 'Income from other sources'.

38. Having said so, let us examine whether the assessee is able to prove expenditure incurred in relation to his business activity of providing consultancy services to SDCL. The assessee claims to have incurred various expenditure in relation to work executed for SDCL which has been filed before the AO. The assessee further contended that because he is following project completion method for recognising revenue from the work, whatever expenditure incurred for the project has been shown under WIP, pending recognition of revenue. The assessee further contended that during the financial year relevant to AY 2008-09, he has incurred various expenditure which have been debited to P&L account in PRS Developers & PRS Enterprises. The AO has conveniently ignored evidences filed by the assessee to make addition towards gross receipts received from SDCL.

39. No doubt, the assessee has proved beyond doubt the impugned receipt from SDCL is for the purposes of providing consultancy services. The assessee also filed certain evidences to prove various expenditures incurred in relation to consultancy services. Income cannot be earned without incurring any expenditure. Income and expenditure are two faces of a single coin. To earn income, necessary expenditure has to be incurred for providing consultancy services. The assessee has filed his financial statements as per which various expenditures have been incurred. If the AO is not satisfied with the details filed by the assessee to prove the expenditure, the total expenditure incurred for earning income cannot be doubted. It is now well settled that if the AO is making best judgement assessment, he should make an intelligent, well founded estimate. Such estimate must be based on adequate and relevant materials. The mere fact that the material placed by the assessee before the assessing authority is unreliable does not empower those authorities to make an arbitrary order. The power to make assessment on the basis of best judgement is not an arbitrary power. If the AO is not satisfied with the evidence filed by the assessee to prove the expenditure, he should have proceeded to estimate the income from the activity of the assessee on best judgement. In this case, the AO has taxed gross receipts without allowing deductions for expenditure incurred by the assessee. Since there is always nexus between income generated and expenditure incurred, levying tax on gross receipts without allowing any deduction for expenditure is arbitrary. The Ld. Senior Counsel for the assessee submitted that the assessee has recognised revenue on project completion method, therefore, if at all the income from the activity of the assessee is to be recognised during the relevant financial year, a reasonable profit may be estimated from the gross receipts. We find merits in the arguments of the assessee for the reason that total receipts cannot be taxed as income of the assessee. The assessee has incurred various expenditures which have been debited to his P&L Account. Though, the assessee claims to have incurred various expenditures, failed to file complete details of expenditures incurred, to the satisfaction of the AO. Under these circumstances, what needs to be done is reasonable estimates of net profit from the business, taking into account the facts & circumstances. In this case, the assessee is in the business of providing consultancy services. In the case of professional and consultancy services, section 44AD provides for taxation of income from profits and gains of profession on presumptive basis. Though, provisions of section 44AD strictly not applicable to the present case, the analogy provided under the said provisions can be taken as basis for determining the profit. In the cases of profession, profit ranging from 10% to 25% is reasonable. Therefore, taking into account overall facts and circumstances of the case, we deem it appropriate to direct the AO to estimate net profit of 20% on total gross receipts received from SDCL. We order accordingly."

20. The Coordinate Bench of the ITAT in the case of Sh. N.J. Thakur at para 39 as elaborated supra has considered that Sh. N.J. Thakur has proved beyond doubt that the impugned receipt from the assessee was for the

purpose of providing consultancy services. It is also stated that he has also filed financial statements as per which various expenditure have been incurred. In view of the findings as referred above there is nothing before us on hand differ from the issue as decided by the ITAT, Mumbai in the case of Shri N.J. Thakur so as to take a different view on this issue, therefore, since, issue on hand being squarely covered, therefore, we don't find any reason to interfere in the decision of ld. CIT(A). Accordingly, ground no. 2 to 4 of the revenue are dismissed.

21. In the result, the appeal of the revenue is partly allowed.

ITA No. 6204/Mum/2019 A.Y. 2009-10
Revised ground of appeal No. 1 (Reopening of assessment)

22. Since, we have adjudicated similar issue on identical facts vide ground no. 1 of the ITA 6033/Mum/2019 therefore applying the finding as mutatis mutandis this ground of appeal is allowed. Therefore, this ground of appeal of the Revenue is allowed.

Revised Ground No. 2 to 4: (Reducing the WIP by the amount of Consultancy payment)

23. Since, we have adjudicated similar issue on identical facts vide ground no. 2 to 4 of the ITA 6033/Mum/19 therefore, applying the finding as mutatis mutandis these grounds of appeal of the revenue are dismissed. Therefore, these grounds of appeal of Revenue and dismissed.

ITA No. 6192/Mum/2019 (A.Y. 2011-12)
Ground No. 1 to 3: (Reducing WIP by the Consultancy Payment)

24. Since, we have adjudicated similar issue on identical facts vide ground no. 2 to 4 of the ITA 6033/Mum/2019 therefore applying the finding as mutatis mutandis these grounds of appeal of the revenue are dismissed. Therefore, these grounds of appeal of the Revenue are dismissed.

ITA No. 6193/Mum/2019 (A.Y. 2013-14)

Ground No. 1 to 3: (Reducing WIP by the Consultancy Payment)

25. Since, we have adjudicated similar issue on identical facts vide ground no. 2 to 4 of the ITA 6033/Mum/2019 therefore applying the finding as mutatis mutandis these grounds of appeal of the revenue are dismissed. Therefore these grounds of appeal of Revenue are dismissed.

Ground No. 4: (Disallowance us/ 14A)

26. The AO has computed disallowance u/s 14A r.w.Rule 8D to the amount of Rs.14851/-. The ld. CIT(A) has allowed the ground of appeal of the assessee since it has not earned any exempt income.

27. Heard both the sides and perused the material on record. It is undisputed fact that the assesse has not earned any exempt income during the year under consideration. The ld. CIT(A) has referred the decision of the Hon'ble Supreme Court in the case of Maxopp Investment Ltd. 91 Taxman.com 154 and the decision in the case of Chettinad Logistics Pvt. Ltd. (95 taxmann.com 250) wherein held that Section 14A cannot be invoked where no exempt income was earned by the assessee in the relevant assessment year. In view of the above facts and judicial findings we do not find any infirmity in the decision of ld. CIT(A). Therefore, this ground of appeal of revenue is dismissed .

ITA No. 6194/Mum/2019 (A.Y. 2012-13)

Ground No. 1 to 3: (Reducing WIP by the Consultancy Payment)

28. Since, we have adjudicated similar issue on identical facts vide ground no. 2 to 4 of the ITA 6033/Mum/2019 therefore applying the finding as mutatis mutandis these grounds of appeal of the revenue are dismissed. Therefore, these grounds of appeal are dismissed.

Ground No. 4: (Disallowance u/s 14A)

29. Since, we have adjudicated similar issue on identical facts vide ground no. 4 of the ITA No. 6193/Mum/2019, therefore, applying the findings as mutatis mutandis this ground of appeal of Revenue is dismissed.

ITA No. 6191/Mum/2019 (A.Y. 2014-15)
Ground No. 1 & 2: (addition of Notional income of Rs.115,96,021/- on account of notional rent)

30. The AO found that there was finished properties, however, no demand income was offered to tax on the said unsold flat. The AO made addition of Rs.115,96,021/- on the basis decision of Hon'ble Delhi High Court in the case of CIT Vs. Ansal Housing Finance and Leasing Co. Ltd. (354 ITR 180)

31. The ld. CIT(A) has deleted the addition after following the decision of the ITAT Mumbai in the case of M/s Runwal Construction Vs. ACIT in ITA No. 5408 & 5409/Mum/2016 dated 22.02.2018 wherein decision of Hon'ble Gujarat High Court in the case of Neha Builder & Pvt. Ltd. is considered wherein held that unsold flats are stock in trade any income derived from the such stocks cannot be termed as income from house properties.

32. Heard both the sides and perused the material on record. Following the judicial findings referred by the Ld. CIT(A) in his findings we do not find any merit in this ground of appeal of the Revenue. Therefore, this ground of appeal of Revenue is dismissed.

Ground No. 3 to 5: (Reducing WIP by Consultancy payment):

33. Since, we have adjudicated similar issue on identical facts vide ground no. 2 to 4 of the ITA 6033/Mum/2019 therefore applying the finding as mutatis mutandis these grounds of appeal of the revenue are dismissed. Therefore, these grounds of appeal are dismissed.

Ground No. 6 (Disallowance u/s 14A)

34. Since, we have adjudicated similar issue on identical facts vide ground no. 4 of the ITA No. 6193/Mum/2019, therefore, applying the findings as mutatis mutandis this ground of appeal of Revenue is dismissed.

35. In the result, the appeal of the revenue vide ITA Nos. 6033/Mum/2019 is partly allowed, ITA No. 6204/Mum/2019 is partly allowed, ITA No. 6192/Mum/2019 is dismissed, ITA No. 6193/Mum/2019 is dismissed, ITA No. 6194/Mum/2019 is dismissed ITA No. 6191/Mum/2019 is also dismissed.

Order pronounced in the open court on 30.08.2023

Sd/-	Sd/-
(Vikas Awasthy) Judicial Member	(Amarjit Singh) Accountant Member

Place: Mumbai
Date 30.08.2023

Rohit: PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण DR, ITAT, Mumbai
5. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//
आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण/ ITAT, Bench, Mumbai.