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

BEFORE SHRI BR BASKARAN, AM AND SHRI ABY T. VARKEY, JM

आयकर अपील सं/ I.T. A. No. 3443/Mum/2023
(**निर्धारण वर्ष** / Assessment Year: 2015-16)
&
आयकर अपील सं/ I.T. A. No. 3442/Mum/2023
(**निर्धारण वर्ष** / Assessment Year: 2016-17)
&
आयकर अपील सं/ I.T. A. No. 3441/Mum/2023
(**निर्धारण वर्ष** / Assessment Year: 2017-18)
&
आयकर अपील सं/ I.T. A. No. 3440/Mum/2023
(**निर्धारण वर्ष** / Assessment Year: 2018-19)
&
आयकर अपील सं/ I.T. A. No. 3439/Mum/2023
(**निर्धारण वर्ष** / Assessment Year: 2019-20)
&
आयकर अपील सं/ I.T. A. No. 3438/Mum/2023
(**निर्धारण वर्ष** / Assessment Year: 2020-21)
&
आयकर अपील सं/ I.T. A. No. 3437/Mum/2023
(**निर्धारण वर्ष** / Assessment Year: 2021-22)

Rubberwala Realty Ground Floor, Rubberwala House, Dr. A Nair Road, Agripada, Mumbai-400011.	**बनाम** / Vs.	DCIT, Central Circle-4(2) 19th Floor, Air India Building, Nariman Point, Mumbai-400021.

आयकर अपील सं/ I.T. A. No. 3531/Mum/2023
(**निर्धारण वर्ष** / Assessment Year: 2018-19)

DCIT, Central Circle-4(2) Room No. 1921, 19th Floor, Air India Building, Nariman Point, Mumbai-400021.	**बनाम** / Vs.	Rubberwala Realty Ground Floor, Rubberwala House, Dr. A Nair Road, Agripada, Mumbai-400011.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AACCR7449B		
(अपीलार्थी / **Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Assessee by:	Shri Mani Jain, FCA

Revenue by:	Shri Sanyogita Nagpal, CIT

सुनवाई की तारीख / Date of Hearing: 08/04/2024
घोषणा की तारीख /Date of Pronouncement: 07/06/2024

आदेश / O R D E R

PER BENCH:

All these appeals preferred by the Revenue and the assessee are against the common order of Learned Commissioner of Income Tax (Appeals) -52, Mumbai [in short 'ld. CIT(A)'] dated 31.07.2023 arising out of the assessment orders passed by Deputy Commissioner of Income-tax, Central Circle 4(2), Mumbai [in short 'AO'] for AYs 2015-16 to 2021-22. Since the issues involved were common, all the appeals were heard together. Both the parties also argued them together raising similar contentions on these issues. Accordingly, for the sake of brevity, we dispose all the appeals by this consolidated order.

2. Before we advert to the grounds taken in the cross appeals, it would first be relevant to cull out the basic facts of the case and effect of law in brief in respect of certain AYs. Search u/s 132 of the Income Tax Act, 1961 (hereinafter referred to as "the Act") was conducted against the Rubberwala Group, on 17-03-2021 thereby triggering Section 153A of the Act. Prior to the date of search, the income-tax assessments for AYs 2015-16 to 2019-20 were either completed u/s 143(1)/143(3) of the Act and/or the time limit for issue of notice u/s 143(2) of the Act had expired. Accordingly, the income-tax

assessments for AYs 2015-16 to 2019-20 did not abate consequent to the search on 17-03-2021. With regards AYs 2020-21 and 2021-22, it was pointed out that these were abated assessments. The summary of the additions/disallowances in Rupees made by the Assessing Officer which are in dispute in the cross appeals for AYs 2015-16 to 2021-22 are as follows:

(in Rs.)

Sl.	Asst Year	Issues		
		Addition of unsecured loans u/s 68	Addition of Interest expense u/s 69C	Addition on account of on-monies received in cash
1.	2015-16	-	Rs.2,16,000	Rs.2,25,729
2.	2016-17	-	Rs.1,57,414	-
3.	2017-18	-	-	Rs.4,25,363
4.	2018-19	-	-	Rs.2,41,96,000
5.	2019-20	-	-	Rs.7,87,500
6.	2020-21	Rs.15,00,000	Rs.1,23,614	Rs.4,60,696
7.	2021-22	-	Rs.80,260	-

3. It is noted that the reasoning given by the AO for making the above additions/disallowances were verbatim same across all AYs. Hence, for the sake of convenience, and to avoid repetition of facts; we deem it fit to adjudicate each of the common issues across all AYs before us together.

4. Issue 1: Addition of unsecured loans u/s 68 of the Act and disallowance of interest paid thereon u/s 69C of the Act

Ground Nos. 1, 4 & 5 of Assessee's appeal for AY 2015-16
Ground Nos. 1, 2 & 3 of Assessee's appeal for AY 2016-17

Ground Nos. 1, 4, 5 & 6 of Assessee's appeal for AY 2020-21
Ground Nos. 1 & 2 of Assessee's appeal for AY 2021-22

4.1 These grounds relate to the addition/s made on account of receipt of unsecured loans by the assessee in AY 2020-21 and also the disallowance of interest paid in respect of unsecured loans in AYs 2015-16, 2016-17, 2020-21 & 2021-22. The facts as noted by us are that, according to the AO, details of unsecured loans were found and seized in the form of loose paper ID marked Annexure A1, Page 50 at the residential premises of Mr. Tabrez Shaikh. The AO stated that this sheet contained names of several lenders who had advanced loans to the entities of Rubberwala Group. According to the AO, the content of this seized material was incriminating in nature. The AO in the assessment order has extracted the answers given by Mr. Tabrez Shaikh in his statement recorded in the course of search, wherein he was confronted with the details of these lenders, to which he did not give any proper reply. The AO further noted that, Mr. Shaikh was required to establish the identity, creditworthiness and genuineness of the loan transactions and why these loans should not be treated as accommodation entries. In response, the AO noted that Mr. Shaikh had only pleaded before the Investigating authorities that these loans ought not be considered as accommodation entries. The AO however observed that no supporting documents were provided by him to the Investigating Authorities. The AO thereafter discussed the post search enquiries made by the Investigating Authorities from these lenders and noted that some of these lenders had not complied with the notices

issued to them. The AO in the course of assessment is noted to have made independent enquiries from these lenders u/s 133(6) of the Act. Based on the replies received or the details furnished by the assessee, the AO analyzed each of these lenders and held that the assessee was unable to discharge the creditworthiness of the lenders and the genuineness of the transactions and therefore, treated the unsecured loans received from one (1) lender in AY 2020-21 to be unexplained and added it u/s 68 of the Act and also disallowed the interest paid on the unsecured loan obtained from this lender in AYs 2020-21 & 2021-22. The AO is also noted to have disallowed the interest paid in AYs 2015-16 & 2016-17 relating to loans which were obtained in earlier years, holding it to be unexplained expenditure and added it back u/s 69C of the Act. Aggrieved by the order of the AO, the assessee preferred an appeal before the Ld. CIT(A) who partly allowed the same. Being aggrieved by the Ld. CIT(A)'s order, the assessee is in appeal before us.

4.2 Assailing the action of the lower authorities, the Ld. AR of the assessee contended that AYs 2015-16 & 2016-17 in question, were unabated assessment years and therefore the impugned additions made in these AYs were unsustainable since it was not based on any incriminating material found in the course of search. With regard to the abated AYs 2020-21 & 2021-22, the Ld. AR submitted that complete details of the sole lender involved across these two AYs were furnished before the lower authorities. He showed us that the said lender, M/s Vishal Overseas was a regular income-tax assessee and

took us through their details viz., loan confirmations, bank statements, financial statements etc. Relying on the decision of the Hon'ble Gujarat High Court in the case of **PCIT vs Ambe Tradecorp Pvt. Ltd. (145 taxmann.com 27)**, the Ld. AR submitted that when the identity of the lender had been proved and it was also shown that the loan was repaid subsequently, no addition was permissible u/s 68 of the Act. He thus urged that the additions made by the AO u/s 68 and 69C of the Act be deleted.

4.3 Per contra, the Ld. CIT, DR, appearing for the Revenue, supported the order of the lower authorities. According to Ld. CIT, DR therefore the AO had rightly made the addition based on incriminating material in the unabated AYs 2015-16 & 2016-17. In respect of AYs 2020-21 & 2021-22, the Ld. CIT, DR has heavily relied on the findings of the AO, wherein the financials and creditworthiness of the lender had been examined and it was found that he lacked creditworthiness to advance the loan. The Ld. CIT, DR therefore urged that the entire addition made by the AO u/s 68 of the Act as well as the disallowance of interest u/s 69C of the Act ought to be upheld

4.4 Heard both the parties. In light of the facts narrated in Para 2 above, it is noted that, on the date of search i.e. 17.03.2021, income tax assessment for AYs 2015-16 & 2016-17 were unabated. While adjudicating the appeal in the case of another entity belonging to Rubberwala Group viz., **M/s Rubberwala Housing & Infrastructure Ltd**. in their **ITA Nos. 3444 to 3448/Mum/2023**, we have already held

that the seized document A-1, Page 50 read with the statement of Mr. Shaikh did not constitute incriminating material found in course of search and therefore the addition/s made by way of unsecured loans and interest paid thereon in the unabated AYs were held to be unsustainable, by holding as under:-

> "4.6 …The provisions of Section 153A of the Act, forming part Chapter XIV of the Act contain special provisions for completing assessments in case of search conducted u/s 132 of the Act or requisition made u/s 132A of the Act. These provisions can be invoked only in cases where the Income-tax Department has exercised its extra ordinary powers of conducting search and seizure operations after complying with stringent pre-conditions prescribed in Section 132 of the Act. We find that Section 153A itself creates the differentiation amongst specified six assessment years depending whether prior to search, the proceedings are abated or not. We note that, the relevant section itself clarifies that where an assessment was already completed against an assessee and any appeals or further proceedings are pending, then such appeals or other proceedings do not abate. We should therefore keep in mind that merely because an assessee is subjected to search u/s 132 of the Act, such action by itself does not give carte blanche to the Department to subject such an assessee to the rigors of the assessment afresh for all the completed assessments. It is for this reason that the Parliament in its wisdom has categorically created two classes among the six years, (a) un-abated assessment and (b) abated assessments. Consequent to a search conducted u/s 132 of the Act, the AO is required to issue notices u/s 153A of the Act to assess the income

of the assessee for six assessment years preceding the date of search. These six assessment years comprise of assessments which are not abated; and assessments which are pending on the date of search, and is treated to be abated. In case of abated assessments, the AO is free to frame the assessment in regular manner and determine the correct taxable income for the relevant year inter alia including the undisclosed income, having regard to the provisions of the Act. However, in relation to unabated assessments, which were not pending on the date of search, there is an embargo on the powers of the AO. In case of unabated assessments, the AO can re-assess the income only to the extent and with reference to any incriminating material which the Revenue has unearthed in the course of search. Considering these aspects the Hon'ble Delhi High Court in the case CIT vs Kabul Chawla (supra) held as under:-

> "37. On a conspectus of section 153A(1) of the Act, read with the provisos thereto, and in the light of the law explained in the aforementioned decisions, the legal position that emerges is as under:
>
> Once a search takes place under section 132 of the Act, notice under section 153A(1) will have to be mandatorily issued to the person searched requiring him to file returns for six AYs immediately preceding the previous year relevant to the AY in which the search takes place.
> Assessments and reassessments pending on the date of the search shall abate. The total income for such AYs will have to be computed by the Ld AOs as a fresh exercise.

The Ld AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The Ld AO has the power to assess and reassess the 'total income' of the aforementioned six years in separate assessment orders for each of the six years. In other words there will be only one assessment order in respect of each of the six AYs "in which both the disclosed and the undisclosed income would be brought to tax".

Although Section 153A does not say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with the Ld AO which can be related to the evidence found, it does not mean that the assessment "can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material."

In absence of any incriminating material, the completed assessment can be eiterated and the abated assessment or reassessment can be made. The word 'assess' in Section 153 A is relatable to abated proceedings (i.e. those pending on the date of search) and the word 'reassess' to complete assessment proceedings.

Insofar as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under Section 153A merges into one. Only one

assessment shall be made separately for each AY on the basis of the findings of the search and any other material existing or brought on the record of the Ld AO.

Completed assessments can be interfered with by the Ld AO while making the assessment under section 153A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment."

38. The present appeals concern AYs 2002-03, 2005-06 and 2006-07, on the date of the search the said assessments already stood completed. Since no incriminating material was unearthed during the search, no additions could have been made to the income already assessed."

4.7 We find that the decision of Hon'ble Delhi High Court has since been affirmed by the Hon'ble Supreme Court in the case of PCIT vs Abhisar Buildwell Pvt. Ltd. (supra). In view of the foregoing, the settled law is clear that, in the case of unabated assessments of an assessee, no addition is permissible in the order u/s 153A unless it is based on any tangible & cogent incriminating material found during the course of search.

4.8 In light of the above settled position of law, which has not been disputed by either of the parties, the limited question for our consideration is, whether the contents of the seized document A1, Page 50 read with the statement of Mr. Shaikh, referred to by

the AO, was 'incriminating' in nature or not. For the sake of convenience, the said seized material is reproduced below:

…

4.9 On perusal of this seized material, it is noted that it simply contains the names of lenders, corresponding names of borrower entities belonging to Rubberwala Group and the amounts lent by them. On examination of the entries in the documents, it is noted that this was a tabulation of the unsecured loans availed by the assessee and its Group entities through banking channels and the same formed part of their books of accounts. There is no mention of any word such as 'cash' or 'cheque entry' on this document. The manner in which this tabulation has been made is prima facie noted to form part of the regular books of the assessee and its group entities, having no incriminating contents whatsoever. We further note that the Ld. CIT, DR in her written submissions, at Para 2.5, has observed that, *the loose paper containing details of loan transactions may not be said to be incriminating by itself*. We also note that the unsecured loans found mentioned against the name of the assessee in this sheet correlates with the loans appearing in the books of accounts of the assessee and therefore we find merit in the plea of the assessee that this document cannot be construed to be incriminating in nature. It is noted that somewhat similar facts and circumstances were involved in the case before this Tribunal at Guwahati in the case of ACIT vs Goldstone Cements Ltd. (ITA Nos. 126-131/Gau/2020) dated 10.12.2021. In this decided case, the AO had referred to a statement retrieved from the hard disk which contained the shareholding pattern of the assessee along with the details of shares issued to each of the share subscribers as an incriminating document and accordingly added the share

capital by way of unexplained cash credit. This Tribunal after examining the meaning of the term 'incriminating material', concluded that this document was not incriminating as the shareholding pattern found mentioned therein was verifiable with the books of accounts. Hence, in absence of any incriminating material found in the course of search, this Tribunal deleted the addition made u/s 68 of the Act in the unabated AYs. The relevant findings of the Tribunal as taken note by us is as follows:

> "9.9 Heard both the parties. In light of the above settled position of law, which has not been disputed by either of the parties, the limited question for our consideration is, whether the contents of the seized document GCL-HD-1, referred to by the AO, was 'incriminating' in nature or not. Before we proceed to examine the contents of the seized document GCLHD-1, it is first relevant to understand as to the meaning of the expression "incriminating material" or evidence. There can be several forms of incriminating material or evidence. In order to constitute an incriminating material or evidence, it is necessary for the AO to establish that the information, document or material, whether tangible or intangible, is of such nature, which incriminates or militates against the person from whom it is found. Some common forms of incriminating material, inter alia, are for instance, where the search action u/s. 132 of the Act reveals information (oral or documentary) that the assets found from the possession of the assessee in form of land, building, jewellery, deposits or other valuable assets etc. do not corroborate with his returned income (which includes earlier AY's return also) and/or there is a material difference in the actual valuation of such assets and the

value declared in the books of accounts. Further, incriminating evidence may also constitute of information, tangible or intangible, which suggests or leads to an inference that the assessee is conducting transactions outside the regular books of account which are not disclosed to the Department. Incriminating material may also comprise of document or evidence found in search which demonstrates or proves that what is apparent is not real or what is real is not apparent. In other words, let us assume that an assessee has recorded transactions in his books or other documents maintained in the ordinary course of business, then it is discovered in the search from certain material or evidence which states the contrary. In such an event then, the discovered material or evidence can be held to be incriminating in nature, only when it is found to affect the veracity of the entries made in the books of the assessee and thus lead to the conclusion that the entries made regularly/maintained by the assessee do not represent true and correct state of affairs. Rather the evidence unearthed or found in the course of search would go on to show that the real transaction of the assessee was something different than what was recorded in the regular books and therefore the entries in the books did not represent true and correct state of affairs i.e. the assessee has undisclosed income/expense outside the books or that the assessee is conducting income earning activity outside the books of accounts or all the revenue earning activities are not disclosed to the tax authorities in the books regularly maintained or the returns filed with the authorities from time to time is not true etc. The nature of the evidence

or information gathered during the search should be of such nature that it should not merely raise doubt or suspicion but should be of such nature which would prima facie show that the real and true nature of transaction between the parties is something different from the one recorded in the books or documents maintained in ordinary course of business. In some instances, the information, document or evidence gathered in the course of search, may raise serious doubts or suspicion in relation to transaction reflected in regular books or documents maintained in the ordinary course of business, then also in such an event the AO is not permitted to straightaway treat such material as 'incriminating' in nature unless the AO thereafter brings on record further corroborative material or evidence to transform his suspicion to belief and conclude that the transaction reflected in regular books or documents did not represent the true state of affairs and rather that can be the starting point of inquiry to un-earth further material or evidence to transform his suspicion to belief and conclude that the transaction reflected in regular books or documents did not represent the true state of affairs. Until these conditions are satisfied, it cannot be held that every seized material or document found in the course of search as incriminating in nature qua the assessee justifying the additions in unabated assessments. In other words, any and every seized material, which comes in AO's possession cannot be construed as 'incriminating material' straightaway. For instance, scribbling or rough notings found on loose papers cannot be straightaway classified as 'incriminating material' unless the AO establishes nexus or

connect of such notings with unearthing of undisclosed income of the assessee. This nexus or connect has to be brought out in explicit terms with corroborative material or evidence which any prudent man properly instructed in law must be able to understand or correlate so as to justify the AO's inference of undisclosed income from such seized incriminating material. This exercise is therefore found to be essentially a question of fact.

…..

9.14 We note that the Ld. CIT(A) had examined in detail the contents of the above document and concluded that this document was not an incriminating document and that the it was a shareholding pattern of the assessee which was duly verifiable from the books of accounts and other secretarial records filed by the assessee with ROC, prior to the date of search. For the sake of convenience, the relevant findings recorded by the Ld. CIT(A) in this regard, at Pages 145 to 147 of his order, is extracted below:

….

9.15 Having examined the contents of GCL-HD-1, we find ourselves in agreement with the above findings of the Ld. CIT(A) that this document was a share-holding pattern document prepared by way of secretarial compliance report, which as the assessee has shown, was filed along with the company’s annual return in Form MGT-7 on 28-11-2017 with the Registrar of Companies and was therefore

available in the public domain (much prior to the date of search). It is found to contain the details of the name of shareholders, their amount and percentage of shareholdings. In our considered view, this document was a regular business document having no incriminating content whatsoever. Nothing whatsoever has been brought on record by the Revenue to correlate or link as to how the contents of this statement led to unearthing of unexplained cash credit by the AO and therefore the aforesaid factual finding of the Ld. CIT(A) remains uncontroverted. Hence, we do not see any reason to interfere with the order of the Ld. CIT(A) on this aspect and hold that the seized document GCL-HD-1 did not constitute incriminating material or evidence."

4.10 We note that the above findings has since been affirmed by the Hon'ble Gauhati High Court which is reported in 156 taxmann.com 529, by observing as under:

"11. The issue whether a document, which in these cases is the electronic device in the form of a hard drive extracted from the computer of the assessee during search conducted in the year 2017 constitutes incriminating material or not, would unquestionably require evaluation, assessment and appreciation of contents of such document which is an exercise of evaluation of evidentiary worth of the document. Thus, this Court has no doubt in its mind that the conclusions recorded on the nature of contents of the document by the competent forum, be it the Commissioner

of Income-tax (Appeals) or the Income-tax Appellate Tribunal as to whether the same was incriminating or not, would definitely be findings of fact and hence, the proposed substantial question of law No. 2 in all these appeals, which is the primary ground for assailing the judgment passed by the Income-tax Appellate Tribunal and seeking admission of the appeals, cannot be considered to be a substantial question of law. The question so framed, pertains to examination and re-appreciation of contents of the document GCL-HD-1 for deciding its creditworthiness and to adjudicate whether the same constitutes incriminating material or otherwise. Such an exercise unquestionably tantamounts to re-appreciation of evidence and cannot constitute a substantial question of law and rather poses a simple issue of facts which too stand concluded against the revenue by 2(two) competent forums, *i.e.* the Commissioner of Income-tax (Appeals) and the Income-tax Appellate Tribunal who after threadbare discussion and appreciation of the contents of GCL-HD-1, the projected incriminating material, have recorded concurrent findings of fact that the same does not constitute incriminating material so as to justify the re-opening of the assessment by virtue of Sections 153A of the Income-tax Act for the unabated/completed assessments.

12. In wake of the discussion made hereinabove and keeping in view the law as laid down by Hon'ble the Supreme Court in the case of *Abhisar Buildwell (P.) Ltd.* (*supra*), followed by this Court in a recent judgment dated 14-8-2023 passed in ITA No. 5/2022 (The *Commissioner of*

> *Income-tax* & Anr. v. *Fortune Vanijya Private Limited*), we have no hesitation in holding that the Hard Drive GCL-HD-1 collected by the jurisdictional authority during the search carried out in the premises of the assessee in the year 2017 does not constitute incriminating material so as to justify reopening of assessment of unabated/completed assessments under sections 153A of the Income-tax Act and addition to the income of the assessee under section 68 of the Income-tax Act. The concurrent findings of fact recorded by the Commissioner of Income-tax (Appeals) *vide* judgment dated 18-3-2020 and the Income-tax Appellate Tribunal in the 3(three) appeals of the revenue and the cross-objections of the assessee *vide* judgment dated 10-12-2021 cannot be termed to be perverse, illegal or unjustified in any manner. Hence, we are of the unhesitant opinion that the appeals herein, do not involve any substantial question of law warranting admission."

4.11 Now we come to the reliance placed by the Revenue on the statement of Mr. Shaikh to justify the impugned addition. We have perused the contents of the statement of Mr. Shaikh and it is nobody's case that he had admitted to any wrong doing or had averred that the loans availed from these lenders represented his unaccounted monies. Reading of the statement shows that the Investigating Authorities had required Mr. Shaikh to provide several details of these lenders viz., their address, email ID, business profile, details of meetings held with them, collateral securities provided for obtaining loan, details of intermediaries who arranged the loan, details of board of directors of these lenders etc. On perusal of his reply, it is noted that he had

answered some of the queries viz., that no intermediary was involved for availing the loan and therefore question of payment of commission did not arise. As far as other documentary evidences sought for were concerned, Mr. Shaikh had sought time to verify from his records and submit the details. We are unable to agree with the Ld. CIT, DR as to how this averment incriminated the assessee. The statement shows that the deponent had only expressed his inability at that material time to provide the data. This, according to us, cannot be treated as incriminating statement to draw adverse inference in an unabated assessment. The Ld. AR has rightly pointed out that the Investigating Authority had put forth these queries regarding several lending entities from whom loans were obtained across several years and understandably, the deponent was required to verify the past business records of the group entities and consult with his office staff so as to provide appropriate reply to these questions. The Ld. AR also rightly contended that, it was not necessary that Mr. Shaikh would be aware of every aspect of the functioning of each of the group entities and he cannot be expected to provide the exact details of the group finances along with supportings spanning across several years on the same day when he was being questioned in the course of search. We thus find force in the Ld. AR's contention that Mr. Shaikh's answer seeking time to provide the relevant details cannot be viewed adversely. Moreover, it was shown to us, that, in the post search enquiries, the assessee had provided these details to the Investigating Authorities. Having regard to the foregoing and more so when the impugned statement itself did not contain any admission or surrender to any wrong doing, we do not countenance this plea of

the Revenue that the said statement constituted incriminating material unearthed in the course of search.

4.12 With regard to the whatsapp conversations referred to by the Ld. CIT, DR, it is noted that no incriminating conversations whatsoever were placed before us. Upon query from the Bench, the Revenue was unable to show to us any such whatsapp chats which incriminated the assessee qua the unsecured loans obtained from the lenders in question. Instead, we find that the Ld. CIT, DR had baldly relied on the observations made by the AO at Para 6.2.2 of the assessment order. Having perused the same, it is noted that the AO has not cited the exact conversations or the contents of the chat but has simply observed that there were few whatsapp chats between one, Mr. Ahmed and Mr. Shaikh where the word 'cheque-entry' was used and Mr. Ahmed had purportedly stated that this denoted payment in cheque which was returned in cash. It is however not the AO's case that, these whatsapp chats related to the unsecured loans obtained from these lending entities. Instead, the AO is noted to have referred to the same, which was in completely different business dealings, to deduce that these unsecured loans would also be in the nature of accommodation entries obtained in lieu of cash. According to us, such an inference based on surmises and presumptions was far-fetched and untenable. We are in agreement with the Ld. AR that these presumptive observations made by the AO cannot be construed as an incriminating or tangible material which would suggest that the unsecured loans were in the nature of unexplained cash credits.

> 4.13 We now come to the Ld. DR's reliance on the past history of litigation of the assessee group on this issue of unsecured loans to justify addition/s in unabated assessments. The Ld. AR, in this regard, has pointed out to us that, the addition/s made by the AOs in the earlier AYs on account of unsecured loans u/s 68 of the Act has since been deleted by this Tribunal and the relevant appellate order of the concerned group entity has been placed at Pages 319 to 335 of Paper Book. Be that as it may, according to us, this cannot be regarded as an incriminating material found in the course of search and hence this particular contention of the Revenue is also rejected.
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> 4.14 For the reasons set out in the preceding paragraphs and the judicial precedents discussed above, we are therefore of the considered view that there was no incriminating material found in the course of search on the basis of which additions u/s 68 and 69C of the Act could have been legally made in the unabated AYs 2016-17 and 2018-19. We accordingly direct the AO to delete the impugned addition/s made u/s 68 & 69C of the Act in the unabated AYs 2016-17 & 2018-19."

4.5 Following the above, we thus hold that there was no incriminating material found in the course of search on the basis of which disallowance u/s 69C of the Act could have been legally made in the unabated AYs 2015-16 & 2016-17. The AO is accordingly directed to delete the same. Hence, these grounds of the assessee taken in AYs 2015-16 & 2016-17 stands allowed.

4.6 Now, we come to the additions made u/s 68 & 69C of the Act in the abated AYs 2020-21 and 2021-22. It is noted that the unsecured loan in question was received from Mr. Lalit J Kothari, Prop. of Vishal Overseas. Before the lower authorities, the assessee had furnished confirmation letter, financial statements, Income-tax Acknowledgement of this lenders. The said lender is also noted to have complied with the enquiry made u/s 133(6) of the Act. The AO after analyzing his financials primarily doubted his creditworthiness to advance the loans and therefore added the same u/s 68 of the Act and disallowed the interest paid u/s 69C of the Act in AYs 2020-21 & 2021-22. On appeal, the Ld. CIT(A) is noted to have sustained the addition.

4.7 Before we advert to the facts of the case, it is necessary to recapitulate the provisions of Section 68 of the Act, which read as under:

> "Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the [Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year :
>
> Provided that where the assessee is a company (not being a company in which the public are substantially interested), and the

> sum so credited consists of share application money, share capital, share premium or any such amount by whatever name called, any explanation offered by such assessee-company shall be deemed to be not satisfactory, unless—
>
> (a) the person, being a resident in whose name such credit is recorded in the books of such company also offers an explanation about the nature and source of such sum so credited; and
>
> (b) such explanation in the opinion of the Assessing Officer aforesaid has been found to be satisfactory:
>
> Provided further that nothing contained in the first proviso shall apply if the person, in whose name the sum referred to therein is recorded, is a venture capital fund or a venture capital company as referred to in clause (23FB)of section 10."

4.8 Bare reading of the provision makes it abundantly clear that an assessee firm is required to substantiate only the first source of receipt in relation to advance/loan/deposit and nothing more. The additional burden laid down in the proviso to Section 68 of the Act only applied to 'share application monies' which are raised by closely held companies. In the case at hand therefore, the proviso to Section 68 is not applicable. Under the extant provisions of Section 68 of the Act [as it stood in AY 2020-21], the burden cast on the assessee is only to substantiate the source of receipt of the loan/deposit. Hence, in our considered view, the onus cast upon the assessee is only to establish three things necessary to obviate attracting Section 68 of the Act which

are, (i) identity of the creditor; (ii) their creditworthiness and (iii) Genuineness of the transaction.

4.9 In view of the above position of law, let us now examine the facts of the case. From the assessment order, it is noted that, the AO had doubted the source of the loan creditor and had held that his creditworthiness remained unsubstantiated. The AO upon his own analysis of the financials of this lender had noted that his financial worth which did not commensurate with the loans advanced and the AO therefore raised doubts on his creditworthiness. According to us however, only because the lender did not derive sufficient profits during the year cannot be the sole determinative factor to doubt his creditworthiness. It is noted that, the lender had demonstrated that the loans were advanced by him, either out of their own funds or borrowings made by them in their respective capacities through banking channel. Also, the interest paid by the assessee formed part of his regular books of accounts. On these facts, in our considered view therefore, nothing much turns on the fact that if this lender had reported meagre income in the relevant year.

4.10 The Ld. AR further showed us that, even on facts, the above averment was not factually tenable. Having examined the records, it is noted that the assessee has placed on record the PAN details and Income-tax Acknowledgment of Mr. Lalit J Kothari, Prop. of Vishal Overseas. This lender is noted to be involved in substantial business

activities and is a regular income-tax filer. The lender, Mr. Lalit J Kothari is also noted to be a businessman operating under the trade name M/s Vishal Overseas. He is also noted to have consistently disclosed income in the range of Rs. 20.27 lacs in AY 2015-16, Rs.22.46 lacs in AY 2016-17, Rs.26.12 lacs in AY 2017-18, Rs. 32.47 lacs in AY 2018-19 and Rs.35.48 lacs in AY 2019-20 & Rs. 42.18 lacs in AY 2020-21. The loans obtained from him was transacted through banking channels. It is also noted that the loan was also subsequently repaid along with interest. The assessee is noted to have placed on record the loan confirmations obtained from this lender as well. All these documents which were filed by the assessee before the lower authorities have not been found to be incorrect or faulty at any stage.

4.11 Having regard to the above, it is noted that the source of the loan had been established in as much as the identity of the lender, his creditworthiness and genuineness of the transaction was substantiated by the assessee as per the requirement of law. Moreover, in our considered view, if the AO suspected his financial ability to advance the loan, then the correct course of action was to proceed against the creditor rather than the assessee because the assessee has discharged the burden as required by law [Section 68 of the Act] and the assessee cannot be expected to do more than what the law prescribed. For this, we rely on the decision of the Hon'ble jurisdictional Bombay High Court rendered in the case of **Gaurav Triyugi Singh v. ITO [2020] 121 taxmann.com 86/423 ITR 531**. In the decided case the assessee

had received unsecured loans from two individuals, whose details were submitted before the AO. The AO however doubted the creditworthiness of the individuals and took a view that the assessee had not established genuineness of the loan. On appeal, the Hon'ble High Court deleted the addition by observing as under:

> "13. Section 68 of the Act has received considerable attention of the courts. It has been held that it is necessary for an assessee to prove prima facie the transaction which results in a cash credit in his books of account. Such proof would include proof of identity of the creditor, capacity of such creditor to advance the money and lastly, genuineness of the transaction. Thus, in order to establish receipt of credit in cash, as per requirement of section68, the assessee has to explain or satisfy three conditions, namely : (i) identity of the creditor; (ii) genuineness of the transaction; and (iii) credit-worthiness of the creditor.
>
> 14. In Pr. CIT v. Veedhata Towers (P.) Ltd. [2018] 403 ITR 415 (Bom), this court has held that assessee is only required to explain the source of the credit. There is no requirement under the law to explain the source of the source. In the instant case, there is no dispute as to the identity of the creditor. There is also no dispute about the genuineness of the transaction. That apart, the creditor has explained as to how the credit was given to the assessee. Thus assessee had discharged the onus which was on him as per the requirement of section 68 of the Act. What the Assessing Officer held was that sources of the source were suspect i.e., he suspected the two sources Shri Rajendra Bahadur

Singh and Smt. Sarojini Thakur of the source Smt. Savitri Thakur.

15. In view of discharge of burden by the assessee, burden shifted to the revenue; but revenue could not prove or bring any material to impeach the source of the credit. Though Mr. Walve, learned standing counsel, has pointed out that the creditor had no regular source of income to justify the advancement of the credit to the assessee, we are of the view that the assessee had discharged the onus which was on him to explain the three requirements, as noted above. It was not required for the assessee to explain the sources of the source. In other words, he was not required to explain the sources of the money provided by the creditor Smt. Savitri Thakur i.e. Shri Rajendra Bahadur Singh and Smt. Sarojini Thakur.

16. Considering the above, we are of the view that the Tribunal was not justified in sustaining the addition of Rs. 14 lakhs to the total income of the assessee as undisclosed cash credit under section 68 of the Act.

17. Consequently, finding of the Tribunal to the above extent is set aside. The question framed is answered in favour of the assessee and against the Revenue."

4.12 Another reasoning given by the Revenue to doubt the genuineness of the loan was that, the assessee had not provided the details of collaterals offered for obtaining this loan, business profile of the lender etc. To this, the Ld. AR has pointed out that the loan in

question was admittedly unsecured and therefore the question of placing collaterals did not arise. Further, he showed that the business profile were verifiable from the financial statements and thus according to him, this averment of the Revenue was also factually misplaced. We are also in agreement with the Ld. AR that, on the overall facts as already discussed in preceding paragraphs, these aspects pointed out by the Revenue were irrelevant in as much as the same could not be viewed adversely to justify the addition made u/s 68 of the Act.

4.13. Before us, the Ld. CIT, DR had also placed emphasis on the AO's findings that both this lender did not attend the summons issued to him. In this regard, the Ld. AR has pointed out to us that, the nature of relationship between the assessee and the individual lender was that of debtor-creditor which is limited to advancement of loan, payment of interest, and thereafter refund of the same. The Ld. AR submitted that, the assessee also cannot be expected to enforce compliance from the creditor, particularly when the loan had been refunded along with interest. The Ld. AR explained that, it was purely a case of finance/money-lending transaction and thus under the given circumstances therefore, the loan received by the assessee cannot be doubted on the ground that the AO was unable to make enquiries from this creditor, particularly when the loan had already been refunded. Having regard to the foregoing contentions and the fact that the requisite documentary evidences in relation to the loan creditor which

the assessee was required to maintain had already been furnished before the AO, the alleged non-attendance of summons by the lender cannot be decisive to justify the impugned addition. For this, we rely on the decision of the Hon'ble Supreme Court in the case of **CIT vs Orissa Corporation (P) Ltd (159 ITR 78)** wherein the facts of the case was that *"the assessee, with regard to loans taken produced before the Income- tax Officer letters of confirmation, the discharged Hundis and particulars of the different creditors general index numbers were with the Income-tax Department. Attempts bad been made to bring those creditors therefore the Income-tax Officer by issue of notices under Section 131 of the Act, but the said notices were returned with the endorsement 'left'. The Income-tax Officer, therefore, treated the entire amount of R. 1,50,000 as unproved cash credit and added the same to the income of the assessee"*. On these facts, the Hon'ble Apex Court is noted to have held as follows:

> "In this case the assessee had given the names and addresses of the alleged creditors. It was in the knowledge of the Revenue that the said creditors were income-tax assessees. Their index number was in the file of the Revenue. The Revenue, apart from issuing notices under section 131 at the instance of the assessee, did not pursue the matter further. The Revenue did not examine the source of income of the said alleged creditors to find out whether they were credit-worthy or were such who could advance the alleged loans. There was no effort made to pursue the so called alleged creditors. In those circumstances, the assessee could not do any further. In the premises, if the Tribunal came to the

> conclusion that the assessee had discharged the burden that lay on him then it could not be said that such a conclusion was unreasonable or perverse or based on no evidence. If the conclusion is based on some evidence on which a conclusion could be arrived at, no question of law as such arises."

4.14 We also rely on the decision of Hon'ble Gujarat High Court in the case of **Dy. CIT v. Rohini Builders (256 ITR 360)**, wherein the Court has held that onus of the assessee (in whose books of account credit appears) stands fully discharged if the identity of the creditor is established and actual receipt of money from such creditor is proved. In case, the Assessing Officer is dissatisfied about the source of cash deposited in the bank accounts of the creditors, the proper course would be to assess such credit in the hands of the creditor (after making due enquiries from such creditor). In arriving at this conclusion, the Hon'ble Court has further stressed the presence of word "may" in section 68. Relevant observations at pages 369 and 370 of this report are reproduced hereunder:-

> "Merely because summons issued to some of the creditors could not be served or they failed to attend before the Assessing Officer, cannot be a ground to treat the loans taken by the assessee from those creditors as non-genuine in view of the principles laid down by the Supreme Court in the case of Orissa Corporation [1986] 159 ITR 78. In the said decision the Supreme Court has observed that when the assessee furnishes names and addresses of the alleged creditors and the GIR numbers, the

> burden shifts to the Department to establish the Revenue's case and in order to sustain the addition the Revenue has to pursue the enquiry and to establish the lack of creditworthiness and mere non- compliance of summons issued by the Assessing Officer under section 131, by the alleged creditors will not be sufficient to draw and adverse inference against the assessee. in the case of six creditors who appeared before the Assessing Officer and whose statements were recorded by the Assessing Officer, they have admitted having advanced loans to the assessee by account payee cheques and in case the Assessing Officer was not satisfied with the cash amount deposited by those creditors in their bank accounts, the proper course would have been to make assessments in the cases of those creditors by' treating the cash deposits in their bank accounts as unexplained investments of those creditors under section 69."

4.15 Further, as noted above, these loans had been repaid, and, therefore, the allegation of the AO that assessee was a beneficiary of the loan cannot be sustained on these facts and is liable to be deleted. We gainfully refer to the judgment of the Hon'ble Gujarat High Court in the case of **PCIT vs. Ambe Tradecorp (P.) Ltd (supra)** where it has been held as follows:

> "The Tribunal rightly recorded in para 29 of the judgment. "Once repayment of the loan has been established based on the documentary evidence, the credit entries cannot be looked into isolation after ignoring the debit entries despite the debit entries being carried out in the later years. Thus, in the given facts and

circumstances, were hold that there is no infirmity in the order of the Ld. CIT(A)."

10. We, therefore, under the given facts and circumstances of the case, are of the considered view since the assessee has successfully discharged its onus of proving the identity of the loan creditor, which in the instant case duly registered with Ministry of Corporate Affairs, having PAN and had filed return of income as well. Further creditworthiness of the transaction is proved with the fact that they have been carried through banking channel and sufficient funds were available with the loan creditors to explain the amount of loan given and the genuineness of the transaction is proved with the fact that the assessee company is carrying out regular business activity and the loan was obtained at commercial rate of interest which was also repaid at a later date in subsequent year, interest was paid on the loans and tax at source has been deducted and duly reflected by the loan creditor in their income tax return. Therefore, we fail to find any justification in the action of ld. AO invoking the provisions of Section 68 of the Act. We, thus, set aside the finding of ld. CIT(A) and delete the addition of Rs.25,00,000/- made u/s 68 of the Act.

4.16 In view of the above reasoning therefore, we are of the considered view that the addition of Rs.15,00,000/- sustained by the Ld. CIT(A) u/s 68 of the Act was untenable both in law and on facts and thus the AO is directed to delete the same as well. Consequently, the disallowance of interest paid on this loan in AYs 2020-21 & 2021-

22 made u/s 69C of the Act is also held to be unjustified and thus deleted.

5. Issue 2: Addition on account of on-monies received on sale of flats

Ground Nos. 2 & 3 of Assessee's appeal for AY 2015-16
Ground Nos. 1 & 2 of Assessee's appeal for AY 2017-18
Ground Nos. 1 & 2 of Assessee's appeal for AY 2018-19
Ground No. 1 of Revenue's appeal for AY 2018-19
Ground Nos. 1 & 2 of Assessee's appeal for AY 2019-20
Ground Nos. 2 & 3 of Assessee's appeal for AY 2020-21

5.1 The facts relating to this issue as noted by us are that, in the course of search, there were electronic data found which inter alia included the details of sale of unit/flats in the real estate projects undertaken by Rubberwala Group across several entities including the Project Nebulla/Sindhi Gully undertaken by the assessee. It is noted that, the electronic data concerning the details of on-monies received by the assessee was found and seized by the Investigating authorities, which have been taken note of by us as well. These facts gathered in the course of search along with the statements of the persons from whose possession these electronic data was found was confronted to Mr. Shaikh, the principal promoter of the Rubberwala Group. He is noted to have admitted having received the on-monies on sale of flats in the real estate project undertaken by the assessee. He however pointed out that against the receipt of these on-monies, expenses were also incurred in cash towards the project and thus Mr. Shaikh is noted to have accordingly offered 8% of the on-monies by way of

unaccounted income derived upon sale of flats. It is further noted that in the course of post-search verification, another excel sheet titled *'2002 to 1.1.2020-1'* was also found in a pen drive seized from the premises of Mr. Shaikh, which according to the AO contained details of both unaccounted cash income and expenditure relating to the projects undertaken by Rubberwala Group including the assessee. Based on the data found, the AO is noted to have compiled the aggregate details of on-monies received by the assessee, which is as follows:

Assessment Year	**Total On-Monies (in Rs.)**
2015-16	50,16,200
2016-17	-
2017-18	94,52,500
2018-19	2,63,00,000
2019-20	1,75,00,000
2020-21	1,02,37,668
Total	**6,85,06,368**

5.2 It is noted that the details of on-monies as quantified by the AO in AYs 2015-16, 2017-18 to 2020-21 have been accepted by Mr. Shaikh and he had accordingly offered 8% of the aggregate undisclosed proceeds by way of unaccounted profit derived by the assessee from the project undertaken by it. On the basis of this disclosure, the assessee is noted to have accordingly filed the returns

of income u/s 153A of the Act, wherein it has admitted and offered the aforesaid unaccounted profit to tax. The AO, for the various reasons set out in the assessment order, is noted to have disputed the assessee's action of only offering profit element in the on-monies and instead has added the entire value of on-monies by way of unaccounted income of the assessee. On appeal the Ld. CIT(A) is noted to have in principle accepted the assessee's plea that only the profit element embedded in these on-monies ought to have been taxed by the AO. The Ld. CIT(A) however restricted the quantum of addition viz., the profit element embedded in the on-monies, to 12.5% as opposed to 8% of the receipts, offered by the assessee, across the years.

5.3 Being aggrieved by the order of the Ld. CIT(A), the assessee is in appeal for the AYs 2015-16, 2017-18 to 2020-21 contending that the profit element ought to be estimated at 8% of the on-money receipts, as offered by the assessee, as opposed to 12.5% estimated by the Ld. CIT(A), across the years. And, the Revenue is in appeal before us only in AY 2018-19 wherein it has urged that the entire value of the on-money receipts i.e. Rs.2,63,00,000/- ought to be brought to tax.

5.4 Heard both the parties. It is noted that identical issue has been adjudicated by us in the case of the flagship entity belonging to Rubberwala Group viz., **M/s Rubberwala Housing & Infrastructure Ltd.** in their **ITA Nos. 3444 to 3448/Mum/2023**. Like in the decided case, the findings & observations of the AO, arguments of the Ld. DR as well as the contentions put forth by the assessee are noted to be

verbatim same. While adjudicating this issue in the case of M/s Rubberwala Housing & Infrastructure Ltd. (supra), it has been held that only the profit element embedded in the on-monies ought to be assessed to tax and that on the given facts, the addition of entire value of on-monies made by the AO was held to be unwarranted. It was further held that, 8% is the appropriate profit percentage to estimate profit element embedded in on-monies received on sale of units/flats. The relevant findings set out therein are as follows :-

> "5.7 We have heard both the parties and perused the material placed before us. At the outset, it is noted that there is no dispute between the parties that the assessee had received on-monies on sale of units at its Platinum Mall Project. Even the quantum of on-money receipts quantified by the AO have not been disputed by both the parties, which as noted by Ld. CIT(A) is as follows :-
>
> ….
>
> 5.8 The limited issue for our consideration is whether the entire value of these receipts have to be brought to tax or only the profit element embedded therein has to be taxed. From the facts placed before us, it is noted that the assessee is engaged in the business of development of real estate. In the course of search, electronic data was found, more particularly excel sheets which inter alia contained details of on-monies received on sale of flats. Having perused these excel sheet on sample basis, it is noted that the same sheet also contained notings of expenses. From the statement of Mr. Shaikh, it is gathered that even the Investigating authorities tacitly acknowledged that there were notings of cash

expenses incurred by the assessee in this excel sheet by putting up the following questions to Mr. Shaikh.

> "Q.47. Please refer to your response to the question above. It is seen from the various sheets which have been named at Q. No. 43, that there are names of various parties with whom payment and receipt transactions have been undertaken by you. Therefore, your claim that you don't have the details of the names is not correct. Many of the names are mentioned as aliases and in abbreviated forms. In view of this, please go through the said excel sheets and clarify the complete names of the various parties involved.
>
> Ans: Sir, the names mentioned in the sheet are the names of various persons who gives us the payments on behalf of someone and also the names of the persons to whom we made the payments on behalf of someone and therefore I am unable to recollect the transactions as the name in the sheets have no direct relations with the actual transactions. Further as the transactions were in cash therefore the proper details of the same was not maintained by us and that's why details are not available with us."

5.9 It is further noted that Mr. Shaikh had further averred that in both his statements recorded in course of the search as well as in post search enquiries that the exact profit from the working in these excel sheets was not possible and therefore he had estimated the profit from on-monies @ 8% and offered the

same to tax. The relevant questions and answers taken note of by us are as follows :-

> "Q.10. During the course of search proceedings of group companies, the statement u/s 132(4) of the Income Tax Act, 1961 was taken on 17.03.2021 at 1402, Ameena Heights, Dr. A Nair Road, Agripada, Mumbai 400 011and in answer to the Q.47 to 54 you stated that "Ma'am I will have to look into the Books of Accounts and cash flows of my various entities and only then I will be able to comment on the pen drive in question and the statement of Mr. Imran Ansari". Till today you have not filed any explanation for the questions asked during the course of search proceedings, in these circumstances why amount of Rs. 151,39,11,026/- should not be considered as the unaccounted income of M/s Rubberwala Housing Infrastructure Limited, from the sale of shops at Platinum Project undertaken by the company. Please comments.
>
> Ans. Sir, I have already elaborated the circumstances under which I was not been able to file my replies on the questions asked by you during the course of search proceedings. Now I am in receipt of the copy of the statements along with the seized documents and after verification of the documents it is submitted that we have received cash towards the shops and also make various expenditures in cash towards the project out of the said cash receipts. I am submitting herewith the cash receipts and payments details for the following years.
>
> …
>
> On the plain reading of the seized material as provided by you it is evident that we have made various expenditures towards the platinum project out of the cash received towards the shops in the project. As the data is voluminous and exact profit working from the seized data cannot be

derived therefore exact details of profit or loss toward the cash transactions recorded in the seized material cannot be ascertained.

Further as far as my knowledge is concerned, I have not earned anything out of the total receipts in cash as income because unaccounted cash received from the various business activity are paid towards the expenses of the projects of the group. To settle the dispute, avoid further litigations and assuming that no penalty will be levied on M/s Rubberwala Housing and infrastructure Ltd for disclosure of additional income. I am offering an amount equitant to 8% of total unaccounted receipts as additional income of the respective company.

Total cash received towards the Platinum project are as under and the income @ 8% on unaccounted receipts is offered as additional income for M/s Rubberwala Housing and infrastructure Ltd

…….

Q.43. During the course of post search proceedings, you have been provided the soft copy of the excel sheet named as "2002 to 1.1.2020-1 which is retrieved from the 16GB SanDisk pen drive on which white paper pasted found during the course of Search Action u/s 132 in your laptop bag of your bedroom at Flat No. 1402, Ameena Heights, Agripada, Mumbai 400011. Please explain the content of the excel sheets?

Ans. Sir, I have gone through the excel sheet as provided by you and in the given excel sheet the seven columns starting from column A to column G. The column wise details is as under:

Column	Explanation
A	This column of the excel sheet with the heading as 'Date' i.e. the column contain the date of transaction.

B	This column of the excel sheet with the heading 'Particulars' i.e. the said column contain the details of short Name of party.
C	This column of the excel sheet with the heading 'Vch Type' i.e. the column contain the type of the voucher. Further the same includes voucher of Receipt, payments etc.
D	This column of the excel sheet with the heading 'Description' i.e. the said column the nature of transactions.
E	This column contains the amount of receipts.
F	This column contains the amount of payment.
G	This column of the excel sheet with the heading 'Company' i.e. the said column contain the details of Name of Project, location or nature of the receipt and payment etc.

In this sheet unaccounted cash income and expenditure related to various projects are noted. This is the consolidated income and expenditure sheet for Rubberwala Group entities. All receipts in respect of the projects are noted in the sheet at the receipt side. Further the receipts are noted in the name of various persons (L.e. employees/associates/partners of Rubberwala group) from whom the cash was received, because the cash was collected from the customers by various employees of the group and after that the same was received by the respective senior persons and after aggregating the said cash was handed over to me and the same was noted in the sheet as aggregated basis.

Therefore, each entry of the individual sheets (ie. Platinum mall project and Fuego project excel sheets) recovered during the course of search may not be reconciled individually but on overall basis the receipts noted in the "2002 to 1.1.2020 -1" are more than the individual sheets found during the course of search.
The said received cash are duly expensed out for the projects and the same fact can easily be verified from the sheet provided by you. In the said excel sheet received cash is duly paid towards the expenditure of the projects running by the group. There are various expenses of the projects like relocation of the tenant, payment towards vacating of the land, material procurement expenses, Labour payments

and various other approval related expenses etc. are noted and was made out of the cash receipt from the project and the same are verifiable from the said sheet therefore it is beyond doubt that the group earned all the unaccounted cash as income.

As the data are voluminous and it is not possible to derive the exact profit working from the excel sheets and therefore to settle the dispute, avoid further litigations and assuming that no penalty will be levied on the group for disclosure of additional income I am offering an amount equitant to 8% of total unaccounted receipts as additional income of the respective company.

As the data noted in the excel sheet entity wise bifurcation are not possible and therefore the project wise income will be offered as per the respective seized material in the respective company/firm and income over and above the individual sheet noting will be offered as additional income in M/s Rubberwala Housing and Infrastructure limited as the company are flagship company of group and major work are done in the same company. The year wise bifurcation of income as per the excel sheet "2002 to 1.1.2020-1" is as under:

….

The above total receipts are including the income offered in various companies/firms as replied in previous questions, and the details of the same are as follows:

….

And therefore, I am offering to tax the assessee wise year wise unaccounted income as additional income as under:
…

3. Rubberwala Reality: Project Nebula/Sindhi Gully-(PAN: AANFR3670E)

Financial Year	Total Unaccounted Receipt	Additional Income @8% of the total

		unaccounted Receipt
2014-15	50,16,200	4,01,296
2015-16	-	-
2016-17	94,52,500	7,56,200
2017-18	2,63,00,000	21,04,000
2018-19	1,75,00,000	14,00,000
2019-20	1,02,37,668	8,19,013
2020-21	-	-
Grand Total	6,85,06,368	54,80,509

5.10 From the above answers given by Mr. Shaikh, he is noted to have not only admitted to having received on-monies on sale of flats / units but at the same time also stated that cash expenditure relating to the same activity had also been incurred and accordingly offered additional income @ 8% of receipts. Having regard to these contemporaneous facts, we thus note that the allegation of the Revenue that, the additional income as a percentage of on-monies receipts offered in the return of income was an after-thought, is factually misplaced. Instead, we find that, in the course of search itself, the details of expenses were found noted on the same excel sheet where on-monies notings were found. When confronted, Mr. Shaikh admitted to both cash receipts and cash expenses and in the same breath he had offered additional income embedded therein viz., 8% of the receipts.

5.11 The Revenue has however contended that, the expenses found noted on this excel sheet were not shown by the

assessee to have been incurred for business purposes. The Ld. AR, on the other hand, brought to our notice that, Mr. Shaikh in his answers had inter alia explained the nature and purpose of expenses which included payments for vacation of land, relocation of tenants, certain material procurement, labour payments etc. which were intrinsic to the said project. The Ld. AR invited our attention to the terms used in the excel sheet viz., *'Building Gate Work'*, *'Zaheer Plumber for excavation labour payment'*, *'Tenant Shifting A/c Chunu'*, *'Manoj Material Purchase'*, *'Labour Salary March 18'* etc. Having examined the contents of the excel sheet in light of the answers given by Mr. Shaikh in his statement, we find merit in the assessee's case that the notings of the expenses found on this excel sheet indeed related to the business i.e. real estate project. We also agree with the Ld. AR that, the fact that these expenses were noted corresponding to on-monies receipts further lends credence to the assessee's contention that these notings were pertaining to the business of real estate.

5.12 Now we come to reliance placed by the Revenue in this regard on the decision of Hon'ble Bombay High Court in the case of Harish Textile Engrs. Ltd. Vs DCIT (supra) to dispute the allowability of expenses found noted on these excel sheets. Having perused the said judgment, we find the same to be factually distinguishable. In the decided case, the seized papers were found to indicate only notings of payments which was claimed as deduction u/s 37(1) of the Act by the assessee. On a factual analysis, it was also found that the said seized documents only indicated seeking of funds and/or reimbursement of funds which by itself was held to be insufficient to establish that the

money has been actually expended. The said notings were found to be bereft of any details whatsoever which would suggest that it had been incurred for business purposes. On the contrary, in the facts before us, it is noted that the same excel sheet contained notings of both receipts and expenses. Having regard to this material fact, according to us, there is no discretion available either with the Department or the assessee to rely upon a part of the document favourable to it and plead for rejection of the other part which is not favourable to it, or in respect of which no supporting material is found. In general, the contents of the document seized have to be accepted as true irrespective of whether it is favourable to assessee or Department and the seized/impounded document has to be read as a whole. Gainful reference in this regard may be made to the decision of Hon'ble Delhi High Court in the case of CIT Vs D D Gears Ltd (211 Taxman 8) which is found to be relevant in the given facts of the present case. In the decided case also, expenses were found to have been noted on the same document where receipts were recorded. In these circumstances, it was held that expenses, which are recorded in the very same seized material, should be reduced while computing undisclosed income. The Hon'ble High Court accordingly held that, while computing undisclosed income on the basis of such seized material, no part thereof can be ignored or no entry stated in such material can also be ignored, if it do not suite the convenience of the Assessing Officer. The material is to be considered as a whole and not selectively.

5.13 Also, the notings found mentioned in the excel sheet clearly suggest that the expenses have already been incurred. Moreover, it cannot be a matter of an argument in the given facts

of the present case that, the amount of receipts/ sales by itself would represent the income of the assessee. For this, we gainfully rely on the following findings rendered by the Hon'ble Gujarat High Court in the case of CIT Vs President Industries (258 ITR 654).

"3. Having perused the assessment order made by the Assessing Officer, the order made by the Commissioner (Appeals) and the Tribunal, we are satisfied that the Tribunal was justified in rejecting the application under section 256(1). It cannot be a matter of an argument that the amount of sales by itself cannot represent the income of the assessee who has not disclosed the sales. The sales only represent the price received by the seller of the goods for the acquisition of which it has already incurred the cost. It is the realisation of excess over the cost incurred that only forms part of the profit included in the consideration of sales. Therefore, unless there is a finding to the effect that investment by way of incurring cost in acquiring goods which have been sold has been made by the assessee and that has also not been disclosed, the question, whether entire sum of undisclosed sale proceeds can be treated as income of the relevant assessment year answers by itself in the negative. The record goes to show that there is no finding nor any material has been referred to about the suppression of investment in acquiring the goods which have been found subject of undisclosed sales."

5.14 Furthermore, if Revenue's plea is acceded to and the notings of expenses are discarded due to insufficiency of documentary evidences to support it, then likewise corresponding notings of on-monies would also have to be treated as unreliable.

In our considered view however such an inference in the context of estimation of undisclosed income in the given facts of the present case, would be illogical. For the aforesaid reasons, the decision of Harish Textile Engrs. Ltd. Vs DCIT (supra) relied upon by Revenue is found to be of no assistance.

5.15 The next argument of the Revenue is that, even if these notings are found to be expenses incurred towards business but because the names of the payees along with documentary evidences for such expenses have not been provided, the benefit for the same should not be given. In this regard, we find that, on same set of facts, similar contention was raised by the Revenue before this Tribunal in the case of M/s Prime Developers Vs ACIT (supra) viz., the set-off / benefit of expenses against on-monies should not be allowed as the assessee was unable to substantiate the incurrence of expenses with evidences. This Tribunal is noted to have rejected this plea of the Revenue and upheld the assessee's plea for estimation of profit element embedded in on-monies by observing as under:-

> "42. Scope of Reasonable Expenditure: Assessee needs to expend in order to earn income/profit and it is basic and universal principle in any business. This principle applies to both accounted and unaccounted profits. In a case of unaccounted profits, due to its very nature of unaccounting, normally, the parties do not maintain evidences and therefore, evidencing such unaccounted evidences is impossibility. Probably, for this reason, the courts have taken conscious view that it is for the assessing authority to quantify reasonable expenditure considering the facts of the

case and industry. Legally speaking, the judgments are uniform in asserting that entire sale proceeds should not be added as income. Honble High court of Ahmadabad ruled in the case of Panna Corporation that the " assessee ought to have spent reasonable amount for the purpose of receiving such gross profit' (para 14 of Tax Appeal No 325 of 2000 dt. 16.6.2012). Further, Hon'ble High Court OF Madya Pradesh held in the case of President Industries 258 ITR 654 that ' entire sale proceeds of the assessee should not be added in his income'. Further, from the judgment in case of Panna Corporation (supra), it is settled proposition that there is no need for the assessee to demonstrate the genuineness of the claim of unaccounted expenditure in the cases of this kind. The underlined logic is that the unaccounted expenditure is always unevidenced and never maintained. Therefore, transferring onus on to the assessee in matters of this kind is not approved. Ex consequenti, it is for the AO allow necessarily reasonable deduction towards such unaccounted expenditure without demanding evidences, considering the nature of industry and also evidences relating to extents of net profits earned by the assessee. Considering the above legal position on the matter, we are of the clear-cut opinion, the AO's conclusions on this issue are certainly erroneous. In principle, we uphold the views of the CIT(A) in this regard. Therefore, relevant grounds raised in the revenue's appeals are dismissed."

5.16 It was brought to our notice that the above findings of this Tribunal have been affirmed by the Hon'ble Bombay High

Court in their decision rendered in ITA No.2452 of 2013. Following the binding *ratio decidendi*, this particular argument of the Revenue is hereby rejected.

5.17 The alternate contention of the Revenue that, the cash expenses were still not allowable u/s 40A(3) of the Act is also found to be untenable. For this, we find that the Ld. AR has rightly relied on the following findings of this Tribunal at Pune in the case of Dhanvarsha Builders & Developers (P.) Ltd. Vs DCIT (102 ITD 375) which were as follows:-

> "The argument of the learned DR in this matter may also be considered here. His case was that the expenditure has to be proved by the assessee. We are unable to agree with this submission if the impugned seized material is to be considered for the purpose of computation of the undisclosed income. The learned DR had pointed out that the Assessing Officer had verified some of the cash receipts from the customers. It appears that no opportunity of cross examination has been given by the Assessing Officer to the assessee in this behalf. Therefore, the evidence gathered by him in respect of receipt of 'on money' is only a tentative evidence on which no firm conclusion can be drawn. If the learned DR's arguments regarding expenditure were to be accepted, then, the figures of cash receipts mentioned in the seized paper will also have to be ignored. Such course of action will be against the tenor of the evidence seized in the course of search operation, more particularly, when the evidence gives clear picture of the undisclosed income of the assessee. The other argument of the learned counsel

was that provisions of section 40A(3) should be applied in respect of expenditure. It may be pointed out that we are on the issue of computation of income of the assessee de hors the books of account and on the basis of seized material. In such computation, provisions of section 40A(3) are not applicable because this is not the case of the assessee or the revenue that the computation of undisclosed income is on an exact basis as per seized documents and the books of account. The result of the aforesaid discussion is that the undisclosed income is to be quantified at Rs. 14.74 lakhs."

5.18 We find that similar view has been expressed by this Tribunal in the case of Western India Bakers (P.) Ltd. Vs DCIT (87 ITD 607) wherein also it was held that the limits under Section 40A(3) of the Act cannot be applied while estimating undisclosed income. The relevant findings of this Tribunal as taken note of by us are as follows :-

"28. Coming now to the last issue that whether disallowance under section 40A(3) was possible in the facts of the present case, we have noted that the assessment was made on the basis of undisclosed investment. Where the basis is undisclosed investment, one cannot apply the prescription of section 40A(3) of the Act. In the case of CIT v. Aloo Supply Co. [1980] 121 ITR 680 (Ori.), the Hon'ble High Court has held that if an assessee makes payments at different times during the day and he has no idea that he has to pay to the same person on more than one occasion, he cannot be subjected to the statutory provision

contained in section 40A(3) of the Act, unless any one payment is above the prescribed limit. The statutory limit under section 40A(3) of the Act applies to payment made to a party at a time and not to the aggregate of the payments made to a party in the course of the day as recorded in the cash book. In the present case there is no finding that the assessee did make any payment exceeding the prescribed statutory limit contained in section 40A(3) of the Act. As such, it cannot be said that the assessee violated the provision under section 40A(3) of the Act.

29. In the case of Hynoup Food & Oil Industries (P.) Ltd. v. Asstt. CIT [1994] 48 ITD 202 (Ahd.), it was held that if an overall estimate of income has been made, there would not be any scope for applying the prescription of section 40A(3) of the Act.When a provision of law is to be applied, it is to be seen that all the circumstances alliunde to the application of such provision did exist. If it is not possible to find out that how the violation of the provision was done, addition cannot be made on the basis of inference and surmises. In the present case it is not known that at what point of time and how assessee violated the provisions of section 40A(3) of the Act. As such, no addition on this count is warranted. We decide this issue in favour of the assessee and against the revenue."

5.19 Overall therefore, we thus find that the electronic material seized in the course of search did support the assessee's case that, it had incurred expenses out of the on-monies received from sale of units. In light of the foregoing, we find merit in the

assessee's plea that, the entire value of on-monies receipts could not be taxed but only the profit element embedded therein was to be taxed in its hands, in the facts and circumstances of this case. On this aspect, it is noted that in the case of ITO Vs. Anand Builders, this Tribunal in similar circumstances had held that, 8% of the unaccounted on-money could be taxed in place of the entire unaccounted on-money receipts since there is always the unaccounted payments. The above decision of this Tribunal is noted to have been upheld by the Hon'ble Gujarat High Court and the SLP filed against the judgment before the Supreme Court was also dismissed and reported in 265 ITR 37. The relevant findings of Hon'ble Apex Court is noted to be as follows:

> "Dismissed the special leave petition filed by the Department against the judgment dated January 21, 2002 of the Gujarat High Court in ITA No. 52 of 2002 whereby the High Court dismissed the Department's appeal on the ground that no substantial question of law arose. The question of law raised in the appeal before the High Court was whether the Appellate Tribunal's finding while directing the Assessing Officer to tax only 8 per cent of the unaccounted on money receipt instead of fully taxing it, in the absence of any evidence of expenditure, could not be stated to be perverse."

5.20 We further find that a similar view had been taken by the Hon'ble High Court of Gujarat in the case of PCIT, Surat Vs. Anupam Organiser (2020) (9) TMI 973. In its said order the Hon'ble High Court relying on its earlier order passed in the case of DCIT vs Panna Corporation (74 DTR 89), had observed, that

the Tribunal was justified in considering that the assessee ought to have spent reasonable amount for the purpose of receiving the amount of on-monies and thus, what could be brought to tax was the profit embedded in such receipts and not the entire receipts. Similar view is noted to have been expressed by the Hon'ble High Court of Gujarat in the case of CIT Vs. Abhishek Corporation (158 CTR 374).

5.21 We further noted that another coordinate Bench of this Tribunal at Mumbai in the case of ACIT Vs. Guruprena Enterprises (ITA Nos. 255 to 257, 544 & 545/Mum/2010 and 4836/Mum/2009) had observed as under:

> "Even though it is established from seized documents that assessee was receiving premium/on-money on booking of flats belonging to third parties, entire receipts of on-money/premium cannot be treated as undisclosed income of assessee; only net profit rate can be applied on unaccounted sales/receipts for making addition."

5.22 We note that the above decision has since been affirmed by the Hon'ble Bombay High Court in ITA No. 1849 of 2011. Also, relying on the aforesaid judicial pronouncements, this Tribunal at Mumbai in the case of Sumer Builders Vs. Dy. CIT, Central Circle-5(3), Mumbai, ITA No. 4915/Mum/2016; dated 09.01.2021 had observed as under:

> "Further, admittedly the on-money is merely receipts of sale proceeds as noted by the Assessing Officer in his order at Page No. 3 and what could be taxed is only income and not receipts. We further note that in various judgments relied on above it has been categorically held that on-money receipts are in the nature of sale price and not income per se. In the case of CIT vs. President Industries

[258 ITR 654 (Guj)] it has been held that the entire sum of undisclosed sale proceeds cannot be treated as income. Similar view has been taken by the Hon‟ble Bombay High Court in the case of CIT vs. Hariram Bhambhani in ITXA No. 313 of 2013. Further in the case of Guruprerna Enterprises (supra) relying on Abhishek Corporation vs. DCIT [63 TTJ (Ahd) 651] it has been held as under :-

….

The other judgments relied on by the assessee also support its case. The ld. D.R has not brought on record any contrary judgments. We, therefore, agree with the consistent view expressed in these judgments that on-money receipts are in the nature of undisclosed receipts and not income per-se and therefore only profit element embedded therein are liable to be taxed and not the entire on-money receipts."

5.23 Gainful reference is also made to the following findings recorded by another coordinate Bench in the case of Ekta Housing Pvt Ltd in ITA No. 1732/Mum/2019 dated 24.05.2021 wherein on similar issue regarding taxability of on-monies, it was held as under:-

“In the case before us, in the backdrop of the fact admitted by the A.O while framing the assessment that the incriminating documents seized in the course of the search proceedings contained records of cash transactions, both receipts and expenses, which were not accounted for in the regular books of accounts of the assessee, and that the unaccounted transactions w.r.t cash expenses incurred by the assesseeout of the unaccounted sales receipts i.e on-money receipts had surfaced in the course of the search proceedings, we are of the considered view that no infirmity arises from the order of the CIT(A) who drawing support from the judicial pronouncements that were relied upon by the assesseee before him, had concluded, that the addition as regards the on-money received by the assessee was to be made to the extent of the income element embedded in such receipts and the entire amount of on-money could not have been added in the hands of the assessee. We, thus, agreeing with the consistent view taken in the aforesaid judicial pronouncements, therein

respectfully follow the same, and thus, finding no infirmity in the view taken by the CIT(A), uphold the same."

5.24 For the reasons discussed in the foregoing and following the decisions (supra), we accordingly hold that only the profit element embedded in the on-monies ought to be assessed to tax and that on the given facts, the addition of entire value of on-monies was unwarranted.

5.25 Now we come to the issue of estimating the profits of the assessee. The Ld. CIT(A) is noted to have estimated the profit at 12.5% of the on-monies. We however note that no rational basis or logic has been provided by the Ld. CIT(A) for arriving at such a rate. On the other hand, the Ld. AR brought to our notice that, the Hon'ble Supreme Court in the case of ITO Vs Anand Builders (supra) had upheld the Tribunal's action of estimating profit percentage @ 8% of on-monies. The Ld. AR pointed out that the aforesaid assessee was also in the same line of business as that of the assessee i.e. real estate. Further, this Tribunal in the cases of M/s Platinum Properties Vs DCIT (ITA No.2600/Mum/2012) and Dhanlaxmi Builders Vs DCIT (ITA No. 504/Mum/2009) had held 8% to be appropriate profit percentage to estimate profit embedded in on-monies received on sale of units/flats."

5.5 Following the above, we accordingly uphold the assessee's offer of 8% of the on-monies receipts in the returns of income filed u/s 153A of the Act to be fair and reasonable. Hence, no further addition on the impugned issue was permissible and we therefore direct the AO

to delete the addition/s retained by the Ld. CIT(A) on account of on-monies, over and above the assessee's offer of 8% in AYs 2015-16, 2017-18, 2018-19, 2019-20 & 2020-21. Hence, the grounds taken by the assessee in all these years stands allowed and the grounds of Revenue for AY 2018-19 stands dismissed.

6. In the result, all the appeals of the assessee for AYs 2015-16 to 2021-22 stands allowed and the appeal of the Revenue for AY 2018-19 stands dismissed

Order pronounced in the open court on this 07/06/2024.

Sd/-	Sd/-
(B R BASKARAN)	**(ABY T. VARKEY)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

मुंबई Mumbai; दिनांक Dated : 07/06/2024.
Vijay Pal Singh, (Sr. 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, मुंबई / DR, ITAT, Mumbai
5. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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