

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "G", MUMBAI**

**BEFORE SHRI NARENDER KUMAR CHOUDHRY, JUDICIAL MEMBER
AND
SHRI RATNESH NANDAN SAHAY, ACCOUNTANT MEMBER**

**ITA No.4431/M/2023
Assessment Year: 2018-19**

M/s. Supreme High Spaces LLP 301, Everest Classic, Linking Road, Khar West, Mumbai Maharashtra- 400052 PAN: ACDFS3233J	Vs.	NaFAC Delhi
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Ketan L. Vajani, CA
Revenue by : Smt Sujatha P. Iyengar, Sr. AR

Date of Hearing : 03.09. 2024
Date of Pronouncement : 07.11. 2024

O R D E R

Per : Narender Kumar Choudhry, Judicial Member:

This appeal has been preferred by the Assessee against the order dated 29.11.2023, impugned herein, passed by the National Faceless Appeal Center (NFAC)/ Ld. Commissioner of Income Tax (Appeals) (in short Ld. Commissioner) under section 250 of the Income Tax Act, 1961 (in short 'the Act') for the A.Y. 2018-19.

2. In the instant case, the Assessee has raised three main issues which pertains to following additions:

- 1) *Rs.3,10,245/- u/s 14A of the Act r.w.r. 8D of the IT Rules, 1962 (in short 'the Rules')*
- 2) *Rs.4,95,25,408/- as undisclosed income of the Assessee*
- 3) *Rs.3,16,21,494/- on account of interest income*

3. At the time of hearing, the Ld. Counsel of the Assessee did not press the issue no. 1, which pertains to the addition of Rs.3,10,245/- on account of disallowance u/s 14A of the Act. **Thus, this issue no.1 is dismissed as being not pressed.**

4. Coming to the 2nd issue, which pertains to the addition of Rs.4,95,25,408/-, the Assessee has claimed that during the AY under consideration, it was carrying on the real estate development project namely "**Amadore**" and has been following the percentage completion method. The Assessee during the AY under consideration could not secure at least 25% of the saleable project area by contracts or agreements with the buyers and therefore it has not recognized the revenue in view of clause 5(3) of the guidance notes issued by Institute of Chartered Accountants of India (ICAI), which mandates that for recognizing the revenue atleast 25% of the saleable project area by contracts or agreements with the buyers is to be secured.

5. The Assessing Officer (AO) by perusing the financial of the Assessee observed as under:

"From the audited profit & loss account of the Assessee it has observed that the Assessee has carried out two projects (1) Project Estabin (completed during the year) (2) Project Amadore (running project). Though the Assessee has disclosed revenue from real estate development/sale against proposed Estabin, but no revenue has been recognized from project "Amadore". As per balance sheet, total cost of construction as on 31.03.2018 in respect of project "Amadore" has been shown as Rs.84,08,93,144/- (WIP as per schedule 5 of balance sheet). On verification of available records, it is noticed that the Assessee in succeeding financial year i.e. F.Y. 2018-19 (in which financial year substantial sale from Amadore project was disclosed) disclosed investment in "Amadore" project to the tune of Rs.1,04,91,48,653/-. Such information was required to be gathered to calculate, whether minimum ceiling of 25% of total project cost has actually been incurred up to the financial year end or not and it has been found that 80% of the project "Amadore" was completed in F.Y. 2017-18. Therefore, revenue is to be recognized in F.Y. 2017-18 as per percentage completion method as prescribed in Ind. AS-09 r.w.s. 145 of the Act. And therefore considering the facts that sufficient advances were received against project Amadore and cost incurred on such project has already exceeded much more than 25% of total project cost".

The AO therefore on the aforesaid reasons and in order to verify the claim of the Assessee, vide notice dated 03.02.2021 asked the Assessee

to explain as to why corresponding income has not been offered for taxation.

6. The Assessee vide its response dated 09.02.2021 claimed that as per AS-9, to recognize the revenue there was another condition to fulfill i.e. 25% of the sale should happen i.e. registration of sales agreement and the purchaser has to pay the minimum 10% of the amount of consideration. In "Amadore project" sale agreements qua 8 flats consisting of 10,621.48 sq. ft. in total were registered. The area 10,621.48 sq. ft. was 12% of the total area of the project i.e. 90456.03 sq. ft. for total number of units 62, therefore the condition as prescribed in AS-9 for securing 25% sale, has not been fulfilled. Thus, for this reason, it had not offered the sale in the current assessment financial year.

7. The AO though considered the reply of the Assessee however, found the same as wrong mainly on the reasons that as per AS-09 or IAS-07 r.w. ICDS-4 notified as per section 145(1) of the Act, revenue is to be recognized when 25% of total cost of project has been completed. Hence, the explanation of the Assessee is not tenable and hereby rejected. Keeping in view that more than 25% of project was completed (substantially completed up to F.Y. 2017-18) and the Assessee received substantial number of advances from various customers against the sale of flats, recognition of revenue is being computed as per ICDS-IV r.w.s. 145(1)(2) of the Act as on 31.03.2018, is as under:

S. no.	Particulars	Amount
A	Total saleable area (in Sq ft)	90,456.03 sq. ft
B	Land cost	25,24,68,549/-
C	Estimated construction and development cost	79,66, 80,104/-.
D	Total, estimated cost (Land + Construction) *	104,91,48,653/-
E	Total area sold (in sq. ft.)	10.621.48 sq.ft

F	Total sale agreement value**	18,49,83,552/-
G	Amount collected	12,91,21,809/-
H	Cost incurred including land up to 31/03/2018	84,08,93,144/-
	Land cost	25,24,68,549/-
	Construction cost	58,84,24,595/-
	Total estimated cost as per (D)	104,91,48,653/-
J	Total actual cost incurred as per (H)	84,08,93,144
K	Percentage of completion (J/I) %	80.15%
L	Revenue to be recognized (F x K)	14,82,64,317/-
M	Percentages of sales %	11.74%
N	Cost allocation	98,73,89,089
	Land cost (H/AxE)	Rs.2,96,45,228/-
O	Construction cost (H/A x E)	Rs.6,90,93,681/-
P	Total cost of land & construction (E/A x J)	Rs.9,87,38,909/-
Q	Profit	Rs.4,95,25,408/-
R	WIP – Carried forward (Land + Expense) – (H-P)	Rs.74,21,54,235/-

7.1 The AO ultimately treated the amount of Rs.4,95,25,408/- being undisclosed income from real estate business and consequently added the same to the total income of the Assessee by observing and holding as under:

“The agreement for sale is considered to have the effect of transferring all significant risks and rewards of ownership to the buyer provided the agreement is legally enforceable and subject to the satisfaction of conditions which signify transferring of significant risks and rewards even though the legal title is not transferred or the possession of the real estate is not given to the buyer. Accordingly, any acts on the real estate performed by the seller are, in substance, performed on behalf of the buyer in the manner similar to a contractor. In this case the assessee has already collected around 70% of the total agreement value.

Therefore, the profit earned from Project Amadore as computed under percentage completion method ICDS-IV read with sec 145(1) & (2) of the IT Act, 1961 is Rs.4,95,25,408/- which the assessee has not disclosed in its P & L A/c Therefore, Rs.4,95,25,408/-, being undisclosed income from real estate business is added to the total income of the assessee. Penalty proceedings u/s 270A of the IT Act, 1961 is also being initiated for underreporting of income in consequence of misreporting of income.

Undisclosed income of Rs.4,95,25,408/-

8. The Ld. Commissioner on appeal affirmed the said addition mainly on the following reasons:

“That there is no dispute regarding applicability of percentage completion method (POCM). The ICAI guidance note mandates recognizing revenue based on the percentage of project cost incurred but not the total salable area. In this case 80.15% of the project cost had been incurred by 31.03.2018 making the Assessee’s argument on the 25% salable area threshold is irrelevant. Further, the Assessee had already received 70% of the sale consideration and therefore under AS-7 and ICDS-IV revenue should be recognized when significant risk and rewards of ownership are transferred which occurred through sale agreements making revenue recognition obligatory. The Assessee incorrectly claimed that only sale deeds triggered revenue recognition. Whereas sale agreements are sufficient for this purpose, as the same transfer the risk and rewards of ownership which in the instant case occurred while registering the sale deeds. The Assessee has already received substantial portion of sale consideration and there are no uncertainties regarding collection, therefore the revenue could not be deferred to a subsequent year. Further each flat or unit has to be treated as independent project and once ownership transferred, the related profit could not be postponed”.

9. The Assessee, being aggrieved, has also challenged this addition under consideration before us and submitted as under:

“That the Assessee was supposed to construct total 62 flats in the “Amadore project” with a total salable area of 90456.03 sq. ft. and out of 62 flats, agreements for sale had been entered into in respect of 8 flats only consisting of 10621.48 sq. ft. constructed area as on 31.03.2018. The total cost of construction of project as estimated was Rs.1,04,91,48,653/-, whereas the Assessee till 31-03-2018 has incurred the cost of Rs. 84,08,93,144/- only as it is clear from the schedule 5 in the audited accounts of the Assessee and therefore, AO held that the Assessee had incurred cost to the extent of 80.15% till 31.03.2018. The Assessee till 31.03.2018, has entered into agreements for sale in respect of only 11.7% of the total salable area. However, the AO took note of only one part i.e. cost of the construction incurred till 31.03.2018 and held that the revenue should have been offered at Rs.4,95,25,408/-”.

9.1 The Assessee further submitted as under:

“That the Ld. Commissioner almost on the same reasoning as of the AO and not following the ICAI guidelines affirmed the aforesaid addition. ICDS-3 is not applicable to the real estate developers including the Assessee herein. Further, principle of AS-7 cannot be applied without making due modification to the same. Similarly, though the basic principle of AS-9 for revenue recognition is relevant, however the same have to be suitably read so as to arrive at correct accounting principles to be followed by the real estate developers. As the ICAI has issued a guidance note on accounting for real estate transactions, from which it is clear that principle adopted for the accounting standard may be relevant for percentage completion method by the real estate developers. Further, principle laid down for application of percentage completion method as enumerated in para no.5 of the guidelines laid down certain principles/conditions (a) & (d) are required to be fulfilled completely and in toto. As the Assessee has not secured 25% of the salable area and therefore as per clause 5.3(c) of the guidance note, question for recognition of revenue does not arise. Even otherwise the Assessee

during the A.Y. 2019-2020 to 2021-22 has paid due taxes on the income as per return of income for all these issues, wherein the Assessee has shown and recognized the revenue from the "Amadore" project and it is admitted fact that the returns filed by the Assessee have also been accepted by the Revenue u/s 143(1) of the Act and therefore, income already offered in the earlier years and accepted by the Revenue Department, the addition if any is affirmed, would result double addition/taxation for the same income and therefore the same is not justified on this ground alone. Further, the Assessee has also submitted even otherwise in subsequent assessment years, the tax slab rate was same as 30% as applicable in the A.Y. under consideration. Hence, the question is only about the year of taxability of any particular income. The Assessee further relied on the judgment passed by the Hon'ble Apex Court in the case of CIT vs. Excel Industries Ltd. (2013) 358 ITR 295 (SC) as well as by the Tribunal in the case of Prateek Infra projects India Pvt. Ltd. vs. ACIT (ITA No.3129/Del/2019) order dated 03.08.2021".

10. On the contrary, the Ld. D.R. refuted the claim of the Assessee and supported the determination made by the authorities below, by submitting mainly as under:

1. There is no dispute regarding applicability of % completion method (POCM).
2. The ICAI Guidance Note mandates recognizing revenue based on the percentage of project cost Incurred, not the total saleable area. In this case, 80.15% of the project cost had been incurred by 31.03.2018, making the assessee's argument on the 25% saleable area threshold irrelevant.
3. The assessee had already received 70% of the sale consideration. Under AS-7 and ICDS-IV, revenue should be recognized when significant risks and rewards of ownership are transferred, which occurred through sale agreements, making revenue recognition obligatory.
4. The assessee incorrectly claimed that only sale deeds trigger revenue recognition. However, sale agreements are sufficient for this purpose, as they transfer the risks and rewards of ownership.
5. The judicial precedents cited by the assessee are distinguishable on the facts since in none of those decision it has been affirmed that for recognizing revenue % of saleable area is required to be followed. Also, in the present case, the project completion and collection of consideration were substantially advanced, making those decisions inapplicable.
6. The AO's and CIT(A)'s method of recognizing revenue under the Percentage of Completion Method is legally correct, and the addition of Rs. 4,95,25,408 to the assessee's income is justified.
7. And therefore, in view of the above discussion, the addition is liable to be sustained, by dismissing the appeal of the Assessee."

11. Having heard the parties and perusing the material available on record, we observe that it is not in controversy that the Assessee has consistently been following the percentage completion method and during the assessment year under consideration sold 8 flats consisting the area 10621.48 sq. ft. and on a consideration of Rs.18,49,83,552/- i.e. 11.7% of the sales to be recognized. It is not in controversy that as per AO, the Assessee during the assessment year under consideration has secured

sales to the extent of 11.74%, which has also been considered for computation of revenue recognition, as per percentage completion method as on 31.03.2018 as reflect in chart, noted at page 6-8 of the assessment. The Ld. Commissioner also affirmed the addition recognizing this fact that the Assessee has carried out the sale to the tune of Rs.18,49,83,552/-as taken into consideration by the AO for computation of revenue.

12. We further observe that the ICAI Guidelinelines/Notes as enshrined in clause 5.3, have prescribed certain parameters/conditions for recognizing the revenue under percentage completion method, which were also considered by the Hon'ble Co-ordinate Bench of the Tribunal at Bengaluru in the case of Krishna Campus Pvt. Ltd. vs. Dy. CIT (ITA No.1588/Bang/2019 decided on 08.06.2022) and by the Co-ordinate Bench of the Tribunal at Mumbai in the case of Reliable Builders & Developers (ITA No.4205/M/2023 & ors. decided on 30.09.2024). For completeness, ready reference and brevity, the conclusion drawn by the Hon'ble Co-ordinate Bench of the Tribunal in the case of Reliable Builders & Developers (supra) is reproduced as under:

"10. We observe that admittedly the Assessee was/is supposed to construct 23 story building (228 flats in total) and has completed the construction only and upto 1st slab of the 23-story building and thereafter the construction was stopped or remained on hold and as per admitted position, the project/construction is at standstill due financial crunches and legal impediments. From the certificate of architect i.e. Arch View Associates dated 13.06.2023, it is clear that up to 31.03.2023, the construction work has been completed up to 17.50% only on the site, as per the approved plan. Even the Assessee during the year under consideration has entered into with the agreements to sell of 24 flats only, as against 228 flats projected. Admittedly as per Guidance Note on Accounting for Real Estate Transactions (for entities to whom INDAS is applicable) for following the application of percentage completion method, the following parameters are prescribed which reads as under:

"Guidance Note on Accounting for Real Estate Transactions (for entities to whom Ind AS is applicable)

(The following is the text of the Guidance Note on Accounting for Real Estate Transactions, issued by the Council of the Institute of Chartered Accountants of India for entities to whom Ind AS is applicable.)

1. Objective and Scope
Objective

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1.3 *The Guidance Note primarily provides guidance on application of percentage of completion method, where it is appropriate to apply this method as explained in subsequent paragraphs as such transactions and activities of real estate have the same economic substance as construction contracts. For this purpose, the Guidance Note draws upon the principles enunciated in Ind AS 11, Construction Contracts. In respect of transactions of real estate which are in substance similar to delivery of goods principles enunciated in Ind AS 18, Revenue, are applied.*

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5. **Application of *Percentage Completion Method***

5.1 *The percentage completion method should be applied in the accounting of all real estate transactions/activities in the situations described in paragraph 3.3 above, i.e., where the economic substance is similar to construction contracts. Some further indicators of such transactions/activities are:*

(a) *The duration of such projects is beyond 12 months and the project commencement date and project completion date fall into different accounting periods.*

(b) *Most features of the project are common to construction contracts, viz., land development, structural engineering, architectural design, construction, etc.*

(c) *While individual units of the project are contracted to be delivered to different buyers these are interdependent upon or interrelated to completion of a number of common activities and/or provision of common amenities.*

(d) *The construction or development activities form a significant proportion of the project activity.*

5.2 *This method is applied when the outcome of a real estate project can be estimated reliably and when all the following conditions are satisfied:*

(a) *total project revenues can be estimated reliably;*

(b) *it is probable that the economic benefits associated with the project will flow to the entity;*

(c) *the project costs to complete the project and the stage of project completion at the reporting date can be measured reliably; and*

(d) the project costs attributable to the project can be clearly identified and measured reliably so that actual project costs incurred can be compared with prior estimates.

When the outcome of a project can be estimated reliably, project revenues and project costs associated with the project should be recognised as revenue and expenses respectively applying the percentage of completion method in the manner detailed in paragraphs 5.3 to 5.8 below.

5.3 Further to the conditions in paragraph 5.2 there is a rebuttable presumption that the outcome of a real estate project can be estimated reliably and that revenue should be recognised under the percentage completion method only when the events in (a) to (d) below are completed.

(a) All critical approvals necessary for commencement of the project have been obtained. These include, wherever applicable:

(i) Environmental and other clearances.

(ii) Approval of plans, designs, etc.

(iii) Title to land or other rights to development/ construction.

(iv) Change in land use.

(b) When the stage of completion of the project reaches a reasonable level of development. A reasonable level of development is not achieved if the expenditure incurred on construction and development costs is less than 25% of the construction and development costs as defined in paragraph 2.2 (c) read with paragraphs 2.3 to 2.5.

(c) At least 25% of the saleable project area is secured by contracts or agreements with buyers.

(d) At least 10% of the contract consideration as per the agreements of sale or any other legally enforceable documents are realised at the reporting date in respect of each of the contracts and it is reasonable to expect that the parties to such contracts will comply with the payment terms as defined in the contracts. To illustrate If there are 10 Agreements of sale and 10% of gross amount is realised in case of 8 agreements, revenue can be recognised with respect to these 8 agreements only.

5.4 When the outcome of a real estate project can be estimated reliably and the conditions stipulated in paragraphs 5.2 and 5.3 are satisfied, project revenue and project costs associated with the real estate project should be recognized as revenue and expenses by reference to the stage of completion of the project activity at the reporting date. For computation of revenue the stage of completion is arrived at with reference to the entire project costs incurred including land

costs, borrowing costs and construction and development costs as defined in paragraph 2.2. Whilst the method of determination of stage of completion with reference to project costs incurred is the preferred method, this Guidance Note does not prohibit other methods of determination of stage of completion, e.g., surveys of work done, technical estimation, etc. However, computation of revenue with reference to other methods of determination of stage of completion should not, in any case, exceed the revenue computed with reference to the 'project costs incurred method. Illustration appended to this Guidance Note clarifies the method of computation of revenue.

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{Highlighted by us for better understanding and ready reference}

10.1 Though the Assessee is not supposed to follow the “percentage completion method” as held by us above, even otherwise, if we still consider the parameters laid down for application of percentage completion method, as appears in para 5.3 of Guidance Note on Accounting for Real Estate Transactions, the revenue can be recognized under the percentage completion method only, when the parameters **a to d** as reproduced above, are achieved, which goes to show that **at least 25% of the saleable project area is to be secured by contracts or agreements with buyers** (as mandated in clause “5[3] c”). Here in the instant case, the admittedly Assessee out of 228 flats, has entered into agreements to sell of 24 flats only, which is admittedly 10.5 % only. The Assessee has also been able to demonstrate that though the project of Assessee consists of 23 storey residential building which is saleable, however, during the assessment year under consideration it has completed 1st slab only and thereafter the project was/is on hold owing to certain legal impediments and financial difficulties, as appears from the letter of the bank (supra) whereby the Bank has declared the loan availed by the Assessee as NPA and therefore the Assessee during the assessment year under consideration, has completed 10% of the project/saleable building only and few clients have made agreements to sell but not the sale deeds and therefore, the parameters/conditions as prescribed for application of “percentage completion method” though not admitted but even otherwise has not being achieved. “

13. From the decision of the Co-ordinate Benche of the Tribunal it is clear that for recognition of revenue under percentage completion method, conditions as prescribed in sub clauses (a) to (d) of clause 5(3) of the notes issued by ICAI, are required to be fulfilled simultaneously and in toto.

14. We observe from the impugned order that the Ld. Commissioner has not followed the said guidelines and discarded the claim of the Assessee and affirmed the aforesaid addition mainly on the following reasons that the Assessee has failed to provide the sales agreement executed and has filed only the first page of the agreement and the registration details suppressing the actual date of sale agreements with buyers, which presumably a date prior to the date of registration.

Further, non-submission of copy of full agreement document proves Assessee's conduct and intention as not bonafide. The presumption is found to be absolutely correct while examining certain ledger accounts. Further, the Assessee's argument of non fulfillment of 25% sale area is blatantly misleading, manipulative by an extrapolate and emphasizing the registration date and by suppressing the date of sale agreements. The argument put forward by the Assessee is thus not bonafide and deserves to be rejected. Further, the rebuttal presumption mentioned by the ICAI in para-no.5.3 itself having no sacrosanct value for determination of assessable income for ongoing project under the Act. The Assessee has failed to place any material before him to prove its contention that three conditions are cumulative. Logically the contention of the Assessee leads to an absurdity.

15. Whereas it is a fact that ICAI guidelines have been accepted by the Revenue Department as well as by the Higher Courts as well and admittedly the Assessee has not achieved the sale more than 11.74% of total estimated sale and therefore according to the guidance note (para 5.3) the Assessee was not supposed to recognize the revenue. Hence, the action of the Assessee cannot be faulted with.

16. Even otherwise in the subsequent assessment year, the Assessee has already recognized the revenue from the project under consideration. The Hon'ble Co-ordinate Bench of the Tribunal in the case of Prateek Infra projects India Pvt. Ltd. vs. ACIT (supra) has also considered the accounting principle set out under POCM read with guidance note and deleted the identical addition by taking cognizance of the fact that the Assessee has already offered the entire revenue for taxation. For brevity and ready reference and completeness the conclusion drawn by the Co-ordinate Bench of the Tribunal is reproduced herein below:

"11. We have given thoughtful consideration to the orders of the authorities below. It is true that the assessee recognized revenue in A.Y 2014-15 when the project was completed only 18.26% and as per the accounting principles read with Guidance Notes under PoCM, revenue has to be recognized after completion of 25% of the project. Revenue recognition can be understood from the following chart:

(Reproduction of the above table in the original order itself is not visible)

12. In our considered opinion, the action of the assessee company on the revenue reported by it on its project Prateek Edifice has not caused any loss to the revenue and the entire exercise is revenue neutral as the assessee has already offered complete amount of tax in the subsequent F.Y., and such completion was before passing of impugned assessment order, which is dated 29.12.2017. These facts clearly show that the Assessing Officer was well aware of the revenue recognized by the assessee from the entire project and the taxes paid by it.

13. It would be pertinent to consider the following decisions of the Hon'ble Supreme Court and the High Court of Delhi:

"CIT vs Triveni Engg. & Industries Ltd. [2011] 336 ITR 374 (Delhi High Court), "in the projected scenario of the instant case, 'the entire exercise was revenue neutral. It was a matter of record that against the provision of Rs. 1.39 lakhs, the assessee had to actually incur expenditure of Rs. 28.03 lakhs, i.e., more than the provision made. It was undisputed that the expenditure incurred by the assessee on the project was admissible deduction. The only dispute that the revenue sought to raise was regarding the year of allowability of expenditure. Considering that the assessee, was a company assessed at uniform rate of tax, the entire exercise of seeking to disturb the year of allowability of expenditure would, in any case, be revenue neutral."

14. After carefully perusing the documentary evidences brought to our notice, we find that the undisputed position that emerges is that the assessee is following consistent method of accounting to recognise revenue under the project. No doubt, the assessee has not included cost of land for computation of profit under PoCM, but before completion of project, the entire revenue has been offered for taxation which also included the impugned addition made by the Assessing Officer. We, therefore, do not find any merit in the impugned addition. Considering the facts of the case in totality, we direct the Assessing Officer to delete the addition. This ground is accordingly allowed."

17. The Hon'ble Apex Court in the case of CIT vs. Excel Industries Ltd. (supra) has also taken into consideration the similar fact that where the tax applicable in the present assessment year as well as in the subsequent assessment year was same and the Assessee has shown the amount in the subsequent accounting year, then there is no need for the revenue to continue with the litigation.

18. On the aforesaid facts and circumstances and analyzations, we are of the considered view, as the Assessee has not secured 25% of the sale

of the total saleable area and therefore as per the guidance note (para 5.3) was not supposed to recognize the revenue and consequently has not recognized the revenue and therefore on this aspect itself, the addition is unsustainable. Even otherwise the Assessee has already recognized the revenue in the subsequent years i.e. 2019-20 to 2021-22 and paid the relevant taxes on the revenue generated/earned and the returns filed by the Assessee have duly been processed u/s 143(1) of the Act and accepted by the CPC vide intimations/orders dated 22.02.2020 and 13.10.2022 respectively for the AY's 2019-20 and 2021-22, as filed before us by the Assessee, hence no purpose would be served by sustaining the addition. Even otherwise taxing the same income, which has already been offered for the taxation in the subsequent year, would amount to double taxation, which is not permissible as per law. Thus, on the aforesaid facts and circumstances, the addition in hand is unsustainable and consequently, the same is deleted.

19. Coming to the 3rd issue/addition of Rs. 3,16,21,494/- which was made on account of debenture interest, we observe that the Assessee company is also a shareholder in M/s. Turquoise Housing Society Private Limited (in short 'THPL') holding 99.995% of its shares. The remaining shares were/are with Mr. Vishal Suresh Jhumani and Mr. Sanmi Ramesh Bijhlani who are holding 1 share (0.0025%) and being an individual are also Directors of THPL. The Assessee from THPL on dated 28.08.2012 had purchased 13,36,500 debentures (optionally convertible redeemable debentures – ORCDs) @ Rs. 100 each, carrying a 6% coupon rate and for a total consideration of Rs. 13,36,50,000/-. The debentures were later converted into compulsorily convertible debenture (in short CCDs) in 2014.

19.1 The THPL vide Resolution dated 29.04.2016 stopped paying the interest from 01.04.2016 i.e. from the F.Y. 2016-17 and onwards.

19.2 The Assessee by issuing a letter dated 30.04.2016 (page No.245) has accepted the said condition/communication of THPL and waived the interest and therefore, has not earned/received any interest w.e.f.

01.04.2016 i.e. from the F.Y. 2016-17 and onwards. Consequently, the Assessee has not declared or recognized any income in its accounts on account of interest earned from the aforesaid debenture.

20. The Assessing Officer though considered the claim of the assessee, however, not being satisfied made the addition of Rs.3,16,21,494/- and added the same in the income of the Assessee by observing and holding as under:

"3.3 Accrued interest on debenture:

As per audited Balance sheet for F Yr 2017-18, assessee made total investment of Rs 52,70,24,899/- in 6% ORCD debenture of M/s Turquoise Housing Pvt Ltd. From the ITR filed by the assessee, it has been found that no interest on such debenture has been disclosed. Assessee vide this office notice u/s 142(1) of the IT Act, 1961 dated 14/01/2021 was requested to explain the reason behind so. Assessee vide its reply dated 21/01/2021 explained that:

"The firm had made investment in debentures issued by the Company Turquoise Hosing Private Limited, which was also owned by the firm with 100% holding. So the Company had decided not to provide any interest on debentures. So there is no interest accrued/credited."

On perusal of the debenture certificates it is clearly mentioned that the holder of investor of ORCD[Optionally or Redeemable Convertible Debentures] shall be entitled to receive interest @6% every year. Therefore, the reply of the assessee is not acceptable as the assessee maintains its books of account on mercantile basis so it must disclose the interest on accrual basis which the assessee failed to do so. Therefore, interest @6% on Rs 52,70,24,899/- which comes to Rs3,16,21,494/- is added to its total income under the head Income from Other Source and taxed accordingly. Penalty proceedings u/s 270A of the IT Act 1961 is also being initiated for underreporting of income in consequence of misreporting of income.

(Undisclosed interest income of Rs.3,16,21,494/-)"

21. The Assessee being aggrieved challenged this addition before Ld. Commissioner and mainly claimed as under and in support of its claim also relied on various judgments:

"The business operation of THPL had not started and therefore THPL has not generated any profit, which resulted into non-paying the interest on the debentures and consequently the resolution was passed by the THPL on dated 29/04/2016 for not paying the interest on debentures from financial year 2016-17 onwards. The Assessee in response to the resolution of THPL acknowledged its decision to forgo any interest on the debentures. The Assessee has no expectation of receiving any interest in the future and therefore, no interest income has accrued and therefore tax cannot be charged on notional income".

22. The Ld. Commissioner though considered the aforesaid claim of the Assessee, however, on the same reasoning, as of the AO rejected the claim of the Assessee and ultimately affirmed the aforesaid addition by observing and holding mainly as under:

" 1. The Assessee waived the interest by letter dated 30.04.2016 without any reason and claimed that interest income was not accrued in the previous year to be assessed in A.Y. 2018-19. Interest @ 6% coupon rate on debenture of Rs. 13,36,50,000/- is held to have been accrued on the date of debenture agreement due for payment at each year end. Relinquishment of right to receive interest on due date i.e. on 31.03.2018 may be an application of income without paying tax but cannot override accrual of income. Interest on debenture of Rs. 40,09,50,000/- acquired by the Assessee in F.Y. 2017-18 is definitely chargeable to tax on accrual basis since this debenture and accrued interest thereon are not covered in resolution dated 29.04.2016.

2. As per audited accounts of the company THPL for year ended 31.03.2018, the company liquidated its interest liability to the extent of Rs. 4,63,25,101/- and such liability was booked only in the name of assessee LLP for debenture loan of Rs. 53.46 crore in aggregate and in the name of Vishal Jumani for loan of Rs.10.36 crore.

3. In the audited financial statement for F.Y. 2017-18, the Auditor of the company THPL has stated in point No. 6 that "according to the information and explanation given to him, the company has not defaulted in repayment of dues to a financial institution or bank or debenture holder as the company has not taken any such loan."The Auditor's statement disproves the contention of the assessee.

4. The company THPL is found to be simply a name lender. Its act and conduct are dictated by Jumani group controlled and managed by Suresh Jumani and Vishal Jumani. An asset being land and building under construction standing as Inventory WIP in the balance sheet of THPL worth Rs. 64.64 crore was exclusively funded by Jumani group. It is found to be a colorable and sham device to divert all income likely to be derived from trading of the property to THPL, whose role is simply a 'benamdar'

5. Application of income (by foregoing debenture interest) or a pre-planned act or conduct to divert income may be permissible only after paying legitimate tax on such income which is lacking in the present case. From the act and conduct of the assessee in its totality, it is held it is an impermissible avoidance arrangement arising out of underlying hidden understanding amongst associated parties and entities. However, determination of tax effect of this arrangement is immature at this moment.

6. The assessee heavily stressed in financial incapacity of the borrower company THPL to justify its argument. But it is found that the company had adequate liquidity for having a real asset of land and building under construction worth Rs. 64.64 crore. Moreover, incapacity to pay or no prospect of recovery could not make the accrual of such interest income as non-accrual.

7. The assessee claimed that there was no hope for recovery of interest income from THPL. Still, it invested huge sum of Rs. 40.09 crore to the debenture of THPL in F. Y. 2017-18. The assessee itself had taken loan of Rs. 8.98 crore and claimed benefit of interest expenditure of Rs. 42.44 lakh whereas it had given up interest income of Rs. 3,16,21,494/- to its 100% subsidiary company THPL. The act and conduct does not prove and business expediency and disproves assessee's contentions and arguments.

8. Lastly, assessee argued that interest income cannot be charged to tax on notional basis. The Hon'ble Supreme Court in the case of State Bank of Travancore v. CIT (158 ITR 102) has been categorically held that in the case of sticky advance, the interest becomes taxable as per the notion of real income.

In this view of the matter, I am inclined to stay with the AO by holding that interest of Rs. 3,16,21,454/- on debenture was accrued in the hands of assessee in the previous year 2017-18

and chargeable to tax in A.Y. 2018-19. Accordingly, the addition is hereby confirmed and ground no 3 of the appeal is dismissed."

23. The Assessee being aggrieved also challenged this addition under consideration and claimed as under:

"Since the Assessee has waived its right to receive interest at the rate of 6% p.a. on the debentures held in the company THPL, with effect from 1.04.2006 and onwards and therefore it has neither interest nor accounted for the said interest in its books of accounts. However, the Assessing Officer made the addition of Rs. 3,16,21,494/- which is under consideration, on the basis of the initial term of issue of the debentures @ 6% of the investment made by the Assessee, which is in disregard of the fact that interest on debentures has already been waived and therefore, the same was neither accrued nor the Assessee has received such interest. Section 5 of the Income Tax Act defines the scope of total income for the purpose of levy of income tax, according to which the income which is either received or deemed to have been received by assessee or an income which is accrued or deemed to have been accrued to the assessee, can only be considered for the purpose of computation of total income and therefore in the facts of the case, there is neither receipt nor accrual of the amount under consideration, and hence the said amount cannot be covered within the scope of total income. It is a fact that the according to the arrangement made between Assessee and the THPC, the THPL company has also not claimed any deduction of interest on the debentures and similarly the assessee has also not received any interest, because the Assessee has no right to receive the said interest from the said company and therefore as per settled law, no addition qua notional income, is warranted.

The Hon'ble jurisdictional high court in the case of CIT(A) vs. Nion Solution Pvt. Ltd. (ITA No.2251 & 2360/M/2013 order dated 05.04.2016) has submitted that even in the mercantile system of accounting, an item would be regarded as income only, if there is certainty of receiving it and not when it has been waived. The decision of the Hon'ble Tribunal has been affirmed by the Hon'ble High court on the ground that Tribunal has taken a possible view, therefore the question raised by the revenue not give rise to the substantial of the law.

The Assessee further claimed that even otherwise the funds used for the investment in debentures were from Assessee's own fund and therefore, as per settled position of law, the Assessing Officer cannot enter into the shoes of Assessee and decide the manner in which the assessee needs to carry its business activity. Further the Assessing Officer cannot compel to Assessee to earn the interest income, when the Assessee has taken a view to waive off the interest, considering commercial expediency."

23.1 On the contrary, Ld. DR supported the decision of the Ld. Commissioner by submitting as under:

"That THPL Resolution dated 29.04.2016 for stopping the interest payment on the debentures, lacked its sanction, as the same was in violation of the terms of Companies Act being not approved by the NCLT. The resolution was made just to evade the taxes. The resolution passed by THPC Company and the later acknowledging the same, was signed without consent of all partners of the companies and therefore cannot be relied on.

Further the Assessee's letter dated 30.04.2016 waiving the interest did not neglect the facts that the interest has already accrued, as per the debenture's agreement. Further THPL's auditor's statements for the financial year 2017-18, contradicted the Assessee's claim that

THPL defaulted for interest payments being unable to fulfil its financial obligation. Further entire arrangements were made to divert the income. The waiver of interest cannot disprove income, which remains taxable. Further income, once it has accrued or even if it is later waived, cannot escape tax liability."

24. Having heard the parties and considering the rival claims of the parties and perusing the material available on the record, we observe that the assessee had purchased ORCD in the year 2012 for an amount of Rs. 12.24 crore of THPL, which were subsequently converted to CCD with the coupon rate @ 6% on the said CCD. It is also a fact that said investment has been made by the assessee from its own funds and Assessee has not utilised any borrowed funds for the purpose of making such investment in the group concern company (THPL). It is also a fact that THPL was supposed to undertake one real estate project at Pune on the basis of an idea conceived somewhere in the 2012, but due to various constrains/factors and adverse market conditions, the idea in real could not happen, as claimed by the Assessee and therefore, the said THPL company has not earned any revenue and consequently, was unable to pay interest on the debentures issued by it, which resulted into passing a Board's Resolution dated 29.04.2016 for not paying any interest on debentures issued by it from 01.04.2016 onwards. The Assessee by issuing a letter of waiver dated 30.04.2016, accepted the condition for not paying the interest by THPL, and therefore, from 1.04.2016 onwards no interest has been paid by THPL Ltd. It is also admitted fact that subsequently, during the financial year 2017-18, the Assessee acquired 100% shares of THPL and become 100% owner of the same. The Assessee has waived its right to receive interest which was agreed upon at initial purchase of debentures and therefore, has not received any such interest and consequently not accounted for the said interest in its books of accounts. It is also fact that THPL also has not claimed any deduction on account of alleged interest paid to the Assessee. However, both the authorities below vide respective orders made and affirmed the addition under consideration on the accrual basis, without considering the fact that the assessee in fact has not received any such interest.

24.1 We observe that the authorities below doubted the transaction carried out through the resolution and acceptance of the same by issuing a waiver letter by the Assessee's company and treated the same as sham transaction and not as per the provisions of law and/or in violation of the company's law act and further also doubted the arrangements made by the parties on technical or legal aspects.

24.2 It is trite to say, as held by the Hon'ble Apex Court in the cases SA Builders Ltd. Vs. CIT(A) (2007) 158 taxman 74/288 ITR 1(SC) and CIT Vs Panipat Woolen and General Mills Company Ltd. (1976) 103 ITR 66) and Shiv Ram Gupta Vs Commissioner of Income tax Delhi (2020) 117 taxman. com 871 (SC) that the Assessee has liberty to carry its business in its own way and in accordance with law. The Revenue cannot justifiably claim to put itself in the arms chair of the businessman or in the position of the board of directors. Further no businessman can be compelled to maximize its profit. The income tax authorities must not look at the matter from their own view point but has to look that of prudent businessman. Further commercial expediency would be seen from the view point of the businessman and not of the income tax department.

24.3 Further the Hon'ble apex court in the case of Commissioner of Income Tax Vs. Excel Industries Ltd 358 ITR 295 (SC) /(2013) has also held that hypothetical/notional income cannot be brought to tax under the income tax act, as settled by this court in the case of CIT Vs. Shoorji Vallabhdas and Company (1962) 46 ITR 144 (SC) , wherein it was held as under :

"Income-tax is a levy on income. No doubt, the Income-tax Act takes into account two points of time at which the liability to tax is attracted, viz., the accrual of the income or its receipt; but the substance of the matter is the income. If income does not result at all, there cannot be a tax, even though in book-keeping, an entry is made about a 'hypothetical income', which does not materialize. Where income has, in fact, been received and is subsequently given up in such circumstances that it remains the income of the recipient, even though given up, the tax may be payable. Where, however, the income can be said not to have resulted at all, there is obviously neither accrual nor receipt of income, even though an entry to that effect might, in certain circumstances, have been made in the books of account."

24.4 Even otherwise it is the mandate of the article 265 of the constitution of India “*that no tax shall be levied or collected except by authority of law*” meaning thereby tax can be levied only in accordance with law but not otherwise.

24.5 We further observe that Hon’ble Jurisdictional High Court in the case of Commissioner of Income Tax Vs Neon Solutions Pvt. Ltd. {Income Tax Appeal No.2251 Of 2013 decided on 05-04-2016 Citation: (2016) 387 ITR 667} has also dealt with an identical issue, as involved in this case or a case where Assessee in 2003 had subscribed to 2% non-convertible unsecured debentures of Rs.42 crores issued by one of its group companies viz. M/s. Marketing & Brand Solutions (I) Pvt. Ltd, who in response to a demand for interest from the Assessee requested waiver of interest on the debentures, as it was facing financial difficulties. The request was approved, interest was waived by the Assessee. Somehow the AO made the addition of Rs.84 lakh each being 2% interest on Rs.42 crores of debentures by Assessment Order passed under Section 143(3) of the Act and CIT(A) affirmed the same. However the Tribunal deleted the said addition, which was affirmed by the Hon’ble High Court, by analysing, observing and holding as under:

1. *These two Appeals under Section 260A of the Income Tax Act, 1961 (the Act) challenges the order dated 30th April, 2013 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned orders relate to Assessment Years 2007-08 and 2009-10.*

2. *Although numerous questions had been raised in the memo of appeal, the only question which arises for our consideration is:*

"Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in holding that in spite of following a mercantile system of accounting, the Respondent- Assessee was entitled not to bring the notional interest on debentures subscribed by it to tax?"

3. *The Respondent Assessee had in 2003 subscribed to 2% nonconvertible unsecured debentures of Rs.42 crores issued by one of its group companies viz. M/s. Marketing & Brand Solutions (I) Pvt. Ltd. On 20th May, 2004 M/s. Marketing & Brand Solutions (I) Pvt. Ltd. in response to a demand for interest from the Respondent Assessee requested waiver of interest on the debentures as it were facing financial difficulties. In fact on 31st May, 2004 at a meeting of debenture holders waiver of interest on the debentures till 31st March, 2010 was approved. Consequent to the above, the Board of Directors of the Respondent Assessee on 8th June, 2004 also passed a Resolution to waive interest on the debentures of M/s. Marketing &*

Brand Solutions (I) Pvt. Ltd. upto 31st March, 2010 and also duly informed the same to M/s. Marketing & Brand Solutions (I) Pvt. Ltd.

4. In the two assessment years under consideration, the Assessing Officer made addition of Rs.84 lakhs each being 2% interest on Rs.42 crores of debentures by Assessment Orders passed under Section 143(3) of the Act. This on the ground that waiver of interest for the six year period (2004 to 2010) by board resolution as produced is not believable.

5. In appeal the Commissioner of Income Tax (Appeals) upheld the orders of the Assessing Officer for both the subject assessment years.

6. On further appeal, the Tribunal by the impugned order takes into account the fact that even in mercantile system of accounting an item would be regarded as accrued income only if there is certainty of receiving it and not when it has been waived. The Tribunal has in the impugned order very succinctly set out the principles to be applied while recovering income in following the mercantile system of accounting:

"(A) that merely because assessee was following mercantile system of accounting, it could not be held that income had accrued to it.

(B) earning of the income, whether actual or notional, has to be seen from the viewpoint of a prudent assessee. If in given facts and circumstances the assessee decides not to charge interest in order to safeguard the principal amount and ensure its recovery, it cannot be said that he has acted in a manner in which no reasonable person can act.

(C) The guidance note on accrual of income on accounting issued by the ICAI lays down that where the ultimate collection with reasonable certainty is lacking, the revenue recognition is to be postponed to the extent of uncertainty involved. In terms of the guidance note, it is appropriate to recognise revenue in such cases only when it becomes reasonably certain that ultimate collection will be made.

(D) Non recognition of income on the ground that the income had not really accrued as the realisability of the principal outstanding itself was doubtful, is legally correct under the mercantile system of accounting, when the same is in accordance with ASI notified by the Government.

(E) It is one of the fundamental principles of accounting that, as a measure of prudence and following the principle of conservatism, the incomes are not taken into account till the point of time that there is a reasonable degree of certainty of its realization, while all anticipated losses are taken into account as soon as there is a possibility, howsoever uncertain, of such losses being incurred.

(F) The provisions of Section 145(1) are subject to, inter alia, mandate of ASI which also prescribes that "Accounting policies adopted by an assessee should be such so as to represent a true and fair view of the state of affairs of the business, profession or vocation in the financial statements prepared and presented on the basis of such accounting policies." In the name of compliance with Section 145(1), it cannot be open to anyone to force adoption of accounting policies which result in a distorted view of the affairs of the business. Therefore, even under the mercantile method of accounting, and, on peculiar facts of instant case, the assessee was justified in

following the policy of not recognising these interest revenues till the point of time when the uncertainty to realise the revenues vanished.

"The Tribunal further referred to the fact that the various resolutions which were passed by the company as well as the communication exchanged between the parties would establish on facts that interest has been waived. Further on facts it holds that there is no reason to disbelieve the resolution passed by the Respondent Assessee waiving interest. The Tribunal further adverted to the fact that subsequently, M/s. Marketing & Brand Solutions (I) Pvt. Ltd. had amalgamated with the Respondent Assessee which would also establish that the debentures issuing company was in serious financial difficulties which was incidentally a group company of the Respondent. The decision rendered by the Tribunal in the impugned order is a decision on facts and nothing has been shown to us which would warrant interference by this Court on account of any finding being perverse or arbitrary.

7. We were informed at the hearing that for the Assessment years prior to A.Y. 2007-08 no addition was sought to be made by the Revenue on account of notional interest.

8. The view taken by the Tribunal in the impugned order is a possible view. In these circumstances, the questions raised for our consideration does not give rise to any substantial question of law.

9. Accordingly, both the Appeals are dismissed. No order as to costs".

24.6 Coming to the instant case, we observe though the THPL has not suffered with serious financial difficulties, however it's a fact as observed above that THPL was supposed to undertake one real estate project at Pune on the basis of an idea conceived somewhere in the 2012, but due to various constrains/factors and adverse market conditions, the idea in real could not happen, as claimed by the Assessee and therefore, the said THPL company has not earned any revenue and consequently, was unable to pay interest on the debentures issued by it, which resulted into passing a Board's Resolution dated 29.04.2016 for not paying any interest on debentures issued by it from 01.04.2016 onwards. The Assessee duly accepted the resolution and waived its right and therefore the Assessee cannot be compelled to offer the income, which is neither accrued nor earned, hence on the aforesaid facts and circumstances and respectfully following the judgments of the Hon'ble Apex Court referred to above and specifically by the Jurisdictional High Court in the case of SION case (supra) which is directly on the issue/addition under consideration, we are inclined to delete the addition under consideration, hence the same is deleted.

25. In the result, the appeal filed by the Assessee stands allowed.

**Order pronounced on 07.11.2024 under rule 34(4) of the Income
Tax (Appellate Tribunal) Rules, 1963**

**Sd/-
(RATNESH NANDAN SAHAY)
ACCOUNTANT MEMBER**

**Sd/-
(NARENDER KUMAR CHOUDHRY)
JUDICIAL MEMBER**

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.