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

Before Shri P.M.Jagtap, Accountant Member
and Shri Amit Shukla, Judicial Member..

I.T.A. No.8485/Mum/2011.
Assessment Year : 2007-08.

M/s LokHousing and Constructions Limited, Lok Bhavan, Lok Bharti Complex, Marol Maroshi Road, Andheri (E), Mumbai – 400 059. PAN AAACL 1881B	**Vs.**	Asstt. Commissioner of Income-tax-8(3))OSD), Mumbai.
Appellant.		**Respondent**.

Appellant by : Shri S.C. Tiwari
Ms. Natasha Mangat.
Respondent by : Smt. Usha Nair.

Date of hearing : 14-09-2012
Date of pronouncement : 23-10-2012.

O R D E R

Per P.M. Jagtap, A.M. :

This appeal filed by the assessee is directed against the order of learned CIT(Appeals)-17, Mumbai dated 31-10-2011 whereby he upheld the order of the AO treating the revised return filed by the assessee as invalid and assessing the total income of the assessee at Rs.135.56 crores on the basis of original return filed by the assessee.

2. The relevant facts of the case giving rise to this appeal are that the assessee is a listed company engaged in the business of development of real estate and construction. The return of income for the year under consideration i.e. assessment

year 2007-08 which was due to be filed by 30th Nov., 2007 had not been filed by the assessee till 11-09-2008 when a survey u/s 133A of the Act was carried out at its premises. During the course of survey, audited financial statements for the previous year relevant to assessment year 2007-08 were found showing profit before taxation at Rs.142.45 crores. In the computation of total income of the assessee company as made by its accounts staff on the basis of the said financial statements, a sum of Rs.52.55 crores was shown to be payable by the assessee company for assessment year 2007-08 on account of tax as well as interest u/s 234A, 234B and 234C. During the course of survey, statement of Shri Lalit C. Gandhi, Chairman and Managing Director of the assessee company was recorded wherein he accepted that the tax so payable was not paid by the assessee company due to severe financial crunch and the return of income for the year under consideration was also not filed due to non-payment of the said tax. Subsequent to the survey, letters were also filed by the assessee company reiterating its assurance to make the payment of outstanding tax for the year under consideration. Finally, the return of income for the year under consideration was filed by the assessee on 23-09-2008 in response to notice issued by the AO u/s 142(1) on 18-09-2008 declaring total income of Rs.135.47 crores but no payment of tax due thereon was made. The said return filed by the assessee was processed by the AO u/s 143(1) on 22-10-2008. Thereafter a revised return was filed by the assessee company on 01-01-2009 declaring therein its total income at Nil. Along with the said return, revised annual accounts were also filed by the assessee which revealed that the major difference between the original and revised return was on account of cancellation of the following five transactions in immovable property and reversal of income recognition from the said transactions by the assessee :

Date of Sale	Amt. Refunded till date	Buyer	Sale Conside-ration	Particulars of property sold	Advance Received.	Date of Cancell-ation
29.06.06	Adjusted Against loan Given by Assessee to Chirag Holdings (a Sister concern Of Deebro Silk Industries)	Deebro Silk Industries Pvt. Ltd., Gala No. 20/B, Bldg No. 1, Industrial Estate, M.V Road, Andheri (East), Mumbai59	Rs.17.81 crores	Development Rights for part of Land situated at Ambernath	Rs. 3 crores	03.12.2008
25.9.06	Rs.5 lakhs	Lok Holdings and Constru-Ctions Ltd., Lok Bhavan, Lok Bharti Complex, Marol Maro-shi Road, Andheri (E), Mumbai-59.	Rs. 18 Crores.	75% rights in Land at Veera Desai Property Andheri 13,271.10 sq. mtrs.	Rs. 3 Crores.	4.12.2008
27.09.06	Rs.5 lakhs	Azofen Pvt Ltd., Lok Bhavan, Lok Bharti Complex, Marol Maroshi Road Andheri (E), Mumbai 59.	Rs. 51 Crores	Land of 1,24,143 sq. mtrs at Kalyan.	Rs. 3 Crores.	28.11.2008
30.12.2006	Rs. 5 Lakhs	Azofen Pvt. Ltd., Lok Bhavan, Lok Bharti	Rs.56.26 Crores.	Development Rights for Part of Land Situated at	Rs. 3 Crores.	28.11.2008

		Complex, Marol Maroshi Road Andheri (East) Mumbai 59.		Ambernath.		
30.03.2007	NA	C&B Futuristic Builders Pvt. Ltd. Office No. 203, Ahuja Chamber No.1, Kumara Krupa Road, Bangalore560001	Rs.51crores as Capital introduced in Joint Venture with the Buyer and 25% profits in the said Joint Venture.	Land at Kadugodi Village, Plantation Area, White Field, Bidarahalli Hobli, Hoskote Taluk, Bangalaore.	Nil	08.12.2008

3. The revised return filed by the assessee company was rejected by the AO holding the same to be invalid on the following grounds :

(a) During the course of survey the Chairman cum MD of the Company, Shri Lalit C. Gandhi, had admitted in his statement under oath, that the assessee's income for A.Y, 2007-08, as per audited accounts, was Rs. 142.45 crores, on which tax of Rs. 52.55 crores was due. However, he admitted, that the same could not be paid due to a financial crunch. Further, Mr. Gandhi also admitted that :

> "During the F. Y. 2006-07 and 2007-08 Lok Group had entered into certain transactions for sale of properties held as stock in trade, pursuant to which profits of approximately Rs. 300 crores were recognized. The revenues were recognized in accordance with the company's consistently followed accounting policies to recognize sales on execution of agreements. The revenue recognition resulted into tax obligations to the extent of Rs. 85 crores ....."

(b) Section 139(5) permitted an assessee to revise its return if there was any omission or wrong statement in the original return. The AO did not agree with the assessee's explanation that the revised return had been accepted by the Bombay High Court pursuant to its writ petition. The AO also did not agree with the appellant that cancellation of the sale agreements in the subsequent financial year amounted to an omission or wrong statement in the original return. In this regard, AO relied upon the following decisions:

(i) Deepanarayan Nagu & Co V. CIT (1986) 157 ITR 37 (MP)

(ii) CIT v. Girishchandra Haridas (1922) 196 ITR 833,836 (Ker)

(iii) Sunandda Ram Oeka V CIT (1994) 210 ITR 998, 990(Gauh)

(c) The AO held that all the sale agreements, which were subsequently cancelled, were collusive transactions, as the agreements were made with either sister concerns or with concerns on which the assessee company was having a direct or indirect control

(d) The AO also noted that in the original return the assessee had declared its income on the basis of its consistently followed accounting policy, as noted in schedule Q of the notes to accounts, as follows:

"iii) Revenue recognition in respect of property sale transactions is on the basis of agreement of sale and are subject to execution of conveyance and compliance of applicable legal formalities. "

The AO also noted that sale was correctly recognized in 2006-07 keeping in view the Transfer of Property Act, 1882 and Sale of Goods Act, 1930. As the sale had been recognized on' the basis of its OWA accounting policy, the assessee could not now say that there was any omission or wrong statement in the original return of income.

(e) The AO noted that the auditors of the assessee had themselves expressed reservations on the revision of accounts, as follows

"As *per our opinion, which opinion is also supported by the Institute of Chartered Accountants of India,* a *company cannot reopen and revise the accounts once adopted by the shareholders at an Annual*

General Meeting. Contrary to this opinion, the Board of Directors of the Company has reopened and revised the aforesaid accounts in terms of the Circular of the Ministry, of Finance and company affairs dtd 13.1.2003 in compliance with the Accounting Standards.

We have considered the earlier Auditor's Report dated 28th June, 2007 on the original accounts and have examined the changes made therein which are as under :

"Cancellation of sale amounting to Rs. 1,81,56.33 *lacs reversal of cost of sales there to amounting to Rs. 90,32.86 lacs and resulting reduction in profit after tax by Rs.91,23.47 lacs"*

These financial statements are the responsibility of the company's management. Our responsibility is to express an opinion on these financial statements based on our audit.

(f) Lastly, the AO held that owing to the recognition of revenue from the above cited five sale agreements, for a period of approximately 2 years from the date of sale agreement to the date of termination of the agreement, the company's / concerns connected with the assessee had made substantial profits by trading in the assessee's shares. Between January 2006 to December 2006, the share price of the assessee company, quoted in the Bom bay Stock Exchange, rose from Rs.35 per share to Rs.351 per share. The share price fell to Rs.15.75 per share in 2008. As a result of the fluctuation in the share price, which was directly related to the audited accounts of the assessee and its subsequent revision, the' associate companies of the assessee made huge profits. Thus the assessee cannot now say that there was a omission or wrong statement in the original return. ”

4. The AO also rejected the claim of the assessee on merit relating to reversal of income recognition from the five transactions as shown in the original return of income, for the various reasons given in the assessment order which, as summarized by the learned CIT(Appeals) in his impugned order, are as under :

“The sale agreements, entered into F.Y. 2006-07, were cancelled after a period of 2 years. None of the parties to the transactions, barring the assessee, have

revised their accounts for F.Y. 2006-07, as was done by the assessee.

- The assessee has agreed to cancel the agreements without arbitration or charging of any interest or penalty from the buyers.
- Three out of the five agreements in question, were with group companies of the assessee having common shareholders. In the case of the joint venture agreement, Shri Chetan Gandhi is a distant relative of the MD of the assessee company, Shri Lalit Gandhi.
- The sale agreements were valid legal documents and the assessee has, prior to cancelling these agreements, taken no legal measures to recover its dues or forfeit the part consideration received by it. Hence the AO held : *"The manner and the facts by which the sale agreements have been cancelled clearly indicates that these are mutually convenient documents created through collusive activities for the sole purpose of wriggling out from the tax liability which was otherwise payable by the assessee. Since all these parties were closely connected with the assessee and the assessee has* a *lot of influence on all these parties, and in one of the transactions assessee himself was* a *buyer through* a *joint venture partnership r the cancellation of the agreements has been solely* a *devise to reduce the tax liability.*
- In A.Y. 2009-10, the auditors have qualified the accounts of the assessee company as follows: .

"In our opinion and to the best of knowledge and according to the explanation given to us and subject to the specific reference being drawn on

i. *note #2 (a) regarding non-accounting of sales returns of Rs.* 2,82,14.46 *lacs effected during the year under review (instead sales returns being accounted in earlier years). The resulting impact being that sales /gross revenue for the year is over stated by Rs.* 2,82,14.46 *lacs and the net loss after tax is under stated by Rs. 1,69,01.50 lacs however the reserves and surplus and inventories remaining the same;.) "*

Keeping in view the above reasons as well as the discussion made on the various case laws relevant on this point, the AO completed the assessment u/s 143(3) vide an order dated 19-12-2009 on income of Rs.135.56 crores on the basis of original return filed by the assessee ignoring revision thereof as made by the assessee.

5. Against the order passed by the AO u/s 143(3), an appeal was preferred by the assessee before the learned CIT(Appeals) challenging the action of the AO in ignoring the revised return filed by it treating the same as invalid and in holding that profit from the five transactions of immovable property was chargeable to tax in the hands of the assessee for the year under consideration on accrual basis. On the first issue relating to validity of its revised return, elaborate submissions were made on behalf of he assessee before the learned CIT(Appeals) which have been summarized by the latter in his impugned order as under :

> •"The revised return was filed to correctly reflect the true income of the assessee company by making suitable corrections of wrong statements inadvertently made in the earlier return with regard to certain hypothetical income allegedly flowing from some preparatory and incomplete agreements of the property executed by the assessee with some parties.

- The sale agreements with regard to the five properties were nearly provisional and did not give rise to any legal enforceable rights. These were development agreements and were executed with a view to give effect to the future intentions.
  As the assessee had been unable to fulfill the obligations embodied in the agreements, the same were rendered void.
- No sanctions, approvals, permissions, etc were procured by the assessee to commence development work. No formal possession of the property was given. Nor were the agreements registered under the Registration Act.
- Therefore, the assessee had committed a legal error in recognizing hypothetical income in its books.
- The entire consideration receivable by the assessee under these agreements had neither being received nor recruit. Only a token money had been received on advance.
- No formalities had been completed to give control of the properties to the assignees.
- As the agreements were not registered the assignees were under no legal obligation to carry out the agreement.

> In view of the above, it was submitted that the income from these agreements had not accrued or arisen to the assessee and the entries in the books were erroneous. The cancellation deeds were only a recognition of the existing position that no income had accrued from the said agreements."

In the light of the above submissions, it was contended on behalf of the assessee before the learned CIT(Appeals) that there was a wrong statement of income made in the original return inasmuch as there was no such income accruing or arising to the assessee and, therefore, the revised return filed by it correcting the said wrong statement was valid in accordance with the provisions of section 139(5).

6. In addition to the submissions made on the preliminary issue relating to validity of the revised return, elaborate submissions were made on behalf of the assessee company before the learned CIT(Appeals) on merit stating that the profit from the relevant five transactions in immovable property as declared in the original return of income was only the hypothetical income which could not be brought to tax especially when the said transactions were cancelled subsequently. These submissions made on behalf of the assessee as summarized by the learned CIT(Appeals) were as under :

> "The assessee recorded hypothetical income in the original return on the basis of 5 agreements. The revised return filed excluding the hypothetical Income has not been accepted by the AO. The AO committed mistake in making factually incorrect observations in para 4.1 that all the terms of the agreement has been satisfied. He further factually erred in observing that all the requirements as per the Transfer of Property Act, 1882 & Sale of Goods Act, 1930 to constitute the transactions of sale during the A.Y. (para 4.3). thus, he came to the conclusion, on erroneous assumption of facts, that the income is sought to be reversed only on account of non payment of balance consideration mentioned in these agreements. The AO further misconstrued the true purport of existing accounting policy on revenue recognition to discard the reversal of notional income. He

further questioned the validity of the revised return on the ground that there is no wrong statement in the original return to entitle the assessee to file the revised return.

- The case of the assessee is that no income has accrued or arisen at any point of time from impugned 5 agreements merely on account of erroneous book entries. The agreements were only preparatory and executor and had no legal sanction.

  The rights of the assessee under agreements were inextricably linked to the corresponding obligations on the assessee. The assessee itself has failed to meet the sacrosanct obligations without which the agreements could not be proceeded with. The assessee has in turn not received any part of the balance consideration. The income returned in the original return based on erroneous accounting entries recognizing such proposed considerations from the preparatory agreements has never accrued or legally due to the assessee. Mercantile system of accounting is relevant only for the purposes of point of time at which such income is to be taxed. However, income must accrue or arise as a precondition before it can be taxed.
- A formal cancellation deed was executed without obliterated the original agreements with whatever little value it might have. The assessee was therefore justified in revising the return consequently.
- [illegible] development work ever commenced. The so called development agreement was only MOU and not registered. The agreement could not be enforced in court.The agreement finally was cancelled without any work. The assessee continued to retain the same rights in the property as before the development agreement.

  No income therefore accrued or arose to the assessee.
- Other 2 agreements were in relation to 'sale of land/property'. Again, the .. agreements were only preparatory and in the nature of MOU. The title to the property never passed to the buyers. No possession was given. Again no consideration was received except the token advance against these MOUs. The property continues to belong to the assessee in the same manner as before. No change in the status of the property. The proposed buyer can not enjoy or deal with property in any manner in exclusion to the assessee. Therefore no income can be contemplated from such agreements.
- One agreement executed on the last day of the financial year pertains to a 'joint venture'. The account of the assessee in joint venture was to be credited notionally with Rs. 51 crs. for introducing property proposed to be developed.

The assessee was also entitled to 25% of the income in the joint venture. The property proposed to be introduced however did not belong to the assessee itself at the time of agreement. The property belonged to a group of 3 sellers to whom only a token amount was paid by the agreement. The property could be transferred in favour of the assessee by these groups of sellers only on clearance from the State Govt of Karnataka. No such approval has been obtained. The title or possession of the property has not been transferred to the assessee. Therefore, the assessee itself was constrained from executing such joint venture. No formal assignment of property in favour of joint venture. No possession of property to the co venture. No work whatsoever has been done pursuant to the joint venture. The joint venture did not take off at all. No bank account was opened. No PAN number was obtained for the proposed joint venture. Therefore, in the absence of any transfer of property to the joint venture, no question of income arises.

- No material has been brought on record to disprove the version of the assessee. No inquiry was considered necessary from the contracting parties either.
- The statement of CMO' of the assessee co. was based merely on book entries. He was not alive to the legal position that such book entries recording hypothetical income on the basis of bald agreements was neither in accordance with regularly followed accounting policies of the company nor is 'accrued income' as per the Act. The statement was therefore gullible and in any case not conclusive of the matter.

  The Supreme Court in the plethora of cases has held that book entries are not decisive in determination of taxability nor otherwise of a transaction. What is relevant is the actual accrual of income. The accrual of income means the right to receive is vested in favour of assessee and becomes legally due to him. In the instant case, mere execution of bald agreements will not give rise to income of any sort.
- In the facts and circumstances of the case, the purported income never accrued or become legally due to the assessee, Hence, the assessee was fully justified in excluding hypothetical income based on erroneous book entries by filing revised return. In any case, the hypothetical income cannot be taxed even under original return based on stingless preparatory agreements on the grounds of 'real income theory'. The original agreement being a nullity does not give rise to any income albeit cancellation deeds executed subsequently. The original agreements have become nonest owing to cancellation deed based on the 'doctrine of relation back.

7. After taking into consideration the submissions made on behalf of the assessee as well as the material available on record, the learned CIT(Appeals) proceeded to decide initially the issue relating to the validity of revised return filed by the assessee. In this regard, he referred to the provisions of section 139(5) and held that the word "discovers" used in the said provision connotes discovery of some omission or wrong statement in the return of which the assessee was not aware at the time of filing of the original return. He also held that for a return to be eligible for the revision u/s 139(5), not only should there be a wrong statement or omission, but the same should be a bonafide wrong statement or omission. He held that the original return in the present case was filed by the assessee company on the basis of audited accounts and in accordance with the revenue recognition policy being consistently followed by it. As noted by him, the sale was recognized by the assessee regularly in the year in which the sale agreements were entered into and the effect of the cancellation of the sale agreements, if any, was always given in the year in which they were cancelled. He held that this was the regular system of accounting being followed by the assessee regularly in the earlier years which was violated in the revised return filed by the assessee for the year under consideration. He held that the action of the assessee in revising the return as well as in revising the audited accounts thus was not bonafide. According to him, there was a gap of two years between the sale agreements and their cancellation and during this period, the value of share of the assessee company had increased substantially which aspect was utilized or exploited by its associate concerns by selling the shares of the assessee company at huge profits. He held that the arguments of the assessee that the income accruing in its balance sheet was hypothetical and it amounted to a wrong statement thus was not borne out by

facts. He held that acceptance of such argument of the assessee would amount to rigging the share market.

8. As regards the contention of the assessee that the revised return was filed on the basis of the revised audited accounts for the year under consideration, the learned CIT(Appeals) noted that the revised return of income was filed by the assessee on 01-01-2009 whereas the audit report accompanying the revised audited accounts was dated 30-03-2009. He held that the revised return thus was filed by the assessee even prior to the revision of its books of accounts. He then referred to the relevant two Circulars issued by Ministry of Corporate Affairs dealing with revision of annual accounts relied upon by the assessee and held that as per the said Circulars, accounts could only be revised under the Companies Act pursuant to technical requirements of any other law only. According to him, there was no such requirement either indicated by the Auditors of the assessee company or even by its Directors at the time of adopting the revised accounts. He held that the revised accounts, on the basis of which the revised return was claimed to be filed by the assessee, thus were not valid within the purview of the Companies Act and this being so, there was no bonafide in the assessee's submission that original audited accounts of the company did not reflect the real income of the company. The learned CIT(Appeals) accordingly upheld the action of the AO in holding that the revised return filed by the assessee was not a valid one.

9. The learned CIT(Appeals) then proceeded to examine the issue relating to taxability of profit arising from the five transactions in immovable property as income in the hands of the assessee for the year under consideration on merit. In this regard, he examined the relevant agreements for sale and development and found that there was no clause in the entire agreement dealing with the termination or cancellation of the agreement. He also examined the relevant termination

agreements and held on such examination that although the reason for termination was mentioned therein as due to inability of the other party to pay the balance consideration to the assessee, the entire act of cancellation or termination by refunding the advance consideration received was sham in the absence of any clause relating to termination or cancellation in the original agreements. He held that all the parties to the five transactions/agreements were related to the assessee directly or indirectly which made the relevant transactions suspicious and collusive.

10. As regards the contention of the assessee that there was no real income accrued to it from the relevant transactions/agreements since necessary sanctions and approvals had not been received or specific obligations were not performed, the learned CIT(Appeals) held that the same were not acceptable since there was no provision in the relevant agreements for termination or cancellation due to non performance. Relying on the decision of the Hon'ble Supreme Court in the case of Morvi Industries Ltd. 82 ITR 835, he held that the income had accrued to the assessee the moment the relevant agreements were signed and termination of the said agreements after a period of two years could not affect the accrual of income. He held that the assessee was not only maintaining its books of account on mercantile basis but it was also consistently crediting its books as and when agreements for sale were entered into in respect of immovable property which constituted its stock in trade. He held that the act of terminating the agreements much after the end of the relevant previous year, therefore, would not exempt the assessee from its liability of paying its taxes on the accrued income. Accordingly, the learned CIT(Appeals) rejected all the contentions raised by the assessee on merits and upheld the order of the AO bringing to tax the profits arising from the five transactions in immovable property as income of the assessee for the year

under consideration. Aggrieved by the order of the learned CIT(Appeals), the assessee has preferred this appeal before the Tribunal.

11. The first issue raised by the assessee in this appeal is relating to validity of the revised return filed by it.

12. The learned counsel for the assessee submitted that the revised return of income filed by the assessee company has been held to be invalid by the authorities below on the ground that there was no discovery of any omission or any wrong statement by the assessee in the original return of income subsequent to the filing of the said return. He contended that this reasoning given by the authorities below is contrary to the facts on record and there was no reason for them to hold that the assessee knew all along that the original return of income was not true and correct. He submitted that this stand taken by the authorities below is self contradictory inasmuch as the assessee was alleged to have the knowledge of the original return of income being not true and correct right from the beginning while the assessment has been completed on the basis of the said original return accepting the income declared therein with some minor addition.

13. The learned counsel for the assessee pointed out that the original return filed by the assessee was processed by the AO u/s 143(1) on 22-10-2008 and the notices u/s 143(2) and 142(1) were issued on 04-03-2009 and 02-06-2009 respectively only after filing of the revised return by the assessee on 01-01-2009. He contended that the revised return filed by the assessee thus was impliedly accepted by the AO and the notices u/s 143(2) and 142(1) were issued to scrutinize the said return. He contended that the AO, therefore, was not justified to treat the revised return filed by the assessee as invalid and the learned CIT(Appeals) was not right in going a step further to declare the said return as non-est ignoring that the powers conferred

upon him u/s 251(1)(a) are only in relation to the order of assessment to the extent that he may confirm, reduce, enhance or annul the assessment. He contended that the learned CIT(Appeals), therefore, exceeded his jurisdiction while declaring the revised return of income filed by the assessee as non-est.

14. In support of the assessee's case that the revised return filed by it was in accordance with the provisions of section 139(5), the learned counsel for the assessee submitted that the accounting policy consistently followed by the assessee had two limbs. He submitted that the original return was filed by the assessee relying on the first limb of the accounting policy whereby income from the five transactions in immovable property was declared subject to execution of conveyance and compliance of applicable legal formalities, which was the second limb of the accounting policy followed by the assessee. He submitted that none of the parties to the said transactions/agreements actually acted thereupon due to change in the real estate market condition and the same were finally cancelled by mutual consent in the month of November and December, 2008. He contended that the second limb of the accounting policy thus became operative and the statement made in the original return by recognizing the revenue in respect of five transactions in real estate turned out to be wrong. He submitted that the assessee became aware of this wrong statement only after the cancellation of the relevant transactions and filed the revised return in order to correct the said wrong statement which was in accordance with the provisions of section 139(5). He submitted that it is relevant to note here that the revised return filed by the assesee never treated as a defective return by the AO as required by the provisions of section 139(9) and the revised return filed by the assessee, therefore, cannot be treated as no-nest. Relying on the decision of Hon'ble Supreme Court in the case of CIT Vs Ranchhoddas Karsondas 36 ITR 569 and that of Hon'ble Delhi High

Court in the case of Qammar-ud-din & Sons Vs CIT 129 ITR 703, he contended that the assessee can always correct the return filed by him by filing the revised return and once the revised return is filed by the assessee, the same cannot be ignored. He also contended that it is a well settled legal position that once a revised return is filed, the existence of original return of income is obliterated thereafter.

15. The learned counsel for the assessee submitted that when the revised return of income filed by the assessee had not been declared to be defective u/s 139(9) and the same was acted upon by the AO by issuing notice u/s 143(2), the said return had obliterated the existence of original return filed by the assessee and it was not open to the Revenue to rely entirely upon the original return ignoring completely the revised return filed by the assessee. He contended that the assessee in any case is entitled to make its claim before the appellate authority as held by the Hon'ble Supreme Court in the case of National Thermal Power Co. vs. CIT 229 ITR 383 and the appellate authority can entertain the said claim made even otherwise by filing the revised return as held by Hon'ble Supreme Court in the case of Goetze (India) Ltd. Vs CIT 284 ITR 323.

16. The learned DR, on the other hand, strongly supported the impugned order of the learned CIT(Appeals) upholding the action of the AO in treating the revised return filed by the assessee as invalid and non-est. She contended that the incone of Rs.135.47 crores had accrued to the assessee in the year under consideration as a result of entering into five agreements and the same was rightly recognized and declared by the assessee in the original return as per the accounting policy consistently followed by it. She contended that there was thus no omission or wrong statement made by the assessee in the original return which could be said to be subsequently discovered by it. She contended that cancellation of the agreement after a passage of more than two years by the assessee and that too with

the parties who were at its command and control cannot be equated to discovery of any omission or wrong statement within the meaning of section 139(5) of the Act so as to make the assessee entitled to file a revised return. She contended that the assessee cannot take a stand that the revenue was recognized in the original return on conditional basis and that it could cancel the revenue so recognized at its own will at any time by virtue of its accounting policy without establishing that there was any omission or wrong statement made in the original return. She submitted that as per the accounting policy followed by the assessee in the earlier years, the effect of cancellation of sale agreements was given in the year in which the cancellation had taken place and going by this policy adopted by the assessee, it cannot be said that there was any omission or wrong statement made in the original return of income. She contended that the revised return filed by the assessee thus was not in accordance with the provisions of section 139(5) and the same was rightly declared by the authorities below as invalid and non-est. She, therefore, strongly relied on the impugned order of the learned CIT(Appeals) on this issue and submitted that the case laws relied upon by the learned CIT(Appeals) fully support the case of the Revenue on this issue.

17. We have considered the rival submissions and also perused the relevant material on record. As per the provisions of section 139(5), a person, who has furnished a return u/s 139(1) or in pursuance of a notice issued u/s 142(1), on discovery of any omission or wrong statement therein, is entitled to furnish the revised return at any time before the expiry of one year from the end of the relevant assessment year or before the completion of the assessment, whichever is earlier. Thus in order to enable the assessee to furnish a revised return u/s 139(5), the following conditions must be satisfied:

i) that the original return must have been furnished u/s 139(1) or in pursuance of a notice issued u/s 142(1),

ii) that the assessee discovers any omission or any wrong statement therein and

iii) that the revised return is filed at any time before the assessment is made or before the expiry of one year from the end of the relevant assessment year.

In the present case, the original return was filed by the assessee in response to a notice issued u/s 142(1) and the revised return was filed by it on 01-01-2009 that is before the assessment was made as well as before the expiry of one year from the end of the relevant assessment year i.e. assessment year 2007-08. The conditions (i) and (iii) thus were duly satisfied in the present case as stipulated in section 139(5) and there is no dispute about the same. The only dispute is about the satisfaction of second condition as to whether there was discovery of any omission or wrong statement by the assessee in the original return of income. According to the Revenue, the word "discovers" used in section 139(5) connotes discovery of some omission or wrong statement in the original return of income of which the assessee was not aware at the time of filing the original return. It is, therefore, necessary to ascertain as to whether there was any wrong statement made in the return of income originally filed by the assessee and whether the assessee was not aware of such wrong statement at the time of filing the original return. For this purpose, we are of the view that the claim made by the assessee in the revised return of income viz-a-viz the return of income filed originally needs to be examined on merit to ascertain as to whether there was any wrong statement made in the original return of which the assessee was not aware at the time of filing the same. In our opinion, such examination of the assessee's claim on merit only will reveal as to whether the condition No. (ii) was satisfied in the present case in order to enable the assessee to furnish the revised return u/s 139(5). We, therefore, now

proceed to examine the said issue on merit and will revert back to the issue relating to validity of the revised return filed by the assessee u/s 139(5) thereafter.

18. The issue that has been raised by the assessee in the present appeal on merit is relating to the addition made by the AO and confirmed by the learned CIT(Appeals) on account of profit from five transactions in immovable properties as declared in the original return of income ignoring the revised return wherein the same was withdrawn/reversed.

19. The learned counsel for the assessee submitted that the aggregate agreed consideration as per the five agreements amounting to Rs.194.07 crores was taken into consideration by the assessee and estimated accrued income of Rs.135.47 crores was recognized and declared in the return of income originally filed for the year under consideration following the Accounting Policy i.e.*"Revenue recognition in respect of property sale transactions is on the basis of agreement of sale and are subject to execution of conveyance and compliance of applicable legal formalities."* He submitted that the said Accounting Policy followed by the assessee has unmistakably two limbs. The first limb is recognition of revenue in respect of a transaction of sale of property on the basis of agreement of sale and the second limb is revenue recognized in such manner shall be subject to execution of conveyance and compliance of applicable legal formalities. He contended that initial recognition of revenue thus was in anticipation and was conditional upon further progression of the agreement of sale in as much as if subsequently in the case of sale of land, conveyance deed is not executed or in the case of development agreement, necessary legal formalities are not complied with, the revenue recognized earlier on the execution of agreement would be cancelled. He submitted that that none of the five agreements executed by the assessee proceeded beyond the stage of signing of agreement and the assessee did not

receive a single rupee by way of sale proceeds. He contended that in these facts and circumstances of the case, the Accounting Policy followed by the assessee clearly required that the revenue recognized on signing of agreement in anticipation must be reversed.

20. The learned counsel for the assessee submitted that the assessee in any case is liable to tax on income which the provisions of Income-tax Act determine and not on any higher or lower income which is wrongly mentioned in the books of account of an assessee. He submitted that the assessing officer is duty bound to make assessment of an assessee in accordance with the provisions of the Act irrespective of the amount of income admitted or not admitted in the books of account and/or in the return of income filed by an assessee especially when the assessment has been made by the assessing officer under section 143(3)(ii). He emphasized that none of the five agreements entered into by the assessee in the present case could be acted upon and they remained just on paper only without yielding income of a single rupee to the assessee during the year under consideration or even thereafter.

21. Relying inter-alia on the decisions of Hon'ble Supreme Court in the case of Kedarnath Jute Mfg. Co. Ltd. vs. CIT 82 ITR 363 (SC) and Sutlej Cotton Mills Ltd. vs. Commissioner of Income Tax 116 ITR 1 (SC), the learned counsel for the assessee contended that even where an assessee following mercantile system of accounting makes entries in its books of accounts on the basis of accrual of income, if on the peculiar facts and circumstances of his case resultant income is not really earned or otherwise not going to be received by the assessee, then such resultant income based on accrual should be ignored and the assessment should be

made on the basis of 'Real Income' actually earned or loss actually incurred. He also relied on the decision of Hon'ble Supreme Court In the case of CIT vs. Shoorji Vallabhadas & Co. 46 ITR 144 (SC) and submitted that the assessee in the said case was a firm which entered into certain agreements whereby it was entitled to receive commission at the rate of 10% on the freight charged in relation to the previous year relevant to assessment year 1948-49. In the books of account of that assessee, the commission as agreed upon was recognized as having accrued. However, subsequently the parties to the agreement insisted upon reducing the commission from 10% to 2.5% which the assessee firm conceded. A question arose as to whether the assessee was chargeable to tax for assessment year 1948-49 on the income recognized in the books of account on the basis of commission at the rate of 10% or on the basis of 2.5% as actually received. Hon'ble Supreme Court held that the assessee was chargeable to tax on income which was actually earned by it and not on the basis of income shown to have accrued in the books of account of the assessee firm on the basis of earlier agreement.

22. The learned counsel for the assessee also relied on the decision of Hon'ble Supreme Court in the case of Godhra Electricity Co. Ltd. vs. CIT 225 ITR 746 (SC) and submitted that the assessee in the said case was an electricity company keeping accounts on mercantile system. It increased the tariff of electricity supplied and billed the consumers at the enhanced rate. This resulted into long drawn litigation as well as intervention of the government and finally the assessee could not collect the charges from consumers on the basis of enhanced tariff and received much smaller amounts than that shown as accrued in the books of accounts of the assessee. The question arose as to whether the assessee was required to be assessed on the income which was treated as accrued on the basis of enhanced tariff or on the actual electricity charges realized by it from its

customers. The matter travelled to Supreme Court and Hon'ble Supreme Court held that the claim at the increased rates as made by the assessee-company on the basis of which necessary entries were made represented only hypothetical income and the impugned amounts as brought to tax by the ITO did not represent the income which had really accrued to the assessee-company during the relevant previous years. He submitted that the sum of Rs.135.47 crores shown as accrued income in the books of accounts of the assessee in the present case never really accrued to the assessee in as much as none of the five agreements were acted upon and resulted into any income to the assessee. All that the assessee received was the sum of Rs.9 crores by way of advance and not as sale proceeds or income which became refundable on cancellation of agreements. He contended that the insistence of the assessing officer as well as ld. CIT(A) upon assessing the sum of Rs.135.47 crores as income of the assessee is in gross violation of law as pronounced by the Apex Court and other courts in India. He contended that even if the assessee had not reversed entries in its books of accounts of F.Y. 2006-07, the assessment of its income in relation to the five agreements in question could not be made at any amount other than NIL.

23. The learned counsel for the assessee then proceeded to meet the various objections raised by the AO as well by the learned CIT(A). He submitted that the observations of the Assessing Officer that the assessee had correctly recognized revenue in the original return of income since in the case of the assessee the requirements of provision of section 54 of Transfer of Property Act, 1882 and section 4 (3) of Sale of Goods Act, 1930 were satisfied are ridiculous and betray complete lack of application of mind. He submitted that as per Section 54 of the Transfer of Property Act, the transfer of tangible immovable property of the value of Rs. 100 and more can be made only by a

registered document and an Agreement of Sale does not of itself create any interest in or charge on such property. He contended that the provision of section 54 of Transfer of Property Act thus is resoundingly in favour of the assessee and even under widely extended and enlarged definition of "transfer" as provided u/s. 2(47) of Income-tax Act 1961, the position remains unchanged and unaffected that mere Agreement of Sale does not of itself effect any transfer of an immovable property or of any interest in immovable property. As regards the provision of section 4(3) of Sale of Goods Act, 1930 relied upon by the authorities below, he contended that the Sale of Goods Act, 1930 does not apply to an immovable property and therefore reliance of the Revenue thereon is clearly misplaced.

24. As regards the stand of the Assessing Officer and CIT(A) that the sister concerns of the assessee made huge profits on sale of shares at higher market price achieved as a result of higher revenue recognized in the assessee's accounts, the learned counsel for the assessee submitted that these observations are based on mere suspicion, conjuncture and surmises. He submitted that no evidence other than pure guess work has been relied upon so as to arrive at the finding that the assessee deliberately recognized higher revenue so as to make profit out of artificially inflated market price of the assessee company's shares. He submitted that there are many holes in this hypothesis of the authorities below. First it is mere assumption of the Assessing Officer / CIT(A) that the prices of the shares of the assessing company moved upwards because of the revenue recognized in relation to the five agreements in consideration. Secondly, there is no material to hold that it was done in collusive matter. He submitted that there has been no adverse finding or order against the assessee from any competent authority including SEBI or BSE in relation to the allegations of the type as made in the assessment order

and the order of learned CIT(A) and in the absence of any such adverse finding or order from any competent authority, they are not justified to make such wild allegations without concrete evidence. He submitted that neither the Assessing Officer nor the learned CIT(A) in any case has thrown any light upon as to how these allegations support the assessment of huge income of Rs. 135.47 Crores in the hands of assessee when it is undisputed fact that the assessee did not earn a single rupee from the five agreements under consideration. He submitted that it is also not their case that the assessee's company earned any income on sale of its own shares. He contended that the entire arguments and exercise of Assessing Officer and learned CIT(A) in this respect is futile and malicious mud-slinging having no logical nexus with the additions to income made in their orders. He also contended that this stand taken by the revenue denounces the original return of income filed by the assessee which is the sole basis of the impugned assessment order and thus takes away the wind from the sail of the assessment order.

25. As regards the stand of the authorities below that the cancellation of the agreements was not a bona fide action of the assessee, the learned counsel for the assessee submitted that there is nothing brought on record to show that these five agreements were acted upon. He reiterated that as per the provision of section . 54 of the Transfer of Property Act. a contract of sale of immovable property does not, of itself, create any interest in or charge on such property. There is nothing even in the widely extended and enlarged definition of "transfer" u/s. 2(47) of Income-tax Act to move away from this well settled legal position. He submitted that even nothing much turns upon as to whether or not there is any termination clause in the agreements because by mutual consent parties to the agreement can always do anything to the agreement. As regards the allegation of the learned CIT(A) that the

assessee cancelled the agreements because it did not want to pay tax, he submitted that no businessman shuns income merely because it is chargeable to tax.

26. As regards the reliance placed by the learned CIT(A) on the judgment in the case of Morvi Industries Ltd. 82 ITR 835(SC), the learned counsel for the assessee submitted that the same is distinguishable on facts in as much as it was a case of an assessee forgoing an income which had already been accrued to him. He submitted that as explained by of the assessee, the agreements were abandoned and accordingly cancelled because of the sudden change in the matrix of the real estate market as a result of which the agreements no longer remained attractive and there is nothing brought on record to dislodge this claim of the assessee. As regards the allegation of the revenue authorities that these agreements with related parties were aimed at artificially jacking-up price of the assessee company's shares in the market so that the sister concerns of the assessee could make huge profits on sale of the shares of the assessee company, he submitted that if it was so, no fault could be found with the reversal of the recognition of revenue by the assessee in the revised return of income. He however hastened to clarify that all the acts of the assessee were entirely bona fide and prompted by objective business considerations. The agreements in question were entered into with great hopes to make good profit and the change in market scenario was not foreseen or anticipated. As the matrix of the market changed it became necessary to revoke the agreements. The assessee has acted as an honest and prudent businessman. However, even if for argument sake, without prejudice and without conceding anything it is assumed that the arguments of learned Assessing Officer and learned CIT(A) are justified, then all their objections are to the agreements and recognition of revenue based thereupon. He contended that this is the fallacy in their argument inasmuch as they argue against the original return of income but want to hold the

revised return as not bona fide.

27. As regards the objection of the revenue authorities that under the Companies Act audited accounts approved by the shareholders cannot be subsequently revised, the learned counsel for the assessee contended that charge of income tax is not restricted to computation of income as arising from the final accounts of an assessee. The charge of income tax is on the actual facts of the case of an assessee as found from the scrutiny and enquiry made by the Assessing Officer and other income tax authorities. He reiterated that entries in the books of accounts of an assessee are not conclusive and it is to be seen which of the two final accounts are closer to actual facts of the case and lead to correct computation of income chargeable to tax. Relying on the decision of Hon'ble Supreme Court in the case of CIT v. Simon Carves Ltd. 105 ITR 212 (SC), he contended that the Assessing Officer should have focused his attention on finding out what is the correct amount of business income of the assessee during the financial year instead of bothering about which of the two balance sheets would prevail under the Companie Act. He pointed out that the revised final accounts were submitted by the assessee to the Company Law authorities and there has been no objection from them till today.

28. Regarding the accounting policy adopted by the assessee, the learned counsel for the assessee submitted that the finding of Assessing Officer and learned CIT(A) that there is change in the treatment given in the books of accounts to the cancellation of agreements this year in contradistinction to the treatment given in the earlier assessment years is factually incorrect. He explained that cancellation of agreement in past related to some stray flat buyers who wanted to cancel the booking and obtain the refund of amounts paid. The projects were implemented in

those cases and buildings were indeed constructed and the cancelled flats were indeed sold albeit to another buyer. On the other hand, the cancellation of agreements in the year under consideration related to the projects as a whole. The factual matrix of those projects and recognition of revenue in relation thereto under the designated accounting policy of the assessee demanded that the cancellation be given effect from the date of agreement itself. The reasons for this are quite obvious and easy to understand. Cancellation of the bookings by some stray buyer merely resulted into the sale of the flat to another buyer. The cancellation of projects resulted into anticipated income not materializing. He contended that the need to revise the earlier accounting entry therefore arose because it was necessary to withdraw recognition of revenue which did not accrue at all. Reliance in this regard was placed by him upon the judgments of Hon'ble Supreme Court in the cases of CIT Vs. Birla Gwalior (P) Ltd. 89 ITR 266 (SC) and CIT Vs. A. Gaj apathy Naidu 53 ITR 114(SC) as well as that of Hon'ble Punjab & Haryana High Court in the case of CIT Vs. Ferozpur Finance (P) Ltd. 124 ITR 619 (P&H) to contend that even under mercantile system of accounting no income can be assessed unless accrued.

29. As regards the stand of the Revenue that because the signing of the agreements and the cancellation of agreements took place in two different financial years, the assessee should have given the effect of cancellation in the assessment year relating to the date of cancellation of agreements, the learned counsel for the assessee reiterated that there are two limbs of the Accounting Policy of the assessee which both the Assessing Officer and learned CIT(A) have ignored. They have taken into consideration only the first limb of the Accounting Policy that results into recognition of revenue entirely on anticipation and in advance long before accrual of such income and have ignored the second limb that clearly

states that the anticipated recognition of revenue is subject to subsequent accrual. In the event of anticipated revenue not materializing the recognition of the revenue itself would be cancelled or modified. He contended that it is not open to them to accept the Accounting Policy in part and reject in part especially when such piecemeal acceptance and rejection results into absurd assessment of income as has been done by Assessing Officer and upheld by learned CIT(A) in the present case.

30. In reply, the learned DR at the outset narrated the sequence of events that is relevant in the present context. She submitted that the return of income for the year under consideration was not filed by the assessee till the date of survey carried on 11-09-2008 although the due date of filing the same was 30-10-2007. She pointed out that the assessee was issued a Notice u/s.142(1) of the Act after the date of survey and accordingly the assessee filed original return of income on 23.09.2008, declaring total income at Rs. 135,47,15,708/-. She submitted that the assessee however subsequently filed its revised return of income on 01.01.2009, declaring total income at Rs. NIL. She submitted that the revised return was not accepted by the theAssessing Officer who finalized the assessment u/s.143(3) of the Act on 29.12.2009, assessing the total income at Rs.135,56,57,729/- after taking into consideration the Statements on oath recorded at the time of survey proceedings and also the admissions of the Managing Director therein. She emphasized that in his Statement recorded on oath at the time of survey proceedings, Shri Lalit C. Gandhi, the then Chairman-cum Managing Director of Lok Group of companies, admitted that the revenues were recognized in accordance with the company's consistently followed accounting policies to recognize sales on execution of Agreements. She pointed out that Shri Eanthi

also admitted the tax liability of the assessee company in his statement recorded on oath at the time of survey proceedings as well as by his subsequent communication vide letters dated 12th a 23rd September, 2008.

31. Regarding the assessee's plea that following the second limb of the Accounting Policy for 'revenue recognition' being adopted by the assessee, the estimated accrued revenue of Rs.135.47 crore recognized in the financial year 2006-07 could be cancelled by virtue of cancellation of the Agreements by way of filing revised return, the learned DR submitted that merely by adopting the Accounting Policy of revenue recognition subject to execution of conveyance and / or compliance of applicable legal formalities, the assessee cannot be exonerated from complying with the provisions laid down in the Statute. She contended that the relevant five Agreements were executed in the financial year 2006-07 relevant to A.Y. 2007-08 wherein the assessee had rightly offered the income accrued to it in its original return of income and that mere cancellation of the said Agreements in subsequent years cannot relate back to the year when agreements were executed. In support of this contention, the learned DR relied on the following case laws :-

i.	Shiv PrakashJanak Raj & Co. Ltd. V. CIT	222 ITR 583 (SC)
ii.	Saraswati Insurance Co. (P) LTd. V CIT	252 ITR 430 (Del.)
iii.	H.P. Mineral & Ind. Development v. CIT	302 ITR 120 (HP)
iv.	Rohini Holdings (P) Ltd. v. CIT	345 ITR 466 (Mad.)

32. The learned DR submitted that the assessee has tried to distinguish these transactions and accounting policy regarding cancellations followed in the earlier assessment years. She pointed out that the Assessing Officer had rightly observed in the remand report submitted to

CIT(A) that in the earlier years a different treatment was given to the cancellation of Agreements and that in its revised return of income, the assessee has changed its method of accounting which is not permissible. She invited our attention to para 7.2(i) on page No.14 & 15 of the impugned order of the learned CIT(A) wherein he has observed that in the financial years 2002-03, 2003-04, 2004-05 & 2005-06, the assessee was reducing the cancellation of sale itself i.e. cancellations made in F.Y. 2002-03, 2003-04, 2004-05 & 200506 were reduced from the gross sales of the relevant financial years though the sale had been recognized and accounted by the assessee in the year prior to relevant financial year. She contended that it clearly shows that the assessee itself has violated the regular accounting practice followed earlier by it in the A. *Y.* 2007-08 and 2008-09 which is not permissible in law.

33. The learned DR referred to the relevant provisions of section 211 and 215 of the Companies Act, 1956 and submitted that in view of these provisions, it is not at the discretion of the assessee being a listed company to change its method of accounting at its own will and revise its financial statements at its own sweet will at any time after a passage of almost 1 1/2 years after completion of the financial year. She submitted that it is significant to note in this connection that the assessee has got its accounts audited thrice for the financial year 2006-07 relevant to A.Y. 2007- 08 and the third audit report is dated 31.03.2009 whereas the assessee has filed its revised return of income on 01.01.2009 i.e. prior to such audit report.

34. The learned DR submitted that the Assessing Officer has rightly observed that it is apparent that owing to higher revenue recognized in the

assessee's books of accounts during the year under consideration, the assessee company's shares on Bombay Stock Exchange were quoted at a higher market price, resulting into benefit to its sister concerns on sale of shares of the assessee company at such higher market price. It is reiterated that the cancellation of Agreements and consequently revision of return of income was not a *bona fide* act on the part of the assessee. She submitted that keeping in view the provisions of Section 220 of the Act read with the Ministry's General Circular No.1/2003, a company cannot lay more than one set of annual accounts for a particular financial year unless it has reopened / revised such annual accounts after their adoption in the annual general meeting on the grounds specified in the Ministry's Circular No.1/2003. She contended that the revised accounts, on the basis of which the revised return has been filed, are not valid within the purview of the Companies Act, 1956 as neither have they been adopted by the AGM nor have they been revised to meet the technical requirements of any other law for the time of being in force as is required by the Circular of the Ministry of Corporate Affairs.

35. The learned DR submitted that it appears that at one point of time the assessee follows 'mercantile' method of accounting and suddenly at another point of time, the assessee opts for 'cash' system of accounting and revises all its books of accounts from the year of execution of Agreements which goes on till the year of cancellation of such Agreements. She read out and relied on para 7.2 on page No.21 of the impugned order of the learned CIT(A) wherein he has critically examined the relevant aspects of the Agreements in question and held that income from these transactions were liable to be assessed in the relevant assessment year as per the original return of income and subsequent cancellation of those agreements cannot

retrospectively replace income offered in the original return of income.

The learned DR submitted that the development rights and TDRs assigned by the assessee represent its stock-in-trade as evident from the copies of the relevant Balance Sheets and Profit & Loss Accounts. Therefore, the assessee's emphasis on transfer which is germane to capital gains is irrelevant and unfounded. The assessee is in the business of construction and real estate. Undoubtedly, by these Agreements, the assessee had assigned the rights to the assignees for development of the respective properties in the ordinary course of its business activity. The subsequent cancellations of the Agreements denote that the original position is restored i.e. the assessee's stock-in-trade has been returned to it and that no consideration is payable by the assignees any more. Thus, the transaction is in the nature of 'sales returns' and as per the accounting policies, the same are to be accounted for in the year of returns and not in the year of sale.

36. We have considered the rival submissions on this issue and also perused the relevant material on record. We have also deliberated upon the verrious judicial pronouncements cited by both the sides in support of their respective stand. Under the Income-tax Act, income charged to tax is the income that is received or is deemed to be received in India in the previous year relevant to the year for which assessment is made or the income that accrues or arises or is deemed to accrue or arisen in India during such year. The computation of such income is to be made in accordance with the method of accounting regularly employed by the assessee. If the accounts are maintained under the mercantile system, what has to be seen is whether income can be said to have really accrued to the assessee. There are settled principles to ascertain whether income can be said to have really accrued to the assessee. In the present case, the assessee is following mercantile system of

accounting and before we decide as to whether the income in question from the relevant five transactions in immovable property can be said to have really accrued to the assessee in the year under consideration on the touchstone of these principles and in the light of the propositions propounded by the Hon'ble Supreme Court in the various judicial pronouncements, it is pertinent to first consider and deal with the various objections/contentions raised by the Revenue to bring to tax the said income in the hands of the assessee for the year under consideration in the light of elaborate submissions made on behalf of the assessee in order to meet the said objections/contentions of the Revenue.

37. The first objection raised by the Revenue is based on the accounting entries as made by the assessee in the books of account originally prepared. During the course of survey, the said accounts were found and on the basis of profits reflected in the said accounts, Chairman and Managing Director of the assessee company agreed to pay the tax thereon and file the return after payment of tax. Although no such tax was finally paid by the assessee company, the original return of income was filed declaring the total income of Rs.135.47 crores on the basis of profits reflected in the books of accounts as found during the course of survey. Thereafter, a revised return was filed by the assessee declaring Nil income which was claimed to be filed on the basis of the revised accounts. The Revenue has not accepted either the revised return or the revised accounts holding that the revision of accounts was not permissible under the Companies Act. They have relied on the entries made by the assessee in the books of accounts originally as found during the course of survey to hold that income of Rs.135.47 crores had accrued to the assessee from the five agreements for sale of properties entered into in the year under consideration. It is by now well settled that the way in which entries are made by the assessee in the books of accounts is not determinative of the question

whether the assessee earned any profit or suffered any loss. As held by the Hon'ble Supreme Court in the case of Satlej Cotton Mills Ltd. 116 ITR 1, the assessee may, by making entries which are not in conformity with the proper accounting principles, conceal profits or show loss and the entries made by him cannot, therefore, be regarded as conclusive one way or the other. What is to be considered is the true nature of the transaction and whether in fact it has resulted in profit or loss to the assessee. In the case of Kedarnath Jute Manufacturing Co. Ltd. vs. CIT 82 ITR 363, it was held by the Hon'ble Supreme Court that whether the assessee is entitled to a particular deduction or not will depend on the provision of law relating thereto and not on the view which the assessee might take nor can the existence or absence of entries in the books of accounts be decisive or conclusive in the matter. In the case of H.M. Kashiparekh & Co. Ltd. vs. CIT 39 ITR 706, Hon'ble Bombay High Court held that the income-tax is a levy on income and although the Income-tax Act takes into account two points of time at which the liability to tax is attracted viz. the accrual of the income or its receipt, the substance of the matter is the income. It was held that if income does not result at all, there cannot be a tax, even though in book keeping entries are made about a hypothetical income which does not materialize. In our opinion, the ratio laid down in these decisions of the Hon'ble Supreme Court and of the Hon'ble jurisdictional High Court makes it abundantly clear that the entries made by the assessee in the books of accounts are not determinative of the question whether the assessee has earned any income and what is to be considered to decide the said question is the true nature of the transaction and whether in fact it has resulted in profit to the assessee. We, therefore, hold that the various objections raised by the Revenue based on the accounting entries as made originally in the books of accounts or the revision thereof are not sustainable and overruling the same, we hold that the question as to whether the income can be said to have really accrued to the assessee from the

relevant five transactions in immovable property is required to be considered keeping in view the true nature of the said transactions and whether in fact the said transactions have resulted in profit to the assessee.

38. Another objection raised by the Revenue is that as a result of huge profits shown by the assessee in its books of accounts arising from the relevant five transactions in immovable properties, the share price of the assessee company had gone up substantially and its sister concerns exploited this situation by selling the shares of the assessee company held by them at higher market price. We really fail to understand how this aspect is relevant for the purpose of determining whether there was any income actually accrued to the assessee as a result of the said transactions. If the allegation of the Revenue is about insider trading or rigging of share prices on the part of the assessee company or its sister concerns, the assessee can be liable for suitable action by the SEBI. However, as submitted by the learned counsel for the assessee, no such action has been initiated by the SEBI against the assessee company or even against the sister concern. The Revenue authorities, in our opinion, therefore, were not justified to make such allegations without there being any action taken by the authority competent to do so and to make assessment on a huge income in the hands of the assessee on the basis of such allegation. In any case, even if the Revenue is trying to show by making such allegation that the relevant transactions were sham and not the real one, no income can be said to have actually accrued to the assessee as a result of such sham transaction.

39. The Revenue has also doubted the genuineness of the cancellation of the relevant agreements on the ground that it was not a bonafide action of the assessee. The main objection raised by the learned CIT(Appeals) in this regard is that there was no clause in the original agreements allowing cancellation or termination of

the agreements. As rightly contended by the learned counsel for the assessee in this regard, any agreement entered into by the parties can be terminated or cancelled by mutual consent even in the absence of any clause specifically permitting to do so. Moreover, as a result of cancellation of the agreements, the relevant immovable properties have come back to the assessee company and the same are duly reflected in its balance sheet for the subsequent years as demonstrated by the learned counsel for the assessee. In our opinion, there is thus no reason to doubt the genuineness or bonafide of the action of the assessee in cancelling the agreements which has been accepted and duly acted upon by all the parties concerned. It is pertinent to note here that the reason for cancellation of agreements was explained by the assessee before the authorities below as change in the market scenario relating to real estate and this reason given by the assessee to justify the decision taken to cancel the agreements as a honest and prudent business man has not been doubted or disputed by the authorities below by bringing any material or evidence on record.

40. The Revenue authorities have doubted the authenticity of the revised accounts when the accounts prepared originally had already been approved by the share holders and filed with the Registrar of Companies. They have referred to the relevant Circulars in this context which permit such revision only in exceptional circumstances stipulated therein. Although the learned counsel for the assessee has made elaborate submissions in order to meet these objections of the Revenue, we are of the view that nothing real turns on this aspect keeping in view the decision of Hon'ble Supreme Court in the case of Sutlej Cotton Mills Ltd. (supra) wherein it was held that the way in which entries are made by the assessee is not determinative of the question whether the assessee has earned any profit and what is to be considered to decide this question is the true nature of the transaction and

whether in fact it has resulted in profit to the assessee. It is, however, worthwhile to note here that the revised accounts were approved by the shareholders of the assessee company and the same were duly filed with the Registrar of Companies is shown by the learned counsel for the assessee from the relevant evidence placed on record.

41. In the present case, as per the accounting policy followed by the assessee company, revenue in respect of property sale transactions is claimed to be recognized on the basis of agreement of sale subject to execution of conveyance and compliance of applicable legal formalities. Accordingly, the assessee is claimed to have recognized the income in respect of five transactions of properties in the books of accounts for the year under consideration as originally prepared and when the same was not followed by execution of conveyance and compliance of applicable legal formalities resulting into cancellation of the agreements, accounts were revised as per what is called as second limb of the accounting policy followed by the assessee. The Revenue has not accepted this stand of the assessee mainly on the ground that in the earlier years, cancellation of transactions was given effect to in the year of cancellation as taken place subsequently. However, as explained by the learned counsel for the assessee, the assessee has followed project completion method in respect of projects actually undertaken and executed by it and the cancellation as referred to by the authorities below which had taken place in the earlier years was of tenements in the said projects which were resold after the cancellation. The relevant transactions in dispute, however, were relating to transfer of land or rights therein and the cancellation of such transactions, in our opinion, cannot be equated with the cancellation of tenements of the housing project undertaken and executed by the assessee. In our opinion, as per the accounting policy followed by the assessee company, the Revenue in respect of

property sale transaction was recognized originally in the books of accounts of the year under consideration on the basis of agreement of sale which was subject to execution of conveyance and compliance of applicable legal formalities. Accordingly, in the original return of income, the revenue so recognized in the accounts was offered to tax by the assessee company. However, as a result of cancellation of the relevant transactions, there was no income really accrued to the assessee which was chargeable to tax and the declaration of such income turned out to be a wrong statement of which the assessee became aware only on cancellation. It, therefore, revised the accounts which, in our opinion, was in conformity with the accounting policy followed by it and also revised the return of income to correct the wrong statement made in the original return.

42. After having found that the objections of the Revenue are not sustainable, we now proceed to consider and decide on merit the main issue as to whether income can be said to have really accrued to the assessee company as a result of the relevant five transactions of property having regard to the true nature of the transactions. The first and foremost issue in this context is that the relevant properties, the sale of which has given rise to the dispute relating to the taxability of the profit arising from transactions therein, were held by the assessee company as stock in trade. The contention raised by the learned counsel for the assessee in this regard is that the sale of immovable property being stock in trade is governed by the provisions of Transfer of property Act and not the Sale of Goods Act. He has contended that section 2(47) giving the definition of transfer in relation to capital asset thus is not relevant and since there was no sale of immovable property being stock in trade in the year under consideration as per the Transfer of Property Act, no income can be said to have accrued to the assessee from the relevant transactions in the year under consideration. We find that this contention of the

learned counsel for the assessee is duly supported by the decision of coordinate bench of this Tribunal at Chennai in the case of R. Gopinath (HUF) vs. CIT 42 DTR 127 wherein it was held that sale/transfer of immovable property which is stock in trade, cannot be equated with the transfer of capital asset and section 2(47) dealing with transfer of capital asset cannot be applied in case of sale/transfer of stock in trade. It was held that the sale/transfer of immovable property being stock in trade is governed by the Transfer of Property Act and as held by Hon'ble Supreme Court in the case of Alapatti Venkataramaiah vs. CIT 57 ITR 185, there cannot be a sale or transfer of immovable property until and unless the title of the property is passed on to the purchaser. The provision of section 53A of the Transfer of Property Act was also considered by the Tribunal as incorporated in section 2(47) and it was held that delivery of the possession under the development agreement of the property which is stock in trade of the assessee cannot be treated as a transfer by applying the definition of transfer in section 2(47) of the Income-tax Act, 1961 as in the case of stock in trade, the transfer u/s 2(47) of the Income-tax Act, 1961 is not applicable and what is applicable is the contextual or the ordinary meaning of the word "transfer". It was held that when the legal title and possession of the property were with the assessee, then the transfer or sale was not possible merely by allowing the developer to carry out the construction work and unless and until the title of the property is passed on to the customer, there cannot be a sale or stock of the immovable property which is stock in trade. In our opinion, if the ratio of the decision of the Tribunal in the case of R. Gopinath (HUF) (supra) is applied to the facts of the present case, it become abundantly clear that the relevant agreements entered into by the assessee did not result in sale or transfer of immovable properties constituting stock in trade as the title of the said properties was not passed on to the purchasers and the same remained with the assessee all throughout. It, therefore, cannot be said that there was accrual of

income to the assessee as a result of the said transactions/agreements in the year under consideration and declaration of such income in the original return which had not accrued to the assessee clearly represented a wrong statement.

43. It has been contended on behalf of the assessee before the authorities below as well as before us that even if it is assumed for the sake of argument that there was accrual of income to the assessee as a result of the relevant transactions/agreements in immovable properties in the year under consideration, the said transactions/agreements having been cancelled subsequently, there was really no accrual of such income which can be brought to tax in the hands of the assessee in the year under consideration. The learned DR in this regard has contended that the cancellation of the agreement took place subsequently after a gap of more than two years and such subsequent event taking place in the succeeding year cannot affect the accrual of income which had taken place in the year under consideration. In support of this contention, she has relied on certain judicial pronouncements. A perusal of the same, however, shows that the said case laws cannot be of any help to the Revenue's case on the issue involved in the present appeal as the issue involved therein was relating to accrual of interest income and since the interest income accrues periodically when it falls due, Courts held that interest had already accrued to the assessee on the due dates and waiver of such interest subsequently was not relevant in this context.

44. It is observed that the case laws cited by the learned counsel for the assessee on this point, on the other hand, are directly applicable to the issue involved in the present case. In the case of Godhra Electric Co. Ltd. (supra), the assessee company had decided to enhance the rates of electricity in 1963 and also made entries in its books of accounts recognizing the income as a result of enhanced

charges for the supply made to the customers. The enhancement in the rates was challenged by the consumers and after the prolonged litigation, Hon'ble Supreme Court finally decreed in favour of the consumers on 23rd June, 1974. In these facts and circumstances of the case, the question that arose for consideration before the Hon'ble Supreme Court was whether there was real accrual of income to the assessee in respect of the enhanced charges for supply of electricity and the Hon'ble Apex Court held that this question has to be considered by taking the probability or improbability of realization in the realistic manner. Hon'ble Supreme Court held that in the facts and circumstances of the case, it was not possible to hold that there was real accrual of income to the assessee company in respect of the enhanced charges for supply of electricity and the claim made by the assessee at the increased rates on the basis of which necessary entries were made represented only hypothetical income which could not be said to have really accrued to the assessee company during the relevant previous years. To come to this conclusion, Honble Supreme Court, inter alia, relied on its earlier judgment in the case of Shoorji Vallabhdas & Co. (supra) wherein it was held that income-tax is a levy on income and although Income-tax Act takes into account two points of time at which the liability to tax is attracted viz. the accrual of income or its receipt, the substance of the matter is the income. It was held that if the income does not result at all, there cannot be a tax even though in book keeping entries were made about hypothetical income which does not materialize.

45. In his impugned order, the learned CIT(Appeals) has heavily relied on the decision of Hon'ble Supreme Court in the case of Morvi Industries Ltd. (supra) in support of the Revenue's case. It is observed that the said decision in the case of Morvi Industries Ltd. was also relied upon on behalf of the Revenue before the Hon'ble Supreme Court in the case of Birla Gwalior P. Ltd. 89 ITR 266 and after

considering the same, it was held by the Hon'ble Supreme Court that although emphasis was also placed in the course of judgment delivered in the case of Morvi Industries Ltd. (supra) on the fact that the assessee was maintaining its accounts on the basis of mercantile system, it was not on that basis alone that the Court came to the conclusion that the income in question had accrued on 31st December, 1955 and 31st December, 1956. It was held that in arriving at that conclusion, the Court primarily took into consideration the terms of the agreement. Hon'ble Supreme Court in the judgment delivered in the case of Birla Gwalior P. Ltd. (supra) found that its judgment in the case of Shoorji Vallabhadas & Co. (supra), on the other hand, was directly on the point and following the same, it was held by the Hon'ble Supreme Court that it is not hypothetical accrual of income that has got to be taken into consideration but the real accrual of income.

46. In the case of H.L. Keshariparekh & Co. Ltd. (supra), the concept of real income was expounded by the Hon'ble Bombay High Court which has been approved by the Hon'ble Supreme Court in the case of Poona Electric Supply Co. Ltd. vs. CIT 57 ITR 521. It was held by the Hon'ble Bombay High Court in the case of H.L. Keshariparekh & Co. Ltd. (supra) that the principle of real income is not to be so subordinated as to amount virtually to a negation of it when a surrender or concession or rebate in respect of managing agency commission is made, agreed to or given on the ground of commercial expediency, simply because it takes place sometime after the close of accounting year. It was held that in examining any transaction and situation of this nature, the Court would have more regard to the reality and speciality of the situation rather than pure theoretical or doctrinaire aspect of it.

47. A some what similar issue again arose before the Hon'ble Bombay High

Court in the case of CIT vs. Shivsagar Estate (AOP) reported in 204 ITR 1. In the said case, the assessee had leased a plot on rent and had made certain advances on interest to M under an agreement. M was to construct the Hotel on the said plot which he was unable to do. A fresh agreement, therefore, was entered into between the assessee and M subsequently under which the assessee waived rent and interest and received back the plot. In these facts and circumstances, the doctrine of real income was held to be applicable by the Hon'ble Bombay High Court holding that no rental or interest income could be charged in the hands of the assessee on the basis of earlier agreement with M. In the present case, the original agreements/transactions in respect of immovable properties have been subsequently cancelled/terminated and as a result of the said cancellation/termination, the relevant immovable properties have been returned back to the assessee which are duly reflected in its balance sheet as stock in trade in the succeeding years as demonstrated by the learned counsel for the assessee from the relevant balance sheet placed on record. As further submitted by him, the assessee company is still holding the said immovable properties as stock in trade. Having regard to all these facts of the case, we are of the view that no income can be said to have really accrued to the assessee from the relevant transactions/agreements in respect of the immovable properties and the addition made by the AO and confirmed by the learned CIT(Appeals) alleging accrual of such income in the year under consideration cannot be sustained by the doctrine of real income.

48. Keeping in view the legal position emanating from the judicial pronouncements discussed above and having regard to all the facts of the case, we are of the considered view that no income can be said to have really accrued to the assessee as a result of the five relevant transactions in the immovable properties

which is chargeable to tax in its hands for the year under consideration. The declaration of such income, which was not accrued to the assessee in the real sense in the original return thus represented a wrong statement which was corrected by the assessee by filing the revised return and the AO as well as the learned CIT(Appeals), in our opinion, was not justified in bringing to tax such hypothetical income in the hands of the assessee company on the basis of original return of income ignoring the revised return filed by the assessee. We, therefore, decide this issue in favour of the assessee on merit and delete the addition made by the AO and confirmed by the learned CIT(Appeals) on this issue.

49. Having decided the issue on merit in favour of the assessee, now we revert back to the issue relating to the validity of the revised return filed by the assessee. We have already held that the assessee having filed the original return in response to notice u/s 142(1) and revised the same before the assessment is made and within the period of one year from the end of the relevant assessment year, two of the three conditions for filing the revised return in accordance with the relevant provisions of section 139(5) were duly satisfied. Regarding the third condition that there should be some omission or wrong statement in the original return which the assessee has discovered later on, the stand taken by the Revenue is that there was no wrong statement in the original return of income filed by the assessee of which the assessee was not aware of. According to the Revenue authorities, there was no such wrong statement as the income offered by the assessee in the original return had accrued to it in the year under consideration and if at all there was such wrong statement, the assessee was aware of the same as the execution of the original agreements with the sister concerns and cancellation thereof subsequently was a preplanned affair with an intention to rig the prices of its shares so that the sister concerns could sale the shares of the assessee company at higher price in order to

make huge profits. We are unable to accede to this theory of the Revenue. In our opinion, if the profits reflected in the accounts as found during the course of survey represented figures inflated by the assessee company with an intention as alleged by the Revenue, there was no reason for its Chairman-cum-Managing Director to agree to pay tax on such huge income. If he was aware of the fact that the said profits represented inflated figures which was not real, there was nothing to prevent him from saying so in his statement recorded during the course of survey instead of agreeing to pay tax thereon. Even in the letter submitted by the assessee company after the survey to the AO, it offered to pay such tax.

50. As regards the allegation of the Revenue that it was done by the assessee with an intention that its sister concerns make huge profits by selling its shares at jacked up higher price, it is observed that such profit alleged to have been made by the sister concerns of the assessee company as per the working given by the AO in the assessment order was Rs.77 crores while the demand raised against the assessee as a result of the disputed transactions on account of tax and interest is Rs.75.68 crores. It is difficult to comprehend how and why the assessee would accept the liability of Rs.75.68 crores on account of tax and interest in order to enable its sister concerns to make a profit of Rs.77 crores. The allegation made by the Revenue about the so called intention of the assessee behind executing the agreements and cancelling the same thus is based purely on conjectures and surmises and it is very difficult to accept the stand of the Revenue that every thing was done by the assessee with that intention. On the other hand, we are of the view that the profits reflected in the accounts found during the course of survey was offered to tax as its income by the assessee in the bonafide manner and accordingly return of income was also originally filed declaring the said income. The relevant transactions/agreements, however, were subsequently cancelled/terminated as a

result of which the declaration of income as made by the assessee in the original return turned out to be a wrong statement and after becoming aware of the same, the revised return was filed by the assessee which, in our opinion, was valid in the eye of law as the conditions stipulated u/s 139(5) were duly satisfied. It is well settled that when a revised return is filed by the assessee, the original return is totally substituted and the revised return alone has to be taken into consideration in completing the assessment. The earlier return, after a revised return has been furnished, cannot form the basis of assessment. For the purpose of assessment of income, the effective return thus is the revised return filed by the assessee ultimately. In any case, there is no bar on the appellate authorities to consider the claim of the assessee on merit even in the absence of revised return filed by him making such claim as held by Hon'ble Supreme Court in the case of Goetze (India) Ltd. vs. CIT 284 ITR 323 and as a matter of fact, the learned CIT(Appeals) has considered and decided the same on merit by his impugned order.

51. The last issue raised by the assessee in its appeal as taken in ground No. 2(m) relates to the addition of Rs.9,42,021/- made by the AO on account of waiver of principal amount.

52. In its profit & loss account filed along with the return of income, principal amount of Rs.9,42,021/- under Scheme of OTS waived during the year under consideration was credited by the assessee. For the purpose of computation of total income, the said amount, however, was excluded by the assessee on the ground that it was a capital receipt not chargeable to tax either u/s 41(1) or even u/s 28(iv). This stand of the assessee was not found acceptable by the AO keeping in view the decision of Hon'ble Bombay High Court in the case of Solid Containers Ltd. vs. DCIT 308 ITR 417 wherein it was held that although the loan was taken by the

assessee for trading activity but upon waiver, the said loan was returned by the assessee in the business and the same, therefore, was taxable in its hands as income. Relying on the said decision of Hon'ble jurisdictional High Court, the principal amount waived of under the Scheme of OTS was treated by the AO as the income of the assessee and addition was made by him to the total income of the assessee.

53. We have heard the arguments of both the sides and also perused the relevant material on record. It is observed that the addition made by the AO on this issue was disputed by the assessee in an appeal filed before the learned CIT(Appeals) by taking a specific ground. It appears that the learned CIT(Appeals), however, has not decided the said issue vide his impugned order. In any case, no material contention has been raised by the learned counsel for the assessee before us to show that how the decision of Hon'ble Bombay High court in the case of Solid Containers Ltd. (supra) relied upon by the AO to decide this issue against the assessee is not applicable. On the other hand, as held by the AO, the issue involved in the present case as well as all the material facts relevant thereto are similar to that of the case of Solid Containers Ltd. (supra) decided by the Hon'ble Bombay High Court and this being so, we respectfully follow the said decision of Hon'ble jurisdictional High Court and confirm the addition made by the AO on this issue.

54. In the result, the appeal of the assessee is partly allowed.

Order pronounced on this 23rd day of Oct. , 2012.

Sd/-	Sd/-
(Amit Shukla)	(P.M. Jagtap)
Judicial Member	Accountant Member

Mumbai,
Dated: 23rd Oct., 2012.

Copy to :

1. Appellant
2. Respondent
3. C.I.T.
4. CIT(A)
5. DR, A-Bench.

(True copy)

By Order

Asstt. Registrar,
ITAT, Mumbai Benches,
Mumbai.

Wakode