आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर

IN THE INCOME TAX APPELLATE TRIBUNAL,
INDORE BENCH, INDORE
BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER
AND SHRI MANISH BORAD, ACCOUNTANT MEMBER

ITA No.121/Ind/2016 & 686/Ind/2016
Assessment Year: 2012-13& 2013-14

Ashoka Hi-Tech Builders P.Ltd, Indore	Vs.	Dy. Commissioner of Income Tax(Central)-I, Indore
(Appellant)		(Respondent)
PAN No.AAHCA5239R		

Revenue by	Shri K.G. Goyal, Sr.DR
Assessee by	Shri P.M.Choudhari, Advocate
Date of Hearing	**26.6.2018**
Date of Pronouncement	**03.8.2018**

O R D E R

PER MANISH BORAD, AM.

These two appeals filed by the assessee pertaining to the A.Y. 2012-13 & 2013-14 are directed against the order of ld. Commissioner of Income-tax (Appeals)-III, Indore dated 30.03.2016 which is arising out of the order u/s 143(3) of the Income Tax Act dated 24.3.2015 passed by DCIT (Central)-1,Indore.

2. The assessee has raised following grounds of appeals for Assessment Year 2012-13;

1. That the Learned CIT(A) has erred in law in confirming the addition of Rs.16,12,34,754/- made by Adopting and applying the method of accounting followed by a different assessee M/s JSM Devcons Pvt.Ltd with whom the appellant had merely entered into contract for development of the land belonging to the appellant company. The AO and CIT(A) failed to see that the appellant's income had to be assessed as per the method of accounting regularly followed by it and the AO could not change the appellant's method of accounting on the basis of the method followed by another assessee. The authorities below have also erred in applying the accounting standards AS-7 which are applicable to developers without appreciating the fact that appellant is not the developer but is land owner.

2. The Learned CIT(A) as also the AO failed to see that the income arising out of the development agreement between the appellant and the developer M/s JSM Devcons Pvt Ltd would accrue in the hands of the appellant only when the appellant's right to get the 32% constructed area under the Development Agreement would crystallize as per the terms of the development agreement between the parties, according to which appellant is entitled to receive 32% area on completion of the construction of that area correspondingly the method of accounting to recognize the revenue only on execution and registration of Sale Deed in favour of buyer

i.e. the method to recognize revenue as per project completion method is correct and proper and the appellant's income ought to have been assessed in accordance with the said method in view of the mandatory provisions of section 145.

3. Without prejudice to above even assuming without admitting that the appellant's income is to be assessed according to the percentage completion method, even then the addition of Rs.16,12,34,754/- made by AO and confirmed by CIT(A) is improper and the addition ought to have been restricted to Rs.6,53,00,764/- received by appellant from the developer towards its 32% share in the year under consideration. The addition is thus excessive and unreasonable."

3. Assessed has also filed appeal for A.Y 2013 14 raising similar grounds against the addition of Rs.12,25,55,171/- confirmed by Ld. CIT(A).

4. From the perusal of the above grounds for both the years the issue needs to be adjudicated is whether both the lower authorities were justified in confirming the addition by applying the percentage completion method as against the project completion method/ completed contract method adopted by the assessee thereby showing the revenue on the basis of the sale deeds registered. As

the issue raised in the appeal are common and pertaining to the same assessee, they have been heard together and are been disposed off by this common order for the sake of convenience and Brenaty. For the purpose adjudication we will take up the facts for A.Y. 2012-13 as the basis and our decision shall apply to the appeal for A.Y. 2013-14 also.

5. Briefly stated facts as culled out from the records are that the assessee is engaged in the business of purchase/sales/development of land, real estate and infrastructure and construction and civil work. Search and Seizure operations u/s 132 of the Act were carried out on the business as well as residential premises of the Apollo Group of Indore including the assessee along with other concerns/business associates on 21.09.02. As most of the concerns and individual are inter linked the case were clubbed under the over all name of Apollo (NRK) Group of Indore Assessee company is one of the company of the NRK group of Indore and was incorporated on 22.1.2009. Warrant of authorization was issued u/s 153A of the Act to the assessee on 31.5.2013 for A.Y. 2007-08 to 2012-13. As the assessee was incorporated on 22.1.2009 it was

required to file returns of income for the A.Y. 2009-10 to 2012-13. In compliance to the notices u/s 143(2) of the Act the assessee filed returns of income. As far as for the Assessment Year 2012-13 is concerned the assessee disclosed loss of Rs.25,98,002/- in the returns filed regularly u/s 139(1) of the Act on 28.9.2012 and the same amount of loss i.e. Rs.25,98,002/- was disclosed in the return filed in compliance to notice u/s 153A of the Act on 12.7.2013. Thereafter notices u/s 143(2) and 142(1) of the Act were duly served upon the assessee and necessary details were called for from the assessee. The issue linked to the grounds raised in this appeal relates to agreement dated 1.4.2009 entered into between the assessee and M/s. JSM Devcon Pvt.Ltd. The assessee is the owner of 2.039 hectare of land situated at Piplyakumar, Tehsil Indore and the same was given for development to M/s. Devcon Pvt. Ltd. As per the terms and condition of the development agreement, the developer will construct various high rise buildings on the land and in consideration for allowing the development of land, the assessee company will be entitled to 32% of the total saleable constructed area to be constructed by the developer. The units were not demarcated between the developer and the land owner. Instead, it

was decided that entire revenue shall be shared in the ratio of 68:32 as decided in the development agreement. On examination of the audited accounts of the assessee, it was revealed that the assessee has not reflected any revenue from sale of units however it was getting advance against sale from the developer from 2010-11 onwards. Summary of the transactions with M/s JSM Devcon Pvt. Ltd as reflected in the books of the assessee is being reproduced as under:

	A.Y 2011-12	A.Y 2012-13	A.Y. 2013-14
Opening Balance	19,00,000	3,23,35,702	7,52,36,466
Add: Share of advance receivable	4,84,35,702	6,53,00,764	5,23,49,207
Less: Amount Received	1,61,00,000	2,24,00,000	2,88,50,000
Closing Balance	3,23,35,72	7,52,36,466	9,87,35,673

6. As at 31st March, 2013, the assessee company has reflected an amount of Rs.9,87,35,673/- receivable from M/s. Devcon Private Limited. In order to examine the transaction, details were called from M/s. JSM Decon Private Limited u/s 133(6) of the I.T. Act. In response to the said notice, M/s JSM Devcon Private Limited

submitted copies of ledger account of the assessee company in the books of M/s. JSM Devcon Private Ltd.

7. It was submitted by the assessee during the assessment proceedings that it is consistently following project completion method and has offered the revenue for tax in the year in which sales have been effected and the sale deeds registered. However LD.A.O was not convinced with the submission and made by the assessee and he applied the method adopted by M/s. Devcon Pvt. Ltd i.e. the percentage completion method on the assessee and calculated the income of the assessee applying the ratio of 68:32 as agreed in the agreement. The Ld. Assessing Officer took the basis of financial data of M/s. JSM Devcon Pvt. Ltd which has accounted for the revenue on the basis of percentage completion method as per the guidelines prescribed by the ICAI. M/s. JSM Devcon Pvt. Ltd recognize the revenue of Rs.35,47,19,797/- in financial year 2011-12 and revenue of Rs.26,96,23,914/- in financial year 2012-13. The Ld. Assessing Officer took both these figures representing 68% of total revenue of the project and accordingly calculated the share of revenue for financial year 2011-12 and 2012-13 at Rs.16,69,26,963/- and Rs.12,68,81,842/- respectively. Amount of addition was calculated in the following manner;

Particular	Sales being 32% of total amount received by Developer	Cost @3.41% of Sales	Profit/Addition
F.Y. 2011-12	16,69,26,963/-	56,92,209/-	16,12,34,754/-
F.Y. 2012-13	12,68,81,842/-	43,26,671/-	12,25,55,171/-
Total	29,38,08,805/-	1,00,18,880/-	28,37,89,925/-

8. Income assessed accordingly after making addition of Rs.16,12,34,754/-.

9. Aggrieved assessee filed appeal before Ld. CIT(A) against the method and Ld.CIT(a) confirmed the action taken by Ld.AO observing as follows;

> "4. I have gone through the assessment order, the appellant's contentions and the audited accounts of M/ s JSM Devcon Private Limited. In the assessment year under consideration the appellant company has not reflected any revenue from the operations in the P&L account. During the course of assessment proceedings the appellant company in response to the query for not recognizing revenue in the books of account had furnished the following reasons:-

i)The company has been recognizing revenue on the basis of sales deeds executed at the time of full payment coupled with possession of the opartment.
ii)Advances have been received from various customers on the basis of schedule given in the allotment letter which specifies that installment shall be paid on *completion of a particular level of activity. The amount* so *received* is *liable to refund and the possession shall be given at the time of execution of the sale deed.*
iii) In the transaction of advance received from customer, there is *no transfer of property as envisaged in Sec.* 2(47) *of The Income Tax Act,* 1961 *read with section 53A of Transfer of Property Act, 1882.*
iv) Similar type of accounting method (mercantile) has been followed by the assessee from year to year.

4.1 The Assessing Officer did not accept the appellant's contentions for the following reasons:-

i) *The assessee has stated that the revenue* is *recoqnized on execution of the sale deeds. In this respect, it is once again reiterated that the assessee company has entered into a joint venture agreement with M/* s *JSM Devcon Private Limited in which the project was to be developed by,the said party and : the entire revenue of the project shall be shared between the assessee company and the developer company* in *the ratio of* 32:68. *All the acts and deeds in respect of the project including but not limited to construction of building, obtaining approvals from authorities, dealing with customers, issuing allotment letters and receiving payment as per schedule are being undertaken by* M/ s. *JSM Devcon Private Limited and the assessee* Is *not required to perform any activity in the process. That is all the* risk *associated with the transactions are* on *the part of the developer.*

ii) M/ s. *JSM Devcon Private Limited, while deciding on the accounting method* to *recognise the revenue had two options before it viz whether to apply Completed Contract Method* or *to adopt Percentage Completion Method. In both the options, the difference* is *on only* on *account of risk and reward. In the Completed Contract Method, the risk and reward do not get transferred until the completion of the entire contract whereas in the Percentage Completion Method the risk and rewards are transferred and subsequent* to *such transfer acts and deed are done for completion. Para* 3.3 *of the said Guidance Note explain the situation in which the above two methods are to be applied reads as under:*

"In case of real estate sales, the seller usually enters into an agreement for sale ***WItil*** *the buyer at initial stages of construction. This agreement for sale is also considered to have the effect of transferring all significant risks and rewards of ownership* to *the buyer provided tne aqrcenicnt* is *legally enforceable and subject to the satisfaction of conditions which signify trarisferrino of significant risks and rewards even though the legal title is not transferred* or *the pos ses sion of the real estate* is *not given to the buyer. Once the seller has transferred all the significant risks and rewards* to *the buyer, any* acts *on the real estate performed by the seller are, in substance, performed on behalf of the buyer in the manner similar to a contractor. Accordingly, revenue in such* cases is *recognised by applying the percentage of completion method. "*

iii) *From the above, it is clear that the risk and reward of the transactions can be shifted even when the . legal title* is *not transferred* or *the possession* is *not given to the buyer.* M/ s *JSM Devcon Private Limited after considering all the factors has adopted Percentage Completion Method for revenue recognition, which shall be binding on assessee as well, as it* is *dependent on the developer on all the activities. Thus, the argument of the assessee that*

revenue is *recognized on the basis of sales deed executed at the time of full payment coupled with possession of the apartment does not hold ground.*

iv) The assessee profit and loss account ces it reliance on the allotment letter Issued by 11'1/ s *LlSM Devcon Private Limited as per which the amount received as ad.uance is liable to refund and the possession shall be given at the time of execution of the sale deed. As has been discussed earlier the risk and reuiard s of the traneaction has been shifted to buyer* on *the date of entering into the agreement. The buyer is at liberty to sell the interest in the flat to another person us per his will and receive the consideration. Similarly, the buyer is at liberty to cancel the booking and shall get the amount paid after de du ction of pre scribed amounts. Once the risk and rewards are transferred, the pendency of certain things does not affect the transaction.*

v) The assessee has contested that there is no transfer of the property as envisaged u/ s 2(47) *read with section 53A of Transfer of Property Act, 1882 and since, there* is *no transfer, there is no reason for recognize revenue. In order to examine the argument of the assessee, it would be imperative to examine Sec.* 2(47) *which reads as under:*

"(47) "transfer", in relation to a capital asset, includes,-

(i) The s *a* I e *exchange* or *relinquishment of the asset: or*
(ii) The extinguishment of any rights therein; or
(iii) The compulsory acquisition thereof under any law; or
(iv) in a case where the asset is *convened by the owner thereof into,* or *is treated by him as, stock-in-trade of a business carried on by him. such conversion or treatment:* or
(iva) The maturity or *redemption of a zero coupon bond;* or
(v) Any transaction involving the allowing of the possession of any immovable property to be taken or

retained In par! performance of a contract of the nature referred to in section 53 *A of the Transfer of*

(vi) Any transaction (whether by way of becoming a member of or acquiring shares in. a co-opera five society, company or other association or persons or by way of any agreement or any arrangement or in any other manner whatsoever) which has the effect of transferring, or enabling the enjoyment of any Immovable property.

Explanation I =Fo r the purposes of sub-clauses (v) and (vi). "immovable property" shall have the same meaning as in clause (d) of section 269UA.

Explanation 2. *-- For the removal of doubts, it is hereby clarified that "transfer" includes and shall be deemed to have always included disposing of or parting with an asset or any interest therein, or creating any interest in any manner whatsoever, directly or indirectly, absolutely or conditionally, voluntarily or involuntarily. By way of any agreement (whether entered into in India or outside India) or otherwise, notwithstanding that such transfer of rights has been cl=xracterized as being effected or dependent upon or flowing from the transfer of a share or shares of a company registered or incorporated outside India: "*

vi) On perusal of the above sub section, it would be seen that it deals with the transaction of transfer of capital assets and not stock in trade. In the instant case the assessee has reflected the land as stock in trade and therefore the provision of sub section are not applicable to it.

vii) As regards the assessee argument that it has been recognising the revenue on the same line from years to years, it will be sufficient to state that the submission of the assessee is not as per records. On examination of the balance sheet of the assessee for the various years, it can be seen that the assessee has not recognized any revenue. Thus, the assessee submission that the practice is being regularly followed by it is also not established.

4.2 The appellant company had acquired 2.039 Hectare of agriculture land on 23.03.2009 and the said agriculture land was given approval for housing development in the master plan. The appellant company entered into a development agreement on 01.04.2009 with *Mj* s JSM Devcon Pvt. Ltd. and as per the terms of the agreement the Developer, *Mj* s JSM Devcon P.vt. Ltd. had to construct High Rise Buildings on the said land and in consideration the appellant company was entitled to receive 32% of the total flats constructed.

":

4.3 The appellant company is maintammg its books of accounts on Mercantile System of Accounting and revenue has been recognized on accrued basis, except certain income. In the notes on accounts, under the revenue recognition, it is stated as under:

The Co. has entered into an agreement with JSM Devcon (P) Ltd., R/o Orbit Mall, and A.B Road Indore for development and construction of High-n'se/ Multistoried Buildings upon its land at Survey No. 56 *and* 61, *Gram Pipliyakumar, Teh. & Dist. Indore, as per Registered Agreement dated* 01/04/2009. *Accordingly Total Cost of Development & Construction of Building shall be incurred & born by the Developer Co. JSM Deucon and* 32 *of the total completed flats/ saleable area shall be given to the* co *par:y Ashoka* Hz *Tech Builders Pvt. Ltd. as consideration. In pursuance of this, the Developer Co. has credited and transferred* 32 *of the total consideration received towards booking of flats/saleable area till the end of F. Y* 2012-13. *The same has been credited to Booking Advance A/c. The Company has not yet recognized any Revenue from the Construction Activity"*

4 Further, in the Auditor's Report for the period ending 31.03.2013 it is reported under Legal and Regulatory Requirements in point no. 8 as under-

> *"8. As required by section* 227(3) *of the Act, we report that:*
> *In our opinion, the Balance Sheet, Statement of Profit and Loss, comply with the mandatory Accounting Standards referred to in sub-section (3C) of section* 211 *of the Companies Act, except AS-7 and AS-9, read together with Notes op: Accounts as per Note* 11 *annexed with Balance Sheet ....* ' ..'

4.5 The appellant company has submitted during the appeal proceedings that the method of accounting as adopted by it is in consonance with AS-9 issued by ICAI and deserves to' be accepted. However, as reproduced above from the Auditor's Report for the period ending 31.03.2013 the appellant's accounts do not comply with the Accounting Standard AS-9.

4.6 At this stage it is important to look at the application of revenue recognition Principles prescribed in AS-9 to real estate sales:

> *"2. For recognition of revenue in case of real estate sales, it is necessary that all the conditions specified in paragraphs* 10 *and*]] *of Accounting Standard (AS)* 9, *reuenue recognition, as reproduced below are satisfied:*
>
> *10. Revenue from sales or service transactions should be recognized when the requirements as to performances set out in paragraphs* 11 *and* 12 *are satisfied, provided that at the time of performance it is not unreasonable to expect ultimate collection. If at the time of raising of any claim it* is *unreasonable to expect ultimate collection, revenue recognition should be postponed.*
>
> *11. In a transaction involving the sale of goods, performance should. be regarded as being achieved when the following conditions have been fulfilled:*

the seller of goods has transferred to the buyer the property in the goods for a price or all significant risks and rewards or ownership have been transferred to the buyer and the seller retains no effective control of

the goods transferred to a degree usually associated with ownership; and
no significant uncertainty exists regarding the amount of the consideration that will be derived from the sale of the goods."

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4. 7 Considering the revenue recognition Principles prescribed in AS-9, the real estate sale takes place at a point of time when all significant risks and rewards of ownership are transferred as per the terms and conditions of the agreement to sell. The event of entering in to Agreement to sell is to be construed as having the effect of transferring of the significant risks and rewards of the ownership to buyers, provided, the agreement is legally enforceable. By virtue of clause 17 of the Allotment letter the appellant company / developer has transferred the price risk which is the most significant risk in the real estate business. As per this clause, the onus is on the buyer to strictly adhere to the payment schedule, failing which the entire amount already paid, was liable to be forefeited. Thus, there was no significant uncertainty regarding the amount of consideration to be received by the appellant company/developer from the sales and it was reasonable to expect the ultimate collection.

4.8 The Accounting Standards issued by the Institute from time to time restrict their application to the aspects of maintaining accounts and determining true profit or loss accordingly. These accounting standards or guidance notes can have no bearing on the question of determination of total income under the Income Tax Act. Such accounting standards etc. do not acquire any statutory force under the provisions of the Act in so far as the question of determination of total income is concerned. Scope of the total income is controlled by section 5 of the Income Tax Act, and not by the accounting standards etc., issued from time to time. At this juncture, it is significant to note the directive of section 145, which provides for the method of accounting. It transpires from the prescription of section 145 that only the accounting standards issued by the Central Government under this section are mandatory and have a bearing on the computation of total income. Any other accounting standard issued by any statutory or non statutory body cannot affect the computation of total income under the provisions of the Act. The Accounting Standards etc. issued by the Institute, have, of course, relevance in the manner of maintenance of accounts, but, cannot override the mandate of the provisions of the Act.

4.9 Turning to the taxation principle relevant for present purpose, section 5 contains the scope of total income. It provides, *inter alia,* that all income from whatever Source derived which accrues or arises or is deemed to accrue or arise, is included in the scope of total income. Under the mercantile system of accounting, which the extant appellant is following, an income becomes taxable When right to receive an income is finally acquired. Ordinarily, when some goods! products are sold by a businessman, income does not arise before the transfer of title in such goods to the buyer, It is because that till that time, the buyer does not acquire any risks and rewards attached to the product, which pass only with the sale. But, if the

"product under sale is of a unique nature, such as, a commercially constructed unit, for which the developer has entered into agreement for ' sale at the initial stage of construction by transferring all significant risks and rewards of the ownership to the buyer, the income accrues on year-to-year, basis by considering the percentage of completion of the property under transfer. It is so for the reason that after signing agreement to sell, the developer

acquires an infallible right over the payments received towards sale consideration which coincide *with* the progress in construction. The buyer simultaneously acquires ownership of the right in the property much before the transfer of legal title *in* his favour. Such a right in the hands of buyer is a valuable right capable of transfer to any third person at any stage of construction. As such, it is wrong to say that no profit accrues to the developer/builder till the execution of registered sale deed. The position may be different when the developer undertakes the construction work without entering into any agreement for sale to the buyers at the initial stage. When .. the developer first completes the construction work at his own and then sells the commercial *units* to the buyers, no income can be said to have accrued to the developer till the construction is completed and sale is made to the buyers by transfer of legal title. The reason being that till the transfer of title to the buyers, it is only the developer who holds all the risks and rewards of ownership. Income becomes taxable only when it accrues and it accrues when right to receive it is finally acquired. A right to receive income in the case of sale of commercial unit is acquired when risks and rewards attached to its ownership are transferred to the buyers and not before or after that. It is but natural that no developer will transfer risks and rewards of ownership to the buyers until he has secured the receipt of sale consideration. This appears to be the reason which propelled the Institute to come out with guidance note in 2006 requiring the adoption of the percentage completion method alone for the recording of accounting transactions by developers so that the accounts give a true and fair view of its profits. Similar view has been reiterated in the guidance note issued in 2012. So the litmus test of accrual of income of a developer under the mercantile system of accounting is the passing of risks and rewards of ownership to the buyers.

4.10 Turning to the facts prevailing in the instant case, the assessee has recognized the revenue only when the registration of the sale deed has been done in favour of the buyer. Under AS-7 and AS-9 this is not a recognized method of recognizing the revenue. This method is neither project completion method nor percentage of completion method. The method adopted by the assessee, therefore, cannot be regarded to comply with the ingredients as laid down under section 145. Registration of the sale deed represents only the transfer of the title in favour of the buyer from the assessee. It has nothing to do with the method of accounting followed by the assessee. Section 145 makes it mandatory on the part of the assessee to follow either cash or mercantile system of accounting regularly. Recognizing the revenue when the sale deed had been registered by the assessee in favour of the buyer could not be regarded to be either cash or mercantile system of accounting. Further, it is important to note that the appellant company has not received 32 of the completed flats and then entered into agreement to sell. M/ s JSM Devcon Pvt. Ltd. entered into agreements to sell for 32 of the appellant company's share as well and accordingly transferred 32 of the monies received to the appellant's account. The Developer, M/s JSM Devcon Pvt. Ltd. after considering all the factors has adopted Percentage Completion Method for revenue recognition, which shall be binding on the appellant company as well, as it is dependent on the Developer for all the activities.

4.11 Reliance is also placed on the following decisions:-

i) DCIT vs. Sudhit V. Shetty (2014) 50 Taxmann.com 372 (Mumbai-Trib) ii) ACIT vs.

Alcon Develpoers (2015) 54 Taxmann.com 54 (Panaji-Trib)
iii) ACIT vs. Paras Build call Pvt. Ltd. (2015) 57 Taxmann.com 112 (Delhi- Trib) iv) Prestige
States Project Ltd. 129 ITD 342 (Banglore-Trib)

4.12 M/s JSM Devcon Pvt. Ltd has recognized revenue of Rs. 35,47,19,797/- in the F.Y. 2011-12 and Rs. 26,96,23,914/- in the F.Y. 2012-13 which represents 68 of the revenue of the project and the Assessing Officer has worked out the appellant's share to Rs. 16,69,26,963/- for. F.Y. 2011-12 and Rs, 12,68,81,842/- for F.Y. 2012-13. After allowing the proportionate cost of land, the profit of Rs.16,12,34,754/- for F.Y 2011-12 and Rs.12,25,55,171/- for F.Y. 2012-13 is worked out.
4.13 In view of the discussion in the preceding paragraphs, addition of Rs.16,12,34,754/- for A.Y. 2012-13 and Rs.12,25,55,171/- for A.Y. 2013-14 is confirmed. Ground No.1 is dismissed."

10. Now aggrieved assessee is in appeal in the Tribunal against the finding of Ld.CIT(A).

11. The Ld. Counsel for the assessee referring to the detailed written submissions submitted that the assessee company entered into an agreement with M/s. JSM Devcon Pvt. Ltd (In short JSM DPL) for development of the lands owned by the company in the capacity as land owner. It was agreed that out of the total constructed salable area/flats constructed by the developer the assessee being land owner is entitled to 32% of the constructed saleable area and the developer is entitled to retain its 68% of the constructed area. As per Clause-9 of the agreement it is mentioned that on completion of the entire construction, the completed plots

are to be divided and allocated between the land owner and the assessee/ Developer (JSM DPL) . In accordance with Clause 2 of the agreement which entitles to the owner to keep 32% constructed area upon completion of entire construction. Ld. Counsel for the assessee asserted the word "entire construction" to convey to the Bench that appellant's right to 32% of the constructed area would have crystallized only on completion of construction. It was for this reason that in the year under consideration i.e. Assessment Year 2012-13, the assessee right to receive the constructed area as per the agreement had not accrued. For this very reason only, assessee has shown the advance received from proposed buyers of the flats as liability and they were offered to tax in the year when the sale deed was registered in the name of the buyer.

12. Ld. Counsel for the assessee submitted that the assessee's capacity as per the agreement with JSM DPL is only as the land owner and therefore cannot be considered either as a joint venture or a partnership firm and this is only the development agreement which was entered into in to receive 32% of the constructed salable area. He also appraised that the assessee company is following

mercantile system of accounting and books of accounts are duly audited under the provision of IT Act and Company Act. It is consistently adopting the accounting system of project completion method and for the A.Y 2011-12 also he has disclosed the advance received from the buyers as liability and no addition has been made by the revenue authorities during the assessment for the A.Y. 2011-12 and the method adopted by the assessee has been accepted. By maintaining the same consistency the assessee prepared the financial statement for A.Y 2012-13 and onwards. As regards the action of Ld.AO adopting the percentage completion method followed by the developer company i.e. JSM DPL, he humbly submitted that a person is free to adopt one of the prescribed method of recognizing the revenue as provided under the provisions of law and it was not mandatory on the part of the assessee to follow the system of accounting adopted by the Developer. He further submitted that as per the settled legal position according to provisions of Section 145 of the Act which are mandatory in nature, the Assessing Officer is bound to assess the appellants income in accordance with the accounting system regularly followed and as far as tax on the income is concerned the

assessee has duly offered the revenue for tax during the Assessment Year 2015-16 and onwards in respect of sale deeds registered during the year which were duly reflected in the tax audit report prepared for financial year 2014-15 and onwards. The Ld. Counsel for the assessee referring to financial statements for F.Y. 2014-15 submitted that during this year assessee received income against total advance of Rs.30.15 crores (approx.) and the assessee has shown the sale of flats/property of Rs.6.07 crores. In support of this contention the Ld.Counsel for assessee referred and relied on following judgments;

(1) Supreme Court in case of Investment Ltd V/s CIT reported in (1970) 77 ITR 533 (SC), where their Lordships have held that

> ***"****assessee is free to employ for the purpose of his trade , his own method of keeping accounts, and for that purpose to value his stock-in-trade either at cost or at market price. A method of accounting adopted by the trader consistently and regularly cannot be discarded by departmental authorities on the view that he should have adopted a different method of keeping accounts or of valuation. The method of accounting regularly employed may be discarded only , if , in the opinion of taxing authorities , income of the trade cannot be properly deduced there from (as per*

provisions of 1922 Act in force at that time , presently only if case falls in sub section (3) of section 145)".

(2) Supreme Court in the case of CIT V/s Krishna Swamy Mudiliar reported in (1964) 53 ITR 122 (SC) **,** their Lordship's of Apex court while dealing provisions of section 13 of 1922 Act (the provisions of which are in pari-materia of section 145 of 1961 Act) have held as under:

"*Section 13 of 1922 Act merely prescribes that the computation of taxable profits shall be made according to the method of accounting regularly employed. Where in the opinion of the ITO the income , profits and gains cannot be properly deduced from the method of accounting, it is open to ITO to compute the income upon such basis and in such manner as he may determine".*

Comparing the provisions with the English provisions, it is held,

"the only departure made by section 13 of 1922 Act from tax legislation in England is that whereas under English legislation the commissioner is not obliged to determine profits of a business venture according to method of accounting adopted by the assessee , under the Indian Income Tax Act , prima-facie , the ITO has for purposes of section 10 & 12 of 1922 act to compute income , profits and gains in accordance with method of accounting regularly employed . If, therefore, there is a system of accounting regularly employed and by appropriate adjustments from the accounts maintained taxable profits may be properly deduced , the ITO is bound to compute profits in accordance with method of accounting. but where in the opinion of ITO , the profits cannot be properly deduced from eth system of accounting adopted by assessee it is open to him to adopt a more suitable basis for computation of true profits".

Their Lordships then also dealt with method of accounting and observed as under-

> *"among Indian businessmen as elsewhere, there are current two principle systems of book keeping , there is , firstly, the cash system in which record is maintained of actual receipts and actual disbursements , entries being posted when money or money's worth is actually received , collected or disbursed . There is secondly, mercantile system in which entries are posted in eth books of account on the date of transaction i.e. on the date on which rights accrue or liabilities are incurred irrespective of the date of payment .*

(3) ITAT Allahabad Bench in the case of Mahabir Jute Mills V/s JCIT reported in (2013) 36 Taxmann.com 587 as also on the decision in the case of CIT V/s Advance Construction Company P. Ltd reported in (2005) 275 ITR 30 (Guj) , where their Lordships have reiterated position that choice of accounting method lies with that of assessee , the only caveat being that it has to show that the chosen method has been regularly followed . The section is couched in mandatory terms and the department is bound to accept the assessee's choice of method regularly employed except for the situation wherein the AO is permitted to intervene, in case it is found that true income profits and gains cannot be arrived at by the method employed by assessee. Their Lordship's further held that the position of law is further well settled that regular method adopted by assessee cannot be rejected merely because it gives benefit to assessee in certain years.

12. The Ld. Counsel for the assesee further submitted that in view of the above settled legal position, provisions of section 145 being mandatory in nature, Ld. AO is bound to assess appellant's income in accordance with the method of accounting regularly employed by assessee except in the case when the case falls in section 145(3) for which the AO is required to record satisfaction as contemplated in the said section. In the instant case, as categorically accepted by CIT(A) the appellant maintains accounts on mercantile basis . The said method has been consistently employed by assessee and appellant's assessment on the basis of said method has been completed by even by AO for first two years viz, A.Y. 2010-11 & 2011-12 . In both these years also the appellant has credited the advance received against proposed sales of flats to a separate account and shown as a liability in balance sheet. At this stage it may be relevant to mention in those years also the appellant has credited the advance received against proposed sale of flats to the Advance against sale of Flat A/c and not treated the same as income for said years on the basis that revenue in respect of sale of said flats would be recognized only on execution and registration of sale deeds of flats. The assessment of the said years have been completed by AO by the same common order, accepting the method of accounting and method of recognition of revenue. Thus the method followed by appellant is a consistent method which has been even accepted by AO for two years i.e. AY 2010-11 & 2011-12 . Since the said method has been consistently followed by appellant and even accepted by department, the same cannot be deviated in

the present two years without there being any finding as contemplated u/s 145(3) and since there is no finding as contemplated by section 145(3) on the basis of satisfaction required by that section viz., (1)about correctness or completeness of the accounts of the assessee or (2) about the fact that the assessee has not regularly employed the method of accounts provided in section 145(1) or (3) that the income has not been computed in accordance with the standards notified u/s 145(2) , the assessment of the appellant has to be made as per method adopted by it. The appellant further submits that even in case covered by section 145(3) , the AO could at the most make assessment as provided u/s 144 but could not have enforced the method of accounting followed by another assessee. Such course adopted by AO as well as CIT(A) is not supported by any provisions of law. Such orders are therefore vitiated in law.

13. The Ld. Counsel for the assessee further submitted that the other question that requires consideration is regarding the point of time of the accrual of income under the mercantile system of accounting. At the cost of repetition it is submitted that U/s 5 the income can be brought to tax either on receipt basis or on accrual basis . As to receipt basis there is no difficulty because income is obvious and its physical form is experienced but in case of accrual or arrival basis, it is based on right to receive the income and the income would accrue or arise at point of time when the right to receive becomes tangible and enforceable and crystallizes into a particular sum [refer the decision of Supreme Court in the case of

CIT V/s A Krishnaswamy Mudliar (supra)]. A reference may also be made to the decision of Karnataka High Court in the case of CIT v/s Syndicate Bank reported in (2003) 261 ITR 528 . It is thus clear that the accrual of income under the mercantile system of accounting depends upon the accrual or crystallization of right to receive and hence in view of the accepted position that the appellant has maintained its accounts on mercantile basis, the question that requires consideration is as to when the right to receive the constructed flats which in turn are agreed to be sold arises in favour of the assessee. The appellant in this respect submits that it is now well settled that when a right arises as a result of contract or agreement the accrual of right would depend upon terms of agreement. A useful reference may be made to the decision of Kerala High Court in the case of Janatha Contract Co. V/s CIT reported in (1976) 105 ITR 627 where it is held as under

> *"As the assessee had been following the mercantile system of accounting. If the money had become due during the accounting period it would be income which would have to be taken into account in determining total income of the assessee. But the question whether the money had become due and whether income had accrued would depend upon the terms of the contract."*

In the facts of the case before their Lordship's, their lordships in view of the retention clause came to conclusion that when there was a stipulation in the contract postponing the time

for payment of the whole or part of the balance , until after the expiration of period during which contractor was liable for defects or for repairs payment would not have become due for the contractor. It is further held that what is the nature of contract and whether money had become due would have to be ascertained by interpreting all the relevant terms and by finding out the exact practice followed by department. Whether there was certificate for payment , if so whether it was a final certificate , and even in cases where there had been a final certificate whether there was a further stipulation for retention , would all have to be examined to find out whether money had become due.

14. The Ld. Counsel for the assessee further submitted that aspect of mere postponement of tax as a result of method employed by assessee has not been viewed adversely by courts so long as the method is regularly and consistently employed as is clear from the above decision of Apex court in the case of Excel Industries Ltd (Supra) . The same view is found in the case of CIT V/s Advance construction Co. P. Ltd (supra) decided by Gujarat High Court where the aspect of offering the amount in question for tax in succeeding years has been favorably considered by Gujarat High Court.

15. The Ld. Counsel for the assessee further submitted that apart from the question of the right of accrual under the agreement, since the appellant has regularly followed the method of not

recognizing revenue at the time of receipt of advances through developer from the prospective buyers against sale of flats that would ultimately come to appellant's share and since the AO has accepted the said method in the earlier years and further since the appellant had already shown the income in subsequent years, the exercise undertaken by department being revenue neutral, there is no legality / propriety in disturbing the appellant's method of accounting regularly followed.

16. The Ld. Counsel for the assessee further submitted that as observed by the AO as also CIT(A) , the appellant has followed the method of recognition of revenue only at the time of execution and registration of sale deeds in favour of ultimate buyer i.e. the completed contract method . According to CIT(A) project completion method / completed contract method or percentage of completion method are not methods of accounting but methods of revenue recognition . Such view of CIT (A) appears to be contrary to view of Supreme Court in case of CIT V/s Billahari Investment Ltd. Reported in 299 ITR 1 where their Lordship's have considered these methods as methods of accounting and has placed its seal of approval upon completed contract method also. Their Lordship's approving the decision of Bombay High Court in the case of Taparia Tools Ltd. V/s JCIT reported in 260 ITR 102 have held that in every case of substitution of one method to another the burden is upon department to prove that the method in vogue is not correct and it distorts the profits of a particular year. Under the mercantile system of accounting based on accrual of income , the method of

accounting followed by assessee is relevant and since there was no finding recorded by AO that completed contract method distorted profits of a particular year. Further, the court considered the entire exercise to be revenue neutral.

17. The Ld. Counsel for the assessee further submitted that in the instant case also since no finding as is contemplated u/s 145(3) has been recorded by AO, under the circumstances, the substitution of method from completed contract method to percentage completion method only on the basis of the method followed by developer JSM Devcons Pvt. Ltd , is clearly contrary to law as well as judicial pronouncements . The order thus deserves to be set aside. The appellant also relies upon following decisions where project completion method has been considered to be recognized method and if consistently followed, the AO is bound to assess the income of the assessee on that basis.

a) Decision of Gujarat High Court in the case of Manjusha Estates (P) Ltd Vs ITO reported in (2017) 393 ITR 644 .

b) Decision of ITAT- Mumbai in the case of Prem Enterprises Vs. ITO reported in (2012) 25 Taxmann.com 179 (Mumbai)

c) Decision of High Court of Punjab & Haryana in the case of CIT Vs. Principal Officer, Hill view Infrastructure reported in (2016) 384 ITR 451- Follows CIT Vs. Bilahari Investment (P) Ltd. reported in (2008) 299 ITR 1 (SC)

d) Decision of ITAT-Mumbai in the case of Hardware Infrastructure P. Ltd copy at page 346 of paper book

e) Decision of ITAT- Ahmedabad in the case of Unity constructions V/s ITO –copy at 350 to 357

f) Decision of ITAT- New Delhi in the case of DCIT V/s Sub Infrastructure – 358 paper book

g) Decision of Delhi High Court in the case of Manish Buildwell Pvt. Ltd. reported in (2016) 16 Taxmann.com 27 (Del)

18. Per contra the Ld. Departmental Representative vehemently argued supporting the detailed finding of Ld.A.O and Ld. CIT(A) and also submitted that the assessee should have followed percentage completion method as adopted by JSM DPL as they were booth working under the development agreement entered for construction of the building.

19. We have heard rival contentions and perused the records placed before us. The only issue for our consideration in these two appeals is that whether both the lower authorities were justified in making additions in the hands of assessee by applying percentage completion method as against the project completion

method/completed contract method followed by the assessee. The assessee company which was incorporated in June, 2009 owns a land. Vide agreement dated 1.4.2009 (registered on 17.4.2009) it entered into development agreement with another company namely JSM Devcon (P) Ltd for development of the lands owned by the company in the capacity as land owner. As per the agreement placed in the paper book, on getting necessary sanctions, approvals and NOC the developer would construct high rise buildings on the land belonging to the appellant with all necessary facilities, amenities etc. Out of the total constructed saleable area the appellant as the land owner would be entitled to 32% of total constructed salable area as the right of ownership and this 32% constructed area shall vest with the assessee only upon completion of the entire construction (As agreed in Clause 9 of the agreement).

20. Before moving further it is worth discussing certain clauses of the agreement between the assessee and JSM DPL as they are the foundation of the issues emanating out at these two appeals:-

(i) As per clause (9), on completion of the entire construction the completed flats are to be divided and allocated between the

land owner and developer in accordance with clause (2) of the agreement which entitles the owner to get 32% constructed area upon completion of the entire construction . A combined reading of clause (2) & (9) would thus go to show that the appellant's right to get 32% of the area would crystallize / accrue on completion of the entire construction and till then owner has no right to claim any right over any of the constructed portion.

(ii) Clause (7) of the agreement specifies the period for construction of buildings according to which the developer is required to complete the construction within 54 months (subject to a grace period of 6 months) from the date of handing over of the possession by owner and obtaining necessary permissions, approvals, NOCs etc . The developer is thus required to handover the landowner's share of 32% of the completed constructed saleable area within 60 Months from above date failing which the developer is required to first allocate 32% area to the land owner out of the area constructed till then. This has been stated to be an essential condition of the agreement. The failure of developer to give such 32% area, makes the developer liable to pay interest @ 12% p.a. on the remaining area. A closure study of the agreement thus shows that appellant's right to get 32% of the constructed area would crystallize only on completion of construction and demarcation / division as per clause (9) or 60 months from the date of possession as aforesaid whichever

is earlier. Since the agreement is executed on 01-04-2009, the period of sixty months will be completed on 31st March 2014 . In other words the appellant has no right to claim possession of its share of 32% of constructed area**.** It would thus be clear that. in the years under consideration i.e in AY 2012-13 & 2013-14 , the appellant's right to receive the constructed area as per agreement had not accrued. The appellant did not have any cause of action under the agreement till completion of the period specified in the agreement.

(iii) Clause (4) of the agreement requires developer to pay to the owner a sum of Rs. 5,01,00,000/- (Rupees Five Crores One Lakhs) towards refundable security deposit for ensuring the performance of the terms of contract . The security deposit is refundable as per clause (11) of the agreement. The refund of security is also linked with completion of construction and handing over of possession of 32% of the constructed area to the owner. The manner of refund of security deposit is phase wise as specified in said clause. However, the total refund is only upon completion of construction and handing over of 32% of the constructed area to the owner.

(iv) Clause (10) of the agreement gives exclusive right of sale of constructed flats to the developer along with right to determine / fix the rates for sale , conditions and other policies about sale of Flats , obviously from the point of view of uniformity of the policy in that behalf . Since the exclusive

right of sale has been conferred upon the developer, the owner is required to execute sale deeds in respect of its 32% area as per the deal struck by the developer.

21. A bare reading of the agreement as a whole thus goes to show that the appellant's capacity in the said agreement is only as a land owner whereby the appellant has assigned development rights in respect of the lands in question in favour of the developer and the appellant is entitled to 32% of constructed saleable area in the project constructed by the developer. The agreement in question cannot therefore be construed either as a Joint Venture or a Partnership agreement but is merely a development agreement between the developer and the land owner and the appellant's right to receive 32% of the constructed saleable area accrues and arises only upon completion of the entire construction by developer or upon completion of the period of 60 months from the date of handing over of the possession of the land by the appellant land owner along with necessary permissions , NOCs etc , whichever is earlier.

22. It is further observed that the assessee follows mercantile system of accounting and since during the years under

consideration, the construction on the lands handed over to the developer for development and construction was not completed but the appellant had merely received advances from the proposed buyers, no revenue was recognized by appellant and the advances received against proposed sales were credited in advances against sale of flat account and shown as liability in the Balance Sheet. At this stage it may be relevant to note that since as per the agreement, exclusive right of sale was given to the developer M/s JSM Devcons Pvt. Ltd., the advances against sales were to be received by appellant through the developer, as such the accounting in that respect has been done accordingly. It may further be relevant to mention that the appellant started receiving advances against the sales from A.Y. 2010-11 which have been duly reflected in the books of account from year to year on consistent basis.

23. From perusal of the financial statement we observe that the assessee is maintaining its books of accounts on mercantile basis and it is consistently showing the advances received from JSM DPL on behalf of various proposed buyers of flats under the head advance against sale of flat in the liability side of the balance sheet.

It started receiving the money from assessment year 2010-11 onwards. The revenue authorities has accepted the income/loss declared in the income tax returns for A.Y. 2009-10, 2010-11 and 2011-12 under the respective orders passed u/s 153A r.w respect to section 143(3) of the Act. This fact cannot be disputed that the assessment of income/loss in these years support the contention of the assessee that the accounting method followed by the appellant stands accepted according to which the amounts received from proposed buyers (through developer) in advances against sale of flats shown as liability in the balance sheet has been accepted. The reason for showing such advances was the liability of assessee as the transaction of sale was not completed and treated as sales when sale deed was executed and registered in favour of the buyer and as the assessee has adopted project completion method it has recognized the revenue only on the completion of sale i.e. upon execution and registration of sale deeds in favour of the buyer.

24. Audited financial statement for the A.Y. 2010-11 and 2011-12 placed at 49 and 64 of paper book shows that during the assessment year 2010-11 the assessee received Rs.19 lakhs and for

the assessment year 2011-12 sum of Rs. 4,65,35,702/- was received as advance from proposed buyers. The revenue authorities have accepted this system for accounting adopted by the assessee for both the years in the assessment framed u/s 143(3) r.w.t 153A of the Act.

25. It was only for assessment year 2012-13, 2013-14 that the Assessing Officer applied the method of percentage completion adopted by the developer i.e. JSM DPL on the assessee and made the addition observing that assessee has entered into the agreement as a joint venture for development and the method of accounting applied by JSM DPL is binding on the appellant also. The Ld.AO without giving any weightage to the advances received during the year by the assessee as well as the accounting method adopted consistently just for the basis of the value of construction completed during the year and on the basis of the ratio agreed in the development agreement of 68:32, calculated the addition of Rs.16.12 crores (approx) for A.Y. 2012-13 and Rs.12.25 crores for A.Y 2013-14.

26. When the matter came up before the CIT(A) he also confirmed the addition without considering the fact that assessee is the land owner who has assigned the development right in favour of the developer on the terms and conditions specified in the agreement between the parties. We find that the assessee is entitled to the

possession of its share of 32% of constructed area only upon completion of entire construction and before that the assessee has no right to claim possession of its 32% constructed area which is required to be completed within 60 months from the date of handing over of possession of land along with all necessary permissions/approvals. The period of 60 months taken from the date of agreement shall end on 31.3.2014 and the assessee still have the right to sale the completed area as per agreement thereafter.

27. To summarize the facts we find that the assessee got the right to sell its 32% share of the salable constructed area only during the F.Y. 2014-15 and onwards and money received from the developer i.e. JSM DPL was only an advances from proposed buyers on which the assessee was not having the legal right and the fact could not be denied that when a person does not have a right to hold an amount the same can be taken back by the proposed buyers in case there is a default on the part of the developer and in such situation there could be a remote possibility that assessee could have disclosed the income from sale of flats, the right of which was not devolved on it.

28. Now the issue as to whether a person is mandatorily required to adopt percentage completion method or not. The method of accounting is governed by section 145 of the Act and as per section 145(2) of the Act the income is to be computed in accordance with either cash or mercantile system of accounting to be regularly

employed. This sub section further empowers Central Government to notify the accounting standards to be followed by any case of assessee or in respect of clause from time to time and sub section 3 of section 145 empowers the Assessing Officer to make the assessment of the assessee in the manner provided under section 144, in case he is not satisfied about the correctness or completeness of the assessee or where the method of accounting have not been regularly followed by the assessee. Once the assessee followed accounting regularly the Assessing Officer is bound to assess the income of the assessee on the basis of such method of accounting. On perusal of the provision of section 145 shows that it nowhere empowers the authorities to assess the income on the basis of method of accounting followed by another assessee nor does it empower the authorities to thrust upon the assessee to adopt the method of accounting followed by another assessee. In the instant appeal both the lower authorities have rejected the books of accounts of assessee and applied the percentage completion method adopted by the developer JSM DPL and computed the income accordingly. Whether such action of the revenue authorities is justified or not needs to be examined in light of the jurisdictional pronouncements.

29. We find that Hon'ble Supreme Court in case of Investment Ltd V/s CIT reported in (1970) 77 ITR 533 (SC) , where their Lordships have held that

"assessee is free to employ for the purpose of his trade , his own method of keeping accounts, and for that purpose to value his stock-in-trade either at cost or at market price. A method of accounting adopted by the trader consistently and regularly cannot be discarded by departmental authorities on the view that he should have adopted a different method of keeping accounts or of valuation. The method of accounting regularly employed may be discarded only , if , in the opinion of taxing authorities , income of the trade cannot be properly deduced there from (as per provisions of 1922 Act in force at that time , presently only if case falls in sub section (3) of section 145)".

30. Further in another judgment of Hon'ble Supreme Court in the case of CIT V/s Krishna Swamy Mudiliar reported in (1964) 53 ITR 122 (SC) **,** their Lordship's of Apex court while dealing provisions of section 13 of 1922 Act (the provisions of which are in pari-materia of section 145 of 1961 Act) have held as under:

"Section 13 of 1922 Act merely prescribes that the computation of taxable profits shall be made according to the method of accounting regularly employed. Where in the opinion of the ITO the income , profits and gains cannot be properly deduced from the method of accounting, it is open to ITO to compute the income upon such basis and in such manner as he may determine".

Comparing the provisions with the English provisions, it is held,

"the only departure made by section 13 of 1922 Act from tax legislation in England is that whereas under English legislation the commissioner is not

obliged to determine profits of a business venture according to method of accounting adopted by the assessee , under the Indian Income Tax Act , prima-facie , the ITO has for purposes of section 10 & 12 of 1922 act to compute income , profits and gains in accordance with method of accounting regularly employed . If, therefore, there is a system of accounting regularly employed and by appropriate adjustments from the accounts maintained taxable profits may be properly deduced , the ITO is bound to compute profits in accordance with method of accounting . but where in the opinion of ITO , the profits cannot be properly deduced from eth system of accounting adopted by assessee it is open to him to adopt a more suitable basis for computation of true profits.

Their Lordships then also dealt with method of accounting and observed as under-

"among Indian businessmen as elsewhere, there are current two principle systems of book keeping , there is , firstly, the cash system in which record is maintained of actual receipts and actual disbursements , entries being posted when money or money's worth is actually received , collected or disbursed . There is secondly, mercantile system in which entries are posted in eth books of account on the date of transaction i.e. on the date on which rights accrue or liabilities are incurred irrespective of the date of payment **.**

31. Further in the decision of the coordinate Bench, ITAT Allahabad Bench in the case of Mahabir Jute Mills V/s JCIT reported in (2013) 36 Taxmann.com 587 as also on the decision in the case of CIT V/s Advance Construction Company P. Ltd reported in (2005) 275 ITR 30 (Guj) **,** where their Lordships have reiterated position that choice of accounting method lies with that of assessee

, the only caveat being that it has to show that the chosen method has been regularly followed . The section is couched in mandatory terms and the department is bound to accept the assessee's choice of method regularly employed except for the situation wherein the AO is permitted to intervene, in case it is found that true income profits and gains cannot be arrived at by the method employed by assessee. Their Lordship's further held that the position of law is further well settled that regular method adopted by assessee cannot be rejected merely because it gives benefit to assessee in certain years.

32. Examining the facts of instant appeal we in light of above judgments we find that the method of accounting along with following project completion method for treatment of advances received from proposed buyers the assessee has been consistently followed this method and appellant's assessment has been completed by the Ld. AO for first two years viz, A.Y. 2010-11 & 2011-12. In both these years also the appellant has credited the advance received against proposed sales of flats to a separate account and shown as a liability in balance sheet . At this stage it may be relevant to mention that in those years also the appellant has credited the advance received against proposed sale of flats to the Advance against sale of Flat A/c and not treated the same as income for said years on the basis that revenue in respect of sale of said flats would be recognized only on execution and registration of sale deeds of flats . The assessment of the said years have been completed by AO by the same common order , accepting the method

of accounting and method of recognition of revenue . Thus the method followed by appellant is a consistent method which has been accepted by AO for two years i.e. AY 2010-11 & 2011-12 Since the said method has been consistently followed by appellant and even accepted by department, the same cannot be deviated in the present two years without there being any finding as contemplated u/s 145(3) on the basis of satisfaction required by that section viz., (1)about correctness or completeness of the accounts of the assessee or (2) about the fact that the assessee has not regularly employed the method of accounts provided in section 145(1) or (3) that the income has not been computed in accordance with the standards notified u/s 145(2).

33. Now it is an admitted fact based on the financial statement and audited reports for 2010-11 and 2011-12 accepted by the revenue authorities in the assessment proceedings u/s 143(3) read with respect of 153(A) of the Act that the assessee has been consistently following project completion method/completed contract method for the treatment of advances received from proposed buyers through developer JSM DPL. In the light of the above fact we observe that Hon'ble Gujarat High Court in the case of Manjusha Estates (P) Ltd Vs ITO reported in (2017) 393 ITR 644 (Guj,) adjudicating similar issue i.e. *"Whether on the facts and in the circumstances of the case, the Tribunal was right in law in rejecting the project completion method which was followed consistently by the assessee and instead applying work in progress method and taxing 80 per cent. Thereon as net profit?* held that " as assessee has

followed the method which is consistent considering the decision in the case of CIT v Shivalik Buildwell P Ltd (2013) 40 taxmann.com 219 (Guj.) (supra) and CIT Vs. Umang Hiralal Thakur (2014) 42 taxmann.com 194 (Guj) (supra) and therefore this court is are of the opinion that the view taken by the Tribunal and the Commissioner of Income Tax is not correct. Issue decided in favour of assesssee.

34. Further the Hon,ble High Court of Gujarat in the case of CIT v Shivalik Buildwell P Ltd (2013) 40 taxmann.com 219 (Guj.) dealing with the similar issue observed as follows;

> "On the Revenue's appeal, the Tribunal confirmed the view of the Commissioner of Income Tax (Appeals), however, on slightly different ground, namely, that the assessee being a developer of the project, profit in his case, will arise on transfer of title of the property and receipt of any advances or booking amount cannot be treated as trading receipt of the year under consideration. The Tribunal further noted that such method of accounting followed by the assessee had been accepted by the Revenue in earlier years. The Tribunal was, therefore, of the opinion that the Assessing Officer's decision to reject the book results during the year under consideration was not justified.
>
> We are of the opinion that the Tribunal committed no error. If as per the accounting standard available, the assessee was entitled to claim the entire income on completion of the project and if such accounting standard was accepted by the Revenue in the earlier years, in the present year, the Assessing Officer could not have taken a different sand and that too, without hearing the assessee".

35. Further in another judgment by CIT Vs. Umang Hiralal Thakur (2014) 42 taxmann.com 194 (Guj) is placed on the following paragraphs of its judgment.

> "In the present case, it is not the Assessing Officer's case that the appellant is not reporting or under reporting its income. In fact, I find in the subsequent assessment year, i.e. the assessment year 2007-08, the appellant has disclosed substantial income from the projects undertaken in the business proprietary concerns, viz, M/s. Neelkanth Enterprises, M/s. Ghanshyam Enterprises and M/s. Swaminarayan Enterprises. In the subsequent year, i.e. the assessment year 2007-08 the profit declared from the projects run by these three proprietary concerns ranges from 43 per cent to 46 per cent. The Supreme Court in the case of Sanjeev Woolden Mills v. CIT (supra), has clearly held that to attract the proviso to secti9on 145(1) of the Act, the Assessing Officer should be of the view that the accounts are correct and complete but the method employed is such that the income cannot be property deduced there from. The choice of method of accounting regularly employed by the assessee lies with the assessee but the assessee would be required to show tat he has followed the chosen method regularly. The Department is bound by the assessee's regular method would not be rejected as improper merely because it gives the assessee the benefit in certain years or that as per the Assessing Officer, the other method would have been more preferable. If the method adopted does not afford true picture of profit, it would be rejected, but then such rejection should be based on cogent evidence and should be done with caution.
>
> In the present case, the appellant has declared substantial profits on the basis of project completion method in the subsequent years. In construction, the project completion method and percentage completion methods, both have also been recognized by the Central Board of Direct

Taxes in the instruction No.4 of 2009 dated June 30, 2009. Therefore, the Assessing Officer is not considered justified in bringing to tax the profit of Rs.1,66,70,811 in the year under consideration, particularly when such profits have already been offered to tax by the appellant in the assessment year 2007-08. The addition of Rs.1,66,70,811 are directed to be deleted".

36. Further the co-ordinate Bench of Ahmedabad Tribunal in the case of Vraj Developers passed in ITA No.19/AHD/2008 which attained finality as it is not challenged by the department before the high forum observed as follows;

"The learned Departmental representative supported the order of the learned Assessing Officer and the learned authorized representative of the assessee supported the order of the learned Commissioner of Income-tax (Appeals) and also placed reliance on the Bangalore Bench of the Tribunal in the case of Nandi Housing P. Ltd v. Deputy CIT (2003) 80 TTJ (Bang) 750, wherein the Tribunal followed the decision of the Karnataka High Curt in the case of Khoday Distillers Ltd, in ITRC Nos. 19mto 21 of 1993. This, it is observed that the issue which requires our adjudication is that the income in the instant case is to be computed as per system of accounting followed by the assessee or as per accounting followed by the assessee or as per accounting standard AS7 for the purpose of charging of income tax. We find that the issue is to be decided in accordance with the provisions of section 145 of the Act shows that the business income which is assessable under the Income tax Act is to be computed in accordance with the consistent system of accounting followed by the assessee unless such system, of accounting is defective and/or from such system of accounting, profit cannot be deduced. Thus, in our considered opinion, the option for choosing the system of account is with the assessee and not with the learned Assessing Officer provided the

system chosen by the assessee is consistently followed by him and such system is not a defective system. In our considered view, provisions of AS7 cannot override the provisions of section 145 in so far as the computation of business income under the Income Tax Act for the purpose of determining income is concerned. In the instant case, we find that the learned Assessing Officer has brought no material on record to show that the system of accounting adopted by the assessee for the year under appeal was not consistently followed y the assessee or the system adopted was a defective system. In our considered view, even a project completion method is also a recognized system of accounting. Simply the Institute of Chartered Accountants of India has recommended the percentage completion method does not mean that project accounting or the same is a defective system of accounting. The learned Commissioner of Income-tax (Appeals) has recorded a finding after pursuing the assessment records of the subsequent years that the assessee has offered for taxation its income in the subsequent year as per the consistent system of accounting followed by the assessee. The learned Departmental representative could not point out any error in the above finding of the learned Commissioner of Income-tax (Appeals). In view of the above discussion, we do not find any error in the order of the learned Commissioner of Income-tax (Appeals) and therefore, the same is upheld and the appeal of the Revenue is dismissed.

It is reported that the decision of Appellate Tribunal in the case of Vraj Developers (supra) has attained the finality as the said decision is not challenged by the Department before higher forum. In view of the above and more particularly, when it has been found that the assessee is consistently following the accounting system of percentage completion method, which is permissible and accepted by ICAI and the Central Board of Direct Taxes with respect to construction work, it cannot be said that the learned Appellate Tribunal has committed any error/ or

illegality, which call for the interference of this court. We see no reason to see to interfere with the impugned judgment and order passed by the learned Commissioner of Income tax (Appeals) deleting the addition of Rs.1,66,70,881 which was made by the Assessing Officer on rejecting the accounting system on percentage completion method followed by the assessee. No question of law much less any substantial question of law arise in the present appeal. Hence, the present appeal deserves to be dismissed and is accordingly dismissed."

37. We further find the co-ordinate bench of Mumbai in the case of Prem Enterprises V Income Tax Officer (2012) 25 taxmann.com 179 (Mum.) deal with the similar issue wherein the assessee was constructing a project and was consistently following project completion method and the assessing officer rejected the method of project completion adopted by the assessee on observing that 8% of the total project has been incurred up to the relevant assessment year the income should have declared on the percentage completion method. *The Co-ordinate Bench decided in favour of the assessee holding that the results declared by the assessee on the basis of method of accounting consistently followed and the entire profit of the project has been offered in subsequent assessment year therefore there is no justification in rejecting the method of accounting followed by the assessee and substituting the same by adopting accounting AS-7 issued by ICAI and followed it for accounting.*

38. Similarly Hon'ble High Court of Punjab & Haryana in the case of Commissioner of Income Tax (Central), Gurgaon V. Principal Officer, Hill View Infrastructure (P) Ltd (2017) 81 taxmann.com 58 (Punjab &

Haryana) order dated 13.8.2015 confirmed the view taken by the Tribunal deciding in favour of the assessee relating to the issue of the project completion method adopted by the assessee vis-à-vis percentage completion method applied by us, the Assessing Officer observing as follows;

> "The assessee in reply to the query raised by the Assessing Officer had inter alia claimed that it had been consistently following method of booking of the revenue on the completion of the flat when full payment had been made to it by the person concerned and possession was delivered to him. It was pointed out that neither Accounting standard 9 (AS 9) or Accounting Standard 7 (AS 7) issued by the Institute of Chartered Accounts of India has been recognized by the Act and in such circumstances, there was no guidance or strict procedure for adopting a particular accounting standard under the /act and it depends upon facts and circumstances of each case. In other words, the assessee was entitled to adopt Project Completion method for determining its income which was being regularly followed by it. Though the Assessing Officer had rejected the plea of the assessee, but the CIT(A) while accepting the appeal of the assessee made the following observations:-
>
> "It is however not the AO's case that the profits have been distorted by following the project completion method. The impugned order is also silent as regards the position of the books of account. In other words the books have not been rejected, nor any defects pointed out. In the case of CIT vs. Bilahari Investment (P) Ltd (2008) 299 ITR 1 SC, the Apex Court held that the completion contract method adopted by the assessee for chit discount consistently over the years, is not required to be substituted by percentage completion method. In CIT v Manish Buildwell (P) Ltd (2011) 245 CTR 397 (Del), it was enunciated that project completion method is one of the recognized methods of accounting. That

it cannot be said that the project completion method followed by the assessee would result in deferment of payment of taxes.

Therefore, considering the discussion above, I do not find any merit on the part of the AO to have worked out the income by applying the percentage completion method".

The Tribunal affirmed the order of the CIT(A). It was concluded that project completion method and percentage completion method are accepted standards of accounting and the assessee has option to adopt any one of them. The relevant findings recorded by the Tribunal read thus:-

"We have heard the rival contentions and perused the record. The issue arising in the present appeal before us is in relation to the method to be applied for recognizing the revenue generated by the assessee in the course of carrying on the business of real estate developers. The case of the assessee is that it is following one of the accepted accounting standards approved by ICAI for recognizing the revenue generated by it. The assessee had followed project completion method which had been consistently followed by the assessee for the preceding years also. The Assessing Officer on the other hand, had applied percentage completion method to compute the income in the hands of the assessee. The Commissioner of Income Tax (Appeals) had allowed the claim of the assessee.

Both the methods of accounting are i.e. project completion method and percentage completion method is accepted standards of accounting and either of the methods can be applied by the assessee. In the facts of the present case before us, the assessee had chosen to compute its income on the basis of project completion method i.e. recognizing the income on the completion of the project and not from year to year whereas the case

of the revenue was that it should account for the income as it is generated in the hands of the assessee i.e. from year to year on the basis of the work completed being relatable to the revenue generated from year to year.

The Hon'ble Supreme Court in CIT Vs. Bilahari Investment (P) Ltd (supra) had held that "recognition/identification of income under the 1961 Act is attainable by several methods of accounting. It may be noted that the same result could be attained by any one of the accounting methods. Completed contract method is one such method. "It was further held that "Every assessee is entitled to arrange its affairs and follow the method of accounting which the Department has earlier accepted. It is only on those cases where the department records a finding that the method adopted by the assessee results in distortion of profits, the Department can insist on substitution of the existing method".

Applying the above said principles to the facts of the present case we find that the assessee before us has been following the systematic method of accounting from year to year which has been accepted by the department and no defects have been pointed out by the department in the method of accounting adopted by the assessee and thus, there is no reason to reject the same.

The Hon'ble Delhi High Court in CIT v Manish Buildwell (P) Ltd (supra) had held that "It is well settled that the project completion method is one of the recognized methods of accounting. It cannot be said that the projection completion method followed y the assessee would result in deferment of the payment of the taxes which are to be assessed annually under the IT Act. AS-7 issued by the ICAI also recognizes the position that in the case of construction contracts, the assessee can follow either the project completion method or the percentage completion method."

Where the assessee was following a particular method of accounting consistently, which has been accepted by the department from year to year and in the absence of any defect being pointed out by the Assessing Officer that by following such method, income had escaped assessment, we find no merit in the order of the Assessing Officer in holding that percentage completion method should be applied to the assessee for the year under consideration. It is the prerogative of the assessee to arrange its affairs in such a manner and follow any recognized method of accounting to compute its profits. In view thereof, we find no merit in the order of the Assessing Officer in recomputing the income in the hands of the assessee. Upholding the order of Commissioner of Income Tax (Appeals), we dismiss ground of appeal raised by the revenue".

The Delhi High Court in CIT v Manish Build Well (P) Ltd (2011) 16 taxmann.com 27(2002) 204 Taxman 106 noted that project completion method is one of the recognized methods of accounting. It was held as under:-

"It is well settled that the project completion method is one of the recognized methods of accounting. It cannot be said that the project completion method followed by the assessee would result in deferment of the payment of the taxes which are to be assessed annually under the IT Act"

The assessee respondent had been consistently following one of the recognized methods of accountancy, i.e project completion method, for computation of its income. In the absence of any prohibition or restriction under the Act for doing so, it cannot be held that the approach of the CIT(A) and the Tribunal was erroneous or illegal in any manner so as to call for interference by this Court. No substantial question of law arises. Consequently, finding no merit in these appeals, the same are dismissed."

38. It is well settled that the project completion method is one of the recognized methods of accounting. In CIT v Hyundai Heavy Industries Co. Ltd (2007) 291 ITR 482/ 161 Taxman 191 (SC) the Supreme Court held as follows:-

> "Lastly, there is a concept in accounts which is called the concept of contract accounts. Under that concept, two methods exist for ascertaining profit for contracts, namely, "completed contract method" and "percentage of completion method". To know the results of his operations, the contractor prepares what is called a contract account which is debited with various costs and which is credited with revenue associated with a particular contract. However, the rules of recognition of cost and revenue depend on the method of accounting. Two methods are prescribed in Accounting Standard No.7. They are "completed contract method" and "percentage of completion method".

39. This view was reiterated by the Supreme Court in CIT v. Bilahari Investment (P) Ltd. (2008) 299 ITR 1/168 Taxman 95 with the following observations:

> "Recognition/identification of income under the 1961 Act is attainable by several methods of accounting. It may be noted that the same result could be attained by any one of the accounting methods. The completed contract method is one such method. Similarly, the proceedings of completion method is another such method.

Under the completed contract method, the revenue is not recognized until the contract is complete. Under the said method, costs are accumulated during the course of the contract. The profit and loss is established in the last accounting period and transferred to the profit and loss account. The said method determines results only when the contract is completed. This method leads to objective assessment of the results of the contract.

The On the other hand, the percentage of completion method tries to attain periodic recognition of income in order to reflect current performance. The amount of revenue recognized under this method is determined by reference to the stage of completion of the contract. The stage of completion can be looked at under this method by taking into consideration the proportion that costs incurred to date bears to the estimated total costs of contract.

The above indicates the difference between the completed contract method and the percentage of completion method." (underlining ours)

40. After the above judgments of the Supreme Court it cannot be said that the project completion method followed by the assessee would result in deferment of the payment of the taxes which are to be assessed annually under the Income Tax Act. Accounting Standards 7 (AS7) issued by the Institute of Chartered Accountants of India also recognize the position that in the case of construction

contracts, the assessee can follow either the project completion method or the percentage completion method. In view of the judgments of the Supreme Court (Supra), the finding of the CIT(A), upheld by the Tribunal, does not give rise to any substantial question of law. Further, the Tribunal has also found that there was no justification on the part of the assessing officer to adopt the percentage completion method for one year(the year under appeal) on selective basis. This will distort the computation of the true profits and gains of the business. For these reasons, we are of the view that no substantial question of law arises. We, therefore, decline to admit question Nos. 2 and 3."

41. From perusal of all the judgments it has been consistently held rather a settled law that the action of revenue authorities cannot be held justified if they substitute another method of accounting on the assessee which in the instant case was imposing of percentage completion method on the assessee even when it has been consistently maintaining the regular books of accounts on mercantile basis u/s 145 of the Act adopting project completion method to account for the revenue and the revenue authorities have failed to bring forth any inconsistency in the books of accounts. The Assessing Officer in the instant case has merely applied the method of percentage completion adopted by the Developer JSM DPL and calculated the income of the assessee completely ignoring the fact that the assessee was merely the owner of land and he was entitled to 32% of saleable area only on completion of construction and the deadline of which was 60

months from the date of agreement i.e. from 1.4.2009. The Ld.A.O also ignored the fact that right to sale its share of constructed area with the assessee was only from April, 2014 onwards and the assessee has offered the revenue for taxation from F.Y 2014-15 onwards as and when the sale deed has been registered. As held by various courts as discussed above that the method of adopting project completion method is not ultra virus and the assessee is free to adopt either the percentage completion method or project completion method with the only rider that it should be consistently adopted and in case of any deviation the effect of profit or loss should be offered to tax as the case may be. Revenue has not disputed this fact that assessee has offered the impugned advances to tax in the subsequent years i.e. from financial year 2014-15 based on sale deed registered which proves that there has been no loss to the revenue. Mere postponement of tax as a result of method employed by assessee has not been viewed adversely by courts so long as the method is regularly and consistently employed as held by Hon'ble Apex Court in the case of Excel Industries Ltd (2013) 358 ITR 295.

42. Before parting of with adjudication of this issue it would be relevant to take note of the amendment brought in statute with retrospective effect w.e.f. 1.4.2017 by way of insertion of Section 43CB for the purpose of computation of income from construction and service contract. The relevant provision of Section 43CB of the Act reads as follows;

"43CB. *Computation of income from construction and service contracts.*—(1) The profits and gains arising from a construction contract or a contract for providing services shall be determined on the basis of percentage of completion method in accordance with the income computation and disclosure standards notified under sub-section (2) of section 145:

Provided that profits and gains arising from a contract for providing services,—

(*i*) with duration of not more than ninety days shall be determined on the basis of project completion method;

(*ii*) involving indeterminate number of acts over a specific period of time shall be determined on the basis of straight line method.

(2) For the purposes of percentage of completion method, project completion method or straight line method referred to in sub-section (1)—

(*i*) the contract revenue shall include retention money;

(*ii*) the contract costs shall not be reduced by any incidental income in the nature of interest, dividends or capital gains.".

43. From the perusal of above section it is crystal clear that before the insertion of this section there was no legal obligation on the part of the assessee to follow percentage completion method only. Before insertion of this section person engaged in construction and service contracts were free to follow either the project completion/ Completed project method or percentage completion method in accordance with the provisions of Section 145 of the Act. In the instant appeal assessee even though not directly involved in the construction activity and it is merely gave its land for development and it was agreed between the assessee company and the developer that 32% of the saleable area shall be given to the assessee. The

assessee is constituently followed completed project contract/percentage completion method as recognized its revenue at the time of execution of getting the sale deed registered and before that it has to be consistently showing the advance from sale of flats as the liability in the balance sheet.

44. We therefore in the given circumstances of the case and in the light of judgment referred in preceding paragraphs are of the considered view that the Ld. A.O was not justified in applying the percentage completion method on the assessee merely on the basis that it was followed by the developer JSM DPL and arbitrarily making addition to the income ignored the fact that project completion method/ completed contract method of accounting has been consistently adopted by the assessee and even have been accepted by the revenue authority for the A.Y. 2010-11 and A.Y. 2011-12. We therefore set aside the findings of Ld.CIT(A) and delete the addition of Rs.16,12,34,754/- for Assessment Year 2012-13.

45. As regards Appeal No.ITA/686/Ind/2016 pertaining to A.Y 2013-14 as the issue are being the same we apply our decision of Assessment Year 2012-13 in assessee's own case referred above on the appeal for the year 2013-14 and accordingly set aside the findings of both the lower authorities and delete the addition of Rs.12,25,55,171/- and allowed all the ground No. 1 & 2 s raised by the assessee in its appeal for the A.Y. 2013-14.

46. In the result Ground No.1 and 2 of the assessee's appeal for A.Y. 2012-13 & A.Y. 2013-14 are allowed. Ground No.3 being alternate plea become infructuous as ground No.1 & 2 are already allowed. Ground No.4 is general in nature which needs no adjudication.

46. In the result both the appeal of the assessee are allowed.

The order pronounced in the open Court on 03.8.2018.

Sd/- Sd/-

(KUL BHARAT) (MANISH BORAD)
JUDICIAL MEMBER ACCOUNTANT MEMBER

दिनांक /**Dated : 03 August, 2018**

/Dev

Copy to: The Appellant/Respondent/CIT concerned/CIT(A) concerned/ DR, ITAT, Indore/Guard file.

By order

Private Secretary/DDO, Indore