

आयकर अपीलीय अधिकरण, चण्डीगढ़ न्यायपीठ "ए", चण्डीगढ़
IN THE INCOME TAX APPELLATE TRIBUNAL, CHANDIGARH BENCH "A", CHANDIGARH

HEARING THROUGH: PHYSICAL MODE

श्री आकाश दीप जैन, उपाध्यक्ष एवं श्री विक्रम सिंह यादव, लेखा सदस्य
BEFORE: SHRI. AAKASH DEEP JAIN, VP & SHRI. VIKRAM SINGH YADAV, AM

आयकर अपील सं. / ITA Nos.663, 668 & 679/Chd/2023
निर्धारण वर्ष / Assessment Years : 2017-18, 2018-19 & 2019-20

Khanna Infrabuild Private Limited 2000/1A, Sukhdev Nagar, Ferozepur Road, Ludhiana	बनाम	The DCIT Central Circle-2, Ludhiana
स्थायी लेखा सं. / PAN NO: AAFCK0050Q		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/Assessee by : Shri Sudhir Sehgal, Advocate
राजस्व की ओर से/ Revenue by : Shri Rohit Sharma, CIT, DR

सुनवाई की तारीख/Date of Hearing : 03/04/2024
उद्घोषणा की तारीख/Date of Pronouncement : 28/06/2024

आदेश/Order

PER VIKRAM SINGH YADAV, A.M. :

All the above appeals have been filed by the Assessee against the separate orders of the Ld. CIT(A)-5, Ludhiana each dt. 19/10/2023 pertaining to Assessment Years 2017-18, 2018-19 and 2019-20 respectively.

2. Since the issues involved in all the above appeals are common and were heard together so they are being disposed off by this consolidated order for the sake of convenience and brevity.
3. The assessee has raised the following grounds in ITA No. 663/Chd/2023 for the A.Y. 2017-18:

"1. That the Ld. CIT(A) has erred in confirming the action of the Ld. AO in sustaining an addition of Rs. 2,09,48,986/- in the assessment framed u/s 153A on account of alleged unexplained investment as made by the assessee company in the construction of Hotel Building against the loss of Rs. 17,57,981/- declared by the assessee.

2. That the Ld. CIT(A) has also erred in invoking the provisions of section 69 read with section 115BBE of the income Tax Act on account of alleged unexplained investment in the Hotel Building.

3. That the Ld. CIT(A) has erred in confirming the action of the Assessing Officer in making the reference to the Departmental Valuer, for estimate cost of construction of the hotel building, without any incriminating evidence during the course of search from the business premises of the assessee company or from residential premises of the Directors.

4. That the Ld. CIT(A) has ignored the judgment of the jurisdictional Bench of ITAT in the case of Harbhajan Kaur and Smt. Jatinder Kaur in ITA No. 70 Et 71/Chd/2021 and 75 a 76/Chd/2021 in which, following the judgment of Delhi High Court in the case of Abhinav Kumar Mittal reported at 351 ITR 20, it has been held that no reference could be made to the Valuation Officer in the absence of any incriminating material found during search.

5. That the finding of the Ld. CIT(A) that the reference the Valuation Officer is valid, even if, no document or material is unearthed for the aforesaid period is against the facts & circumstances of the case and on the other hand, treating the material seized from the third party as incriminating material is a contradictory finding and the Ld. CIT(A) has failed to appreciate the facts in the judgment M/s Abhisar Buildwell Pvt. Ltd., reported in 149 Taxman.com 399 and following in other cases like PCIT Vs S.S.Con Build Pvt. Ltd., 455 ITR 506, PCIT Vs S.S. Con Buildwell in ITA No. 4326/2023, dated 10.07.2023 and U.K. Paints 150 Taxmann.com 108.

6. That the Ld. CIT(A)-5, has erred in following the order of his predecessor for Asstt. Year 2016-17 vide order, dated 27.02.2023 and that order was subject matter of appeal before the Hon'ble ITAT and where it has been held that neither reference to DVO was held to be valid nor the addition was justified.

7. Notwithstanding the above said grounds of appeal, the Ld. CIT(A) has erred in sustaining the addition on the basis of report of the Valuation Celt, which is based on the CPWD Rates, against the PWD rates, which should have been applied as per the binding judgment of the Jurisdictional High Court in the case of CIT vs. Rajesh Mahajan reported at [201] 50 taxmann.com 206 (P&H).

8. Notwithstanding the above, grounds of appeal, that the confirmation of addition on substantive basis on the basis of the judgment of CIT vs. Sh. Baba Rupa Dass is against the facts & circumstances of the case, since it is not a case of any amount introduced in the books of accounts of the assessee.

9. That the Ld. CIT(A) has erred in upholding the action of the Assessing Officer in rejecting the books of accounts u/s 145(3) since no defect have been pointed out in the books of accounts which are maintained and duly audited and, as such, the upholding of rejection of books of accounts u/s 145(3) is void abintio.

10. That the Ld. CIT(A) has erred in confirming the action of the Assessing officer in disallowing the current year business loss without pointing out any defect and further has erred in not allowing carried forward of losses.

11. That the Ld. CIT(A) has erred in not allowing the deduction u/s 35AD for which, the necessary evidence was filed and has also failed to appreciate the written submission and various judgements as cited before him on this issue.

12. That the said deduction u/s 35AD have been disallowed without giving specific finding.

13. That the assessee craves leave to add, amend, and alter any ground or grounds of appeal before the appeal is finally heard or disposed-off."

4. The assessee has raised the following grounds in ITA No. 668/Chd/2023 for the A.Y. 2018-19:

"1. That the Ld. CIT(A) has erred in confirming the action of the Ld. AO in sustaining an addition of Rs. 2,02,71,026/- in the assessment framed u/s 153A on account of alleged unexplained investment as made by the assessee company in the construction of Hotel Building declared by the assessee.

2. That the Ld. CIT(A) has also erred in invoking the provisions of section 69 read with section 115BBE of the Income Tax Act on account of alleged unexplained investment in the Hotel Building.

3. That the Ld. CIT(A) has erred in confirming the action of the Assessing Officer in making the reference to the Departmental Valuer, for estimate cost of construction of the hotel building, without any incriminating evidence during the course of search from the business premises of the assessee company or from residential premises of the Directors.

4. That the Ld. CIT(A) has ignored the judgment of the jurisdictional Bench of ITAT in the case of Harbhajan Kaur and Smt. Jatinder Kaur in ITA No. 70 a 71/Chd/2021 and 75 & 76/Chd/2021 in which, following the judgment of Delhi High Court in the case of Abhinav Kumar Mittal reported at 351 ITR 20, it has been held that no reference could be made to the Valuation Officer in the absence of any incriminating material found during search.

5. That the finding of the Ld. CIT(A) that the reference the Valuation Officer is valid, even if, no document or material is unearthed for the aforesaid period is against the facts & circumstances of the case and on the other hand, treating the material seized from the third party as incriminating material is a contradictory finding and the Ld. CIT(A) has failed to appreciate the facts in the judgment M/s Abhisar Buildwell Pvt. Ltd. reported in 149 Taxman.com 399 and following in other cases like PCIT Vs S.S.Con Build Pvt. Ltd., 455 ITR 506, PCIT Vs S.S. Con Buildwell in ITA No. 4326/2023, dated 10.07.2023 and U.K. Paints 150 Taxmann.com 108.

6. That the Ld. CIT(A)-5, has erred in following the order of his predecessor for Asstt. Year 2016-17 vide order, dated 27.02.2023 and that order was subject matter of appeal before the Hon'ble ITAT and where it has been held that neither reference to DVO was held to be valid nor the addition was justified.
 7. Notwithstanding the above said grounds of appeal, the Ld. CIT(A) has erred in sustaining the addition on the basis of report of the Valuation Cell, which is based on the CPWD Rates, against the PWD rates, which should have been applied as per the binding judgment of the Jurisdictional High Court in the case of CIT vs. Rajesh Mahajan reported at [201] 50 taxmann.com 206 (P&H).
 8. Notwithstanding the above grounds of appeal, that the confirmation of addition on substantive basis on the basis of the judgment of CIT vs. Sh. Baba Rupa Dass is against the facts & circumstances of the case, since it is not a case of any amount introduced in the books of accounts of the assessee.
 9. That the Ld. CIT(A) has erred in upholding the action of the Assessing Officer in rejecting the books of accounts u/s 145(3) since no defect have been pointed out in the books of accounts which are maintained and duly audited and, as such, the upholding of rejection of books of accounts u/s 145(3) is void abintio.
 10. That the Ld. CIT(A) has erred in confirming the action of the Assessing officer in making the addition of Rs. 37,30,789/-u/s 35AD, without pointing out any defect and further has erred in not allowing the carried forward of losses.
 11. That the Ld. CIT(A) has erred in not allowing the deduction u/s 35AD, for which, the necessary evidence was filed and has also failed to appreciate the written submission and various judgements as cited before him on this issue.
 12. That the Ld. CIT(A) has erred in not allowing the carried forward loss as claimed by the assessee.
 13. That the said deduction u/s 35AD have been disallowed without giving specific finding.
 14. That the assessee craves leave to add, amend, alter any ground or grounds of appeal before the appeal is finally heard or disposed-off."
5. The Assessee has raised the following grounds in ITA No. 679/Chd/2023 for the A.Y. 2019-20:
- "1. That the Ld. CIT(A) has erred in confirming the action of the Ld. AO in sustaining an addition of Rs. -2,03,67,385/- in the assessment framed u/s 153A on account of alleged (unexplained investment) as made by the assessee company in the construction of Hotel Building declared by the assessee.

2. That the Ld. CIT(A) has also erred in invoking the provisions of section 69 read with section 115BBE of the Income Tax Act on account of alleged/unexplained investment in the Hotel Building.

3. That the Ld. CIT(A) has erred in confirming the action of the Assessing Officer in making the reference to the Departmental Valuer, for estimate cost of construction of the hotel building, without any incriminating evidence during the course of search from the business premises of the assessee company or from residential premises of the Directors.

4. That the Ld. CIT(A) has ignored the judgment of the jurisdictional Bench of ITAT in the case of Harbhajan Kaur and Smt. Jatinder Kaur in ITA No. 70 & 71/Chd/2021 and 75 & 76/Chd/2021 in which, following the judgment of Delhi High Court in the case of Abhinav Kumar Mittal reported at 351 ITR 20, it has been held that no reference could be made to the Valuation Officer in the absence of any incriminating material found during search.

5. That the finding of the Ld. CIT(A) that the reference the Valuation Officer is valid, even if, no document or material is unearthed for the aforesaid period is against the facts & circumstances of the case and on the other hand, treating the material seized from the third party as incriminating material is a contradictory finding and the Ld. CIT(A) has failed to appreciate the facts in the judgment M/s Abhisar Buildwell Pvt. Ltd., reported in 149 Taxman.com 399 and following in other cases like PCIT Vs S.S.Con Build Pvt. Ltd., 455 ITR 506, PCIT Vs S.S. Con Buildwell in ITA No. 4326/2023, dated 10.07.2023 and U.K. Paints 150 Taxmann.com 108.

6. That the Ld. CIT(A)-5, has erred in following the order of his predecessor for Asstt. Year 2016-17 vide order, dated 27.02.2023 and that order was subject matter of appeal before the Hon'ble ITAT and where it has been held that neither reference to DVO, was held to be valid nor the addition was justified.

7. Notwithstanding the above said grounds of appeal, the Ld. CIT(A) has erred in sustaining the addition on the basis of report of the Valuation Cell, which is based on the CPWD Rates, against the PWD rates, which should have been applied as per the binding judgment of the Jurisdictional High Court in the case of CIT vs. Rajesh Mahajan reported at [201] 50 taxmann.com 206 (P&H).

8. Notwithstanding the above grounds of appeal, that the confirmation of addition on substantive basis on the basis of the judgment of CIT vs. Sh. Baba Rupa Dass is against the facts & circumstances of the case, since it is not a case of any amount introduced in the books of accounts of the assessee.

9. That the Ld. CIT(A) has erred in upholding the action of the Assessing Officer in rejecting the books of accounts u/s 145(3) since no defect have been pointed out in the books of accounts which are maintained and duly audited and, as such, the upholding of rejection of books of accounts u/s 145(3) is void abinito.

10. That the Ld. CIT(A) has erred in confirming the action of the Assessing Officer in making the addition of Rs. 64,60,630/- under section 35AD, without pointing out any defect and further has erred in not allowing carried forward of losses.

11. That the Ld. CIT(A) has erred in not allowing the deduction u/s 35AD, for which, the necessary evidence was filed and has also failed to appreciate the written submission and various judgements as cited before him on this issue.

12. That the Ld. CIT(A) has erred in not allowing the carried forward loss as claimed by the assessee.

13. That the said deduction u/s 35AD have been disallowed without giving specific finding.

14. That the assessee craves leave to add, amend, alter any ground or grounds of appeal before the appeal is finally heard or disposed off."

6. With the consent of the parties, the case of the assessee in ITA No.633/Chd/2023 was taken as the lead case wherein the brief facts of the case are that the assessee was involved in the business of running a hotel. A search and seizure operation, u/s 132 of the Act, was carried out at the hotel premises of the assessee on 21.02.2019. It was noticed from the balance sheet of the assessee company that the assessee company had shown total amount spent on construction of hotel building in different years at Rs.6,14,92,469/-, whereas the value of the building was more. The matter was referred to Departmental Valuation Officer (DVO) for calculating the investments made by the company in the hotel building. The DVO gave the report estimating the cost of construction in various years totaling Rs. 20,21,69,800/-. The Assessing Officer further noted that earlier a separate search action was carried out in the case of another party i.e. M/s Royal Builders on 29.11.2018, during the course of which, certain incriminating documents were found at the premises of the said third party. That document no. 58 found from the premises of M/s Royal Builders showed project wise detail on 12.02.2016, which included the project of M/s Khanna Infrauild Pvt. Ltd. (assessee). He observed that the said document showed that the assessee company had remitted cash payment of Rs.

5,81,00,000/- including cheque payment of Rs. 1,15,00,000/- to M/s Royal Builders on account of construction of the hotel building upto 12.02.2016. He noted as per said document, the assessee had made payments aggregating to Rs. 6,76,00,000/- to the Royal Builders, whereas, the assessee company had shown in his account, the total cost at Rs.6,14,92,469.59/- including cheque payment of Rs.1,15,00,000/-. The Assessing Officer allowed the rebate of expenditure @10% on account of self-supervision and further @7.5% for discount on self-procurement of construction material and thereafter the Assessing Officer bifurcated the said total investment determined by the DVO into different years and made the impugned additions on account of difference in the value of investment on construction of hotel building shown by the assessee in the books of account as compared to the value of investment estimated by the DVO. The details of which is given as under:

F.Y.	Declared by the Assessee	Estimated by Valuation Cell	Rebate @17.5%	Net Valuation	Year wise Unexplained Investment
A	B	C	$D(C*D/100)$	E (C-D)	F (E-B)
2012-13	65,07,890.00	2,13,96,100.00	37,44,318.00	1,76,51,782.50	1,11,43,893.00
2013-14	-	-	-	-	-
2014-15	2,72,08,989.00	8,94,55,400.00	1,56,54,695.00	7,38,00,705.00	4,65,91,716.00
2015-16	1,55,41,673.81	5,10,96,600.00	89,41,905.00	4,21,54,695.00	2,66,13,021.00
2016-17	1,22,33,916.78	4,02,21,700.00	70,38,798.00	3,31,82,902.50	2,09,48,986.00
Total	6,14,92,469.59	20,21,69,800.00	3,53,79,715.00	16,67,90,085.00	10,52,97,615.00

The Assessing Officer further noted that the assessee company was incorporated on 21.11.2012. He in this respect observed that till the time the operation of hotel business of the assessee company commenced, there has been no source of income or availability of own generated funds with the assessee company, other than the contribution made by the directors themselves as share capital and unsecured loans introduced. The Assessing Officer, therefore, observed that since the assessee company did not have any source of earning then the amount invested in the construction of the hotel building could have only be funded by the shareholders/directors, who had the

interest/ownership rights in the land/building of the assessee company. He observed that the assessee company, being an artificial juridical person, could not have earned, itself, any income prior to the commencement of business or operation of hotel in the instant case. He, therefore, held that the unaccounted investment in the hotel building was made by the three directors/shareholders of the assessee company. He accordingly made the substantive addition in the hands of the directors of the company on proportionate basis. However, he made the impugned addition in the hands of the assessee company on protective basis.

7. Being aggrieved by the said order of the Assessing Officer, the assessee company preferred appeal before the CIT(A). The Id. CIT(A) however confirmed the additions so made by the Assessing Officer, rather, on substantive basis in the case of the assessee company observing that it was immaterial as to whether the assessee company had commenced its business or not when, the undisclosed investments were found in the hands of the assessee company.

8. Against the said findings and directions of the Id CIT(A), the assessee company is in appeal before us.

9. During the course of hearing, the Id. Counsel for the assessee has submitted that admittedly no incriminating material was found during the course of search action at the premises of the assessee. He has submitted that in the absence of incriminating material found during the search action, the reference to the DVO for determining the estimated cost of construction was not valid. He has further submitted that so far as the reference to some incriminating documents from the office premises of a third party i.e. M/s Royal Builders during an earlier search in the case of the said party was concerned, neither the said documents were brought to the knowledge of the assessee nor the same was confronted to the assessee. He, therefore, has submitted that the reference to

the DVO, merely, on the basis of cost shown in the balance sheet of the assessee, without any other incriminating material found during search action, was bad in law. He in this respect has relied upon the latest decision of the Hon'ble Supreme Court in the case of PCIT vs. Abhisar Buildwell Pvt. Ltd. [2023] 149 taxmann.com 399 (SC). He in this respect has made the following written submissions also:

"7. We have as per our ground of appeal by way of ground number one to have challenged the jurisdiction of the DDI to refer to the case of valuation cell without there being any incriminating material found during the course of search from the premises of the assessee, either from Hotel or from the residential premises of the promoters and for which our contention are as under:-

(i) It is a fact that the no incriminating material was found from the assessee and as such the reference to the valuation cell was uncalled for. The Ld. CIT(A) has referred to the certain document as seized from third party namely M/s Royal Builders during search in his case on 29.11.2018 and a further held that the reference to the valuation cell may not on the basis of incriminating document, but was within the powers of the AO as per section 142A, without there being any incriminating material in hand as well.

(ii) The Ld. CIT(A) has referred to some judgements at page 16, but all Such judgement are not applicable due to the recent judgement of the Supreme Court M/s AbhisarBuildwell Pvt. Ltd. as per copy placed at page 27 to 48 and which judgement has again been followed in the case of PCIT vs Kind Buildcon Pvt. Ltd. by the Apex Court, copy placed at page 49 to 50 of the paper book.

(iii) As regard, to the said incriminating document, it may be stated that the said document as mentioned by the AO in the assessment order was never confronted during the course of assessment proceedings as is evident of the discussion at page 11 of the assessment order and we came to know only, when the assessment order was received and obtained a copy thereof and the same is evident from the content of the assessment order and neither any statement of Sh. Vishal Bhatia was confronted to us and we had before the Ld. CIT(A) in para 12 at page 10 of the said order mentioned this fact and cited the case of "Andaman Timber Industries" and others in this context and further, stated that no addition could be made on the basis of third party evidence and thus, no reliance could be placed on such documents and copy of the document was copied from the assessment order in the individual cases as passed by the Ld. AO and the copy of said document is at the page 26 of the paper book.

(iv) The reliance is being placed on the judgement of the Delhi High Court in the case of Sh. Abhinav Kumar and, which have been followed by the Chandigarh Bench in the case of Smt. HarbhajanKaur as per copy placed at page 64 to page 67 and page 51 to page 63, both were the search assessment and judgement is securely applicable.

(v) The finding of the CIT(A), thus, are not applicable to the fact of the case and without confronting the document to the assessee during assessment proceedings and straight away relying on the third party evidence, the conformation of addition by the Ld. CIT(A) is not a correct observation in view of the judgement of the Apex Court and of the Chandigarh Bench ITAT. The said document cannot be said to be incriminating, in so far, as the assessee is concerned in view of the judgement of the Apex Court and further the finding of the Ld. CIT(A) at page 17, that there is no requirement of incriminating material for the purpose of assessment u/s 153A is devoid of any valid reasoning. In view of the direct judgment of Apex Court, Delhi High Court.

(vi) Reliance in being placed on the judgement of Delhi High Court in the case of CIT vs Concorde Capital Management Company Ltd. reported in (2011) 334 ITR 346, that when no incriminating documents were found during course of search, the additions cannot be sustained on the basis of third party statements, independent of the search. In our case, there was no parallel search as the search was conducted on the Vishal Bhatia on 29.11.2018 and the search on the assessee was on 21.02.2019.

(vii) The finding of the CIT(A) on section 292C is not relevant, since the said document was not found in the possession of the assessee, but from the third party and under what circumstances the said document has been prepared by third party is not known to the assessee and merely that some cheque transactions total tallies with the assessee cannot amount to the addition, as the document may have been prepared by the third party, with the ulterior motives and the fact of the matter is that the document has not been confronted to the assessee and reliance on that statement at the back of the assessee without giving any opportunity to the assessee, the whole basis of finding is devoid of any valid consideration. We had cited the case of Andaman Timber & Others that no addition could be made in such circumstances.

(viii) The reliance on the judgement at page 20 by the CIT(A) in the case of VC Shukla and Smt. P K Noorjahan is not correct, since the document as found from the third party is from an independent search and has been challenged because of the facts as stated above and further there are so many other names in the said document and hence the observation of the CIT is not correct. Further, the Royal Builders is not our group case as he was searched separately.

(ix) Besides, that for the sake of argument though not admitting, it may be stated that as per the Assessing Officer the total amount mentioned in the seized document is Rs. 6,96,00,000/- against which the assessee has debited an amount of Rs. 6,14,92,469/- and thus there is a minor difference of only Rs. 81,00,000/- and thus even on this account, the huge addition as made cannot survive.

8. Further, the reference was made in the name of the company by department to the valuation cell as is evident on page 3 of the assessee and the DVO forwarded the valuation report in the name of the company and the applicant filed his objections to the AO and also stated that CPWD rates are much higher and in the case of Sh. Raiesh Mahajan, the Hon'ble Punjab and Haryana High Court has held that CPWD rates are higher by 30% and besides that for personal supervision, the benefit of 15% is to be allowed as against 7.5% allowed by the DVO and thus the Ld. AO has only allowed a benefit of 7.50% on an ad hoc basis and which is not proper,

The said report has been challenged as defective as per our objection raised during the assessment proceedings."

10. The Id. Counsel has further contended that after the search, the department had referred the case to the DVO to assess the cost of construction in respect of the Hotel Building and on the basis of report of the DVO starting from Asstt. Years 2013-14, 2015-16, 2016-17, 2017-18, 2018-19 & 2019-20, certain additions had been made on account of difference in the cost of construction as discussed as per DVO report and that matter had come before the Hon'ble ITAT, Chandigarh Bench, Chandigarh in these years i.e. Asstt. Years 2013-14, 2015-16 & 2017-18 and the Hon'ble Bench in a decision reported in 110 ITR (Trib.) 161 (Chd.) both on the legal and on merits, the said additions were deleted and copy of the reported judgments had also been submitted to your goodself.

11. It was further submitted that the Ld. CIT(A) had followed the order of the CIT(A) in the earlier assessment years, where he had confirmed such addition as per para 7.2.1, at page 23 of the order. Thus, in view of the above said facts, the addition had been deleted by the Hon'ble ITAT in the case of same assessee on similar facts and circumstances and, as such, the grounds No. 1 to 8 as raised before your honour should be allowed.

12. The Id. DR, on the other hand, has relied upon the findings of the Id. CIT(A) and has submitted that the Id. CIT(A) has rightly confirmed the additions on account of undisclosed investment on the hotel building. At the same time, he fairly submitted that the matter is covered by the decision of the Coordinate Bench as so referred by the Id AR.

13. We have heard the rival contentions and perused the material available on record. During the course of hearing, our reference was drawn to the findings of the Coordinate Bench (*in ITA No. 133-135/Chd/2023 for A.Y 2013-14, 2015-16 and 2016-17*) and the same reads as under:

"7. We have considered the rival contentions and gone through the record. The peculiar fact to be noted in this case is that no incriminating material was found during the course of search action at the premises of the assessee. The time period for initiating original scrutiny assessment u/s 143(3), by issue of notice u/s 143(2) of the Act, in this case has already lapsed on the date of search action, which means that the original assessment in this case stood completed and not abated on the date of search. The Hon'ble Supreme Court in the case of PCIT vs. Abhisar Buildwell Pvt. Ltd. (supra) has settled the proposition of law that in case of no incriminating material is found during the course of search action and the assessment stood completed and not abated for that assessment year, then no addition can be made in the absence of any incriminating material found during the course of search action.

7.1. Now, the question before us is as to whether the report of the DVO obtained after search action can be based for making the impugned additions in this case in the absence of any incriminating material during the course of search action. We note that the report of the DVO is purely based on estimation basis. The assessee had filed various objections against the said report. One of the important objections of the assessee was that the DVO had taken the rates of construction as per the Central Public Works Department (CPWD) rate. It was submitted that the property was situated in the State of Punjab. That the DVO, subject to a other objections, was otherwise required to take the prescribed rates of State Public Works Department (PWD rates). It was submitted before the Assessing Officer that there was difference of at least 25% in the rates of construction released by the CPWD as compared to PWD rates. It was also submitted that no discrepancy was found in the books of account of the assessee. It was also submitted that even otherwise, a very higher profit rate is embedded of the contractor in the Government departmental rates i.e. CPWD/PWD, whereas, the assessee has got construction of the work in self-supervision and even the material was purchased at discounted rates, and that the concession given by the Assessing Officer, in this respect was very less.

7.2. We, further, note that no incriminating or corroborating evidence was found during the course of search action at the office premises of the assessee prompting the search party/Assessing Officer to get the report of the DVO regarding the cost of construction. The issue has been settled by the various Hon'ble High Courts, who have been unanimously on the point that if during the course of search, no incriminating material was found exhibiting unexplained investment by an assessee, merely, on the basis of DVO's report, the addition cannot be made. The Ahmedabad Bench of the Tribunal in the case of ACIT vs. ShriJayantilal T. Jariwala in IT(SS) A No.65/Ahd/2009 vide order dated 28.10.2015 has taken note of the following decisions of the Hon'ble High Courts in this respect:

- "i) Hon'ble Gujarat High Court in the case of CIT Vs. Jayendra N. Shah, (2014) 52 taxmann.com 54 (Gujarat).
- ii) The Hon'ble High Court in the case of CIV Vs. Vasudev Construction (2014) 44 taxmann.com 30 (Kar.)
- iii) CIT Vs. Berry Plastics P. Ltd., (2013) 35 taxmann.com 296 (Guj)
- iv) CIT Vs. Sadhna Gupta (IT Appeal No.434 of 2012) (Delhi HC);
- v) CIT Vs. Lahsa Construction P. Ltd., (2014) 42 taxmann.com 549 (Delhi);
- vi) GookluckAutomobils P. Ltd. Vs. ACIT (2012) 26 taxmann.com 254 (Guj)"

7.3. The Coordinate Ahmedabad Bench of the Tribunal in the case of ACIT vs. ShriJayantilal T. Jariwala (*supra*) taking note of the aforesaid decision of various High Courts, under similar circumstances, has decided the issue in favour of the assessee, observing as under:

“8. We have duly considered rival contentions and gone through the record carefully. Before we embark upon an inquiry on the facts of the present case, we would like to take note of the finding recorded by the Delhi High Court in the case of CIT Vs. Sadhna Gupta (*supra*) on the issue whether merely on the basis of the DVO's report, an addition can be made or not. The following finding is worth to note:

“4. The only point to be considered is whether the valuation rendered by the DVO is to be taken into account or not. It has been argued by the learned counsel for the revenue that the assessing officer was justified in referring the matter to the DVO for an opinion with regard to the fair market value of the property and once that opinion has been rendered, the same has to be taken into account and if that were to be so, the addition of Rs. 2,81,83,000/- would be fully justified. Consequently, it was submitted by the learned counsel for the revenue that the Tribunal had erred in deleting the addition. On the other hand the learned counsel for the respondent referred to a Division Bench decision of this Court in the case of CIT v. PuneetSabharwal [2011] 338 ITR 485. In that decision a specific question had been raised as to whether the Income Tax Appellate Tribunal was right in holding that notwithstanding the report of the DVO the revenue had to prove that the assessee had received extra consideration over and above the declared value of the same. That question was answered by this Court in favour of the assessee and against the revenue. The Division Bench in the case of PuneetSabharwal (*supra*) had also placed reliance on the decision of Supreme Court in K. P. Varghese (*supra*) as also on another decision of a Division Bench of this Court in CITv. Smt. Suraj Devi [2010] 328 ITR 604 wherein this Court held that the primary burden of proof with regard to concealment of income was on the revenue and it was only when the said burden was discharged that reliance could be placed on the valuation report of the DVO. There are several other decisions of this Court in the same vein. One such case being the case of CIT v. VinodSinghal (IT Appeal No.482/2010 decided on 05.05.2010) where, again, reliance was placed on the very same decision of the Supreme Court in K.P. Varghese (*supra*) and also on a decision of this Court in CIT v. Smt. Shakuntala Devi [2009] 316 ITR 46. It was observed that there must be a finding that the assessee had received an amount over and above the consideration stated in the sale deed and for this the primary burden was cast on the revenue. It is only when this burden is discharged by the revenue that it would be permissible to rely upon the value as given in the valuation report of the DVO.

5. The law seems to be well settled that unless and until there is some other evidence to indicate that extra consideration had flowed in the transaction of purchase of property, the report of the DVO cannot form the basis of any addition on the part of the revenue. In the present case there is no evidence other than the report of the DVO and, therefore, the same cannot be relied upon for making an addition. In these

circumstances, the question which has been framed is decided in favour of the assessee and against the revenue. The appeal is dismissed."

9. Similarly, it is pertinent to note the observations of the Hon'ble Gujarat High Court in the case of CIT Vs. Jayendra N. Shah (supra). The observations in para-8 and 9 are worth to note. They read as under:

"8. We have no reason to interfere with the concurrent reasonings of the two authorities below. Firstly, taking the issue of cost of construction, it clearly emerges from the record that between the DVO's estimation of cost of construction without furniture and fixture and that of the assessee's valuer, there is a minor difference of Rs. 1.22 lakhs. When we are considering the total figure in the vicinity of Rs. 1.36 crores, this difference is insignificant. Even if, therefore, the Assessing Officer had accepted the DVO's report in its entirety, the total addition under the head could not have exceeded Rs. 1.22 lakhs. He instead made an addition of Rs. 27.69 lakhs, for which we see no basis whatsoever. Learned counsel, Shri K. M. Parikh, strenuously urged that the construction was carried out in three separate previous years relevant to different assessment years. The Assessing Officer had, therefore, divided the undisclosed investment in the cost of construction in these three years. Even if this be so, we fail to see how the total of these three years of expenditure could exceed Rs. 1.22 lakhs which was the difference between the DVO's valuation and that of the valuation of the assessee's valuer, on the basis of which he filed the return.

9. Coming to the question of addition towards purchase of land, the Commission of Income-Tax (Appeals) as well as the Tribunal both have examined the issue on the basis of the material available on record. It is noted that the assessee had made no disclosure towards the purchase of land in his statement during the search proceedings. The addition was made merely on the basis of the DVO's report without there being any other material. Moreover, the DVO had also substantially relied on jantri rates and had made other reference's for arriving at the valuation."

10. Both the issues are based primarily on factual aspects. No question of law, therefore, these appeals are dismissed."

10. Similarly, in the case of CIT Vs. Berry Plastics P. Ltd., (2013) 35 taxmann.com 296 (Guj), the Hon'ble Gujarat High Court has made following observations:

"9. We are of the opinion that CIT(Appeals) as well as the Tribunal committed no error in deleting the additions made by the Assessing Officer. It is undisputed that the sole basis for making the addition was the DVO's report. DVO's report may be a useful tool in the hands of the Assessing Officer, Nevertheless it is an estimation and without there being anything more, cannot form basis for additions under Section 69B of the Act. In absence of any other material on record, addition was correctly deleted. Tax Appeal is, therefore, dismissed."

11. A perusal of the above judgments would indicate that mere valuation report is not sufficient to conclude that the assessee has made unexplained investment.

From perusal of the assessment, nowhere it reveals that inspite of search, Revenue was in a position to lay its hands on any material exhibiting the unexplained investment made by the assessee, over and above one stated in the books of accounts. Further, we find that the Id. First Appellate Authority has deleted the addition by following the order of the ITAT in the case of Smt. Ilaben Bharat Shah in ITA No.839/Ahd/2007 dtd. 17-8-2007 for the Asstt. Year 2004-05. The Id. First Appellate Authority is of the opinion that the addition cannot be made merely on the basis of DVO's report, and there should be some other incriminating material to support the case of the Revenue. The issue is also covered by the various decisions of the Hon'ble High Courts cited supra, and therefore, we do not find any reason to interfere in the order of the CIT(A), which is confirmed and the ground of appeal of the Revenue is dismissed."

7.4. Even the Hon'ble Delhi High Court in the case of CIT vs. Abhinav Kumar Mittal, reported in (2013) 351 ITR 0020, has taken the similar view.

7.5. So far as the reliance by the Assessing Officer to the document found from the premises of third party i.e. M/s Royal Builders was concerned, admittedly the said document was never confronted to the assessee, either during the search action or during the assessment proceedings. The Id. CIT(A), himself, in the impugned order has mentioned that the additions in the case of the assessee have been made on the basis of report of the DVO, rather than, on the basis of documents impounded from the premises of M/s Royal Builders. The Id. CIT(A) has observed that the said documents were a trigger point for reference of the valuation to the valuation officer. However, the facts of the case do not speak so. The search action was carried out in the case of M/s Royal Builders on 29.11.2018. The first contention of the Id. Counsel for the assessee in this respect is that the said statement was never acted upon by the department and even neither confronted to the assessee either during the course of search action or even during the assessment proceedings. Secondly, there was a difference of only Rs.50,00,000/- regarding the cost of construction mentioned in the said document as compared to the cost of construction accounted for by the assessee in the books of account. That the amount mentioned in the said slip was 6.76 crores, whereas, the amount booked by the assessee in the books of account was 5.14 crores and there was a meagre difference noted.

7.6. We note that as per the relevant provisions of the Act, if the department wanted to act on the said document, the proceedings could have been initiated u/s 153C of the Act against the assessee by recording satisfaction by the Assessing Officer of the searched person. Thereafter, after receipt of the documents from the Assessing Officer of the searched person, the Assessing Officer of the assessee could have initiated the proceedings u/s 153C of the Act. However, the department did not act on the said documents. Even otherwise, the said slip was a third party document, which was never confronted to the assessee. The difference of the amount mentioned in the said slip was also meager as compared to the additions made by the Assessing Officer. Thirdly, since the said document was not sufficient enough to base additions in this case, the said document at the most could have been a trigger point to initiate search action in the case of the assessee. As per the facts on the file, the matter was referred to the DVO after the search action at the premises of the assessee and admittedly, no incriminating material whatsoever was found during the search action, however no incriminating material was found, which could have been stated to be a trigger point to refer the matter to the DVO.

7.7. *The other important point in this case is that the report of the DVO is based on pure estimation of investment. The DVO has taken the CPWD rates and as noted above, the CPWD rates are on more than 25% higher side as compared to the state-PWD. there is force in the contention of the Id. AR that a very high profit rate of the contractor is embedded in the departmental rates and further a lot of difference in expenditure occurs between a work got done through government contractor and the workgot done under self-supervision and self-purchasing of the material.*

In view of the above discussion, as per the settled law, neither reference to the DVO in this case was valid in view of the various decisions of the Hon'ble High Courts as noted above nor the addition in this case was justified based purely upon the report of the DVO which was a work of pure estimation of cost based on government rates.

8. *Even otherwise, since the assessee company's business has not commenced and that the construction of the building was done out of the capital invested by the shareholders and hence, there was no case of earning of any income, what to say of any income from undisclosed sources, therefore, the substantive addition in the hands of the assessee company was not justified. The issue is squarely covered by the various decisions including the decision of the Hon'ble Apex Court in the case of "CIT vs Bharat Engineering & Construction Co." (supra) as referred to above by the Id. Counsel for the assessee in the written submissions. The action of the CIT(A) in reversing the view point of the Assessing Officer on this issue, therefore, cannot be held to be justified. In view of this, the additions made in the case of the assessee cannot be held to be justified and the same are accordingly ordered to be deleted.*

14. Admittedly and undisputedly, the facts and circumstances of the case are pari-materia with others years where the matter has been decided by the Coordinate Bench (supra). Following the principles of consistency, we see no reason to deviate from the earlier orders of the Coordinate Bench and the same have thus been followed for the impugned assessment year 2017-18 and the additions made in the case of the assessee cannot be held to be justified and the same are accordingly ordered to be deleted.

15. In the result, ground of appeals no 1-8 of the assessee's appeal are hereby allowed.

16. In Ground No. 9, the assessee has challenged the rejection of books of accounts u/s 145(3) of the Act. The Assessing Officer has discussed this issue in para 3.1.5 at page 12 and has mentioned that since there is difference between the amount invested in the building and amount as disclosed in the books of accounts, therefore, the books of accounts are liable to be rejected.

The Ld. CIT (A) has discussed this ground of appeal, in para 7.3 of the order and confirmed such rejection of books of accounts at page 24. It was submitted that where such addition on account of difference in cost of construction and DVO report stands deleted by the decision of the Tribunal and, thus, there is no basis of rejection of books of accounts.

17. We agree with the contention so advanced by the Id AR as the whole basis of rejection of books of accounts was difference in amount invested in building and as we have deleted the same, there is no justifiable basis for rejection of books of accounts and hence, the said ground of appeal is allowed.

18. Ground No. 10 deals with action of the Assessing Officer in disallowing the current year business loss being without pointing out any defect and not allowed to be carried forward to the subsequent years.

19. The Assessing has discussed this issue in para 7 at pages 15 to 17 of the order and only ground for disallowing the current year's business loss and not to be allowed to be carried forward was rejection of books of accounts u/s 145(3) of the Act. Now, since the very basis of rejection of books of accounts is not sustainable as discussed above, we see no basis for denying the current year business loss and carry forward of the same for set off in subsequent years. Hence, the ground of appeal is allowed.

20. In Ground No. 11 & 12, the assessee has challenged the sustenance of disallowance of deduction under section 35AD of the Act.

21. Briefly, the facts of the case are that during the course of assessment proceedings, the AO observed that the assessee company has claimed deduction of a sum of Rs. 9,88,54,633/- under section 35AD of the Act on account of expenditure incurred on hotel building in the name and style of 'The

Palm Court'. In order to examine the claim so made by the assessee company, the assessee was asked to furnish the certificate of star rating as classified by the Central Government. In response, the assessee submitted a copy of the payment receipt of Rs. 15,000/- for applying for hotel classification and on perusal thereof, the AO observed that the payment receipt does not depict either the date of filing of the application or the name of the Government Agency to which the application has been filed. The AO further referred to the website of National Integrated Database of Hospitality Industry (NIDHI) (www.Nidhi.nic.in) which provides real time details of all the classified and non classified hotels/resorts/guest house in the country and it was observed by the AO that the hotel run by the assessee company in the name of "The Palm Court" was an unclassified hotel of 41 rooms and a copy of the scanned image of the website has been reproduced in the assessment order. The AO accordingly held that the Hotel being run by the assessee company is not registered / classified as a star rated Hotel by the Central Government for the Financial Year under consideration. Further the assessee company has failed to file the copy of the two star or above category certificate as issued by the Central Government in support of its claim of deduction under section 35AD of the Act, accordingly claim of deduction under Section 35AD was disallowed.

22. Being aggrieved, the assessee carried the matter in appeal before the Ld. CIT(A) and it was submitted that the assessee had claimed deduction u/s 35AD for the first time in the Assessment Year 2017-18 since the hotel started functioning in early 2017 and the said deduction has been claimed as per the provisions of Section 35 AD which provides that an assessee shall , if he opts, be allowed a deduction in respect of the whole of any expenditure of capital nature incurred, wholly and exclusively, for the purposes of any specified business carried on by him during the previous year in which such expenditure is incurred by him. It was submitted that though the deduction is allowed for each year in which such "expenditure is incurred but in respect of capital expenditure

incurred prior to starting of the operations, the whole of the capital expenditure incurred prior to its operations will be allowed as deduction in the first year of its operation. It was submitted that it is a fact that the Hotel started functioning during the year under consideration and receipts have been disclosed in the audited set of accounts to the tune of Rs. 22,62,584/- and as per computation of income, a deduction of Rs. 9,88,54,633/- has been claimed and which is evidenced by the fixed asset chart and that has not been doubted by the Ld. AO and during the course of assessment proceedings, the Ld. AO has disallowed the deduction only on account of fact that the certificate of proof of star rating as classified by the Centre Government of India could not be submitted though the payment receipt of Rs. 15,000/- for applying for hotel classification had been submitted and in para 17.6, the Ld. AO has given a findings that since no requisite certificate has been submitted the claim of deduction u/s 35AD has been disallowed.

23. It was further submitted before the Id CIT(A) that the said approval has since been received from the Ministry of Tourism vide Certificate dated, 14.12.2021 and therefore, the assessee fulfills all the conditions for grant of such deduction u/s 35AD. It was also submitted that since this is a additional evidence which was not available at the time of assessment proceedings, the same may be admitted as additional evidence under Rule 46A since the assessee was prevented by reasonable and sufficient cause in not submitting the same to the Ld. AO and reference was drawn to the judgment of Hon'ble Supreme Court in the case of Tek Ram reported at 357 ITR 133 in which it has been held that additional evidence even if, it is submitted before the High Court/Apex Court, the same deserves to be admitted provided it as a nexus to the issue in hand. It was submitted that this certificate is very much relevant to their claim of deduction u/s 35AD and, therefore, the same deserves admission.

24. The submissions and additional evidence so filed by the assessee were sent to the AO seeking his comments and the AO in his Remand Report has referred to the provisions of Section 35AD of the Act and in particular the definition of specified business as so provided which talks about "Building and operating, anywhere in India, a hotel of two star or above category as classified by the Central Government". The AO thereafter stated that during the assessment proceedings, the assessee failed to submit a valid star rating category certificate pertaining to the assessment year 2017-18 to 2019-20, which was the basic requirement/eligibility criteria for claiming deduction u/s 35AD of the Income Tax Act. The new hotel though had commenced its working in the A.Y.2017-18 but was not registered/classified as star rated hotel by the Central Government as no two star or above rating category certificate as classified by the Central Government existed in case of the assessee company till the date of passing of the assessment order for the A.Y.2017-18 to 2019-20. Now during the appellate proceedings, the assessee has submitted a four star rating certificate issued by the Ministry of Tourism dated 14.12.2021 (valid from 14.12.2021 to 13.12.2026) and a perusal of the additional evidence shows that the four star rating certificate of the assessee company is valid from December 2021 to December 2026 (i.e. A.Y.2022-23 onwards). Thus, proving the fact & the observation made in the assessment order that the assessee does not had a valid star rating certificate and thus failed to submit the documentary evidence of the eligibility criteria of claiming deduction u/s 35AD of the Income Tax Act. Also, the additional evidence proves beyond doubt that the Hotel run by the assessee company in the name & style of "The Palm Court" does not held any two star & above rating certificate issued by the component authority during the A.Y.2017-18, A.Y.2018-19 & A.Y.2019-20, which was mandatory for being covered under the definition of specified business and claiming deduction u/s 35AD of the Income Tax Act. Thus, the claim of deduction under section 35AD remains non-allowable for the above mentioned 3 A.Y's (A.Y.2017-18 to

A.Y.2019-20). Keeping in view the above, it was requested that the additional evidence given by the assessee may not be accepted and the appeal of the assessee may be decided accordingly on the merits of the case.

25. Thereafter, the assessee company in his rejoinder submitted that from the above bare reading of the section 35AD, it is very much clear that the deduction is allowable of the expenditure, which is capitalized in the books of accounts and the same is allowable in the previous year, in which the commencement of business takes place and 'hotel' is one of the 'specified category'. Further, if the assessee claims such deduction," then no depreciation is allowed to the assessee. It was submitted that the assessee had filed its return of income u/s 139 (1) on due date and in the computation of income, we have disallowed the provisions for depreciation in each year and claimed the deduction u/s 35AD and there is a loss, which have been carried forward. It was submitted that the Hotel was started, which is very much clear from the annual audited accounts of the assessee, which copies have been filed in the earlier paper book and there is revenue from operation of Rs 22,62,584/- in A.Y 2017-18, 6,90,65,650/- in AY 2018-19 and 8,92,64,179/- in AY 2019-20. Thus, from the above paragraph, it is established that the hotel had started functioning from Asstt. Year 2017-18 and, thus, there should not be any dispute for deduction u/s 35AD.

26. Regarding the contention of the Assessing Officer that as per certificate, it was valid from 14 December 2021 to 13 December 2026, it was submitted that the issuance of certificate is only a formality and, whereas, the fact is that the hotel has already started the working and, therefore, the said deduction is allowable in Asstt. Year 2017-18 particularly, when the assessee had added back the depreciation and the revenue from operations have been declared and accepted by the department. The contention of the Assessing Officer in the remand report that since in the certificate, the date is different is not allowable, is not a correct observation because, there is no such time limit for obtaining star

certificate, which has been prescribed, in the above said section and "the "only-requirement is that it should be classified as operation of two or more star hotel by Central Government. Further, reliance was placed on the following judgments:

- ACIT Vs. River View Hotel reported in 94 taxman.com 433 (Ahd. Trib)
- CIT Vs. Ceebros Hotels(P) Ltd. (Madras HC) reported in 101 taxmann.com 173
- Robust Hotels (P) Ltd. Vs. DCIT, reported in 139 taxmann.com 53 (Chennai Trib)
- Banaras Hotels Ltd. Vs. DCIT (Varanasi Trib) reported in 115 Taxmann.com 39

27. The submissions so filed by the assessee and the remand Report by the AO were considered by the Ld. CIT(A). As per Ld. CIT(A), the language in the Act is very clear and there is no ambiguity in this regard as to the eligibility for claim of deduction under Section 35AD of the Act. As per the Ld. CIT(A), a bare reading of the certificate proves that no such valid certificate was in existence during the year under consideration and hence the claim of the assessee under Section 35AD is not in order during the year under consideration. The Ld. CIT(A) further held that various decisions cited by the assessee in its submissions are distinguishable on the facts, hence the disallowance so made by the AO was confirmed.

28. Against the said findings and the directions of the Ld. CIT(A), the assessee is in appeal before us.

29. During the course of hearing, the Id AR taken us through the submissions made before the lower authorities and legal authorities on the subject and it was submitted that the same have not been appreciated properly by the authorities and the claim of deduction which has rightly been claimed by the assessee company has been wrongly denied. It was submitted that the

assessee had claimed deduction for the first time in Asstt. Year 2017-18, since the Hotel had started its operations and all details were submitted before the Assessing Officer, but only 'Star Rating Certificate' to substantiate the claim could not be filed and, therefore, the said deduction was disallowed by the Assessing Officer. It was submitted that it was submitted that certificate regarding the proof of star rating as classified by the Central Govt, could not be submitted before the AO and said certificate was received from the Ministry of Tourism vide certificate, dated 14.12.2021 and, thus, it was stated that the assessee fulfilled all the condition and requested for admission of additional evidence. On this issue, the remand report of the Assessing Officer was called for and the Ld. Assessing Officer has stated that since four star rating certificate of the assessee company is valid from 14.12.2021 to 13.12.2026 and, thus, for the year under consideration, since the said certificate was not there and, therefore, no such deduction is allowable. It was submitted that in response, it was submitted that the revenue have been generated by the Hotel as per details filed at page 20 of the order of CIT(A) order and, therefore, it was stated that the Hotel started its working in financial year 2016-17 and issuance of certificate was just a formality because in the section, no such time for obtaining the star rating had been required in the above said section and the only requirement was that it should be classified as operational as two or more star Hotel by the Central Govt, and, reliance was placed, on the judgments of 'Ahmedabad Tribunal', 'Madras High Court', 'Chennai Bench' and 'Varanasi Tribunal' and copies of same have been submitted at paper books pages 165 to 221 and certificate of the Central Govt, have been placed at pages 130 to 132 of the Paper Book. It was submitted that the Ld. CIT (A) has given his finding on this issue in para 7.5 and has only stated that since the Hotel was not registered as a Star Hotel as required under the Act and, therefore, this ground was dismissed. It was submitted that the Hotel consisting of 41 rooms and started its working in Asstt. Year 2017-18, which is a fact and the case laws as cited

before the Ld. CIT (A) were not considered by the Ld. CIT (A) and it has been held in all the judgments that since the certificate of classification issued in favour of assessee had not been doubted and section also does not require any specific date of operation to be mentioned in the certificate and, therefore, the deduction should have been allowed by the Assessing Officer. It was accordingly submitted that the order of the Ld. CIT(A) on this issue may be reversed and necessary relief be provided to the assessee.

30. In his submissions, the Id CIT/DR submitted that the hotel being run by the assessee was not a star rated hotel during the financial year relevant to impugned assessment year in absence of any star rating certificate issued by the Ministry of Tourism. It was submitted that the assessee company only submitted a copy of the payment receipt that shows the date of 20/01/2018 during the course of assessment proceedings and no other information was submitted and in absence thereof, the AO has rightly denied the claim of the deduction u/s 35AD of the Act. It was submitted that the impugned assessment year, being the first year of claim of deduction, it was incumbent on part of the AO to verify the satisfaction of relevant conditions before allowing the claim of deduction and since, the assessee failed to produce any star rating certificate issued by the Competent authority, the action of the AO cannot be faulted. It was further submitted that the assessee subsequently produced the four star rated certificate during the course of appellate proceeding and thus, as far as existence of such certificate is concerned, there is no dispute, at the same time, it needs to be noted that such certificate was issued on 14/12/2021 and it was valid for the period 14/12/2021 to 13/12/2026 and thus, both the issuance of certificate as well as validity of the said certificate is for the period subsequent to the financial year relevant to impugned assessment year and such a certificate therefore cannot form the basis for claim of deduction for the impugned assessment year. It was accordingly submitted that where the Id CIT(A) has held that the language in the statute is clear and there is no doubt for ambiguity, he

has rightly held so as the language in the statute talks about building and operating anywhere in India a hotel of two star or above category as classified by the Central Government and since the deduction has been claimed for the impugned assessment year, the star rated certificate has to be issued and valid for the impugned assessment year and which is not the case. It was accordingly submitted that there is no infirmity in the said findings of the Id CIT(A) and the same be confirmed and the ground of appeal so taken by the assessee be dismissed.

31. We have heard the rival contentions and perused the material available on the record. The issue under consideration relates to claim of deduction under Section 35AD of the Act. Sub-Section (1) of Section 35AD provides that an assessee shall, if he opts, be allowed deduction in respect of the whole of any expenditure of capital nature incurred wholly and exclusively for the purpose of any specified business carried on by him during the previous year in which such expenditure is incurred by him. It has further been provided that where the expenditure is incurred prior to the commencement of its operation and the amount is capitalised in the books of accounts of the assessee on date of commencement of its operation, the expenditure incurred wholly and exclusively for the purposes of specified business shall be allowed as deduction during the previous year in which it commences operation of his specified business. Sub-Section (2) of Section 35AD provides that section applies to specified business which is not set up by splitting up or the reconstruction of a business already in existence and is not set up by the transfer to the specified business of machinery or plant previously used for any purposes. Sub-Section (5) of Section 35AD provides that the provision of this section shall apply to the specified business where it commences its operation on or after the 1st day of April, 2010 where the specified business is in the nature of building and operating a new hotel of two star or above category as classified by the Central Government and thereafter, under Sub-Section 8(c)(iv) of Section 35AD, the

phrase "specified business" has been defined *interalia* to mean "building and operating anywhere in India a hotel of two star or above category as classified by the Central Government".

32. In the instant case, the Assessing officer held that the Hotel being run by the assessee company is not registered / classified as a star rated Hotel by the Central Government for the financial year under consideration. Further, the assessee company has failed to file the copy of the two star or above category certificate as issued by the Central Government in support of its claim of deduction under section 35AD of the Act and for the said reasons, the claim of deduction under Section 35AD was disallowed. It is further noted that during the appellate proceedings, the assessee has produced the four star rating certificate issued by the Ministry of Tourism dated 14.12.2021 which was valid from 14.12.2021 to 13.12.2026. The AO in the remand report has stated that the new hotel though had commenced its working in the A.Y.2017-18 but was not registered/classified as star rated hotel by the Central Government as no two star or above rating category certificate as classified by the Central Government existed in case of the assessee company till the date of passing of the assessment order for the A.Y.2017-18 to 2019-20. It has been further stated by the AO that the assessee has submitted during the appellate proceedings a four star rating certificate issued by the Ministry of Tourism dated 14.12.2021 and a perusal of the same shows that the four star rating certificate of the assessee company is valid from December 2021 to December 2026 (i.e. A.Y. 2022-23 onwards), thus, proving the fact & the observation made in the assessment order that the assessee does not had a valid star rating certificate and thus failed to submit the documentary evidence of the eligibility criteria of claiming deduction u/s 35AD of the Income Tax Act. It was further stated by the AO that the additional evidence in terms of star rating certificate proves beyond doubt that the Hotel run by the assessee company in the name & style of "The Palm Court" does not held any two star & above rating certificate issued by the

component authority during the A.Y.2017-18, A.Y.2018-19 & A.Y.2019-20, which was mandatory for being covered under the definition of specified business and claiming deduction u/s 35AD of the Income Tax Act.

33. We therefore have a situation where the hotel run by the assessee was not granted any star rating for the financial year relevant to the impugned assessment year 2017-18, and subsequent to the close of the assessment proceedings, the assessee got the four star rating certificate on 14/12/2021 valid for the period starting 14/12/2021 to 13/12/2026 and which was furnished during the course of appellate proceedings before the Id CIT(A), and in such a situation, whether the same would be in compliance with the provisions of Section 35AD and in particular, the definition of the "specified business" as so defined therein and the assessee can be held eligible for claim of deduction u/s 35AD of the Act.

34. The provisions of Section 35AD and in particular, the matter relating to grant of star rating to the hotel, came up for consideration before the Hon'ble Madras High Court in the case of CIT vs. Ceebros Hotels Pvt. Ltd. (supra) wherein briefly the facts of the case were that the assessee filed its return claiming deduction under section 35AD(5)(aa) and the AO while completing the assessment under section 143(3) denied the benefit on the ground that the assessee obtained the classification as a three star category hotel only during the next year. The Tribunal allowed the claim of the assessee and on Revenue's appeal, the Hon'ble High Court, referring to the contention advanced by the Ld. Standing Counsel for the Revenue that obtaining the star category recommendation from Ministry of Tourism, Government of India is a pre requisite for being entitled to benefit of Section 35AD of the Act, held that the requirement for obtaining classification with regard to the star category hotel is neither in the hands of the assessee nor of the Revenue, that the classification is done by the Ministry of Tourism, Government of India and what is required to be

seen in the case on hand is as to how the assessee has been treated by the Department and thereafter, referring to the findings of the Tribunal, the Hon'ble High Court has upheld the findings of the Tribunal as fully correct. It was further held by the Hon'ble High Court that Section 35AD(5)(aa) of the Act does not mandate that the date of certificate should be w.e.f a particular date. It was held that the provisions of Section 35AD which is obviously to encourage establishment of hotels of a particular category should be read as a beneficial provision and in this regard, we deem it useful to reproduce the legal proposition so laid down by the Hon'ble High Court which are contained at para 16 of its order and the same reads as under:

"16.The test would be as to whether the provisions of Section 35AD of the Act would apply to specified business referred to in Sub-Section (2) if it commences operations and in the case of business like that of the assessee, on or after 01.4.2010, where specified business is in the nature of building and operating new hotel of two star or above category as classified by the Central Government. We find nowhere in Clause (aa) to Sub-Section (5) of Section 35AD of the Act mandating that the date of certificate should be with effect from a particular date. Therefore, the provision, which is obviously to encourage establishment of hotels of a particular category, should be read as a beneficial provision and therefore, the interpretation given by the Tribunal considering the facts of the case is perfectly valid and justified. For the above reasons, we find no grounds to interfere with the order passed by the Tribunal."

35. Similar issue came up for consideration before the Coordinate Varanasi Benches in case of Benares Hotels Ltd. Vs. DCIT (*Supra*) wherein the briefly of the facts of the case were that the AO held that the newly commenced hotel *qua* which the deduction was claimed by the assessee was not of specified category though assessee had started operating hotel, that there was no formal launch and Government of India had not issued any classification certificate certifying hotel as a four star hotel and claimed of deduction u/s 35AD was denied. Thereafter, the Commissioner (Appeals) concurred with the AO's findings and held that certificate approving four star hotel category issued by Ministry of Tourism was issued post passing of the assessment order on 31/01/2018 w.e.f 29/01/ 2018 and since the assessee did not have requisite classification certification in year under consideration, the benefit of deduction

could not be provided to the assessee. On further appeal, the Coordinate Bench allowed the claim of the assessee following the decision of Hon'ble Madras High Court in Ceebros Hotels Pvt. Ltd. (supra). It was held by the Coordinate Bench (speaking through one of us, being a party to the said decision) that a pure and a simple question which arise for consideration is whether the assessee is entitled to deduction under section 35AD when the relevant certificate has been granted in accordance with the guidelines issued by the Ministry of Tourism to the assessee obviously having fulfilled the requisite condition for grant of classification as four star hotel despite the fact that the certificate was issued in the subsequent assessment year and was for a specified period of five years from 29/01/2018 to 28/01/2023 and thereafter, answering the said question, it was held by the Coordinate Bench that the decision of Hon'ble Madras High Court in case of Ceebros (supra) is directly on the issue where it holds in no uncertain terms that section 35AD(5)(aa) nowhere mandates that the date of the certificate should be with effect from a particular date. In the said decision, the Coordinate Bench has held that the date of issuance of certificate/period for which the classification has been granted is irrelevant for the grant of deduction under section 35AD of the Act and the fact with regard to the certificate having been granted in the year subsequent to the year under consideration is not of any detriment to the assessee so long as the certificate of classification issued in favour of the assessee has not been doubted. In this regard, we deem it appropriate to refer to the findings of the Coordinate Bench which are contained at para 19 to 25 of its order and the same reads as under:

"19. The Id. CIT (A) has also held that it was not simply a procedural matter beyond the control of the assessee that the certificate in question got issued in the subsequent assessment year; that the assessee had, for the first time, made an application to the Ministry of Tourism, requesting grant of four-star category hotel status, on 4/7/2014; that there were discrepancies in the proposal of the assessee and, accordingly, a letter was issued from the Ministry of Tourism, on 22/7/2014, to the assessee, to remove the discrepancy; that the assessee took time to remove the discrepancy and submitted its reply on 23/3/2015, i.e., at the fag end of the relevant financial year; that the assessee had submitted that the Inspection Committee of the Ministry of Tourism visited the Hotel in Gondia on

23/1/2018 to decide about confirming the eligibility of the unit being fit for four-star category classification; and that the assessee received the certificate on 30/1/2018. Thus, as per the Id. CIT (A), it were these facts which led to the issuance of the certificate in the next financial year.

20. Be that as it may, these facts, as narrated by the Id. CIT (A), cannot tinge the certificate to be useless so far as regards the grant of the deduction claimed under section 35AD, for the year under consideration. To reiterate, 'Ceebros' (supra) is categorical that the date is of no relevance in this regard. At this juncture, it would be appropriate to mention that the provisions of section 35AD contain conditions which require to be satisfied before the assessee becomes entitled to deduction thereunder. These conditions are that the expenditure should have been incurred prior to the commencement of the operation; that the amount should be capitalized in the books of account on the date of commencement of the operations; that the unit is not set up by splitting up, or the reconstruction of a business already in existence; and that the unit is not set up by the transfer, to the specified business, of machinery or plant previously used for any purpose. The last two conditions have not been challenged as being relevant to the dispute under consideration. The "specified business" has also not been disputed to be that of building and operating a new hotel of a two-star or above category, in keeping with the provisions of section 35AD(5)(aa) of the Act (which was the provision under consideration in 'Ceebros' (supra) too). Then, the incurrance of expenditure for the construction of The Gateway Hotel by the assessee has also not been disputed as having been done prior to the commencement of the operations of the business. Further, neither of the authorities below has made out that the amount was not capitalized in the books of account of the assessee. Rather, the taxing authorities have accepted the income offered to tax by the assessee, it is the deduction claimed under section 35AD, which has been disallowed.

21. It is, thus, seen that none of the conditions of the provisions of section 35AD of the Act has been violated at the hands of the assessee.

22. The provisions of this section stand explained in the Memorandum explaining the provisions of Finance Bill, 2010, wherein, it has been noted that "In view of the high employment potential of this sector, it is proposed to provide investment linked incentive to the hotel sector, irrespective of location, under section 35AD of the Income-tax Act. The investment-linked tax incentive allows 100 per cent deduction in respect of the whole of any expenditure of capital nature (other than on land, goodwill and financial instrument) incurred wholly and exclusively, for the purposes of the "specified business" during the previous year in which such expenditure is incurred." Therefore, it is quite evident that it is an incentive provision by way of section 35AD, which was introduced in the statute book. For the sake of convenience, section 35AD is being reproduced, as below:

"35AD. (1) An assessee shall be allowed a deduction in respect of the whole of any expenditure of capital nature incurred, wholly and exclusively, for the purposes of any specified business carried on by him during the previous year in which such expenditure is incurred by him:

Provided that the expenditure incurred, wholly and exclusively, for the purposes of any specified business, shall be allowed as deduction during the previous year in which he commences operations of his specified business,

sub-section (5) The provisions of this section shall apply to the specified business referred to in sub-section (2) if it commences its operations."

23. It would also be apt, at this stage, to reiterate what the Ministry of Tourism, Government of India, has observed, in the opening lines (APB:253) of its "Guidelines for classification/re- classification of hotels", as under:

"Hotels are an important component of the tourism product. They contribute to the overall tourism experience through the standards of facilities and services offered by them. With the aim to provide contemporary standards of facilities and services, the Ministry of Tourism has formulated a voluntary scheme for approval of hotel projects.....

Thus, the impetus to be granted to the hotel industry being the aim of the Government of India, is again evident. Now, the classification certificate) in question is also as per the Guidelines issued by the Ministry of Tourism. This, again, has not been called in question.

24. To sum up, our observations on this issue are a *savoir faire*:

(1) The Id. CIT (A) has erred in confirming the assessment order in refusing to allow the deduction claimed under section 35AD of the Act.

(ii) The certificate of classification issued in favour of the assessee has not been doubted.

(iii) The date of issuance of this certificate/the period for which the classification has been granted, is irrelevant for the grant of deduction under section 35AD of the Act.

(iv) 'Ceebros' (*supra*) is categorical in this regard.

(v) No decision contrary to 'Ceebros' (*supra*) has been cited before us.

(vi) The Id. CIT (A) did not have the benefit of 'Ceebros' (*supra*) while passing the order under consideration, 'Ceebros' (*supra*) having been rendered post-the passing of the Id. CIT (A)'s order.

(vii) The facts with regard to the certificate having been granted in the year subsequent to the year under consideration, are not of any detriment to the assessee, in keeping with 'Ceebros' (*supra*).

(viii) Even if, *arguendo*, these facts were to be accepted, they do not detract from the settled position [as per 'Ceebros' (*supra*)], that once the conditions of section 35AD are fulfilled, the section, *per se*, not requiring any specific date of operation, the deduction thereunder cannot be disallowed.

25. In view of the above, finding the grievance of the assessee by way of Ground No.1, to be justified, we accept the same. The disallowance of deduction claimed under section 35AD of the Act, as upheld by the Id. CIT (A), is, therefore, deleted."

36. We find that similar matter came up for consideration before the Coordinate Ahmedabad Benches in case of ACIT VS River View Hotels (*supra*)

wherein again, it has been held that there is no time limit of obtaining star certificate as prescribed in Section 35AD(8)(a)(c)(iv) of the Act and only requirement is to build and operate two or more star hotel classified by the Central Government and the AO has misconstrued the said clause where he observed that in order to avail the benefit of a three star category hotel, the assessee was required to classify his three star category hotel in the year of operation as the benefit of this can only be given to a two and above star hotel and the said finding of the AO were set aside. No contrary authority has been brought on record.

37. Following the aforesaid authorities on the subject, in the instant case, we find that the hotel being run by the assessee has been duly granted a four star rating certificate by the Ministry of Tourism, Government of India and thus, it qualify as a specified business for the purposes of claim of deduction u/s 35AD of the Act. The compliance of other conditions are not in dispute. In view of the same, we are of the considered view that there is no justifiable basis to deny the claim of deduction and the assessee is held eligible for claim of deduction u/s 35AD of the Act. The findings of the AO and that of the Id CIT(A) are hereby set-aside and the AO is directed to allow the deduction as so claimed by the assessee u/s 35AD of the Act. In the result, the ground of appeal is allowed.

38. In the result, the appeal of the assessee is allowed.

ITA No. 668 & 679/CHANDI/2023

39. Both parties fairly submitted that similar facts and circumstances of the case are involved in the two other appeals and similar contentions as raised aforesaid may be considered, hence, our findings given above will apply *mutatis mutandis* to ITA No. 668 & 679/CHANDI/2023 and these two appeals are also allowed.

40. In the result, all the three appeals of the assessee are allowed.

Order pronounced in the open Court on 28/06/2024.

Sd/-

आकाश दीप जैन
(AAKASH DEEP JAIN)
उपाध्यक्ष / VICE PRESIDENT

Sd/-

विक्रम सिंह यादव
(VIKRAM SINGH YADAV)
लेखा सदस्य/ ACCOUNTANT MEMBER

AG

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

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकर आयुक्त/ CIT
4. आयकर आयुक्त (अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय आधिकरण, चण्डीगढ़/ DR, ITAT, CHANDIGARH
6. गार्ड फाईल/ Guard File

आदेशानुसार/ By order,
सहायक पंजीकार/ Assistant Registrar