आयकर अपीलीय अधिकरण, 'ए' न्यायपीठ,चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH, CHENNAI

श्री महावीर सिंह, उपाध्यक्ष एवं श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष

BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENTAND
SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER

आयकर अपील सं./**ITA No.: 1653/CHNY/2019**

निर्धारण वर्ष/Assessment Year:2013-14

Parry Infrastructure Co. Pvt. Ltd., #234, Dare House, N.S.C. Bose Road, Parrys Corner, Chennai – 600 001.	Vs.	**The Deputy Commissioner of Income Tax,** Corporate Circle-5(1), Chennai.
PAN: AADCP 7827J		
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellant by : Shri Philip George, Advocate
प्रत्यर्थी की ओर से/Respondent by : Shri Nilay Baran Som, CIT-DR

सुनवाई की तारीख/Date of Hearing : 29.05.2024
घोषणा की तारीख/Date of Pronouncement : 03.07.2024

आदेश /O R D E R

PER MAHAVIR SINGH, VICE PRESIDENT:

This appeal by the assessee is arising out of the order of the Commissioner of Income Tax (Appeals)-3, Chennai in ITA No.91/2016-17/A-3 dated 29.03.2019. The assessment was framed by the Deputy Commissioner of Income Tax, Corporate Circle 5(1), Chennai for the assessment year 2013-14 u/s.143(3)of the Income Tax Act, 1961 (hereinafter the 'Act') vide order dated 21.03.2016.

2. The first issue in this appeal of assessee is as regards to enhancement of income by CIT(A) without appreciating that the powers of CIT(A) of Income-tax Department are restricted and therefore, cannot step into the shoes of AO to review the entire assessment. The CIT(A) enhanced the assessment on the following issues:-

i. *Disallowance of extra land cost paid to Tube Investments of India Ltd., amounting to Rs.16,20,96,994/-.*
ii. *Disallowance of extra land cost paid to EID Parry (India) Ltd., amounting to Rs.3,56,06,250/-.*
iii. *Understatement of sales by allotting more saleable area to M/s. EID Parry (India) Ltd., amounting to Rs.4,31,45,948/-.*
iv. *Disallowance of cost of construction paid to Coromandel Engineering Company Ltd., amounting to Rs.15,91,14,399/-.*
v. *Disallowance of consultancy charges paid to M/s.Mahavir Consultancy amounting to Rs.1,36,51,200/-.*
vi. *Disallowance of excess payment on account of business advisory services EID Parry (India) Ltd., amounting to Rs.2,40,00,000/-.*
vii. *Disallowance of marketing fees paid to Coromandel Engineering Company Ltd., amounting to Rs.47,75,301/-.*
viii. *Disallowance of borrowed cost paid to EID Parry (India) Ltd., amounting to Rs.1,67,35,093/-.*

2.1 The assessee has raised the following grounds for challenging of enhancement of income by CIT(A):-

> *2. Enhancement of income*
>
> *2.a. The Commissioner of Income Tax (Appeals) grossly erred in enhancing the assessment without properly appreciating the peculiar facts of the Appellant's case.*

2.b. The Commissioner of Income Tax (Appeals) ought to have appreciated that in the facts and circumstances of the case, there is no warrant for enhancing the assessment.

3. Briefly stated facts are that the assessee Parry Infrastructure Co. Pvt. Ltd., filed its return of income for the relevant assessment year 2013-14 on 27.11.2013. The assessee company is a property developer. The assessee's case was selected for scrutiny assessment and accordingly, notice u/s.143(2) of the Act dated 02.09.2014 was issued. Based on discussion and submissions made during the course of assessment proceedings, the assessment was completed u/s.143(3) of the Act vide order dated 21.03.2016 by making disallowances under the following heads:-

i. Disallowance u/s.14A of the Act amounting to Rs.2,87,984/-
ii. Disallowance of legal, professional and consultancy charges amounting to Rs.1,66,86,000/-
iii. Disallowance of provision created by assessee of professional charges amounting to Rs.1,70,00,000/-

Against these additions, assessee filed appeal before CIT(A).

4. During the course of appellate proceedings, the CIT(A) noticed that the assessee has disclosed revenue from sale of plots at Rs.62,49,87,730/- (excluding other income) against which disclosed net profit of Rs.4,72,60,511/- which comes to about 7.55%. The

assessee has developed a residential project by the name 'CENTRALIS' at ABM Avenue, Adyar Club, Chamiers Road, Chennai. The CIT(A) examined the fresh information gathered during appellate proceedings and comparative amount of revenue from sale of flats, operating expenses and profit from sale of flats was gathered for financial years 2011-12, 2012-13 & 2013-14 and tabulated as under:-

F.Y.	*Revenue from sale of flats*	*Operating Expenses*	*Profit from sale of flats*
2011-12	*55,35,93,544*	*52,12,23,556*	*3,23,69,988*
2012-13	*62,49,87,730*	*57,77,27,219*	*4,72,60,511*
2013-14	*19,46,84,176*	*17,14,29,065*	*2,32,55,111*
TOTAL	*137,32,65,450*	*127,03,79,840*	*10,28,85,610*

The CIT(A) asked for information and assessee filed the following documents:-

S.No.	*Particulars*	*Date of agreement*
1	*Power of attorney given by M/s. Tube Investments India Ltd. and EID Parry India Ltd., in favour of M/s. Parry Infrastructure Co Pvt Ltd (the appellant)*	*22.06.2010*
2	*Joint Development Agreement*	*24.11.2010*
3	*Supplementary Agreement*	*04.03.2011*
4	*Amendment Agreement*	*16.09.2011*
5	*Agreement of Sale by and between M/s. Cholamandalam MS General Insurance Co. Ltd and Parry Infrastructure Co. P Ltd*	*23.01.2010*
6	*Agreement of Sale by and between M/s Carborandum Universal Ltd and Parry Infrastructure Co.P Ltd*	*28.04.2010*

7	*Letter issued to M/s.Mahavir Consultancy for engagement as consultants*	*12.05.2011*
8	*Memorandum of Understanding by and between M/s.Coromandel International Ltd/Parry Chemicals Ltd/Sheth Corporation Pvt Ltd*	*18.07.2012*
9	*Agreement for providing infrastructure project services by and between Parry Infrastructure Co. P Ltd and Coromandel Fertilizers Ltd*	*22.07.2009*
10	*Business advisory services agreement by and between EID Parry India Ltd and Parry Infrastructure Co. P Ltd and M/s.Silkroad Sugar P Ltd*	*04.11.2010*
11	*Deed of lease by and between Parry Infrastructure Co.P Ltd and M/s.Silkroad Sugar P Ltd*	*31.07.2008*
12	*Power of attorney given by M/s.Cholamandalam MS General Insurance Co. Ltd in favour of Parry Infrastructure Co. P Ltd.*	*27.01.2010*
13	*Power of attorney given by M/s. Carborandum Universal Ltd in favour of Parry Infrastructure Co.P Ltd*	*21.04.2010*

The CIT(A) noted that these documents are not registered except the power of attorney executed by assessee in favour of Tube Investments India Ltd., and EID Parry (India) Ltd., on 22.06.2010. The CIT(A) examined the breakup of project cost expenses as under:-

S.No.	*Particular*	*Amount (in Rs)*
1	*Cost of land*	*26,88,10,045*
2	*Construction cost*	*16,72,92,191*
3	*Material cost-cement*	*36,61,573*
4	*Material cost-steel, window, AC Lift*	*2,18,38,846*
5	*Borrowing cost*	*1,67,35,093*
6	*Other cost*	*32,32,596*
7	*Legal/professional/consultancy charges*	*8,80,21,511*

8	*Marketing charges*	*47,75,301*
9	*Sponsorship & Advt. expenses*	*18,10,687*
10	*Directors sitting fees*	*55,000*
11.	*Audit fees*	*33,708*
12	*Tax audit fees*	*22,472*
13	*Other expenses*	*14,38,195*

5. The CIT(A) further noted that the assessee has grossly inflated the expenditure booked on account of land cost, cost of construction, other expenses, finance cost and he discussed these issues by gathering information from pages 5 to 21 at para 11 to 36 of his appellate order. Accordingly, the CIT(A) noted that this is a fit case of enhancement of income in view of power vested in CIT(A) u/s.251(2) of the Act and also relying on the judgments of Hon'ble Supreme Court in the case of Jute Corporation of India vs. CIT, reported in [1991] 187 ITR 688 (SC), CIT vs. Nirbheram Deluram reported in [1997] 224 ITR 610 (SC) and State of Andhra Pradesh vs. Hyderabad Asbestos Cement Production Ltd., reported in [1994] taxmann.com 361(SC) and the Hon'ble Madras High Court in the case of Megatrends Inc vs. CIT reported in [2016] 74 taxman 197 issued enhancement notice u/s.251(2) of the Act dated 11.03.2019 and after reproducing the same show-cause notice in the appellate order enhanced the assessment at Rs.45,91,25,185/- by observing in paras 38 to 41 as under:-

38. In response to the notice issued for enhancement of income in terms of provisions contained u/s. 251(2) of the Income Tax Act, 1961, the appellant has given reply but failed to substantiate the excess land cost debited on account of payments made to its holding company EID Parry India Ltd. and to one of its group entity TII, excess cost of construction paid to one of its group concern CECL consultancy fees paid to Mahavir Consultancy, excessive payment made on account of business advisory services received from its holding company EID Parry India Ltd. and borrowing cost paid to its holding company EID Parry India Ltd. with any documentary evidence. From the discussion made in the foregoing paragraphs, it can be seen that all the impugned transactions are intra-group ones and not at arm's length. As can be seen from the above, the sale price realized in the project undertaken by the appellant PICPL is very high and the total revenues realized are at Rs.137,32,65,450/- towards sale of 18 out of 24 flats which came to appellant's share. In order to evade taxes, the appellant has resorted to inflation of expenditure by whatever means it can. The appellant has created a maze of documents to create an impression that the expenditure debited on account of land/construction/business advisory services/consultancy/marketing expenses/borrowing looks genuine. But the fact remains that the appellant failed to substantiate the genuineness and reasonableness of these expenses. As is evident from the above discussion, the appellant has paid extra consideration of Rs.16,20,96,994/- to its group concern TII on account of land cost (in the show cause notice this figure is taken at Rs.17,64,98,250/- considering the realized sale price of the flats in the project at Rs.27,000/-, however, on verification it is found to be Rs.26,414/-). The appellant has allotted more saleable area in the form of two flats to its holding company EID Parry, the value of which comes to Rs.4,31,45,948/- (in the show cause notice this figure is taken at Rs.4,60,47,800/- considering the realized sale price of the flats in the project at Rs.27,000/-, however, on verification it is found to be Rs.26,414/-). To that extent, the sales disclosed were understated. Further, the appellant has paid an extra consideration of Rs.3,56,06,250/- to its holding company EID Parry on account of land cost u/s.40A(2)(b). Based on work order and running bills. The appellant has paid additional amount of Rs.15,91,14,399/- to its group concern CECL in the guise of cost of construction, which the appellant failed to substantiate the same with material evidence. The appellant has also paid interest@ 13% amounting to Rs.1,67,35,093/- on the funds borrowed from its holding Company EID Parry, when the same are not required. So is the case with the payments made to its holding company EID Parry towards business advisory services

at Rs.3,00,00,000/- out of which Rs.2,40,00,000/- found to be excessive u/s.40A(2)(b). Payments made to Mahavir Consultancy at Rs.3,03,37,200/- in the guise of consultancy charges remained unsubstantiated. Since the assessing officer has already disallowed an amount of Rs.1,66,86,000/- out of this amount, the balance amount of Rs.1,36,51,200/- is now brought to tax. The appellant also failed to justify the claim of marketing expenses debited at Rs.47,75,301/-. None of the agreements entered into by and between the appellant and the group concerns are registered. No stamp duty is paid on purchase of land from its group concerns.

39. In this regard, reliance is placed on the judgement of Hon'ble Supreme Court in the case of Union of India Vs Gosalia Shipping (P) Ltd 113 ITR 307 (SC). Hon'ble Supreme Court has said:

> "It is true that one cannot place over reliance on the form which the parties give to their agreements or on the label which they attach to the payment due from one to other. One must have regard to the substance of the matter and if necessary, tear the veil in order to see whether the true character of a payment is something other than what by clever device of drafting it is made to appear."

40.While the grounds taken in respect of additions made at Rs.1,66,86,000/- on account of disallowance of consultancy charges paid to Mahavir consultancy andRs.1,70,00,000/- on account of disallowance of Provision for expenditure u/s. 37stands dismissed, I direct the assessing officer to tax the enhanced income on the following counts.

S.No.	*Particular of enhancement*	*Amount in rupees*
1	*On account of disallowance of extra land cost paid to TII*	*16,20,96,994*
2	*On account of disallowance of extra land cost paid to EID Parry*	*3,56,06,250*
3	*On account of understatement of sales by allotting more saleable area to EID Parry*	*4,31,45,948*
4	*On account of disallowance of cost of construction paid to CECL*	*15,91,14,399*
5	*On account of disallowance of consultancy charges paid to Mahavir consultancy*	*1,36,51,200*
6	*On account of disallowance of excessive*	*2,40,00,000*

	payment made on account of business advisory services to EID Parry	
7	*On account of disallowance of marketing fees*	*47,75,301*
8	*On account of disallowance of borrowal cost*	*1,67,35,093*
	TOTAL	*45,91,25,185*

41.As can be seen from the above table, the total enhancement of income in this case comes to Rs.45,91,25,185/-, Based on the above discussion, I am satisfied that the appellant has concealed its income and so also furnished inaccurate particulars of income for evading taxes as understood in terms of provisions contained in section 271(1)(c) of the Income Tax Act, 1961 in respect of the additions made to the tune of Rs.45,91,25,185/- by way of enhancement to the income returned. Penalty proceedings u/s.271(1)(c) are therefore, initiated on both counts viz., concealment of income and furnishing of inaccurate particulars of income."

Aggrieved, now assessee is in appeal before the Tribunal.

6. Before us Ld. Sr.Counsel, Shri Pillip George argued on behalf of assessee and on behalf of revenue Ld. CIT-DR, Shri Nilay Baran Som argued. The ld.counsel for the assessee pointed out that the AO has made addition on the issues (i) Disallowance u/s.14A of the Act (ii) Disallowance of legal, professional and consultancy charges & (iii) Disallowance of provision created by assessee for professional charges. But the CIT(A) enhanced the income in respect of above mentioned eight items. The ld.counsel for the assessee argued that the un-surrendered lands i.e., UDI is not arising from JDA and not

forming part of the assets from which income is earned cannot be enhanced. He narrated the following three enhancements:-

i)	*Disallowance u/s 14A*	*Rs. 2,87,984/-*
ii)	*Disallowance as discussed as in Para No.2*	*Rs. 1,66,86,000/-*
iii)	*Provision as discussed as in Para No. 3*	*Rs. 1,70,00,000/-.*

6.1 The ld.counsel for the assessee argued that the CIT(A) discovered a new source of income on account of above mentioned three items and enhanced the income which is not permitted u/s.251(1)(a) of the Act. He explained that the new source, as sought to be taxed by the CIT(A) is purported income alleged to be earned from lands retained by the owners and JDA has nothing to do with this. According to him, the owners i.e., TII & EID only surrendered the portion of their land to JDA and retained the balance land for themselves. Further, the PICPL has no interest in these retained lands nor any obligation to pay for or receive any income from these retained lands. He explained that the subject matter of assessment is income from JDA and these retained lands do not form part of the JDA. He explained that only income arising from lands surrendered by these parties under JDA can be assessed as income, as only these lands form part of the assets from which income is earned and are therefore the 'source' of income earning for the assessee. The ld.counsel for the assessee for this proposition relied on the decision of Hon'ble Supreme Court in the case of CIT

vs. Shapoorji Pallonji Mistry vs. CIT reported in [1958] 34 ITR 342. The ld.counsel also relied on the Co-ordinate Bench decision in the case of Melongos India P Ltd., vs. ITO in ITA No.863/CHNY/2019, order dated 06.05.2022 and also Delhi Bench in the case of Ginni Gold Ltd., vs. Addl.CIT in ITA No.673/Del/2015, order dated 15.04.2021. The ld.counsel for the assessee further stated that the Hon'ble Delhi High Court in the case of Gurinder Mohan Singh Nindrajog vs. CIT reported in [2012] 348 ITR 170 has laid down certain principles and action to be taken by Revenue under different situations. The ld.counsel in its written submission has given different situations arising out of the various provisions of the Act, which reads as under:-

	DIFFERENT SITUATIONS	*APPROPRIATE SECTION*
1)	*The Assessing Officer may accept the return of income without making any addition or disallowance;*	*Section 148/147*
2)	*The assessment is framed and the Assessing Officer makes certain additions or disallowances and in making such additions or disallowances, he deals with such item or items of income in the body of the order of assessment but he under-assessed such sums;*	*Section 251(1)(a)*
3)	*The Assessing Officer makes no addition in respect of some of the items, though in the course of hearing before him, he holds a discussion of such items of income;*	*Section 263*
4)	*There can be yet another situation where*	*Section 147*

	the Assessing Officer inadvertently omits to tax an amount which ought to have been taxed and in respect of which he does not make any enquiry;	
5)	*Where an item or items of income or expenditure, incurred and claimed is not at all considered and an assessment is framed, as a result thereof, a prejudice is caused to the Revenue*	*Section 263*
6)	*Where an item of income which ought to be taxed remained untaxed, and there is an escapement of income, as a result of the assessee's failure to disclose fully and truly all material facts necessary facts for computation of income*	*Section 147*

6.2 The ld.Counsel also relied on the decision of Hon'ble Supreme Court in the case of CIT vs. Raj Bahadur Hardutroy Motilala Chamaria reported in [1967] 66 ITR 443 (SC) and decision of Hon'ble Delhi High Court in the case of CIT vs. Sardari Lal and Co., reported in [2001] 251 ITR 864 (Del). The ld. Counsel argued that in view of the above, the CIT(A) has erred in enhancing the assessment on the above three issues because these issues are not arising out of the assessment order or not connected with earning of income because of land retained by the respective owners i.e., TII & EID. He argued that one subject matter of assessment is the income from JDA and these retained lands do not form part of JDA, the only income arising from land surrendered can be assessed as income

arising from JDA and which form part of assets from which income is earned or they are for source of income earning.

7. On the other hand, the ld.CIT-DR listed out all eight items on those the CIT(A) has exercised power u/s.255(1A) of the Act enhancing the income and he argued that the CIT(A) did not travel beyond matters already disclosed by assessee in its return of income and it is not a case of the assessee that the CIT(A) has gone back to the income of any other year or any other receipt that does not come out of the income returned by assessee or the submissions made before the lower authorities. He tried to distinguish the case law of Shapoorji Pallonji Mistry, *supra* by stating the fact that the Hon'ble Supreme Court while adjudicating on the appeal for the AY 1947-48, acted upon a note in the file for the AY 1946-47 that a sum of Rs.40,000/- was omitted to be taxed. The omission was brought to the notice of the CIT(A) by the Assessing Officer, and the appellate authority acted upon this information. The ruling in the case of CIT v. Rai Bahadur Hardutory Motilal Chamaria reported in (1967) 66 IR 443 (SC), was also delivered in peculiar facts of the case.

7.1 He further explained the powers conferred upon the CIT(A) u/s.251(3) as inserted by the Finance No.2 Act, 1997, which is quite different in its express wordings from the corresponding provision of section 31 of the Income-tax Act, 1922 i.e., old Act. The ld.CIT-DR gave in writing the difference between the two provisions i.e., between new Act and old Act and provisions are explained in juxtaposed as under:-

Text of section 31 of the Indian Income-tax Act, 1961 *Source:* *https://www.incometax.gov.in*	*Text of section 251 of the Income-Act, 1961 (As it stood for assessment year 2013-14)* *Source:* *https://www.indiacode.nic. In*
Sec 31 *31(1): The Assistant Commissioner shall fix a day and place for hearing of the appeal, and may from time to time adjourn the hearing.* *(2) The Assistant Commissioner may, before disposing of an appeal, make further inquiry as he deems fit, or cause a further inquiry to be made by the Income-tax Officer.* *(3) in disposing of an appeal, the Assistant Commissioner may, in the case of an order of assessment -* *(a) confirm, reduce, or annul the assessment, or* *(b) set aside the assessment and direct the Income tax Officer to make a fresh assessment after making such further inquiry as the Income-tax Officer thinks fit or the Assistant Commissioner may direct and the income tax Officer shall thereupon*	*Sec 251.* *251 (1) In disposing of an appeal, the Commissioner (Appeals) shall have the following powers-* *a) in an appeal against an order of assessment, he may confirm, reduce, enhance or annul the assessment.* *(aa) in an appeal against the order of assessment in respect of which the proceeding before the Settlement Commission abate sunder section 245HA, he may, after taking into consideration all the material and other information produced by the assessee before, or the results of the inquiry held or evidence recorded by the Settlement Commission, in the course of the proceeding before it and such other material as may be brought on his record, confirm, reduce, enhance or annul the assessment;* *(b) in an appeal against an order imposing penalty, he may confirm or*

proceed to make such fresh assessment, or, in the cases of an order under sub-section (2) of section 26 or section 28, may confirm, cancel or vary such order: Provided that the Assistant Commissioner shall not enhance an assessment unless the appellant has had a reasonable opportunity of showing cause against such enhancement.	*cancel such order or vary it so as either to enhance or to reduce the penalty.* *(c) in any other case, he may pass such orders in the appeal as he thinks fit.* *2) The Commissioner (Appeals) shall not enhance an assessment or a penalty or reduce the amount of refund unless the appellant has had a real opportunity of showing cause against such enhancement or reduction.* *Explanation – In disposing of an appeal, the Commissioner (Appeals), may consider and decide any matter arising out of the proceedings in which the order appealed against was passed, notwithstanding that such matter was not raised before the Commissioner (Appeals) by the appellant.*

7.2 The ld.CIT-DR explained from the above that apparently there is a major difference in between the provisions of the 1922 Act and the 1961 Act, so far as the powers of the Commissioner (Appeals) are concerned, in the form of Explanation below section 251. An immediate fallout of the above decision is that any judicial decision substantially depending on the text of the 1922 Act has to be appreciated with the above limitation of the then prevailing Act. The case law cited by ld.counsel for the assessee, he pointed out Shapoorji Pallonji Mistry, *supra* and Raj Bahadur Hardutroy Motilal

Chamaria, *supra* are based on old act when the above provisions of the statute of 1961 was not existed. According to him, even otherwise the powers of enhancement of CIT(A) is inherent and further buttressed by the several decisions of various courts of law including the Apex court. The ld.CIT-DR took us through the provisions of section 251(1)(a) of the Act and argued that the CIT(A) has given powers not only to confirm, reduce, or annul the assessment, but even for pass an order enhancing the income determined by the AO. The Courts have held that in terms of Section 251 of the Act, the Commissioner (Appeals) has wide powers, which includes the power of enhancement. He further argued that the plain reading of Section 251(1)(a) of the Act, the power of enhancement has not been further qualified. However, under what circumstances the Commissioner (Appeals) should invoke and use such powers, will depend upon his satisfaction upon proper appreciation of facts and materials in cases before him. He is the best and sole judge to decide on application of mind and no hard and fast rule or test or guidelines can be laid down. This view was expressed by the Hon'ble Supreme Court, in a three-judge Bench decision, in the case of PCIT Vs Kanpur Coal Syndicate (1964) 53 ITR 225 (SC). It was held therein that the powers of the appellate authority, namely the Commissioner (Appeals), are plenary, co-

extensive, and co-terminus with that of the AO. *"The CIT(Appeals) can do what the Assessing Officer can do & can also direct him to do what he failed to do'".* The CIT(A) further submitted that over the years, there has been a broad consensus that once an assessment comes before the first appellate authority, his competence is not restricted to examining those aspects of the assessment that are agitated by the assessee. His competence ranges over the whole assessment and it is open to him to correct the AO not only with regard to the matter raised by the assessee but also with regard to a matter which has been considered by the AO and determined in the course of assessment, or which the AO failed to consider.

7.3. In the case of CIT v. Rai Bahadur Hardutroy Motilal Chamaria reported in (1967) 66 ITR 443 (SC) another ruling relied on by the ld.counsel, it has in fact been held that the principle that emerges as a result of the authorities of this Court is that the appellate Assistant Commissioner has no jurisdiction, u/s. 31(3) of the Act to assess a source of income which has not been processed by the ITO and which is not disclosed either in the return filed by the assessee or in the assessment order, and therefore, the Appellate Assistant Commissioner cannot travel beyond the subject matter of assessment. In the instant case, the ld. CIT(A) was very much within

his power to make enhancements on certain items elaborately analysed and discussed by him.

7.4 He also relied on the case law of the Honourable Supreme Court in a later decision in CIT v. Nirbheram Daluram (1991) 224 ITR 610 (SC) held that the High Court was clearly erred in holding that the appellate power conferred on the first appellate Authority was confined to the matter which had been considered by the Income Tax Officer. Hence, of late, the Apex Court's view is that the first appellate authority would have full powers to enhance the income even on an issue, which could constitute a new source of income and which was not the subject matter of assessment before the AO.

7.5 The Hon'ble Madras High Court, in the case of Megatrends Inc. Vs CIT and another (2016) 388 ITR 16 (Mad.), had an occasion to adjudicate on the issue of scope of powers of Commissioner (Appeals) to enhance an assessment u/s.251(1)(a) of the Act. Relying on the Full-Bench decision of the Hon'ble Madras High Court in the case of State of Tamilnadu Vs Arulmurugan & Co. (1982) 51 STC 381 (Mad.), the High Court has held that the CIT(Appeals) has wide powers to enhance the income of the appellant without any limitation placed on such powers, as the statute itself has not placed any embargo on his powers.

7.6 Finally, the ld.CIT-DR argued that in view of the various issues enhanced by CIT(A) vide his order dated 29.03.2009, it is clear that all the enhancement arose out by the income and expenditure disclosed by assessee in its return of income. Therefore, the enhancement is as per law and should be sustained.

8. We have gone through the submissions of both the sides and noted that the AO has made additions on three issues:-

i. Disallowance u/s.14A of the Act amounting to Rs.2,87,984/-
ii. Disallowance of legal, professional and consultancy charges amounting to Rs.1,66,86,000/-
iii. Disallowance of provision created by assessee of professional charges amounting to Rs.1,70,00,000/-

Further, the CIT(A) has enhanced the assessment on the following eight issues:

i. Disallowance of extra land cost paid to Tube Investments of India Ltd., amounting to Rs.16,20,96,994/-.
ii. Disallowance of extra land cost paid to EID Parry (India) Ltd., amounting to Rs.3,56,06,250/-.
iii. Understatement of sales by allotting more saleable area to M/s. EID Parry (India) Ltd., amounting to Rs.4,31,45,948/-.
iv. Disallowance of cost of construction paid to Coromandel Engineering Company Ltd., amounting to Rs.15,91,14,399/-.
v. Disallowance of consultancy charges paid to M/s.Mahavir Consultancy amounting to Rs.1,36,51,200/-.

vi. Disallowance of excess payment on account of business advisory services EID Parry (India) Ltd., amounting to Rs.2,40,00,000/-.

vii. Disallowance of marketing fees paid to Coromandel Engineering Company Ltd., amounting to Rs.47,75,301/-.

viii. Disallowance of borrowed cost paid to EID Parry (India) Ltd., amounting to Rs.1,67,35,093/-.

8.1 Now the assessee has challenged the power of assessment on the following three issues namely:

i. On account of disallowance of extra land cost paid to TII

ii. On account of disallowance of extra land cost paid to EID Parry

iii. On account of understatement of sales by allotting more saleable area to EID Parry

According to assessee the reason for enhancement are that these three items pertains to discovery of new source of income and new source is sought to be taxed by CIT(A) as a purported income to be earned from lands (UDI) retained by the owners. The owners namely TII & EID only surrendered their portion of their land towards GDA and retained the balance land. The assessee has no interest in the retained land by the respective owners or any obligation to pay or for receive any income from these retained lands. The Revenue tried to distinguish the case law of Hon'ble Supreme court in the case of Saboorji Pallonji Mistry, *supra* but we noted that the Hon'ble

Supreme court categorically noted this and observed that the question which arises in this appeal may be formulated thus: *"whether in an appeal filed by an assessee, the Appellate Assistant Commissioner can find a new source of income not considered by the Income-tax Officer and assess it under his powers granted by section 31 of the Act."* The Hon'ble Supreme Court observed, the controversy in this case is about his discovering new sources, not mentioned in the return and not considered by the Income-tax Officer. The Hon'ble Supreme Court in the case of Shapoorji Pallonji Mistry, *supra,* considering the decision of Hon'ble Madras High Court in the case of Gajalakshmi Ginning Factory vs. CIT reported in [1952] 22 ITR 502 has considered "*ofcourse, it would not be open to the Appellate Assistant Commissioner to introduce into the assessment new sources, as his power of enhancement should be restricted only to the income which was the subject-matter of consideration for the purposes of assessment by the Income-tax Officer"* and finally the Hon'ble Supreme Court held that it would not be open for the first appellate authority to introduce into assessment of new source of income as his power of enhancement made is restricted only to income which was subject matter of consideration for the assessment by the AO and the Hon'ble Supreme Court finally held as under:-

"In our opinion, this Court must be held not to have expressed its final opinion on the point arising here, in view of what was stated at pp. 709 and 710 of the Report. This Court, however, gave approval to the opinion of the learned Chief Justice of the Bombay High Court that s. 31 of the Income-tax Act confers not only appellate powers upon the Appellate Assistant Commissioner in so far as he is moved by an assessee but also a revisional jurisdiction to revise the assessment with power to enhance the assessment. So much, of course, follows from the language of the section itself. The only question is whether in enhancing the assessment for any year he can travel outside the record, that is to say, the return made by the assessee and the assessment order passed by the Income-tax Officer with a view of finding out new sources of income, not disclosed in either. It is contended by the Commissioner of Income-tax that the word "assessment" here means the ultimate amount which an assessee must pay, regard being had to the charging section and his total income. In this view, it is said that the words "enhance the assessment" are not confined to the assessment reached through a particular process but the amount which ought to have been computed if the true total income had been found. There is no doubt that this view is also possible. On the other hand, it must not be overlooked that there are other provisions like s. 34 and 33B which enable escaped income from new sources to be brought to tax after following a special procedure. The assessee contends that the powers of the Appellate Assistant Commissioner extend to matters considered by the Income-tax Officer, and if a new source is to be considered, then the power of remand should be exercised. By the exercise of the power to assess fresh sources of income, the assessee is deprived of a finding by two tribunals and one right of appeal.

The question is whether we should accept the interpretation suggested by the Commissioner in preference to the one, which has held the field for nearly 37 years. In view of the provisions of section 34 and 33b which escaped income can be brought to tax, there is reason to think that the view expressed uniformly about the limits of the powers of the Appellate Assistant Commission to enhance the assessment has been accepted by the legislature as the true exposition of the words of the section. If it were not, one would expect that the legislature would have amended section 31 and specified the other intention in express words. The Income-tax Act was amended several times in the last 37 years, but no amendment of section 31(3) was undertaken to nullify the rulings, to which we have referred. In view of this, we do not think that we should interpret section 31 differently from what has been accepted in India as its true import, particularly as that view is also reasonably possible."

8.2 We noted that the Hon'ble Supreme Court while interpreting the provisions of section 31(3) in the case of Rai Bahadur Hardutroy

Motilal Chamaria *supra,* has considered and noted that it is not open to the commissioner (Appeal) to travel outside the record i.e., the return made by the assessee or the assessment order passed by the AO with a view to find out new source of income and the power of enhancement u/s.31(3), which is *para materia* to section 251(1) of the Act, is restricted to the source of income which has been the subject matter of consideration by the AO from the point of view of taxability. Hon'ble Supreme Court has then considered, in this context, the consideration does not mean "incidental" or "collateral" examination of any matter by the AO in the process of assessment. There must be something in the assessment order to show that the AO has applied his mind to a particular subject matter or the particular source of income with a view to its taxability or to its non-taxability and not to any incidental connection. In the present case, the subject matter of assessment is the income from the JDA but these retained lands, retained by the respective party i.e., TII & EID Parry, do not form part of the JDA and only income arising from UDI surrendered can be assessed as income arising from the JDA as only these lands form part of assets from which income is earned and are therefore, the source of income earning. Even Hon'ble Supreme Court in the case of Shapoorji Pallonji Mistry, *supra* also considered the contention of the Revenue that the word "assessment" means

the ultimate amount which an assessee must pay, regard being add to the charging section and his total income. Hon'ble Supreme Court observed that the word 'enhance the assessment' are not confined to the assessment reached to a particular process but the amount which ought to have been computed if the true total income had been found. Hon'ble Supreme Court stated that this view is possible but it was observed that the other provisions like revision by CIT or reopening by the AO or the other provisions which enables either erroneous order amounts to prejudice caused to Revenue or escaped income from new source to be brought to tax after following procedure prescribed. Hence as argued by ld.counsel for the assessee, there are many situations where the untaxed income can be brought to tax within the taxing ambit by the machinery provided in the Act.

8.3 Further, as cited by ld.counsel for the assessee, the Hon'ble Delhi High Court in the case of Sardari Lal & Co, reported in 251 ITR 864, wherein the Hon'ble Delhi High Court has considered the case laws cited by the ld.Senior DR and finally held that no new source of income can be introduced by CIT(A) while deciding the appeal and enhancement of income. The Hon'ble Delhi High Court has considered this issue in great detail in para 6, 7 & 8 as under:-

6. A similar question has been examined by the Apex Court as noted above, on several occasions. We do not think it necessary and appropriate to proliferate this judgment by making reference to all the decisions. A few of the important ones need to be noticed. One of the earliest decisions on the point was in CIT v. Shapoorji Pallonji Mistry (1962) 44 ITR 891 (SC). The matter related to the corresponding provisions of the Indian Income Tax Act, 1922 (hereinafter referred to as "the old Act"). It was held, inter alia, that in an appeal filed by the assessed, the Appellate Assistant Commissioner has no power to enhance the assessment by discovering a new source of income not considered by the Income Tax Officer in the order appealed against. A similar view was expressed in CIT v. Rai Bahadur Hardutroy Motilal Chamaria (1967) 66 ITR 443 (SC). That also related to a case under section 31(3) of the old Act. It was held that the power of enhancement under section 31(3) of the old Act was restricted to the subject-matter of the assessment or the source of income, which had been considered expressly or by clear implication by the assessing officer from the point of view of taxability and that the Appellate Assistant Commissioner had no power to assess the source of income, which had not been taken into consideration by the assessing officer. It is to be noted that strong reliance was placed by learned counsel for the revenue on the decision of the Apex Court in CIT v. Nirbheram Daluram (1997) 224 ITR 610. It was submitted that a different view was expressed about the scope and ambit of the power of the first appellate authority vis-a-vis the sources considered by the assessing officer and even if the action of the first appellate authority related to a new source of income not considered by the assessing officer, it was not impermissible. It is to be noted that in Union Tyres' case (supra), this decision was also considered by this court in the background of what had been stated in Daluram's case (supra) and it was observed that there was really no difference from the view expressed earlier in Shapoorji Pallonji Mistry's case (supra) and Rai Bahadur Hardutroy Motilal Chamaria's case (supra).

7. The learned counsel for the revenue also submitted that this conclusion of the Division Bench needs a fresh look. We have considered this submission in the background of what had been stated by the Apex Court in Jute Corporation's case (supra) and Daluram's case (supra). In Jute Corporation's case (supra), the Apex Court while considering the question whether the Appellate Assistant Commissioner has the jurisdiction to allow the assessed to raise an additional ground in assailing the order of assessment before it, referred to Shapoorji's case (supra), and drew a distinction between the power to enhance tax on discovery of a new source of income and granting a deduction on the admitted facts supported by the decision of the Apex Court. Relying on certain observations made by the Apex Court in CIT v. Kanpur Coal Syndicate (1964) 53 ITR 225 (SC), the Apex Court held that powers of the first appellate authority are coterminous with those of the assessing officer and the first appellate authority is vested

with all the wide powers, which the subordinate authority may have in the matter. In Daluram's case (supra), the decisions of Kanpur Coal's case (supra) and Jute Corporation's case (supra) were also considered and it was observed by the Apex Court that the appellate powers conferred on the first appellate authority under section 251 of the Act were not confined to the matter, which had been considered by the Income Tax Officer, as the first appellate authority is vested with all the wide powers of the assessing officer may have while making the assessment, but the issue whether these wide powers also include the power to discover a new source of income was not commented upon. Consequently, the view expressed in Shapoorji Pallonji Mistry's case (supra) and Rai Bahadur Hardutroy Motilal Chamaria's case (supra) still holds the feet. It may be noted that the issue was considered in CIT v. McMillan and Co. (1958) 33 ITR 182 (SC). Referring to a decision of the Bombay High Court in Narondas Manordass v. CIT (1957) 31 ITR 909 (Bom), it was held that the language used in section 31 of the old Act is wide enough to enable the first appellate authority to correct the Income Tax Officer not only with regard to a matter which has been raised by the assessed but also with regard to a matter which has been considered by the assessing officer and determined in the course of the assessment. It is also relevant to note that in the Jute Corpn. of India Ltd.'s case (supra), the Apex Court, inter alia, observed as follows :

> *"…… The AAC, on an appeal preferred by the assessed, had jurisdiction to invoke, for the first time, the provisions of rule 33 of the Indian Income Tax Rules, 1922 (hereinafter referred to as 'the Rules'), for the purpose of computing the income of a non-resident even if the Income Tax Officer had not done so in the assessment proceedings. But, in Shapoorji Pallonji Mistri [1962] 44 ITR 891, this court, while considering the extent of the power of the Appellate Assistant Commissioner, referred to a number of cases decided by various High Courts including the Bombay High Court judgment in Narrondas Manordass [1957] 31 ITR 909 and also the decision of this court in McMillan & Co. [1958] 33 ITR 182 and held that, in an appeal filed by the assessed, the AAC has no power to enhance the assessment by discovering new sources of income not considered by the Income Tax Officer in the order appealed against. It was urged on behalf of the revenue that the words 'enhance the assessment' occurring in section 31 were not confined to the assessment reached through a particular process but the amount which ought to have been computed if the true total income had been found. The court observed that there was no doubt that this view was also possible, but having regard to the provisions of sections 34 and 33B, which made provision for assessment of escaped income from new sources, the interpretation suggested on behalf of the revenue would be against*

the view which had held the field for nearly 37 years…." (p.692) [Emphasis, supplied].

4. Looking from the aforesaid angles, the inevitable conclusion is that whenever the question of taxability of income from a new source of income is concerned, which had not been considered by the assessing officer, the jurisdiction to deal with the same in appropriate cases may be dealt with under section 147/148 of the Act and section 263 of the Act, if requisite conditions are fulfilled. It is inconceivable that in the presence of such specific provisions, a similar power is available to the first appellate authority. That being the position, the decision in Union Tyres' case (supra) of this court expresses the correct view and does not need reconsideration. This reference is accordingly disposed of.

8.4 We noted that in the present case, the CIT(A) enhanced the income in respect of above mentioned eight items. We have gone through these three items of income enhanced by the CIT(A) and are of the view that the un-surrendered lands i.e., UDI is not arising from JDA and not forming part of the assets from which income is earned cannot be enhanced. The following three enhancements:-

i. *On account of disallowance of extra land cost paid to TII*
ii. *On account of disallowance of extra land cost paid to EID Parry*
iii. *On account of understatement of sales by allotting more saleable area to EID Parry*

8.5 We are of the view that the CIT(A) discovered a new source of income on account of above mentioned three items and enhanced the income which is no permitted u/s.251(1)(a) of the Act. We agree with the argument of Ld Counsel that the new source, as sought to be taxed by the CIT(A) is purported income alleged to be earned

from lands retained by the owners and JDA has nothing to do with this. The owners i.e., TII & EID only surrendered the portion of their land to JDA and retained the balance land for themselves. Further, the PICPL has no interest in these retained lands nor any obligation to pay for or receive any income from these retained lands. We noted that the subject matter of assessment is income from JDA and these retained lands do not form part of the JDA. We are of the view that only income arising from lands surrendered by these parties under JDA can be assessed as income, as only these lands form part of the assets from which income is earned and are therefore the 'source' of income earning for the assessee.

8.6 In view of the above factual aspect, once the subject matter of assessment is the income from JDA and these retained lands i.e., retained by TII and EID Parry do not form part of JDA cannot be subject matter of enhancement on the following three items:-

i. On account of disallowance of extra land cost paid to TII
ii. On account of disallowance of extra land cost paid to EID Parry
iii. On account of understatement of sales by allotting more saleable area to EID Parry

Only income arising from lands i.e., UDI surrendered can be assessed as income arising from the JDA as only these lands form

part of the assets from which income is earned and are therefore, the source of income earning. In view of the above, we are of the considered view that in respect of the above three items of enhancements, the CIT(A) has exceeded his jurisdiction u/s.251(1) of the Act while enhancing the income and hence, we quash the enhancement on these three items. As regards to balance five items, which are as under, the enhancements is sustained on jurisdictional issue.

i. On account of the disallowance of the cost of construction paid to Coromandel Engineering Company Ltd., amounting to Rs.15,91,14,399/-.
ii. On account of disallowance of consultancy charges paid to M/s.Mahavir Consultancy amounting to Rs.1,36,51,200/-.
iii. On account of disallowance of excessive payment made on account of business advisory services to EID Parry (India) Ltd., amounting to Rs.2,40,00,000/-.
iv. On account of disallowance of excessive marketing fees paid to Coromandel Engineering Company Ltd., amounting to Rs.47,75,301/-.
v. On account of disallowance of borrowed cost paid to EID Parry (India) Ltd., amounting to Rs.1,67,35,093/-.

9. The second issue, on merits, in this appeal of assessee, is as regards to disallowance of extra cost of land paid to Tube Investments of India Ltd., amounting to Rs.16,20,96,994/- by the

AO and confirmed by CIT(A). For this, assessee has raised the following grounds:-

> *2.1.* ***Disallowance of extra land cost paid to M/s. Tube Investments of India Ltd. [TII] - Rs.16,20,96,994/- [Original Grounds of Appeal Nos. 2.1. to 2.1.e.] :***
> *2.1.a. The Commissioner of Income Tax (Appeals) grossly erred in making an addition of Rs.16,20,96,994/- by observing the same to be extra land cost paid to TII.*
>
> *2.1.b. The Commissioner of Income Tax (Appeals) grossly erred in the methodology he has followed in computing the compensation payable to TII for the land surrendered for the project.*
>
> *21.c. The Commissioner of Income Tax (Appeals) ought to have therefore appreciated that the consideration paid to TII by the Appellant is in order and no addition is called for.*

10. First of all we need to assimilate the facts of the case on merits in clarity. The facts argued by both sides, revealed from records including written submissions filed by Revenue as well by assessee are that the assessee planned to develop and sell the piece of property situated at ABM Avenue, Adyar Club, Chamiers Road, Chennai. The project was named "CENTRALIS". In pursuance of the same the assessee approached following companies belonging to the same group, who held land lying contingent to each other:

(1) Cholamandalam MS General Insurance Co. Ltd. (in short "Chola")
(2) Carborundum Universal Ltd. (in short "CUMI")
(3) Tube Investments of India Ltd. (in short "TII")
(4) EID Parry India Ltd. (in short "EID")

'Chola' and 'Cumi' were not interested in joining in the scheme and therefore entered into agreement of sale to transfer their share of land to the Developer, the assessee herein, or to its nominees. These details are verified from relevant agreements for sale of land which are available at Page Nos. 2 to 8 and 15 to 20 of assessee Paper Book. For this they were paid upfront as follows, based on the market value of Rs.18,750/- per Sq.Ft. of land surrendered :

1) Chola agreed to transfer 3485 Sq.Ft. for a sum of Rs.6,53,43,750/-. This amount was paid on 27.01.2010.
2) CUMI agreed to transfer 12,608 Sq.Ft. for a sum of Rs.23,64,00,000/-. This amount was paid on 28.04.2010.

10.1 The CIT(A) raises the question as to why these payments were being made prior to the signing of the Joint Development Agreement (JDA). It was contended by Ld.Counsel that these parties were not interested in joining the JDA and they wanted their money to be paid before the project was initiated and further the assessee also wanted the safer method as in the event of the market value going up it would end up paying more at a later date. Subsequent to purchase of this land from Chola and Cumi, a JDA was entered into on 24.11.2010 and copy of this JDA is available at Page Nos. 31 to 63 of assessee's Paper Book. Further, it is to be noted from JDA that

the parties to the JDA were TII, EID, Chola, Cumi, PEIL and assessee. It was contended that Chola, CUMI and PEIL had entered as CONFIRMING PARTIES only and they had no financial interest in the JDA and moreover PEIL was included by way of abundant caution as it was previously a joint owner of some of the lands brought within the scope of the JDA. Accordingly, the entire cost of land for the project was debited at Rs.54,42,00,000/-. The break up for the same as follows :

Sl. No.	***Name of the Party***	***Amount in Rs.***
1.	*Cholamandalam MS General Insurance*	*6,53,43,750*
2.	*Carborundum Universal Ltd.*	*23,64,00,000*
3.	*EID Parry (India) Ltd.*	*3,56,06,750*
4.	*Tube Investments of India Ltd.*	*19,87,31,250*
5.	*EB/Sewerage and others in the case of TII*	*81,18,750*
	Total	***54,42,00,000***

10.2 The facts pertaining to TII are that total land holding by TII is 17057 Sq.Ft. and total undivided share of land surrendered is 11012 Sq.Ft. as per supplementary agreement. Copy enclosed by assessee in its paper book at Page Nos. 64 to 76**.** The total undivided share of land retained is 6045 Sq.Ft. by TII and the assessee had to recompense TII the value of the undivided share of land surrendered. As per supplementary agreement it was agreed that in respect of the undivided share of land area of 11,012 Sq.Ft. surrendered, the assessee would pay a compensation of

Rs.20,68,50,000/- at Rs.18,750/- per Sq.Ft. This amount was settled in the following manner :

Cheque paid on 05.07.2010	*Rs. 10,00,00,000/-*
Cheque paid on 04.10.2010	*Rs. 2,00,00,000/-*
Total cheque component	***Rs. 12,00,00,000/-***
Add : *Value of 4 flats and 8 garages of Saleable area 10,721 Sq.Ft. at Rs.7343.64 per Sq.Ft.*	*Rs. 7,87,31,250/-*
Add : *Amount payable but not paid as it was adjusted towards govt. levies*	*Rs. 81,18,750/-*
Total paid to TII by the Appellant	***Rs. 20,68,50,000/-***

10.3 We noted that the CIT(A) computed the amount paid/payable to TII as follows :

Value of 4 flats allotted to TII at Rs.26,414/- per sq.ft	*Rs. 28,31,84,494/-*
Cheque payments made on 05.07.2010 & 04.10.2010	*Rs. 12,00,00,000/-*
Consideration paid in exchange of UDS (flat value)	*Rs. 7,87,31,250/-*
Total paid to TII	***Rs. 48,19,15,744/-***

This works out to Rs.44,951/- per Sq.Ft. The CIT(A) then computed the value of the entire land holding of TII at Rs.31,98,18,750/-, being 17,057 Sq.Ft. at Rs.18,750/- per Sq.Ft. and then held that the value of land had been inflated by Rs.16,20,96,994/-. In paragraph 40 of his order, the CIT(A) directs that this amount be added and taxed as enhanced income as "On account of disallowance of extra land cost paid to TII". According to us, this finding of the CIT(A) is absolutely wrong as it is neither based on facts nor on any principle of law. The amount of Rs.28,31,84,494/- computed by the CIT(A), as the value of the four flats allotted to TII, is computed by him by multiplying the built-up area of the four flats which was 10,721

Sq.Ft. into the average selling price at which the assessee had sold the flats to outsiders (10721 sq.ft x Rs.26,414/- = Rs.28,31,84,494/-). This is a total misconception by the CIT(A). The selling price of Rs.26,414/- is the price paid inclusive of the UDS and the built-up area and other amenities granted to a buyer of the flat. TII has got in its possession an area of 6045 Sq.Ft. of undivided share of land in the complex and the built up area handed over to it is relatable to this holding and so TII does not have to be paid for any UDS they already hold in their own name and right and which had never been surrendered or contemplated to be surrendered. It is for the purpose of getting the four flats plus the amenities, mentioned hereafter, that TII surrendered 11,012 Sq.Ft. of UDS and was paid and was entitled to receive only Rs.20,68,50,000/- at the rate of Rs.18,750/- per Sq.Ft.

10.4 As regards to the amenities mentioned and includable in the package, we noted that these are : UPVC windows, complete Teak flush doors, marble, granite, wooden flooring and other superior finishes, stilt parking with paving stone flooring, 2 numbers Mitsubishi lifts, Wood work for wardrobes and modular kitchen, AC-VR system in the apartment and split AC in the common area, Furniture in the party hall (sofas) and in the lounge, gym equipment

and LED 55 Samsung TV, OHP and screen in the party hall, spa with jacuzzi and steam chamber, roof garden, gas bank with gas piping, meter and controls, compound wall with two motor operated gates, paving in the driveway, landscaping and pathway on the rear side, Swimming pool, water body, deck floor et cetera, Wi-Fi and security camera systems, play area equipment, 2 numbers 320 KV generators in addition to superior quality civil work and finish.

11. We have also gone through and noted that the CIT(A) proceeds on the basis that as TII possesses 17,057 Sq.Ft. of land, it is entitled to get flats for this area, but that is a wrong premise and fact. They are only entitled to get flats for the value of the UDS surrendered. Therefore the premise of the CIT(A) that TII was entitled to an additional Rs.28,31,84,496/- is totally wrong. There was no separate payment of Rs.28,31,84,496/- made nor is such a payment contemplated under the JDA. The CIT(A) in paragraph 14 states *"if the same price is taken as a benchmark, the market value of the land held by TII to the extent of 17,057 Sq.Ft. as per the JDA entered into on 24.11.2010 comes to Rs.31,98,18,750/- (17057 sq.ft x Rs.18,750/-).*" In paragraph 15, he states *"When TII is entitled for a consideration of Rs.31,98,18,750/- based on the market price of its share of land…..*". The entire premise of the

discussions and conclusions entered into in these two paragraphs is purely an imagination of the CIT(A) and totally opposed to the facts and the reality existing in this case. The findings of the CIT(A) that the assessee *"has paid an extra amount of Rs.16,20,96,994/- (481915744-319818750) to TII towards its share of land cost. PICPL failed to substantiate as to why this amount of Rs.16,20,96,994/- is paid to TII over and above its share of land price of Rs.31,98,18,750/-. Also, PICPL has not substantiated the rational and basis for payment of cash of Rs.12,00,00,000/- before signing the JDA on 24.11.2010. Further, PICPL failed to explain as to why a further sum of Rs.7,87,31,250/- has been paid towards exchange of land, when undivided share of land (UDS) cannot be sold separately without corresponding sales of flats. The UDS is inseparable, meaning thereby, the UDS goes along with the sale of flats. In other words, the land cost debited to P&L account has been inflated by an amount of Rs.16,20,96,994/-."* These findings of the CIT(A) are totally baseless. The assessee never had any obligation to pay TII any consideration for its entire holding of 17,057 Sq.Ft. The only obligation the assessee had under the JDA was to pay TII for the 11,012 Sq.Ft. of UDS surrendered. The balance of undivided share of land of 6045 Sq.Ft. was and is under the ownership of TII and they are not entitled to receive any payment towards this holding nor is

the assessee liable to make any payment towards this holding of TII. The assessee had never debited any amount in the region of Rs.48,19,15,744/- but had only debited Rs.20,68,50,000/-, for which the modus of payment has been explained.

11.1 We further noted from facts that the CIT(A) further goes on to state that the assessee has not *"substantiated the rational and basis for payment of cash of Rs.12,00,00,000/- before signing the JDA on 24.11.2010. Further, PICPL failed to explain as to why a further sum of Rs.7,87,31,250/- has been paid towards exchange of land, when undivided share of land (UDS) cannot be sold separately without corresponding sales of flats. The UDS is inseparable, meaning thereby, the UDS goes along with the sale of flats. In other words, the land cost debited to P&L account has been inflated by an amount of Rs.16,20,96,994/-"*. This entire paragraph is based on a wrong comprehension by the CIT(A). The payments mentioned in the paragraph are the actual payments due to be made by the assessee as per the JDA and which have actually been made. These are the only payments made to TII and no other payments have been made. When the CIT(A) questions the payment made *towards "exchange of land"* he fails to understand that this is the value of the flats that have been allotted to and handed over to TII by the assessee as per

the terms of the JDA. This is only the accounting and balancing entry made by the assessee being the value of the flats handed over to TII and is not an actual payment. What the CIT(A) says about the transfer of UDS is not legally correct. In law, UDS of land can be sold and transferred on its own. It is the property of the person having an undivided interest held along with others. It is not necessary that it can only be transferred along with a flat or building. If no flat or building is existing on the land and the land is owned by a number of persons in specified shares, they are said to hold the corresponding UDS or undivided interest. It is only if a flat or building is standing on the piece of land that UDS and share in the flat or building is transferred together. So the thesis that the CIT(A) seeks to propound is totally wrong and legally untenable. In the assessee's case what is being sold by TII and paid for is the UDS in the land only and which was formerly owned by TII and now is being transferred to the assessee or its nominees under the JDA. TII retains and holds UDS of 6045 Sq.Ft. in the property, to which the flats now handed over are relatable.

Therefore, the assessee is liable and had paid the consideration for the value of the undivided share of land surrendered of 11,012 Sq.Ft. at Rs.18,750/- per Sq.Ft. being as mentioned earlier and reiterated for easy reference :

Cheque paid on 05.07.2010	*Rs. 10,00,00,000/-*
Cheque paid on 04.10.2010	*Rs. 2,00,00,000/-*
Total cheque component	***Rs. 12,00,00,000/-***
Add : Value of 4 flats and 8 garages of Saleable area 10,721 Sq.Ft. at Rs.7343.64 per Sq.Ft.	*Rs. 7,87,31,250/-*
Add : Amount payable but not paid as it was adjusted towards govt. levies	*Rs. 81,18,750/-*
Total paid to TII by the Appellant	***Rs. 20,68,50,000/-***

The total cost of construction per Flat, including the garages and all other amenities and facilities were estimated at Rs.7343.64 per Sq.Ft. We have also noted the fact that the assessee has also obtained a Valuation Report dated 02.12.2019 from Registered Valuer for the purpose of ascertaining the approximate value of construction and the same is in the vicinity of the assessee's claim. A copy of the said Valuation Report is enclosed at Page Nos. 77 to 102 of assessee's Paper Book. Therefore the CIT(A) is completely off the mark and totally wrong, both legally and factually, while he holds that a sum of Rs.16,20,96,994/- has to be added to the income of the assessee by way of enhancement. Hence, we delete the enhancement on merits and allow this issue of assessee's appeal.

12. The next issue on merits, is as regards to disallowance of extra land cost paid to EID Parry (India) Ltd., amounting to Rs.3,56,06,250/- and understatement of sales by allotting more saleable area to EID Parry (India) Ltd., amounting to

Rs.4,31,45,948/- by AO and confirmed by CIT(A). For these two interconnected and common issues, the assessee has raised the following grounds:-

Ground Nos. 2.2 & 2.3 – Disallowance of extra land cost paid to EID – Rs.3,56,06,250/- & Understatement of sales by allotting more saleable area to EID – Rs.4,31,45,948/- :

2.2.Disallowance of extra land cost paid to M/s. EID Parry (India) Ltd. EID Parry - Rs.3,56,06,250/- [Original Grounds of Appeal Nos. 2.2. to 2.2.e.] :

2.2.a. The Commissioner of Income Tax (Appeals) grossly erred in making an addition of Rs.3,56,06,250/- by observing the same to be extra land cost paid to EID Parry.

2.2.b. The Commissioner of Income Tax (Appeals) grossly erred in the methodology he has followed in computing the compensation payable to EID Parry for the land surrendered for the project.

2.2.c. The Commissioner of Income Tax (Appeals) ought to have therefore appreciated that the consideration paid to EID Parry by the Appellant is in order and no addition is called for.

2.3. Understatement of sales by allotting more saleable area to M/s. EID Parry (India) Ltd. – Rs.4,31,45,948/- [Original Grounds of Appeal Nos. 2.3. to 2.3.e.] :

2.3.a. The Commissioner of Income Tax (Appeals) grossly erred in making an addition of Rs.4,31,45,948/- by observing that there was understatement of sales by allotting more saleable area to EID Parry.

2.3.b. The Commissioner of Income Tax (Appeals) ought to have appreciated that the allotment of flats is as per the Agreement for Joint Development.

13. We have heard rival contentions on these combined two additions and noted that the CIT(A) in paragraph 40 of his order, based on his finding in paragraph 16, directs the disallowance and addition of the following amounts in the case of EID :

1) Alleged extra land cost paid Rs.3,56,06,250/-
2) Alleged understatement of sales by allotting more saleable area Rs.4,31,45,948/-

The first premise of the CIT(A) was that the value of the two flats of 4952 Sq.Ft. allotted to EID was to be valued at Rs.13,08,02,128/- (4952 Sq.Ft. x Rs.26,414/-). The second premise on which the CIT(A) proceeded was that EID was entitled to saleable area in respect of its entire holding of land of 4675 Sq.Ft., which he valued at Rs.8,76,58,200/- (4675 Sq.Ft. x Rs.18,750/-). On this basis the CIT(A) firstly held that as EID was entitled to a saleable area of only 3318.55 Sq.Ft. (8,76,56,200 / 26,414). This computation of the CIT(A) is wrong because EID is not entitled to compensation of Rs.8,76,58,200/- as assumed by the CIT(A). EID has surrendered only 1883 Sq.Ft. of land and has to be compensated only for this i.e. Rs.3,53,06,250/- (1883 sq.ft x Rs.18,750/-)(wrongly typed as 3,56,06,250/-). Therefore the flat area or saleable area has to correspond to this amount only. The price of Rs.26,414/- as explained earlier is the average price for the constructed area, amenities and the UDS of land. When the assessee had conceived the project, it had estimated the selling price of the flats at Rs.26,414/- on the basis that the selling price of the constructed area, amenities, garages and other facilities would be fixed in the range of Rs.7,000/- to Rs.7,500/- and the balance relatable to the

land (UDS) would be somewhere in the vicinity of Rs.19,000. The original pricing was only an estimate and it went up or down a little bit. Since valuation and pricing is only an estimate, there are bound to be fluctuations and variations. On this basis, EID was entitled only to get a built-up area of 4952 Sq.Ft. as has been given to them and the CIT(A) is totally wrong, both legally and factually, in his findings and directions in this regard. As stated earlier, the value of construction of the flats and garages were estimated at Rs.7343.64 Sq.Ft. and EID was entitled only to get a built-up area of 4952 Sq.Ft. as has been given to them. Copy of the Valuation Report enclosed at Page Nos. 77 to 102 of assessee's Paper Book is relied on to show that the claim of cost of construction of the assessee is more or less the same. But the CIT(A) on the basis of the above assumptions has held that EID would be entitled only to a built-up area of 3318.55 Sq.Ft. (87656200/26414) and as it had been allotted 4952 Sq.Ft., it had been allotted an extra 1633.45 Sq.Ft. (4952 - 3318.55). On this basis he has held that the assessee had allotted extra built-up area of a value of Rs.4,31,45,948/- and he has held that this amounted to an understatement of income and directed that this should be assessed as undisclosed sale consideration.

13.1 Secondly, the CIT(A) has stated that the assessee had not substantiated as to why a sum of Rs.3,56,06,250/- was paid to EID for exchange of land. The figure should be Rs.3,53,06,250/- (not Rs.3,56,06,250/-). This sum of Rs.3,53,06,250/- is the amount due and payable to EID for the undivided share of land surrendered by it being 1883 Sq.Ft. at Rs.18,750/- per Sq.Ft. This is a legitimate payment due to EID and that explanation was tendered to the CIT(A). The CIT(A) has held that the land cost has been inflated to the extent of Rs.3,56,06,200/- (sic) and that this amount has to be disallowed under section 40A(2)(b) of the Act.

13.2 The CIT(A) has, both in the case of TII and EID, kept on repeating the words *"when undivided share of land (UDS) cannot be sold separately without corresponding sale of flats. The UDS is inseparable, meaning thereby, UDS goes along with the sale of flats".* There is no law or rule that states that the UDS cannot be sold separately. It all depends on the context and the facts of each individual case. An UDS in a piece of vacant land can be sold on its own with the owner divesting himself of the ownership in a defined proportion or share and retaining and holding his right in the balance. In the case of the assessee itself the very sale of 11,012 Sq.Ft. and 1,883 Sq.Ft. respectively by TII and EID is only in the

exercise of their right to transfer an UDS in the property, being just land, in favour of the assessee or its nominees. The flats that are handed over both to TII and EID would have corresponding UDS with respect to the balance of the UDS retained and held by them. These portions of the UDS belonging to both these parties were never transferred to the assessee and it was never contemplated that the assessee should compensate or pay for these portions of the UDS retained by TII and EID. This is a crucial and basic mistake made by the CIT(A) in his coming to the above adverse conclusions. He has misunderstood the very concept of the mechanics of a JDA, UDS and the legal rights accruing and/or arising from the above. Therefore, we are of the view that the enhancements of following are to be deleted:

1) Rs.3,56,06,250/- (sic) on account of disallowance of extra land cost paid to EID and
2) Rs.4,31,45,948/- on account of understatement of sales by allotting more saleable area to EID:

Hence, we delete these two enhancements on merits.

14. The next issue in this appeal of assessee is as regards to the order of CIT(A) confirming the action of the AO in disallowing cost of

construction paid to Coromandel Engineering Company Ltd., amounting to Rs.15,91,14,399/-. For this assessee has raised the following grounds:-

> *"**Ground No. 2.4 – Disallowance of cost of construction paid to Coromandel Engineering Company Ltd. [in short "CECL"] – Rs.15,91,14,399/- :***
>
> *2.4. Disallowance of cost of construction paid to M/s. Coromandel Engineering Company Ltd. [CECL] – Rs.15,91,14,399/- [Original Grounds of Appeal Nos. 2.4.to 2.4.j.]:*
>
> *2.4.a. The Commissioner of Income Tax (Appeals) grossly erred in making an addition of Rs.15,91,14,399/- by observing that the construction cost paid to CECL is inflated.*
>
> *2.4.b. The Commissioner of Income Tax (Appeals) grossly erred in estimating the construction cost per square feet of built up area at Rs.2,000/-*
>
> *2.4.c. The Commissioner of Income Tax (Appeals) grossly erred in holding that Rs.81,77,792/- is sufficient to cover the balance construction cost.*
>
> *2.4.d. The Commissioner of Income Tax (Appeals) ought to have appreciated that there in no inflation of construction cost paid to CECL and hence addition is not warranted in the facts and circumstances of the Appellant's case."*

15. The brief facts relating to this issue are that in order to execute the construction of the project "CENTRALIS" the assessee engaged the services of Coromandel Engineering Co. Ltd. (in short "CECL") and entered into a work order agreement dated 29.09.2010 enclosed at Page Nos. 103 to 128 of assessee's Paper Book. The terms of the agreement was that CECL would take on the work of constructing the residential complex as per plan and that they would be paid at the rate of Rs.4540/- per Sq.Ft. The total area to be constructed was

68,150 Sq.Ft. Therefore the presumptive cost of construction was estimated at Rs.30,94,01,000/-. The assessee had agreed to supply/meet the cost of cement, steel, windows, air-conditioners and lifts estimated to amount to Rs.4,72,46,487/-. However, due to various factors, the amount finally paid to CECL was Rs.40,80,76,960/-. Therefore, the total cost of construction of the project amounted to Rs.45,53,23,447/- for the development and construction of total saleable area of 68,150 Sq.Ft., which worked out to a rate of Rs.6,681/- per Sq.Ft. Out of this, an amount of Rs.5,988/- per Sq.Ft. was paid to CECL. The CIT(A) held that *"available information on technical aspects of cost of construction when examined reveal that the cost of construction for the construction of premium buildings with superior specifications such as marble flooring, branded fittings for sanitary and electrical works, shall not exceed Rs.2,000/- per Sq.Ft. after excluding the cost incurred by PICPL at Rs.4,72,46,487/- separately towards cement/steel/windows/AC's and lifts".* Before the CIT(A) the assessee produced the work order dated 29.09.2010 and also details of the running bills submitted by CECL and subsequent correspondences between the assessee and CECL for additional works. The CIT(A) however held that the assessee had failed to substantiate the huge amount debited on account of cost of

construction. The CIT(A) has not made available to the assessee 'the technical information available' on which he relied on to hold that the cost of construction of premium buildings of the nature constructed by the assessee could not exceed Rs.2,000/- per Sq.Ft. after excluding the cost of the material supplied by the assessee itself. On this basis, he held that the cost of construction payable to CECL would not exceed Rs.13,63,00,000/- (i.e. 2000 x 68150) and concluded that the assessee had paid an extra cost of Rs.27,17,76,962/- to it's sister (sic) concern CECL. We noted the fact that CECL is not a sister concern of the assessee and is only a company in the same group of the industrial house of the Murugappa group.

15.1 Further, the CIT(A) held that in the assessment year 2012-2013, a sum of Rs.12,81,22,208/- had already been debited and claimed and therefore only a further sum of Rs.81,77,792/- was allowable towards the total cost of construction and only that was allowable in this year. The balance of Rs.15,91,14,399/- has to be disallowed. It was explained by Ld.Counsel that despite the assessee producing the running bills submitted by CECL, the CIT(A) held that the onus was not discharged and the residential complex has been constructed in the poshest and most exclusive area of Chennai i.e.

Adyar Gate. The residents of this area are all persons holding the highest positions in the industrial, business and social fields and therefore their expectations are of the level of the first world standards. Therefore this complex has been constructed keeping in mind this high level of expectations of the clientele and the construction was of the highest quality and only the best fittings have been used. As has been mentioned earlier, the facilities and amenities provided are exceptional and of the highest quality such as UPVC windows, complete Teak flush doors, marble, granite, wooden flooring and other superior finishes, stilt parking with paving stone flooring, 2 numbers Mitsubishi lifts, Wood work for wardrobes and modular kitchen, AC-VR system in the apartment and split AC in the common area, Furniture in the party hall (sofas) and in the lounge, gym equipment and LED 55 Samsung TV, OHP and screen in the party hall, spa with jacuzzi and steam chamber, roof garden, gas bank with gas piping meter and controls, compound wall with two motor operated gates, paving in the driveway, landscaping and pathway on the rear side, Swimming pool, water body, deck floor et cetera, Wi-Fi and security camera systems, play area equipment, 2 numbers 320 KV generators in addition to superior quality civil work and finish.

15.2 We noted that the CIT(A) held that it would be impossible to construct a complex with all these mentioned facilities and of this quality on a budget of Rs.2,000/- per Sq.Ft. The estimation made by the CIT(A) is totally unrealistic and has no basis to stand on. The CIT(A) has not produced or informed the assessee of the material on which he has arrived at this erroneous conclusion. In addition to the amenities mentioned earlier it may be noted that this construction required installation of 192 RCC piles of 26 to 28.5 feet depth of 20 inches diameter. The structure is an RCC framed one with brick walls with cement plastering and with Plastic emulsion paint both on the exterior and interior, lift and staircase headroom, security and pump room, two underground sumps and two overhead tanks, all of 18,000 litres capacity each, along with water filtration facilities and pumps, along with all the internal and external sanitary, water and service connections, internal electrification and external lighting. The CIT(A) has not taken into consideration any of the above factors while arriving at his decision. The CIT(A) has mentioned only marble floors, branded fittings for sanitary and electrical fittings and ignored all the other fittings and amenities provided which would not be provided in the type of construction, the CIT(A) is comparing with. What the CIT(A) is presumably referring to is his personal knowledge of what it would cost to construct a home for the affluent middle

class family and not one with all these amenities and facilities mentioned earlier.

15.3 We noted the fact that assessee had agreed to a cost of construction of Rs.4,540/- per Sq.Ft. but ultimately had incurred a cost of approximately Rs.5,988/- per Sq.Ft. due to additional works as communicated vide letters dated 07.02.2011, 06.08.2012 and email dated 03.10.2012 and communication received from CECL dated 22.03.2013 are enclosed at Page Nos. 129 to 133 of assessee's Paper Book. The crucial fact is that the project itself took four years to complete and that it is obvious that there would be cost escalation and inflation during this period. Therefore it was inevitable that the costing made before the project had commenced would be liable to change over the years. The original agreement to pay Rs.4,540/- was based on an estimate and the facts that arose in the intervening period of construction must be kept in mind and realty appreciated. The estimate made by the CIT(A) is totally unrealistic and without any basis and it should be rejected and the assessee's claim be accepted. The assesseen had enclosed a valuation report dated 02.12.2019 from Value Assessors & Surveyors P. Ltd. at Page Nos. 77 to 102 of assessee's Paper Book to establish by way of corroborative evidence that the cost incurred was reasonable. In

these circumstances, we are of the view that the estimate made by the CIT(A) is totally unrealistic and without any basis and it should be rejected and the enhancement of Rs.15,91,14,399/- by CIT(A) is deleted and the CIT(A) order reversed.

16. The next interconnected and common issue is as regards to the order of CIT(A) enhancing the consultancy charges paid to M/s. Mahavir Consultancy to Rs.3,03,37,200/- as against added by AO by disallowing a sum of Rs.1,66,86,000/-. For this confirmation of addition and enhancement of income, assessee has raised following grounds:-

Ground No. 2.5 – Enhancement / Disallowance of consultancy charges paid to M/s. Mahavir Consultancy – Rs.1,36,51,200/-

2.5.Disallowance of consultancy charges paid to Mahavir Consultancy- Rs.1,36,51,200/- [Original Grounds of Appeal Nos. 2.5. to 2.5g]

2.5.a.The Commissioner of Income Tax (Appeals) grossly erred in disallowing the consultancy chargespaid to M/s. Mahavir Consultancy to the tune o Rs.1,36,51,200/-.

2.5.b. The Commissioner of Income Tax (Appeals) ought to have appreciated that the payment is genuine and allowable as business expenditure since incurred for and in the course of business.

2.5.c. The Commissioner of Income Tax (Appeals) grossly erred in observing the transaction to be sham.

Ground No. 4 – Disallowance of consultancy charges paid to M/s. Mahavir Consultancy – Rs.1,66,86,000/-.

4.Disallowance of consultancy charges paid to Mahavir Consultancy - Rs.1,66,86,000/- [Original Grounds of Appeal Nos. 4. to 4.4.] :

4.1. The Commissioner of Income Tax (Appeals) grossly erred in upholding the disallowance of consultancy charges paid to M/s. Mahavir Consultancy Rs.1,66,86,000/-.

4.2 The Commissioner of Income Tax (Appeals) ought to have appreciated that no disallowance can be made on the basis of non receipt of corresponding income.

17. As these two grounds relate to the same party, same issue and same facts, they are taken up together. Brief facts are that before the Assessing Officer the assessee claimed a sum of Rs.3,03,37,200/- as commission payable to M/s. Mahavir Consultancy (hereinafter the firm). This amount was inclusive of all government levies. The assessee on 22.07.2009 entered into an Agreement with M/s. Coromandel Fertilisers Ltd (in short "**CFL**") in order to help CFL to sell or transfer by way of lease, property belonging to CFL located in Ambattur, Chennai as well as some property in Navi Mumbai, copy of agreement is enclosed at Page Nos. 134 to 137 of assessee's Paper Book. In order to carry out its obligations, the assessee appointed the firm to render services in this regard vide engagement letter dated 12.05.2011, copy enclosed at Page Nos. 138 to 140 of assessee's Paper Book and had agreed to pay the firm a brokerage commission of 1% on the sale consideration on finalisation of an MOU with a prospective buyer. The firm identified one M/s. Sheth Corporation P. Ltd.. In the meanwhile another group company, M/s Parry Chemicals Ltd. (PCL)

also approached the assessee to help it sell two properties belonging to it. The assessee therefore orally requested the firm to help them out in this case also on the same terms as earlier agreed to. An MOU was signed on 18.07.2012 between CFL, PCL and M/s. Sheth Corporation P. Ltd. in respect of the three properties, copy of MOU is enclosed at Page Nos. 141 to 171 of assessee's Paper Book. On the signing of the above MOU, the firm raised two bills for a total consideration of Rs.2,70,00,000/- copy of which are enclosed at Page Nos. 172 & 173 of assessee's Paper Book. The assessing officer held that since the assessee had entered into an MOU only with CFL the commission payable on the sale consideration agreed between CFL and M/s. Sheth Corporation P. Ltd. was allowable and allowed a proportionate sum of Rs.1,03,14,000/- and disallowed the balance of Rs.1,66,86,000/-, which was relatable to the properties of PCL, with whom the assessee had not entered into any written agreement. The assessee filed an appeal before the CIT(A) on the ground of disallowance of Rs.1,66,86,000/-. The CIT(A) while he took up this ground has held that the assessing officer was wrong in having allowed Rs.1,03,14,000/-, thereby enhancing the income assessed by this amount and further confirmed the disallowance of the balance amount of Rs.1,66,86,000/-.

18. We have heard rival contentions and gone through facts and circumstances of the case. The CIT(A) has held that the assessee had not produced any evidence to substantiate the services rendered by the firm but the documentary proof sought for by the CIT(A) relates to the internal working and efforts made by the firm. The CIT(A) holds that there is no evidence for the cost incurred by the firm in respect of the services and work they had done to fulfil their obligations to find a buyer. It was contended that these details which are private and the internal matter of the firm cannot have been accessed by the assessee and therefore the CIT(A)'s approach is wrong in expecting the assessee to produce these evidences. Further, the fact whether the firm has incurred or not incurred any expenditure is an issue extraneous to the matter in dispute as that is a matter in its discretion. The assessee has an agreement with the firm under which they have agreed to pay a commission to the firm for getting a party to sign an MOU. This eventuality has happened and the assessee is legally bound to fulfil its part of the contract as the other party has fulfilled its part. The CIT(A) holds that there is no reference for any payment to be made to the firm in the MOU signed on 18.07.2012 between CFL, PCL and M/s. Sheth Corporation P. Ltd. We agree with the contention of assessee that it is not the practice to mention the names or details of payments due to brokers

and commission agents when MOUs are entered into between the parties to the transaction. The CIT(A) holds that no correspondence between the firm and M/s. Sheth Corporation P. Ltd. was produced. To expect the disclosure of their internal correspondence is very unreasonable. Another point raised by the CIT(A) is that no correspondence was produced between the assessee and the firm. We noted that the assessee had entrusted the firm with the work and thereafter it was the obligation and duty of the firm to find a buyer and there was no necessity that the assessee should have been kept informed of all the parties and work that was carried out. The CIT(A) further questions as to why the assessee had to outsource the work as the assessee itself was in the line of property development. The assessee was in the midst of the work of construction and sale of the CENTRALIS project and therefore in its wisdom, it thought it best to outsource the work as the major properties were situated in Mumbai. This was purely a business decision and the CIT(A) cannot sit in judgement over it. The fact that the assessee utilises the services of its holding company cannot be a reason for upholding the disallowance. The manner in which a business entity wishes to conduct its business cannot be questioned. Finally the CIT(A) states that there is no contract between the assessee and PCL and there is no MOU between the assessee and

the firm in respect of the properties of PCL. These facts are correct but these are merely a technical defect or lapse and since the parties were known to each other and were in the process of dealing with each other this aspect was overlooked and they all proceeded on the basis of trust. The fact is that in the MOU with M/s. Sheth Corporation P. Ltd., PCL is also a party and its lands are included. The CIT(A) is wrong in coming to the conclusion that this transaction was a sham transaction and that it was entered into with an intention to conceal its profits by debiting spurious expenditure. There is nothing to prove this finding of the CIT(A) other than his unsubstantiated statement and his presumed suspicion. Suspicion is not evidence. CIT(A) ought to have appreciated that an MOU had been signed on 18.07.2012 and that fact cannot be denied. The entire amount was paid by cheque and TDS had been made. The parties to the transaction are all genuine and existing parties and are not fictional entities. The fact that PCL's property was also included inspite of there being no MOU between the assessee and the firm on this account cannot be considered as a factor to hold that the entire transaction was a make-believe affair. The assessee did not receive any commission from CFL and PCL because unfortunately the transaction did not go through. The CIT(A) erred in enhancing the income by the amount of Rs.1,36,51,200/- and confirmation of the

disallowance made by the assessing officer of Rs.1,66,86,000/- and hence the same are being deleted.

19. The next issue in this appeal of assessee is as regards to disallowance of excess payment on account of business advisory services to EID Parry India Ltd., enhanced by CIT(A) amounting to Rs.2,40,00,000/-. For this assessee has raised the following grounds:-

> Ground No. 2.6 – Disallowance of excess payment on account of business advisory services to EID – Rs.2,40,00,000/- :
>
> *2.6 Disallowance of excess payment on account of business advisory services to M/s. E.I.D. Parry (India) Ltd. - Rs.2,40.00,000/- [Original Grounds of Appeal Nos.2.6. to 2.6.i.] :*
>
> *2.6.a. The Commissioner of Income Tax (Appeals) grossly erred in disallowing a sum of Rs.2,40,00,000/- being the payment on account of business advisory services by observing the same to be excessive.*
>
> *2.6.b. The Commissioner of Income Tax (Appeals) ought to have appreciated that the payment was made pursuant to the agreement entered into between the Appellant and EID Parry.*
>
> *2.6.c. The Commissioner of Income Tax (Appeals) erred in making an observation that for sale of 18 flats, one accounts person and staff will be sufficient to look after the maintenance of accounts, undertake banking operations and day to day administration.*
>
> *2.6.d. The Commissioner of Income Tax (Appeals) grossly erred in applying Section 40A(2)(b) since the payment made was based on arm's length principle.*
>
> *2.6.e. The Commissioner of Income Tax (Appeals) ought to have therefore appreciated that the expenditure is genuine and incurred in the course of and for the purpose of business to be allowed as a revenue expenditure u/s. 37 of the Income Tax Act 1961.*

20. The assessee had paid a sum of Rs.3,00,00,000/- to its holding company EID Parry Ltd. on the basis of an agreement dated 02.05.2012, copy of agreement is enclosed at Page Nos. 177 to 182 of assessee's Paper Book. The said payment was reflected in the accounts and claimed as a deduction. The assessing officer after perusing the agreement and also appreciating the facts of the case allowed the entire amount paid. Before the CIT(A), the issue was not in appeal but he took it upon himself to re-examine this issue and directed that an amount of only Rs.5 lakhs a month was sufficient to be paid. On the basis of this, he directed that an amount of Rs.60 lakhs should be allowed for the year as remuneration due and payable to EID and he directed the disallowance of the balance of Rs.2,40,00,000/-.

20.1 Before the CIT(A) the assessee had filed submissions in support of its claim. However the CIT(A) has held against on the following grounds :

1) The copy of the agreement filed before him related to an earlier year and therefore was not valid and applicable to the assessee's case for this assessment year.
2) No documentary evidence in the support of nature of services rendered, manpower employed, man hours spent, etc. had been filed.

On the above basis, the CIT(A) has held that the payments made on account of business advisory services was not a genuine payment and he then holds that it would be sufficient if a payment of Rs.5 lakhs per month was allowed. He therefore directed the allowance of Rs.60 lakhs and held that the balance of Rs.2,40,00,000/- was to be treated as excessive payment in terms of the provisions contained under section 40A(2)(b) of the Act. Now it was argued that the agreement for the earlier year was filed before the CIT(A) in order to substantiate the fact that payments for similar services from EID had been made in earlier years also. The agreement relevant to the present assessment year enclosed at Page Nos. 177 to 182 of assessee's Paper Book was also filed personally before the CIT(A) during the course of appeal hearing proceedings. Unfortunately the CIT(A) has ignored the existence of the agreement on his files. In respect of second ground, it is submitted that the assessee had filed submissions before the CIT(A) detailing the services rendered by EID in its letter dated 27.12.2018 filed at Page Nos. 189 to 193 of assessee's Paper Book which has also been referred to by the CIT(A), the services have been very elaborately explained. According to the CIT(A), the nature of business of the assessee would require just two people to run the entire show, ignoring the fact that it would be necessary to comply

with a number of Statutory requirements and for which it did not have the necessary infrastructure.

20.2 It was argued that the assessee is a company which is run by the Board of Directors and does not have any employees on its rolls. In fact, the CIT(A) has himself mentioned that it does not have an office premises of its own and is working from a work station in its holding company's premises. In the circumstances, it was absolutely necessary for it to get the services of an outside agency to help it comply with all the requirements under the various statutes governing the running of a company. In its letter dated 27.12.2018, it has clearly laid out the various services rendered to it under the various heads that it has enumerated therein. The CIT(A) has picked up just the headings that have been given but ignored the various items of work that have been referred to and explained therein. It should be appreciated that these items of work which have been mentioned in its letter are all very complex issues and time consuming. It would be relevant to highlight that in addition to other major services availed, one of the major service availed that had been highlighted was the use of the SAP/ERP software for the system management that belonged to EID that was used for most of the services above-mentioned. The SAP system consists of a

number of fully integrated modules, which covers virtually every aspect of business management. In addition to the initial cost of hardware, which is very high, it would require it to employ persons trained in the software. Further, in addition to the heavy onetime purchase cost it would entail a recurring subscription cost and license cost for each user. It is estimated that the total expenditure that would be necessary to install, set up, maintain and operate the SAP system alone would be in the range of about Rupees one Crore initially. Further separate staff would have to be engaged and trained to use such a system, if installed by it. In addition, the services of the experienced employees of EID were deputed to it. These employees took care of and represented it before the various different statutory governmental authorities. EID is a very large industrial organisation and has on its rolls employees having expertise in the various fields being legal, accountancy, business management, marketing, science and technology.

20.3 The assessee obtained legal support services from EID. Legal services included the drafting of the JDA, sales agreements and sale deeds, power of attorneys, consultation with advocates, registration of sale deeds, obtaining valuation reports of property held by the company, maintaining the legal documents of the assessee,

resolution of legal disputes, filing of appeals before various forums in cases for and against the assessee. The assessee also utilised the services of the employees of EID in the nature of CFO services, secretarial services, accounting services, taxation services and treasury related services. Since the assessee did not have any employees on its rolls, by opting for entering into this agreement, it had saved itself a lot of capital and recurring expenditure and the necessity of having a huge number of employees on its rolls, thereby saving a huge sum by way of employee costs like salaries, bonus, gratuity and other incidental expenses.

20.4 The CIT(A) has mentioned that it had incurred some other expenditure by way of professional charges, legal and consultancy paid to various persons and these payments were made for specific services sought for and rendered directly and for which the assessee was liable to make payment. We noted that the CIT(A) has himself accepted and agreed to the fact that services had been rendered to the assessee by EID and he was therefore not right in holding that only Rs.60,00,000/- was allowable. The CIT(A) ought to have appreciated that having conceded that services had actually been rendered it was not proper to restrict the payment for the said services, especially having regard to the fact that he has proceeded

purely on suspicion and surmises. In view of the above facts and circumstances of the case, we are of the view that the amount of Rs.3,00,00,000/- paid under the agreement for the business advisory services was a reasonable amount having regard to the type and quantum of services rendered and the potential savings that have accrued to the assessee. Hence, we delete the enhancement and allow this issue of assessee's appeal.

21. The next issue in this appeal of assessee is as regards to the order of CIT(A) enhancing the disallowance of marketing fee paid to Coromandel Engineering Company Ltd., amounting to Rs.47,75,301/-. For this assessee has raised the following grounds:-

Ground No. 2.7 – Disallowance of marketing fees paid to CECL – Rs.47,75,301/- :

2.7. Disallowance of marketing fees paid to M/s. Coromandel Engineering Company Ltd. (CECL]- Rs.47,75,301/- [Original Grounds of Appeal Nos. 2.7. to 2.7.e.]:

2.7.a. The Commissioner of Income Tax (Appeals) grossly erred in making the disallowance of marketing fees paid purely on suspicion and surmises.

2.7.b. The Commissioner of Income Tax (Appeals) ought to have appreciated that the addition is not warranted as the payment was genuine and TDS was also made on the payment.

2.7.c. The Commissioner of Income Tax (Appeals) ought to have appreciated that the marketing fees was incurred wholly and exclusively for the purpose of business.

22. Brief facts relating to this issue are that the CIT(A) made the enhancement on the basis that majority of the flats were sold in the preceding assessment year itself and the assessee had failed to justify / substantiate its claims by way of documentary evidence. It was argued that the targeted customers for purchase of flats promoted by the assessee are high net worth individuals and for that it availed the marketing services of CECL, who was having domain expertise from a very long term in respect of marketing services. The correspondence is enclosed at Page No. 194 of assessee Paper Book. The payments were made as per the letter of engagement dated 30.08.2010 enclosed at Page Nos. 195 & 196 of assessee's Paper Book, wherein it was explicitly agreed to between the assessee and CECL that the first installment of the marketing fees will be paid at the time of allotment advise and receipt of allotment money from prospective buyers and secondly at the time of signing of sale cum construction agreement. During the impugned assessment year, the assessee had received consideration to the tune of Rs.20,60,95,200/- for flat bookings from the customers referred by CECL as per Table below :

Customer	***Flat no***	***Amount received during year [in Rs.]***	***Total Sale value [in Rs.]***	***Rate of commission***	***Commission [in Rs.]***
Sudarsanam	*1A*	*7,20,00,000*	*8,09,41,350*	*2%*	*16,18,827*
Dr Sumantran	*1B*	*7,70,95,200*	*8,82,72,850*	*2%*	*17,65,457*
Krishnamurthy	*4C*	*5,70,00,000*	*6,95,50,850*	*2%*	*13,91,017*

(Minica Services Pvt. Ltd.)					
	Total	***20,60,95,200***	***23,87,65,050***		***47,75,301***

Therefore, as per the total consideration received from customers referred by CECL, the marketing fees was paid to CECL. This is a genuine payment. TDS was also deducted from the marketing fees paid to CECL and the balance fees were also paid through banking channels, which will prove without doubt the genuineness of the payments. There is no warrant for CIT(A) to enhance the assessed income merely on suspicions and surmises without any valid reasons or materials. Hence, we are of the view that the enhancement on this account by the CIT(A) be deleted. Hence, we delete the addition.

23. The next issue in this appeal of assessee is against the order of CIT(A) enhancing the borrowals cost paid to EID Parry (India) Ltd., amounting to Rs.1,67,35,093/- and added to the returned income of the assessee. For this assessee has raised the following grounds:-

> *Ground No. 2.8 - Disallowance of borrowal cost paid to EID – Rs.1,67,35,093/- :*
> *2.8. Disallowance of borrowal cost paid to M/s. E.I.D. Parry (India) Ltd. - Rs.1,67,35,093/- [Original Grounds of Appeal Nos. 2.8. to 2.8.h.] :*
>
> *2.8.a. The Commissioner of Income Tax (Appeals) grossly erred in disallowing a sum of Rs.1,67,35, 093/- being the borrowal cost paid by invoking provisions of Section 40A(2)(b).*

2.8.b. The Commissioner of Income Tax (Appeals) ought to have appreciated that the payment of interest at 13% is reasonable as the loan is unsecured and out of business expediency.

2.8.c. The Commissioner of Income Tax (Appeals) grossly erred in applying Section 40A(2)(b) since the payment made was based on arm's length principle.

28.d. The Commissioner of Income Tax (Appeals) ought to have therefore appreciated that the expenditure is genuine and incurred in the course of and for the sole purpose of business to be allowed as a revenue expenditure u/s. 37 of the Income Tax Act,1961.

24. Brief facts are that the CIT(A) made the enhancement on the ground that when the assessee has received advances of Rs.59,72,60,805/- from customers towards sale of flats and also lease deposit of Rs.30,00,00,000/- during the F.Y. 2011-2012, the need to borrow monies from its holding company in the previous year and paying interest on the same at the rate of 13% is not substantiated with reference to commercial expediency. The presumption of the CIT(A) is that when the assessee had huge funds available with it for cost of construction, there may not be any need for borrowals and paying huge interest on the same and hence the same is disallowable u/s. 40A(2)(b). This presumption of the CIT(A) is misplaced due to the following facts in each of financial years:

F.Y. 2009-10 (Y.E. 31.03.2010)

In this year, the loan amount received was Rs.8,78,00,000/- and the assessee had to pay a sum of Rs.6,53,43,750/- to Chola

towards the purchase of land for the JDA. The payment was made from out of this borrowals and there is direct nexus. This was the first year in which the JDA was in place.

F.Y. 2010-11 (Y.E. 31.03.2011)

In this year, the assessee had a number of commitments to meet, in addition to the works relating to the JDA and it had to pay a sum of Rs.23,64,00,000/- to CUMI also for the purchase of land for the JDA. A sum of Rs.23,64,00,000/- was received from EID as a loan on 28.04.2010 and it was transferred to CUMI in discharge of this obligation. In this year, the assessee also borrowed a further sum of Rs.10,00,00,000/- and paid the same to TII in terms of the JDA. It also paid TII a further sum of Rs.2,00,00,000/- and this was paid out of the amount received on redemption of Mutual Fund. Therefore, the total loan borrowed during the year was Rs.33,64,00,000/- over and above the amount of Rs.8,78,00,000/- outstanding as on 01.04.2010, being brought forward from the earlier year, the total amount of loan outstanding was Rs.42,42,00,000/-. During this year, the assessee also paid back part of the loan amounting to Rs.11,78,00,000/-. The source for this amount paid towards loan repayment was the receipts from redemption of Mutual Funds. Further we noted the source during the

year, it had also received a sum of Rs.18,90,00,000/- as advance from the purchasers of the apartments.

F.Y. 2011-12 (Y.E. 31.03.2012)

In this year, no borrowals were made and in fact the assessee paid back a sum of Rs.6,14,00,000/-. During this year, the assessee had received a further amount of Rs.40,82,00,000/- as advances from the apartment purchasers. The amount of Rs.59,72,60,805/- mentioned by the CIT(A) is the total of these two receipts received in F.Y. 2010-11 [Rs.18,90,00,000/-] and F.Y. 2011-12 [Rs.40,82,00,000/-].

F.Y. 2012-13 (Y.E. 31.03.2013)

In this year, the year under appeal before Tribunal, the assessee had repaid the entire amount of Rs.24,50,00,000/- being the outstanding of the loan taken from EID and closed the loan account. The above facts narrated are exhibited in the table below :

BORROWINGS FROM EID PARRY INDIA LIMITED	
F.Y. 2010-11 (A.Y. 2011-12)	***Rs.***
Balance as on 01.04.2010	***8,78,00,000***
Add: *Additional borrowing during F.Y. 2010-11*	*33,64,00,000*
Less: *Repayment during FY 2010-11*	*11,78,00,000*
Closing balance as on 31.03.2011	***30,64,00,000***
F.Y. 2011-12 (A.Y. 2012-13)	
Balance as on 01.04.2011	***30,64,00,000***
Add: *Additional borrowing during F.Y. 2011-12*	-
Less: *Repayment during F.Y. 2011-12*	*6,14,00,000*
Closing balance as on 31.03.2012	***24,50,00,000***

F.Y. 2012-13 (A.Y. 2013-14)	
Balance as on 01.04.2012	***24,50,00,000***
Add: *Additional borrowing during F.Y. 2012-13*	-
Less: *Repayment during F.Y. 2012-13*	*24,50,00,000*
Closing balance as on 31.03.2013	**-**

25. The facts relating to the amount of Rs.30,00,00,000/- mentioned by the CIT(A) is that the assessee has taken on lease property belonging to Coromandel International Ltd. (CIL) and sub-leased this to Silk Road Sugars Ltd. (SRSL). The assessee was to leave a refundable lease deposit with CIL. It collected this amount from SRSL, also as a refundable lease deposit. On receipt of this amount from SRSL in 2007, it was passed on to CIL. The amount is exhibited in the Balance Sheet under the heads "Other Long Term Liabilities" [Note 4] and "Long Term Loans and Advances" [Note 8] copy enclosed at Page Nos. 205, 210 & 211 of assessee's Paper Book, as it is an amount to be received when the Lease Agreement expires. This amount being an amount due from CIL has been exhibited as per accounting principles. This amount is in turn refundable to SRSL, when they vacate the premises. Therefore, this amount is not an amount available with the assessee. Further since the assessee does not own any property on its own possession, it was not also able to obtain loans from any financial institutions and hence availed the loans from its holding company. It is also to be noted that the loan received from holding company is an unsecured

loan and the rate of interest paid is also @13%. Therefore, the stand of the CIT(A) that just because the loan was received from holding company and interest was paid to holding company only in order to reduce the income tax liability, holds no water. The payment of interest is also acknowledged by the holding company and returned to tax in its computation of income. It is further submitted that both the holding company and assessee are companies taxable at same tax rates and is therefore revenue neutral. The assessee had therefore borrowed from its holding company since it was not able to procure the money for its genuine needs from any other financial institutions and paid minimal interest on the borrowed capital. The assessee filed cash flow statement for the F.Y. 2009-10 to F.Y. 2013-14 in the assessee's paper book at Page Nos. 201 to 204, to substantiate.

26. As far as application of Section 40A(2)(b) is concerned, it is only where the expenditure is excessive or unreasonable having regard to the fair market value of the goods, services or facilities for which the payment is made or not for the legitimate needs of the business or profession of the assessee or the benefit derived by or accruing to him therefrom, the expenditure is considered to be excessive or unreasonable only then the expenditure shall not be allowed as a deduction. However, in the present case of assessee,

the borrowal of loan from holding company was only due to commercial expediency being to meet the genuine needs of the assessee and the expenditure is also not excessive or unreasonable, since it is paid only at the rate of 13%, which is far less than the fair market value of interest charged by financial institutions on unsecured loans. Only because the interest was paid to holding company, it cannot be held that the holding company is going to benefit by means of the receipt as it might have earned more if invested in its own line of businesses. Therefore, Section 40A(2)(b) is not applicable to the facts of the present case. Hence, we delete the enhancement on this count and the order of CIT(A) is reversed.

27. The next issue in the appeal of assessee is as regards to the order of CIT(A) confirming the action of the AO making addition by disallowing expenses relatable to exempt income u/s.14A of the Act read with Rule 8D(2) of the Rules amounting to Rs.2,87,984/-. For this assessee has raised the following grounds:-

Ground No. 3 – Disallowance under section 14A – Rs.2,87,984/- :

"3. Disallowance u/s.14A – Rs.2,87,984/- [Original Grounds of Appeal Nos.3 to 3.5]

3.1 The Commissioner of Income Tax (Appeals) grossly erred in upholding the disallowance u/s.14A read with Rule 8D.

3.2 The Commissioner of Income Tax (Appeals) ought to have appreciated that the Appellant itself worked out the disallowance at Rs.90,032/- on the basis of actuals.

28. We have heard rival contentions and gone through facts and circumstances of the case. Brief facts are that the assessee received the dividend income of Rs.30,01,078/- on an investment of Rs.15.12 crore. The assessee disallowed expenses relatable to exempt income suo-motto amounting to Rs.90,032/-. The AO invoking Rule 8D(2) computed the disallowance at Rs.3,78,016/- and thereby made further disallowance of Rs.2,87,984/-. The AO applied Rule 8D(2)(iii) and made this disallowance by taking average value of investment at 0.5% of the exempt income and computed the disallowance at Rs.3,78,061/-. Ld.counsel for the assessee now could not adduce any argument on this disallowance and hence, the disallowance is confirmed. This issue of assessee's appeal is dismissed.

29. The next issue in this appeal of assessee is as regards to the order of CIT(A) confirming the action of the AO in disallowing the provision of Rs.1.70 crores being payment made to CECL. For this assessee has raised the following ground:-

Ground No. 5 - Disallowance of Provision of Rs.1,70,00,000/- :

5.1 The Commissioner of Income Tax (Appeals) grossly erred in upholding the disallowance of provision of Rs.1.7 Crores.

5.2 The Commissioner of Income Tax (Appeals) ought to have appreciated that the payment was made subsequently to CECL and therefore is an allowable expenditure u/s.37.

5.3 The Commissioner of Income Tax (Appeals) ought to have appreciated that the same was wholly and exclusively for the purpose of the business of the Appellant and is hence allowable u/s.37.

30. Brief facts are that the assessee had created a Provision of Rs.1.7 Crores, which was disallowed by the Assessing Officer and upheld by the CIT(A). The facts leading to making of this provision is that CECL had vide letter dated 22.03.2013 indicated to the assessee that a sum of Rs.163 Lakhs was to be additionally paid to them as the expenses had exceeded the budgeted costs. Therefore, the assessee made a provision of Rs.1.7 Crores on the basis of prudence of this claim of CECL and claimed the same as expenditure in its accounts.

30.1 The assessee accepted the claim of CECL that some amount was payable due to escalation but the same was to be quantified, subject to negotiations. The debit to the accounts was made as the liability was acknowledged in the year. It was only the exact quantification that was postponed. Since the liability had arisen in this year, the amount was claimed in this year. The nomenclature

"Provisions" was used only because the need to quantify the exact amount due even though the claim was an ascertained liability.

31. After hearing both the sides, we noted that the assessee simpliciter created this provision just on the basis of presumption and claimed the same as payable due to escalation in cost but did not quantify it. It was claimed that the same was to be quantified subject to negotiations. In our view, this is totally unascertained liability and hence, the AO has rightly disallowed and CIT(A) confirmed. We confirm the order of the lower authorities on this issue.

32. In the result, the appeal filed by the assessee is partly-allowed.

Order pronounced in the open court on 3rd July, 2024 at Chennai.

Sd/-	Sd/-
(मनोज कुमार अग्रवाल)	(महावीर सिंह)
(MANOJ KUMAR AGGARWAL)	**(MAHAVIR SINGH)**
लेखा सदस्य/ACCOUNTANT MEMBER	उपाध्यक्ष /VICE PRESIDENT

चेन्नई/Chennai,
दिनांक/Dated, the 3rd July, 2024

RSR

आदेश की प्रतिलिपि अग्रेषित/Copy to:
1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त /CIT, Chennai
4. विभागीय प्रतिनिधि/DR
5. गार्ड फाईल/GF.