IN THE INCOME TAX APPELLATE TRIBUNAL

HYDERABAD BENCH 'B', HYDERABAD

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER

AND SMT. ASHA VIJAYARAGHAVAN, JUDICIAL MEMBER.

ITA No.	Assessment year	Appellant	Respondent
1014/Hyd/2009	2000-01	Dy. Commissioner of Income-tax Central Circle -2, Hyderabad	Shri M.V.Subramanyeswara Reddy(HUF), Hyderabad **(PAN AABHM 2104 C)**
1015/Hyd/2009	2005-06		
1016/Hyd/2009 1018/Hyd/2009	2002-03 2003-04	Dy. Commissioner of Income-tax Central Circle -2, Hyderabad	Shri M.Ramakrishna Reddy, L/R of Late B.Rami Reddy(Indl) Hyderabad **((PAN AABHB 1951 Q)**
1017/Hyd/2009	2003-04	Dy. Commission-er of Income-tax Central Circle -2, Hyderabad	Shri M.Ramakrishna Reddy (HUF), L/R of Late B.Rami Reddy(HUF) Hyderabad **(PAN AABHB 1951 Q)**
1019/Hyd/2009 1020/Hyd/2009	2004-05 2005-06	Dy. Commission-er of Income-tax Central Circle -2, Hyderabad	Smt. Harinuitha Reddy, Hyderabad **(PAN AATPM 6617 M)**
1021/Hyd/2009 1022/Hyd/2009	2004-05 2005-06	Dy. Commission-er of Income-tax Central Circle -2, Hyderabad	Shri Ramakrishna Reddy, Hyderabad **(PAN AATPM 6618 M)**

Appellants by **:** *Smt. K.Mythili Rani*

Respondent by : *Smt. P .Murali Mohana Rao*

Date of Hearing	17 10.2011
Date of Pronouncement	27.12.2011

O R D E R

Per Asha Vijayaraghavan, Judicial Member

There are nine appeals in this bunch. They are directed against separate orders of the CIT(A)-III, Hyderabad all dated 8.7.2009/1.7.2009. Assessment years involved are from 2000-01 to

2005-06. Since common issues are involved, these appeals are being disposed off with this common order for the sake of convenience.

ITA No.1014/Hyd/2009 : Assessment year 2000-01

2. In this appeal directed against the order of the CIT(A) dated 8.7.2009, the first issue raised in this appeal is against the addition of Rs 4,00,000/- made on account of unexplained investment in purchase of plot in the name of minor son.

3. Facts of the case in brief in relation to this issue are that the assessee was found to have purchased a plot at Madhapur for Rs.4,00,000/- in the name of his minor son Sri. M. Ramakrishna Reddy. On being asked about the source of investment, it was explained by the assessee that the sale consideration was paid by cheque and the transaction was duly recorded in his account books. However, the Assessing Officer did not find the explanation satisfactory and treated the investment as .unexplained. During the appeal proceedings, ld AR filed the copies of sale deed, cash book, ledger and the bank statement evidencing the payments made by cheque and duly recorded in the account books. It was submitted that the said account books were seized during search and the AO without verifying the same made the addition.

4. On appeal, the CIT(A) deleted the addition made by the assessing officer, observing as follows:-

> ***"On due verification of the evidences produced by the assessee, I am convinced that the source of investment in the said land was satisfactorily explained by the assessee. The payments were made by cheque which were duly reflected in the assessee's bank statement and his books of account. Hence, the addition made by the AO is deleted."***

5. The second issue involved in this appeal is against the addition of Rs 3,40,000/- made on account of unexplained investment in purchase of land at Madhapur.

6. Facts in relation to this issue are that during the assessment proceedings, the assessee explained that the investment was made by cheque and duly reflected in the bank statement and account books. However, the AO was not satisfied with this explanation. He made the addition holding that the return of income filed by the assessee did not reflect any withdrawal for making the said investment.

7. During the appeal proceedings before the CIT(A), learned authorized representative for the assessee filed the copies of sale deed, relevant bank statement and cash book to show that the payments are duly recorded in the books of account and properly explained. The CIT(A) deleted the addition made by the assessing officer, holding as follows:-

> ***"On the perusal of the evidences filed by the AR, I am satisfied that the assessee has filed satisfactory explanation and evidences to explain the source of investment in the said land. The AO has made the addition without verifying the account books of the assessee seized during the search. The return of income is not meant to provide the information about all the deposits and withdrawals made in the bank accounts of the assessee. The addition made by the AO is accordingly deleted"***

8. The third issue involved in this appeal before us is against the addition of Rs.4,00,000/- made on account of unexplained investment in plot at Madhapur in the name of minor daughter during the assessment year 2000-01.

9. The CIT(A) deleted this addition, holding as follows:-

> ***"The facts of the issue are same as mentioned in respect of ground of no.1 in para 2 above. The investment made in the plot is duly reflected in the bank statement and recorded in the books of accounts seized during search. The source of this investment is satisfactorily explained by the assessee. He addition made by the AO is deleted"***

10. Aggrieved by the reliefs granted by the CIT(A) in relation to the above three issues, the department has filed appeal for the assessment year 2000-01 and has raised the following grounds of appeal:-

1. ***The learned CIT(A) erred in deleting the additions made by the Assessing Officer towards unexplained investment in the purchase of plot of Rs. 4,00,000/- on account of unexplained investment in purchase of site at Madhapur of Rs. 3,40,000/- He has also erred in deleting addition made of Rs 4,00,000/- towards unexplained investment in purchase of plot at Madhapur in the name of his minor daughter.***

2. ***The learned CIT(A) erred in holding that the sources for the investment were satisfactorily unexplained by the assessee.***

3. ***The learned CIT(A) ought to have considered the fact that the assessee did not properly explained the sources except mere saying that the payments were made through bank and the transactions were recorded in the books of account.***

4. ***The learned CIT(A) ought to have not admitted those fresh evidences submitted by the assessee which is against Rule 46 of the I.T. Act.***

11. We heard both the parties. It is mentioned by the CIT(A) at para 2.2. at Page 2 of his order that during the Appellate Proceeding., the Ld.AR filed the copies of sale deed, cash book, ledger, and the bank statement evidencing the payments made by cheque and duly recorded in the accounts books. The CIT(A) has also observed that the said account books were seized during search and the assessing officer made the addition without verifying the same. In the circumstances, we are of the opinion that the additional evidence was not placed by the assessee before the assessing officer and hence the learned CIT(A) ought not to have admitted fresh evidences and should have followed the procedure under Rule 46A of the Income Tax Rules.

12. Further, the learned CIT(A) at para 3.,2 at page 3 of this order has observed as follows:-

"During the appeal proceedings, ld.AR filed the copies of the sale deed relevant bank statement and cash book to show that the payments are duly recorded in the books of account and properly explained"

13. Here again, the CIT(A) has violated the provisions of Rule 46A of the Income Tax Rules. Again with respect to addition of Rs.4 lakhs made on account of unexplained investment in Plot at Madhapur in the name of Minor Daughter, the CIT(A) has decided the issue on the same lines as in the case of the minor son of the assessee, which has been discussed at 10 herein above.

14. In these circumstances, we set aside the order of the CIT(A) on these issues and restore the matter to the file of the assessing officer to consider the evidences produced by the assessee for the first time before the CIT(A), and as such was not available before him earlier and thereafter decide the issues in accordance with law and after giving reasonable opportunity of hearing to the assessee.

15. In the result, this appeal is allowed for statistical purposes.

ITA No.1015/Hyd/2009 : Assessment year 2005-06

16. In this appeal for the assessment year 2005-06, the grievance of the Revenue in the grounds of appeal, is against the addition of Rs 15,18,341/- made on account of unexplained investment in the construction of "Punnaiah Plaza", which has been deleted by the CIT(A).

17. The CIT(A) has deleted the impugned addition of Rs.15,18,341, with the following observations:-

"Similar issue on the same set of facts was dealt in the appellate order dated 1.7.2009 in ITA Nos. 0396 to 0398/CIT(A) III/08-09 in the case of Sri. M. Ramakrishna Reddy. For the detailed reasons given therein, the addition made on this account is deleted."

18. Aggrieved the department has filed an before us with the following grounds of appeal

1. The learned CIT(A) erred in deleting the addition made by the Assessing Officer towards assessee's understatement in cost of construction in "Punnaiah Plaza" basing on the seized material.

2. The CIT(A) erred in concluding that the A.O. estimated the cost of construction on presumption as the estimation was made based on the seized document and the rate adopted based on the valued as per seized document only.

19. We had heard both the parties. In the cases of Shri Y.Shivarama Krishna in ITA No 969-970/Hyd/08, the co-ordinate Bench of this Tribunal, has held as follows:-

> *"Search and seizure operations were conducted on 07.10.2004. In the premises of the person relating to Sujana group of companies, including the assessee. During the course of search operations, some material was found from the residence of one shri C.V.Ramana Reddy. The assessing officer on the basis of the presumption under Section 132(4) of the Act made additions in the hands of the present assessee. However, on appeal, the CIT(A) held that presumption under Sec.132(4) is applicable only in respect of persons from whose custody or possession, seized material was found and it cannot be applied to third parties The CIT(A) placed reliance on the third member decision of this Tribunal in the case of Rama Traders V/s, first ITO (1982) 32 TTJ (Patna) 483 (TM), wherein it was held that presumption provided in Section 132(4) is only in respect of persons from whose custody the document was seized and the presumption cannot be extended to third parties. Since the CIT(A) found that the presumption cannot be extended to third persons, following the third Member decision of this Tribunal cited above, we find no infirmity in the order of the CIT(A) on this issue. We accordingly uphold the same and reject the grounds of revenue on this issue"*

20. Facts and circumstances of the case on hand being identical, respectfully following the above decision of the co-ordinate bench of this Tribunal, we find no merit in the grievance of the Revenue in this appeal. Revenue's grounds in this appeal are accordingly rejected.

21. In the result, this appeal of the Revenue is dismissed.

ITA Nos.1016/Hyd/2009 : Assessment year 2002-03
ITA Nos.1018/Hyd/2009 : Assessment year 2003-04

22. Effective grievance of the Revenue in these appeals relate to the additions made by the assessing officer, by estimating the income as a percentage of turnover, after rejecting the book results disclosed by the assessee.

23. Facts of the case in brief are that the assessee is in the business of construction in the name of his Proprietary concern, M/s.BRR Constructions. In the return of income filed for assessment year 2001-02, the assessee disclosed work in progress of Rs.20,80,000 and declared net profit of Rs.93,849 In the return of income for assessment year 2002-03 the assessee disclosed income of Rs.2,03,320 on sales turnover of Rs.57,49,600. In the return for assessment year 2003-04, the assessee disclosed income of Rs.1,61,060/- on sales turnover of Rs.78,91,100. During the assessment proceedings the assessee explained to the assessing officer that the total sales turnover of this concern in three years was of Rs.1,36,40,700. The sales were duly recorded in the books of account which were duly audited. A copy of the Audit Report u/s.44AB was also submitted to the assessing officer. However, the assessing officer rejected the book result on the ground that the assessee did not produce the books of account and necessary vouchers. He estimated the income @ 15% on the work in progress and sales turnover shown in each year and accordingly made an addition of Rs.3,12,000/- for assessment year 2001-02, of Rs.8,62,440/- for assessment year 2002-03 and of Rs.62,665/- for assessment year 2003-04.

24. During the appeal proceedings before the CIT(A), learned authorized representative filed the written submissions stating that the assessee had maintained regular books of account for all the three years under consideration which were duly audited. Copy of the audited profit and loss account and balance sheet were filed along with the returns of income. The sales turnover and cost of land of Rs.54,00,000/- shown in the books, have been accepted by the assessing officer. Hence, it was submitted that there

was no scope whatsoever for assessing officer to estimate the income @ 15% of sales turnover. He vehemently opposed the estimation of income on work in progress in assessment year 2001-02. The learned authorized representative filed copies of audited accounts during the appeal proceedings.

25. The CIT(A) deleted the impugned additions made by the assessing officer, by observing as follows:-

> ***"I have duly considered the submissions of the assessee and the material available on record. I do not agree with the contention of the ld.AR that if the books of account are audited, the same cannot be rejected and income cannot be estimated. It is the duty of the assessee to produce the books of account and vouchers for verification of the AO. In this case, the same were not produced before the AO during the assessment proceedings. Hence, I uphold the action of the AO rejecting the book result and estimating the income, however the income estimated @ 15% of the sales turnover is on higher side. The AO has not given any basis or reason for adopting the net profit rate of 15%. The various Courts and Tribunals, especially the ITAT, Hyderabad in the case of M.Bhaskar Reddy (ITA No 168/H/2006 order dated 19/120.2007) have approved the net profit rate of 8% of the sales turnover made in AY 2002-03 and 2003-04. No profit can be estimated on the work in progress shown in AY 2001-02. The addition made in the AY 2001-02 is accordingly deleted. The income in other two years are to be reworked out by the AO, as directed above"***

26. Aggrieved, the department has filed the present appeals before the Tribunal.

27. Effective grounds of the Revenue in these appeals read as follows-

1. **The ld CIT(A) erred in holding that estimation of income @ 15% of the sales turnover by the Assessing Officer is on higher side.**

2. **The ld. CIT(A) erred in allowing relief by directing the Assessing Officer to determine the net profit @ 8% of the sales turnover Assessment Year 2002-03.**

28. We have heard both parties. We find no infirmity in the order of the CIT(A), as the CIT(A) has adopted the net profit rate of 8% for construction business following the consistent view taken by the Tribunal in similar cases, as of the ITAT, Hyderabad in the case of M.Baskara Reddy in ITA No

168/Hyd/2006. We accordingly uphold the orders of the CIT(A) and reject the grounds of the Revenue in these appeals.

29. In the result, both these appeals are dismissed.

ITA No.1017/Hyd/2009 : Assessment year 2003-04

30. The only effective grievance of the Revenue in this appeal, directed against the order of the Commissioner of Income-tax(Appeals) dated, relates to addition made on account of capital gains, which has been deleted by the CIT(A).

31. Facts of the issue are that in the return of income filed for assessment year 2003-04, assessee offered long term capital gains of Rs.15,01,473 on sale of his undivided share of land in Yousufguda. The assessee owned this land jointly with Sri.M. Koti Reddy, which was given for development to M/s BRR Constructions. The sale value of land was determined at Rs. 54,00,000, 50% of which was shown in the hands of the assessee HUF. In lieu of the land transferred to M/s BRR Constructions, the assessee received flat No.501 along with the appurtenant lands. The flat was valued at Rs.16,00,000 and the same was claimed as deduction u/s 54F of the Act. The assessing officer observed that the appurtenant land admeasuring 2,830 sq. ft. was the extra gain to the assessee which should be taxed as long term capital gains. He valued the said appurtenant land at Rs 23,20,600 @ Rs. 410/- per sq. ft. and added the differential amount to the income returned.

32. In his written submissions filed before the CIT(A), learned Authorised Representative stated that capital gains tax is leviable on the sale of land jointly held with Sri. M. Koti Reddy. The entire land was transferred to the developer M/s BRR Constructions for Rs.54,00,000/- This amount was accepted and allowed as cost of land by the assessing officer in the assessment of Sri. B. Rami Reddy proprietor of M/s BRR Constructions. The long term capital gain has to be computed in respect of land transferred, 50% of which

amounting to Rs.27,00,000 has been offered for tax. The value of flat no. 501, and appurtenant land shown in the partition deed dated 16.8.2002 was for the purpose of registration of partition deed between the assessee and Sri. M. Koti Reddy. The same cannot be taxed as long term capital gains/Ld/ AR filed the copies of partition deed to support the contention.

33. The CIT(A) decided this issue in favour of the assessee in the following manner-

> ***" I have duly considered the submission of the assessee and the material available on record. AO has confused the computation of capital gains arising on the sale of undivided share of land at Yousufguda with the market value of flat and appurtenant land received from the developer as mentioned in the partition deed. AO has not disputed the sale value of land taken at Rs. 27,00,000/- as well as the cost of acquisition of the said land at Rs.11,98,527/- shown by the assessee in the computation of capital gains. The entire land was transferred to the developer for a consideration of Rs 54,00,000/- Hence the capital gains can only be Rs 15,01,473/- in the hands of assessee. In lieu of the sale consideration of land, the owners got four flats along with appurtenant lands, which was partitioned between the co-owners vide partition deed dated 16.8.2002. For registration purposes, the flats appurtenant lands, were valued at different rates depending on the floors. This value cannot be taken as the sale value of the land transferred by the assessee to the developer. The same can only be taken if the flats and appurtenant lands received by the owners are subsequently sold by them at that rate, giving rise to further capital gains. Hence, the addition of Rs. 22,22,073/- made on the sale of aforesaid land is illogical and cannot be sustained. The addition made by the AO is accordingly, deleted.***

34. Aggrieved, the Revenue is in appeal before us.

35. Effective grounds of the Revenue in this appeal are as follows-

1. **The ld CIT(A) erred in deleting the addition of Rs. 22,22,073/- made by the Assessing Officer on account of long term capital gains not disclosed by the assessee.**

2. **The ld. CIT(A) erred in appreciating the fact that the Assessing Officer determined the full value of the consideration on the basis of the partition deed as per provisions of section 48 of the I.T. Act.**

3. **The ld. CIT(A) erred in not considering fact that the property was given on development jointly by the assessee and Sri. M. Koti Reddy (Indl) and in turn the assessee has received developed area as per partition deed. This is nothing but full value of consideration for the purpose of section 48 of the I.T. Act.**

36. We have heard both the parties. We find that the assessee has owned this land jointly with Shri M.Koti Reddy and it was given for development to M/s.BRR Constructions. The sale value of the land was determined at Rs.54,00,000 50% of which was shown in the hands of assessee HUF. In lieu of the land transferred to M/s.BRR constructions, the assessee received flat NO.501, along with the appurtenant lands. The flat was valued at Rs.16 lakhs and the same was claimed for deduction u/s.54F of the Act. The assessing officer observed that the appurtenant land admeasuring 2,830 sq. ft. was the extra gain to the assessee which should be taxed as long term capital gains. He valued the said appurtenant land at Rs 23,20,600 @ Rs. 410/- per sq. ft. and added to the income returned.

37. The Learned Counsel for the assessee, Shri Murali Mohana Rao, submitted that the entire land was transferred to the developer, BRR Constructions, for Rs.64 lakhs and this amount was accepted and allowed as cost of land by the assessing officer in the assessment of Shri V.Rami Reddy, proprietor of BRR Constructions and hence long term capital gain has to be computed on that basis, in respect of land transferred and 50% of it amounting to Rs.27 lakhs has been offered for tax.

38. The learned counsel further submitted that the value of flat No. 501 and the appurtenant land shown in the partition deed dated 16.08.2002 was for the purpose of registration of the partition deed between the assessee and Shri Koti Reddy and the same cannot be taxed as long term capital gains.

39. We find that the assessing officer has not disputed the value of the land taken at Rs.27 lakhs as well as cost of acquisition of the land shown by the assessee in the computation of capital gains. The entire land was transferred to the developer for Rs.54 lakhs and hence the capital gains in the hands of the assessee works out to Rs.15,01,473/. The owners got four flats along with appurtenant lands in lieu of sale consideration of flats which was partitioned between the co-owners. For registration purpose, the flats and

appurtenants lands were valued at different rates depending upon the floors. This value has been wrongly taken as the sale value of the land transferred by the assessee to the developer by the assessing officer and the CIT(A) has rightly deleted the addition made by the assessing officer. In this view of the matter, we confirm the order of the CIT(A) and dismiss the departmental appeal.

40. In the result, this appeal of the Revenue is dismissed.

ITA No.1019 & 1921/Hyd/2009 : Assessment year 2004-05

41. Since Smt Harinitha Reddy, respondent in ITA No.1019/Hyd/2009, is the sister of Shri M.Ramakrishna Reddy, respondent in ITA No.1021/Hyd/2009, and they are joint owners of a property, in relation to which tax dispute has arisen for consideration in these appeals. Since the dispute is common, these appeals are disposed off together.

42. The facts of the issue in dispute are that the assessee, Shri Ramakrishna Reddy, sold 1800 sq. yds of land jointly owned by him with his sister Smt. M. Harinitha Reddy, for Rs. 63,52,500/- and declared half of his share at Rs 31,76,250/- After deducting indexed cost of acquisition long term capital gains was computed at Rs. 30,20,598/- The said amount was invested in a new property named “Punnaiah Plaza” at Rd. No.2 Banjara Hills, Hyderabad vide registered sale deed dated 14.8.2004. The assessee claimed deduction under S.54F, but the same was disallowed by the assessing officer on the ground that the new property purchased was not a residential property as required under S.54F.

43. In his written submission filed during the appeal proceedings before the CIT(A), the learned authorized representative for the assessee stated that the property purchased by the appellant was a residential property as evident from the construction plan approved by MCH, guarantee issued by the bank approval of Director General of Fire Services and Govt. G.O.

permitting the construction of residential complex. Learned authorized Representative also filed copies of all these evidences as additional evidences as per the provisions of Rule 46A.

44. The aforesaid additional evidences were forwarded to the assessing officer for verification and comments vide CIT(A)'s office letter dated 17.3.2009. The assessing officer vide his letter dated 4.5.2009 objected to the admission of additional evidences, though no comments were offered on the veracity and relevance of the evidences.

45. The CIT(A) by the impugned order however, accepted the claim of the assessee for relief under S.54F of the Act, in the following manner-

> ***"I have duly considered the submissions and evidences filed by the appellant and other material available on record. AO has referred to the registered sale deed dated 14.8.2004, seized vide Annexure No.A/MVSR/4/page No.38 by which the appellant and his sister Ms. M. Harinitha Reddy had purchased 5840 sq/ft/ of unfinished structure of western block of third floor of the complex along with covered parking of 480- sq.ft. and undivided share of 160 sq.yds of land. The perusal of this sale deed clearly shows that the said property was a residential property as evident from the narrations given on page 4,5,6 & 14 of the sale deed. Para 10 on page 14 of the deed reads as under:***
>
> > ***10. That the Sale Deed executed by the Vendors in favour of the Purchasers limits the ownership of the purchasers to the residential unit of an extent of 5840 sq.ft. comprising of shell, consisting of columns, beams, lintels brick work and slab located in the Third floor of said residential building constructed by the vendors an extent of about 480- sq.ft. of covered car parking space in the basement together with open spaces and common areas within the premises and more particularly described in the Schedule property annexed to this Sale Deed.***
>
> ***The plan attached to the sale deed shows the construction of bedrooms, kitchen, dining, study etc. These facts clearly show that the property purchased by the appellant was a residential property. There was no basis for the AO to infer that the property purchased was a commercial property.***
>
> ***2.5. The additional evidences filed by the appellant are allowed to be admitted as the same are crucial and relevant to decide the issue. AO was given due opportunity to examine the same as required under rule 46A. It is evident from the MCH permission dated 10.5.2000 that the construction of said property was approved as residential complex. Similarly the bank guarantee for security deposit dated 15.5.2000 given by State Bank of India to MCH also referred the said property as residential complex. The permission/ no objection certificate given by the Fire Service Department vide its letter dated 11.1.1999 also specifically and repeatedly referred the property as a residential complex. The memorandum of understanding dated 14.1.2001 entered for the joint development***

and construction of the said property also referred to the construction of residential complex.

2.6. In view of the aforesaid evidences I hold that the property purchased by the appellant was a residential property and therefore the appellant was eligible for deduction u/s 54F of the Act. It is immaterial that the property was subsequently leased out to M/s APP Lab Technologies P. Ltd., which might have used the property for non residential purposes. I am supported in my views by the decision of ITAT, Delhi in the case of Mahavir Prasad Gupta vs JCIT (2006) 5 SOT 353. where the assessee let out the new property for commercial use due to which AO disallowed the claim of deduction u/s 54F. Hon'ble Tribunal held that the only requirement of sec. 54F is the construction or purchase of a residential house by the assessee. The use of the property is not the relevant criteria to consider the eligibility of sec. 54F benefit. It was held that mere non residential use would not render a property ineligible for benefit u/s 54F, if it is otherwise a residential house. If it is capable of being used for the purpose of residence, then the requirement of sec 54F is satisfied, Hon'ble Tribunal distinguished sec 54F from sec 54 of the Act where the user of the premise as a residence is a condition. In this case, Tribunal allowed the deduction u/s 54F to the assessee on the purchase of basement floor of property which was allegedly used for non residential purposes. It was held that since basement floor of property was capable of being used as residential accommodation assessee was entitled for deduction u./s 54F of the Act.

Considering all the facts and circumstances of the case, deduction u/s 54F is allowed to the appellant".

46. Aggrieved the department has filed the present appeals.

47. Grounds of appeals raised by the Department in these appeals read as follows-

1. *The learned CIT(A) has erred in allowing deduction u/s 54F claimed by the assessee treating the property purchased by the assessee was capable of being used as residential accommodation.*

2. *The learned CIT(A) ought not have admitted those fresh evidences submitted by the assessee which is against Rule 46 of the I.T. Act. In this connection the decision of Hon'ble Madras High Court in the case of CIT vs Krishnaveni Ammal has been relied as the assessee was in possession of certain material that was not submitted before the Assessing Officer when it was called.*

3. *The CIT(A) ought to have considered the Sale Deed for purchase of the property which clearly emphasize that the property purchased is commercial accommodation and not residential accommodation and hence not capable for allowing deduction u/s 54F of the I.T. Act.*

48. We have heard both the parties. We find that the CIT(A) has accepted the claims of the assessees for relief under the provisions of S.54F of the Act, keeping in view the following factual aspects of the matter-

a) Perusal of the sale deed shows that the property was a residential property especially the narration at para 10 at Page 14 of the deed, which has been reproduced by the CIT(A) at page 4 at para 2.4 of his order.
b) The plan attached to the sale deed shows the construction of bed room, Kitchen, study etc., showing that the property is residential one.
c) The MCH permission dated 10.05.2000 has approved the property as "residential complex"
d) The bank guarantee for security deposit given by State Bank of India to MCH also refers to the property as residential complex.
e) Permission / No objection certificate given by the Fire Service Department also refers to the property as residential complex
f) The memorandum of understanding dated 14.01.2001 entered for the joint development and construction of the said property also refers to the construction of residential complex.

We find no infirmity in the view taken by the CIT(A) as to the residential nature of the property purchased by the assessees, considering the factual aspects noted above. Even though the property was subsequently leased out to M/s.APP Lab Technology P Ltd, and it has been used for non-residential purposes, on that ground, the deduction u/s.54F cannot be denied. Mere non residential use subsequently would not render the property ineligible for benefit u/s.54F, if it is otherwise a residential property, as held by the Delhi Bench of the Tribunal in the case of Mahavir Prasad Gupta Vs JCIT (5 SOT 353). Respectfully following the said decision of the Tribunal, we are of the opinion that the CIT(A) had rightly allowed deduction u/s.54F.

49. Further, we find that there is no merit in the grounds raised by the department with respect to Rule 46 of the I.T Rules as the CIT(A) had given, due opportunity to the assessing officer, by remanding the matter, to examine the evidences as required under Rule 46A of I.T. Rules and therefore, there cannot be any grievance for the department on that count.

50. Consequently, both these appeals of the department are dismissed.

ITA No.1020/Hyd/2009 : Assessment year 2005-06
ITA No.1022/Hyd/2009 : Assessment year 2005-06

51. In both these appeals, the only effective grievance of the Department relates to additions made by the assessing officer on account of unexplained investment in the purchase of a property.

52. The appellant along with his sister purchased residential unit admeasuring 5840 sq. ft. along with covered parking of 480 sq.ft. in Punnaiah Plaza for a consideration of Rs.40,00,000/- vide registered sale deed dated 14.8.2004. The assessing officer held that the purchase consideration was grossly understated. It was observed that the said property was valued at Rs.1,48,00,000/- in the diary seized at the residence of one Sri. Harshavardhan Reddy, S/o Sri P.R. Gopala Krishna Reddy vide annexure No.A/PHVR/34-pages 46-48. It was further observed by the assessing officer that the said property was leased out to M/s APP Labs Technologies P. Ltd., @ Rs 24 per sq.ft. per month giving rate of return on capital at 34%, which was not only illogical but was also impossible. Assessing officer also noted that a plot existing opposite to Punnaiah Plaza was auctioned by HUDA for Rs. 1,42,000 per sq. yd. on 20.2.2006. He, therefore, concluded that the actual investment of the assessees in the said property was only Rs 1,48,00,000. Since the assessee and his sister had shown the investment only at Rs 40,00,000, the assessing officer concluded that there was gross understatement, and accordingly treating the difference of Rs. 1,08,00,000 as undisclosed investment, arrived at the

unexplained investment liable to be added in the hands of both these assessees as such, at 50% thereof viz. Rs.54,00,000, and accordingly brought the same to tax in the hands of the assessees.

53. On appeal, the CIT(A) deleted the additions of RS.54,00,000 made by the assessing officer as above, with the following reasoning-

> ***"I have duly considered the appellant's submissions and perused the relevant seized documents. It is an undisputed fact that no evidence of on-money payment by the appellant was found during search at any of the premises. Neither the seller nor the purchaser stated or accepted the on - money transactions. In such circumstances onus is on the AO to prove the payment of on money as held by the Hon'ble Supreme Court in the case of K.P. Verghese (131 ITR 597). One such case came up before the Hon'ble Madras High Court in CIT Vs P.V. Kalyana Sundaram (282 ITR 259) where the Tribunal had accepted the assessee's plea that no on money payment was made though the other party to the transaction .accepted receipt and the market value was also significantly higher than the value recorded in the sale deed. It was held by the Hon'ble Court that the payments over and above the amount mentioned in the registered document though widely prevalent would require investigation to establish the same where such payment was denied since the burden of proving that the appellant is not real falls on the revenue. There can be no presumption of on money payment. The decision of the Hon'ble Madras High Court was affirmed by the Apex Court in the decision reported in 294 ITR 49.***
>
> ***Similar ratio was laid down by the Hon'ble Rajasthan High Court in the case of CIT vs Raja Narendra (210 ITR 250) & CIT Vs Bhanwarlal Murwatiya (2008) (215 CTR 489) where it was held that even if it were to be assumed that the price of the land was different than the one recited in the sale deed, unless it is established on record by the department that as a matter of fact the consideration as alleged by the department did pass to the seller from the purchaser it cannot be said that the department had any right to make an addition.***
>
> ***An allegation that the assessee had paid a consideration larger than what is indicated in the registered sale deed cannot be lightly made since the law of evidence would place the burden on the revenue. This was the point considered in CIT vs Satinder Kumar (250 ITR 484) (P & H) In that case the Revenue relied upon n impounded diary of a property dealer recording transaction in the property located in that very area, but the information therein apparently did not relate to the very property under consideration. It was held that the impounded diary of the property dealer recording actual transactions in properties located in that very area had no evidentiary value. It was also observed that the Revenue has also not made any enquiries from the property dealer vendor etc to establish that the assessee paid any amount over and above the apparent consideration to purchase the said plots. The case illustrates not only a rule of evidence***

but also points out the responsibility of the Revenue to bring home concealment by proper enquiries, where apparent reasons exist to assume such concealment which has not been established.

*The same Bench of the Punjab and Haryana High Court also delivered an identical judgment in the case of CIT vs MNitin Kumar *248 OTR 478). The addition made u/s 69 on estimated basis over and above the stated consideration in the sale deed was deleted as no evidence was found during the course of search that the assessee had paid more amount than what was stated in the document. The Hon'ble ITAT, Bangalore in the case of Smt. Bhanu R,. Shah vs DCIT (2004) (3 SOT 792) held that addition ignoring the document value and estimating the value was not sustainable unless there was a positi9ve evidence that the document value was understated..*

I also agree with the argument of the Ld. A.R. that document found from a third person, cannot be used for addition in the assessment of the assessee. In the case of Amarjeet Singh Bakshi (263 ITR (AT) 75 (Del) the Hon'ble Third Member held that ho addition can be sustained on the basis of notings on a slip of paper found in the premises of a third party. It was held that what was found on a slip of paper or a loose sheet is not covered by any rule under the Evidence Act . In the absence of anything more to corroborate the inference drawn on the basis of a noting on a slip of paper the addition could not be sustained. It was held in the case of Rama Traders v ITO (32 TTJ 483) TM(Pat) that presumption can be drawn against person from whom books seized but not against any third person,. This decision was followed by Hon'ble ITAT Hyderabad in the case of Shri.V.Y. Sivaramakrishna (Supra) . In fact the Hon'ble Supreme Court in the case of P.R. Metrani vs CIT (287 ITR 209) held that the presumption u/s 132 (4A) is neither conclusive nor applicable to the assessment proceedings..

The document seized from the residence of Shri Harshavardhan Reddy, relied upon by the AO was in respect of some dispute with Sri. P. Prabhakar Reddy where the property in Punnaiah Plaza was proposed to be exchanged with some property in Ooty and shares in HPS Hotels. In that context the property of Punnaiah plaza was valued at Rs 1.48,00,000/- The seized document no where mentioned that the actual consideration Paid for this property was Rs 1,48,00,000/- In the absence of a positive evidence brought on record by AO that appellant paid on money in the purchase of said property, the addition made on account of unexplained investment can not be sustained. The addition of Rs 54,00,000/- is accordingly deleted"

54. The next grievance of the Department in these appeals for assessment year 2005-06 against the addition of Rs. 12,85,487 made on account of unexplained investment in the construction of the property in "Punnaiah Plaza".

55. Facts in brief relating to this issue are that the assessing officer made the impugned additions, on the basis of cost of construction of Punnaiah Plaza determined in the assessment order of Shri. P..R. Gopala Krishna Reddy co-owner. During the search proceedings at the premises of Shri. P.R. Gopala Krishna Reddy a document was seized vide Annexure No.PRGK/A/2-Page No..86 to 88, containing the details of expenditure incurred up to 30.6.2005 in the construction of Punnaiah Plaza. The total cost of construction incurred till 30.6.2005 was mentioned at Rs 4,17,90,346. Further expenditure of Rs 1.66 crores was to be incurred for centralized air-conditioning which was to be reimbursed by the lessee M/s. App Labs Technologies P. Ltd., as per MOU dated 14.12.2002. The instalment of Rs 83,00,000 was paid on the date of MOU and balance of Rs 83,00,000/- was to be paid on submission of proof of placing order for the equipments. It was observed by the assessing officer that the appellant spent only Rs 49.23 lakhs till 30.6.2005 as per accounts. He, therefore, inferred that balance amount of Rs.1,16,76,030 was not accounted for by the assessee. The assessing officer therefore, estimated the total cost of construction of "Punnaiah Plaza" at Rs 5,34,66,376, and accordingly worked out the cost per sq. ft. at Rs 932.60

56. The assessing officer, taking note of the investments made by these two assessees and the shares of the assessees in the total area of construction, the assessing officer applying a rate of Rs. 933 per sq. ft., determined the understatement of cost of construction at Rs.12,85,487 in the case of Shri M.Ramakrishna Reddy and at Rs.12,84,613 in the case of Smt.Harnita Reddy, and accordingly made the additions in that behalf.

57. Aggrieved by the above additions, assessees pleaded before the CIT(A) that the construction of Punnaiah Plaza was done as per MOU wherein the amount was contributed by various individuals/owners in certain ratio. As per MOU the cost of construction and the lease rent of 2nd, 3rd & 4th floor was to be shared with 1st & ground floor in the ratio of 1.2 : 1 + 2:1. Hence the

uniform cost of construction cannot be applied in respect of all the floors. It was further contended that there was no basis for the AO to arrive at a conclusion that a sum of Rs 1,16,76,030 was spent unaccounted for centralized air conditioning of the building. The expenses were to be incurred by lessee M/s App Lab Technologies P. Ltd as per MOU dated 14.12.2004. Learned Authorised Representative for the assessee filed copies of audited accounts of M/s P. Rajasree & Others for Assessment years 2005-06 to 2007-08 to show that the cost of construction of "Punnaiah Plaza" shown in the audited accounts and the seized documents were one and the same and no unaccounted expenditure was incurred by the owners in the construction.

58. The CIT(A) deleted the disputed additions made by the assessing officer in the following manner (as taken from the order of the CIT(A) in the case of Shri Ramakrishna Reddy) –

> **"On due consideration of the relevant documents I find force in the argument of the appellant, The construction account statement seized from the residence of Shri. P.R. Gopalakrishna Reddy contains the year wise details of construction expenses incurred from F.Y. 1998-99 to 30.6.2005. The total cost of construction up to 30.6.2005 was mentioned at Rs 4,17,90,346/- The total cost of construction up to 30.3.2005 I was Rs 3,71,69,349/- ^The same was mentioned at Rs 3,70,09,219/- in the audited accounts for year ending 30.3.2005. It is also noted that the cost of construction incurred in F.Y: 2004-05 as per audited accounts was Rs 1,93,19,209/- while the same was mentioned at Rs 1,93,17,695/- in the seized document. This it is evident that the cost of construction mentioned in the seized document and in the audited accounts was almost same. The AO determined the higher cost of construction by presuming that the owners of the "Punnaiah Plaza" incurred unaccounted expenditure for centralized air conditioning of the building. There is no basis for such presumption of the AO. It is also illogical to presume unaccounted expenditure in centralized air conditioning since the entire cost of centralized air conditioning was to be reimbursed by M/s APP Labs technologies P. Ltd. The cost of construction determined by AO @ Rs 933 per s.ft was without any valid basis,. No addition u/s 69 on account of unexplained investment can be sustained on presumptions and surmises. It is also pertinent to mention that the total investment made by the appellant in the construction of the said property was Rs 11,29,935/- as on 30.3.2006 as per the audited accounts of M./s P. Rajasree & others where the total cost of construction of the property was shown at Rs 4,58,1,700/-**

Considering all these facts and circumstances of the case the addition of Rs 12,85,487/- made by the AO is deleted. The ground raised by the appellant is accordingly allowed"

59. Aggrieved by the above order of the CIT(A) on this issue, the department is an appeal before us.

60. The learned counsel for the assessee submitted that the appellant purchased a semi constructed property as evident from the sale deed. He further invested a sum of Rs 11,91,000 in the construction of the said residential unit. At the time of purchase there was a dispute over the sanction plan due to which a stay order was passed by the Hon'ble High Court. Hence, the property purchased by the appellant cannot be compared with the prevailing market rate as contended by the AO. Similarly the comparison made by the AO with the HUDA auction on subsequent date, was also not justified,.

61. The learned counsel for the assessee further contended that no addition can be made on the basis of a document seized from the premises of a third person i.e. Shri Harshvardhan Reddy. The seized document referred to certain settlement with Shri. P. Prabhakar Reddy, in which the appellant was not a party. The appellant was not aware of the said disputes and was not aware of the said seized document. No evidence was found during search showing that the appellant had made any amount over and above the purchase consideration mentioned in the registered sale deed. Hence no addition can be made on account of unexplained investment in the said property. The Ld counsel for the assessee relied on the third Member decision of ITAT, Patna in the case of Rama Traders vs ITO (32 TTJ 483) and decision of ITAT, Hyderabad in the case of Shri. Y. Shivarama Krishna (ITA No. 969 -970/Hyd/08 order dated 7.11.2008)

62. The learned Departmental Representative, Smt. Mythili Rani relied on the order of the assessing officer.

63. We had heard both the parties. In the case of Shri Y.Shivarama Krishna in ITA No 969-970/Hyd/08, relied upon by the ld counsel for the assessee, it has been held by the co-ordinate bench of this Tribunal has held as follows:-

> ***"Search and seizure operations were conducted on 07.10.2004. In the premises of the person relating to Sujana group of companies, including the assessee. During the course of search operations, some material was found from the residence of one shri C.V.Ramana Reddy. The assessing officer on the basis of the presumption under Section 132(4) of the Act made additions in the hands of the present assessee. However, on appeal, the CIT(A) held that presumption under Sec.132(4) is applicable only in respect of persons from whose custody or possession, seized material was found and it cannot be applied to third parties The CIT(A) placed reliance on the third member decision of this Tribunal in the case of Rama Traders V/s, first ITO (1982) 32 TTJ (Patna) 483 (TM), wherein it was held that presumption provided in Section 132(4) is only in respect of persons from whose custody the document was seized and the presumption cannot be extended to third parties. Since the CIT(A) found that the presumption cannot be extended to third persons, following the third Member decision of this Tribunal cited above, we find no infirmity in the order of the CIT(A) on this issue. We accordingly uphold the same and reject the grounds of revenue on this issue"***

64. Inasmuch as the above decision of the Tribunal covers the issue in favour of the assessee, respectfully following the same, we find no infirmity in the order of the CIT(A). We accordingly reject the grounds of the Revenue in these appeals.

65. In the result, these two appeals of the Department are dismissed.

66. To sum up, out of the nine appeals filed by the revenue, while ITA No.1014/Hyd/2011 is allowed for statistical purposes, the remaining eight appeals are dismissed.

Pronounced in the Court on 27.12.2011

Sd/-	Sd/-
(Chandra Poojari)	**(Asha Vijayaraghavan)**
Accountant Member.	**Judicial Member.**

Dated 27th December, 2011

Copy forwarded to:

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8. Commissioner of Income-tax-III, Hyderabad
9. DR, ITAT, Hyderabad

B.V.S.