

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

**BEFORE SHRI ABY T VARKEY, JUDICIAL MEMBER &
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER**

**ITA Nos.2246 & 2247/Mum/2021
(A.Ys. 2014-15 & 2015-16)**

The Dy. Commissioner of Income Tax, Central Circle-5(3) Room No. 1906, 19 th Floor, Air India Building, Nariman Point, Mumbai – 400021	Vs.	M/s Shakti Enterprise Plot No.4, Gaujjarwadi, Behind Haryana Handloom, Near Vanita Vishram Ground, Gujarat - 395006
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No:ACRFS6859G		
Appellant	..	Respondent

Appellant by :	Ganesh Rakh
Respondent by :	Dr. P. Daniel

Date of Hearing	24.08.2023
Date of Pronouncement	10.11.2023

आदेश / O R D E R

Per Amarjit Singh (AM):

Both these appeals filed by the revenue are directed against the different order of ld. CIT(A) for assessment year 2014-15 and AY. 2015-16. Since, common issue on identical facts are involved in these two cases, therefore, for the sake of convenience both these appeals are adjudicated together by taking ITA No. 2246/Mum/2021 as a lead case and its finding will be applied mutatis mutandis to the other appeal wherever it is applicable.

ITA No. 2246/Mum/2021

- “1. *On the facts and circumstances of the case, the Ld CITAJ has erred in deleting the addition made of Rs.2,54,74,813/ which was made by the Assessing officer on the basis of entries of cash receipts relatable to specific units of plots sold after deducting the expenditure related to the business recorded in some impounded records, by holding that there is uncertainty in revenue being received and hence, in view of AS9 no income has accrued, overlooking the fact that the receipts and payments were in the form of unrecorded cash transactions, and accounting standards were not applicable on the same*
2. *On the facts and in the circumstances of the case and in law, the Ld. CI(A) is right in ignoring the decision of Hon'ble Supreme Court in the case of Tuticorin Alkali Chemicals & Fertilizers Ltd us CIT[1997] 227 ITR 172, wherein the Hon'ble Supreme Court has categorically mentioned that accounting practice cannot override any provisions of the Act, in this case where the income was already received as per the impounded records and is taxable U/s 5 of the Act and otherwise also regular books of account are not maintained.*
3. *On the facts and circumstances of the case, the Ld CIT) has erred in deleting the addition made by computing the profit on the basis of unrecorded actual cash receipts and expenses, by applying revenue recognition principles of accounting standards 9 ignoring the reasoning and facts given by the assessing officer, even though the assessee has never filed the return or responses before the assessing officer*
4. *On the facts and circumstances of the case, the Ld CITA) has erred in deleting the addition made of Rs.2,54,74,813/- based on the entries in the impounded records without giving any findings that, entries are not correct and merely by holding that the amounts received are mere advances without confirming from sellers, or allowing the AO opportunity to verify the same*
5. *On the facts and circumstances of the case, the Ld. CIT(A) has asserted the fact that there is no physical possession of the plots sold and the sales registered without examining the same and without stating what beneficiaries were conducted the same.*
6. *on the facts and circumstances of the case the ld. CIT(A) has erred in deleting the profit addition on the ground of uncertainty of revenue recognition, even though the assessee himself has stated that the buyers have been accommodated elsewhere implying that sales have been completed against the cash receipts and thereby deciding without considering relevant facts.*
7. *On the facts and circumstances of the case the Ld. CIT(A) has erred in deleting addition of Rs.3,27,24,218/- on account of the disallowance made u/s 40A(3) of the Act by stating that d cannot be done when profit has been estimated and thereby relying on wrong facts to arrive at the decision as there is no estimation of profit by the assessing officer and the actual expenses recorded in impounded records have been debited for the profit computation.*
8. *On the facts and circumstances if the case, the Ld. CIT(A) has erred in deleting the addition made u/s 40A(3) of the Act, on the basis of manner of profit computation, when the profit computation itself has been deleted by him, thereby by applying Accounting Stands contradicting himself.*

9. *Without prejudice to the grounds of appeal 7 and 8 above, Ld. CIT (A) has erred in not upholding the disallowance u/s 40A(3) of the IT Act and at the same time giving findings in respect of income based on Accounting Standard 9, there by benefiting the assessee in valuation of Work in Progress too, if and when the income is computed on the actual sales as per findings given by the Ld. CIT(A).*
10. *On the facts and circumstances of the case, the Ld. CIT(A) has erred by ignoring the crucial relevant facts and has decided on inadequate and irrelevant facts and hence, is perverse in his finding.*
11. *That the appellant craves to add alter, modify or abrogate any grounds of appeal at the time of hearing.”*

2. Fact in brief is that a search and seizure action/s 132(1) of the Act was conducted on “Gadhiya Group” on 07.01.2016. The assessee firm M/s Shakti Enterprises was one of the concern of Gadhiya family that runs real estate business. During the year under consideration the assessee has undertaken project named “Shakti Villa”. A survey action u/s 133A of the Act was carried out on 07.01.2016 in the case of the assessee at its office premises at Sarthana Jakat Naka, Varacha Road, Surat, Gujarat. During the course of survey various incriminating documents as per annexure A-1 to A-357 comprising loose papers, diaries and incriminating data from the laptop and the computer were impounded. On examination of the impounded material the assessing officer found that assessee firm had taken on money against sale of plot in its project “Shakti Villa” and had not offered any income to tax in the return of income for A.Y. 2014-15. The case of the assessee was reopened by issuing of notice u/s 148 of the Act on 18.03.2019. In response to the notice the assessee has not filed any return of income. Further the AO has provided a number of opportunities, by issuing of various notices however, the assessee has not made any compliance before the assessing officer during the course of assessment. Because of non-cooperation from the side of the assessee, the assessing officer has completed the assessment u/s 144 of the Act on the basis of material seized and impounded during the course of survey action carried along with the search action in the case of Gadhiya Group. The

assessing officer reported at page no. 4 of the assessment order that impounded material consisted of Annexure A-10 and A-11 and 332 small hand written diaries containing details of all the amount received from the various buyers of plot in respect of 3 project developed by the Shakti Group. Further forensic data back up was also taken of two laptops and 3 mobile phones at the aforesaid premises of the assessee firm. During the course of survey statement u/s 131 of Shri Jitendra Ghohabahi Chothani was recorded also recorded who worked in association with Shri Bipin L. Gadhiya who was one of the main person responsible for maintaining the various accounting records of various ongoing projects of Shakti Group. The assessing officer has given the extract of the statement at page no. 5 to 9 of the assessment order. From the impounded material and statement recorded the assessing officer found that assessee was in the practice of receiving the sale amount against sale of plots in cash. It was also found from the material impounded and explained in the statement that assessee was in the practise of writing the various amounts by omitting a certain number of zero's i.e 8710 as per annexure A-2 means Rs.8710,000/-. The assessing officer also found from the seized material and statement given by Shri Jitendra Chothani that assessee was maintaining parallel cash book comprising 103 pages in which date wise amount of cash received on plot sold was recorded. Shri Bipin L Gadhiya who managed cash receipt for all the projects has explained that amount received on account of booking of plots as per the different diaries found and impounded as per annexure A-25 to A-356 during the course of survey had not been recorded in the books of account. During the course of survey proceedings Shri Bipin L Gadhiya had admitted that the amount of Rs.13,97,01,864/- as recorded in the different diaries was pertained to 3 projects as under:

No.	Name of the Project	Amount (Rs.)
1.	Shakti Lake City	5,40,56,684
2.	Shakti Villa	5,45,84,000
3.	Shree Rudra Residency	3,10,61,180
	Total Amount received	13,97,01,864

The assessee has submitted in the past search proceedings that Shakti Villa project was cancelled, however, during the course of assessment proceedings the assessing officer has provided a number of opportunities but no compliance was made by the assessee to establish that the project was cancelled. The assessing officer has also given the details of impounded documents in respect of Shakti Villa project in the assessment order and part of the extract are given as under:

“Annexure A-3 (Super Deluxe Register)

This register contains some record of brokerage payments related to Shakti Villa project (pg. 1 to 5). Pages 6/7 contain details of plot numbers/parties and amounts, so are pages 11 to 17. Pages 8/9 merely contain plot numbers, as also page 18. The last page contains rough jottings.

Annexure A-4 (Black Cover Register)

This register is the complete Brokerage record of brokerage related to the Shakti Villa Project. It mentions plot numbers, broker names, the rate/date of payment and the amount. It is a serially numbered plot summary, wherever the plot is unsold, the respective page/column is blank. As per the statement of Shri Jitendra Chothani recorded in the post search proceedings on 12.04.2016, this register has been recorded by Shri Jitendra Chothani and Shri Jayesh Balar. It is seen that the figures mentioned in this annexure are written in 'Hundreds', for example, 150.00 means Rs. 15,000/-. The total of the amounts mentioned in this register is 35950.00 means Rs. 35,95,000/-.

Annexure A-5 (Yellow Coloured Register)

This Annexure is complete record of Brokerage payments pertaining to the Shree Rudra Residency project. In this register plot numbers, broker names, the rate of brokerage, date of payment and the amounts are mentioned. On going through the amounts mentioned in the register, it is found that the figures are in 'Hundreds', for example, 75.00 means Rs. 75,000/-. As per the statement of Shri Jitendra Chothani recorded in the post search proceedings on 12.04.2016, this register has been recorded by Shri Jitendra Chothani, Shri Jayesh Balar and Shri Prateek Balar.

Annexure A-6 (Classmate Note Book)

This notebook is a record of exchange of plots of Shakti Villa (SV) project to Shree Rudra Residency (RR) project. The left side of the page mentions the original allotment of plot and the right side mentions the exchange plots, with

owner names. A similar exchange summary is mentioned on pages 6 to 10, in a different format. While page 5 mentions a name, page 11 merely states the plot numbers.

Annexure A-7 (Multicolour Navneet Note Book)

This diary records exchange of Shakti Villa plots with Shree Rudra Residency plots. The diary begins with an index, which mentions the plot numbers/plot holders of the Shakti Villa (SV) project, on pages 1 to 4. The pages 5 to 33 contain the plot holder wise details of payments received and the exchange of plot and the amounts adjusted there against. It also mentions the brokerage payment has been made to the broker. A number of pages are blank or merely mention a plot number (8, 9, 10, 22, 23, 24, 30). While pages 34 and 35 contain a summary of broker wise plots/payments, pages 37 to 40 state the plot numbers and party names.

As illustration, on going through the Page No. 14, it is seen that the amount of Rs. 5,00,000/- of plot no. B-80 and B-81 has been adjusted against the plot no. 105 of Shree Rudra Residency. Out of the balance amount of Rs. 4,77,680/-, the buyer of the plot paid Rs. 2,00,000/- on 14.12.2015. Similarly, on page no. 28 amount of Rs. 4,25,000/- of plot no. B-207 of Shakti Villa has been adjusted against the plot no. 154 of Shree Rudra Residency. Out of remaining amount of plot no. 154 of Shree Rudra Residency, the buyer of the plot has paid Rs. 50,000/- on 18.12.2015.

Annexure A-10 (Multicoloured S.V. Note Book)

This Annexure pertains to the project Shakti Villa. This is the systematically recorded Cash Book of the Shakti Villa project which is maintained on day to day basis. On Page No. 1, the brought forward figure of receipts of Rs. 5,64,10,000/- is mentioned. In Page No. 2 to 82, there are date wise, plot wise entries of the amounts received from the buyers of the plots. In the first page, the amount received upto 24.06.2014 is mentioned, and the last entry in the name of Rajubhai on 09.12.2015 is on page no. 82. There are four columns in each page from page no. 2 which are date, name, plot no. and amount. It is seen that the breakup of part payments are given below the names of the buyers in the second column, and the total of these amounts are given in the fourth column. It is also seen that the assessee has written monthly totals after the end of the month and the cumulative totals up to that month are also given at the end of the month. In the second part of this Annexure, from page no. 83 to 100, there is date wise record of the expenses made by the assessee. The total amount of receipts for Shakti Villa project as recorded in this Cash Book is Rs. 10,55,29,000/- (Rs. 10,39,84,000/- upto Page No. 79 and Rs. 15,45,000/- being the sum from Page 80 to 82.)

Annexure A-22 (Blue Colour Small Note book)

This Annexure is an important core document. It is a small Diary containing hand-written records of various amounts paid for purchase of Land for Shakti Villa project (Block Nos. 63 and 66, Nansad village). The amounts are recorded date-wise and also contain details of Cheque payments. The total land expense as recorded in the Annexure for the said project is Rs. 14,95,00,000/-.

11. The income of the assessee, from the Shakti Villa project, as per the impounded documents is thus analyzed as under:-

- a. The data pertaining to this project is available in Annexure A-10 of impounded material from Rise-on Plaza premise, which is the Cash Book of the project, updated up to 04.01.2016 (as seen from Page No. 100 of the said Cash Book). Further, the complete Brokerage record of the project is available in Annexure A-4 of the impounded material of Rise-on Plaza. Annexure A-22 of the impounded material of Rise-on Plaza contains the details of all amounts paid for purchase of land for this project. The Excel file named "sv_22,10,2015_continue" located in "HP 2000 LAPTOP D\Jeet Backup_13122015\TOTAL\Krishna Krish_2015" also contains the records of the project updated till 26.10.2015 (as seen from the computer properties of this Excel file).
- b. From the sheet named 'Common' of the file "sv_22.10.2015_continue", it is seen that the total receipts of the project up to 26.10.2015 as recorded herein are Rs. 10,39,74,000/- (Cell No. AU379). From Page No. 79 of the Cash Book (Annexure A-10) also, it is seen that the total receipts of the project are Rs. 10,39,84,000/- (up to 26.10.2015) which (almost) matches with that mentioned in the Excel File. Upon including the further amounts mentioned in Pages 80 to 82 of the Cash Book, the total receipts of the project upto the date of Search are seen to be Rs. 10,55,29,000/-.
- c. Further, in Page Nos. 86 to 100 of the Cash Book, certain expenses/refunds etc. are recorded (from June 2014 to January 2016), whose total amount is Rs. 1,02,20,840/-. Out of this, upon detailed analysis, it is seen that the refunds to customers' amount to Rs. 4,25,000/-, brokerage expenses amount to Rs. 17,25,000/- and all other expenses amount to Rs. 80,70,840/-.
- d. As per the complete Brokerage record of this project in Annexure A-4, the total brokerage expense is seen to be Rs. 35,95,000/- The details of all plots that have been cancelled till 26.10.2015 are recorded in the Column No. 'AU' of the sheet 'Common' of "sv_22.10.2015_continue". The total of receipts with respect to sale of these plots as recorded in Column 'AS' is Rs. 47,00,000/-
- c. The total cost of land for this project as recorded in Annexure A-22 of impounded material of Rise-on Plaza premise is Rs. 14,95,00,000/-, which includes cheque payments. The total number of plots sold as seen from 'Common' sheet of "sv_22.10.2016_continue" is 368, whereas the total number of plots in the project as seen from this sheet is 516 (A-1 to A-64 and 1 to 452) Accordingly, the percentage of plots sold is 71.30% Further, the total amount received in respect of the sold plots is Rs. 10,39,74,000/- (as per Column 'AS'). whereas the total of pending amounts yet to be received as recorded in Column No. 'AT' of 'Common' sheet of "sv_22.10.2016_continue" is Rs. 15,64,83,000/- Accordingly, total sale consideration on accrual basis as per this file is Rs 26,04,57,000/- Thus, the sale amount received for this project as per this sheet (i.e., Rs. 10,39,74,000/-) is 39.91% of the total sale consideration accrued [i.e., Rs 26,04,57,000/-]. In view of these facts, the land expense allowable on proportionate basis in the

computation of profit of the project is Rs. 4,25,41,466/- [i.e., 39.91% of (71.30% of (the total land cost Ra. 14,95,00,000/-)}]

Thereafter the assessing officer computed the undisclosed income of the Shakti Villa project after taking into consideration the land cost and other expenses i.e brokerage etc. and arrived at undisclosed income for the year under consideration for A.Y. 2013-14 to 2015-16 as under:

“12. From the above discussion, and from voluminous impounded documents, it is clearly evident that the assessee had undertaken a real estate development project titled 'Shakti Villa' and had received sales receipts in cash of over Rs. 10 crores, as mentioned in the impounded documents A-2 to A-357 and further recorded in the computer data file sv_22.10.2015_continue of Annexure A-1.

On the basis of the said impounded documents and the computer data file, as discussed in para 11 above, the income of the assessee from the said Shakti Villa project is computed as under:-

No.	Description		Amount (Rs.)
1.	Total Receipts (Annexure A-10)		10,55,29,000
2.	Less: Land Cost (on proportionate basis)	4,25,41,466	5,93,32,306
3.	Brokerage expense (Annexure A-4)	35,95,000	
4.	Refunds to customers (Annexure A-10)	4,25,000	
5.	Other expenses (Annexure A-10)	80,70,840	
6.	Cancelled plots (Excel File)	47,00,000	
	Profit of Shakti Villa Project		4,61,96,694

Thereafter, the total undisclosed income of the project is Rs.4,61,96,694/-.

The year wise breakup of the gross receipts of the assessee from the aid project as per the computer date file is as under:

F.Y.	Rs.
2013-14	5,81,99,030
2014-15	4,32,62,020
2015-16	40,59,660

The profitability of the project for A.Y. 2014-15, 2015-16 and 2016-17 on the basis of these impounded documents as analysed above is computed as under:

*Shakti Villa (Shakti Enterprises)
F.Y. 2013-14, 2014-15, 2015-16*

Particulars	Ref. of Annexure	F.Y. 2013-14	F.Y. 2014 - 15	F.Y. 2015-16	Total
Total Income	Computer Excel file	5,81,99,030.00	4,32,62,020.00	40,59,660.00	10,55,20,710.00
Less: Expenses					
Land Cost	Computer Excel File	2,34,63,375.63	-1,74,41,407.97	16,36,682.39	4,25,41,466.00
Brokerage	A-4	19,82,790.99	-14,73,899.88	1,38,309.13	35,95,000.00

Refund	A-10	2,34,405.05	1,74,244.07	16,350.87	4,25,000.00
Other	A-10	44,51,401.62	-33,08,931.99	3,10,506.50	80,70,840.00
Cancelled Plots	Computer Excel file	25,92,244.13	-19,26,934.48	1,80,821.40	47,00,000.00
NET PROFIT		2,54,74,812.58	1,89,36,601.71	17,76,989.71	4,61,88,404.00
Ratio	Accrual basis	0.551541304	0.409986059	0.038472637	1

13. In view of the above working, the profit for the relevant assessment years are as under:

Sr. No.	Financial Year	Assessment Year	Net Profit
1.	2013-14	2014-15	2,54,74,812.58
2.	2014-15	2015-16	1,89,36,601.71
3.	2015-16	2016-17	17,76,989.71
	Total		4,61,88,404.00

Thus, the total profit of the assessee in respect of its project 'Shakti Villa' for A.Y. 2014-15 is Rs.2,54,74,812/-.

3. The assessee filed the appeal before the ld. CIT(A). The ld. CIT(A) has deleted the addition. The relevant part of the decision of CIT(A) is reproduced as under:

"6.3 The facts of the case and the findings of the AO in the assessment order and the submission made by the appellant has been considered.

While determining profit of the project, the AO has taken income of Rs. 10,55,20,710/- which is cash receipt on booking of plots. Whereas expenses have been allowed taking total sale as Rs. 26,04,57,000/- on accrual basis (Amount received. Rs. 10,55,20,710+ Amount to be received: Rs. 15,64,83,000). As per AO, the amount of Rs. 26,04,57,000/- was in respect of booking of 368 plots, whereas the total number of plots in the project was 516 (A-1 to A-64 and 1 to 452). Accordingly, the AO has taken percentage of plots sold as 71.30% The sale amount of Rs. 10,39,74,000/- received for the project is 39.91% of the total sale consideration accrued of Rs. 26,04,57,000/-. The AO has then allowed the land expenses in same proportion of (i) plots sold vis-a-vis total plots and (ii) cash sale receipt vis-a-vis total sale accrued. The AO has worked out expenses of the project at Rs.4,25,41,466/- [i.e 39.91% of (71.30% of (the total land cost Rs. 14,95,00,000/))]

The profit of the project so determined is apportioned in three A.Y.s, ie. A.Y. 2014-15: Rs. 2,54,74,812/-, A.Y. 2015-16: Rs. 1,89,36,601/- and A.Y. 2015-16: Rs. 17,76,989/-.

While determining profit of the project, the AO has taken income of Rs. 10,55,20,710/- which is cash receipt on booking of plots. Whereas expenses have been allowed taking total sale as Rs. 26,04,57,000/-on accrual basis (Amount received Rs. 10,55,20,710 + Amount to be received: Rs. 15,64,83,000) As per AO, the amount of Rs. 26,04,57,000/- was in respect of booking of 368 plots, whereas the total number of plots in the project was 516 (A-1 to A-64 and 1 to 452). Accordingly, the AO has taken percentage of plots sold as 71.30%. The sale amount of Rs. 10,39,74,000/- received for the project is 39.91 % of the total sale consideration accrued of Rs. 26,04,57,000/X DEPAR

Thus, it is seen that the AO has applied the concept of accrual of income in respect of sale of the plots in the project. Now, it is to be decided what constitute accrual of income in case of sale of plots by the real estate developers.

AS-9 of the Indian Accounting Standards are applicable to real estate sales. For recognition of revenue in case of real estate sales, it is necessary that all the conditions specified in paragraphs 10 and 11 of Accounting Standard AS-9 are satisfied.

The relevant paras of the AS-9 are reproduced as reproduced as below:

10. Revenue from sales or service transactions should be recognised when the requirements as to performance set out in paragraphs 11 and 12 are satisfied, provided that at the time of performance it is not unreasonable to expect ultimate collection. If at the time of raising of any claim it is unreasonable to expect ultimate collection, revenue recognition should be postponed.

11. In a transaction involving the sale of goods, performance should be regarded as being achieved when the following conditions have been fulfilled: (1) the seller of goods has transferred to the buyer the property in the goods for a price or all significant risks and rewards of ownership have been transferred to the buyer and the seller retains no effective control of the goods transferred to a degree usually associated with ownership; and (ii) no significant uncertainty exists regarding the amount of the consideration that will be derived from the sale of the goods"

Thus, as per provisions of AS-9, revenue in case of real estate sales should be recognised when all the following conditions are satisfied. (1) The seller has transferred to the buyer all significant risks and rewards of ownership and the seller retains no effective control of the real estate to a degree usually associated with ownership; (ii) no significant uncertainty exists regarding the amount of the consideration that will be derived from the real estate sales, and (ii) it is not unreasonable to expect ultimate collection

In case of real estate sales, all significant risks and rewards of ownership are normally considered to be transferred when (i) legal title passes to the buyer (e.g., at the time of the registration, with the relevant authorities, of the real estate in the name of the buyer) or (ii) the seller enters into an agreement for sale and gives possession of the real estate to the buyer under the agreement. All significant risks and rewards of ownership are also considered to be transferred, if the seller has entered into a legally enforceable agreement for sale with the buyer even though the legal title is not passed or the possession of the real estate is not given to the buyer.

The facts of the appellant case are that due to delays in land acquisition the project has not been launched. In respect of 368 plots out of 516 total plots, customers have paid part amount for booking of the plot. Due to delays in the project, some customers have cancelled the booking and sought refunds, some have switched to another project such as Shakti Lake City or Rudra Residency, while some have yet continued their booking. It is a fact that in none of the plots, sale have been registered or physical possession have been given to the customer. Thus as per AS-9, the receipt of cash on booking of the plots does not result in the accrual of any income and the amount so received remained in the nature of advances.

The AO has misunderstood the concept of accrual of income. The AO has tried to extend the concept of accrual of income on receipt of cash on mere booking of plots. The AO has hypothetically overextended the concept of accrual of income even to the amount which is yet to be received from customers in future. Looking the status of the project, there is no certainty of receiving this remaining amount from the customers in future.

In the case of the appellant, there has been no accrual of income related to booking of plots in this project. Therefore, determination of profit of the project on the basis of non-existing accrual of income by the AO is a futile and worthless exercise. Therefore, the profit of the Project determined by the AO at Rs. 4,61,88,404/- cannot be legally sustained.

In view of the above discussion the addition of Rs.2,54,74,812/- made by the AO as undisclosed income is deleted.”

4. During the course of appellate proceedings before us the ld. D.R vehemently contended that a volume of incriminating material as discussed in the assessment order was found and impounded during the course of survey action taken place in the case of the assessee. He further submitted that as per the entries recorded in the impounded diaries the assessee has received unaccounted amount in cash on the sale of various plots and in spite of giving various opportunities the assessee has deliberately had not made any compliance before the assessing officer. The ld. D.R. further submitted that the ld. CIT(A) has neither called any remand report nor considered this fact that assessee has not made any compliance before the assessing officer and erroneously deleted the addition by referring the accounting standard 9.

On the other hand, the ld. Counsel supported the order of Ld. CIT(A) and referred the material placed in the paper book in respect of cancelling of the plot allotted by the assessee.

5. Heard both the sides and perused the material on record. As discussed in this order a search and seizure action u/s 132(1) of the Act was carried out in the group cases of the assessee firm. A survey action was also conducted under Section 133A of the Act in the case of the assessee firm. As elaborately discussed in the order of assessing

officer various incriminating documents from annexure A-1 to A-357 were found and impounded from the office premises of the assessee firm. The assessee has not made any compliance during the course of assessment proceedings initiated u/s 147 of the Act on the basis of incriminating materials impounded during the course of survey action in the case of the assessee firm. However, the assessee has not made any compliance. Therefore, the assessing officer has passed the assessment order ex-parte u/s 144 r.w.s 147 of the Act and determined the undisclosed income of the project after referring the incriminating material impounded during survey action as discussed in the assessment order from page 1 to 28 and explained in the statement of various persons recorded during the course of survey.

6. We find that in spite of knowing this material fact that assessee has not made any compliance before the assessing officer the Id. CIT(A) has passed order u/s 250 of the Act on 13.07.2021 without calling any remand report from the assessing officer. Further we have noticed that the Id. CIT(A) has given incorrect finding at page 5 of the assessment order stating that in response to the query raised by the assessing officer the assessee had made submission. The Id. CIT(A) also mentioned that AO rebutted all the objection raised by the assessee. However, the fact is that assessee has not made any compliance before the assessing officer and the Id. CIT(A) has not brought on record any evidence to demonstrate that the assessee has made any compliance before the assessing officer during the course of assessment proceedings. The incorrect finding of the Id. CIT(A) is reproduced as under:

“In response to the query raised by the AO, the appellant had made submission. The AO rebutted all the objections raised by the appellant.”

However, the fact is that assessee has not made any submission before the AO during the course of assessment proceedings. Further we have gone through the paper book submitted by the assessee and it is noticed

that all the document placed in the paper book were the copies of annexure of seized material and copies of agreement etc. which were impounded during the course of survey action and there was not any single evidence in the paper book which could demonstrate that assessee had made any submission before the assessing officer during the course of assessment proceedings u/s 147 of the Act. We have further noticed that in the paper book the assessee has placed a copy of letter dated 20.12.2018 addressed to the assessing officer pertaining to assessment year 2016-17 whereas the case of the assessee is pertained to A.Y. 2014-15 and 2015-16 for which assessment proceedings was initiated by issuing of notice u/s 148 of the Act only on 18.03.2019. All these facts and evidences placed on record substantiate that neither the assessee has made any compliance before the assessing officer nor the ld. CIT(A) called any remand report from the assessing officer. In view of the incorrect facts reported in the order of the ld. CIT(A) as discussed supra we consider that AO is required to verify/examine the impounded material after providing due opportunity to the assessee. Therefore, we restore this case to the file of the assessing officer for deciding de novo as directed above. The assessee is directed to make compliance before the assessing officer without any failure. Accordingly, the appeal of the revenue is allowed for statistical purposes.

ITA No. 2247/Mum/2021

7. Since the facts and the issue involved in this ground of appeal is similar to the facts and issue involved in the appeal vide ITA No. 2246/Mum/2021 as adjudicated supra in this order, therefore, applying the finding of ITA No. 2246/Mum/2021 as mutatis mutandis this ground of appeal of the revenue is also allowed.

8. In the result, both the appeals of the revenue are allowed for statistical purpose.

Order pronounced in the open court on 10.11.2023

Sd/-

Sd/-

(Aby T Varkey)
Judicial Member

(Amarjit Singh)
Accountant Member

Place: Mumbai

Date 10.11.2023

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.