

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

BEFORE SRI MAHAVIR SINGH, JM AND SRI B. R. BASKARAN, AM

ITA Nos.3019,3020, 3021, 2985 & 2986/Mum/2011

(A.Ys.: 2004-05, 2005-06, 2008-09,2006-07 & 2007-08)

AND

ITA Nos.1097 and 5613/Mum/2013

(A.Ys. 2009-10 and 2010-11)

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| The Asst. Commissioner of Income Tax, Central Circle-21, 4 th floor, Aayakar Bhavan, Mumbai 400 020 | Vs. | M/s. Layer Exports Pvt. Ltd., 5C,Swapnalok,L.Jagmohandas Marg, Mumbai 400 036 PAN: AAACL 1418IL |
| Appellant | .. | Respondent |

ITA Nos.1927, 1907, 1928, 1929 and 1930/Mum/2011

(A.Ys. 2004-05, 2005-06, 2006-07, 2007-08 and 2008-09)

AND

ITA Nos.1842/Mum/2013 & 3378/Mum/2016

(A.Ys. 2008-09 & 2011-12)

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| M/s. Layer Exports Pvt. Ltd., 5C,Swapnalok,L. Jagmohandas Marg, Mumbai-400 036 PAN: AAACL 1418IL | Vs. | The Asst. Commissioner of Income Tax, Central Circle-21, 4 th floor, Aayakar Bhavan, Mumbai 400 020 |
| Appellant | .. | Respondent |

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|--------------------|----|---------------------------------|
| Revenue by | .. | Shri R. P. Meena, Sr. DR |
| Assessee by | .. | Shri Hariom Tulsyan, AR |

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|------------------------------|----|-------------------|
| Date of hearing | .. | 10-10-2016 |
| Date of pronouncement | .. | 31-10-2016 |

ORDER

PER MAHAVIR SINGH, JM:

Out of these fourteen cross appeals, seven are filed by the Revenue and the other seven are filed by the assessee.

2. Brief background of the case is that the assessee is a private limited company engaged in the business of development and construction of buildings and during the years under consideration, it undertook the development of residential project namely, Legend at Walkeshwar, Malabar Hills, South Mumbai having two wings viz. "Sea View" and "Necklace View". A Search operation u/s 132 of the Income-tax Act, 1961 (hereinafter

as 'the Act') was conducted at the residential/business premises of the Bharat Shah Group of cases on 13.03.2008 and subsequent dates. The assessee, interalia, was covered in the search operations but pursuant to search warrants drawn in respect of premises not belonging to the assessee. However, it was claimed by the assessee that search at the said premises did not lead to discovery of any unaccounted assets, investments or incriminating evidence whatsoever relating to the assessee. Copy of the panchanama drawn in joint names, interalia, incorporating the name of the assessee was filed. (enclosed at pages 15 - 119 and pages 124-130 of the Assessee's Paper Book-I). During the course of search operation u/s 132 of the Act on 15.03.2008 at the office premises of Prime Down Town Estates Pvt. Ltd (in short PDTEPL), a group company formerly known as Bharat Shah Estates P. Ltd., at 3rd Floor, 55 Gamdevi Road, Gamdevi, Mumbai, certain loose papers were found and seized by the search party and marked as Annexure A-1, pages 1 to 19. These loose papers contained recordings made in respect of on-money allegedly received by the assessee for Legend project. However, it was claimed by the assessee that the said papers were found in course of search operation of another person i.e. a distinct company independently assessed under the Act, before alleging that the said papers belonged to the assessee.

3. First, we will take up assessee's appeal in ITA No. 1927/Mum/2012 for the AY 2004-05, wherein the first issue on merits is as regards to the interpretation of the seized papers viz. Annexure A1 consisting of pages 1 to 19 containing noting of receipts of 'own money' by the assessee for flats in Legend Project as dumb loose sheets of papers. For this, assessee has raised following ground Nos. 2, 3 and 4:-

2. *That the Learned CIT (A) misdirected himself in accepting the AO's interpretation of the seized papers and rejecting appellant's interpretation of the same.*
3. *The Learned CIT (A) erred in ignoring the clinching evidences filed by the appellant in support of its interpretation of seized papers.*
4. *That the Learned CIT (A) erred in holding that impugned seized papers viz. Annexure A1, pages 1 to 19 contained notings of receipt of "on money" by the appellant for flats in Legend Project to the extent of Rs.57,14,15,087/- for A. Y. 2004-05."*

The Revenue in ITA No.3019/Mum/2011 for the assessment year 2004-05 has also raised the issue of deletion of addition of on-money receipts directing the AO to assess the same in the year in which project was completed. For this, the Revenue has raised the following grounds:-

“a) On the facts and in the circumstances of the case and in law, the Ld CIT (A) erred in concluding that the accounted cash receipts, which were received during the AY 2004-05 should be taxed in the year in which project was completed.

(b) On the facts and in the circumstances of the case and in law, the Ld CIT (A) has failed in appreciating that the income received by the assessee in the form of unaccounted receipts over and above the sale price shown in agreement represents the income of the assessee during the year current AY i.e. 2004-05, which was not recorded by the assessee in its books of accounts.

(c) On the facts and in the circumstances of the case and in law, the Ld CIT (A) has failed to appreciate that the said income has nothing to do with the accounting system followed by the assessee for recognizing the revenue and that the same should be taxed in the year in which it was received by the assessee.

(d) On the facts and in the circumstances of the case and in law, the Ld CIT (A) has erred in relying on the ratio laid down by the Hon'ble Bombay High Court in the case of Jalaram Jagruti Developers Pvt Ltd. Wherein unaccounted cash receipts were entered in the regular books of accounts whereas in the instant case the assessee has neither admitted the existence of unaccounted cash receipts nor accounted them in its regular books of accounts.

4. The AO observed that during the course of search u/s 132 of the Act on the office premises of PDTEPL on 15-03-2008 an Annexure A1 containing loose papers pages 1 to 19 were seized and copy of which are attached to the assessment order as Annexure A. The assessee before the AO explained the contents of these seized papers as under:-

“1. Page Number 1 to 16 appear to be rough estimates of working prepared by some-one, as can be seen from explanation appearing on page 12 of loose paper seized on 16.03.2006 (total pages 133). It appears that the working is estimated receipts on proposed sales of flats.

2. It appears that the working was done on the basis of possibility of sale of built up area of 2550 sq. ft. 4550 sq. ft. and 5675 sq. ft as the company was then trying to construct flats of built up area of 2550 sq. ft. and 5675 sq. ft.

3. *As the flats were proposed to be sold on the basis of built up area (i.e. carpet area + 20%) the working has been given for area then available @ 10,000/- per sq. ft.*

4. *As the person it appears, was suggesting providing of special house, by offering fully made up houses with interior work of high quality commensurate with the status of the buyer and location of the building, the rate of estimated realization is more than actual rate of sale of Rs.10,000/- per sq. ft.*

5. *Page 18 appears to be some working in respect of Petty Cash."*

The AO analyzed the seized materials and made inferences as listed in Para 3 to 14 of the assessment order. From the AO's analysis it seems that substantial parts of the total consideration of flats in Legend Project had been received in cash. The AO also brought out details from loose papers pages consisting of 1 to 19 i.e. saleable area of flats, floor-wise, which was mentioned and tallied with other papers as it was common practice among builders to charge super built up area from customers which is 35% to 40% over and above the carpet area and made agreement from built up area which includes carpet areas plus 20%. The inference drawn by the AO and the reply of the assessee was incorporated in the assessment order at pages 19 to 39, which we need not to reproduce from the assessment order. The AO considered the explanations of the assessee and submissions made by assessee on 24-11-2009 and finally made addition of Rs.57,14,15,087/- by interpreting seized papers viz. Annexure A1 consisting of pages 1 to 19 containing noting of receipts of 'on money' by the assessee for flats in Legend Project by observing as under:-

"Assessee's submissions in this regard are carefully considered but can't be accepted because of the following reasons:-

1. *Assessee has repeatedly contended that these loose papers are rough nothings only, in relation to prospective clients. But this fact can't be refuted that all these prospective clients are also ultimate buyers of the flats in the legend project. Further, these papers can't be just ignored as rough nothings, as the papers actually are informal ledger accounts of the flat purchasers. These pages contain nothings regarding the value of flats (including unaccounted receipts), noting of change in sales consideration (upon bargaining etc), details of receipt of cash & cheque over a period of time. It has been written over a period of time, after due thinking and consideration, as and when events like rate finalization, rate renegotiation, cash received, cheque /draft received have taken place. It*

contains all or most of details in respect of the sale transactions mentioned therein, viz-

- XI. Name of the main person negotiating for purchase of flat.*
- XII. Contact details of said person.*
- XIII. Super built up area*
- XIV. The rate finally decided to be charged per sq. f. & super built up area.*
- XV. Total money receivable*
- XVI. Breakup of money receivable into accounted and unaccounted portion.*
- XVII. Where renegotiation of rate has taken place, the renegotiated rate, revised total consideration and its breakup*
- XVIII. Details of cheque received from time to time*
- XIX. Details of cash received from time to time.*
- XX. Details of balance receivable*

17. It is clear, therefore that your contention that these papers are rough workings only is clearly wrong, as discussed above. It is not rough working, but a systematic working.

18. Assessee repeatedly claimed that SH represents Special House i.e. buyers have been offered to get the interiors done, which include tiling, furniture & fixture etc., for an additional ate of Rs. 5000 p.s.f and "Recd." Represents recording of all these proposals. But this contention of the assessee is also completely without any base and an afterthought. Assessee's claim that it is recording of first offer to clients is wrong as many papers contain details of actual receipts, including of accounted receipts. Assessee's explanation regarding "SH and Recd". Can't be accepted due to following reasons:-

a. Assessee is claiming sh nothing is for special house and recd means recording, but this seems to be an afterthought as none of the buyer, including those whose statements were recorded under oath, confirm that any such discussion was taken place regarding special house.

b. Assessee has no explanation as to why "chq/q", which means cheque payments, are mentioned along with Sh and their figures also tally with the figures which you accounted in your books for cheque payments.

c. On some pages, it is clearly written as "sh to receive", for eg. On page 6, which can't be even remotely linked to "recording", as inferred by you.

d. As per your claim, these are notings for recordings regarding special house, for which you were planning to charge approx. 5000 rs. Per sq. ft. from buyers, which is substantial amount, but you failed to identify the person, who has written these papers, And furthermore, are claiming that these are not written by any of the director, shareholder or authorized employee. On one side you don't know who has written the paper and on the other hand you are claiming that sh is abbreviation for special house

and recd. Is abbreviation for recording, which can't be accepted. Either you produce the person, who has written these papers or you accept that cash/ unaccounted money has been received.

e. These can't be rough notings, as in most of the papers, name of buyers match with actual buyers and almost all buyers know Bharat Shah personally. This is also evident from the fact that in many cases name of the buyer was mentioned in form of his surname and business concerns, for eg. On page 9, shishir Mehta in Belgium.

f. All your submission seems to be afterthought to avoid any tax liability, which is very evident from the fact that as per your claim you were planning to sell flats @ 10000rs. per sq ft chargeable on flats were sold @ 12000 rs per sq ft and more, for eg. Ashok Meta, Sujit Mehta, Ashok Siroya etc.

g. Regarding out of book receipts in form of US dollars, assessee h. company has claimed that, it might be regarding provision of substantial imported items for special house, as it was possible for the company to import such items as per government policy, however it has failed to provide any evidence to substantiate this claim of yours. All these seem to be part of your afterthought process.

19. Further, as contended by assessee, SH means special house, in which 5000 rs. PSF are charged for furniture, tiles etc. But, as it is evident from the loose papers itself that claim of the assessee is wrong, as on page no. 10, there is mention of sale of sample flat on 10th floor to Mr. Naresh Shah (sample flat means fully furnished flat, which is shown to prospective buyers) On this page, it is clearly mentioned that "F&F" i.e. for furniture and fixture, there will be separate charge of Rs. 70 lakh. If assessee's contention regarding SH i.e. special house and charging of Rs. 5000 psf is accepted, then, on each page, it must be separately mentioned as mentioned on page no. 10. This fact was also reconfirmed by Mr. Deepak Jain, Director of Sankhla Builders Pvt. Ltd. that Flat on 10th floor was fully completed with Furniture and fixture, Flooring etc and annexure to the agreement is also attached in this regard.

20. Beside this, Kranti Impex Pvt Ltd., Sankhla Builders Pvt. Ltd. and Mangalam Gems Pvt. Ltd are associate concerns and purchased flat no. 9,10, and 11 respectively. All these three flats are having same built-up area i.e of 1878.16 sq ft as per BMC plan, as per details submitted by assessee on 24.11.2009. But agreement for 9th and 11th floor is of 1989.26 sq ft, built-up area, whereas for 10th floor is of 1695.85, built-up area. Although flat no. 9 and 11 and 11th floor flats is Rs. 1,98,92,600, whereas of 10th floor flat is Rs.2,63,04,320, which is mainly because of the time difference and of the fact that 10th floor flat was sample flat and was fully furnished. And on pg. no. 10, there is also mention of F&F i.e. furniture and fixture of 70 lakhs, which also matches with the difference of Rs. 65 lakhs approx in the agreement value of 9th and 11th floor and 10th floor. From this instance, it can be inferred that, even if, in remotest sense, there is any proposal of special house, it can't be for Rs. 5000 per Sq. ft, as in

this case this difference is not more than 65 lakhs in any case, and is mainly because of time difference.

21. *In this respect, statements under oath of some buyers were also recorded, relevant extract of which, I am reproducing here:-*

Statement of Pranay Desai u/s 131, son of Chandravadan Desai, on 13.09.2009:-

Q.6. I am showing you page no.8 of loose paper file containing pages 1 to 19 in which Name of Mr. Chandravadan Desai and Mrs. Jyotsna Desai were written and it is mentioned that 19th and 20th floor has been sold to them. Further, it is being mentioned that they are being charged @Rs. 13200/- per sq. ft. for two flats and the total salable area charge to you is 4550 sq. ft. per flat. According to this calculation total consideration is coming at Rs 12,01,20,000/- (4500 x 2 x 13200). Further, there is mention that 4 parking are being sold to you @ Rs 5 lakh per parking, for which Rs.20 lakhs already been separately charged from you. Thus total consideration charged by M/s Layer Exports Pvt. Ltd, for flats on 19th and 20th floor, as per this loose paper seized from Mr. Bharat Shah's premises, who is the promoter of Layer Exports Pvt Ltd, comes to Rs. 12,21,20,000/- What you want to say about this?

Ans. We have nothing to do with this. We stand by the facts and figures which I am submitting to you.

Q.8 On this page No.8 itself it is mentioned that on 27.11.2003 cheque of Rs. 100 Lakhs has been received and on 1.12.2003 cheque of Rs. 100 lakhs has been received, which is also evident from the details submitted by you regarding cheque payment. Do you confirm this?

Ans. Yes I do confirm.

Statement of Ashok siroya u/s on 12.10.2009:-

Q.6 I am showing you page no.7 loose paper file containing pages 1 to 19 seized from Mr. Bharat Shah's premises. From this page it can be inferred that you have purchased flat on 14th floor in Legend project for which you have been charged at the rate of Rs.14,111/- for saleable area i.e. super built up area of 2550 sq. ft, which comes to Rs. 3,59,83,060/-. Further, it has been written that no parking has been given to you. It is also been written that total cheque consideration of Rs. 19892949/- is to be received by Layer Exports. Pvt. Ltd from you regarding 14th floor flat out of which Rs 100 lakhs has been received. This also tallied from the details submitted by Layer Exports that 4 cheques amounting to Rs. 25 lakhs, Rs. 26 lakhs, Rs. 25 lakhs and Rs. 24 lakhs has been paid by you total of which Rs. 100 lakhs. Thus all these details written on the page tallied with the details as per the books of accounts. Further, it is written that total cash consideration to be received is Rs. 16090101/- out of which rs 100 lakhs has already been received. Accordingly total consideration for this flat No. comes to Rs. 35983050/. What you want to say about?

Ans. I have booked the said flat in Y 2003-04 and also we have made the payment from November 2003 onwards. The final price was agreed at Rs. 2,37,52,200/- @ Rs 12647/- per sq. ft. (built up area). It was also agreed that parking space shall be provided at the time of possession. I further state that agreement for the said flat was executed on 10.10.2008 for total consideration at Rs. 2,37,52,200/- Details of payments have already been submitted. I state that we have made payments by cheque only and nothing has been paid by way of cash. I have seen the paper which you have mentioned in the question. I state that I have seen the paper first time and what is written on the papers is not in our knowledge. I totally deny that any payment is made by cash except cheques.

Statement of Ashok Mehta u/s 131, recorded on 1..10.2009, in the presence of Sh. Vijay Biyani, who is also AR of Layer exports Pvt. Ltd.

I am showing you page No. 16 from loose paper file 1 to 19 seized from Mr. Bharat Shah's premises in which your name Mr. Ashok R Mehta are written along with this 15th and 16th is written and "Sh recd 659.60" and "Q recd 285100" written. From this nothings, it can be inferred that Mr. Ashok R Mehta have bought 15th and 16th floor in Legend project and cheque of Rs. 2,85,00,000/- has been received. This also tallies with the details submitted by the assessee that the total of first three cheques received b the assessee vide cheque No. 910755, 910760, 633881 being Rs. 3500000, 20000000, and 5000000 total up to Rs 28500000/- . Accordingly, as it is the practice followed by Layer Exports Pvt. Ltd to write Q for cheque and Sh for cash, it can be clearly inferred that total Rs. 6,59,60,000/- has been received in cash for flats on 15th and 16th floor and Rs 285,00000/- has been received by cheque. Further, on this page "5x5=25" is written which can be clearly inferred as that total 5 car parking for a consideration of Rs. 25 lakhs has been purchased. This details also tallies with your previous answers that total 5 car parking were purchases?

Ans. I have not given any cash and the garages were including with the purchase of each flats as explained above i.e. 3 and 2 with all flats. Regarding cheque payment total payment paid by my family is Rs. 3,35,00,000/- and Rs. 1,18,00,000/- by me and my mother respectively.

Q.9 Do you confirm that first three cheques given by you to Layer Exports vide cheque No. 910755, 910760, 633881 being Rs. 3500000, 20000000, and 5000000 total up to Rs. 2,85,00,000/- as mentioned in question No.8, has been paid by you?

Ans. Yes I confirm.

From all these statements, it is ample clear that none of the buyer was aware of the noting on these loose papers, and particularly of words SH and Recd. From this it is clear that Assessee Company's contention that these notings on loose paper are recordings discussion with buyers is not correct.

3. Regarding sale of sample flat on 10th floor to Naresh Shah as mentioned on Page no. 10, assessee objected that this flat was sold to Sankhla Builders and not to Naresh Shah. However this contention of the assessee can't be accepted, as assessee has firstly sold this sample flat to Naresh Shah only, as it is also evident from loose paper no. 14, of Annexure A-1, containing pgs. 1 to 25, where in list of advances received for AY 2006-07, name of Naresh Shah is there, where as in List of advances for AY 2007-08, on loose page no. 13 of same annexure. This name is not there, as during AY 2007-08 only this flat was resold. This fact was also reconfirmed by Mr. Depak Jain director of Sankhla Builders in his statement und oath, recorded on 4.11.2009, which is being reproduced here.

Q-6. Is it true that flat on 10th floor was already sold by Layer Export to one Mr. Naresh Shah and it was a sample flat and surrendered back to Layer Exports by Mr. Naresh Shah?

Ans. Yes. The 10th floor flat, purchased by M/s Sankhala Builders Pvt. Ltd, was earlier sold to Mr. Naresh Shah by Layer Exports. Subsequently, it was surrendered back to layer Export and we have purchased the same from Layer Exports in 2006. This was a sample flat having furniture and fixtures and including two car parking space.”

Q-10. I am showing page No. 10 in which details regarding sale of flat on 10th floor are mentioned. Please explain its contents.

Ans. This page seem to belong to Mr. Naresh Shah, who has purchased flat earlier and surrendered it back to Layers Exports Pvt. Ltd. It was a sample flat completed with furniture and fixture, marble flooring, details of which are annexed in agreement also. For this flat, which I bought in 2006, I paid total consideration as per agreement only. I have not paid any amount over and above the agreement.”

Q.11. Do you know Mr. Naresh Shah, who was the owner of this flat previously?

Ans. We never dealt with him. We dealt with M/s Layer Exports directly. However, he is a proprietor of M/s N Shah BVBA and based in Antwerp, Belgium.”

Accordingly, it can be concluded that even page no. 10 was not rough noting and supported revenue's contention that notings on these pages are systematically recorded.

4. On these loose papers, saleable area is mentioned as 2550 sq. ft. up to 14th floor, 4500 sq ft from 14 to 25 floor, and 5675 sq ft for floors above 25th floor, as it is common practice among builders to charge super built-up area from customer, which is 35-40% over and above carpet area and make agreement for built-up area which is carpet area + 20 % and thus evade taxes. On being confronted on this fact, assessee refuted it and claimed that initially, at the time of submitting plan to BMC, it was

expected that 2550 sq ft saleable area will be allowed, but finally approved plan dt 13.9.2005, 2550 sq. ft area was not approved. This contention of the assessee can't be accepted at all, as it is evident from the loose paper no. 1 to 12 of Annexure A-1, containing pages 1 to 25 that assessee company has offered flats in Legend Project as security for credit facility in favour of B. Vijay Kumar & Co. and B. Vijay Kumar Jewellers. For security purposes, saleable area of flat is mentioned as 2550 sq. ft for 2nd to 8th floor and 6000 sq. ft on 31 and 32 floor. These saleable areas of flats are mentioned in letter dt 15.2.2006, 15.1.1.2007 of Layer Exports pvt. ltd. These letters are written in response to sanction letter of Oriental Bank of Commerce no. OBC.OHB/1014/2005 dt. 2.1.2006. Further there are also sanction letters by Oriental bank of Commerce, in which above mentioned are of flats are clearly mentioned. These loose papers no.1 to 12, thus clearly indicate to the fact that assessee company sold flats for super built up area only and make agreements for carpet area or built-up area. As per claims of the assessee company itself, final approval from BMC came on 13.9.2005, for which copy of the plan is also being submitted by them, however even in 2007, company keeps on showing saleable area of flat as 2550 sq ft and keeps on selling flats for saleable area of 2550 sq ft.

5. This contention of the revenue was further supported by valuation report by Yardi Prabhu consultants Pvt., who are approved valuer of Oriental Bank of Commerce, seized during search and marked as page no. 4 of Annexure A-2, containing loose pages from 1 to 183, in which it has been mentioned specifically that saleable area of 17m and 18th floor in Sea View wing in Legend Project is 5050 sq ft. and their present value as on 4.11.2005 was 10 crores on the basis of selling price method and Rs. 9 crores on distress sale method. Accordingly, it can be directly inferred from this that saleable area of each flat is super built-up area only is. 2550 sq ft, which has been clearly mentioned on Page no. 2 of Annexure-A1 of loose paper tile containing pages 1 to 19. Further on page no. 4 of loose paper file having pages 1 to 133. there is another valuation report, which reconfirms the fact mentioned in preceding sentences.

6. As per assessee company claim, these are notings for recordings regarding special house, for which they were planning to charge approx. 5000 rs. Per sq. ft. from buyers, which is substantial amount, but they failed to identify the person, who has written these papers. And furthermore, they are claiming that these are not written by any of the director, shareholder or authorized employee. On one side they don't know who has written the paper and on the other hand they are claiming that sh is abbreviation for special house and recd. is abbreviation for recording, which can't be accepted. They have been asked to either produce the person, who has written these papers or to accept that cash/unaccounted money has been received.

7. Assessee' 5 claim that SH stands for special House and Recd. stands for Recording is completely an afterthought as, during Search action, in his statement under oath, recorded on 8.5.2008, Mr. Bharat Shah, in clear words refuted that he is not aware of words "SH" '0'

RECD". Relevant extract of Mr. Bharat' Shah's reply is being reproduced here:

"Q.7 On the above mentioned pages at various places, it is written "Q" recd. and "SH" recd. Doesn't this indicate that part consideration has been received in cash and part in cheque?"

Ans. I do not know the meaning of "Q" and "SH" as mentioned in the pages 1 to 19 of Annexure A-1. I once again reiterate that these are certain rough workings and nowhere cash is mentioned on these pages."

This statement was given by Mr. Bharat Shah, chief promoter of Layer Exports Pvt. Ltd. in spite of the fact that in Question no. 5 of same statement, he mentioned about furnished flats. i.e Special House. Under oath.

22. *On the basis of above mentioned events, it clearly seems, that in order to suit his own needs, and to take benefit of accidental mention of special house in his statement, assessee created this theory for his own benefit and to evade taxes, that SH represent Special House and Recd. represents recording. But at the same time assessee failed to explain that what does "0/ ch/chq" and "SH to Receive" represents.*

23. *Assesses company has also failed to produce the person, who has written all these notings, although it keeps on claiming what SH means, what Recd. means. They also failed to explain as what all the figures, written on these 19 pages signifies and for what purpose they are written.*

24. *Assessee company is also relying on some writing on page no 12 of loose paper file containing pgs. 1 to 133, but failed to explain as who has written this page, in what context it has written, why this has been written on an official document i.e. credit approval letter issued by Global Trust bank, to which director it has been addressed, in which company's context it has been written, on which date it has been written, whose verbal instructions are mentioned in this letter.*

25. *Assessee company is also comparing its building with Navyug Niketan, which is in vicinity, but failed to mentioned the fact that Navyug Niketan Building is very old structure and not even having sufficient car parking space. Navyug Niketan is 20-40 years old structure, when parking, no one wants to enter any building. Further, in this area, very high society people resides, who owns a number of luxury cars, for which sufficient parking space is must, which is sufficiently available in Legend. This fact is also evident from the facts mentioned on the loose papers, in which parking are sold at the rate of Rs. 5 lakh per parking.*

26. *From pg 12, it can be clearly inferred that flat no. 31 & 32 in a. who as per records Diamexon, which is a famous diamond company, owned by Pankaj Mehta, who as per records submitted by assessee, purchased 29 end 30 and 31&: 32 floor are reserved for Rashesh Shah, son of Bharat Shah, promoter of layer exports Pvt. Ltd.. which must have*

been done to accommodate Rashesh Shah later on, as both Bharat shah and pankaj Mehta are from diamond trading community. From this page it is evident that 10.67.25.000 rs. have been received in cash is over and above cheque payment Assessee's submission in this regard has been considered but can't be accepted and accordingly addition of Rs. 10.67.25.000 on account of "on money' receipts has been made. '

27. *On the basis of all the facts and analysis as mentioned above, it is crystal clear that Assesses is actively involved in the practice of receiving "on money", i. e. out of books money and making agreement for very less value. Summary of yearwise receipts of "on m given below:*

| Name of purchase | Wing | Falt no. and area sold | Date of first payment | Accounted payment | Unaccounted payment | Page no | AY |
|-------------------------------|----------|------------------------|-----------------------|-------------------|--------------------------------|---------------|---------|
| Shishir Mehta | Sea | 10/1878.16 | 8/1/2004 | 1,98,92,949 | 2,1,32,051 | 9 | 2004-05 |
| Yogesh Mehta | Sea | 13/1878.16 | 5/11/2003 | 1,98,92,600 | 2,01,32,051 | 6 | 2004-05 |
| Ashok Siroya Lalita Siroya | Sea | 14/1878.16 | 4/11/2003 | 2,37,52,200 | 1,60,90,101 | 7 | 2004-05 |
| Ashok Mehta | Sea | 15,16/3466.44 | 29/08/2003 | 3,85,67,640 | 6,84,60,000 | 15 | 2004-05 |
| Kiran Kothari | Sea | 23,24/3011.29 | 22/05/2004 | 4,87,00,000 | 4,42,82,3324 | 16 | 2004-05 |
| Vipul Shah | Necklace | 6,7,8/5634 | 14/12/2003 | 5,85,06,710 | 4,17,71,153 | 4 | 2004-05 |
| Kranti Impex | Necklace | 9/1878.16 | 22/1/2004 | 1,98,92,600 | 2,06,32,051 | 11 | 2004-05 |
| Naresh Shah | Necklace | 10/1878.16 | 16/1/2006 | 2,63,04,320 | 2,76,32,051 | 10 | 2004-05 |
| Mangalam Gems | Necklace | 11/1878.16 | 16/1/2006 | 2,63,04,320 | 2,76,32,051 | 10 | 2004-05 |
| Maya Mehta | Necklace | 13/1878/.16 | 17/01/2004 | 2,03,50,200 | 1,93,57,051 | 3 | 2004-05 |
| Ramesh Mehta | Necklace | 14/1878.16 | 1/9/2003 | 2,03,50,200 | 1,93,57,051 | 3 | 2004-05 |
| Chandravad an Desai | Necklace | 19,20/3466.44 | 2/12/2003 | 4,19,80,608 | 8,01,39,192 | 8 | 2004-05 |
| Shrikant Mehta | Necklace | 21,22/3466.44 | 22/12/2005 | 4,82,09,400 | 10,02,10,600 | 14 | 2006-07 |
| Pankaj Mehta | Sea | 29,30/3864.92 | 10.10.2003 | 4,23,71,880 | 106750000 | 12 | 2004-05 |
| Sujit Mehta | Sea | 21,22/3466.44 | 2/9/2003 | 3,85,67,040 | 31047960 and 3,50,00,000 | 15 & 13 | 2004-05 |
| | | 23/41383.25 | | | 67,16,25,687 | | |
| Sujit Mehta | Sea | 21,22/3466.44 | 2/9/2003 | 3,85,67,040 | 31047960 and 3,50,00,000 | 15 & 13 | 2004-05 |
| | | 23/41383.25 | | | 67,16,25,687 | | |

28. *Accordingly, out of Rs. 67,16,25,687, Rs. 10,02,10,600 is being added in AY 2006-07, as date of first payment is 22.12.2005 and rest of the amount of Rs. 57,14,15,087 is being added back in AY 2004-05 as dates of first payments are falling in AY 2004-05."*

5. The CIT (A) also confirmed the action of the AO in making addition of 'on money' by observing as under:-

"10.0 I have gone through the facts related to Grounds no.1 and 2, assessment order, appellant's submissions and the seized materials.

10.1 The impugned seized material was found at 3rd floor, Plaza Panchsil, 55 Gamdevi Road, Huges Road, Mumbai-7, the premises which was used as site office for the construction projects carried out by Bharat

Shah group of cases including the appellant company's project "Legend" at Walkeshwar, Mumbai. These loose papers numbering 1 to 19 were found in a file and seized (Pl. see Panchnama – page 133 of the paper book).

10.2 The AO has analyzed the seized papers from page no.4 to 14 of the assessment order. Pages 3 to page 16 of the seized material contain the details of sales of flats in the appellant's project "Legend" in Walkeshwar. In these seized papers name of the purchaser is mentioned, Floor Numbers were mentioned. How many flats purchased in each floor is mentioned, which wing in which the flats are located (either Necklace View or Sea View), total space is mentioned, Amount per square feet is mentioned, purchasers phone number is mentioned, Total amount is mentioned, how much amount is received in cheque is mentioned, how much cash received (it is noted as SH Recd), how many parking spaces purchased is mentioned, amount payable on parking spaces is mentioned. It is also seen that on pages 1, 8 and 13 dates of 18.9.01, 8.7.03, 27.11.03, 1.12.03 and 1.10.03 are mentioned.

10.3 It is also seen from page 2 of Annexure 'A' of the seized material and other pages that the flats in Floor 1 to 14 were taken with space of 2550 sq. ft. and 15 to 24 at 4550 sq. ft. and above 25 flats at 5674 sq. ft. and rate per sq. feet is charged differently from different purchasers. But floor space mentioned was same in the respective floors.

10.4 It is also seen that the cheque payments were made on various times and the cheque payments tallies with the amount recorded in the books of accounts.

10.5 The cash payments were also received on various dates and in many cases how much balance money to be received is also mentioned.

10.6 The AO has elaborately discussed the contents in the seized papers from page 3 to 14 of the assessment order. The inference drawn by the AO is very correct and I am convinced that the appellant has collected "On Money" on sale of flats and it is not accounted.

10.7 The appellant's contention that 'SH' means Special House is not at all correct and the seized material clearly brings out the fact of receipt of cash and it is clear that the cash receipts are mentioned as "sh" i.e. last two words of cash. The AO has clearly brought out the reasons why the appellant's contention that SH cannot be considered as special house (as contended by the appellant) in pages 42 to 47 of the assessment order.

10.8 Further the words "Recd" is very clear that it is for "received". The receipt of cash on

In page 4 of the seized material it is mentioned as "SH to Receive" and "Q Recd".

Further it is mentioned as follows:

| | |
|--------------------|--------------------|
| | 10,14,50,000 |
| <i>Q</i> | <u>5,96,78,847</u> |
| <i>SH</i> | 4,17,71,153 |
| <i>Recd</i> | <u>2,33,75</u> |
| <u><i>Bal.</i></u> | 1,83,96,153 |

These entries clearly establish that 'Q' is cheque, 'SH' is cash and "Recd" is Received. The appellant's contention that "SH is Special House" and 'Recd is Recorded is disproved by this seized material.

10.9 Similarly in page 6 of the seized material the words "SH to Receive" is used.

Page 7 of the seized material used the word "Recd" and "Bals" which indicates the total amount, amount received and the balance to be received.

Page 9 used the word "SH Recd", "SH to Receive" and in the end, it is mentioned All Q/SH.

Full Recd.

These entries make it very clear that "SH" is Cash "Recd" is Received.

10.10 Similarly, in page 11 the words "chq to Recd" and "SH to Recv" "Q Recd full" are appearing. This clearly indicates that "SH" cannot be special house and "Recd" cannot be recorded. They mean only Cash Received.

10.11 The seized documents clearly proves that "SH" means cash and "Recd" means Received. The reasons mentioned above and the detailed analysis made by the AO from pages 3 to 14 of the assessment order and the detailed conclusions arrived by the AO in the assessment order makes it very clear that the appellant has received unaccounted cash (on money) on the flats sold in the project "Legend" developed by the appellant. The seized documents are detailing all details just like a Ledger listing out enormous details about the purchasers, No. of flats purchased, in which wing the flats are located, saleable area, built up area, Total amount, How much in cheque, how much in cash, How much amount in cheque received so far, how much cash received so far, how much cash is yet to be received. As mentioned in page 1, 8 and 13 dates are mentioned.

10.12 In view of all the above, I hold that the appellant has received unaccounted cash towards the sale of flats in the project "Legend".

10.13 Since the seized documents contains full details about the purchaser of flats in the project 'Legend' and the cheque payments and cash payments are recorded over a period and since the documents were seized from the site office of the construction projects carried out by the group, the appellant's contentions that these are loose, dumb papers and written by some third party cannot be accepted. Since the seized documents were seized from the site office of the project carried out by the

appellant's group, presumption u/s. 292 C has to be drawn and AO has correctly drawn the presumption and the AO's action is upheld The appellant's contentions are rejected.

10.14 The appellant tires to explain with the help of page no.12 Annexure A2 that the appellant wanted to construct Special Houses with Furniture and Fittings etc. and to charge Rs.5000/- per sq. ft. extra. Page no.12 of the Annexure A2 is reproduced below:

*To
The Director*

As per verbal instructions, I clarify the method of working in respect of estimated details of selling flat, which is subject to increase in area of flat to 2550 sq. ft. upon approval of extra FSI.

Buyers have been explained following pattern for sale of flats. Present approved carpet area is 1658 sq. ft. 20% is to be added for calculating built up area. Hence built up area is worked at 1989.29 sq. ft. Cost of bare flat = 1989.29 @ 10,000/- cost of special House (SH) Rs. 5000 per sq. ft. which will be charged for high quality Italian marble, kitchen, fixture and furniture as per their specification. This is receivable on start of work. The price of special house is negotiable depending on the fittings required by buyer. This is for the submission to the buyer. Accordingly, we can negotiate with the buyers."

10.15 The appellant has also tried to explain that it wanted to construct flats with 2550 sq. ft. built up area thinking it will get extra FSI but it has restricted to built up area of 1989.29 sq. ft.

10.16 The above contentions of the appellant are not correct. Page No.10 of the seized documents in Annexure A-1 (One of the pages of the impugned file containing 19 papers). This page 10 deals with the sample flat. The same flat is already constructed at the time of sale of this flat.

10.17 There is no scope of increase of FSI in this flat even if additional FSI is granted to the project. In this sample flat also, the purchaser was charged for 2550 sq. ft. of saleable area at the rate of Rs.15,500 sq. ft.

10.18 In view of this, the appellant's argument that it charged for 2550 sq. ft. thinking that additional FSI will be available to the project is not correct. From the seized material at page 2 (out of these 19 documents) it is very clear that the appellant wanted to charge for 2550 sq. ft. (saleable area) for the flats in floor 1 to 14 even though the built up area mentioned in the sale agreements is for lesser sq. ft. of built up area. The appellant has fixed 2550 sq. ft. as super built up area and charged from the purchasers accordingly and the price charged per sq. ft. is also higher than the price mentioned in the sale agreement. The appellant has charged from the customers on more area than the built up area mentioned in the

sale agreement and more price per sq. feet than the price mentioned in the sale agreement.

10.19 Pages 1 to 19 of Annexure A1 clearly proves the “on money” received and there is nothing in page no.12 of Annexure A2 to show “no on money was received”. There is also no evidence to show that any “on money” was returned back to the customers.

10.20 In view of this, the contents in page no.12 of Annexure 2 will not come to the rescue of the appellant. I am fully convinced that the evidences in pages 1 to 19 of Annexure A1 is more than sufficient to prove that the appellant has collected “on money” for the flats which are mentioned in these seized documents.

10.21 Further, the affidavit filed by the buyers of the flats and the statements made by the purchasers before the A. O. cannot be relied upon since these statements were made after lot of time from the date of search. The truth contained in the seized documents is so clear and obvious that the appellant has collected “on money” from the buyers of the flat. There is no additional evidence required to prove this truth other than the seized materials.”

Accordingly, the CIT (A) noted that the AO has elaborately discussed the contents of the seized papers from page 3 to 14 of the assessment order and inference drawn by the AO is very correct and he was convinced that the assessee had collected “On Money” on sale of flats and it is not accounted for by the assessee. He further noted that the assessee’s contention that ‘SH’ means Special House is not at all correct and the seized material clearly brings out the fact of receipt of cash and it is clear that the cash receipts are mentioned as “sh” i.e. last two words of cash. According to him, the AO has clearly brought out the reasons as to why assessee’s contention that SH cannot be considered as special house in pages 42 to 47 of the assessment order. Hence, he confirmed the order of AO on this issue. Aggrieved, assessee came in second appeal before Tribunal.

6. We have heard rival contentions and gone through facts and circumstances of the case. We have also gone through seized records, paper book filed by the assessee, case laws cited and orders of the lower authorities. On this first issue the dispute is, whether, in the instant case, additions of Rs. 57,14,15,087/- was made on the basis of incorrect/self-serving and prejudicial interpretation of noting made on dumb loose sheets of papers seized from the premises of PDEPL, a group

concern of the assessee. The assessee claims that since PDEPL is a distinct entity separately assessed to tax, before alleging that the papers seized from the premises of PDEPL belonged to the assessee, the AO was duty bound to comply with the provisions of section 153C of the Act, failing which the said materials could not be used against the assessee. Further, since the said papers were neither seized from the possession nor from the control of the assessee, the assessee was not bound by the presumption u/s 292C of the Act in respect of such papers. It was again claimed by the assessee, since the search in the assessee's own case did not lead to discovery of any incriminating material, whatsoever, against the assessee; the high pitched assessment framed u/s 153A of the Act was bad-in-law. Even otherwise, the seized papers were incorrectly and prejudicially interpreted against the assessee by the Authorities lower. We find that the assessment was made on account of on-money receipts recorded in the 19 loose papers marked as Annexure A-1 seized from the premises of PDTEPL.

7. Learned Counsel for the assessee narrated the facts that while making aforesaid additions, the AO completely brushed aside the consistent statements of the Directors of the assessee company denying any nexus with the impugned seized papers and also the statements and affidavits of the purchasers of the flats in 'Legend' project categorically denying any payment of on-money to the assessee. It was explained by Learned Counsel that the impugned loose papers were found lying in a room at the site office for construction project of PDTEPL at 55, Gamdevi Road, Gamdevi. The cleaning staff of the said office premises swore in his statement recorded in course of search on 13.03.2008 that Sri Ravi Nair, who was absent on the date of search, was in-charge of the said room. Copy of the aforesaid statement of Sri Prakash Vasant Mandovkar, cleaning staff is enclosed at pages 145-146 of the Assessee's Paper Book-I. In the said statement, Sri Mandovkar swore on oath that he was seeing the impugned papers for the first time and did not recognize the handwriting on the said papers. But, he argued that the AO interpreted the notings in the said loose sheets of papers at his own whims and caprice completely ignoring the explanations of the assessee and cogent evidence filed in support thereof. The AO alleged that the said seized papers recorded details of on-

money received in cash by the assessee over and above accounted receipts in cheque in respect of Legend project although no such noting was made in the said papers. The AO further alleged that the assessee was bound by the presumption u/s 132(4A) of the Act regarding the correctness of contents of the said loose papers and under section 132(4A) of the Act, the onus to disprove the same lay on the assessee. Learned Counsel explained that in the instant case, as would be evident from the facts on record, the impugned loose sheets of papers were found lying unattended at the site office for construction project of PDTEPL and the assessee denied all connections with the impugned papers for the reason that these papers did not bear the name of the company and further, the papers were not found to be written by any of the Directors, staff members or employees of the assessee. He argued that in fact, the author of the impugned papers remained unidentified and this is an incontrovertible fact. For this he placed reliance on the reply of Shri Bharat Shah question no. 4 of his statement recorded u/s 132(4) of the Act on 08.05.2008, wherein he stated that the impugned premises was visited by several customers/outsideers who in course of their dealings/discussions, made rough workings for prospective transactions. The said office was handled mainly by staff members of PDTEPL and the Directors of the company seldom visited the said premises. Copy of the said statement of Shri Bharat Shah is enclosed at pages 137-139 of the Assessee's Paper Book-I.

8. We find from the assessment order that the AO made an addition of Rs. 67,16,25,687/- on the basis of interpretation of scribbling on these 19 loose sheets of papers seized from the premises of PDTEPL. The year wise break-up of the addition is as under:-

| | |
|--------------|--------------------|
| A.Y. 2004-05 | Rs. 57,14,15,087/- |
| A.Y. 2006-07 | Rs. 10,02,10,600/- |

Further, based on the aforesaid addition of Rs. 67,16,25,687/- for total built- up area of 41,383.25 sq. ft. of flats sold, the AO extrapolated the resultant on- money @ Rs. 16,230/- per sq. ft. to the remaining flats in the project as under:-

| Assessment Year | Area sold as per BMC | Addition on account of alleged on-money @ Rs.16,230/- per sq. ft. |
|-----------------|----------------------|---|
| 2004-05 | 3466.44 | 5,62,60,321 |
| 2005-06 | 10766.24 | 17,47,36,075 |
| 2007-08 | 7013.59 | 11,38,30,565 |

In view of this, the AO made the following additions on account of on-money receipts in cash by assessee:-

- (i) Addition on account of on-money in respect of flats sold described in aforesaid 19 loose papers - Rs. 57,14,15,087/-.
- (ii) Further an addition of Rs. 10,02,10,600/- was made in AY 2006-07 in the hands of the assessee on the ground of representative assessee of Mr. Srikant Chandulal Mehta, one of the non-resident purchaser of the flats. The addition of Rs. 10.02 crores has been deleted by the CIT (A) and not challenged by the Revenue in appeal before the Tribunal.
- (iii) Addition in respect of other flats sold during the impugned years by extrapolating in results of 19 loose sheets of papers - Rs. 34,48,26,961/-.

9. Now before us Learned Counsel argued that on account of multiple reasons discussed supra, the impugned dumb loose sheets of papers seized from the premises of PDTEPL could not be used against assessee and were completely irrelevant & immaterial insofar as the assessment of the assessee was concerned. For this he explained that, without prejudice to the above, even the noting in the said papers was prejudicially and erroneously interpreted by the AO at his whims and fancies. It is strongly asserted that the impugned papers do not contain any noting in respect of on-money receipts by the assessee and no addition can be made on the basis of the same even if the said papers are presumed to be relevant for the purpose of assessment of the assessee. He argued that, since the impugned papers did not belong to the assessee and contained rough scribbling made by some unknown person, the assessee was neither answerable nor logically expected to explain or interpret the noting therein. On continuous insistence from the AO, the

assessee tried its level best to interpret the noting in the said papers on the basis of surrounding facts and circumstances and materials available on record. He referred to letter dated 06.08.2009, which was submitted during the course of assessment was asked by the AO vide show cause notice dated 26.06.2009, to explain the contents of the impugned loose papers. In response, the assessee submitted as under:

- "1. *Page Number 1 to 16 appear to be rough estimates of working prepared by someone, as can be seen from explanation appearing on page 12 of loose papers seized on 16.03.2006 (total pages 133).*
2. *It appears that the working is estimated receipts on proposed sales of flats.*
3. *It appears that working was done on the basis of possibility of sale of built up area of 2550 sq. ft 4550 sq. ft. and 5675 sq. ft as the company was then trying to construct flats of built up area of 2550 sq. ft. and 5674 sq. ft. As the flats were proposed to be sold on the basis of built up area (i.e. carpet area + 20%) the working has been given for area then available 10,000/-per sq. ft.*
4. *The paper it appears, was suggesting providing of special house, by offering fully made up houses with interior work of high quality commensurate with the status of the buyer and location of the building, the rate of estimated realization is more than actual rate of sale of Rs. 10,000/-per sq. ft.*
5. *Page 18 appears to be some working in respect of Petty Cash."*

Copy of the reply dated 06-08-2009 is enclosed at pages 181-187 of the Assessee's Paper Book-11. But, the AO disregarded the explanations filed by the assessee on the basis that the names of the buyers written on the said pages of Annexure A1 were matching with the actual buyers of the flats and their payment schedules. The AO issued show-cause notice dated 25-05-2009, which is reproduced at pages 3-16 of the assessment order for AY 2007-08, to the assessee analyzing the noting on the said pages. Extract of the same, AO's interpretation of page 4 of the loose papers at pages 6 to 7 of assessment order u/s 153A of the Act for AY 2007-08, is reproduced hereunder for the sake of clarity (Copy of the said loose paper is enclosed at page 97 of the Assessee's Paper Book-I):-

| Actual notings | A O's inference |
|--|--|
| <p>Page 4</p> <p>6.7.8 th Floor Vipul $2550 \times 3 \times 13,000 = 9,94,50,000$ Terrace $350 \times 13000 \times$ $1/3 = 15,17,000$ $4 \times 5 = 20,00,000$ 1029.67 1014,50</p> | <p>As the details contained in this page, purchaser is one Vipul. He has purchased 6th, 7th & 8th floor – total 3 flats. As per record submitted by the assessee, the flats have been purchased by one Sri Vipul P Shah in Necklace view. The writer has written in abbreviation eg. 10,29,67,000 is written as 1029.67. That 1029.67 is actually 102967000 is clear from plain mathematics. Adding 99450000, 1517000 and 2000000 the total of this is 102967000. As per these three flats each admeasuring 2550 sq. ft. have been sold at the rate of Rs.13,000 per square feet. The Terrace admeasuring 350 sq. ft. has also been sold at one third the going rate of Rs.13000 per square feet. In addition, four parking have also been sold at the rate of Rs.5000000 each. The total sale consideration is therefore Rs.102967000/-. This sale consideration is therefore Rs.102967000. This sale consideration has later been reduced to 10,14,50,000 as they have agreed not to charge for the terrace which it seems is being given for free.</p> |
| <p>CHQ 19898200 x 3 = 596946000 19892949 59678847 1029.67 Total 5,96,78,847 596,95 CH 4,32,88,153 432.72 SH</p> | <p>The total consideration of Rs.9945000/- + 20,00,000 has been bifurcated into 59678747 (19892949 x 3) by cheque and balance Rs.43288153 by cash. The two figures for cheque as well as cash has later been reduced in. This is because the assessee later seems to have agreed not to charge for the terrace. Thus, the prices have accordingly been modified. It is clear that the assessee uses abbreviation C and the abbreviation SH to mean cash.</p> |
| <p>432.72 4,32,88.153 -233.75 46.75 receive 198.97 1,99,13,153 Q received 13.50 200.00</p> <p style="text-align: right;">5 x SH to</p> | <p>Of Rs. 4,32,88,153/-, Rs.2,33,75,000/- has been received in cash and the balance of Rs.1,99,13,152/- cash is yet to be received. Further cheque of Rs.13.50 lacs and Rs.2 crores has been received as on that date. All these facts correspond with the regular books except for cash portion, for obvious reasons. The said 6th, 7th and 8th floor as per books and records have been purchased in the necklace view portion of the building by Sri Vipul V. Shah. Further, part of the proceeds seems to have been received in dollars. $5 \times 46.75 = 233.75$ means 500000 dollars at the rate of Rs.46.75 per dollar equal to Rs.23375000 has been received. This is clear because 233.75 has been deducted from 432.72 which is the cash consideration. The balance amount is Rs.43272000 which has later been changed to 43288153. The assessee has received cheque of 13.50 lacs and 200 lacs. This corresponds with payment of Rs.13.50 lakhs received by</p> |

| | | |
|------|--------------------|--|
| | | the assessee as per his books vide cheque numbers 18173, 18176, 18170, 18172, 18171, 18178, 18177, 18175 and 18174. Further, it is also seen that the next few cheques add to 200 lakhs. |
| Q | 10,14,50,000 | The consideration is 101450000 of cheque is 59678847 and cash is 41771153. Of this cash, the assessee has received 23375000. 23375 is actually 23375000 because 41771153 minus 23375000 is 1936153. The overall inference is that the assessee has been accepting sale consideration partly in cash and partly in cheque. The seized paper contains details of cash as well as cheque payments and consideration. The assessee has received 23375000 by way of cash. This payment has been received in dollar denomination. Clearly Q means Cheque and SH means cash. The details contained in this page have not been written in one go but over a period of time. |
| | 59678847 | |
| SH | <u>4,17,71,153</u> | |
| Recd | <u>23375</u> | |
| | <u>1,83,96,153</u> | |

Other pages of the impugned loose papers were analyzed in a similar fashion by the AO, complete details of which are available in the assessment order.

10. On the basis of the same, the AO issued show-cause notice dated 25.09.2009, which reads as under:

"From the above analysis of loose papers 1 to 19, it is clear that a substantial part of total consideration for flats in Legend has been received in cash by the assessee company. Most of the buyers are diamond merchants and know each other and Mr. Bharat Shah, promoter of Layer Exports Pvt. Ltd. very well. Further on page 2 of loose papers 1 to 19, saleable area of flats, floor-wise, is mentioned, which tallies with notings on other papers, as it is common practice among builders to charge super built up area from customers, which is 35-40% over and above carpet area and make agreement for built up area which is carpet area + 20%. Details of cash receipts, page wise, is given below:

| Name of Purchaser | Flat No. and area sold | Date of first payment | Accounted payment | Unaccounted payment | Page no. |
|-------------------------------|------------------------|-----------------------|-------------------|---------------------|----------|
| Shishir Mehta | 10/1988 | 8/1/2004 | 1,98,92,949 | 2,01,32,051 | 9 |
| Yogesh Mehta | 13/1989 | 5/11/2003 | 1,98,92,600 | 2,01,32,051 | 6 |
| Ashok Siroya Lalita Siroya | 14/1879 | 4/11/2003 | 2,37,52,200 | 1,60,90,101 | 7 |
| Vimla Mehta | 13, 16/3212 | 29/08/2008 | 3,85,67,640 | 6,84,60,000 | 15 |
| Kiran Kothari | 23,24/3212 | 22/05/2004 | 4,87,00,000 | 4,42,82,324 | 16 |
| Vipul Shah | 6,7,8/5088 | 15/12/2003 | 5,85,06,710 | 4,17,71,153 | 4 |

| | | | | | |
|----------------------------|------------|------------|--------------|--------------|----|
| Kranti Impex | 9/1990 | 22/1/2004 | 1,98,92,600 | 2,06,32,051 | 11 |
| Sankhla Builders Pvt. Ltd. | 10/1696 | 16/1/2006 | 2,63,04,320 | 2,76,32,051 | 10 |
| Mangalam Gems | 11/1990 | 2/1/2004 | 1,98,92,600 | 2,06,32,051 | 11 |
| Maya Mehta | 13/1685 | 17/01/2004 | 2,03,50,200 | 1,93,57,051 | 3 |
| Ramesh Mehta | 14/1695 | 1/9/1695 | 2,03,50,200 | 1,93,57,051 | 3 |
| Chandravadan Desai | 19,20/3498 | 2/12/2003 | 4,19,80,608 | 8,01,39,192 | 8 |
| Shrikant Mehta | 21,22/3498 | 22/12/2005 | 4,82,09,400 | 10,02,10,600 | 14 |
| | 33146 | | 40,62,92,027 | 49,80,52,727 | |

The learned Counsel for the assessee explained that further, from page no. 13 it was inferred by the AO that Rs. 3,50,00,000 has been received from Baka Mehta i.e. Suresh Chand Mehta, who is father and father-in-law of Sujit Mehta and Ashok Mehta respectively, who bought 21, 22, 15, 16 floors respectively. Similarly, from page no. 14, the AO inferred that total 7 flats are sold to one party by name "L.D." for total consideration of Rs. 35, 86, 25, 000/-. From pg. 12, the AO inferred that flat no. 31 & 32 in "Legend" have been sold to Diamexon, which is famous diamond company owned by Pankaj Mehta, who as per records submitted by the assessee, purchased 29 & 30 floor and 31 & 32 floor are reserved for Rashesh Shah, son of Bharat Shah, promoter of the assessee company which must have been done to accommodate Rashesh Shah later on, as both Bharat Shah and Pankaj Mehta are from diamond trading company. From this page, AO further inferred that Rs.10, 67, 25, 000/- have been received in cash i.e. over and above cheque payment. From notings on various pages, according to AO the cash portion has been received in the form of foreign currency i.e. in USD. The assessee was asked as to how the payment has been made in dollar denomination. Further on pg. 10 there is one noting 0032475265516 of a bank account number of someone?

11. Learned Counsel stated that in reply to the show-cause notice, the assessee filed complete explanation and complete text of which has been reproduced at pages 16-41 of assessment order u/s 153A of the Act for AY 2007-08, now before us filed copy of assessee's reply.(enclosed at pages 188-224 of the Assessee's Paper Book-11):-

"At the outset, we respectfully say and submit that as already pointed out earlier, the loose papers seized by the Department and on which reliance is sought to be placed by you appear to be rough working done by someone being then staff, which were only based on certain hopes, expectations and estimates and are most probably recording of first offer made to prospective clients. These papers do not reflect any notes relating to any concluded financial transactions. Most of the hopes and expectations on which workings were based having not come true, we submit that the loose papers seized by the Department have no relevance whatsoever. We submit that any reliance put on these loose papers will be against the principles of fair play, equity & justice....."

With reference to the 'inferences' sought to be drawn by you out of the seized loose papers, we respectfully submit that all your inferences are based on conjecture and surmises and are not supported by any actual evidences. We further submit that all the inferences are merely guesswork based on some imagination or speculative reading of the paper. None of the inferences are founded on Independent evidences. In the circumstances, we most respectfully submit that all the said inferences are totally baseless. However, without prejudice to our replies with the hope and expectation that the same would help you in arriving at a just, fair, equitable and unprejudiced view of the entire matter."

The Counsel explained that assessee gave page wise analysis of the noting in the seized papers and the same has been reproduced in toto in the assessment order for AY 2007-08. Since the noting on all the pages of the seized papers are made on similar lines, for the sake of discussion, the assessee's explanation in respect of noting in one of the pages i.e. page 4 of the loose papers was drawn our attention. Assessee's explanations (also reproduced at page 22 of assessment order for A.Y. 2007-08) as under:-

| Actual notings | Assessee's explanations |
|---|--|
| Page 4 (*2) 6, 7 th , 8 th Floor Vipul 2550 x 3 x 13,000 = 9,94,50,000 | As per explanation on page 12 as aforesaid the purchaser was shown working of amount to be charges as follows:- |
| Terrace 350 x 13000 x 1/3 =15,17,000 4 x 5 parking =20,00,000 1029.67 1014.50 | 1) Amount to be received as per saleable built-up area at the time of negotiation 1989.29 sq. ft. x 10000 = 19892949/- 2) A working it appears was prepared on the same page as the company was trying for built-up area of 2550 sq. ft. based on 2.5 FSI and had put up plan to BMC accordingly. The working it appears from page 12 aforesaid, was based on total consideration of Rs.13,000/- per sq. ft. for 2550 sq. ft. of built up area having |
| (*1) (*3) CHQ 19898200 x 3 = 59694600 19892949 59678847 | |

| | |
|--|--|
| <p>(*4)</p> <p style="text-align: right;">1029.67 Total 5,96,78,847</p> <p>596.95 CH</p> <p style="text-align: right;">4,32,88,153</p> <p>432.72 SH</p> | <p>Rs.3000/- as component representing consideration to be received upon providing Special House (SH). It appears that recording has been done after discussion with the purchaser and cost of Special House (SH) with Italian marble / granite and other interior work including furniture & fixtures has been arrived at Rs.3000/-. We have not been able to read dollar receipts on the loose papers as alleged by you. However with some of the customers providing of substantial imported items for special house was discussed as it was possible for us to import such items as per Government policy.</p> |
| <p>432.72</p> <p>4,32,88,153</p> <p>-233.75</p> <p>46.75</p> <p>.....</p> <p>receive</p> <p>198.97</p> <p>1,99,13,153</p> <p>Q received 13.50</p> <p style="text-align: right;">200.00</p> <p style="text-align: right;">5 x</p> <p style="text-align: right;">SH to</p> | <p>3) Initially charging of parking space at the rate of Rs.5,00,000/- was discussed as company was planning to provide enclosed garages. However, due to some or other problem in constructing and completing the building and appearance of an article in newspaper, regarding there being no taker for the flat, the company was forced to make sale and include open parking in the agreed rate of Rs.10,000/- per sq. ft. for built up area. The idea of enclosed parking was dropped because of consumption of FSI for the same.</p> <p>4) It appears from page 12 as aforesaid that SH represent "special house" and recd represents "recording" of discussion of special additional items like marble / granite / fittings etc. (imported or otherwise) or of cheques given by the party. It may be noted that the prevailing rate in the vicinity of the project for completed buildings like Navyug Niketan was Rs.10000/- & these buildings are better located.</p> <p>5) Deletion of price for terrace proves beyond doubt that was company was in difficulty and was not able to sell the property, mainly because of problems being faced by the company and newspaper articles as mentioned above and thus scribbling on these loose papers could not have been recording of initial offer and in fact final transaction has happened on much different terms which are correctly and completely recorded in books of account.</p> <p>6) These noting are not in respect of cash received as alleged. These are recording</p> |
| <p>(*5) (*6)</p> <p style="text-align: right;">10,14,50,000</p> <p>Q 59678847</p> <p>SH <u>4,17,71,153</u></p> <p>Recd <u>23375</u></p> <p style="text-align: right;"><u>1,83,96,153</u></p> | |

| | |
|--|---|
| | of preliminary discussion pertaining to probable expenses for providing Special House (SH). Thereafter recordings have been made for part approval for items (imported or otherwise) to be provided for making proposed Special House). |
|--|---|

Serial nos. 1 to 6 mentioned in brackets against noting in the left hand column with (*) mark are not noted in loose papers but have been inserted by assessee for co-relating/ explaining the corresponding points numbered 1 to 6 in the right hand column. The assessee also filed copy of the newspaper article referred to in the aforesaid table showing that the assessee was in difficulty and was not being able to sell the flat in Legend project is enclosed at page 242 of the Assessee's Paper Book-II.

12. Further, We find that assessee has referred to page 12 of loose paper marked Annexure A-2 containing pages 1 to 133 seized in course of search on Bharat Shah Real Estate P. Ltd. (now known as PDTEPL) in the premises at 6th Floor, Mehta Bhavan, 311, Charni Road, Mumbai in the aforesaid explanation. Copy of the relevant panchnama is enclosed at pages 124-130 of the assessee's Paper Book-1. Further, copy of page 12 of Annexure A-2 and typed copy thereof are enclosed at *pages* 113-114 of the assessee's Paper Book-I. The noting on said page 12 is reproduced hereunder:-

"To,

The Director,

As per verbal instructions, I clarify the method of working in respect of estimated details of selling flat, which is subject to increase in area of flat to 2550 sq. ft. upon approval of extra FSL.

Buyers have been explained following pattern for sale of flats. Present carpet area is 1658.19 sq. ft. 20 % is to be added for calculating built up area. Hence built up area is worked out at 1989.29 sq. ft. Cost of bare flat = 1989.29 @10,000/-. Cost of Special House (SH) Rs. 5000 per sq. ft. will be charged for high quality Italian marble, kitchen, fixture and furniture as per their specification. This is receivable on start of work. The price of special house is negotiable depending on the fittings required by buyer. This is the submission to the buyer. Accordingly we can negotiate with the buyers."

The aforesaid page 12 of loose paper file marked Annexure A-2 was also seized in course of search on PDTEPL as in the case of impugned loose papers marked Annexure A-1 (19 pages), albeit in course of search on the said company at a different premise. The assessee before us claimed that the said page 12 of Annexure A-2 clearly supports the interpretation of noting in Annexure A-1 as made by the assessee. The said page 12 also proves conclusively that 'SH' referred to in Annexure A-1 means Special House and not Cash as erroneously interpreted by the AO. But, the AO rejected the explanation of the assessee and reliance was placed on page 12 of Annexure A-2 on the following alleged grounds:-

- "1. Contents of this page no. 12 of loose paper file containing pages 1 to 133 are not clearly understandable.
2. This page is written without any context and without any signature.
3. As you are relying on this page, rate mentioned in this page is 1959.29 @ 1000, which you want to assume as Rs. 10000 per sq. ft. which is not acceptable.
4. Further, there is no mention of any date on this paper as it is written on which date and as you are completely relying on this paper, you are required to produce the person who has written this, as onus u/s 132(4A) of the Act is on you to prove all these things.
5. In this page there is mention that "subject to increase in area of flat to 2550 sq. ft. upon approval to extra FSI". You are hereby asked, as to when this proposal for extra FSI was made and please present all relevant supporting documents."

13. The learned Counsel for the assessee rebutted the objections of the AO in seriatim as under:-

1. *The contents of the impugned loose paper, page 12 is very much legible. Copy of the same is enclosed at page 113-114 of the Paper Book-I. Further, typed copy of the said page was also submitted before the AO.*
2. *Ironically, the loose papers marked Annexure A-i, pages 1 to 19 so emphatically relied upon by the AO for making additions of more than 111 crores in the hands of the appellant company were also written without any context, signature or date. However, the said papers were treated as relevant/sufficient evidence by the AO for making astronomical*

additions in the hands of the appellant company. Thus, the AO erred in taking contradictory stands, i.e. placing unconditional reliance on undated, unsigned and dumb loose sheets of papers marked Annexure A-1 on the one hand and rejecting notings on page 12 of Annexure A-2 on the other hand on the pretext that the same was undated and unsigned. Such a biased approach is bad-in-law. As far as the assessee is concerned, it admits that both Annexure A-1 and page 12 of Annexure A-2, being uncorroborated third party evidences are inconsequential/inadmissible evidence as far as the assessment of the assessee is concerned. Presumption u/s 132(4A) cannot be invoked against the assessee in respect of either of the said papers referred to above. However, the assessee has merely tried to interpret the notings made in one set of dumb loose papers (i.e. Annexure A-i) with the help of somewhat more elaborate and clearer notings in another set of seized papers. Since both the above referred annexure were seized in course of search operation of another person, the AO was required to give similar treatment to both of them i.e., either accept both or reject both. The AO cannot be allowed to blow hot and cold in the same breath.

3. *As would be evident from the copy of the relevant page 12 enclosed in the Paper Book, the rate mentioned is Rs. 10,000/- only and not Rs. 1,000/- as incorrectly read by the AO.*

4. *Both Annexure A-1 relied upon by the AO and Annexure A-2, page 12 relied upon by the assessee are undated and have been written by unidentified persons. As far as onus u/s 132(4A) is concerned, it has been sufficiently elaborated in the preceding paragraphs that since none of the papers were found from the possession or control of the assessee, the assessee was not bound by the presumption u/s 132(4A) in respect of any of them. Reliance on page 12 of Annexure A-2 has been placed by the assessee with the sole object of explaining the entries in Annexure A- 1.*

5. *The relevant documents relating to proposal for extra FSI were duly filed with the AO vide letter dated 28.10.2009. Copy of the covering letter for filing the said details before the AO is enclosed at **page 226 of the Paper Book-11** respectively. On a perusal of the same, Your Honour will appreciate that the assessee filed the following details with the AO:*

Copy of plan submitted for built up are of 2550 sq ft.

- (ii) Copy of IOD
- (iii) Copy of commencement certificate
- (iv) Various permissions of BMC etc.

Copies of the aforesaid documents are enclosed at pages 243-259 of the assessee's

Paper Book-11. The learned Counsel explained on a combined reading of page 12 of Annexure A-2 and pages 1 to 19 of Annexure A- 1, that it is amply clear that the noting on the impugned pages of Annexure A-1 are in the nature of rough workings/ estimates of expected realization from prospective clients under different scenarios i.e.

- (i) Expected realization if the impugned flats are sold Rs. 10,000/- per sq. ft. i.e. the rate prevailing at the time of negotiation on saleable built-up area as per BMC without any additional facilities as per on-going discussions with clients (referred to as 'basic rate' for the sake of discussion)
- (ii) Expected realization if the built-up area of 2550 sq. ft. based on plan submitted to BMC of 2.5 FSI is approved by BMC and the impugned flat is sold as Special House (SH) with extra facilities such as high quality Italian marble, furnished kitchen, other interior work etc.
- (iii) If the buyer opts for imported items, breakup of the cost thereof.
- (iv) Recordings of negotiations/ discussions made with prospective customers for probable expenses for items to be provided for making Special House.
- (v) If the deals materialized, in some cases recordings were also later on made in respect of cheques received from the purchasers. Since most of the purchasers did not opt for Special House and the extra FSI was not approved by BMC, realizations were made at basic rates as per BMC built-up area.

14. In view of these factual explanations, assessee contended that the said papers contain only rough workings of negotiations made over a period of time for on-going deals with prospective customers and not of any concluded transactions with the customers. As per the observation of the AO himself at page 7 of assessment order u/s 153A of the Act for AY 2007-08, the pages have not been written in one go but over a period of time explain the stand of the assessee that the impugned

papers only contain rough jottings of on-going negotiations with prospective clients and also proved from the fact that the so-called agreement values or the total amount receivable by cheque, as alleged by the AO as per noting in the said papers, do not, in most cases, match with the actual agreement values. It was explained that even the AO while summarizing the details of the noting on impugned papers in the table at page 15 of assessment order for AY 2007-08, table in Para 9.7, has taken the actual agreement value under the column showing 'accepted payment' and not the purported agreement value allegedly impounded in the seized papers.

15. We have gone through the table showing the actual agreement value vis-à-vis the purported agreement value as per seized papers as filed by the assessee before lower authorities:-

| Name of Purchaser | Flat No. and area sold | Actual agreement value | So-called agreement value as per seized papers | Seized Annexure-A-1 Page No. |
|-------------------------------|------------------------|------------------------|--|------------------------------|
| Yogesh Mehta | 13/1989 | 1,98,92,600 | 1,98,92,949 | 6 |
| Ashok Siroya Lalita Siroya | 14/1879 | 2,37,52,200 | 1,98,92,949 | 7 |
| Vimla Mehta* | 15, 16/3212 | 3,85,67,640 | 2,85,00,000 | 15 |
| Kiran Kothari | 23,24/3212 | 5,20,34,300 | 3,04,27,676 | 16 |
| Vipul Shah | 6,7,8/5088 | 5,85,06,710 | 5,96,78,847 | 4 |
| Kranti Impex | 9/1990 | 1,98,92,600 | 1,98,98,949 | 11 |
| Sankhla Builders Pvt. Ltd. | 10/1696 | 2,63,04,320 | 1,98,92,949 | 10 |
| Mangalam Gems | 11/1990 | 1,98,92,600 | 1,98,98,949 | 11 |
| Maya Mehta | 13/1685 | 2,03,50,200 | 1,93,57,051 | 3 |
| Ramesh Mehta | 14/1695 | 2,03,50,200 | 1,98,98,200 | 3 |
| Chandravadan Desai | 19,20/3498 | 4,19,80,608 | Not mentioned | 8 |
| Shrikant Mehta | 21,22/3498 | 4,82,09,400 | Not mentioned | 14 |
| | 33146 | 40,62,92,027 | | |

We have gone through all the impugned seized papers recording details of concluded transactions of the assessee company; the purported agreement values as interpreted by the AO from the seized papers, but find that most cases do not match with the actual agreement values. However, since the said papers apparently contained only recordings of initial discussions with prospective customers and not the concluded transactions, the aforesaid figures do not match and agreements have actually been concluded at different rates later on. We also find infirmities at this point that amongst the above parties, the total agreement value had been received before the

search date itself, still there is difference in the agreement value and so-called agreement value. Further, there is mismatch in the case of Shankhala Builders P. Ltd wherein the name mentioned on the seized paper is Mr. Naresh Shah. Even in this case, the agreement for sale of flat and the payment for purchase consideration had been before search date itself. This further proves that the seized paper relied upon are not reliable to make high additions without any corroborative evidence. At this juncture, it will be very pertinent to note that in the case of Smt. Lalita Ashok Siroya (joint buyer of flat no. 14 in Project Legend along with husband Ashok Siroya), the concerned AO made an addition of Rs. 1,04,67,410/- on account of alleged cash payments (of on-money) paid in respect of flat no. 14 on the basis of alleged recording made on page no. 7 of aforesaid Annexure A-1 found in course of search from the premises of PDTEPL but the CIT (A) note the following differences between the noting made in the seized paper and the actual state of affairs which proved the inference drawn by the AO is not proper and that the noting in the seized paper could not be held as genuine:-

- (i) The cheque payments of Rs. 1,98,92,949/- mentioned in the seized paper did not match with the actual cheque payment of Rs. 2,37,52,200/- made by the assessee and her husband as per agreement.
- (ii) The area of the flat as per the sheet was 2550 sq. ft. whereas the correct built up area as per the agreement was 1878.85 sq. ft.

We find that the AO tried to explain the difference in area as per seized sheet and as per agreement by stating that builders normally charge for super built up area which is 40% more than the carpet area and execute agreement showing area only 20% higher than the carpet area. In this regard, the concerned assessee i.e. Smt. Lalita Siroya stated that the AO had not pointed out any material for his conclusion of the aforesaid practice amongst builders. Further the area at which total sale consideration had been calculated in the loose sheet was 62% higher than the carpet area and therefore it was much beyond the 35-40% difference inferred by the AO. The CIT (A), in this case, observed and pointed out the following glaring mismatches between the recordings made on page 7 of Annexure A-1 and the actual state of affairs (at paras 4.8 to 4.10 of the order of CIT (A)), which are surmised as

under:-

- (iii) "Mismatch in the area of flat as per the sheet and as per the agreement is evident. The submission of the AO that sales of flat are made on the basis of super built up area which is about 35-40% higher than the carpet area also do not lead to the conclusion that said document relates to the assessee because carpet area of the flat is 1565.75 sq. ft. and therefore, super built up area being 40% higher than the carpet area would be 2192.05 sq. ft. whereas the area mentioned in the paper is 2550 sq. ft. If it is considered that super built up area is about 40% higher than the built up area, still the built up area would be 2630.46 sq. ft. But it would be 68% higher than the carpet area which appears ridiculous."
- (iv) "Secondly, the cheque amount as per the document is indisputably Rs. 1,98,92,949/- whereas the cheque amount actually paid by the assessee and her husband is Rs. 2,37,52,200/-. This fact is also discernable from Q No. 6 in the statement of Sri Ashok Siroya dt. 12.10.2009. Further as per the said sheet, cash amount of Rs. 56.70 lakhs is shown receivable whereas AO has proceeded on the premise that the entire cash of Rs. 1,60,90,101/- has been paid at the time of booking of flat on 04.11.2003."
- (v) "As per the details of payment furnished vide page 1 of the Paper Book and reproduced in Para 4.1 above, total cheque payment in F.Y. 2003-04 is Rs. 1,53,00,000/-, 76,00,000/- paid by the assessee and Rs. 77,00,000/- paid by Shri Ashok Siroya (husband of the assessee). Date of search in this case is 15.03.2008 and from the details of payment in the said chart, the entire cheque payment of Rs. 2,37,52,200/- has been made by 18.02.2008. As per the seized document, cheque payment received, as seen, is Rs. 1 crore only. Therefore, even the details of cheque payment till the date of search do not match with the noting in the sheet."

In view of the above observations, the CIT (A) in the case of Smt. Lalita Ashok Siroya finally held as under:-

"On a careful examination of the copy of seized document as provided together with the facts as admitted, and in light of the glaring mismatches as above, and absence of any independent, reliable, corroborative evidence, It cannot be said that the said document, in any manner, can be held as genuine and reliable to hold that the assessee had paid unaccounted cash for the purchase of property as held by the AO."

Similar decision was also made by the CIT (A) in the case of Sri Ashok Siroya and Smt. Vimla Mehta.

16. We find that in the case of Smt. Lalita Ashok Siroya decisions of the CIT (A) fortify the assessee's consistent stand that the noting in seized papers Annexure A-1 cannot be held to be conclusive enough to make such additions in the hands of the present assessee. Here we are placing reliance on the judgment of the Hon'ble Supreme Court in the case of CIT vs. P.V. Kalyanasundaram 294 ITR 49 (Copy enclosed at pages 261.1-261.5 of Paper Book), wherein the Hon'ble Supreme Court upheld the decision of the ITAT that *"noting on the loose pieces of paper on the basis of which the initial suspicion with regard to the undervaluation had been raised were vague and could not be relied upon as it appeared that the total area with respect to the sale deed and that reflected in the loose sheet was discrepant. It was also observed that as per the guidelines for registration the fair value for registration on the relevant date was Rs. 244 to Rs. 400 per sq. ft. and the sale consideration for Rs, 850 per sq. ft. claimed by the Revenue was unrealistic and ignored the ground situation."*

17. As regards to other allegations of the AO in the aforesaid show-cause notice dated 25.09.2009, regarding charge from the customers on the basis of payment of Rs 3.5crores to Baka Mehta, for supposed sale of 7 flats to L.D. alleged sale of flat nos. 31 & 32 to Diamexon, we find that the assessee explained before the lower authorities as under:

"As regards your remark on page no 23 & 24 wherein you have listed alleged unaccounted payments & common practice among builders to charge super built up area, it is once again reiterated that inferences sought to be drawn by you out of seized loose papers and listed on page nos. 23 & 24 of your show cause notice are based on conjectures and surmises and are not supported by any actual evidences. We further submit that all the inferences are merely guesswork based on unsupportable rumors. None of the inferences are founded on independent evidence. In the circumstances, we most respectfully submit that all the said inferences are totally unreliable.

It is further stated that your inference as regards page no. 13 that Rs. 3,50,00,000 was received from Sri Baka Mehta is totally unsupported by any evidence.

As regards your remarks regarding page no. 14 alleging that 7 flats sold to one Mr. L.D. is again without any basis as it can be seen that there is mention of flat on 21st & 22nd floor which has been sold for which details have been filed with you.

There are several judicial decisions to the effect that no inference can be drawn on market gossips unless there is positive proof to support it.

It may further be observed that these loose papers are scribbled partly in pencil and partly in ink which shows that they are rough notings & are not details of any concluded transaction. It appears that some of these notings may be in respect of proposals & negotiations carried out in the year 2001."

We have also gone through the statement of Sri Sujit S. Mehta son of Baka Mehta recorded u/s 131 on 23.09.2009, which buttresses the aforesaid denial of the assessee in respect of alleged payment of Rs. 3.5 crores by Baka Mehta (Copy enclosed at pages 153-155 of Paper Book-1). Relevant portions of the statement are reproduced as under:

"Q. 10. Is it true that your father Mr. Sureshchandra Mehta was known as Baka Mehta in business circle"

Ans. Yes. He was known as Baka Mehta.

Q. 11. On page 13 of loose paper file containing pages 1 to 19 it is written "Baka Mehta" on upper right hand side and down side it is written "Sh reed 350" can it not be interpreted that your father must have paid Rs. 3.50 crores in cash to Layer Exports?"

Ans. My father died on 6.7.2003 and I entered into agreement for this flat on 12.6.2006, however, I made the first payment for this flat on 30.8.2003 of Rs. 21 lakhs i.e. even if it can be considered that the flat was purchased in August 2003 for which payment was made, my father already died before the first payment i.e. confirmation of flat."

In view of the fact that Sh. Baka Mehta died on 06.07.2003, and first installment was paid only on 30.08.2003, the allegation of the AO regarding receipt of Rs. 3.50 crores from Baka Mehta is without any basis and moreover no further investigation was done on the son of Sh Baka Mehta. Further, in respect of market rates of flats in similar buildings in the vicinity, the assessee vide letter dated 07-12-2009 filed before the AO, submitted as under (also reproduced at pages 47-51 of assessment order for AY.2007-08):-

"You may kindly appreciate the following facts:-

Rates offered in our building are very much comparable with surrounding buildings under construction and ready buildings available at the time and also the rates at which transaction have

concluded and registered. This can be compared with the information available with the Income-tax Department itself. Our building we are only giving the basic structure without any fittings and furnishings or any further amenities compared to other buildings where amenities like Gymnasium, swimming pool, health clubs etc. are provided. These buildings also provide excellent bathroom fittings, flooring, furnishings etc. as against our building where no such facilities are being provided.

The location of our building is inferior in comparison to other buildings in the area. Moreover even from the financial angle our terms and conditions were different from other builders who were giving liberal installments and thus fetching a higher price and in case of ready buildings full payment is required. Substantial initial payment has saved as interest expenses, but at the same time it has curtailed our ability to quote a higher price.

It may be noted that in spite of media hype for non-saleability of flats in Legend building (relevant newspaper article is enclosed), we were also able to sell at market rate at that time. Our building has not been able to receive the occupation certificate till date which shows that our building was at a disadvantage compared to other buildings in the nearby area. Still we have been able to sell the flat at market price. It may kindly be noted that the rates being considered by your office based on loose papers is not at all comparable with the prevailing rates, as can be verified from comparable sale instances that are available with the Income-tax department.

We have submitted various sale agreements pertaining to relevant location and period. We therefore request you that instead of going by conjecture and hypothesis, the best way to judge correctness or otherwise of price of the flat will be to compare them with other buildings coming up at that time or completed during that time and other ready flats in the area.....

You will appreciate that at about 10000/- per sq. ft. ready possession flats were being sold in the nearby vicinity, evidence in this regard have been filed. We are unable to understand how buyer could have purchased bare flats at rates as mentioned in loose papers in a building which was under construction and when completion date was also not certain..... ”

But, here also, the AO failed to controvert the aforesaid submission of the assessee.

18. The assessee has placed reliance on co-ordinate bench decision of Mumbai Tribunal in the case of Harish Daulatram Innani Vs. DCIT (Inv) (2008) 24 SOT 541 (Mum) wherein it is held as under: (Copy enclosed at pages 493-504 of

assessee's Paper Book):-

"Addition in block assessment towards undisclosed investment on account of payment of on-money by the assessee in purchase of flats on the basis of loose papers found during search could not be made by ignoring the specific denial by assessee in his statement u/s 132(4) and by the seller u/s 131 more so when comparable cases furnished by the assessee stood uncontroverted."

19. We further find that the lower authorities has further alleged, particularly on page 53 of the assessment order for AY 200708, that the assessee's contention that SH means Special House for which Rs. 5000 per square feet (PSF) was charged for special amenities was incorrect in view of noting on page 10 of the seized papers which contained details of sample flats sold on 10th Floor to Mr. Naresh Shah. On the said page, it was mentioned that Rs. 70 lakhs was chargeable in respect of "F&F" i.e. furniture and fixture. He therefore alleged that if the assessee's contention regarding SH i.e. Special House and charging of Rs. 5000 PSF is accepted then on each page it must be separately mentioned as on page no. 10. We find from the records and noted that under the SH scheme, the assessee was offering several options and levels of luxuries in the form of amenities, interiors and facilities. Since the flat on the 10th floor was a sample flat, i.e. furnished flat with basic furniture & fixtures already installed, the estimated amount chargeable for such furniture and fixtures was ascertainable and therefore mentioned separately. Further, the additional amenities and facilities (including imported items) would also be provided to the buyer of sample flat on request if they opted for a higher category of SH for which additional consideration would be chargeable. As regards the non-mention of F&F separately in respect of other flats it appears that since the said flats were not already furnished, amount chargeable in respect of furniture and fixtures was not fixed. The rates chargeable were dependent on negotiation with clients and furniture, fixtures, other amenities would be provided only on request if the buyers opted for SH Scheme. In support of the aforesaid, copy of the assessee's letter dated 17.12.2009 filed before the AO in respect of different levels/ categories of Special Houses provided by it is enclosed at pages 236-237 of the assessee's Paper Book-II.

20. We also noted another objection raised by the AO on page 57 of the assessment order for AY 2007-08 is in respect of letters filed by the assessee company to Oriental Bank of Commerce (OBC) and seized in course of search in group concerns vide Annexure A-1, pages 1 to 12 offering flats in Legend Project as security for credit facility in respect of B. Vijay Kumar & Company and B. Vijay Kumar Jewellers. The AO further observed that in these letters, for security purposes, saleable area of flat is mentioned as 2550 sq. ft. for 2nd to 8th Floor and 6000 sq. ft. on 31st and 32nd floor. These saleable areas are mentioned in letter dated 15.02.2006 and 15.01.2007 of Laxmi Exports. The AO thus alleged that if, in the finally approved plan dated 13-09-2005, BMC disapproved 2550 sq. ft. area, then how the assessee kept showing the saleable area of flats as 2550 sq. ft. This according to the AO proved that the assessee was engaged in the practice of charging super built up area from customers but making the agreement in respect of built up area. The assessee explained that as is evident from the letter dated 11-01-2007 of the assessee company to OBC, the three flat sizes viz. 2550 sq. ft., 4550 sq. ft. and 5675 sq. ft. were based on 2.5 FSI applied to BMC. However, the assessee had received sanctions only for smaller sized flats and as such, had submitted fresh plans under new amended guidelines for 2.5 FSI. Further, it may be noted that the assessee was in receipt of the rejection letter from BMC for higher FSI of 2.5 only on 07-05-2010. Thus, till the date of search, there was hope for higher FSI and accordingly, the said areas would have been mentioned on the seized papers. Thus, the said letters do not by any stretch of imagination prove that the assessee company was engaged in selling flats on the basis of super built up area. The assessee file copy of the aforesaid letter dated 11-01-2007 given to Oriental Bank of Commerce is reproduced hereunder (also enclosed at page 260 of assessee's Paper Book -II):-

"To

*Oriental Bank of Commerce,
Shrijee Chambers, Tata Road No.2,
Opera House Branch, Mumbai 400 004*

SUB - Plans sanctioned by Development Authorities

REF- Legend Building, Walkeshwar, Layer Exports Put. Ltd.

Dear Sir,

As you know we had put up proposed building plans for sanction with building planning department of M. C. G. M. for 3 size flats, based on 2.5 F. S. I. in our building "Legend", being of 2550sq.ft., 4550 sq.ft. and 5675 sq.ft., however we have received sanctions from the planning authorities for flats of sizes 1900 sq. ft, 3200 sq.ft. and 3500 sq. ft.

We would like to inform you that we have submitted fresh plans under the new amended guidelines to obtain 2.5 F.S.I. and anticipate to receive the same shortly.

This is for your kind information and record.

Thanking you,

Yours sincerely,

For Layer Exports Put. Ltd.

(Authorised Signatory)"

21. We have noted another reason for taking inference for these seized documents on the basis of which addition is made by the AO i.e. on the so-called common practice among builders to charge super built up area from customers and make agreement of built up area, We are of the view that while making an assessment, additions are required to be supported by tangible evidence and not by what the AO believes to be a prevalent practice. No inference can be drawn on the basis of market gossips unless backed by corroborating evidence. In this regard, we are placing reliance on the decision of co-ordinate bench of the Mumbai Tribunal in the case of ITO Vs. W. D. Estate Pvt. Ltd. [1993] 45 ITD 473 (Mum) (Copy enclosed at pages 543-553 of assessee's Paper Book). In this case, the Tribunal was faced with a somewhat similar situation wherein additions were made on account of on money received by the assessee in respect of sale of property. The CIT(A) confirmed the addition partly after being influenced by a report published by Ministry of Finance wherein prevalence of notorious practice of payment of black money in real estate transaction in metropolitan city of Bombay was discussed. The ITAT deleted the additions. In this case, there was an adverse statement by one of the disgruntled employees of the assessee. Further, the comparable cases in the vicinity suggested payment of on money. Despite all these facts, the Mumbai Tribunal held that additions could not be made on the basis of report

prepared by the experts in the Ministry of Finance. A survey report which highlighted prevailing practice could not be adequate substitute for tangible evidence.

22. We have also noted that the assessee filed complete details of names and addresses and copies of agreements entered into with the purchasers of flats in Legend before the AO. The AO issued summons u/s 131 of the Act to various purchasers of flats in the impugned project. The statements of several buyers were recorded on oath. In their respective statements recorded on oath, all the buyers uniformly stated that they were seeing the impugned papers for the first time and did not have any knowledge about the contents thereof. They emphatically denied making any payment by way of on-money in cash to the assessee company. Copies of the following statements recorded u/s 131 are enclosed in the assessee's Paper Book:-

- (a) Copy of statement of Sri Ashok R. Mehta - pages 150-152 of the Paper Book-1.
- (b) Copy of statement of Sri Sujit S. Mehta - pages 153-155 of the Paper Book-1.
- (c) Copy of statement of Sri Pranay Desai- pages 156-158 of the Paper Book-1.
- (d) Copy of statement of Sri Ashok Siroya - pages 159-160 of the Paper Book-1.

Relevant extracts of few of the aforesaid statements are reproduced hereunder:-

Statement of Sri Ashok Siroya u/s 131 on 12. 10.2009

"Q. 6. I am showing you page no. 7 of loose paper file containing pages 1 to 19 seized from Mr. Bharat Shah's premises. From this page it can be inferred that you have purchased flat on ^{14th} floor in legend Project for which you have been charged at the rate of Rs. 14,111/-for saleable area i.e. super built up area of 2550 sq. ft which comes to Rs. 3,59,83,0601-. Further, it has been written that no parking has been given to you. It has also been written that total cheque consideration of Rs. 198929491- is to be received by Layer Exports Pvt. Ltd. from you regarding 14th floor flat out of which Rs. 100 lakhs has been received. This also tallied from the details submitted by Layer Exports that 4 cheques amounting to Rs. 25 lakhs, Rs. 26 lakhs, Rs. 25 lakhs and Rs. 24 lakhs has been paid by you total of which is Rs. 100 lakhs. Thus all these details written on page tallied with the details as per books of accounts. Further, it is

written that total cash consideration to be received is Rs. 16090101/- out of which Rs. 100 lacs has already been received. Accordingly, total consideration for this flat no. 14 comes to Rs. 359830501-. What do you want to say?

Ans. I have booked the said flat in F. Y. 2003-04 and also we have made the payment from November 2003 onwards. The final price was agreed at Rs. 2,37,52,2001- @ Rs. 12,6471- per sq. ft. (built up area). It was also agreed that parking space shall be provided at the time of possession. I further state that agreement for the said flat was executed on 10.10.2008 for total consideration at Rs. 2,37,52,2001-. Details of payments have been already been submitted. I state that we have made payments by cheque only and nothing has been paid by way of cash. I have seen the paper first time and what is written on the papers is not in our knowledge. I totally deny that any payment is made by cash except cheques."
Statement of Ashok Mehta u/s 131 recorded on 1.10.2009:

"Q. 8. I am showing you page no. 16 from loose paper file 1 to 19 seized from Mr. Bharat Shah's premises in which your name Mr. Ashok R. Mehta are written along with this 15th and 16th is written and "Sh recd 659.60" and "Q recd 285100" written. From this notings, it can be inferred that Mr. Ashok R Mehta have brought 15th and 16th floor in Legend project and cheque of Rs. 28500000 has been received. This also tallies with the details submitted by the assessee that the total of first three cheques received by the assessee vide cheque no. 910755, 910760, 633881 being Rs 3500000, 20000000 and 5000000 total upto Rs. 28500000/-. Accordingly, as it is the practice followed by Layer Exports Pvt. Ltd. to write Q for cheque and Sh for cash, it can be clearly inferred that total Rs. 65960000/- has been received in cash for flats on 15th and 16th floor and Rs. 285000001- has been received by cheque. Further, on this page "5 x 5 = 25" is written which can be clearly inferred as that total 5 car parking for a consideration of Rs. 25 lakhs has been purchased. These details also tallies with your previous answers that total 5 car parking were purchased?"

Ans. I have not given any cash and the garages were including with the purchase of each flats as explained above i.e. 3 and 2 with all flats. Regarding cheque payment total payment by my family is Rs. 33500000 and Rs. 11800000 by me and my mother respectively."

Statement of Su.jit S. Mehta recorded u/s 131 on 23.09.2009 "Q 13.

Do you want to say anything else?

Ans. Whatever is mentioned in my agreement dated 12.6.2006 is correct. I have paid only Rs. 3,85,67,0401- for the purchase of the flats No. 2101C, 2102F, 2103B, 2202E and 2203B on 21st and 22nd floor in Sea View Wing in "Legend" along with my wife Mrs. Shreepa S Mehta and it also includes three car parking. There is no cash payment made at all."

23. Thus, all the purchasers' summoned u/s 131 of the Act by the AO categorically denied making any payment in cash to the assessee. Further, Shri Bharat Shah, director, consistently denied any receipt of on-money by the assessee. Following is the extracts of statement of Shri Bharat Shah recorded u/s 132(4) on 08.05.2008 in course of search (copy enclosed at pages 137-139 of the assessee's Paper Book-I):

'Q. 4. The pages in Annexure A-i (1 to 19) mentioned above in Q' No. 3 have been found and seized from your office. Accordingly, the same are presumed to be belonging to you/ your business and you are supposed to know the contents of the same. Kindly avail another opportunity to explain the same.

A. In our office at 3rd Floor, Gamdevi, old papers since 1985 are lying. This office is a site office for construction project and so many personal customers visit who make different rough workings for prospective transactions. We are not regularly visiting that office and only our staff is handling that premise.

Q. 5 On going through these pages mentioned above, it is seen that details of flats at different floors along with details of area of flat, and part cheque consideration and part cash consideration have been mentioned. You are requested to explain which project these workings belong to and why it should not be construed that part consideration in respect of these flats has been received in cash outside the books of account?

A. Since 1985 our many projects have been on-going/ completed. Before the project and during the construction phase, we make plans for different size flats and also furnished flats i.e. special house and unfurnished flats without amenities. The plans get altered as per the customers' requirement and BMC FSI. Further cash is nowhere mentioned in the above mentioned papers."

As clearly evident from the above, the assessee's interpretation of the noting on loose papers is also supported by the statement of Shri Bharat Shah recorded in course of search and statements of buyers recorded u/s 131 of the Act. Thus, these evidences and statements cannot be ignored if there is specific denial by the buyers and director and in such situation no addition can be made in the hands of the assessee on account of on-money merely on the basis of interpretation of noting in seized loose papers on the basis of conjunctures & surmises. We have already referred to the decision of Mumbai Tribunal in the case of *Harish Daulatram Innani*

Vs. DCIT(Inv) (2008) 24 SOT 541(Mum).

24. Our reference was invited to the decision of co-ordinate bench of the Mumbai Tribunal in the case of Harakchand N. Jain Vs. ACIT (1998) 61 TTJ (Mum) 223 wherein it was held as under (Copy enclosed at pages 505-536 of assessee's Paper Book):

"Since the agreements of some purchasers are on the record, the AO could very well verify from the purchasers, the rates and the area from the purchases. The AO has made the addition merely on presumption and assumption without any definite evidence which should form the basis of making the addition. In fact, the seized papers have already been explained by the assessee. However, no assets have been found during the search which could show that the assessee had received on money or he has shown the suppressed value of sale of flats. In fact, it is the duty of Revenue to show that the assessee had received more than what has been declared or disclosed by him and there was an understatement or concealment of the consideration. In the present case, the agreement between the parties are basic evidence to show that the sale consideration and the built up areas on which the shops and flats have been sold by the assessee and the Revenue could not bring out any evidence to show that the assessee has suppressed the sales merely on the basis of suspicion and presumption. Accordingly, the addition on this account made by the AO deserves to be deleted."

We find that these decisions of co-ordinate bench are applicable to the facts of the present assessee's case. In the instant case also the agreements of the purchasers of flats in Legend were on record with the AO. Further, the assessee duly explained the noting in the seized papers and no assets were found during the search which could show that the assessee had received on money or that it had shown the suppressed value of sale of flats. Further, on being summoned u/s 131 of the Act, the purchasers of the flats also denied making any payment in cash to the assessee in their respective statements recorded on oath by the AO. Thus, in light of the judgment supra, the addition made by the AO merely on the basis of surmises, conjectures.

25. We also noted that the assessee vide letter dated 16-12-2009 submitted the following affidavits of the buyers of flats in Legend before the AO:-

- (b) Mr. Shishir Mehta
- (c) Mr. Yogesh Mehta
- (d) Mr. Sujit Mehta
- (e) Mr. Amar K. Kothari

- (f) Mr. Ashok Mehta
- (g) Mr. Vipul Shah
- (h) M/s. Kranti Impex Pvt. Ltd.
- (i) M/s. Shankhala Builders Pvt. Ltd.
- j) M/s. Mangalam Gems Pvt. Ltd.

2) Evidence in respect of price at which flats have been sold in other buildings in Walkeshwar Area at comparable rates. The agreements submitted were in respect of building with ready flats and amenities whereas the assessee had sold under-constructed and bare flats in Legend. Still the rates were comparable.

3) Copy of the said letter dated 16.12.2009 (Copy enclosed at page 235 of assessee's Paper Book-11). Further copies of affidavits and agreements for sale of flats in vicinity at comparable rates (Copy enclosed at pages 161- 180 of Paper Book-I and pages 261-337 of Paper Book-11) respectively. An extract of one of the affidavits i.e. affidavit of Sujit Mehta is reproduced hereunder for the sake of ready reference:-

1. *I confirm that the builder had offered Special House Scheme with furniture in the Building "Legend" being constructed at Walkeshwar & they had taken Interest in the Scheme.*
2. *The initial scheme was a proposal made by the builders based on Special House.*
3. *I later learnt from the builder that the BMC did not sanction the plans for the said flat, as originally proposed.*
4. *In view of uncertainty regarding area of each flat and the BMC plans not being sanctioned, the details of furniture that could be accommodated could not be determined and the area of the flats in the proposed scheme were required to be reworked.*
5. *In view of uncertainty, finally, I along with Mrs. Shreepa Mehta had purchased bare flat without amenities baring no. 21st & 22nd floor of sea view at agreed price of Rs. 385670401- paid by cheque and which is borne out from the Books of Accounts maintained by us and no cash payment was made for the transaction.*
6. *We hereby repeat and reiterate that the entire transaction was completed on the basis of cheque payment made by us and that no cash payment whatsoever has been made by us for the said transaction"*

Similarly affidavits of Director of Shankhala Builders and Amar Kishore Kothari who had purchased flats with amenities were also filed before the AO. The

aforesaid affidavits also fortify the assertion of the assessee that -

- (i) 'SH' noted on the impugned loose papers stood for Special House Scheme and not 'cash' as alleged by the AO,
- (ii) that such scheme had actually been offered by the assessee to the buyers of flats in 'Legend' and,
- (iii) that no cash payments over and above amounts disclosed in regular books of account were received by the assessee.

The AO, however, summarily rejected the affidavits filed by the buyers without citing any plausible reason for the same and taken the same point that SH stood for cash receipts outside books by the assessee and that the seized papers depicted that the assessee company had received huge amounts by way of on-money.

26. Here, we find that the AO had not accepted the affidavit despite that an affidavit is a legal piece of evidence and should be accepted as sufficient proof unless proved otherwise. An Affidavit by itself constitutes valid evidence and cannot be rejected without cogent reasons. It cannot be rejected merely on the ground that it is not supported by documentary evidence unless there is material to suggest that some documentary evidence exists and has not been produced by the assessee despite being required to do so. In this connection, reliance is placed on the judgment of the Hon'ble Allahabad High Court in the case of L. Sohan Lal Gupta Vs. CIT, 33 ITR 786 wherein it was held that *"the Tribunal was not entitled to reject the affidavit filed by the assessee on the mere ground that he had produced no documentary evidence; if it was not accepted as sufficient proof the assessee should have been called upon to produce documentary evidence or he should have been cross-examined to find out how far his assertions in the affidavit were correct."* (Copy enclosed at pages 537- 542 of assessee's Paper Book). Further, Hon'ble Supreme Court in the case of Mehta Parikh & Co. Vs. CIT, 30 ITR 181 (SC), the Hon'ble Apex Court held that *rejection of an affidavit filed by an assessee was not justified unless the deponent had either been discredited in cross examination or had failed to produce other supporting evidence when called upon to do so.* In the

instant case, however, the noting in seized documents corresponded to the facts asserted in the affidavits by various buyers. (Copy enclosed at pages 554- 560 of assessee's Paper Book).

27. Before us, the learned Counsel also relied on co-ordinate bench decision in the case of D.N. Kamani (HUE) vs. DCIT [1999] 70 ITD 77 (TM) (Pat) (Copy enclosed at pages 561- 562 of assessee's Paper Book) -

“Construction and sale of sixteen flats on leasehold land--Search in premises of one of the purchasers disclosing that part of the cost had not been disclosed by vendor--Presumption that similar payments must have been received from other purchasers was not sufficient--No proof in spite of enquiry during proceedings for block assessment that unaccounted money had been received from the other fifteen purchasers--Block assessment on estimate on basis of unaccounted money received in respect of one of flats--Not valid-- Addition made on account of unaccounted money received in respect of one of the flats was valid--Income-tax Act, 1961, s. 158BD.

And also on Ms. Pooja Bhatt Vs. ACIT (2000) 73 ITD 205 (Mumbai) (Copy enclosed at pages 563- 569 of Paper Book): "The addition made by the AO is unwarranted as having been made merely on the basis of suspicion. The transaction of purchase of flats is effected by means of an agreement and the amount of consideration is also indicated in the agreement. There may be a strong suspicion of payment of on-money in respect of the property deals but no addition can be made on the basis of mere suspicion. It is established principle of law that suspicion however strong it may be does not take the place of proof. Since there is no material found during the course of search suggesting payment of on-money in regard to purchase of the flat, the addition made by the AO is unwarranted and is hereby deleted.

• Amar Natvarlal Vs. ACIT (1997) 60 ITD 560 (Copy enclosed at pages 570-598 of Paper Book): Income from undisclosed sources - unexplained investment - loose papers found from the residential premises of the assessee during search - assessee and his family members having interest in various firms engaged in construction of multi storied buildings and sale of flats therein and also cloth mill- no year mentioned in the loose papers - addition of Rs. 1.36 crores made on the basis that 'on money' was received in respect of flats sold - no tangible evidence in the form of unexplained investment found during search -forensic report obtained by AO not supplied to assessee despite request - copies of statements of members of housing societies recorded at the back of the assessee also not supplied - important witnesses not examined - no addition could be made in the hands of the assessee.

Harakchand N. Jain Vs. ACIT (1998) 61 TTJ (Mum) 223 (supra) (Copy enclosed at pages 505- 536 of Paper Book)."

28. In view of the above facts and proposition of law propounded by higher courts, we find that the AO, however, rejected/ disregarded all the evidences filed by the assessee in support of its interpretation of the seized papers and its claim that no transactions outside regular books of account were conducted and finally the AO summed up the year wise alleged receipts of on-money as under:

| Name of Purchaser | Wing | Flat No. and area sold | Date of first payment | Accounted payment | Alleged Unaccounted payment | Pg . No. | AY |
|-------------------------------|----------|------------------------|-----------------------|-------------------|-----------------------------------|---------------|---------|
| Shishir Mehta | Sea | 10/1878.16 | 8/1/2004 | 1,98,92,949 | 2,01,32,051 | 9 | 2004-05 |
| Yogesh Mehta | Sea | 13/1878.16 | 5/11/2003 | 1,98,92,600 | 2,01,32,051 | 6 | 2004-05 |
| Ashok Siroya Lalita Siroya | Sea | 14/1878.16 | 4/11/2003 | 2,37,52,200 | 1,60,90,101 | 7 | 2002-05 |
| Ashok Mehta | Sea | 15,16/3466.4 | 29/08/2003 | 3,85,67,640 | 6,84,60,000 | 15 | 2004-05 |
| Kiran Kothari | Sea | 23,24/3011.2 | 22/05/2004 | 4,87,00,000 | 4,42,82,324 | 16 | 2004-05 |
| Vipul Shah | Necklace | 6,7,8/5634 | 15/12/2003 | 5,85,06,710 | 4,17,71,153 | 4 | 2004-05 |
| Kranti Impex | -do- | 9/1878.16 | 22/1/2004 | 1,98,92,600 | 2,06,32,051 | 11 | 2004-05 |
| Naresh Shah | -do- | 10/1878.16 | 16/1/2006 | 2,63,04,320 | 2,76,32,051 | 10 | 2004-05 |
| Mangalam Gems | -do- | 11/1878.16 | 2/1/2004 | 1,98,92,600 | 2,06,32,051 | 11 | 2004-05 |
| Maya Mehta | -do- | 13/1878.16 | 17/01/2004 | 2,03,50,200 | 1,93,57,051 | 3 | 2004-05 |
| Ramesh Mehta | -do- | 14/1695 | 1/9/1695 | 2,03,50,200 | 1,93,57,051 | 3 | 2004-05 |
| Chandravadan Desai | -do- | 19,20/ 3466.44 | 2/12/2003 | 4,19,80,608 | 8,01,39,192 | 8 | 2004-05 |
| Shrikant Mehta | -do- | 21,22/ 3466.4 | 22/12/2005 | 4,82,09,400 | 1002,10,600 | 14 | 2006-07 |
| Pankaj Mehta | Sea | 29,30/ 3846.9 | 20/10/2003 | 4,23,71,880 | 1067,50,000 | 12 | 2004-05 |
| Sujit Mehta | Sea | 21,22/ 3466.4 | 02/09/2003 | 3,85,67,040 | 3,10,47,960 and 3,50,00,000 | 15 & 13 | 2004-05 |
| Total | | 23/ 41383.25 | | 4872,30,947 | 6716,25,687 | | |

On the basis of the above, the AO made an addition of Rs. 57,14,15,087/- for A.Y. 2004-05 and Rs. 10,02,10,600/- for A.Y. 2006-07 on account of alleged on-money receipts of the assessee allegedly recorded on the impugned 19 loose sheets of papers.

29. We also find that the CIT (A) upheld the AO's interpretation of the seized papers and on the grounds similar to those taken by the latter. The CIT (A) reproduced submissions of the assessee but he did not give findings on the same. The CIT (A)'s reasoning while upholding the AO's interpretation of seized papers and rejecting the assessee's explanations is being summarized as under (paras 10 to 10.21 of the appellate order for A.Y. 2004-05):-

- (i) The impugned seized papers contained details such as the names of purchasers, floor numbers, wing, area, amount per square foot, amounts allegedly received, amount received in respect of parking space etc. in respect of Legend project of the assessee.
- (ii) The cheque payments allegedly mentioned in the seized papers tallied with the books of account.
- (iii) In many cases how much balance money was to be received was also allegedly mentioned.
- (iv) The assessee's contention that SH meant Special House was allegedly not correct and the seized papers allegedly proved that the cash receipts were mentioned as 'sh' i.e. the last two words of cash.
- (v) The words "Recd" was allegedly for "received".
- (vi) On page 4 of the seized paper, it was mentioned "SH to Receive" and "Q Recd".
- (vii) Further, it was mentioned as under:-

| | |
|---------|--------------|
| Q | 10,14,50,000 |
| SH | 5,96,78,847 |
| Recd | 2,33,75 |
| Balance | 1,83,96,153 |

According to CIT (A) the aforesaid entries purportedly established that 'Q' was cheque, 'SH' was cash and "Recd" was received. Thus, the assessee's contention that "SH" was Special House and 'Recd' was recorded was allegedly disproved by the seized material.

- (viii) Page 9 used the word "SH Reed", "SH to Receive" and in the end, it was mentioned All Q/SH Full Reed. The said entries purportedly established that 'SH' was cash, 'Reed' was received.
- (ix) Page 10 of the seized documents contained details of sample flat. The said flat was already constructed at the time of its sale. There was no scope of increase in FSI in the said flat even if additional FSI was granted to the project. Even for the said flat, the purchaser was charged for 2550 sq.ft. of saleable area at the rate of Rs. 15,500 sq. ft. Thus, the

appellant's argument that it charged for 2550 sq. ft. thinking that additional FSI would be available to the project was not correct.

The learned Counsel before us answered that since the said papers were seized in course of search of another person and from the premises of such other person and were not proved to belong to the assessee, the same did not have any evidentiary value insofar as the assessee was concerned. Further, since the notings in the said papers were more in the form of rough scribbling, in coded form with several abbreviations, no definite interpretation could be given to the same. These uncorroborated, rough loose sheets of papers could not form the sole basis of making such enormous additions in the hands of the assessee. The Revenue thus erred in relying upon such feeble evidence in the form of scribbling on uncorroborated rough loose sheets of papers to justify additions running in more than 111 crores of rupees in the hands of the assessee, which is clearly not justifiable. Further, even the Revenue's interpretation of the notings made on the said papers is based on surmises, conjectures, assumptions and presumptions.

30. Without prejudice, the learned Counsel argued that so-called reasoning advanced by the CIT (A) (as summarized in para 11.1 supra) are countered in seriatim one by one hereunder:-

(i) The seized papers contained the impugned details such as names of purchasers, flat nos., wing etc. in project 'Legend' since they appear to be rough noting and estimations in respect of on-going discussions with prospective clients for sale of flats in project 'Legend'.

(ii) The cheque payments mentioned in the impugned papers tallied with the books of account because in some cases where the deal materialized (also order for Special House were not received), recordings were also made for the installments received in cheques. As stated earlier, the scribbling / rough noting were made over a period of time, right from the stage of initial discussions with clients to receipt of payments in cheques in some cases. However, there were no recordings whatsoever for any payments received in cash as wrongly alleged by the CIT (A).

(iii) These were not recordings of balance money to be received as alleged by the CIT (A). These were actually recordings of orders for balance items of Special House to be explained to the client and the initial discussions with clients.

(iv) As repeatedly explained earlier 'SH' did not represent cash but meant Special House which is proved from several corroborating evidences on record (eg. seized papers marked page 12 of Annexure A-2 seized from the premises at 6th Floor, Mehta Bhawan, affidavits of buyers etc.).

(v) The word 'recd' appears to stand for recorded and not received as alleged by the CIT (A).

(vi) The recording on page 4 (Copy enclosed at page 97 of Paper Book-I) read by the CIT (A) as 'Q recd' is not very clear. It appears to be 'Q Rcced' which may be abbreviation for installments received in cheques for part of the deal which materialized. Further, 'SH to receive' appears to be orders to be received for Special House and not cash to be received as alleged by the CIT (A).

(vii) The disputed noting on page 4 of seized paper reads as reads as under:-

| | |
|------|-----------|
| | 101450000 |
| Q | 59678847 |
| SH | 41771153 |
| Recd | 23375 |
| BAL | 18396153 |

The aforesaid entry may be explained as under:-

Total consideration to be received if order of Special House is given - Rs. 101450000, Amount to be received in cheque for house with basic facilities without Special House - Rs. 59678847/-. Total additional consideration for Special House - Rs. 41771153/-, recordings made for few items of Special House on the basis of on-going discussions with prospective buyers - Rs. 23375000, Balance items to be explained and approved by buyers in SH scheme 18396153.

(viii) As regards noting on page 9, as already stated earlier "SH Recd" may be an abbreviation for Special House recorded i.e. recordings for few items of Special House. Further noting read by CIT (A) as "SH to Receive" is actually "SH to Recd" which may stand for recordings for items of Special House pending discussion with client. Lastly noting "All Q/SH Full Recd" at the bottom of page 9 appears to have been made at a later point of time and may mean recordings for basic facilities (if approved to be received in cheque) and special house scheme fully discussed with clients (although pending approval).

(ix) Further, in respect of noting on page 10 of the seized papers containing details of sample flat, the Learned CIT (A) has alleged that since the said flat was already constructed at the time of sale, there was no scope of increase in FSI in the said flat even if additional FSI was granted to the project. Thus, according to the CIT (A), the assessee's argument that it charged for 2550 sq. ft. thinking that additional FSI would be available to the project was not correct. In this regard, it is submitted that the purchaser of flat was charged for 2550 sq ft. on the basis of the fact that he was to be given additional area where the fire fighting equipments were to be installed. However, the BMC authorities did not sanction the plan & the purchaser requested to cancel his flat, as the flat of lesser area was unsuitable for him. On the basis of his request letter, the purchaser's booking was cancelled & he was refunded the booking amount of Rs.50.00 lacs. The final rejection of higher FSI was only in period AY 2011-12. (Copy of rejection letter of BMC is enclosed at pages 519 of Paper Book-III).

Thus, according to the learned Counsel, CIT (A) erred in misinterpreting and misreading the noting on uncorroborated loose sheets of papers and rejecting the assessee's explanations.

31. Another aspect canvassed by assessee that in case the assessee received a total consideration (as alleged by the AO accounted plus unaccounted) of Rs. 1,15,88,56,634/- in respect of 41,383.25 sq. ft. which comes to more than Rs. 28,000/- per square feet which is quite infeasible and unbelievable considering the market rate for sale of comparable flats in Walkeshwar Area during the concerned

period @ Rs. 10000/- PSF approx. Even if for argument's sake, the per square foot rate is computed in accordance with alleged super built up area of 48,280.46 sq. ft. (i.e. say carpet area plus 40% = 140% of 41,383.25/120%), the resultant figure will be more than Rs. 24,000/- PSF (i.e. 1158856634/48,280.46) which is once again quite unbelievable.

32. Thus, it is clear from the aforesaid discussions that whereas the additions made by the AO are based on conjunctures and surmises and rough stray scribbling on 19 loose sheets of papers and seized from the premises of another person. The assessee's explanation and interpretation is supported by the following clinching evidences on record:-

- (vi) Statement on oath of the Director of the assessee categorically denying payment of on-money.
- (ii) Statement recorded on oath of several buyers of flats in Legend denying payment of any on-money to the assessee.
- (iii) Duly sworn affidavits of several buyers of flats in Legend affirming the initial offer of 'Special House' made by the assessee and denying payment of any cash consideration over and above the accounted cheque amount to the assessee.
- (iv) Noting on seized page no. 12 of Annexure A-2 explaining the notings on Annexure A-1 and fortifying the assessee's stand regarding Special House.
- (v) Documents supporting application for 2.5 FSJ by the assessee and rejection of the same by BMC and thus explaining the noting made in the impugned papers in respect of initial negotiation for expected sale of higher area on the basis of expected approval of plan by BMC.
- (vi) Agreements for sale of similar flats in vicinity of the Legend Project at comparable rates.
- (vii) Newspaper article regarding difficulty in sale of flats in Legend and thus reducing chances of sale of flats at exorbitant rates as suggested by the

AO.

- (viii) Non-discovery of any circumstantial evidence in the form of any unaccounted investment, unaccounted cash or unaccounted expenditure corroborating the earning of substantial amount by way of on-money by the assessee as alleged by the AO.

33. In entirety of the matter, we are of the view that an addition in assessments carried out pursuant to search action u/s 132 of the Act has to be related to cogent and positive materials found during search which prove conclusively that the assessee has either earned an income or made an investment which has not been recorded in his regular books of account or that his case is covered under any of the deeming provisions contained in sections 68, 69, 69A to 69D of the Act. However, additions cannot be sustained merely on the basis of rough noting made on few loose sheets of papers unless the AO brings on record some independent and corroborative materials to prove irrefutably that the said noting reveal either unaccounted income or unaccounted investment or unaccounted expenditure of the assessee. As discussed above, in the instant case, assessments for the impugned years have been completed u/s 153A of the Act which relates to assessment in case of search or requisition. The prerequisite condition for application of Sec. 153A of the Act is a search conducted under section 132 of the Act or any requisition made under section 132A of the Act to unearth hidden income or property. Thus, the very purpose/ essence of search conducted u/s 132 of the Act is to unearth hidden income or property or get hold of books of account or documents which has not been or will not be otherwise produced by the assessee in regular course on issue of summons or notice. In the assessee's case, as stated above, the purported search action did not lead to discovery of any unaccounted money, bullion, jewellery or other valuable article or thing. Further, no books of account revealing any undisclosed transactions of the assessee were found during the course of search. The entire assessment order revolves around scribbling in loose sheets of papers seized from premises of another person in course of search action on such other person. It is a fact that the said rough loose sheets of papers scribbled by some anonymous person and seized in course of search of another person cannot be termed as 'documents'

having any evidentiary value within the meaning of section 132 or section 132A of the Act. Thus, the entire assessment u/s 153A of the Act in case of the assessee rests on shaky and incorrect foundation and thus deserves to be quashed. Copies of the 19 loose sheets of papers marked as Annexure A-1 seized from the premises of PDTEPL are enclosed at pages 94-112 of the assessee's Paper Book-I.

34. The case law relied on by assessee of co-ordinate bench of Delhi Tribunal in the case of Atul Kumar Jain Vs. DCIT reported in (1999) 64 TTJ (Del) 786 (Copy enclosed at pages 334-357 of assessee's Paper Book) had an occasion to examine the meaning word "document" and its evidentiary value for the purposes of sections 132, 132A and 132(4A) of the Act. At Para 6.4 to 6.6 of the order, the Delhi Tribunal observed as under:-

"6.4 We find that the AO has made out the case for making such addition based exclusively on the said piece of paper found and seized during the course of search. It is, therefore, to be examined whether the said paper found and seized is a document having evidentiary value to prove the fact of the transaction. The word "document" has been defined in s. 32 of the Indian Evidence Act to mean - any matter expressed or described upon any substance by means of letters, figures, or marks or more than one of those means, intended to be used or which may be used for the purpose of recording that matter. The word "document" has also been similarly defined in the General Clauses Act. The meaning of the word "describe According to the Hon'ble Supreme Court in the case of Ramji Dayawala & Sons (P) Ltd. vs. Invert Import AIR 1981 SC 2085, mere proof of the handwriting of a document would not tantamount to a proof of all the contents or facts stated in the documents, if the truth of the facts stated in a document is in issue, mere proof of the handwriting and execution of the document would not furnish evidence of the truth of the fact or contents of the document. The truth or otherwise of the fact or contents so stated would have to be proved by admissible evidence i.e., by the evidence of those persons who can vouchsafe for the truth of the facts in Issue.

6.5 Further, the Hon'ble Supreme Court in the case of Mohd. Yusuf & Anr. Vs. D. & Anr. AIR 1968 Bom. 112 has observed that the evidence of the contents contained in document is hearsay evidence unless the writer thereof is examined before the Court. The Hon'ble Court, therefore, held that the attempt to prove the contents of the document by proving the signatures of the handwriting of the author thereof is set at naught, the well-recognised rule that hearsay evidence cannot be admitted.

6.6 *If we consider the said piece of paper seized during search in light of the definition of the word "document" as given in the Indian Evidence Act and General Clauses Act and the truthfulness of the contents thereof in light of the aforesaid decisions of the Hon'ble Supreme Court we find that the said paper contains jottings of certain figures but the same does not describe or express the substance of any transaction and even if the said paper has been seized from the possession of the assessee the contents thereof are not capable of describing the transactions the way the AO has deciphered them without support of corroborative evidence of the parties attributed to the alleged transaction. The said paper, therefore, does not come within the compass of the definition of the word "document" to be used as any evidence. The paper seized, therefore, has no evidentiary value and accordingly the same cannot form the basis for assessing the undisclosed income."*

In light of the aforesaid judgment, we are of the view that the impugned loose sheets of papers cannot come within the ambit of definition of the word "document" to be used as evidence and the same cannot form the basis for assessing the undisclosed income of the assessee. Admittedly, the said loose papers are not in the form of promissory notes or duly executed documents or books of account or certificates or money receipts which can prove conclusively the factum of any undisclosed income earned by the assessee or any unaccounted investments or expenditure made by him. Additions cannot be made simply on the basis of rough scribbling made by some unidentified person on few loose sheets of papers.

35. Our attention was further drawn to the decision of the Kolkata Tribunal in the case of ACIT Vs. Sri Radheshyam Poddar reported in (1992) 41 ITD (Cal) 449 (Copy enclosed at pages 368-372 of assessee's Paper Book) wherein it was held that no addition can be made simply on the basis of an unsigned piece of paper. Held as under (at para 5 of the order):-

"After hearing the rival submissions we are of the opinion that the assessee should succeed in this regard. It is no doubt true that as per the provisions of section 132 (4A)(ii), when any document is seized pursuant to search it may be presumed that the contents of such documents are true. We have examined a copy of MOU filed before us in this appeal and we find that the same, is not signed either by the assessee or by any person for and on behalf of Naihati Jute Mills. No names whatsoever are also mentioned in the said MOU on the basis of which the Assessing Officer has made the addition of Rs. 4,93,900. We entirely agree with the assessee's counsel that under section 132(4A) there is no presumption

that if an unsigned paper or document is found during the course of search it has to be presumed that it is signed. We find in section 132(4A)(ii) that if there is signature on any document or account books recovered during the course of search then it has to be presumed that the signature and every other part of such account books and other documents which purport to be in the handwriting of any particular person or which may reasonably be assumed to have been signed by or to be in the handwriting of any particular person are in that person's handwriting. Needless to say that in law no document or paper can have any validity or enforceability until the same bears signature of concerned parties. Signature is the soul and any paper, notice or document is a body. Body without a soul is of no use, value or consequence. What is the significance and importance of a signature on any document can be found in the judgment of Hon'ble Calcutta High Court in the case of B.K Gooyee v. CIT [1966] 62 ITR 109. In that case the Assessing Officer issued a notice under section 34 of the Income-tax Act, 1922 but did not sign it. When the matter came up before the Hon'ble High Court at Calcutta it was held by their Lordships that the unsigned notice issued by the ITO was invalid and consequently equal to no notice. If we are to agree with the contention of the revenue that though the MOU is unsigned the same should form the basis for making additions as per the presumptive provision contained in section 132(4A)(ii) of the Income-tax Act, 1961 then there will be harsh, high-pitched and unreasonable assessments leading to absurd results and miserable consequences on the taxpayers. The provisions of section 132(4A) will become oppressive if applied in this manner and surely this is not the purpose or intention of the Legislature in enacting section 132(4A) in Income-tax Act. Like any other provision of a statute the provisions of section 132(4A) also have to be applied and interpreted in very reasonable manner and in consonance with justice. We say so on the basis of judgment of Hon'ble Supreme Court in the case of R.B. Jodha Mal Kuthiala v. CIT [1971] 82 ITR 570 at p. 575."

36. Further in the case of Pioneer Publicity Corporation & Others Vs. DCIT reported in 67 TTJ 471, (Copy enclosed at pages 373-437 of Paper Book) the Delhi Tribunal held that “no addition could be made simply on the basis of a noting on a visiting card found during search directing certain payment to bearer of card when there was nothing to establish that the assessee paid the amount to the said person. The Department had not made any enquiry from the person named. In the card about the amount given and as such, no addition could be made in the hands of the assessee.”

37. Again in the case of Ashwani Kumar Vs. ITO (1992) 42 TTJ (Del) 644, the Delhi Tribunal observed as under (Copy enclosed at pages 303-315 of

assessee's Paper Book):-

"Then for presuming that the contents of the books of account or document are true the document must be a speaking one. In this case the slip, said to have been recovered by the revenue, does not contain any narration in respect of the various figures noted therein. The slip does not indicate whether the figures referred to quantities of money or to quantities of goods and whether one side, and if so, which side represents receipts and which side represents outgoings. This is, thus a dumb document and as the orders of the authorities below would show they have merely added the total of the right side of the slip without supplying the figures any language to indicate their meaning. In the case of such a dumb document, the provisions of Section 132(4A) do not permit any one to presume that the total of the figures of right side of the slip represents the assessee's income. The presumption at the most is attracted to the figures and a further presumption that they represent the income of the assessee is not permissible under Section 132(4A). When a dumb document, like the present slip, is recovered and the revenue wants to make use of it, it is the duty of the revenue to collect necessary evidence which may provide an acceptable narration to the various entries. The evidence collected should be such that any reasonable man would accept, the hypothesis advanced by the revenue that the figures written on the right side of the slip represent incomes earned by the assessee. It was conceded by the learned Departmental Representative that no such evidence has been brought on record.....Therefore the additions cannot be sustained and they are hereby deleted." (Emphasis supplied).

38. In view of the aforesaid judgments, it is submitted that since the impugned seized papers are undated, have no acceptable narration and do not bear the signature of the assessee or any other party, they are in the nature of dumb documents having no evidentiary value and cannot be taken as a sole basis for determination of undisclosed income of the assessee. When dumb documents like the present loose sheets of papers are recovered and the Revenue wants to make use of it, the onus rests on the Revenue to collect cogent evidence to corroborate the noting therein. The Revenue has failed to corroborate the noting by bringing some cogent material on record to prove conclusively that the noting in the seized papers reveal the unaccounted on-money receipts of the assessee. Further, no circumstantial evidence in the form of any unaccounted cash, jewellery or investments outside the books of account was found in course of search in the case of assessee. Thus, the impugned addition was made by the AO on grossly inadequate material or rather no material at all and as such, deserves to be deleted. Hence, we are of the view that an

assessment carried out in pursuance of search, no addition can be made simply on the basis of uncorroborated noting in loose papers found during search because the addition on account of alleged on-money receipts made simply on the basis of uncorroborated noting and scribbling on loose sheets of papers made by some unidentified person and having no evidentiary value, is unsustainable and bad-in-law. As such, the same is deleted. This issue of the assessee's appeal is allowed and that of the Revenue is dismissed.

39. The next common issue in these appeals, of the assessee in ITA No.1927/Mum/2011 for assessment year 2004-05, in ITA No.1928/Mum/2011 for assessment year 2006-07 and in ITA No.1929/Mum/2011 for assessment year 2007-08 and that of Revenue's appeals in ITA No.3019/Mum/2011 for assessment year 2004-05, in ITA No.2985/Mum/2011 for assessment year 2006-07 and in ITA No.2986/Mum/2011 for assessment year 2007-08, is as regards to extrapolation of 'on-money' receipts noted in seized loose papers for other flats. For this the assessee has raised identically worded grounds and for the sake of brevity we are reproducing the following grounds as raised in assessment year 2007-08 as under:-

“4. That the Ld CIT (A) erred in partly upholding the extrapolation of on-money done by the AO for the year under consideration in respect of other flats sold during the year on the unsubstantiated ground that the said sum must have been received by the appellant.”

Similarly, Revenue has also raised identically worded grounds in all the years and hence, for the sake of brevity we are reproducing the ground raised in assessment year 2006-07 as under:-

“a) On the facts and in the circumstances of the case and in law, the Learned CIT(A) erred in concluding that the unaccounted cash receipts, which were received during the AY 2006-07 should be taxed in the year in which project was completed.”

40. We have heard rival contentions on this issue and gone through facts and circumstances of the case. We find that the AO extrapolated the on-money rate Rs. 16,230/- per sq. ft. to the remaining flats in the project consequent to the aforesaid addition of Rs. 67,16,25,687/- for total built-up area of 41,383.25 sq. ft. of flats sold

as under:-

| A. Y. | Area sold as per BMC | Addition on account of alleged on-money @Rs.16,230/- per sq. ft. |
|---------|----------------------|--|
| 2004-05 | 3466.44 | 5,62,60,321 |
| 2006-07 | 10766.24 | 17,47,36,075 |
| 2007-08 | 7013.59 | 11,38,30,565 |

We find that the AO has, vide Para 31 of the assessment order for A.Y. 2007-08, alleged that the assessee company has contradicted claims regarding saleable area.

For making addition the AO observed as under:-

"31. Further, the assessee company, itself by way of its own submissions contradicts its own claims regarding saleable area. For example, there is huge difference in Built-up area ('saleable area) as per BMC Plan and as per agreement, in case of Flat no. 9, 10, 11, having BMC built-up area of 1878.16 sq. ft., but agreement for built-up area for 9th and 11th floor is made for 1989.25 sq. ft. whereas for 10th floor is of 1695.85 sq. ft. These all three flats are purchased by associate concerns of one group only, even then there is difference in agreement area."

41. In regard to the above, Learned Counsel argued that the differences in the BMC built up area and built up area as per agreement have cropped up mainly on account of inclusion/ exclusion of balcony area and the AHU (Air Handling Unit). Comparative chart showing details of the BMC Carpet Area, BMC Built-up Area, Carpet area and built up area as per agreement, date of agreement, and the causes of differences in BMC built-up-area and Built-up area as per agreements for various flats in project 'Legend' was filed before us (Copy enclosed at pages 338- 349 of assessee's Paper Book-II). On a perusal of the same, we find that the differences are on account of valid reasons and the assessee has not made any contradictory claims in respect of saleable area of flats. But, we are of the view that, since, we have given a find that the impugned papers do not contain recordings of any on-money receipt by the assessee, the question of extrapolating on-money receipts on the basis thereof does not arise. Even otherwise, we are in agreement with the argument of assessee that additions in search assessments are required to be made on the basis of tangible evidence and not solely on the basis of estimations and extrapolation theory. Thus, we delete the addition made on account of

extrapolation of alleged on-money receipts purportedly recorded in loose sheets of papers. Accordingly, this issue of extrapolation in all the three years is allowed in favour of the assessee and against the Revenue.

42. The next common issue in these appeals of the assessee in ITA No.1842/Mum/2011 for the assessment year 2008-09 and of Revenue's appeals in ITA No.3021/Mum/2011 for assessment year 2008-09 and in ITA No.1097/Mum/2013 for the assessment year 2009-10 is as regards to the order of CIT (A) directing the AO to make addition on account of unaccounted money on account of extrapolation and validity of method of accounting followed by the assessee i.e. on account of profit from Legend project in accordance with project completion method of accounting and the correct year of taxability of unaccounted cash receipt. For this, the assessee has identically worded grounds and for the sake of brevity we are reproducing the following grounds as raised in assessment year 2008-09:-

“3. The Learned CIT(A) also failed to appreciate that since the assessee was following project completion method of accounting and the impugned project was not complete during the year under consideration, the appellant had not claimed any deduction on account of construction cost in its P/L A/c and accordingly, no addition on the said count could be made for the year under consideration.”

The Revenue has also raised identically worded grounds in both the years and hence the grounds as raised in assessment year 2008-09 read as under:-

“1. a. On the facts and in the circumstances of the case and in law, the Learned CIT (A) failed to appreciate that the amount of Rs.18.69 crores paid by the assessee to MHADA was in the nature of penalty paid by the assessee for infraction of law, which would not be allowable under the provisions of Section 37 (1).

b. On the facts and in the circumstances of the case and in law, the Learned CIT(A) failed to appreciate that the order of MHADA was passed on 30.07.2009 and the payment of Rs.18.69 crores was made subsequent to the order. Hence, the question of allowability or disallowability of this amount would arise in the A.Y.2010-11 which is still pending before the AO.

c. On the facts and in the circumstances of the case and in law, the Learned CIT(A) erred in concluding that profit of the project should be recognized on completion of the project

and that issue of occupancy issued by Municipal Authorities should only be the criteria for completion of project.

d. On the facts and in the circumstances of the case and in law, the Learned CIT(A) erred in not appreciating the fact that 95% of the project was completed as per assessee's own statement and due to pendency of issue of bogus tenancy, possession was not given.

e. On the facts and in the circumstances of the case and in law the Learned CIT(A) erred in not appreciating the fact that the project cannot be allowed to be stretched at the whims of the assessee, even if the assessee is following project completion method when the other circumstances clearly indicate that the project had been completed. The ratio laid down by the Hon'ble Mumbai Tribunal in the case of Unique Enterprises Vs. ITO (2010- TIOL-737-ITAT-MUM dated 20.08.2010) and Champion Construction Company Vs. ITO (1983) 5 ITD 495 has not been appreciated by the Learned CIT(A)."

43. Brief facts relating to this issue are that the assessee follows project completion method of accounting whereby the profit/ loss on sale of constructed units is recognized only on completion/ substantial completion of work and handing over the possession of flats/ units to substantial number of customers. But, according to the AO, in accordance with AS-7 (revised 2002) read with AS-9 issued by the ICAI, percentage completion method is applicable for construction industry and therefore the assessee was required to follow the same for recognition of profit of project 'Legend'. The detailed discussion in this respect has been made by the AO at pages 2 to 8 of the assessment order for AY 2008-09 and pages 12 to 14 of the assessment order for AY 2009-10. The AO issued show-cause notice dated 30.10.2009, wherein it is stated that Shri Bharat Shah, director of the assessee in his statement u/s 131 had admitted that 95% of the building had already been completed. Hence, the AO concluded that as on 31.3.2008, project was almost complete and possession was not given because of issue of Bogus Tenancy. Accordingly, the AO was of the view that the project had already been substantially completed and accordingly, profits should have been recognized in AY 2008-09. The AO came to the said conclusion on account of the following alleged reasons:-

- (i) The project was going on since 1998 and the assessee had not offered any income up to AY 2008-09.

- (ii) Total saleable area in the project as per BMC plan was 109562 sq ft. out of which till 31.3.2008, 66451 sq ft were sold till 31.3.2008.
- (iii) Mr. Bharat Shah, director of the assessee had stated in course of search that 95% of the project had already been completed.
- (iv) Total agreement value of flats sold till 31.3.2008 was Rs. 95,01,16,716/- and against it till 31.3.2008 advance of Rs. 65,35,01,589 had been received.
- (v) The AO relied on the Guidance Note on recognition of Revenue for Real Estate Developers issued by ICAT.

In response, the assessee vide letter dated 24.11.2009 filed a certificate by Architects Promod Shah & Associates certifying that till 31.03.2008, Legend project was approximately 85% complete. Copy of the said certificate of Shri Promod Shah & Associates was filed before us (Copy enclosed at page 402 of assessee's Paper Book-III). Further, as regards the statement of Shri Bharat Shah wherein he admitted that 95% of the building had already been completed, it was explained that the said statement was made with respect to the external structural work of the building and not in respect of the internal finishing work. From the certificate of the Architect it is clear that the structural work and external wall were 100% complete and external finishing work was 90% complete by 31.03.2008. Thus, on an average, the external work of the building was completed to the extent of about 95% by 31.03.2008, which corresponds with the statement of Shri Bharat Shah. However, on account of completion of internal finishing work only to the extent of 65%, internal walls to the extent of 70%, plumbing work to the extent of 80%, water-proofing work to the extent of 85%, the overall building was completed only to the extent of 85% as certified by the Architect. Thus, the assessee claimed that the profit from the impugned project was not chargeable to tax in AY 2008-09 in accordance with the method of accounting followed by the assessee i.e. project completion method of accounting. As per the Profit & Loss Account for the year ended 31.03.2009 a further cost of Rs. 2,89,24,276/- has been incurred in respect of the project at Walkeshwar during Financial Year 2008-09.

44. The assessee explained that Shri Bharat Shah in his statement recorded u/s 132(4) of the Act on 08.05.2008 declared profit of Rs. 5 crores on an estimated/adhoc basis for AY 2008-09 in order to buy peace since the search party was insisting on some disclosure on the basis of percentage completion method of accounting and therefore, the said profit of Rs. 5 crores was incorporated in the Profit & Loss Account of the assessee for the year ended 31.03.2008 with a note in Schedule 'D' attached to the financial statements for the year ended 31.03.2008. It was claimed before the AO that since the assessee is following project completion method of accounting and the project was not substantially complete by 31.03.2008, no profit is chargeable to tax in the hands of the assessee for the A.Y. 2008-09. Aggrieved, assessee preferred appeal before CIT (A).

45. The CIT (A) held that the assessee had been consistently following project completion method of accounting which was an accepted method of accounting. The said method of accounting had been accepted by the Department up to AY 2007-08. He directed the AO to find out the accounting year in which the occupation certificate or possession of the flat was given (whichever date was earlier) and take advance collected by cheque and alleged estimated cash receipts as sale receipt and assess the income in the relevant assessment year. He thus deleted the addition made by the AO for AY 2008-09. The revenue is in second appeal before the Tribunal against the decision of the CIT (A) and assessee has appealed against the reliance placed by him on the seized papers and misinterpretation of notings therein.

46. We have rival contentions and gone through the facts and circumstances of the case. We have gone through AS-7 issued by the ICAI and find that the same is applicable only to accounting for construction contracts in the financial statements of contractors. The text of AS-7 (Construction Contracts) issued by ICAI was filed before us (Copy enclosed at pages 403-414 of assessee's Paper Book-III). Construction Contract has been defined in para 2 of AS-7 as under:-

"A construction contract is a contract specifically negotiated for the construction of an asset or a combination of assets that are closely interrelated or interdependent in terms of their design, technology and function or their ultimate purpose or use."

In our view, AS-7 prescribes the method of accounting of construction contracts in the books of the contractors. It presupposes the existence of a 'contract' for construction between a contractor and contractee. AS-7 is not applicable to cases where the construction activity is carried out on ownership basis and not in pursuance of any contract with a contractee. Thus, AS-7 is not applicable to the case of the present assessee which is engaged in development and construction of buildings on ownership basis and sale thereof to customers. The buyers purchase ready flats from the assessee. The agreement is for sale of completed flats as opposed to a contract for construction of flats/ buildings. As such, the entire discussion of the AO in respect of applicability of AS-7 and percentage completion method of accounting in the case of the assessee is without any basis. We also find that the assessee has been consistently following project completion method of accounting since the very inception of its business. The said method of accounting has been consistently accepted as such by the AO in assessments framed u/s 143(3) of the Act over the past years. As such, the same method should have also been accepted for AY 2008-09, there being no change in facts and circumstances vis-à-vis the past years. We are placing reliance on the Judgment of Hon'ble Supreme Court in the case of Radhasoami Satsang Vs. CIT, 193 ITR 321 (S.C) wherein it is held that in the absence of any material change in facts, a different view than taken in earlier years could not be taken:

"We are aware of the fact that, strictly speaking, res judicata does not apply to income-tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year.

On these reasonings, in the absence of any material change justifying the Revenue to take a different view of the matter and, if there was no change, it was in support of the assessee-we do not think the question should have been reopened and contrary to what had been decided by the Commissioner of Income-tax in the earlier proceedings, a different and contradictory stand should have been taken."

Further, Hon'ble Delhi High Court in the case of CIT vs. Neo Poly Pack (P) Ltd., 245 ITR 492 (Del) held as under:-

"the doctrine of res judicata does not apply to income-tax proceedings since each assessment year is independent of the other but where an issue had been decided consistently in a particular manner for earlier assessment years, for the sake of consistency the same view -should continue to prevail for subsequent years unless there is material change in the facts. Since in the instant case there was no single distinguishing feature prompting a different view the income was liable to be assessed as business income."

47. Before us Learned Counsel for the assessee filed a submissions, which were filed before CIT (A) also and reproduced by the CIT(A) in the first appellate order for AY 2008- 09) as under:-

"12. The assessee follows project completion method of accounting whereby the profit/ loss on sale of constructed units is recognized only on completion/ substantial completion of work and handing over the possession of flats/ units to substantial number of customers. We have already submitted earlier that the impugned project 'Legend' was not completed during the aforesaid years under consideration i.e. A. Ys. 2004-05 to 2008-09. In this regard we have to submit as under."

1. *Certificate by Architect Pramod Shah & Associates certifying that till 31.08.2008, Legend project was approximately 85% complete. (Copy enclosed at page 402 of Paper Book-III).*
2. *The Appellant had planned to construct 36 storey building in addition to basement and ground floor from the beginning. The Appellant had furnished the plan before the BMC and Fire Department for the same. The construction of 36 storey required FSI of 2.5 and in this respect copies of 3 letters addressed to the Executive Engineer MCGM Byculla, Mumbai- 400008 dated 15.06.06, 06.09.2007 and 10. 12.2008 were submitted (Copy enclosed at pages 516- 518 of Paper Book-III). The request of the appellant, however, was not acceded to and vide its letter dated 07.05.2010 the claim of the appellant for higher FSI of 2.5 was rejected (Copy enclosed at page 519 of Paper Book-III) and the appellant was informed that in its case the applicable FSI will remain at 2. Since the rejection of the request of the Appellant for higher FSI was communicated only in May 2010, the Appellant could not have completed the project in 2008 as alleged by the Department.*
3. *The certificate of Mr. Ashfaq Shaikh, Consulting Civil Engineer & Engineering Solution indicating the stage of construction as on second week of February, 2010. This certificate clearly and precisely*

spells out the fact that substantial construction and finishing work of the building remained to be completed. Enclosure to the certificate gives a list of the pending work in details. (Copy enclosed at pages 520- 521 of Paper Book-Ill).

4. *M/s. Archvision, Architects acting on behalf of the Appellant had written to the Executive Engineer, (BP) City I, MCGM, Byculla, Mumbai - 400008 for grant of completion certificate vide letter dt. 7.12.2009 (Copy enclosed at pages 522 of Paper Book- III). The Appellant was, however, granted permission for part occupation of ground floor and basement and the completion certificate was not issued. Further, the Appellant was required to comply with certain other conditions by the Deputy Chief Engineer Buildings Proposals city vide letter dt. 1. 6.2010 (Copy enclosed at page 523 of Paper Book-Ill). It is worthwhile to note that the search in this case took place in March 2008 and the request for completion certificate was made almost 2 years thereafter in December 2009. It is ironical that the Department recorded a finding that the construction of the building was substantially completed in ^{1st} quarter of 2008 whereas the BMC, the competent authority in this respect was not ready to give completion certificate even in December 2009.*
5. *The letter of M/s. Archvision Architects was supposed to be accompanied by completion certificate. It WOS however in reality a Certificate by Consulting Structural Engineers to the effect that the construction was carried out as per structural design and it was safe and stable. No proper completion certificate was furnished as mentioned in the letter. The Letter of MHADA also was in the nature of NOC to enable the appellant to seek occupation certificate from the executive engineer building proposal of MCGM subject to fulfillment of certain conditions.*
6. *As per plans the flats were to be serviced by four lifts/ elevators to be provided by the Appellant. The Appellant had installed only 2 service lifts which were utilized for construction work to transport material and workers. The regular lifts for the use of flat owners are yet to be installed. The installation of 4 lifts will take place as part of completion of building and this will require the removal and replacement of the existing 2 service lifts.*
7. *In the sale agreement the flat buyers were required to make balance full payment only on issue of completion certificate by the BMC on the flats being ready for occupation (Copy enclosed at page 431 of Paper Book-Ill). Till date the Appellant had not received the full stipulated sale consideration for the flats and occupation was not allowed to any of the flat owners. The relevant clause 2.1 of sale agreement is reproduced below:-*

"Being balance consideration on the promoter notifying to the Purchaser that the said flat is ready for occupation and the

Promoter furnishing to the Purchaser the Occupation Certificate from the Corporation or at the request of the Purchaser, the Promoter giving to the Purchaser earlier possession, whichever is earlier."

8. *It is also worthwhile to note that the amount received by the appellant at the time of sale agreement was in the nature of advance. In the eventuality of the appellant failing to meet the stipulated condition the purchaser were entitled to receipt the refund of the payment made. This clearly proves that the nature of payment was advance and not a sale consideration. The relevant clause 3.2 is reproduced below:*

"Subject only to provisions of clause 11 hereof, on the Promoter committing default in meeting its obligations of achieving and completing the milestones of one or more stage on the due date as set out in Clause 2.1 above, or failing to give possession of the said Premises as stated herein, the Purchaser shall be entitled, if such breach is not remedied by the Promoter within 60 days of the Purchaser giving a notice to the Promoter specifying the breach, at its own option and discretion either to terminate this Agreement by giving one month notice. Provided however that upon termination of this agreement as aforesaid, the Promoter shall refund to the Purchaser the amount which may till then have been paid by the Purchaser to the Promoter along with a further lump sum of Rs...../- with interest thereon at the rate of% p. a. or obtain specific performance of this Agreement.

9. *As per chart enclosed sale agreements were entered into in respect of 17 flats only up to 31.03.2008 as against the total **32 flats** available in the building (Copy enclosed at pages 341- 349 of Paper Book-11). The sale agreements for remaining 13 flats were executed after 31.03.2008. The chart enclosed reflects the amounts received by way of advances at the time of the execution of the sale agreement. The balance amounts were to be received at the time of handing over of possession/ occupation. In respect of the flats for which sale agreements were entered into after 31.03.08, para 30 of the agreement mentioned that state of property as under 'construction'. This also clearly shows that the project had not been completed till the date of search. Further it also shows that upto 31.03.2008 the sale agreements entered into were approximately in respect of 60% of the flats only. The relevant point 30 narrating the stage of property is reproduced below:*

*"The Promoter has agreed to sell and transfer to the purchaser Flat No. 12 admeasuring 145.46 sq. mtrs carpet area i.e. 1565.15 sq. ft. carpet area equivalent to 1578.18 sq. ft. built-up area on the 12th floor in the Necklace wing of the building known as "LEGEND" **under construction** on the said property (hereinafter called "the said flat") together with a proportionate share in the*

common area and facilities in the said property appurtenant to the flat together with Car Parking Spaces No.----- on the lower ground/ upper ground and Car Parking Spaces No-----under stilts of the said building (hereinafter called "the said car parking spaces") at or for the price of Rs. -----/- and on certain terms condition mutually agreed upon by and between them. The said flat and the said parking spaces together with the benefit of the common areas, facilities and open spaces as presently stipulated are hereinafter referred to as "the said Premises"."

10. *It may further be noticed that the agreed sale consideration for all the flats for which sale agreements were entered into comes to Rs. 175.03 crores. The agreed sale consideration for the flats for which the agreement were executed before 31.3.08 is Rs. 66.49 crores out of this agreed transfer consideration the amount received up to 31.3.08 by way of advance is Rs. 47.27 crores. Thus the amount received upto 31.3. 08 by way of advance in regard to the flats for which sale agreements had been entered into is less than 25% of the expected sale consideration for all the flats.*

11. *The Assessing Officer has not placed any material on record to the contrary. He has only given a finding as regards completion based on conjectures and surmises.*

48. Before us reliance was placed on the decision of co-ordinate bench of Mumbai in the case of ITO Vs. Pratiksha Enterprises (2008) 4 DTR 547 (Mum), wherein the dispute was for determination of the year of completion of the project in a case where the assessee is following project completion method. The assessee had offered the income in AY 2003-04 whereas the Department had given a finding that the project was completed in AY 2002-03. The assessee had filed a certificate of Architect showing that, the project was completed up to 75% in AY 2002-03. The Municipal Corporation had granted completion on 25-2-2003 and the possession was given to the flat owners by the assessee only in AY 2003-04. As on 31-3-2002 a sizeable portion of the construction involving large expenditure remained to be completed. The lift was however installed in AY 2002-03. The revenue had accepted that the assessee was following project completion method. On these facts the ITAT has held as under:-

"The project was not complete in A. Y. 2002-03. The project was completed up to 75% and this is supported by the certificate of the architect. The assessee firm has given possession to the flats owners in A. Y. 2003-04. Bombay Municipal Corporation has issued final completion certificate on 25th Feb. 2003. After

31st March, 2002 substantial expenditure amounting to Rs. 10,71,57,107/- has been spent on the project. The various other facilities were not available in the project till 31st March, 2002. The project is not completed upto 90 per cent as argued by the Departmental Representative as no evidence in support of this aspect was produced. The AO in his order has also not given the finding to this effect. Installation of lift in the project cannot be considered as evident to support the completion of the project in this case when there are other evidences to suggest that the project is not complete in A. Y. 2002-03. On factual finding the project was not completed in A. Y. 2002-03 but was completed in A. Y. 2003-04."

From the above facts in the present case before us, it is clear that construction of the property was not completed till 31-3-2008. The AO is, therefore, not justified in assessing the income from this venture in the context of the fact that the assessee was following project completion method. Here, we are also conscious of the fact that the AO has not assessed the advances received from the flat owners as income from business in the year under consideration. It is therefore apparent that he was himself unsure as to in which year the income was to be assessed. Now, since the assessee is following project completion method of accounting and the impugned project was not complete during the years under consideration.

49. We find that in the instant case, as far as the receipts of regular nature i.e. advances received in cheque from the buyers are concerned, the AO has not challenged taxability of the same in the year of completion of the project in accordance with the project completion method of accounting followed by the assessee. The AO has not challenged the disclosure of the receipts in cheques as 'advances' on the liabilities side of the Balance Sheet. He has not proposed to tax the same in the year of receipt as in the case of alleged on-money. Thus, in respect of receipts in cheques, the AO has accepted the project completion method of accounting. Accordingly, the AO erred in whimsically deviating from the said method of accounting and taxing the alleged on-money receipt in the year of purported receipt. Accordingly, we are of the view that the purported on-money receipts could at best be treated as 'advance' in the years of alleged receipts and be brought to tax only in the year of completion of the project in accordance with the method of

accounting followed by the assessee but that issue we have already allowed in favour of the assessee. We find from the facts of the case that the assessee has been consistently following project completion method of accounting since the very inception of its business. The said method of accounting has been consistently accepted as such by the AO in assessments framed u/s 143(3) of the Act over the past years. However, in assessments framed u/s 153A of the Act pursuant to search action, the AO discarded the project completion method of accounting consistently followed by the assessee and taxed the alleged on-money receipts in the years of purported receipts i.e. AYs 2004-05 to 2007-08. Further, for AY 2008-09, AO recognized the entire profit in respect of the total area sold till 31.03.2008 in AY 2008-09 purportedly in accordance with AS-7. Thus, the AO abruptly discarded the method of accounting consistently followed by the assessee and accepted by the Revenue over the past years without citing any plausible reason for the same. We find that the Hon'ble Courts in a plethora of cases held that project completion method of accounting is an accepted method of accounting in case of builders. Where the assessee- builder has been consistently following the said method over the past years and the same has been accepted by the revenue, the revenue cannot reject the said method of accounting for the subsequent years in the absence of specific finding that the method adopted by the assessee results in distortion of profits.

50. Further, we are of the view that the AO has wrongly interpreted Accounting Standard - 7 (Revised) issued by the ICAI, i.e. percentage completion method, which is applicable for construction industry and therefore the assessee was required to follow the same for recognition of profit of the project 'Legend'. In this regard, we are of the view that AS-7 applies only to constructions executed in pursuance of contracts and not to projects executed suo moto. The implication is that in respect of own building projects, AS-7 does not apply. The pre-revised AS 7 (1983), inter alia, provided that "The Statement also applies to enterprises undertaking construction activities of the type dealt with in this Statement not as contractors but on their own account as a venture of a commercial nature where the enterprise has entered into agreements for sale'. The revised AS-7 (2002) does not contain this provision. As a result of this, revised AS-7

is not applicable to certain enterprises, e.g., real estate developers or assesseees carrying on construction business as opposed to construction contractors. As such, since the assessee is engaged in development and construction of buildings on ownership basis, AS-7 (revised) is not applicable to it. As argued by Learned Counsel the Accounting Standard - 7 has not been notified by the Central Government u/s 145(2) of the Act. As such, the AO cannot reject the accounts of the assessee company u/s 145(3) of the Act on the ground that that the assessee has not followed the accounting standard prescribed u/s 145(2) of the Act. For this reliance is being placed on the decision of the Bangalore Tribunal in the case of Prestige Estate Projects (P) Ltd. Vs. DCIT (2010) 33 DTR 514(Bang), wherein it was held that the assessee developer having regularly employed project completion method which is an accepted method of accounting, and the Central Government having not notified AS-7 under section 145(2) of the Act, AO could not reject the accounts under section 145(3) of the Act on the ground that the assessee had not followed the percentage completion method. Held as under:

"The appellant undertakes construction activity for those persons to whom it intends to sell the super-built up area along with undivided share of land in a project which it is developing as a developer. Hence, the assessee is not a construction contractor and revised AS-7 was considered as not applicable. Accounting Standard - 7 has not been specified the Central Government under section 145(2). Hence, the AO could not have rejected the accounts under s. 145(3) on the ground the assessee has not followed the prescribed method of accounting. As per s. 145(1), income is to be computed in accordance with system of accounting regularly employed and project completion method is an accepted method of accounting In view of this, revised AS-7 cannot be applied in the case of the assessee."

Thus, in view of the above, the assessee not being a construction contractor, AS-7 has no applicability in the assessee's case. Hence, as regards the year of completion of the project, we uphold the finds of CIT (A) that the monies received from the purchasers will partake the character of advance only and not as income until the possession is given to the purchaser. In case possession is not given, the purchaser can always claim the refund and the assessee is duty bound to return the money. In view of this receipts can be taxed only in the year in which possession of the flat

was given.

51. We have gone through the order of CIT (A) and noted that he has very aptly quoted from section 3(2)(i), section 5, section 8 and section 16 of the Maharashtra Ownership Flats (Regulation of the Promotions of Construction, Sale, Management and Transfer) Act, 1963 in support of the aforesaid proposition (pages 41 & 42 of the CIT(A)'s order for A.Y. 2008-09). The said sections are also reproduced hereunder:-

(1) Section 3(2)(i) of the abovementioned Act read as under:

"Not allow persons to enter into possession until a completion certificate, where such certificate is required to be given under any law, is duly given by the local authority (and no person shall take possession of a flat until such completion certificate has been duly given by the local authority."

(ii) Further section 5 of the aforesaid Act reads as under:-

"Promoter to maintain separate account of sums taken as advance or deposit and to be trustee therefore and disburse them for the purpose for which are given: - The promoter shall maintain a separate account in any bank of sums taken by him, from persons intending to take or who have taken, flats, as advance or deposit, including any sums so taken towards the share capital for the formation of a co-operative society or a company, or towards the outgoings (including ground rent if and he shall hold the said moneys for the purposes for which they were given and shall disburse the moneys for those purposes and shall on demand in writing by a Competent Authority, make full and true disclosure of all transactions in respect of that account."

(iii) Section 8 of the Act reads as under:-

"Refund of amount paid with interest for failure to give possession within specified time or further time allowed if:-

(a) *the promoter fails to give possession in accordance with the terms of his agreement of a flat duly completed by the dates specified, or any further date or dates agreed to by the parties, or*

(b) *the promoter for reasons beyond his control and of his agents, is unable to give possession of the flat by the date specified, or the further agreed date and a period of three months thereafter, or a further period of three months if those reasons still exist, then, in any such case, the promoter shall be liable on demand (but without prejudice to any other remedies to which he may be liable) to refund the amounts already received by him in respect of the flat (with simple interest at nine percent per annum from the date he received the sums till the*

date the amount and interest thereon is refunded), and the amounts and interest shall be a charge on the land and the construction if any thereon in which the flat is or was to be constructed, to the extent of the amount due, but subject to any prior encumbrances."

(iv) Again, Section 16 of the aforesaid Act reads as under:-

Act to be in addition to Transfer of Property Act and to over-ride contract to the contrary - The provisions of this Act, except where otherwise provided, shall be in addition to the provisions of the Transfer of Property Act, 1882 (IV of 1882), and shall take effect notwithstanding anything to the contrary in any contract."

The abovementioned extracts from the MOFA Act clearly show that the advances collected has to be refunded, if asked for by the buyer, if the possession is not given. The promoter cannot give possession unless the promoter gets occupancy certificate. The CIT (A) has also reproduced extracts of agreement dated 10.06.2008 between the assessee and the purchaser Shri Ashwani Kumar Mehta and Ms. Shobhana Ashwani Kumar Mehta for the sale of flat No. 12 in 12th floor in Necklace View of Legend Project (pages 42-43 of first appellate order for A.Y. 200809) and finally held as under:

"7.26 From the case laws discussed and from the provisions of MOFA Act and the provisions of the agreements entered between the promoter and the purchaser of flats, It is very clear that the advances paid by the purchasers will partake the character of advance till Occupancy Certificate is obtained. The purchaser of the flat cannot let, sublet, transfer, assign or part with purchaser's interest of benefit factor of the agreement until all the dues payable to the promoter are paid up. All the dues will not be paid till the possession of the flat is handed over. In view of this, It can be inferred that the risks and rewards are not transferred to the purchaser by the promoter until possession of Pat is given.

7.27 In the case of flat purchases, normally the purchasers book the flats by paying advances and later enter into agreement for sale and pays the monies as per the agreement for sale. Subsequently, the promoter completes the project and hands over the possession of the flats to the purchasers. The monies paid by the purchasers are returnable to the purchasers if the promoter is not completing the project successfully to the satisfaction of the purchasers. That stage will be achieved only when the Municipal authorities issue Occupancy Certificate. Until then, the money paid by the customers will only partake the character of 'advance money paid' by the flat purchasers. Until the possession is given! Occupancy Certificate is obtained, there is uncertainty and the advances paid will never partake the character of

income. As soon as the possession is given occupancy certificate is issue, the flats are ready for occupation and it is in a fit position to be handed over to the purchaser. So, I am of the view that the date of issue of occupancy certificate date of possession to the purchaser will be the date of accrual of income to the appellant."

52. In view of the above, we are of the view that receipts can be taxed only in the year in which the project is completed and the possession of the flat/ occupancy certificate is given for the flat. Now we find that vide its grounds of appeal before the Tribunal for AYs 2004-05, 2006-07 & 2007-08, the revenue has challenged the reliance placed by the CIT(A) on the decision of the Mumbai Tribunal (and later on affirmed by the Hon'ble Bombay High Court) in the case of Jalaram Jagruti Developers Pvt. Ltd. Vs. DCIT Central Circle (ITA No. 5121 to 5123/M/2008 vide order dated 2-04-2009) (Copy enclosed at pages 795-801 of assessee's Paper Book). The AO has tried to distinguish the said case law from the facts of the present assessee's case on the pretext that in the case of Jalaram Jagruti, unaccounted cash receipts were entered in the regular books of account whereas in the instant case, the assessee has neither admitted the existence of unaccounted cash receipts nor accounted them in its regular books of account. Thus, according to the AO, the said decision is not applicable to the facts of the present assessee's case. We find that the assessee and the CIT(A) have relied on the ratio of judgment rendered in the aforesaid case law to the effect that if the assessee follows project completion method of accounting, then even the unaccounted cash receipts towards sale of flats have to be assessed in the year in which the project is completed. In the case of Jalaram Jagruti, the concerned assessee, engaged in the business of development of land and building and consistently following project completion method of accounting, entered the undisclosed cash receipts unearthed in course of search in its regular books of account after the date of search but offered the same for taxation later on only in the year of completion of the project. The AO in the said case however held that since the cash receipts were from undisclosed sources and detected only as a result of search, they had to be brought to tax in the relevant assessment year to which they related and not on completion of the project, as claimed by the assessee. On appeal, the concerned CIT(A) held that only income from disclosed sources were to be computed as per

method of accounting followed by the assessee and that the said method could not be applied to undisclosed receipts, which were to be taxed in the hand of the assessee on receipt basis. On further appeal by the said assessee, the Mumbai ITAT reversed the order of the CIT (A) and held as under:-

"We have considered the rival submissions. It is not in dispute that the receipts in question have direct nexus with the business of the assessee and represent cash receipts against sale of shops and flats. It is also not in dispute that the assessee follows project completion method of revenue recognition and that project was complete only in A. Y. 2008-09. Since, cash receipts have a direct nexus with the project of Jalaram Park, they have to be taxed onl^y as income from the said project. The assessee has already recognized these receipts in its books of account while passing the necessary entries on 5.5.2005 in its books of accounts. In such circumstances, we are of the view that receipts in question cannot be brought to tax in A. Y. 2003-04 to 2005-06. These receipts have already been accounted for in the books of account can be taxed only in the year in which project is complete and income from the project is offered for tax."

Thus, the ratio of judgment rendered in the aforesaid case law is directly applicable to the present assessee's case. Although the assessee claims that no unaccounted cash was ever received by it, it has taken up an alternative plea that even if for argument's sake unaccounted cash is deemed to have been received in respect of Legend project, since such cash receipts will have direct nexus with the said project, they can be taxed only in the year in which the project is completed in accordance with project completion method of accounting regularly followed by the assessee and accepted by the revenue over the past years. Thus, the ground of appeal taken up by the revenue before the Tribunal challenging the reliance placed by the CIT(A) on the judgment rendered in the case of Jalaram Jagruti is baseless. Thus, the aforesaid case law clearly supports the assessee's contention that:

- (i) Project completion method of accounting is an accepted norm of accounting in case of real estate developers.
- (ii) That AS-7 (revised 2002) is not applicable to the assessee's case.
- (iii) The contention of the AO that the assessee was necessarily required to follow percentage completion method of accounting in accordance with revised AS-7 was misplaced.
- (iv) That the AO was wrong in assessing the income of the assessee for A.Y. 2008-09 in accordance with percentage completion method of

- accounting.
- (v) That the AO was bound to accept project completion method of accounting regularly followed by the assessee over the past years and accepted as such by the Department.
 - (vi) That the burden to prove that the completed contract method followed by the assessee was not correct and resulted in distortion of profits was on the AO and the AO had miserably failed to do so.

53. From the above, we are of the view that no revenue from legend project be assessable for AY 2008-09. As discussed above, in respect of legend project, sale agreements were entered into in respect of 17 flats only up to 31-03-2008 as against the total 35 flats available in the building. The sale agreements for remaining 13 flats were executed after 31-03-2008. The chart enclosed reflects the amounts received by way of advances at the time of the execution of the sale agreement. The balance amounts were to be received at the time of handing over of occupation. In respect of the flats for which sale agreements were entered into after 31-03-08, Para 30 of the agreement mentioned that state of property as under 'construction'. This also clearly shows that the project had not been completed till the date of search. Further it also shows that up to 31-03-2008 the sale agreements entered into were approximately in respect of 60% of the flats only. It further shows that the agreed sale consideration for all the flats for which sale agreements were entered into comes to Rs. 175.03 crores. The agreed sale consideration for the flats for which the agreement were executed before 31.03.08 is Rs. 66.49 crores out of this agreed transfer consideration the amount received 31.03.08 by way of advance is Rs. 47.27 crores. Thus the amount received up to 31.03.08 by way of advance in regard to the flats for which sale agreements had been entered into is less than 25% of the expected sale consideration for all the flats. Further, the fact that the construction of the project was not completed up to 31.03.2008 has also been discussed with corroborating evidences in the preceding paragraphs. Thus, in light of the aforesaid discussion we are of the view that no income was recognizable from the impugned project for AY 2008-09 under project completion method followed by the assessee. Hence, the issue relating to the method of accounting followed by the assessee is allowed. Further, we have already held that the seized documents marked

as Annexure A-1, pages 1 to 19 are held as dumb documents and even otherwise, the assessee explained the entries, no addition on account of receipt of moneys on extrapolation can be added in the hands of the assessee. Accordingly this issue of the assessee's appeals is allowed and the issue of Revenue's appeals is dismissed.

54. The next common issue in this appeal of assessee in ITA No.1907/Mum/2011 and Revenue's appeal in ITA No.3020/Mum/2011 for the assessment year 2005-06 is against the order of CIT (A) confirming the disallowance of compensation of Rs.6,50,00,000/- and interest of Rs. 1,36,65,205/- paid to Videocon Group. For this assessee had raised the following grounds:-

- “1. That on the facts and in the circumstances of the case, the Learned CIT (A) erred in holding that the assessment order passed u/s 143(3) r. w. s. 153A of the Income-tax Act for the year under consideration was valid although no valid search was conducted in the appellant's case and no incriminating evidence was found as a result of search.*
- 2. That the Learned CIT (A) erred in holding that the AO was entitled to use whatever material was available with him, whether or not a discovery of search in assessee's case, including material found in course of search of another person in assessment framed u/s 143(3) r. w. s. 153A of the Act”.*

The Revenue has raised following ground:-

- “1.a. On the facts and in the circumstances of the case and in law, the Learned CIT(A) erred in that the compensation and interest paid by the assessee to Videocon Group was revenue expenditure and incurred wholly and exclusively for the purposes of business.*
- b. Without prejudice to above, on the facts and in the circumstances of the case and in law, the Learned CIT(A) erred in not considering the expenditure as capital expenditure not allowable as revenue deduction.”*

55. Brief facts relating to this issue are that the assessee company had received a sum of Rs. 11.50 lacs from Videocon Group for participation in the project Legend. Subsequently, since the project got delayed, Videocon Group decided to withdraw from the project for which the assessee company offered to repay them the principal amount of Rs. 11.50 crores. However, Videocon Group did not agree and filed a case against the assessee before the Hon'ble Bombay High Court. The said case was

settled by filing Consent Terms wherein it was mutually decided amongst the parties that in lieu of the aforesaid payment, Bharat Shah Group would transfer their unit in the ground floor at Prabhadevi being constructed by Trambak Home Pvt. Ltd. for which necessary permission would be obtained within 90 days or in the alternate pay them Rs. 18 crores, including interest. In support of these facts, the assessee filed copies of orders dated 17.12.2004 & 12.09.2005 of the Hon'ble Bombay High Court (Copy enclosed at pages 350-3 79 of assessee's Paper Book-II). Finally, vide order dated 08.12.2005 of the Hon'ble Bombay High Court decided that the assessee company would pay the aforesaid amount of Rs. 18 crores plus interest in cash. Copy of the aforesaid order dated 08-12-2005 of the Hon'ble Bombay High Court was filed before us (Copy enclosed at pages 382386 of assessee's Paper Book-II). Accordingly, Rs.6,50,00,000/- (total payment of Rs. 18 crores minus principal amount of Rs.11.50 crores) was debited under the head 'compensation paid' and Rs. 1,36,65,205/- as 'interest paid' to Videocon Group in the Profit & Loss Account of the assessee company for the year ended 31.03.2006 (i.e. relevant to AY 2006-07).

56. The AO required the assessee to prove that the payment of compensation of Rs. 6.5 crores and interest of Rs. 1.37 crores to Videocon Group were made wholly and exclusively for the purpose of business. Further, he alleged that these payments were made to compensate the Videocon Group for fault of the promoters and had nothing to do with commercial expediency. Accordingly, the compensation and interest paid to Videocon Group were disallowed by the AO u/s 37(1) of the Act. The assessee claimed that the impugned payments related to AY 2006-07, the AO erroneously made the disallowance in the assessment order u/s 153A of the Act for AY 2005-06. Thus, according to him, the entire addition of Rs. 7,86,65,205/- made on the aforesaid count for AY 2005-06 collapsed at the very threshold. On appeal, the CIT (A) appreciated the submissions of the assessee and deleted the impugned addition for AY 2005-06 partly. The assessee is in appeal before the Tribunal against the confirmation of the addition by the CIT (A) for AY 2005-06.

57. Before us Learned Counsel for the assessee argued, without prejudice to the

fact that the impugned expenses did not pertain to AY 2005-06 and as such, the addition for the said year was not sustainable. It was argued that even otherwise no such disallowance could be made even for AY 2006-07. The impugned compensation and interest expenses paid to Videocon Group were also shown by the assessee company in its Profit & Loss Account filed with the original return u/s 139(1) of the Act for AY 2006-07. Copy of the financial statements for AY 2006-07 are enclosed at pages 38-48 of the assessee's Paper Book-I. The assessment for AY 2006-07 was not pending. Thus, the additions made in AY 2006-07 without giving reference to any seized documents found during course of search is bad-in-law. Learned Counsel argued that in the instant case, the purported search action in the assessee's case did not lead to discovery of any evidence whatsoever with respect to allowability or otherwise of the said expenses. Similarly, the search action in the group cases also did not lead to the discovery of any such evidence with regard to the impugned expenses. As such, items of regular assessment could not be added back in the assessment framed u/s 153A of the Act when no incriminating documents were found with respect to disallowed items in the search proceedings. Since assessment had originally been framed u/s 143(3) of the Act after taking into consideration the said expenses, the same could not be abruptly disallowed in assessments framed u/s 153A of the Act merely on the basis of change of opinion, there being no change in facts and circumstances as compared to the past. Judgment of Hon.ble Bombay High Court in the case of CIT V. Continental Warehousing Corporation (Nhava Sheva) Ltd. (2015) 374 ITR 645 (BOM), wherein Hon'ble Bombay High Court has laid down that if there is no incriminating material found during the course of search then the power under section 153 A of the Act, being not expected to be exercised routinely and should be exercised if the search revealed any incriminating material.

58. In view of the aforesaid case of Hon'ble Bombay High Court in the case of Continental Warehousing Corporation (Nhava Sheva) Ltd. (supra), we are of the view that completed assessments cannot be disturbed if nothing incriminating is found in the course of search and items of regular assessment cannot be added back in proceedings u/s 153A or 153C of the Act when no

incriminating documents were found in respect of the disallowed amounts in search proceedings. In the instant case also, no incriminating material or documents were found in course of the search at any of the premises of group concerns or premises of the assessee company with respect to the allowability or otherwise of the impugned compensation or interest expenses. In the original assessment framed u/s 143(3) of the Act for AY 2006-07, the AO after application of mind and detailed scrutiny of accounts had consciously allowed the said expenses. However, later on while framing assessments u/s 153A of the Act, under identical circumstances vis-a-vis the past, the AO opined that such expenses were not allowable u/s 37(1) of the Act. Accordingly, the same was illegally added back by the AO u/s 143(3) r. w. s. 153A of the Act merely on the basis of change of opinion in the guise of search assessment. Such an action is vitiated in law. It is an accepted principle of law that the AO does not have jurisdiction to review his own order. As such, since between the date of the order of original assessments u/s 143(3) of the Act and the date of framing assessment u/s 153A of the Act, no new material had come on record, no fresh information had been received in respect of the impugned compensation and interest expenses, the A.O could not add back items of regular assessment on the basis of mere change of opinion by resorting to materials already on record at the time of original assessment merely because a search action had been undertaken in the group case. Respectfully following the judgment of Hon'ble Bombay High Court in the case of Continental Warehousing Corporation (Nhava Sheva) Ltd. (supra), we delete the addition made by revenue and allowed this issue of assessee's appeal.

59. The next common issue in assessee's appeal in ITA No. 1930/Mum/2011 and Revenue's appeal in ITA No. 3021/Mum/2011, both for the AY 2008-09, is as regards to the order of CIT (A) disallowing proportionate expenses incurred for constructing saleable area for alleged bogus tenants amounting Rs. 5,56,39,387/- for the AY 2008-09. For this assessee raised following grounds:-

"1. That the Learned CIT (A) erred in directing the AO to make disallowance of expenditure relating to cost of construction of the space meant for tenants in the assessment of the assessee in the assessment year when the income from the project is offered on its completion even though such direction was beyond the jurisdiction of

Learned CIT(A) as the claim relating to deduction of such expenses for that assessment year were not before her and the direction has been issued without consideration of the relevant facts and circumstances of the case as also the contentions of the appellant on the issue.

2. *That the Learned CIT(A) erred in not taking into consideration the fact that the area meant for tenants was legally sanctioned by MHADA and accordingly, the expenses incurred in connection with the construction of the same was fully allowable u/s 37(1) of the Act."*

The Revenue has raised the following grounds:-

- a. *On the facts and in the circumstances of the case and in law, the Learned CIT (A) failed to appreciate that the amount of Rs.18.69 crores paid by the assessee to MHADA was in the nature of penalty paid by the assessee for infraction of law, which would not be allowable under the provisions of Section 37 (1).*
- b. *On the facts and in the circumstances of the case and in law, the Learned CIT(A) failed to appreciate that the order of MHADA was passed on 30.07.2009 and the payment of Rs.18.69 crores was made subsequent to the order. Hence, the question of allowability or disallowability of this amount would arise in the A.Y.2010-11 which is still pending before the AO.*
- c. *On the facts and in the circumstances of the case and in law, the Learned CIT(A) erred in concluding that profit of the project should be recognized on completion of the project and that issue of occupancy issued by Municipal Authorities should only be the criteria for completion of project.*
- d. *On the facts and in the circumstances of the case and in law, the Learned CIT(A) erred in not appreciating the fact that 95% of the project was completed as per assessee's own statement and due to pendency of issue of bogus tenancy, possession was not given.*
- e. *On the facts and in the circumstances of the case and in law the Learned CIT(A) erred in not appreciating the fact that the project cannot be allowed to be stretched at the whims of the assessee, even if the assessee is following project completion method when the other circumstances clearly indicate that the project had been completed. The ratio laid down b the Hon'ble Mumbai Tribunal in the case of Unique Enterprises Vs. ITO (2010- TIOL-737-ITAT-MUM dated 20.08.2010) and Champion Construction Company Vs. ITO (1983) 5 ITD 495 has not been appreciated by the Learned CIT(A)."*

60. Brief facts are that the AO disallowed expenses to the extent of Rs.

6,67,67,532/- for AY 2008-09 under explanation to section 37(1) of the Act alleging the same to be in the nature of proportionate expenses incurred for constructing area for bogus tenants and thus the expenses claimed is illegal in view of the provisions of MHADA. The said figure has been arrived at by the AO as under:-

*“1,11,35,60,275 (total cost till 3 1.3.2008) - 6,50,00,000 (compensation) - 1,36,65,205 (interest) - 30,05,00,000 (Land cost) = 73,43,95,070/ 109562 (total saleable area) * 9960.83 sq. ft. (bogus tenants area) = Rs. 6,67,67,532/-.”*

Aggrieved, assessee preferred appeal before CIT (A), who then determined based on the various orders of the MHADA computed the expenses to be disallowed in regards to illegal the extent of 771.44 sq. mts. i.e. 8300 sq. ft. instead of 9960.83 sq. ft. considered by AO. The AO had, however, not considered the part relief provided by the CIT (A) in its order giving effect. However, he later on rectified the assessment order u/s 154 and provided part relief and made a disallowance of Rs.5,56,39,387/-, which is now under dispute before us.

61. The assessee had then filed an appeal before CIT(A) against the order passed u/s 154 of the Act raising a ground that the said addition cannot be made in AY 2008-09 as the assessee is following project completion method of accounting and has accordingly not booked any income in AY 2008-09. It was claimed that when no income is offered from the said project in AY 2008-09, there is no question of disallowing the said amount in AY 2008-09. The CIT (A) had given relief and held that the proportionate cost of construction is to be disallowed in the year when the project is complete. Aggrieved by the order of the CIT (A), the assessee is before Tribunal. The assessee claimed that the disallowance of the proportionate cost of construction, on the argument that the same, pertains to bogus tenants is incorrect considering the facts of the case.

62. The facts narrated by the assessee in brief, constituting the background of the matter, are that vide order dated 17.12.2007, the Mumbai Building & Reconstruction Board (a MHADA Unit) held that 48 tenants made claim in respect of property bearing C.S. No. 114 (Pt) of Malbar, Cumballa Hill Dn. Ward

No.D-3 133 (1), Bldg. No. 220, Walkeshwar Road (the present site of Legend project) remained unproved and accordingly, possession of 48 flats shown for the purpose of rehabilitation of so called occupants/ tenants needed to be taken over by MHADA after confiscating them. The NOC holder vide letter dated 17-02-2004 gave its consent for handing over the possession of 48 tenements shown for tenants to MHADA. Copy of the said order dated 17-12-2007 was filed by assessee before us (Copy enclosed at pages 387-391 of assessee's Paper Book-III). Thereafter, vide letter dated 30-07-2009 MHADA gave legal sanction to 9 tenants out of the 48 tenants. Copy of the said letter was filed. (Copy enclosed at pages 392-395 of assessee's Paper Book-III). Again, vide letter dated 06.08.2009 MHADA intimated its approval to hand over the balance 771.44 sq. ft. of the disputed area of the impugned project to the assessee on payment of consideration @ Rs. 2,42,300/- per sq mt. amounting to Rs, 18,69,19,912/- to Mumbai Building Repairs & Reconstruction Board. Copy of *the said letter was filed* (Copy enclosed at pages 396-397 of assessee's Paper Book-III). Accordingly, the assessee vide cheque no. 042917 dated 13-08-2009 drawn in the name of M.B.R & R Board (MHADA) paid the impugned amount of Rs. 18,69,19,912/- to MHADA. In support of the aforesaid, copies of the payment voucher and relevant bank statement showing the aforesaid payment was filed. (Copy enclosed at pages 400- 401 of assessee's Paper Book-III).

63. In view of the above, the assessee claimed that since the entire area originally claimed in respect of the disputed 48 tenants was ultimately sanctioned and legalized by MHADA and the assessee paid the requisite consideration thereon, no disallowance can be made by invoking the explanation to section 37(1) of the Act in respect of proportionate expenses incurred in connection with construction of the said areas. Since the impugned area was legally sanctioned by MHADA, expenses incurred in connection with construction of the same are fully allowable u/s 37(1) of the Act. Even otherwise, the assessee claimed that the impugned disallowance of proportionate cost of Rs. 6,67,67,532/- made by the AO has resulted in double addition on the same count. It was further argued that the AO has rejected the book profits shown by the assessee for AY 2008-09 and

estimated the profits of the on the basis of percentage completion method of accounting. While doing so, at Para 13 of assessment order u/s 153A of the Act for AY 2008-09, the AO has deducted impugned proportionate expenses for alleged bogus tenements of Rs. 6,67,67,532/- from the total construction cost of Rs. 103,48,95,070/- (i.e. $103,48,95,070 - 6,67,67,532 = 96,81,27,538$) and considered only the balance cost of Rs. 96,81,27,538/- for the purpose of determining the proportionate construction cost for total area sold of 66451 sq. ft. sold up to 31-03-2008 (i.e. $66451 * 96,81,27,538 / 99601 = 64,59,06,499$). The said proportionate construction cost for 66451 sq. ft. has been deducted from the total agreement value of flats sold till 31-03-2008 to determine the total income on percentage completion method of accounting in respect of 66451 sq. ft. of area sold (i.e. $95,01,16,716$ minus $64,59,06,499 = 30,42,10,217$). Since Mr. Bharat Shah had already offered Rs. 5 crores and the same was shown as business income by the assessee, the AO made an addition for the balance profit of Rs. 25,42,10,217/- in the hands of the assessee. The total income was ascertained by the AO as under:

| | | |
|---|---------------------|---------------------|
| BUSINESS INCOME | | 5,00,32,914 |
| As per computation (offer of Sri Bharat Shah) | | |
| Add: Additions made as discussed above | | |
| 1). Proportionate expenses incurred for constructing area for tenants as per Para 4 | 6,67,67,532 | |
| 2). Addition on account of actual construction cost on saleable area | <u>25,42,10,217</u> | <u>32,09,77,749</u> |
| GROSS TOTAL INCOME | | <u>37,10,10,663</u> |
| Less: Deduction under Chapter VI-A | | NIL |
| TOTAL INCOME | | 37,10,10,663 |

64. Now, having computed the business income for AY 2008-09 at Rs. 25,42,10,217 (balance profit) plus 5,00,32,914/- (profit as per computation on the basis of offer made by Shri Bharat Shah including other income of 32,914) = Rs. 30,42,43,131/- (i.e. the profit estimated by the AO on percentage completion method of accounting for 66451 sq. ft. without allowing deduction on

account of the construction cost of Rs. 6,67,67,532/- in respect of alleged bogus tenants), the AO erred in adding back the impugned amount of Rs. 6,67,67,532/- to the said business income of Rs. 30,42,43,131/- although no deduction of the said sum of Rs. 6,67,67,532/- was made while computing the profit on the above basis by the AO. Thus, the AO while computing the total income of the assessee for AY 2008-09 erred grossly in making disallowance for the impugned construction cost of Rs. 6.67 crores although the said construction cost of Rs. 6.67 crores was never allowed by him while determining the profit of the assessee in accordance with percentage completion method of accounting.

65. On appeal by the assessee, the CIT (A) that the assessee had produced before MHADA evidence in respect of 9 tenants and in consideration of this representation, MHADA passed an order dated 30.07.2009 granting approval of 9 tenants as genuine. In respect of balance tenants the assessee was asked to pay for 771.44 sq. mt. at the rate of Rs. 2,42,300/- per sq. mt. The assessee accordingly paid Rs. 18,69,19,912/- so that the assessee could get this space of 771.44 sq. mt. and sell the flats. From the said facts, the CIT (A) concluded that since 771.44 sq. mt. stood confiscated by MHADA for violation of the law, the amount spent for constructing the said area could not be allowed as deduction u/s 37(1) of the Act, since according to him the said expenditure had been made in violation of law. He therefore directed the A.O to disallow the proportionate expenditure for 771.44 sq. mt. in the place of disallowance made by the AO for 925.39 sq. mt. (corresponding to 9960.83 sq. ft.). Aggrieved by the said order of the CIT(A), the assessee is in second appeal before the Tribunal.

66. We find from the order of the CIT (A) he himself admitted that the assessee is following project completion method of accounting and since the impugned project was not completed by AY 2008-09, no profit could be assessed for the said year. As such, the question of making any disallowance on account of the impugned expenditure (which was never claimed as deduction for the said year in the P/L Account) and corresponding addition did not arise for AY 2008-09. Further, we find from records that the CIT (A) also failed to address the grievance of the assessee

regarding double addition of Rs. 6,67,67,532/- made by the AO.

67. Further, we are of the view that the assessee is engaged in development of disputed/ occupied property duly approved by MHADA at Walkeshwar, Mumbai. In terms of approval, the assessee had to provide space to the occupiers of erstwhile property. There were certain doubts about the number of occupiers and the claim of the assessee was accepted in respect of 9 out of 48 occupiers. On this basis, the authorities in MHADA determined the surplus space at 771.44 sq. mt. intended for the tenants the claim for which was not admitted by MHADA. Accordingly, the assessee made the payment of Rs. 18,69,19,912/- in terms of letter dated 06.08.2009 (Copy enclosed at pages 396-397 of assessee's Paper Book-III). It is a fact that MHADA authorities demanded the amount in terms of provisions of section 103-1(3) of Maharashtra Housing and Area Development Act, 1976. Section 103-I of this Act (Copy enclosed at pages 398-399 of Paper Book-III) provides for methodology for determining the surplus area and the manner in which it is to be dealt with by MHADA authorities. One of the situations, in which there can be surplus and when the space constructed for the erstwhile occupiers is in excess of space allotted to them, under the provision of the aforesaid Act, the MHADA authorities have to decide as to whom the space is to be handed over and for what consideration. The constructed area/ tenements could be handed over to occupiers of another seized building for a consideration. In the present case, the authorities thought it fit to hand over the same to the assessee on payment of amount computed at rates provided in the Ready Recknor which could be thereafter dealt with in a commercial manner (i.e. sold for a consideration) by the assessee. In view of these factual aspects, we are of the view that that it is not a case where the assessee has been found having constructed the property in violation of the sanctioned plan or the relevant provisions of law governing the activity. It is also not the case where any part of the costs incurred on construction of the property has been found to be illegal, non-genuine or incurred for extraneous purposes. It is a case where the construction is legal and as per plan. The entire construction cost claimed by the assessee has actually been incurred by it on construction of the property. There is however, surplus constructed area intended for the occupiers

of the erstwhile property. Since the claim of some of the occupiers was not found admissible, the surplus area has been transferred to the assessee for a consideration. Subsequently, the surplus area has been dealt with by the assessee in a commercial manner and the sale consideration for the same has been duly accounted for as and when so required. It is therefore, perfectly clear that the entire amount incurred on the construction of the property is legal, genuine and in accordance with law and therefore admissible as business expenditure. Since the entire sale consideration for the impugned surplus area (which was later on transferred to the assessee for a consideration) has been duly accounted for as and when sold by the assessee, the corresponding construction cost is also perfectly allowable as business expenditure. Further, the amount paid to MHADA is also in the nature of cost of construction and admissible as business expenditure. The provisions of MHADA Act do not, in any manner, provide for its treatment as anything in the nature of penal payment. The payment is neither in the nature of fine nor in the nature of penalty. It is not attributable to any irregularity or infringement of law. The claim is therefore properly admissible for deduction as business expenditure.

68. The decision of Hon'ble Supreme Court in the case of CIT Vs. Malayalam Plantations Ltd. (1964) 53 ITR 140 (SC) (Copy enclosed at pages 739-750 of assessee's Paper Book) very precisely defines the scope of deduction of expenditure u/s 37(1) of the Act corresponding to section 10(2)(xv) of the Indian Income Tax Act, 1922 as under:-

"The Expression "for the purpose for the business" is wider in scope than the expression "for the purpose of earning profits". Its range is wide; it may take in not only the day to day running of a business but also the rationalization of its administration and modernization of its machinery; it may include measures for the preservation of the business and for the protection of its assets and conjectures without any tangible evidence ignoring the agreements on records, the statements of buyer recorded u/s 131 and the affidavits of buyers affirming the assertions made by the appellant company property from expropriation, coercive process or ascertain of hostile title; it may also comprehend payment of statutory dues and taxes imposed as a precondition to commerce or for the carrying on of a business; it may comprehend many other acts incidental to the carrying on of a

business. However wide the meaning of the expression may be, its limits are implicit in it. The purpose shall be for the business, that is to say, the expenditure incurred shall be for the carrying on of the business and the assessee shall incur it in his capacity as a person carrying on the business. It cannot include sums spent by the assessee as agent of a third party, whether the origin of the agency is voluntary or statutory."

In view of the above, we delete the disallowance of impugned expenses of Rs. 6,67,67,532/-.

69. Coming to the legal issues raised by assessee in ITA Nos. 3019,3020,2985 & 2986/Mum/2011 for the AYs 2004-05, 2005-06, 2006-07 & 2007-08 are as regards to the search assessments framed by the AO under section 153A of the Act despite the fact that no search on the assessee at its registered address was conducted u/s 132 (A) of the Act and no incriminating evidence found during the course of search on other person at the registered address of the assessee, hence, assessments framed are bad in law. Further, procedure laid down u/s 153C of the Act was not followed as the addition is based on paper seized in the course of search in the case of other person at the premises of another person.

70. At the outset, we have already decided the issues on merits i.e. in the appeals of the assessee and the appeals of the Revenue; hence, we need not to adjudicate the issues on jurisdiction i.e. the legal issues.

71. Coming to assessee's appeal in ITA No.3378/Mum/2016 for the assessment year 2011-12, the assessee has challenged the addition made by the AO and confirmed by the CIT (A) of alleged on-money receipts on the basis of certain loose papers found and seized by the search party u/s 132 (1) of the Act and marked as Annexure A-1, pages 1 to 19 amounting to Rs.57,14,15,087/- relating to assessment year 2004-05 and Rs.10,02,10,600/- relating to assessment year 2006-07. The next issue added by the AO and confirmed by the CIT (A) in respect to the above seized papers in respect to on-money extrapolated and added in assessment year 2004-05 Rs.05,62,60,321/-, in assessment year 2006-07 Rs.17,47,36,075/- and in assessment year 2007-08 Rs.11,38,30,565/-. The next issue regarding disallowance of proportionate expenses incurred in relation to construction of saleable area to bogus

tenants for the area of 771.44 sq. mtrs. added by the AO and confirmed by the CIT (A) amounting to Rs.6,67,67,532/-. The last issue is as regards to addition made by the AO and confirmed by the CIT (A) on the basis of amount paid to MHADA amounting to Rs.13,94,44,368/- by invoking the provisions of section 37(1) of the Act. On all these issues, we have already decided these issues on merits in appeals related to assessment years 2004-05 to 2009-10 i.e. of the assessee as well as of Revenue in this order vide Paras 1 to 70 and hence, these appeal of the assessee has become academic in nature. Accordingly, this appeal of the assessee is allowed in terms of the above appeals.

72. In the result, the appeals of the Revenue and that of the assessee are decided as indicated above against each issue.

Order pronounced in the open court on 31-10-2016.

Sd/
(B. R. BASKARAN)
ACCOUNTANT MEMBER

Sd/
(MAHAVIR SINGH)
JUDICIAL MEMBER

Mumbai, Dated: 31-10-2016
Lakshmikanta Deka/Sr.PS

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT (A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file. //True Copy//

BY ORDER,

Assistant Registrar
ITAT, MUMBAI