

IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCHES "A" : DELHI  
[THROUGH VIDEO CONFERENCING]

BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER  
AND  
SHRI O.P.KANT, ACCOUNTANT MEMBER

ITA.No.383/Del./2021  
Assessment Year 2017-2018

|                                                                                                                                |     |                                                                  |
|--------------------------------------------------------------------------------------------------------------------------------|-----|------------------------------------------------------------------|
| Smt. Abha Bansal,<br>103B, The Aralias, DLF<br>Golf Link City Phase-V,<br>Gurgaon, Haryana.<br>PIN – 122 001<br>PAN AANPB8695H | vs. | The Pr. CIT (Central),<br>Gurgaon.<br>Haryana.<br>PIN – 122 001. |
| (Appellant)                                                                                                                    |     | (Respondent)                                                     |

ITA.No.384/Del./2021  
Assessment Year 2017-2018

|                                                                                                               |     |                                                                  |
|---------------------------------------------------------------------------------------------------------------|-----|------------------------------------------------------------------|
| Shri Pankaj Bansal,<br>C-13, Sushant Lok,<br>Phase-1, Gurgaon,<br>Haryana.<br>PIN – 122 002<br>PAN ANHPB5602R | vs. | The Pr. CIT (Central),<br>Gurgaon.<br>Haryana.<br>PIN – 122 001. |
| (Appellant)                                                                                                   |     | (Respondent)                                                     |

ITA.No.385/Del./2021  
Assessment Year 2017-2018

|                                                                                                                                  |     |                                                                  |
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| Shri Basant Bansal,<br>103B, The Aralias, DLF<br>Golf Link City Phase-V,<br>Gurgaon, Haryana.<br>PIN – 122 001<br>PAN AHYPB1937A | vs. | The Pr. CIT (Central),<br>Gurgaon.<br>Haryana.<br>PIN – 122 001. |
| (Appellant)                                                                                                                      |     | (Respondent)                                                     |

ITA.No.386/Del./2021  
Assessment Year 2017-2018

|                                                                                                                |     |                                                               |
|----------------------------------------------------------------------------------------------------------------|-----|---------------------------------------------------------------|
| Shri Roop Kumar Bansal,<br>C-13, Sushant Lok,<br>Phase-1, Gurgaon,<br>Haryana. PIN – 122 002<br>PAN AFJPK0250N | vs. | The Pr. CIT (Central),<br>Gurgaon.<br>Haryana. PIN – 122 001. |
| (Appellant)                                                                                                    |     | (Respondent)                                                  |

|                |                                                             |
|----------------|-------------------------------------------------------------|
| For Assessee : | Shri Gautam Jain, Advocate<br>And<br>Shri Lalit Mohan, C.A. |
| For Revenue :  | Shri Satpal Gulati, CIT-DR                                  |

|                         |            |
|-------------------------|------------|
| Date of Hearing :       | 19.05.2021 |
| Date of Pronouncement : | 31.05.2021 |

**ORDER**

**PER BHAVNESH SAINI, J.M.**

These appeals by the above Assesseees are directed against the different Orders of Learned Pr. CIT (Central), Gurgaon, Dated 24.03.2021 for A.Ys. 2017-2018 under section 263 of the I.T. Act, 1961, challenging the Order under section 263 of the I.T. Act, 1961 on various grounds of appeals.

2. The Learned Representatives of both the parties mainly argued in ITA.No.383/Del./2021 in the case of Smt.

Abha Bansal and have submitted that Order in this case may be followed in other appeals as the issue is identical in the remaining appeals. In view of the above, we proceed to decide the appeal in the case of Smt. Abha Bansal as under:

ITA.No.383/Del./2021 – Smt. Abha Bansal – A.Y. 2017-2018.

3. Briefly the facts of the case are that a search and seizure operation under section 132 of the Income Tax Act, 1961 was conducted at the premises of M3M group on 21.07.2016. The group is controlled by two brothers, namely Sh. Roop Kumar and Sh. Basant Bansal. The Bansal family, their close relatives and associates are involved in the affairs of M3M group of companies. Sh. Pankaj Bansal is son of Sh. Basant Bansal and Smt. Abha Bansal is wife of Sh. Basant Bansal. Two main companies of the group, inter-alia, are M/s M3M India Holding Pvt. Ltd. ('MIHPL') and M/s M3M India Pvt. Ltd. ('MIPL'). Sh. Roop Kumar and Sh. Pankaj Bansal are Directors of MIHPL and hold 50% shares each in the company. Sh. Roop Kumar and

Sh. Pankaj Bansal are Directors of MIPL. MIHPL holds 93% shares of MIPL and the balance is held by various key management personnel ('KMP') of the group. Sh. Roop Kumar, Sh. Basant Bansal, Sh. Pankaj Bansal and Smt. Abha Bansal are, inter-alia, key management personnel and their relatives. In the case of assessee a notice under section 142(1) of the Act was issued and served upon the assessee on 05.01.2018 requiring to file her return of income in respect of assessment year under appeal in which search was conducted in this case. In response to the above, assessee filed its return under section 139(1) of the I.T. Act, 1961 on 29.01.2018 for assessment year under appeal. In this return of income, assessee has declared her income of Rs.7,49,79,780/-. Further statutory notices were also issued under section 143(2) and 142(1) along with the questionnaire which are served upon the assessee seeking explanation of the assessee. The assessee filed the requisite details and written submissions which have been perused by the A.O. The A.O. after completion of the assessment proceedings accepted the returned income at

Rs.7,49,79,780/- and passed the assessment order Dated 18.12.2018 under section 153B(1)(b) read with Section 143(3) of the I.T. Act, 1961.

3.1. Similarly, in the case of Sh Basant Bansal and Sh Pankaj Bansal assessments were framed on 18.12.2018 accepting the returned income. In the case of Roop Kumar assessment order was passed under section 153B(1)(b) read with section 143(3) of the I.T. Act, 1961 on Dated 18.12.2018 after making addition of the seized cash of Rs.35 lakhs to the returned income.

3.2. The Learned PCIT on perusal of the records found that assessment order passed by the A.O. is erroneous in so far as it is prejudicial to the interests of Revenue. Accordingly, show cause notice Dated 23.02.2021 was issued asking the assessee as to why the proceedings under section 263 of the I.T. Act, 1961 should not be initiated in this case. The relevant part of the show cause notice as reproduced in the impugned order is as under :

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Sh Pankaj Bansal, Sh Basant Bansal And  
Sh Roop Kumar Bansal, Gurgaon.

"2.1 On perusal of the computation of the total income, it is seen that the KMPs of the group have declared long term capital gain on account of cancellation of Builder Agreement dated 31.03.2017 which is as under: -

| Name of the assessee | Cost (Rs. in crore) | Compensation (Rs. in crore) | Sales consideration (Rs. in crore) | Indexed cost (Rs. in crore) | Capital gains (Rs. in crore) |
|----------------------|---------------------|-----------------------------|------------------------------------|-----------------------------|------------------------------|
| (1)                  | (2)                 | (3)                         | (2) + (3) = (4)                    | (5)                         | (4) - (5) = (6)              |
| Sh. Roop Kumar       | 161.80              | 129.53                      | 291.33                             | 279.46                      | 11.87                        |
| Sh. Basant Bansal    | 161.77              | 129.56                      | 291.33                             | 279.43                      | 11.89                        |
| Sh. Pankaj Bansal    | 110.18              | 91.33                       | 201.51                             | 194.14                      | 7.36                         |
| Smt. Abha Bansal     | 110.20              | 91.31                       | 201.51                             | 194.13                      | 7.37                         |
| Total                | 543.95              | 441.73                      | 985.68                             | 947.16                      | 38.48                        |

The tax at reduced rate of 20% was paid by all KMPs in respect of the long-term capital gains of Rs. 38.48 crore as computed above. From perusal of records, it was found that during the AY 2017-18, MIPL has debited an amount of Rs. 441.84 crore to its profit and loss account towards compensation paid to the customers. This expenditure was included under the head other expenses. The amount was allegedly paid as compensation to four KMPs of MIPL and their family members namely Sh. Basant Bansal, Sh. Roop Kumar, Sh. Pankaj Bansal & Smt. Abha Bansal, who had booked four villas in one of its projects, namely M3M Golf Estate at Gurgaon for consideration of Rs. 541.51 crore (Rs. 161.59 crore from Sh. Basant Bansal, Rs.

161.59 crore from Sh. Roop Kumar, Rs. 118.43 crore from Sh. Pankaj Bansal and Rs. 118.43 crore from Smt. Abha Bansal) in FY 2009-10. The compensation was claimed to have been paid as per the Award dated 16.03.2017 granted by the Sole Arbitrator Hon'ble Justice Manmohan Singh Liberhan (Retd.) in the arbitration matter between the KMPs and MIPL.

3. From perusal of records, it is noted that the four KMPs of M3M group had earned substantial capital gains on account of sale of 10,000 shares of M/s Dignity Buildcon Pvt. Ltd. (3000 shares each by Sh. Roop Kumar and Sh. Basant Bansal and 2000 shares each by Sh. Pankaj Bansal and Smt. Abha Bansal) on 14.10.2009 during the F.Y. 2009-10. These shares were acquired by the KMPs in November, 2007. Out of the consideration received an amount of Rs. 541 crore was invested by the KMPs in four villas of the project M3M Golf Estate on 31.03.2010 and exemption under section 54F of the Act was claimed on account of investment in the residential house. On perusal of the tripartite Buyer's Agreements between MIPL, KMPs & M/s Manglam Multiplex Pvt. Ltd. ('Manglam') the following facts were noticed: -

a. M3M Golf Estate was a project developed jointly with Mangalam by MIPL on land admeasuring about 63 acres situated in Village Maidawas, Tehsil and District Gurgaon within the boundaries of Sector-65, Urban Estate, Haryana. The land is owned by Manglam.

b. The Tripartite Buyer's Agreement with the KMPs was signed on 31.03.2010. As per para (b) on page 6 of the agreement the Director, Town and Country Planning, Haryana ('DTCP') has granted the license bearing No. 234 of 2007 dated 16.10.2007, No. 52 of 2009 dated 28.08.2009 and No. 35 of 2010 dated 06.05.2010 on the said land in favour of Manglam to develop a Group Housing Colony. It is strange to note that the agreement was signed on 31.03.2010 whereas the third license as mentioned in the agreement was granted on 06.05.2010 after signing of the agreement. It is also noted that M3M Golf Estate project was sanctioned on 08.09.2010 whereas investment in the villas of this project was made by the KMPs on 31.03.2010 six months before the sanction and exemption u/s 54F of the Act was claimed. The investment in the villas was made by the KMPs even before completion of the legal formalities for launching the project M3M Golf Estate.

c. The details of the four villas booked are as under: -

| Name of the allottee | Villa No. | Super Area | Land Area | Basic sale price | Total sale price of which exemption was claimed |
|----------------------|-----------|------------|-----------|------------------|-------------------------------------------------|
|                      |           |            |           | :                |                                                 |

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|                    |           |                                    |                                                |                                                       |                                                          |
|--------------------|-----------|------------------------------------|------------------------------------------------|-------------------------------------------------------|----------------------------------------------------------|
| Sh. Roop Kumar     | MGE/VA/05 | 84655.49 sq.ft.<br>(7867.61 sq.m.) | 5664.68 sq.m.<br>Ground + 3 floors             | 135.44 crore @ Rs. 16,000/- per sq.ft. of super area  | 161.59 crore @ Rs. 19,088/- per sq.ft. of super area     |
| Sh. Basant Bansal  | MGE/VA/04 | 84655.49 sq.ft.<br>(7867.61 sq.m.) | 5664.68 sq.m.<br>Ground + 3 floors             | 135.44 crore @ Rs. 16,000/- per sq.ft. of super area  | 161.59 crore @ Rs. 19,088/- per sq.ft. of super area     |
| Sh. Pankaj Bansal* | MGE/VA/03 | 73603.43 sq.ft.<br>(6840.46 sq.m.) | 4925.13 sq.m.<br>Ground + 2 floors and terrace | 107.75 crore @ Rs. 16,000/- per sq.ft. of super area* | Rs. 118.43 crore @ Rs. 16,090/- per sq.ft. of super area |
| Smt. Abha Bansal*  | MGE/VA/02 | 73603.43 sq.ft.<br>(6840.46 sq.m.) | 4925.13 sq.m.<br>Ground + 2 floors and terrace | 107.75 crore @ Rs. 16,000/- per sq.ft. of super area* | Rs. 118.43 crore @ Rs. 16,090/- per sq.ft. of super area |

As per the agreement, the villas proposed to be constructed were of ground + 3 floors. It is strange to note that the villas were booked at astronomically high rate of Rs. 16,000/- to Rs. 19,000/- per sq.ft. whereas, admittedly the circle rate of the area in which the project M3M Golf Estate is located was Rs. 2,500/- per sq.yd. equal to Rs.277 per sq.ft. (para 9 of the Award dated 16.03.2017). Hence, the cost of land for the villa having larger area works out to approx. 5664.68 sq.m. \* 1.196 \* Rs. 2,500 = Rs. 1,69,37,393/- only. Further, as per the revised rate applicable w.e.f. 11.10.2010 the circle rate of multistory residential group housing societies varied between Rs. 3,250/- to Rs. 4,000/- per sq.ft. only. The circle rate was further revised w.e.f. 01.04.2015 and the revised rate also varied between Rs. 2,600 to Rs. 5,000 per sq.ft. The present circle rate in the area is also Rs. 5,500/- per sq.ft. It clearly demonstrates that the villas were booked at artificial high circle rates with the purpose to claim the deduction u/s 54F of the Act and not to pay the tax in respect of the long-term capital gains which accrued to the KMPs on account of sale of shares.

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Sh Roop Kumar Bansal, Gurgaon.

d. Further, the booking rates of M3M Golf Estate project were called for during the course of the proceedings in the case of MIPL for the purpose of working of POCM. The same is tabulated as under-

| BSP per sq.ft./ FY   | 2011-12 | 2012-13 | 2013-14 | 2014-15 | 2015-16 | 2016-17 |
|----------------------|---------|---------|---------|---------|---------|---------|
| Maximum booking rate | 12,600  | 13,800  | 13,536  | 13,600  | 12,475  | 12,475  |
| Minimum booking rate | 6,100   | 6,000   | 5,600   | 6,000   | 6,000   | 6,000   |

Also, in the earlier search conducted on this group on 30.06.2011, certain incriminating documents indicating the rates of the project were seized as Page No. 4/ Annexure - A3/Party No. 4 (page No. 95 of annexure). The content of the document is reproduced as under for reference -

Following units are available for resale as per the info collected from brokers. In lot of cases the specific unit number is not being disclosed as the broker is insisting on a face-to-face meeting for discussing the same.

|                                                                                                  |
|--------------------------------------------------------------------------------------------------|
| Tower 1, 22 <sup>nd</sup> floor, A unit; 8000                                                    |
| Tower 9, 14 <sup>th</sup> floor, D unit; 8000                                                    |
| Tower 9, 23 <sup>rd</sup> /24 <sup>th</sup> floor; 8000                                          |
| Tower 9, 28-30 <sup>th</sup> floor; 3875 sq. ft., Unit "d", Asking price: Rs. 8200/- per sq. ft. |
| Tower 10 – 8000 (unit not disclosed)                                                             |
| Tower 14 – 2 <sup>nd</sup> and 3 <sup>rd</sup> duplex                                            |
| Tower 19, 14-15 <sup>th</sup> floor @ Rs. 8100 per sq. ft.                                       |

|                                                                                                           |
|-----------------------------------------------------------------------------------------------------------|
| Tower 19, 10-12 <sup>th</sup> floor, asking price Rs, 7800 per sq. ft.                                    |
| Tower 19, 20 <sup>th</sup> floor, asking price Rs. 8000 per sq. ft.                                       |
| Tower 20 Middle floor, seller demanded Rs. 9500 per sq. ft. (Booking has been done @ Rs. 9100 per sq. ft. |
| Tower 20; Penthouse unit (Aditya Khosla)                                                                  |

As stated earlier and seen from above, the rates on which the KMPs booked villas to claim exemption u/s 54F of the Act were exorbitant with the intention to evade payment of due taxes. The rates at which the KMPs booked the villas were so high that even in FY 2016-17 the maximum booking rates were not even close to the rates at which the villas were booked in the month of March, 2010.

e. From perusal of the Buyer's Agreement it is noted that there is no provision of payment of any compensation by the companies MIPL and Manglam to the allottees. Reference may be made to para 13 on page 14, para 14 on page 16 & 17 and para 44 on page 28 of the agreement. Perusal of the Builder Buyer Agreement signed between MIPL, Manglam and the KMPs shows that there are following conditions in the contract:

"-----in case completion of Villa and/or the project is delayed by reason of force majeure events including any act of God or if non-delivery for possession is as a result of any Act, Notice, Order, Rule or Notification of the Government and/or any other Public or Competent Authority -----, notification by the competent authorities become subject matter of any suit/writ before a competent court ----- then the Allottee agree that the Company shall be entitled to the extension of time for delivery of possession of the said villa ----- and the Allottee agrees not to claim compensation of any nature whatsoever during the period of such suspension of the scheme ----- Any such refund by the company to the Allottee shall be made without any interest and only after receiving any and all monies due from insurers, in the event of the Group Housing Colony being ensured. (Para 3 of page no. 16 of the Buyer's Agreement dated 30.03.2010)

-----Should the Company abandon the Project for any other reasons, it shall refund the entire amount received from the Allottees with simple interest calculated @ 9% per annum within One Hundred Eighty (180) days and no other charges/compensation shall be payable by the Company to the Allottees. (Para 2 of

page no. 17 of the Buyer's Agreement)"

In the present case, the project has not been abandoned by the assessee company. It has been claimed that the project was allegedly stopped because of an order dated 04.09.2012 passed by the Hon'ble Civil Judge, Gurugram wherein a status quo order was passed with regard to land upon which the villas were allegedly being developed. Therefore, the KMPs were not entitled to claim any compensation as per the terms and conditions of the Buyer's Agreement dated 30.03.2010. This aspect has apparently not been considered and discussed in the arbitration award as the transaction is between interested parties which is not at arm's length.

4. From perusal of the records, it could not be ascertained whether the location of villas was subsequently changed after holding a meeting of the directors and recording its minutes. It is also not known whether these four villas were proposed to be constructed on any disputed portion of the land. It is also not known whether any building/ tower etc. has been constructed on the initially allotted/changed location of the proposed four villas.

5. A survey under section 133A of the Act was conducted in the case of M3M group on 15.10.2012 to verify genuineness of the exemption claimed u/s 54F of the Act. During the course of survey and subsequently, the following statements, inter-alia, were recorded: -

- a. Statement of Sh. Roop Kumar u/s 131 on 30.10.2012.
- b. Statement of Sh. Basant Bansal u/s 131 on 14.11.2012.
- c. Statement of Sh. Pankaj Bansal u/s 131 on 05.11.2012.
- d. Statement of Smt. Abha Bansal u/s 131 on 14.11.2012.

From perusal of these statements and other documents the following were noticed: -

5.1 At the site marked for the villas, no villa was found to be constructed. At the time of survey, it was stated that at the site marked in the sanction plan for the villas, no villa was constructed and the site of the villas was shifted to a different location.

5.2 It was subsequently explained that the location of the villas was changed in May, 2011 at the request of MIPL which was marked as K-Block. No written agreement was executed by the KMPs with the company for change in location. However, it was stated that the change in location happened through various meetings and discussions.

5.3 It was explained that at the time of change of location of the villa the design was also changed so the new structure was not matching with the Buyer's

Agreement. It was stated that the super area of the earlier design and new design were almost same and any change in super area would be adjusted either in the form of extra payment to the company or adjustment from the last instalment to be paid at the time of possession which shall be very nominal.

5.4 To verify and assess the value of work done on Villa Nos. 1 to 4 under construction at Group Housing Scheme, M3M Golf Estate, Sector-65, Gurgaon the services of Er. M.N. Bhagat, Govt. Registered and Approved Valuer was requisitioned by the ADIT (Inv.), Gurgaon who visited the site on 15.10.2012. As per the valuation report the total plot area under/around all the four villas was two acres approx. whereas as per the Buyer's Agreement the area of each villa was between 1.5 to 2 acres. The alleged villa as per the valuation report consisted of basement, stilt, 1st to VIth Floor, the area of four villa was calculated by the valuer at 22491 sq.ft., 23375 sq.ft., 23375 sq.ft. and 23111 sq.ft. total being 92353 sq.ft. whereas as per the Buyer's Agreement the area of two villas was 84655.49 sq.ft. each and that of another two villas was 73603.43 sq.ft. each. The structures were nowhere near completion stage. Total estimated cost of construction of each villa at the time of valuation varied between Rs. 1.57 crore to Rs. 1.69 crore and the total estimated cost of construction was assessed by the valuer at Rs. 6.49 crore.

5.5 On verification of the level of construction as on date of survey at the alleged new location it was found that it was a partly constructed concrete structure which was nowhere near the completion stage. The layout of the structure at the new place was also different. No separate or modified Buyer's Agreement was entered into by MIPL and Manglam with the KMPs for change in location. On verification, it was found that nominal investment of Rs. 6.49 crore in construction was made against huge amount of Rs. 541crore received as consideration for purchase of the villas. The videography and photography of these structures were also done during the course of survey proceedings. The structure had no correlation with the original layout plan of the villa. It was also difficult to know whether the structure being constructed was that of villas or four residential/ commercial towers. It was also found that these four towers which were claimed to be the villas had a composite/ contiguous base structure meaning thereby that these were not independent structures but four towers which were connected with each other. The partially constructed four towers are not villas as these were multi-storeyed buildings having 6 to 8 floors and contiguous foundation are being constructed on 2 acres of plot and these structures have no resemblance with the villas which were decided as per the agreement. The area of the structures also does not match with that of villas. It appears that, at the time of survey the company MIPL and its KMPs had concocted a story to cover-up the planning to evade the taxes by randomly showing some under-construction towers to the survey team.

5.6 It was subsequently claimed during the survey that due to the injunction order the project Golf Estate was stayed and no construction work is happening in the project. It was claimed that the project could not be completed for the reason that the local Court of Gurgaon had passed a stay order in respect of the project. It was found that the order was passed in the case of Dulichand v. Manglam on 04.09.2012 and not in the case of the MIPL. Further, on perusal of the order it was noted that the same was passed in the case of Dulichand v. Manglam on 04.09.2012 just one month before the date of survey.

5.7 During survey/post survey proceedings it was found that Mr. Dulichand filed the petition for obtaining a stay on 01.09.2012 in the Civil Court, Gurgaon. He had made a contract for purchase of 10 kanal of agricultural land (about 6050 sq.yds. = 1.25 acre) in the year 2005 from one Sh. Naresh Kumar and advanced an amount of Rs. 6,00,000/- to him. Mr. Duli Chand belongs to Alwar (Rajasthan).

5.7.1 Subsequent to survey, summons u/s 131 of the Act in the name of Sh. Duli Chand was issued on 19.10.2012 at the available address i.e., VPO: Tijara, Distt: Alwar (Rajasthan) which was returned undelivered with comment – 'not complete address'. The inspector was then sent to locate Sh. Duli Chand on 01.11.2012. Sh. Duli Chand appeared on 26.11.2012 before DDIT (Inv-1) Gurugram and his statement on oath u/s 131 of the Act was recorded. In the said statement he revealed that the agreement to purchase the land was made in the year 2005 for a sum of Rs. 60 lakh. As an advance Rs. 6 lakhs in cash was given to the seller, Sh. Naresh.

5.7.2 Sh. Duli Chand could not produce or submit copy of the agreement for sale/purchase of the land and the proof of giving advance of Rs. 6 lakhs to the seller. Moreover, Sh. Dulichand had never approached any other authority like jurisdictional Tehsildar, Deputy Commissioner or the police of the area so as to put forward his grievances regarding the construction by the builder company on the land which he had agreed to purchase from the seller.

5.7.3 Sh. Duli Chand is agriculturist and did not file return of income. Moreover, from 2005 till August 2012, no efforts were made by him to know the status of the sale/purchase deal of the land. No rational explanation could be forwarded by him for delay of seven years. The period of almost seven years is too long a period to mature a sale/purchase deal of a land. It appears to be an afterthought and managed.

5.7.4 In view of the above, it appears that the stay from the Civil Court, Gurgaon to stop the construction was managed with an apparent motive to show that there existed reasonable circumstances because of which the construction of the four villas was stopped. However, it is important to note here that, as mentioned earlier, the construction of the four towers which did not resemble villas were still at the primitive

stage.

5.8 It is not known whether he is known to M3M group and its KMPs. It is strange to note that the court proceedings were continuing and allegedly not concluded despite a meagre amount of Rs. 6,00,000/- being involved in the injunction which claimed to have affected the receipts of Rs. 541 crores as consideration by MIPL from the KMPs and as a result of which it was forced to pay compensation of Rs. 441 crores to them. Had MIPL and Manglam negotiated with this person and refunded the advance with substantial interest even being 10 times of the money, it would have costed the company only Rs. 60 lakh whereas the company was made to pay Rs. 441 crore as compensation to its KMPs. There is nothing on record to show that the company even made any effort to settle the matter inside or outside the court, despite the apprehension of putting the entire project in jeopardy. It clearly confirms the intention of MIPL that instead of settling the small matter the whole scheme was designed to siphon off huge amount as compensation to the KMPs without any payment of tax with the motive to evade the taxes. The entire arrangement is against the preponderance of human probabilities. The transaction being a colourable device to evade the taxes cannot be termed as "Real" in view of the surrounding circumstances of the case.

5.9 It is also not verifiable whether the villas were proposed to be constructed on the disputed land. No details of other units (other than villas) which are situated on the specific portion of land i.e. killa no. 16, 17, 18/1, 23/2, 24, 25, khewat no. 217/255 and killa no. 20, 3/2, 4, 5 is available and the status of construction of these units are not known. It is also not known whether the injunction of the Court was in respect of construction of four towers or for the entire project.

5.10 These facts were, inter-alia, confronted to the KMPs of M3M group and their statements were recorded. During the course of survey, the colourable device/modus operandi adopted by the KMPs to evade the taxes by claiming bogus deduction u/s 54F was unearthed. As a result, exemption claimed by the KMPs u/s 54F was surrendered for taxation during the AY 2013-14. It is also noted that despite the aforementioned developments the KMPs never asked for refund of the amounts paid by them to MIPL for purchase of the four villas.

5.11 It is also strange to note that the land in respect of which the status quo order was claimed to be passed is situated in the area where MIPL has launched and is constructing its biggest project M3M Golf Estate. Further, the claim of the assessee that due to the injunction order the project could not be started is not correct. On perusal of computation of revenue recognised on the basis of PoCM for various AYs it is seen that the project M3M Golf Estate is in full swing and MIPL has worked out profit on booking and sale of units in this project and offered the same for taxation in

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AY 2017-18. A chart of booking and cancelation of units in the project M3M Golf Estate extracted from the submission furnished is as under:

| F.Y.                | 2011-12 | 2012-13 | 2013-14 | 2014-15 | 2015-16 | 2016-17 |
|---------------------|---------|---------|---------|---------|---------|---------|
| No. of Units Booked | 99      | 166     | 19      | 51      | 58      | 63      |
| Booking Cancelled   | 35      | 53      | 3       | 14      | 17      | 7       |

The working given by the assessee company in respect of project M3M Golf Estate can be reproduced as under:

|                            | (in Rs.)          |
|----------------------------|-------------------|
| Construction Cost Incurred | 1378,85,19,367.83 |
| Net Cost Incurred          | 1378,85,19,367.83 |
| Budgeted Construction Cost | 2788,00,00,000.00 |
| Sanction Cost              | 169,52,01,588.50  |
| Adm Overhead               | 126,20,72,981.03  |
| Total Budgeted Cost        | 3083,72,74,569.53 |
| % of Construction Cost     | 44.71             |
| Total Cost Incurred        | 1506,51,55,340.37 |
| Net Cost Incurred          | 1506,51,55,340.37 |

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|                                |                   |
|--------------------------------|-------------------|
| Land                           | 76,77,44,070.00   |
| Budgeted Construction Cost     | 2758,40,73,000.00 |
| Sanction                       | 169,52,01,588.50  |
| Admin                          | 126,20,72,981.03  |
| Fin & Marketing                | 50,88,91,902.54   |
| Total Cost                     | 3181,79,83,542.07 |
| % of Total Cost                | 47.35             |
| Total Area                     | 59,83,000.00      |
| Area Sold                      | 21,55,393.00      |
| Value of Area Sold             | 2176,48,92,092.42 |
| % of Area Sold                 | 36.03             |
| Sales to be recognised         | 1030,52,25,028.01 |
| Less Recognised Till Last Year | -                 |
| This Year                      | 1030,52,25,028.01 |
| Cost to be Recognised          | 542,72,65,646.76  |
| Goodwill Recognised            | 574,13,61,668.44  |
| Brokerage to be Recognised     | -                 |

*It may be noted that total cost incurred in respect of the project M3M Golf Estate is Rs.1506 crore and total value of area sold is only Rs.2176 crore whereas four villas sold to the KMPs in 2010 were worth Rs.541 crore.*

*5.12 A perusal of the above working clearly indicates that the construction of the project M3M Golf Estate is on full swing and MIPL has itself recognised revenue from this project in the FY 2016-17. It is beyond comprehension as to under what circumstances other units of this project are being constructed and sold and the revenue is being recognised on the basis of working under PoCM whereas during the arbitration proceedings, it was claimed that the project is stayed by the injunction of the Court.*

*6. The compensation of Rs.441 crore was allegedly paid to the KMPs to affect the Arbitration Award passed by Justice Lebrahan vide Arbitration Order dt.17.03.2017. The arbitration award has affected the profitability of the assessee company by Rs. 441 crore on account of payment of compensation to the KMPs and PoCM profitability by Rs. 541 crore on account of refund of consideration to the KMPs. A perusal of arbitration award shows several misrepresentations of the facts.*

*6.1 It is noted that MIPL and the KMPs filed applications for arbitration on 17.01.2017 and order of arbitration award was passed on 17.03.2017. The entire proceedings starting from filing of application, conducting the hearings, reference to valuation officer, submission of report by the valuation officer, arguments and discussions were concluded within a period of two months only.*

*6.2 It is also not understandable as to why Manglam is not a party to the arbitration award, whereas the Court order, on which the entire payment of compensation was allegedly claimed to be based, is between Duli Chand and Mangalam. Perusal of the Buyer's Agreement also shows that it is a tri-partite agreement signed by MIPL, Manglam and the respective KMPs. Keeping out the related party from the arbitration proceedings itself proves the ulterior motive of the assessee of the group. However, this fact was never considered or apparently brought to the notice of the Arbitrator.*

*6.3 In the arbitration award (page no. 8 para no. 5) it is mentioned that key persons have legal right to claim compensation. However, it is in contradiction to the Buyer's Agreement signed between the parties. The project was allegedly stopped because of an order dated 04.09.2012 passed by the Hon'ble Civil Judge, Gurugram wherein a status quo order was passed with regard to land upon which the villas were being developed. Therefore, the KMPs were not entitled to claim any compensation as per the terms and conditions of the Buyer's Agreement dated 30.03.2010. This aspect has apparently not been considered and discussed in the*

arbitration award as the transaction is between associated concerns which is not at the arm's length.

6.4 From perusal of the minutes of the meeting of the Board of Directors of MIPL it may be noted that the subject of payment of commission was raised and deliberated in the meeting of the Board of Directors of the company wherein it was agreed to refer the matter for arbitration to pay compensation and decide the quantum of compensation. However, the conditions of the Builder Buyer Agreement dated 30.03.2010 referred to supra was nowhere discussed in the said meeting.

From perusal of the copy of the plaint filed before the Sole Arbitrator and it may be noted that in the plaint filed before the Sole Arbitrator clause 54 of Builder-Buyer Agreement was reproduced (para 14 /page 9 of plaint). However, the conditions of the agreement relating to payment of compensation referred to suprawere neither discussed nor brought to the notice of the Arbitrator. In the Arbitration Award dated 17.03.2017 also these conditions have nowhere been discussed.

Further, as per the revised rate applicable w.e.f. 11.10.2010 the circle rate of residential group housing societies at Gurgaon varied between Rs. 3,250/- to Rs. 4,000/- per sq.ft. only. The circle rate was further revised w.e.f. 01.04.2015 and the revised rate also varied between Rs. 2,600 to Rs. 5,000 per sq.ft. The present circle rate in the area is also Rs. 5,500/- per sq.ft. Further, the booking rates of M3M Golf Estate project were called for during the course of the proceedings in the case of MIPL for the purpose of working of POCM. The same is tabulated as under-

| BSP per sq.ft./ FY   | 2011-12 | 2012-13 | 2013-14 | 2014-15 | 2015-16 | 2016-17 |
|----------------------|---------|---------|---------|---------|---------|---------|
| Maximum booking rate | 12,600  | 13,800  | 13,536  | 13,600  | 12,475  | 12,475  |
| Minimum booking rate | 6,100   | 6,000   | 5,600   | 6,000   | 6,000   | 6,000   |

From the table it may be noticed that the range of booking rate has remained same from FY 2011-12 to 2016-17 which evidently do not justify the payment of compensation. Considering the above facts, it is apparent that the payment of compensation of Rs.441 crore has no correlation with ground realities and the entire modus operandi was adopted by the assessees of M3M group to evade the taxes due to the Exchequer. The payment of compensation is apparently based on the report

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dated 28.02.2017 of M/s Grant Thornton India LLP (para 9 to 14 of the award dated 16.03.2017). M/s Grant Thornton India LLP is providing consultancy on regular basis to MIPL. The details of some of the payments made by MIPL to them are as under:

| <b>Bill No.</b> | <b>Description</b>                                                                                                      | <b>Invoice date</b> | <b>Amount in Rs.</b> |
|-----------------|-------------------------------------------------------------------------------------------------------------------------|---------------------|----------------------|
| GT1314-00556    | Being management consultancy services for SOP documentation                                                             | 02.07.2013          | 2,90,000             |
| GT1314-00556    | Being management consultancy services for SOP documentation                                                             | 02.07.2013          | 30,000               |
| GT1314-01884    | Being consultancy charges for SOP consultant for 4 processes (purchase, sales, CRM and D&A) (30% fee on pro rata basis) | 20.12.2013          | 2,47,660             |
| GT1314-02646    | Being on account professional fees towards documenting SOPs and out of pocket expenses                                  | 03.03.2014          | 10,30,000            |

Moreover, perusal of para 9 of Arbitration Order shows that none of the parties sought cross examination.

7. The payment of compensation of Rs. 441 crore as expenses is nothing but a colourable device to reduce the profit and diversion of income by MIPL. It is worth-mentioning that MIPL has been following the percentage of completion method for recognition of revenue in respect of all its real estate projects including M3M Golf Estate. As per the Accounting Guidelines followed by it, the compensation of Rs.441 crore claimed to have been paid to the KMPs, being direct expenses and part of project cost relating to the project M3M Golf Estate should have been capitalized as its work in progress. The compensation as mentioned above ought to have enhanced the quantum of work in progress of the specific project. However, it is noted that the

entire compensation paid to KMPs has been directly debited to the profit and loss account under the head other expenses as indirect expenses. It may be noted that compensation paid to other customers on buy back of the units have not been claimed as other/indirect expenses in the profit and loss account and debited as part of the project cost.

7.1 MIPL has satisfied the conditions of Accounting Guidelines, 2012 (Revised) issued by the ICAI for recognition of revenue under the PoCM in respect of the project M3M Golf Estate in FY 2015-16 relevant to AY 2016-17. However, no profit was offered in this year for taxation. In the FY 2016-17 relevant to AY 2017-18, in which the amount of consideration of Rs. 541.51 crore for booking of villas was claimed to be refunded and compensation of Rs. 441.84 crore paid to the KMPs, MIPL has itself recognised the revenue in respect of the project M3M Golf Estate under the PoCM. It is also strange to note that no actual payment of consideration as well as compensation was made to the KMPs and these amounts are still shown in the balance sheet of the MIPL as advances received from them. It only shows that the assessee has created an artificial bogus entry of compensation of Rs. 441 crores claimed to be paid to the KMPs and directly debited it to the profit and loss account instead of taking it to the work in progress with the intent to reduce its tax liability. Such payment of compensation is neither in accordance with the buyer's agreement nor the act of MIPL to directly debit such compensation to the P&L account is in accordance with the Accounting Guidelines followed by it.

7.2 The four KMPs were given compensation amounting to Rs. 441 crores. In the returns of income for AY 2017-18 these KMPs have shown compensation of Rs. 441 crore as income under the head long term capital gains claiming the consideration paid of Rs. 541 as cost. After reducing such indexed cost from the compensation, a very nominal amount of Rs. 40 crore has been offered for taxation under the head long term capital gains and nominal tax of Rs. 8 crore has been paid at reduced rate of tax applicable to such gains. It is worth mentioning that the profit from the project has been offered for taxation first time during FY 2016-17 relevant to AY 2017-18 and huge compensation of Rs. 441 crore was allegedly claimed as expenses during this year only to evade the payment of taxes of about Rs. 150 crore by MIPL.

7.3 It is also noted that no such huge compensation was paid to any of the buyers who have purchased a property in the said project, Golf Estate at Gurugram, the construction of which was allegedly stopped by a judicial order. There is no such instance in the case of MIPL where similar huge compensation in respect of the project M3M Golf Estate or any other project was paid. Besides the KMPs, the claim of any other customer was never referred to Arbitrator.

8. Search u/s 132(1) of the Act was conducted on 21.07.2016 in the case of Sh.

Gaurav Jain Ex-VP (Finance) of M3M group as part of the search on M3M group and his residence at H.No. 925, Sector 28, Faridabad was also covered. He was a key person of the M3M group holding an important position of Vice President and having the control over the financial transactions of the group. He worked with M/s M3M India Pvt Ltd, Gurugram for about five and half years i.e. from the year 2009 - 2015. In the statement recorded at the time of search he stated that as Vice President (Finance), his responsibilities were as under: -

- i) To maintain books of account in the Oracle System.
- ii) To generate MIS for cash flow purposes, sales control, construction cost and projected profitability.
- iii) To manage various auditors and get books of accounts audited.
- iv) Filing of tax returns and to represent company before tax authorities.
- v) To deal with merger and financial transactions.

8.1 During the search, various documents were found in the computer of Sh. Gaurav Jain at his residence which were in form of power point presentations, briefs for opinion, email exchanges etc. Perusal of these documents clearly indicate that the entire scheme was designed in connivance between the company MIPL and its KMPs with the sole intention to evade the taxes. The details of these documents which are enclosed as Annexure- (page No. 1 to 82) are as under: -

| S.No. | Description                                   | Page No. | Gist of the documents                                                                                                                                                                                               |
|-------|-----------------------------------------------|----------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1.    | Organization Chart of M3M India Pvt Ltd.      | 1        | It is the chart indicating the organizational structure. Sh. Gaurav Jain is Sr.VP, Finance and is the key person.                                                                                                   |
| 2.    | Power Point Presentation namely "Background"  | 2-15     | It has been apparently prepared for a meeting. Various aspects of the issue - compensation to the KMPs on cancellation, issue of debentures in lieu of payment, implication and planning etc. are narrated therein. |
| 3.    | Power Point Presentation namely "Way forward" | 16-25    | It has been prepared for a meeting. Various aspects of the issue - compensation to the KMPs on cancellation, issue of debenture in lieu of payment, implication and planning                                        |

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|    |                                                             |       |                                                                                                                                                                                                                                                                                                                                                                       |
|----|-------------------------------------------------------------|-------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|    |                                                             |       | etc. are narrated therein.                                                                                                                                                                                                                                                                                                                                            |
| 4. | Power Point Presentation namely "Way Ahead"                 | 26-33 | It has been prepared for a meeting. Various aspects of the issue - documentation, claim settlement, issuance of CCD and exit options are mentioned therein.                                                                                                                                                                                                           |
| 5. | Mail from M.P. Varshney, Consultant dated 30.11.2011        | 34-39 | An e-mailed on 30.11.2011 by Mr. M.P. Varshney to Mr. Basant Bansal, Roop Bansal, Pankaj Bansal, Mr. Gaurav Jain and Suresh Chawla. This email indicates planning of tax evasion by exploring various options.                                                                                                                                                        |
| 6. | Mail from Mr. M.P. Varshney, Consultant dated 21.09.2012    | 40    | An e-mailed on 21.09.2012 by Mr. M.P. Varshney to Mr. Gaurav Jain and Suresh Chawla. This email is a draft petition proposed to be written to CBDT u/s 119(2b) to postpone tax liability indefinitely as per option 4 of email dated 30.11.2011 (Sl.No. 5), which shows that the injunction/stay from Court was stage managed and petition u/s 119(2b) was submitted. |
| 7  | Mail from Mr. Malay Chaturvedi, GM Finance dated 27.09.2013 | 41-49 | This e-mail was sent by Mr. Malay Chaturvedi to Mr. Gaurav Jain and Mr. Mukesh. This email indicates planning to evade taxes by exploring various options.                                                                                                                                                                                                            |
| 8  | Brief for Opinion                                           | 50-73 | These are the drafts prepared for taking opinion of tax consultant on the issue of capital gain and payment of compensation.                                                                                                                                                                                                                                          |
| 9  | Brief for Opinion                                           | 74-94 | This is an email sent by Gaurav Jain to Mr. Rishi Jha and Mr. Deepak Joshi for taking opinion on the issue of capital gain and payment of compensation.                                                                                                                                                                                                               |

8.2 The document at Sr.No. 5 in the above table is an e-mail sent on 30.11.2011 by Mr. M.P. Varshney to Mr. Basant Bansal, Roop Bansal, Pankaj Bansal, Mr. Gaurav Jain and Suresh Chawla. This email indicates various options and planning explored to evade taxes.

(i) The Option 4 of the strategy is reproduced as under-

#### Strategy

.....

.....

#### Option -4: Postpone Tax liability indefinitely

If the decision to postpone payment of capital gains liability beyond filing of return under section 153A or not paying by way of advance tax is taken, necessary stay/injunction from court/ statutory authority will have to be secured and order from CBDT will have to be obtained under section 119(2)(b) on the ground of 'genuine hardship' for the period the stay is granted. However, the liability to pay tax will get revived once the stay order is vacated and limitation to frame assessment will run after excluding the period covered under stay.

However, keeping the facts in view and due to high stakes involved, it would be in fitness of things that some construction is started at the site for the villas ASAP. Such construction will have to be started before the centralisation of the individual's cases and in any case latest before 14.10.2012, i.e., the last date of expiry of the prescribed three years period. This is necessary if the transaction is not to be seen as a colourable device or not at arm's length. Because otherwise, the Assessing Officer may apply ratio of Macdowell's case and hold the transaction as a sham transaction with capital gains being liable to be taxed in the year of receipt itself. (i.e. A.Y. 2010-11)

This becomes urgent because soon after centralisation of case, the Income Tax authorities may conduct a survey or inspection in pursuance to directions given to the assessing officer in the appraisal report. After centralisation, assessing officer shall also issue notices under section 153A for six relevant assessment years requiring filing of return within a prescribed period (generally one month) of getting notices. The limitation to complete assessments of returns filed under section 153A will end on 31.12.2013.

It is further submitted that an email was also sent on 21.09.2012 by Mr. M. P. Varshney (one month before survey u/s 133A on 15.10.2012) to Mr. Gaurav Jain

which was a draft petition u/s 119(2b) of the Act. It may also be mentioned that the earlier search u/s 132 of the Act in the case of M3M group was carried out on 30.06.2011 which is mentioned in the email. The relevant para 5 of this draft petition is as under-

That one Sri Duli Chand, son of Sri Ramphal, who claimed to have entered into an agreement in respect of the land on which the residential property was under construction, moved the Court of the Civil Judge, Senior Division, Gurgaon in a suit for permanent injunction against the seller of the land and the Hon'ble Court on 05.09.2012, directed both the parties to the dispute to maintain status quo qua construction over the suit property.

It is also interesting to read the Option 4 and 6 of email dated 27.09.2013 (S.No. 7) which is reproduced as under:

**“-----Option -4: Postpone Tax liability indefinitely till stay is operative**

If the decision to postpone liability of capital gains by not paying by way of advance tax or with the return to be filed under section 153A is taken, necessary stay/injunction from court/ statutory authority will have to be secured and order from CBDT will have to be obtained under section 119(2)(b) on the ground of 'genuine hardship' for the period the stay is operative. However, the liability to pay tax will get revived once the stay order is vacated and limitation to frame assessment will run after excluding the period covered under stay. In such case, if the stay and CBDT's order is obtained, there may not be liability to pay interest for the period of stay. However, the risk of being charged of interest for the period not covered under the stay may still be there if the Assessing Officer holds that the capital gains arose in the year of transfer, i.e., A. Y. 2010-11.

However, keeping the facts in view and due to high stakes involved, it would be in fitness of things that some construction is started at the site for the villas ASAP. Such construction will have to be shown to have started before the centralisation of the individual's cases and, in any case, latest before 14.10.2012, i.e., the last date of expiry of the prescribed three-year period. This is necessary if the transaction is not to be seen as a colourable device or being not at arm length. Otherwise, the Assessing Officer may apply ratio of Macdowell's case and hold the transaction as a sham transaction with capital gains being liable to be taxed in the year of receipt itself. (i.e. A. Y. 2010-11)

Since the revenue from sale is yet to be recognised in the hands of the

company, in case a stay is obtained, it could be before the final furnishing and fixing fitting stage and after the completion of structure. The structure will have to remain in existence, at least, till the stay is vacated or passing of CIT(Appeals) appellate order, whichever is later.

Necessary action, if this course is opted, becomes urgent because soon after centralisation of case, the Income Tax authorities may conduct a survey or inspection in pursuance to directions given to the assessing officer in the appraisal report. After centralisation, assessing officer shall also issue notices under section 153A for six relevant assessment years requiring filing of return within a prescribed period (generally one month) of getting 'notices'. The limitation to complete assessments of returns filed under section 153A will end on 31.12.2013.

There is a remote possibility of investigation wing also conducting a survey to report to the Assessing Officer the stage of construction. Such survey can take place even before centralisation of case.

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**Option-6: Completing part of each flat in K tower as Villas**

The promoters may request the company to switch the allotment of their villas to K Tower which has four vertical villas adjacent to each other in the same complex with four separate lifts comprising of six storeys with a total area of 32,000 sq. ft. This complex is under construction and the structure is ready. Necessary modifications to increase area and nature of construction for independent villa can be carried out.

Once issues relating to switch over are attended, and stay is granted by a court of law or any authority, there could be a case for claiming refund of investment by the promoters from the investee company. After the amount is refunded by the company, the deduction claimed can be surrendered by promoters by getting the refunded amount taxed in the relevant A.Y. of its receipt (i.e. A.Y. 2013-14) on the strength of the case of *Ranjit Narang V. CIT* (Supra) by showing it in the return of income. Though tax will have to be paid by the individual promoters, this will reduce corresponding liability of receiving the amount as sale proceeds in case of the Company. Since the taxability will arise in the third year, i.e. A.Y. 2013-14 interest on promoters may not be chargeable. In such case, tax can be paid after the period prescribed for construction (14.10.2012) gets over, i.e., in December 2012 and March 2013 instalment of advance tax. In case, capital gains are paid late, say, by

way of self-assessment tax, interest will have to be paid for the delay.

In this arrangement, liability to pay interest for capital gains (for the time the amount was with the company) shall get postponed by three years (from A.Y. 2010-11 to A.Y. 2013-14) and the liability to pay tax on income from sale of villas, in case of the company, shall be extinguished.

These emails exchanges in the year 2011 to 2013 recovered from the seized hard disks indicate that the entire scheme was planned several years back to evade the taxes. The assessees of the M3M group made the planseeking the assistance of consultants to evade the taxes and to make it look real.

ii) The action plan included documentation for escalation of claim by the investors for inability to construct and deliver residential villa. The claim was to include the actual amount invested and punitive damages along with indemnifying investor for loss suffered (Time value of money, loss of exemption u/s 54F, appreciation in RE prices across all project in Gurgaon since 2010). The claims raised by other investors were to be relied on/referred for preparation of documentation. It also included documentation on part of the company to rebut/modify and accept the claim.

iii) The tax arbitrage on account of availability of expenses and taxability as capital gains in hands of investors.

iv) Mode of effectuating the settlement reached. The plan was to settle the claim partly in cash and/ or by way of issuance of compulsorily convertible debenture. The risk of heightened scrutiny of the transaction and contention that this is only a sham tax planning device still looms.

v) The amount of compensation being paid would be covered in the ambit of specified domestic transaction and thus would need to be substantiated and demonstrated by means of documentation that no special advantage was accorded to the investor in question vis-à-vis other investors. The transfer pricing may be covered under the CUP method or any other method as described in section 92C of the Act and for the same it was decided to place reliance on information documented and available with the company M Ltd., inter-alia, compensation claims paid to other investors or customers, assured returns provided under various schemes and projects to customers and escalation in market rate of project from date of investment to date of paying compensation.

vi) In the problem statement it is mentioned that the PoCM can invoke/trigger tax liability on M Ltd. though the villa construction is a separate phase but carries risk to be clubbed with rest of project. It is also mentioned that the villas are no longer

required, stay might get vacated at any juncture, so exit strategy need to be worked out. As per proposal the transaction would result in wealth creation in the hands of the investors, allowance of business expenditure in the hands of M Ltd. and the transaction is to be effectuated in a tax efficient manner with the understanding of the tax risk/ litigation exposure.

vii) The issues for consideration were implications of section 2(24)(i)/(iv) and documentation to be prepared to demonstrate the payment of high compensation to the individual investor, make a robust analysis and documentation to support that rights in residential villa is a capital asset taking guidance from judicial pronouncements and the case so far. There is a risk that the tax department will contend that this is only a sham and a tax planning devise.

viii) Some of the thoughts mentioned in the documents on which the planning needs to be done were - demonstrating that the intention was to use the villa as capital asset & was not for trading, demonstrating and documenting that the compensation is a deductible business expenses for M Ltd., the investor claimed exemption u/s 54F and this matter was assessed which is to be carefully leveraged on the contentions made, manner of arriving at the compensation needs to be planned to negotiate the fact that investors are related parties and there is no specific clause in the BBA dealing with the scenario (to manage BBA clause), implication of this being related party transactions needs to be evaluated and planned, risk of disallowance of expense in the hands of M Ltd. needs to be evaluated in detail, attempts should be made to demonstrate zeal to complete the project, the documentation to raise and escalate the claim of the investor would need to be prepared, documenting the validity of the compensatory payments on account of the adverse effect such claim may have on the entire project, evaluation of the risks in detail and finalize the options, approaching a senior counsel to seek his inputs on the entire transaction from tax evasion and/ or litigation perspective.

ix) On perusal of briefs of opinion, it is noted that the various options were explored - to make payment of compensation part in cash and part in the form of debenture. Second option explored was allotment of rights in residential units in lieu of the rights in the residential villas or provide refund for the liquidation of first rights. In one of the briefs for opinion the matters relating to tax avoidance and penalty imposition and applicability of domestic transfer pricing have also been discussed (para 4.14 and 4.15 of brief for opinion at page No. 61). The issue whether the compensation should be through arbitration or direct is also mentioned in the opinion (page No. 63).

x) On perusal of the details it is noted that the entire scheme was planned in 2011 onwards and implemented subsequently. Sh. Gaurav Jain left M3M group in

March, 2015 after working for five and half years.

9. There is no doubt that the said transaction is colourable or artificial devise adopted by the assessee to evade the taxes. The transaction is neither legitimate nor bonafide nor undertaken in the ordinary course of business. Such colourable devises cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by dubious methods. revenue authorities are also supposed to consider the surrounding circumstances and apply the test of human probability. In the present case also, in spite of being an apparent transaction, the same cannot be termed as "Real" in view of the surrounding circumstances of this case. Reliance is placed on the following judgements:

**McDowell and Co. Ltd. v. CTO [1985] 154 ITR 148 (SC)**

**Sumati Dayal v. CIT [1995] 214 ITR 801 (SC)**

In the case of **Longanathan (K.R.) v. UOI [1988] 174 ITR 645**, the Hon'ble Madras High Court has observed as under:

"As pointed out by the Supreme Court in McDowell the proper way to construe a taxing statute, while considering a device to avoid tax, is not to ask whether the provisions should be construed literally or liberally nor whether the transaction is not unreal and not prohibited by the statute, but whether the transaction is a device to avoid tax and whether the transaction is such that the judicial process may accord its approval to it. It is neither fair nor desirable to expect the Legislature to intervene and take care of every device and scheme to avoid taxation. It is up to the court to take stock to determine the nature of the new and sophisticated legal devices to avoid tax and to expose the devices for what they really are and to refuse to give judicial benediction.

I am convinced that the execution of the three separate deeds of sale is a legal device adopted by the vendors and the vendees in collusion to escape liability for the tax."

Similarly, in the case of **Nayantara G. Agarwal v. CIT [1994] 207 ITR 639**, the Hon'ble Bombay High Court has observed as under:

"The courts in such a case should not lay undue emphasis on the language of each individual document as that is not determinative of the controversy. What is really necessary to be considered in such cases is the true nature and effect of the transaction. If on such a consideration, the court arrives at a finding that the true nature is "transfer of land" and the various steps originating from the affidavit and formation of partnership and culminating into dissolution of the same, in the process

leaving the land with the company, are nothing but a device to avoid capital gains tax leviable under section 45 of the Act on transfer of the land to the company, such a device cannot get the seal of approval of this court. In the light of the foregoing discussion, we hold that the firm was not genuine."

In the case of **CIT v. Durga Prasad More [1972] 82 ITR 540 (SC)**, the Hon'ble Apex Court has observed as under:

"It is true that an apparent must be considered real until it is shown that there are reasons to believe that the apparent is not the real. In a case of the present kind a party who relies on a recital in a deed has to establish the truth of those recitals otherwise it will be very easy to make self-serving statements in documents either executed or taken by a party and rely on those recitals. If all that an assessee who wants to evade tax is to have some recitals made in a document either executed by him or executed in his favour then the door will be left wide open to evade tax. A little probing was sufficient in the present case to show that the apparent was not the real. The taxing authorities were not required to put on blinkers while looking at the documents produced before them. They were entitled to look into the surrounding circumstances to find out the reality of the recitals made in those documents."

Hon'ble Supreme Court in the case of **Vodafone International Holdings B.V. v. Union of India [2012] 204 Taxman 408 (SC)** has made it very clear that a colourable device cannot be a part of tax planning. Therefore, where a transaction is sham and not genuine as in the instant case then it cannot be considered to be a part of tax planning or legitimate avoidance of tax liability. Since in this case the transaction has been used as a mere ruse for tax evasion or to circumvent tax obligations, it is necessary to lift the veil from the transaction.

10. On perusal of the records, it is seen that the AO has not considered the aforementioned facts and the circumstances in which the payment of compensation of Rs. 441 crores was made and passed the order without application of mind. The AO has also failed to consider the information and documents which were already available on record especially on account of survey u/s 133A of the Act conducted in the case of the assessee on 15.10.2012. The AO has also failed to consider various documents found in the computer of Sh. Gaurav Jain at his residence and confront the same to the assessee. The compensation was required to be taxed as revenue receipts or income u/s 2(24)(i) or benefit or perquisite u/s 2(24)(vi) of the Act as the KMPs were either Directors of MIPL or their relatives. However, the AO without considering the facts of the case taxed the compensation under the head long-term capital gains and also allowed the benefit of indexation as a result causing huge loss to the revenue. Instead of taxing the entire amount of compensation of Rs. 441 crore @ 30% the AO accepted the returned income in which nominal amount of less than

Rs. 40 crore was offered for taxation under the head long-term capital gains taxed at the reduced rate of 20%.

10.1 The Apex Court in **Malabar Industrial Co. Ltd. v. CIT [2000] 243 ITR 83 (SC)** laid down a four-way test for orders being erroneous in-so-far as they are prejudicial to the interest of the revenue, liable for revision viz. incorrect application of law; wrong assumption of facts; non-observance of the principles of natural justice; or without application of mind. It was also held that the scheme of the Act is to levy and collect tax in accordance with the provisions of the Act and this task is entrusted to the Revenue. If due to an erroneous order of the Income-tax Officer, the revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to the interests of the revenue. The phrase prejudicial to the interests of the revenue has to be read in conjunction with an erroneous order passed by the Assessing Officer. Also, the decision in the case of **CIT v. Infosys Technologies Ltd. 341 ITR 293 wherein the Hon'ble High Court of Karnataka** has held that the provisions u/s 263 is intended to plug leakages to the revenue by erroneous orders passed by the lower authorities, whether by mistake or in ignorance or even by design is applicable to the facts of the case.

11. In view of the above, the assessment order passed by the AO in this case is erroneous in so far as it is prejudicial to the interest of revenue. You are hereby given an opportunity as to why proceedings u/s 263 of the Act should not be initiated in your case for the AY 2017-18. You may file your reply in the office of the undersigned preferably by post/e-mail on or before 04.03.2021."

3.3. In response to the show cause notice, Learned Counsel for the Assessee appeared before the Learned PCIT and filed reply and Annexures in volumes to explain the issue. It was submitted that invocation of Section 263 of the I.T. Act, 1961 is without jurisdiction. The submissions of the assessee were summarized as under in the impugned order :

- (i) That order u/s 153B(1)(b)/143(3) of the Act which has been passed with approval u/s 153D of the

*Act cannot be subject matter of revision u/s 263 of the Act.*

(ii) *That without prejudice assuming for the sake of an argument that approval u/s 153D of the Act is not valid on account of allegations stated in the notice (though the same is seriously disputed) then the approval u/s 153D of the Act is not a valid approval and therefore order of assessment u/s 153B(1)(b)/143(3) of the Act is a vitiated order which cannot be subject matter of revision u/s 263 of the Act.*

(iii) *That the contention that order dated 18.12.2018 u/s 153B(1)(b)/143(3) of the Act is invalid can be raised even in collateral proceedings and ex-consequenti since the instant order is a vitiated order therefore the same cannot be subject matter of revision u/s 263 of the Act.*

(iv) *That notice dated 05.01.2018 u/s 142(1) of the Act was an invalid notice and therefore the impugned*

*order of assessment dated 18.12.2018 u/s 153B(1)(b)/143(3) of the Act pursuant to illegal notice is a vitiated order therefore the same cannot be subject matter of revision u/s 263 of the Act.*

*(v) That claim of the assessee that compensation received of Rs.91.33 crore by the assessee during the Financial Year 2016-17 relevant to Assessment Year 2017- 18 forms part of sale consideration for computation of long-term capital gain on cancellation of the builder buyer agreement dated 31.03.2010 between assessee and M/s M3M India Pvt. Ltd. has been accepted without application of mind is factually incorrect, legally misconceived and therefore unsustainable.*

*(vi) That the compensation received of Rs.91.33 crore under the arbitration award dated 16.3.2017 passed by sole arbitrator namely Justice Manmohan Singh Liberhan (Retd.) is undisputedly and solely on account of cancellation of the*

*agreement for allotment of villas by MIPL and therefore both logically and legally the same forms part of sale consideration for computation of Long-term Capital Gain u/s 45 of the Act read with section 48 of the Act. In fact, arbitration award is final and binding u/s 35 of the Arbitration and Conciliation Act, 1996 and thus any adverse observations thereon are factually incorrect, legally misconceived and wholly untenable.*

- (vii) Without prejudice and even otherwise it is submitted that adverse observations in respect of the arbitration award are misconceived.*
- (viii) That material relied upon in the instant notice is beyond the provisions of section 263 of the Act or based on factually misconceived assumption and thus untenable.*
- (ix) That material seized from the residence of Sh. Gaurav Jain, Ex VP Finance cannot be relied upon in any case cannot be made a basis to reject the*

*claim that compensation so received is not a part of the sale consideration.*

*(x) That various allegations and adverse observation in the notice are factually incorrect, legally misconceived, and wholly untenable.*

*(xi) That allegation that the payment of compensation of Rs.441 crore as expenses is nothing but a colorable device to reduce the profit and diversion of income by MIPL and the allegation that there is no doubt that the said transaction is colourable or artificial devise adopted by the assessee to evade the taxes, the transaction is neither legitimate nor bonafide nor undertaken in the ordinary course of business, such colourable devises cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by dubious methods, revenue authorities are also supposed to consider the surrounding circumstances and apply the test of*

*human probability, in the present case also, in spite of being an apparent transaction, the same cannot be termed as “real” in view of the surrounding circumstances of this case is factually incorrect, legally misconceived and untenable.*

*(xii) That reference section 2(24)(vi) of the Act supports the claim of the assessee.*

*(xiii) That section 2(24)(i) of the Act is not applicable on the facts of the assessee.*

*(xiv) That without prejudice and in the alternative compensation so received is capital receipt.*

*(xv) That once the learned Assessing Officer on examination of the facts on record and after making all possible enquiries had accepted claim of the assessee then such an order of assessment could not be regarded as erroneous in as much as prejudicial to the interest of revenue merely because PCIT holds a different opinion and that too, without having established in any manner*

*that, view adopted by the learned Assessing Officer was an impossible view but on the contrary was a possible view.*

*(xvi) That for holding that the order passed by learned Assessing Officer is not only prejudicial to the interest of revenue but is also erroneous by PCIT has to be preceded by some “minimal” inquiry.*

*(xvii) That action u/s 263 of the Act is otherwise too inapplicable on the factual matrix of the facts of the instant case since admittedly, undisputedly and undeniably not a case of “lack of enquiry” or “lack of investigation” and perusal of the show cause notice itself would show that it has not been denied or disputed that all relevant information have been furnished/obtained in the course of assessment proceeding and therefore the invocation u/s 263 of the Act is not in accordance with law.*

*(xviii) That section 263 of the Act cannot be invoked to make deeper enquiry. In other words, allegation of proper enquiry or inadequate enquiry cannot be a valid basis to invoke section 263 of the Act.*

*(xix) Notice is based on surmises, conjecture and suspicion.*

*(xx) Explanation 2 to section 263 of the Act does not change the scope of section 263 of the Act.”*

3.4. The Learned PCIT after considering the explanation of assessee and material on record did not accept the explanation of assessee and held that the impugned assessment order Dated 18.02.2018 is erroneous in so far as it is prejudicial to the interests of Revenue. The assessment order was set aside on the issue of taxability of compensation under the Head “Long term capital gains” at the reduced rate of 20%. The A.O. was directed to tax the amount of compensation as revenue receipts at normal tax rate applicable. The A.O. directed to modify the impugned assessment order in accordance with the directions contained in the impugned order. The findings of the Learned PCIT in Paras 3 to 18 of the impugned order are reproduced as under :

3. I have perused the reply of the assessee and considered the submissions made. In the grounds at Sr.No. (i) to (iv) the assessee has challenged the show cause on technical grounds. In the ground No. (iii) it was submitted that the impugned order dated 18.12.2018 passed u/s 153B(1)(b) r.w.s. 143(3) of the Act is an invalid order which cannot be subject matter of revision u/s 263 of the Act.

4. It is a settled proposition that right to file an appeal is a statutory right. As per the provisions of section 246A, the first appellate authority for filing the appeal against an order u/s 153B(1)(b) r.w.s. 143(3) is the CIT(A), whereas as per section 253, the first appellate authority for an order u/s 263 is the Hon'ble ITAT. If the assessee felt aggrieved with the order passed u/s 153B(1)(b) r.w.s. 143(3), the objection was required to be raised before the AO and an appeal was required to be filed before the CIT(A) against the original assessment order. The assessee had neither raised any objection before the AO nor filed an appeal before the CIT(A) against the original order. Hence, the order dated 18.12.2018 passed u/s 153B(1)(b) r.w.s. 143(3) of the Act had achieved finality as no appeal was filed by the assessee against this order. In the revisionary proceedings u/s 263 of the Act the legality of this order can neither be challenged nor examined. Having failed to challenge the legality of the original order in the appellate proceedings the assessee is precluded from agitating the same in the revisionary proceedings.

4.1 The contention of the assessee regarding the illegality of the assessment order passed by the AO could have been a subject matter of the appeal before the first appellate authority which is the CIT (Appeal) in such cases and the same ought to have been contested by the assessee before him within the stipulated time as per the provisions of the Act. The assessee having failed to do so cannot challenge it during the revisionary proceedings u/s 263 of the Act. Since, the assessee decided not to contest the legality of assessment proceedings before the AO and thereafter, before the CIT(Appeal) on completion of assessment proceedings, it is concluded that the assessment order was acceptable to the assessee. The contention of the assessee regarding legality of the original assessment order passed by the AO at this stage during the proceedings u/s 263 is an argument to circumvent the provisions of the law and therefore, not acceptable. In the proceedings u/s 263 of the Act the assessee is precluded from challenging the validity of the original order which is sought to be revised. Reliance is placed on the following judgements:

**Hon'ble Kerala High Court** in the case of **CIT v. Jacob J Thaliath (2011) 11 taxmann.com 123** held as under:

*"The Tribunal interfered with section 263 order for the reason that the revised assessment issued under section 147, that was the subject-matter of revision under section 263, itself was an invalid order. The Tribunal has no such power to consider*

*the validity of any such order, while considering the appeal filed against the order issued by the Commissioner under section 263. The assessee having not challenged the revised assessment, could not also contest validity of that proceedings before the Tribunal in an appeal filed against the order issued under section 263. The Tribunal being the second appellate authority, cannot consider validity of an assessment or reassessment order while considering the appeal filed against an order issued under section 263. So much so, the order of the Tribunal was liable to be vacated. [Para 3]"*

**Hon'ble Madras High Court** in the case of **CIT v. A Samarapuri Chetty (1992) 64 Taxman 344** held as under:

*"We do not think that this argument of the learned counsel for the assessee is correct. What the learned counsel for the revenue contended was even though the abovesaid second assessment order dated 11.03.1976 was void order, unless it was set aside by any process known to law, it would bind the parties in the light of the abovesaid decisions and other authorities cited by him. So, it cannot be taken that the learned counsel for the revenue conceded that the abovesaid second assessment order dated 11.03.1976 was non est. In the light of the observations in the above referred to decisions and authorities cited by the learned counsel for the revenue, in particular in A.R. Antulay v. R.S. Nayak [1988] 2 SCC 622, we agree with his contention and hold that the Tribunal was not justified in holding that the above referred to second assessment order of the ITO was non est in any absolute sense, since it would bind the parties unless set aside. Till it was set aside by the Commissioner under section 263, it bound the parties and the question is only whether the Commissioner was right in setting it aside under section 263 and ordering fresh assessment. [Para 16]"*

While deciding the issue, **Hon'ble Madras High Court** has relied upon the decision of **Hon'ble Supreme Court** in the case of **A.R. Antulay v. R.S. Nayak & Anr. on 29 April, 1988, 1988 AIR 1531, 1988 SCR Supl. (1) 1** wherein it was held as under: -

*"19. One of the well-known principles of law is that decision made by a competent court should be taken as final subject to further proceedings contemplated by the law of procedure. In the absence of any further proceedings, the direction of the Constitution Bench on 16th of February, 1984 became final and it is the obligation of everyone to implement the direction of the Apex Court. Such an order of this Court should by all canons of judicial discipline be binding on this Court as well and cannot be interfered with after attaining finality. [84C-D]"*

It may be mentioned that the original assessment order passed by the AO is neither invalid nor void-ab-initio. Also, the assessment order made by the AO is final subject to further proceedings before the CIT (A). This order cannot be challenged or

interfered in the revisionary proceedings after attaining finality.

5. Without prejudice to the above in ground No. (i) it was submitted by the assessee that since the order was passed with the approval of Joint Commissioner of Income Tax, Central Range, Gurugram u/s 153D of the Act the same cannot be subject matter of revision. The assessee relied upon several decisions.

5.1 Under the Income Tax Act all the authorities such as Pr. Commissioner/ Commissioner, Addl. Commissioner/ Jt. Commissioner, Dy. Commissioner/ Asstt. Commissioner etc. have been given different powers. These powers are exercised by them in accordance with the provisions of the Act and the satisfaction arrived by them independently.

Reliance is placed on the decision of **Hon'ble Delhi High Court in the case of CIT v. SPL'S Siddhartha Ltd. [2012] 17 taxmann.com 138 (Delhi)** wherein it was held as under:

*"Section 116 also defines the Income-tax authorities as different and distinct Authorities. Such different and distinct authorities have to exercise their powers in accordance with law as per the powers given to them in the specified circumstances. If powers conferred on a particular authority are arrogated by other authority without mandate of law, it will create chaos in the administration of law and hierarchy of administration will mean nothing. Satisfaction of one authority cannot be substituted by the satisfaction of the other authority. It is trite that when a statute requires, a thing to be done in a certain manner, it shall be done in that manner alone and the Court would not expect its being done in some other manner. [Para 7]*

*Thus, if authority is given expressly by affirmative words upon a defined condition, the expression of that condition excludes the doing of the Act authorised under other circumstances than those as defined. It is also established principle of law that if a particular authority has been designated to record his/her satisfaction on any particular issue, then it is that authority alone who should apply his/her independent mind to record his/her satisfaction and further mandatory condition is that the satisfaction recorded should be "independent" and not "borrowed" or "dictated" satisfaction. Law in this regard is now well-settled. [Para 8]"*

As per the provisions of section 153D of the Act prior approval of the Joint Commissioner of Income Tax is required to pass an order u/s 153B(1)(b) r.w.s. 143(3) of the Act whereas the jurisdiction to pass an order u/s 263 of the Act is vested in Pr. Commissioner or Commissioner of Income Tax who is a higher Income-tax authority than the Joint Commissioner of Income Tax in hierarchy.

In this regard, it is worthwhile to reproduce the observation of **Hon'ble Madras High**

**Court** in the case of **Srinivasan v. ACIT (2013) 29 taxmann.com 279** where it was held as under: -

*"As already pointed out, passing of an order under Section 158BC rests on the previous approval of the Commissioner. On a reading of Section 158BG, particularly the proviso, reveal the mandatory nature of such an approval, that the proviso reads as "provided that no such order shall be passed without the previous approval of the Commissioner ...". In the background of the above-said provisions, in keeping the law declared by the Apex Court in Sahara India (Firm)'s case (supra) that with civil consequences flowing out of such an approval, we have no hesitation in accepting the plea of the assessee that in the face of such an approval granted to the order passed under Section 158BC, there can be no assumption of jurisdiction by an authority of the same rank under Section 263 of the Act."*

In the present case the assessment order was passed by the AO with the prior approval of Joint Commissioner of Income Tax and the show cause u/s 263 was issued by the Pr. Commissioner of Income Tax it cannot be said that the assumption of jurisdiction by him is illegal as the Pr. Commissioner of Income Tax is higher in rank and supervising authority of the Range Head.

Explanation 1 to Sec. 263(1)(a) provides that an order passed by the AO shall include the following orders:

- (i) an order of assessment made by the ACIT/DCIT/ITO on the basis of the directions issued by the JCIT u/s 144A;
- (ii) an order made by the JCIT in exercise of the powers or in the performance of the functions of an AO conferred on, or assigned to, him under the orders or directions issued by CBDT or by the Pr. CCIT/CCIT or Pr. DGIT/DGIT or Pr. CIT/CIT authorised by CBDT in this behalf u/s 120;

In view of above, it is apparent that even if an order is passed by an AO with the prior approval of the JCIT, still such an order can be considered for revision u/s 263 provided other requisite stipulations are met. Reliance is also placed on the decision of **Hon'ble Madras High Court** in the case of **CIT v. V.V.A. Shanmugam 236 ITR 878** in which after discussing a large number of judgements it was held as under: -

*"The Gauhati High Court in Tarajan Tea Company Pvt. Ltd. v. CIT [1994] 205 ITR 45 following various decisions held that the order passed by the ITO as per the direction given by the IAC under section 144B of the Act is amenable to the jurisdiction exercised by the Commissioner under section 263 of the Act."*

*In view of that, the Tribunal was not correct in coming to the conclusion that the*

*Commissioner had got no jurisdiction under section 263 to interfere with the order passed by the ITO as per the direction given by the IAC under section 144A."*

Explanation 1(c) to section 263 specifically provide the details of the order/ matter which cannot be subject matter of revision u/s 263 of the Act.

**Hon'ble Karnataka High Court** in the case of **Devas Multimedia Pvt. Ltd. v. PCIT, 111 taxmann.com 494** has held as under: -

*"It is undisputed that Draft Assessment Order was notified by the Assessing Officer in view of the fact that assessee's business involved International Money Transaction. The assessee was entitled to have an opportunity to look into Draft Assessment Order. He had option either to accept or to submit objections on variations. If objections were filed, in such an event, the Assessing Officer is required to forward Draft Assessment Order and objections raised by the assessee before the DRP to examine the objections raised by the assessee. DRP drew proceedings and forwarded to the Assessing Officer. Consequently, Assessing Officer passed the final assessment order. In this background, where assessment order has attained finality and respondent/Principal Commissioner is not permitted to invoke section 263 or not, sub-clause (c) of Explanation 1 of section 263 stipulates that there is a prohibition in respect of a particular circumstance, where respondent/Principal Commissioner shall not invoke section 263 whereas similar Clause is not forth coming in respect of the matter examined by DRP against Draft Assessment Order of the Assessing Officer along with objections of the assessee. Therefore, the contention of the assessee that respondent does not have power to invoke section 263 insofar as examination of final assessment order along with assessee's objection pursuant to the DRP decision, is untenable.*

*No-doubt DRP panel consists of three Commissioners and Principal Commissioner examining or sitting over decision of the DRP may not be appropriate. At the same time, one cannot lose sight off, of a statutory provision like section 263 unless and until section 263 prohibits to examine the final assessment order, pursuant to the DRP decision. One cannot go beyond the statutory provision and so also 'read' or 'add' words by the Courts while interpreting a statutory provision. Time and again, Supreme Court and other Courts have held that in a matter of interpretation of statutory provisions, Court cannot 'add any words or sentence'. Even if there is any ambiguity, at the best Court can read down or struck down such statutory provision. In the present case, reading of section 263, it is crystal clear that there is no bar for the Principal Commissioner to invoke section 263 in order to examine the final assessment order passed by the Assessing Officer pursuant to the DRP decision. [Para 18]"*

In view of the above, I am of the considered opinion that there is no bar for the Pr. Commissioner to invoke the proceedings u/s 263 in respect of an assessment order passed by the Assessing Officer with the prior approval of Joint Commissioner of Income Tax u/s 153D.

6. In respect of ground No. (ii) it was submitted by the assessee that it is well settled if the approval u/s 153D of the Act was granted in a mechanical manner the order of assessment is illegal and void-ab-initio and therefore such an order cannot be a subject matter of revision u/s 263 of the Act.

6.1 I have considered the submission of the assessee and find it devoid of any merit. It is noted that the assessment order was passed accepting the returned income subsequent to the approval by the JCIT u/s 153D of the Act.

6.2 Further in the approval letter the JCIT is not required to record the detailed reasons for according approval. The statute also does not provide for any format for the manner in which approval is to be granted. Reliance is placed on the judgment of the **Hon'ble ITAT Delhi (Special Bench) in the case of Kailash Moudgil v. Deputy Commissioner of Income-tax, [2000] 72 ITD 97 (Delhi) (SB)**, wherein it was held as under:

*"In answer to question No. 2(a), we hold that provisions of section 158BC do not require the Commissioner to record his reasons in writing while approving the order of the Assessing Officer under section 158BG proviso and for that reason, the assessment order passed under section 158BC does not suffer from any infirmity.*

*In answer to question No. 2(b), we hold that the approval of the Commissioner without recording any reasons in writing for approving the order would not render the order of the Assessing Officer void ab initio and would not invalidate the assessment order. Assuming without admitting that some infirmity is there, it is curable under law, since the order of assessment passed under section 158BC is made appealable under section 253(1)(b) of the Income-tax Act in which the assessee is entitled to canvass all the points available to invalidate any part of the assessment and thus the defect, if any, existing previously would be completely cured. (Para No. 31)"*

Although the above judgement has been delivered in context of approval u/s 158BG of the Act but the same would apply with equal force to the approval granted u/s 153D of the Act by the JCIT.

6.3 The facts mentioned in the decisions relied upon by the assessee are quite different from the case of the assessee. The JCIT while examining the matter u/s 153D does not examine or adjudicate upon the rights or obligations of the assessee, but only considers whether the Assessing Officer has fulfilled the requirements of

section 153A. Reliance is placed on the judgment of **Hon'ble Karnataka High Court** in the case of **Rishabhchand Bhansali v. DCIT, 267 ITR 577**, wherein it was held as under:

*"4.2.....thirdly the order passed by the Joint Commissioner granting previous approval under the proviso to section 158BG is in exercise of administrative power on being satisfied that the order of assessment has been made in accordance with the provisions of Chapter XIV-B. The previous approval is purely an internal matter and it does not decide upon any rights of the assessee. The Joint Commissioner, while examining the matter under the proviso to section 158BG does not examine or adjudicate upon the rights or obligations of the assessee, but only considers whether the Assessing Officer has fulfilled the requirements of Chapter XIV-B.*

4.3 In *V.C. Shukla v. State* AIR 1980 SC 962, the Supreme Court gave the following example:

*"In cases where law requires sanction to be given by the appointing authority before a prosecution can be launched against a Government servant, it has never been suggested that the accused must be heard before sanction is accorded. . . ."*

4.4 Where a statute requires the Executive to take an administrative action after being satisfied or after forming an opinion as to the existence of a state of circumstances, the action is based on the subjective satisfaction. It is well-settled that any administrative actions based either on policy or on subjective assessment, if does not prejudicially affect any vested right or interest, need not be preceded by a hearing, unless the statute specifically provides for the same. Therefore, in the absence of any provision for opportunity of hearing in section 158BG, there is no need for the Joint Commissioner to give a hearing to the assessee before granting "previous approval" under section 158BG. The first question is, therefore, answered against the assessee."

In view of the above the submission of the assessee that the JCIT has granted the approval u/s 153D in mechanical manner without application of mind has no meaning as the approval is an administrative action which is required to be based on existence of set of circumstances and on subjective satisfaction. Further, approval u/s 153D being an official act provided under the statute, it is to be presumed that before according approval, the JCIT has looked into the records, applied his mind and he did not find any reason to disapprove the order passed by the Assessing Authority and thereafter he has accorded approval.

6.4 On perusal of the record, it may however, be seen that the AO did not consider the facts and the circumstances in entirety under which the payment of compensation of Rs. 441 crore was made. The AO also failed to consider the

information and documents which were already available on record especially on account of survey u/s 133A of the Act conducted in the case of the assessee on 15.10.2012. The AO also failed to consider various documents found in the computer of Sh. Gaurav Jain at his residence at the time of search u/s 132 of the Act on 21.07.2016 and confront the same to the assessee. These were also not considered during the assessment proceedings and brought to the notice of the JCIT.

6.5 Without prejudice to the above, since the AO and the JCIT both failed to consider the claim made by the assessee in the return of income properly and framed the assessment order mechanically without application of mind itself, makes the assessment order erroneous in so far as it is prejudicial to the interest of the revenue.

7. In respect of ground No. (iv) it was submitted that since the proceedings for original assessment had not been terminated on the date of issue of notice under section 142(1) of the Act on 05.01.2018, such a notice was not a valid notice. The assessee in support of the submission that proceedings in the original return filed on 02.08.2017 had not been terminated, sought to refer to the intimation dated 18.1.2018. In other words, since the proceedings in the original return filed on 02.08.2017 were only closed or terminated on 18.1.2018, notice dated 05.01.2018 under section 142(1) of the Act was an invalid notice and therefore, the return filed in response to such an invalid notice and assessment framed in pursuance to such an invalid return and invalid notice is an invalid assessment and therefore, without jurisdiction.

7.1 I have considered the submission of the assessee. Even if the notice u/s 142(1) issued on 05.01.2018 is taken as invalid notice then also the assessment proceedings will not get vitiated. Admittedly, in this case original return was filed by the assessee on 02.08.2017. As per the guidelines issued by the CBDT the return filed for assessment year relevant to previous year in which authorization for search and seizure was executed u/s 132 of the Act is required to be compulsorily selected for complete scrutiny. As per proviso to section 143(2), no notice under this sub-section shall be served on the assessee after the expiry of six months from the end of financial year in which the return is furnished. Since, in this case original return was filed on 02.08.2017 a notice u/s 143(2) could be issued upto 30.09.2018. In the assessment order it is clearly mentioned that notice u/s 143(2) along with a questionnaire was issued and served on 16.08.2018 which was not disputed by the assessee. In view of the above the jurisdiction to assess the income u/s 143(3) was properly assumed by the AO and the assessment order passed by him on 18.12.2018 is not a vitiated order.

7.2 It was also submitted by the assessee that section 153B(1)(b) does not provide for framing an order of assessment. It merely provides for time limit for

completion of assessment for the assessment year relevant to the previous year in which, search is conducted under section 132 of the Act. In other words, the submission of the assessee is that the order of assessment framed under section 153B(1)(b) of the Act is without jurisdiction as no order of assessment can be framed under section 153B(1)(b) of the Act and even on this ground, said order of assessment is a nullity, which cannot be revised u/s 263 of the Act.

7.3 I have considered the above submission. It may be mentioned that the assessment order in this case was duly framed under section 153B(1)(b) r.w.s. 143(3) of the Act. In the submission the assessee has conveniently ignored the fact that the assessment was framed u/s 143(3) of the Act. Section 153B(1)(b) was mentioned only for the reason that it provides for time limit for completion of assessment for the assessment year relevant to the previous year in which, search is conducted under section 132 of the Act. Further, section 292B provides that no assessment made shall be invalid or deemed to be invalid merely by reason of any mistake, defect or omission in assessment if such assessment is in substance and effect in conformity with or according to the intent and purpose of the Act. In view of the above, the submission of the assessee in this regard is devoid of any merit.

8. In respect of ground No. (v) it was submitted by the assessee that the AO after extensive and complete enquiries accepted the claim that compensation of Rs. 91.33 crore on cancellation of BBA forms part of sale consideration for computation of long-term capital gain on cancellation of agreement for allotment of villas by MIPL. It was submitted that the claim of the assessee that compensation received of Rs. 91.33 crore by the assessee during the FY 2016-17 relevant to AY 2017-18 forms part of sale consideration for computation of long-term capital gain on cancellation of the builder buyer agreement dated 31.03.2010 between assessee and MIPL has been accepted without application of mind is factually incorrect, legally misconceived and therefore unsustainable.

8.1 I have considered the submission of the assessee. In the show cause it was clearly brought out that the AO did not consider the facts and the circumstances in which the payment of compensation of Rs. 441 crore was made and passed the order without application of mind on wrong assumption of facts. The AO failed to consider the information and documents which were already available on record especially on account of survey u/s 133A of the Act conducted in the case of the assessee on 15.10.2012. The AO also failed to consider various documents found in the computer of Sh. Gaurav Jain at his residence during the course of search on 21.07.2016, consider and confront the same to the assessee. In view of the detailed discussion made in the show cause the compensation was required to be taxed as revenue receipts or income u/s 2(24)(i) or benefit or perquisite u/s 2(24)(iv) of the Act as the KMPs were either Directors of MIPL or their relatives. However, the AO

without considering the facts of the case taxed the compensation under the head long-term capital gains and also allowed the benefit of indexation as a result causing huge loss to the revenue. Instead of taxing the entire amount of compensation of Rs. 441 crore @ 30% the AO accepted the returned income in which nominal amount of less than Rs. 40 crore was offered for taxation under the head long-term capital gains at the reduced rate of 20%.

9. In respect of ground No. (vi) and (vii) it was submitted that an arbitral award is final and binding on the parties and persons claiming under them respectively and the business loss consequent to such award should be duly allowed as deduction. It was also submitted that an arbitral award is admissible as evidence in income tax proceedings. The assessee has extensively quoted from the arbitral award.

9.1 I have considered the submission of the assessee. Although, in this case the compensation was paid in accordance with the arbitral award, however, if the facts and circumstances are viewed in entirety, the transaction entered into and the agreements made by the assessee and other KMPs with MIPL were sham and colourable transactions with a view to appropriate the funds of MIPL for their own use and evade the taxes since the company MIPL was controlled by them. These findings are amply borne by the evidence. In view of the above the arbitral award can no longer be accepted on its face value as gospel truth. Reliance is placed on the judgement of Hon'ble Supreme Court in the case of **Madhowji Dharamshi Mfg. Co. Ltd. v. CIT [1970] 78 ITR 62 (SC)** which is reproduced as under: -

*"The assessee-company was a flourishing concern having very huge reserves. On 7-10-1946, the entire share capital of the assessee-company was purchased by a company controlled by 'D' and the then managing agent of the assessee-company resigned their office. Under an agreement dated 29-10-1948, another company 'DCPM' controlled by 'D' was appointed selling agent with effect from 1-11-1948 for 10 years. Thereupon, another company 'V.V.' controlled by 'D' was appointed managing agent of the assessee for twenty years with effect from 1-7-1950, under an agreement dated 26-10-1950. Under the agreements it was stipulated that even the purchaser of the assets of the assessee was bound to continue these companies as selling agents and managing agents. On 27-10-1950, the assessee agreed to sell all its assets and on 31-10-1950, the purchasers took charge of the mills. On 14-2-1951, the DCPM and V.V. called upon the assessee to pay compensation for breach of their agreements, alleging that the assessee had failed to stipulate for their appointment as selling agents and managing agent, respectively, of the purchasers. The assessee agreed to pay compensation for the unexpired portion of the agency agreements. On 31-3-1951, a portion of the amounts was actually paid. On 31-12-1951, it was resolved to wind up the assessee. The liquidators of the company disputed the validity agreements for payment of compensation. **The dispute was***

*referred to arbitration and the arbitrators made awards to the effect that there was a breach of contract by the assessee and that the selling agents and the managing agents were entitled to compensation and that all the settlements were valid and binding between the parties. A decree was obtained from the High Court of on 16-4-1953, confirming the awards made by the arbitrators. In the assessment proceedings, the assessee claimed allowance of compensation. The ITO rejected the claim and the AAC confirmed the order of the ITO. On a review of the facts, the Tribunal reached the conclusion that the transactions entered into and the agreements made by the assessee with the selling agents and the managing agent and the resolutions passed were all sham and colourable transactions with a view to appropriate the funds of a flourishing concern to their own use by those who controlled the assessee-company and the managing agents and selling agents. The Tribunal, therefore, dismissed the assessee's appeal. The High Court refused to call statement of the case.*

*On appeal to the Supreme Court:*

*The finding of the Tribunal was amply borne out by the evidence. The High Court was, therefore, right in refusing to call for a statement of the case."*

9.2 On perusal of the arbitral award it may be noted that the following facts were neither considered nor brought on the record during the arbitration proceedings: -

a. In the Builder Buyer Agreement ('BBA') it is printed that third license was granted on 06.05.2010 whereas it was claimed to be entered into on 31.03.2010. It conclusively proves that the BBA was signed after 06.05.2010 but the date was manipulated as 31.03.2010.

b. On perusal of para 3(c) to 3(d) of showcase it may be noted that the villas were booked at artificially high circle rates and while awarding the compensation the booking rates of M3M Golf Estate Project during various years and the circle rates for the purpose of payment of stamp duty which were available in public domain were not considered.

c. In the BBA there is no provision of payment of any compensation by MIPL and Manglam to the allottees.

d. The construction of villas at the given location was neither approved by the competent of authority nor undertaken. Subsequently, the location of villas was arbitrarily changed to a place marked as K-Block. K-Block which consisted of four towers having basement, stilt and six floors hardly resembled the villas in terms of their areas and structure. This fact was not brought on record during the arbitration proceeding. Further, the KMPs and MIPL had failed to make any submission as

regards to the status of these towers and the stage of their construction at the time of arbitration proceedings.

e. The construction of the K-Block was allegedly stayed by an order passed in the case of Dulichand v. Manglam on 04.09.2012. MIPL was not a party to it. The KMPs of M3M group were forced to surrender the claim of exemption of about Rs. 541 crore u/s 54F of the Act during the AY 2013-14 as a result of survey u/s 133A conducted by the department in the case of M3M group on 15.10.2012. But still none of the KMPs ever claimed a refund of the booking amount from MIPL.

f. No effort was made by MIPL and Manglam to get the stay vacated despite a meagre amount of Rs. 6 lakh being involved in the injunction.

g. During the arbitration proceedings the fact that the construction of project M3M Golf Estate was in full swing and total cost incurred in respect of the project was Rs. 1506 crore and total value of area sold was worth Rs. 2176 crore was never considered.

h. MIPL first time made and offered profit under PoCM in respect of the project M3M Golf Estate during the FY 2016-17 relevant to AY 2017-18. To evade the payment of taxes, MIPL and their KMPs filed the applications for arbitration claiming compensation on 17.01.2017 and order of arbitration award was passed on 17.03.2017 awarding huge compensation of Rs. 441 crore by MIPL to the KMPs. MIPL thereby reduced its profit by Rs. 441 crore on which it was liable to pay tax @ 30%.

i. The submission of the assessee that the conclusion of arbitration proceedings within a period of two months and not seeking cross examination or allowing cross examination are irrelevant consideration has no merit as the impugned transaction was between the interested parties which is not at the arm's length.

j. The submission of the assessee that Manglam was a confirming party to the agreement and hence not required to be party to the arbitration proceedings has no sound basis. From perusal of the BBA it may be noticed that the land on which the project M3M Golf Estate was being constructed is owned by Manglam and the basis of grant of the arbitral award is the order passed in the case of Dulichand v. Manglam.

k. During the arbitration proceedings the fact that no such compensation was ever paid to any of the allottees by MIPL was never considered.

l. The submission of the assessee that the claim of exemption u/s 54F was duly allowed in AY 2010-11 which has attained finality is again far from truth. As

discussed earlier the exemption claimed u/s 54F was surrendered by the assessee in AY 2013-14 as the construction of villas was not completed and the assessee could not comply with the provisions of section 54F of the Act.

m. The arbitral award is based on the report dated 28.02.2017 of M/s Grant Thornton India LLP. MIPL is a regular client of M/s Grant Thornton India LLP who is providing consultancy on regular basis to MIPL. Hence the report submitted by it cannot be considered impartial and independent.

n. The submission of the assessee that the booking rates of the project M3M Golf Estate cannot be determinative for the payment of compensation is again absurd and without any substance. The assessee admitted the fact that the booking rate of the project M3M Golf Estate has remained constant over the period of six years and varied between Rs. 6,000/- to Rs. 12,500/- per sq.ft. Further, it is strange to note that the villas were booked at astronomically high rate of Rs. 16,000/- to Rs. 19,000/- per sq.ft. whereas, admittedly the circle rate of the area in which the project M3M Golf Estate is located was Rs. 2,500/- per sq.yd. equal to Rs.277 per sq.ft. (para 9 of the Award dated 16.03.2017). Hence, the cost of land for the villa having larger area works out to approx. 5664.68 sq.m. \* 1.196 \* Rs. 2,500 = Rs. 1,69,37,393/- only. Further, as per the revised rate applicable w.e.f. 11.10.2010 the circle rate of multistoried residential group housing societies in similar location varied between Rs. 3,250/- to Rs. 4,000/- per sq.ft. only. The circle rate was further revised w.e.f. 01.04.2015 and the revised rate also varied between Rs. 2,600 to Rs. 5,000 per sq.ft. The present circle rate in the area is also Rs. 5,500/- per sq.ft. It clearly demonstrates that the villas were booked at artificial high circle rates with the purpose to claim the deduction u/s 54F of the Act and not to pay the tax in respect of the long-term capital gains which accrued to the KMPs on account of sale of shares. Further, the payment of compensation has no co-relation with the booking rates of the project M3M Golf Estate or the prevalent circle rates.

o. The linking of compensation with the indexed cost in the arbitral award ensured that there is no payment of tax in terms of computation u/s 48 of the Act because the sale consideration would get offset by the indexed cost. Over and above the indexed cost, an amount of Rs. 40 crore was given as compensation on which the KMPs paid tax under the head Long-term Capital Gains @ 20%. The compensation awarded is not on the basis of market rate/ booking rate of the project. As discussed earlier, no such compensation was ever paid by MIPL to any other allottee of the project. The KMPs over the period of time never asked MIPL to return back the booking amount which even after award of compensation was with the MIPL and was not refunded back. As discussed earlier the application for compensation was filed during the fag end of FY 2016-17 with the sole intention to reduce the taxability of MIPL as the assessee was required to pay tax in respect of the project

M3M Golf Estate for the first time under the PoCM.

10. In ground No. (viii) it was submitted by the assessee that the documents and information which were already available on record especially on account of survey conducted on 15.10.2012 u/s 133A of the Act in the case of assessee are not record and cannot be relied upon for initiating the proceedings u/s 263 of the Act.

In ground No. (ix) it was submitted that material seized from the residence of Sh. Gaurav Jain, Ex VP Finance on 21.07.2016 cannot be relied upon and made a basis to reject the claim that compensation so received is not a part of the sale consideration.

In ground No. (x) the assessee has dealt with various allegations and adverse observations in the show cause notice and submitted that these are factually incorrect, legally misconceived and wholly untenable. These grounds are being dealt with in the subsequent paragraphs.

10.1 The meaning of record is given in clause (b) of Explanation 1 to section 263 of the Act, which includes all records relating to any proceedings under this Act available at the time of examination by the Principal Commissioner or Commissioner. The word 'record' used in section 263 has wide connotation as held in the following judgments:

(i) **CIT v. Shree Manjunatheswar Packing Products & Comphor Works [1998] 96 Taxman 1 (SC)**

(ii) **CIT v. Arunaben Sumankumar [2002] 124 Taxman 57 (Guj.)**

In the case of **Shree Manjunatheswar Packing Products & Comphor Works (supra)** Hon'ble Supreme Court while explaining the meaning of 'record' for the purpose of section 263 has held as under: -

*"It could not be said that the correct and settled legal position, with respect to the meaning of the word 'record' till 1-6-1988, was that it meant the record which was available to the Assessing Officer at the time of passing of the assessment order. Further, such a narrow interpretation of the word 'record' was not justified, in view of the object of the provision and the nature and scope of the power conferred upon the Commissioner. The revisional power conferred on the Commissioner under section 263 is of wide amplitude. It enables the Commissioner to call for and examine the record of any proceeding under the Act. It empowers the Commissioner to make or cause to be made such enquiry as he deems necessary in order to find out if any order passed by the Assessing Officer is erroneous insofar as it is prejudicial to the interests of the revenue. After examining the record and after making or causing to*

*be made an enquiry if he considers the order to be erroneous then he can pass the order thereon as the circumstances of the case justify. Obviously, as a result of the enquiry he may come in possession of new material and he would be entitled to take that new material into account. If the material, which was not available to the Assessing Officer when he made the assessment could, thus, be taken into consideration by the Commissioner after holding an enquiry, there is no reason why the material which had already come on record though subsequently to the making of the assessment cannot be taken into consideration by him. Moreover, in view of the clear words used in clause (b) of the Explanation to section 263(1), it has to be held that while calling for and examining the record of any proceeding under section 263(1) it is and it was open to the Commissioner not only to consider the record of that proceeding but also the record relating to that proceeding available to him at the time of examination. Therefore, in the instant case, it was open to the Commissioner to take into consideration all the records available at the time of examination by him and, thus, to consider the valuation report submitted by the DVO subsequent to the passing of the assessment order and so, the order passed by him was legal."*

**Hon'ble Gujarat High Court in the case of Arunaben Sumankumar (supra)** has held as under:

*"There is nothing in the provisions of the Act, particularly in section 263, which would require the High Court to accept the narrow view which appealed to the Tribunal that the record must be of the assessee concerned and that the Commissioner had no power, jurisdiction and authority to take action under section 263 in the case of the assessee on the basis of the records in the case of other persons."*

In view of the above, the submission of the assessee that while initiating the proceedings u/s 263 the Commissioner should rely only on the record which is available in the assessment folder has no substance. The Commissioner has authority to take action u/s 263 in the case of the assessee on the basis of the records in the case of other persons. It is well within the jurisdiction of the Commissioner to base his findings on various statements recorded and documents/evidences collected during the search and survey conducted by the department and also during the post-search proceedings. In this case if all the evidences available on record are considered properly then there is no doubt that the impugned transaction was used as a mere ruse for tax evasion or to circumvent tax obligations.

10.2 In respect of the documents found in the computer of Sh. Gaurav Jain, Ex VP Finance of M3M group it was merely submitted that these are factually incorrect and have no relevance and has nothing to do with the allegations made in the impugned notice. These documents containing 94 pages which are basically power point presentations and e-mail exchanges were enclosed as annexure containing 94 pages

with the show cause. These documents indicate various steps and consultative processes adopted by M3M group to make the transactions look like real to escape liability for the tax.

10.3 In this regard, it is important to note the content of two e-mails which are at Sr.No. 5 and 7 of the annexure. On page No. 35 of the annexure which is an e-mail dated 30.11.2011 it is clearly mentioned that the **search has taken place in the case of the M3M group on 30.06.2011 (This reference is of an earlier search u/s 132 which was carried out in the case of M3M group on 30.06.2011)** and in the appraisal report, the ADIT (Inv.) directed the Assessing Officer to monitor the date of completion of villas. It is also mentioned that section 54F allows a period of three years for construction of residential property, the time limit available for such construction would be 14.10.2012, i.e. the issue should be examined in the assessment for the FY 2012-13 relevant to AY 2013-14. It is interesting to read issue No. 3 on page 36 which mentioned that **conditions prescribed u/s 54F are violated when no construction takes place before 14.10.2012. In that case, the AO can hold that non-compliance to section 54F took place in the year capital gain arose, then there would be liability to pay interest, besides running the risk of penalty and prosecution.** The second part of discussion in issue No. 3 is more interesting which says that **if investment is made and part construction takes place before some stay is granted by a court of law or an environment or other statutory authority, which legally stops the construction of villas, the adherence to time limit would be beyond the control of either the assessee or the company or the contractor executing the project.**

However, in such case, since section 54F does not provide for any exceptional circumstance which can extend the prescribed time limit, CBDT will have to be approached u/s 119(2)(b) on the ground that 'genuine hardship' shall be caused to the assessee if the prescribed time limit is not extended. Option 4 of the e-mail which is on page No. 38 also discusses the similar issue under the head 'postpone tax liability indefinitely'

10.4 The second e-mail at Sr.No. 7 of the annexure which is written by Sh. Malay Chaturvedi is also very interesting especially the issue No. 3 on page No. 44, Option 4 'Postpone tax liability indefinitely till stay is operative' and Option 6 'Completing part of each flat in K tower as villas'. Option 6 clearly mentions that the promoters may request the company to switch the allotment of their villas to K-Tower which has four vertical villas adjacent to each other in the same complex with four separate lifts comprising of six storeys with a total area of 32,000 sq. ft. This complex is under construction and the structure is ready. Necessary modifications to increase area and nature of construction for independent villa can be carried out.

It is also mentioned that once issues relating to switch over are attended, and stay is granted by a court of law or any authority, there could be a case for claiming refund of investment by the promoters from the investee company. After the amount is refunded by the company, the deduction claimed can be surrendered by promoters by getting the refunded amount taxed in the relevant AY of its receipt (i.e. AY 2013-14) on the strength of the case of *Ranjit Narang v. CIT (Supra)* by showing it in the return of income. Though tax will have to be paid by the individual promoters, this will reduce corresponding liability of receiving the amount as sale proceeds in case of the Company. Since the taxability will arise in the third year, i.e. A.Y. 2013-14 interest on promoters may not be chargeable. In such case, tax can be paid after the period prescribed for construction (14.10.2012) gets over, i.e., in December 2012 and March 2013 instalment of advance tax. In case, capital gains are paid late, say, by way of self-assessment tax, interest will have to be paid for the delay.

10.5 It may be noted that the department conducted a survey u/s 133A on 15.10.2012 i.e. next day of expiry of time limit for completion of construction of villas for claiming exemption u/s 54F. In the survey it was found that there is no construction of villas at the original location. In accordance with the tax planning as mentioned in the e-mails, it was claimed that the location of villas was shifted to K-Block which consisted of four towers having basement, stilt, six floors which nowhere resembled the villas in design and structure. It was also claimed that the construction of K-Block was allegedly stopped because of an injunction order dated 04.09.2012 passed in the case of *Dulichand v. Manglam* wherein status quo order was passed with regard to land upon which these four towers were being developed. Subsequently, the claim for deduction u/s 54F was surrendered by the KMPs and offered for taxation in the returns filed for AY 2013-14.

10.6 The discussion made in these e-mails amply indicate that the apparent was not real and the entire planning was done with the intent to evade the taxes - firstly the tax payment in the AY 2010-11 on capital gains accrued on 14.10.2009 in respect of sale consideration of Rs. 541 crore received on account of sale of shares was avoided by claiming exemption u/s 54F on account of investment in villas. These villas were never constructed. Earlier search u/s 132 was conducted in the case of M3M group on 30.06.2011 and since they apprehended that the AO may monitor the date of completion of villas which was to be constructed by 14.10.2012, the KMPs and officials of M3M group planned to shift the location of villas to four towers of K-Block with hardly any construction and resemblance to villas in structure and design. Further, injunction was allegedly obtained on 04.09.2012 in respect of the project to avoid taxability of the claim of deduction u/s 54F in AY 2010-11 and entire amount was offered for taxation in the returns filed for AY 2013-14. The entire planning was done to evade payment of taxes along with interest and avoid the penalty and

prosecution had the amount of claim of deduction u/s 54F was taxed in AY 2010-11.

10.7 It is interesting to note the second part of planning which is apparent from various power point presentations. The KMPs of M3M group did not make any effort to claim the refund of booking amount of Rs. 541 crore despite the construction of K-Block which is part of the project M3M Golf Estate allegedly stayed by the injunction in FY 2012-13. The booking amount remained with MIPL and when taxability under PoCM of the project M3M Golf Estate arose in AY 2017-18 the applications for arbitration for award of compensation was filed in the month of January, 2017 and huge compensation of Rs. 441 crore was awarded to the four KMPs in the month of March, 2017. The payment of compensation was linked with the indexed cost meaning thereby that there is no payment of tax in terms of computation u/s 48 of the Act because the sale consideration would get offset by the indexed cost. Over and above the indexed cost, an amount of Rs. 40 crore was given as compensation on which the KMPs paid tax of about Rs. 8 crore under the head Long-term Capital Gain @ 20%. It may be noted that the entire compensation of Rs. 441 crore was debited as direct expenses in the Profit and Loss account of MIPL reducing the profit by the said amount evading the payment of taxes by more than Rs. 130 crore. No such compensation was ever paid by MIPL to any of its allottees. On perusal of the power point presentations, it may be noticed that the entire scheme/strategy of payment of compensation was designed and worked out by the officials of MIPL which was allegedly made liable for payment of compensation on account of arbitral award. On perusal of problem statement/ proposal on page No. 3 and 4 of annexure it may be seen that the issue of invoking/triggering tax liability on MIPL under PoCM through villa construction was duly dealt with therein. Accordingly, it was decided by MIPL that the KMPs would be provided with a refund of a booking amount plus compensation. The working of compensation is on page No. 7 of annexure. It is also mentioned that compensation would be tax deductible in the hands of MIPL and compensation shall be taxable in the hands of the investor as Long-term Capital Gain. On page no. 12 of the annexure, it is mentioned that there is a risk that the tax department will contend that this is only a sham and tax planning devise. It is also mentioned that manner of arriving at the compensation needs to be planned to negotiate the facts that the investors are related parties and there is no specific clause in the BBA dealing with the scenario. It demonstrates that the officials of MIPL were aware that in the BBA there is no specific clause for payment of compensation which was never considered during the arbitration proceedings. On page No. 15 of annexure, it is mentioned that the amount of compensation may be taxed u/s 2(24)(i)/(iv) since investors are directors/ related parties. It is also mentioned that attempt should be made to demonstrate zeal to complete the project and documentation to be prepared to demonstrate the payment of high compensation being paid to the individual investors. In fact, as mentioned on page No. 28 of the

annexure, the documentation for claim of compensation by the investor and evaluation/ documentation on part of MIL to rebut/ modify and accept the claim was also prepared by the officials of MIPL. On page No. 32 of annexure, it is mentioned that to justify the compensation paid by MIPL the information such as compensation claims paid to other investors, assured returns provided under various schemes and projects to customers and escalation in market rate of project from date of investment to date of paying compensation will be documented. However, on perusal of arbitral award it may be noted that no such submission was made during the arbitration proceedings implying that the reliance on such information did not justify the payment of huge compensation and would have gone against the company MIPL.

10.8 From perusal of briefs for opinion, it is noted that the various options were explored - to make payment of compensation part in cash and part in the form of debenture. Second option explored was allotment of rights in residential units in lieu of the rights in the residential villas or provide refund for the liquidation of first rights. In one of the briefs for opinion at para 4.14 and 4.15/ page No. 61 the matters relating to tax avoidance and penalty imposition and applicability of domestic transfer pricing have also been discussed. On page No. 63 the issue whether the compensation should be through arbitration or direct is also mentioned in the opinion.

10.9 From perusal of the details it is noted that the entire scheme was planned in 2011 onwards and implemented subsequently. Sh. Gaurav Jain left M3M group in March, 2015 after working for five and half years. In view of the above, the submission of the assessee that these documents have no relevance and nothing to do with the allegations made in the showcause notice is devoid of any merit.

10.10 In para 20 the assessee has submitted the reply to various allegations and adverse observations in the show cause. These submissions are dealt with in the following paragraphs.

a. It is submitted that the license for M/s M3M Golf Estate has been granted in phased manner and thus mere fact the small portion of the area was sanctioned on 06.05.2010 does not in any manner be a basis to draw adverse inference. The assessee has not submitted any reply to the fact as to how a BBA can be signed on 31.03.2010 in which the date of third license granted on 06.05.2010 is printed.

b. The submission of the assessee that the booking rates of MIPL cannot be determinative for the payment of compensation is absurd. In fact, as per the power point presentation discussed above, information such as compensation claims paid to other investors, assured returns provided under various schemes and projects to customers and escalation in market rate of project from date of investment to date of paying compensation were to be documented as these are relevant factors. It may be

seen that over the period of six years there was no substantial increase in the booking rate of the project M3M Golf Estate. Further, no such compensation was paid to any other investor. These facts were conveniently ignored as these did not fit to the scheme of tax evasion.

c. It was submitted that the claim of the exemption u/s 54F was allowed in AY 2010-11 which attained finality hence no adverse view should be taken. The assessee failed to mention the fact that the claim of deduction u/s 54F was not found in accordance with the provisions of the Act and the amount was surrendered for taxation in AY 2013-14.

d. It was submitted that the arbitration award entitlement of compensation has been completely dealt by the sole arbitrator and therefore adverse observation is without jurisdiction and not tenable. In any case to grant compensation or not was only in the realm of the sole arbitrator. The only issue which remained is taxability of the compensation and the same was before the Assessing Officer. The considerations which weighed with sole arbitrator cannot be judged or re-judged or even commented in the instant proceedings. It was submitted that the observations made in the show cause are without jurisdiction.

In my opinion to counter the above, it is important to reiterate the observations in the judgement of **Hon'ble Supreme Court** in the case of **Madhowji Dharamshi Mfg. Co. Ltd. v. CIT [1970] 78 ITR 62 (SC)**. The facts are that in this case the dispute was referred to arbitration and the arbitrators made awards to the effect that there was a breach of contract by the assessee and that the selling agents and the managing agents were entitled to compensation and that all the settlements were valid and binding between the parties and a decree was obtained from the High Court confirming the awards made by the arbitrators. Despite that Hon'ble Tribunal reached the conclusion that the transactions entered into and the agreements made by the assessee with the selling agents and the managing agent and the resolutions passed were all sham and colourable transactions with a view to appropriate the funds of a flourishing concern to their own use by those who controlled the assessee-company and the managing agents and selling agents and Hon'ble High Court and Supreme Court both affirmed the findings of the Hon'ble Tribunal.

In view of the above, the nature of transactions entered into, the agreements made by the assessee with MIPL, award of compensation in arbitration proceedings and its taxability can be examined by the Income-tax authority considering the relationship between KMPs and MIPL and the surrounding circumstances. Further, there are a number of facts which were not brought on record during the arbitration proceedings as the transaction was between the related parties.

e. It was submitted by the assessee that perusal of the BBA would show that Manglam was a confirming party to the agreement and not required to be party to the arbitration proceedings. The claim was between the claimants i.e. the assessee, family members and the respondent company namely MIPL. It is well settled law that all authorities who are to implement an order or judicially enforce an award should not attribute motives to the parties post the award, except to the extent stated in the award. In this regard, it is worth noting that Manglam is not only a confirming party but also owns the land on which the project M3M Golf Estate was constructed. Further, allegedly the construction of K-Block towers which were termed as villas was stopped because of injunction granted in the case of Dulichand v. Manglam. Hence, the submission of the assessee that Manglam was merely a confirming party has no legs to stand as it was very much an interested party affected by the award of compensation.

f. It was also submitted by the assessee that since the assessments for AYS 2010-11 and 2013-14 were accepted and attained finality, hence, the observations made in paras 5.1 to 5.10 of the showcause notice do not require any comment. In my considered opinion and as stated in the show cause notice the entire scheme to evade the tax was planned systematically and implemented subsequently. Hence, it is important to consider the facts of the case and transactions resulting into payment of compensation in the proper perspective.

11. As regards the issue in ground No. (xi) that the payment of compensation of Rs. 441 crore as expenses is nothing but a colorable device to reduce the profit and diversion of income by MIPL the assessee made a very lengthy submission in para No. 21 which are mostly reproduction of various judgements on the subject.

11.1 In this regard it is submitted that there is no doubt that the said transaction is colourable or artificial devise adopted by the assessee to evade the taxes. The transaction is neither legitimate nor bonafide nor undertaken in the ordinary course of business. Such colourable devises cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by dubious methods. revenue authorities are also supposed to consider the surrounding circumstances and apply the test of human probability. In the present case also, in spite of being an apparent transaction, the same cannot be termed as "Real" in view of the surrounding circumstances of this case. Reliance is placed on the following judgements:

**McDowell and Co. Ltd. v. CTO [1985] 154 ITR 148 (SC)**

**Sumati Dayal v. CIT [1995] 214 ITR 801 (SC)**

In the case of **Longanathan (K.R.) v. UOI [1988] 174 ITR 645, the Hon'ble Madras**

**High Court** has observed as under:

*"As pointed out by the Supreme Court in McDowell the proper way to construe a taxing statute, while considering a device to avoid tax, is not to ask whether the provisions should be construed literally or liberally nor whether the transaction is not unreal and not prohibited by the statute, but whether the transaction is a device to avoid tax and whether the transaction is such that the judicial process may accord its approval to it. It is neither fair nor desirable to expect the Legislature to intervene and take care of every device and scheme to avoid taxation. It is up to the court to take stock to determine the nature of the new and sophisticated legal devices to avoid tax and to expose the devices for what they really are and to refuse to give judicial benediction.*

*I am convinced that the execution of the three separate deeds of sale is a legal device adopted by the vendors and the vendees in collusion to escape liability for the tax."*

Similarly, in the case of **Nayantara G. Agarwal v. CIT [1994] 207 ITR 639**, the **Hon'ble Bombay High Court** has observed as under:

*"The courts in such a case should not lay undue emphasis on the language of each individual document as that is not determinative of the controversy. What is really necessary to be considered in such cases is the true nature and effect of the transaction. If on such a consideration, the court arrives at a finding that the true nature is "transfer of land" and the various steps originating from the affidavit and formation of partnership and culminating into dissolution of the same, in the process leaving the land with the company, are nothing but a device to avoid capital gains tax leviable under section 45 of the Act on transfer of the land to the company, such a device cannot get the seal of approval of this court. In the light of the foregoing discussion, we hold that the firm was not genuine."*

In the case of **CIT v. Durga Prasad More [1972] 82 ITR 540 (SC)**, the **Hon'ble Apex Court** has observed as under:

*"It is true that an apparent must be considered real until it is shown that there are reasons to believe that the apparent is not the real. In a case of the present kind a party who relies on a recital in a deed has to establish the truth of those recitals otherwise it will be very easy to make self-serving statements in documents either executed or taken by a party and rely on those recitals. If all that an assessee who wants to evade tax is to have some recitals made in a document either executed by him or executed in his favour then the door will be left wide open to evade tax. A little probing was sufficient in the present case to show that the apparent was not the real. The taxing authorities were not required to put on blinkers while looking at the*

*documents produced before them. They were entitled to look into the surrounding circumstances to find out the reality of the recitals made in those documents."*

Hon'ble Supreme Court in the case of **Vodafone International Holdings B.V. v. Union of India [2012] 204 Taxman 408 (SC)** has made it very clear that a colourable device cannot be a part of tax planning. Therefore, where a transaction is sham and not genuine as in the instant case then it cannot be considered to be a part of tax planning or legitimate avoidance of tax liability. Since, in this case the transaction has been used as a mere ruse for tax evasion or to circumvent tax obligations, it is necessary to lift the veil from the transaction.

12. The issues relating to the taxability of the compensation as revenue receipts or income u/s 2(24)(i) or benefit or perquisite u/s 2(24)(iv) has been dealt in ground Nos. (xii) and (xiii) by the assessee.

12.1 It was submitted that the compensation was rightly offered for taxation under section 2(24)(vi) of the Act which reads as 'any capital gains chargeable under section 45'. Regarding taxability of compensation as benefit or perquisite u/s 2(24)(iv) of the Act it was submitted that there is no valid basis for such a wild assertion. Relationship of director and company does not mean that any and every 'receipt' represent benefit or perquisite. It was submitted that section 2(24) defines 'income' and sub-clause (i) thereof reads 'profits and gains' but the same is inapplicable. Further, since the receipt in the instant case falls under the head capital gains and heads of income are mutually exclusive, such a receipt cannot now be changed under any other head. In any case entering into agreements for allotment of villas is not the business of assessee and thus compensation for cancellation of such agreement is not business.

12.2 I have considered the submission of the assessee. In the case of **Juggilal Kamlatpat v. CIT [1969] 73 ITR 702 Hon'ble Supreme Court** held as under: -

*"In the instant case the Appellate Tribunal had found that the transaction of termination of the managing agency was a colourable transaction and the real purpose was to hand the amount to the assessee-firm. It was also found that the payment was collusive and the partners of the firm continued to run and enjoy the benefit of managing agency as shareholders and directors of the newly formed company by reason of their holding a majority of shares in that company. It was also held by the Appellate Tribunal that the reason for terminating the managing agency was not a true reason but was merely a fake one and the whole transaction was a hoax for the purpose of evading income-tax. In other words, it was a collusive device practiced by the managed company and the assessee-firm for the purpose of evading income-tax both in the hands of the payer and of the payee. The Appellate*

Tribunal also found that there was only a change of personnel in the managing agency and not a change in office and that the assessee had no right of compensation for any loss of office. In a matter of this description, it was well established that the income-tax authorities are entitled to pierce the veil of corporate entity and look at the reality of the transaction. It is true that from juristic point of view the company is a legal personality entirely distinct from its members and the company is capable of enjoying rights and being subjected to duties which are not the same as those enjoyed or borne by its members. But in certain exceptional cases the court is entitled to lift the veil of corporate entity and to pay regard to the economic realities behind the legal façade.

On the facts found in the instant case, it was manifest that the managing agency business carried on by the assessee-firm was not destroyed or lost to the four individual partners who constituted the assessee-firm. What happened was that the individuals who constituted the assessee-firm became the directors of the newly formed company, namely, JKCC, and in this new capacity they undertook the conduct of the managing agency business and as shareholders continued to benefit from the profits of that business flowing to them in the shape of dividend instead of as a share of profits from the assessee-firm. In other words, the managing agency asset was enjoyed by the four individual partners in a different capacity with the same object of profit-making. There was, therefore, no destruction of the apparatus of the profit-making asset, i.e., the managing agency contract. The Appellate Tribunal had found that the amount was received by the assessee-firm "by virtue of its office" and "related to the work of the managing agency" even though the termination of contract was not genuine and the payment was collusive and the managing agency business of the assessee-firm was exploited for gaining that amount. It was obvious that there was an intimate connection in this case between the managing agency business of the assessee-firm and the payment of was, therefore, proper material before the Appellate Tribunal in support of its finding that the receipt by the assessee-firm was a receipt in the course of its managing agency business and was hence a revenue receipt.

For the reasons expressed, it was held that the judgment of the High Court, was correct and these appeals was to be dismissed."

Similarly, in the case of **K. Ramasamy v. CIT [2003] 261 ITR 358 Hon'ble Madras High Court** has held as under: -

"The Supreme Court in the case of *Juggilal Kamlapat v. CIT [1969] 73 ITR 702* held that in cases where the same persons entered into transactions though by introducing a corporate personality into some of those transactions, the income-tax authorities are entitled to pierce the veil of the corporate personality and look at the

reality of the transactions. [Para 8]

*In the instant case, despite the formation of the company and the agreement, the persons who ran the business in reality were the same. Instead of running the business of the hotels as partners of the firm, those same persons controlled and directed the hotel business as shareholders and directors of the company. The participation of the brothers in the running of the hotel business continued even after the formation of the company. The position of the brothers, therefore, did not change in substance after the company was formed and the company was given a right to run the business. [Para 5]*

*Having regard to the totality of the circumstances, piercing the veil of the company was a permissible exercise which the Tribunal undertook. It is well-settled that the formation of a company and its registration does not preclude the lifting of the veil, particularly, where matters of taxation are concerned, if the circumstances of the case so warrant. The finding that the payment made by the company to the brothers was in the nature of the revenue receipt in their hands, would not negate the separate juristic existence of the company. The company continued to remain a legal entity with a right to hold property, to contract, etc. The true character of the payment made by it to the brothers who were shareholders and directors and who, as partners of the firm, owned the buildings and the equipment used by the company for running the hotel, had to be judged by looking at the reality after removing or piercing the veil of the company. The purpose of the deed of compensation in reality was only to screen the payment made under that deed from liability to income-tax in the hands of the assesseees. Therefore, the Tribunal was right in law in holding that the compensation received by the assesseees from the company during the previous year constituted a revenue receipt assessable as income of the assesseees. [Paras 6, 7]"*

The payments made by MIPL to the KMPs are in the nature of the revenue receipts in their hands. The true character of payments made by MIPL to the assesseees who were shareholders, directors, key management personnel and their relatives has to be judged by looking at the reality after removing or piercing the veil of the company MIPL. The purpose of payment of compensation was only to evade the liability to income tax in the hands of the assesseees. In view of the above, the payment of compensation to the KMPs is required to be taxed as revenue receipts at normal rate and not under the head Long-term Capital Gains as offered by them in the returns of income.

12.3 The compensation paid to the assessee can also be taxed under the section 2(24)(iv) as value of any benefit obtained from the company MIPL either by a director or by a person who has a substantial interest in the company, or by a relative of a director or such person. Reliance is placed on the judgement of **Hon'ble Bombay**

**High Court in the case of CIT v. Shri Ramnath A. Porlar [1978] 112 ITR 436,** analyzing section 2(24)(iv) of the Income Tax Act, 1961, made the following pertinent observations:

*"Section 2(24) (iv) of the Income-tax Act, 1961, merely defines the expression 'income'. The value of any benefit or perquisite received by any of the persons falling within the four categories mentioned therein would become the income of such person; in other words, if the benefit or perquisite is received by a director it will be the income of the director, if the benefit or perquisite is received by a person who is substantially interested in the company it will be the income of such person having substantial interest in the company; if the same is received by a relative of the director or if the same is received by a relative of such person having substantial interest in the company, it will be the income of the relative of the director or of such person having a substantial interest in the company. There is no warrant for treating the value of any benefit or perquisite received by the director's relative or the relative of a person having a substantial interest in the company as the income of the director or of such person having substantial interest in the company, unless there is some legal fiction or a deeming provision by which the value of such benefit or perquisite received by a relative of the director or by a relative of a person having a substantial interest in the company is to be regarded as the income of the director or of such person having a substantial interest in the company."*

12.4 Considering the true nature of transaction, it is evident that the entire transaction was sham with the intention to evade the taxes. Alternatively, the compensation paid can be taxed as interest under the head Income from other sources as cost of fund given by the KMPs to MIPL in view of the provisions section 2(28A) of the Act.

13. In respect of ground No. (xiv) it was submitted by the assessee that compensation paid by MIPL to the assessee is capital receipt not exigible to tax.

13.1 In this regard, it is submitted that firstly such submission is beyond the scope of proceedings u/s 263 of the Act. Secondly, the assessee had offered it for taxation under the head capital gains in the return which cannot be held as non-taxable in the proceedings u/s 263 of the Act. Thirdly, the evidences available indicate that the transaction is sham and colourful and entered into with the aim to evade the taxes and hence such compensation is taxable in the hands of the assessee as revenue receipts. Notwithstanding the above, had these transactions been genuine then also such compensation is taxable under the head capital gains. Reliance is placed on the following judgements: -

a. **Jagdish Chander Malhotra v. ITO [1998] 64 ITD 251 (Delhi).**

- b. **Mukesh Sohanraj Vardhan v. ITO** ITA No. 4255/Mum/2018 AY 2012-13 dated 28.08.2020.
- c. **Geetika Rasik Shah v. ACIT** ITA No. 4202/Mum/2015 AY 2006-07 dated 01.09.2017.
- d. **CIT v. Vijay Flexible Container (1990)** 186 ITR 693 (Bom).
- e. **K. R. Srinath v. ACIT (2004)** 268 ITR 436 (Mad).

In view of the above, the submission of the assessee in this respect is devoid of merit.

14. In respect of ground No. (xv) it was submitted by the assessee that once the AO on examination of facts on record and after making all possible enquiries had accepted the claim of the assessee, then such an order of assessment cannot be alleged as erroneous and prejudicial to the interest of Revenue. Further in a case, where two views are possible and the AO has taken a view with which PCIT does not agree, the said order cannot be treated as an erroneous order prejudicial to the interests of the revenue unless the view taken by the Assessing Officer is unsustainable in law.

14.1 I have considered the submission of the assessee. The AO passed the order on wrong assumption of facts and without application of mind which makes the order erroneous in so far as it is prejudicial to the interest of revenue. The AO failed to view the entire transaction in proper perspective as admittedly he failed to consider the information and documents which were already available on record especially on account of survey u/s 133A conducted in the case of the assessee on 15.10.2012 and also various documents found in the computer of Sh. Gaurav Jain, Ex VP Finance of M3M group during the search on 21.07.2016. Since, these were not considered by the AO during the assessment proceedings it cannot be said that the AO examined all the facts on the record, made all the enquiries and considered the transactions in proper perspective. In view of the above, the submission of the assessee is not in accordance with the law.

15. In respect of ground Nos. (xvi), (xvii) and (xviii), it is submitted that for exercising the jurisdiction u/s 263 of the Act, PCIT is required to conduct some minimal enquiry. It was also submitted that it is not a case of lack of enquiry or lack of investigation and section u/s 263 cannot be invoked to make deeper enquiry.

15.1 The submission of the assessee is misplaced. In the show cause notice the entire gamut of transactions has been properly analyzed and due enquiries were made after considering various documents available on record. It may be noted that

the circle rates adopted for the purpose of payment of stamp duty were also obtained which discredited the huge compensation awarded to the KMPs. Since the AO did not consider and analyse the true nature of payment of compensation on the basis of various documents available on record, he passed an erroneous order causing huge loss to the revenue. The AO failed to consider that the payment of compensation is a legal device adopted by the KMPs and MIPL in collusion to escape liability for the tax. In view of the above, the submission of the assessee is not acceptable.

16. In respect of ground No. (xix), it was submitted that section 263 does not permit revision of an order on the basis of suspicion, conjecture and surmises and it has not been shown in the notice u/s 263 as to how the assessment order is prejudicial to the interests of revenue.

16.1 The submission of the assessee has no merit in view of the facts discussed in the earlier paragraphs. The entire scheme has been meticulously planned to evade the taxes. As mentioned in the show cause instead of taxing the entire amount of compensation of Rs. 441 crore as revenue receipts @ 30% the AO accepted the returned income in which nominal amount of less than Rs. 40 crore was offered for taxation at the reduced rate of 20% under the head Long-term Capital Gains. Hence, the submission of the assessee that the assessment order is not prejudicial to the interests of the revenue is without any merit.

17. In respect of ground Nos. (xx) and (xxi), the assessee submitted that explanation 2 to section 263 of the Act does not change its scope. No material was brought on record by the PCIT by making enquiries or verification to substantiate inference. There was no prima-facie material on record to show that the tax which was lawfully eligible has not been imposed or that by application of the relevant statute on an incorrect or an incomplete interpretation, a lesser tax than what was just, has been imposed.

17.1 As discussed in the earlier paragraphs the show cause has been issued after proper examination, enquiries and due verification of the facts. The show cause notice amply demonstrate that the assessment order passed by the AO is erroneous in so far as it is prejudicial to the interests of the revenue. The submission of the assessee, hence, is not acceptable.

18. In view of the above, I hold that the assessment order dated 18.12.2018 passed by the AO u/s 153B(1)(b) r.w.s. 143(3) of the Act is erroneous in so far as it is prejudicial to the interests of the revenue. The assessment order is set aside on the issue of taxability of compensation under the head Long-term Capital Gains at the reduced rate of 20%. The AO is directed to tax the amount of compensation as revenue receipts at normal tax rate applicable. The AO is directed to modify the assessment order dated 18.12.2018 for AY 2017-18 passed u/s 153B(1)(b) r.w.s. 143(3) of the Act in accordance with the above directions.

4. It may be noted here that the dispute primarily in the present appeal is with regard to the taxability of the compensation received by the assessee for non-delivery of the Villa under Builder-Buyer Agreement ["BBA"] through the Arbitration Award. It is relevant to note certain facts that assessee is an individual. She is shareholder in M/s. M3M India Pvt. Ltd., ["MIPL"]. On 31.03.2010 an agreement was entered into between the Assessee and MIPL for an allotment of Villa located at M3M Golf Estate of the Group Housing Colony situated at Sector-65, Urban Estate, District Gurgaon, Haryana. Copy of the BBA is placed at Pages 220-273 of the PB. The assessee in terms of the aforesaid agreement had invested a sum of Rs.110.18 crores by making several remittances to MIPL. Copy of the receipts are filed at Pages 275 to 279 of the PB. On 21.07.2016 a search and seizure operation was conducted on assessee under section 132(1) of the I.T. Act, 1961. On 19.01.2017 Complaint was filed by the assessee before the Sole Arbitrator [Hon'ble Mr. Justice (Retired) Manmohan Singh Liberhan] for claiming compensation for non-delivery of the Villa under BBA. Copy

of the same is placed on record. On 16.03.2017 an Arbitration Award was passed by the Sole Arbitrator in respect of the aforesaid arbitration dispute between the assessee and MIPL. Copy of the same is filed at Pages 45 to 74 of the PB. As a consequence to the aforesaid, compensation was awarded at Rs.91.33 Crores in A.Y. 2017-2018 on cancellation of the BBA Dated 31.03.2010 in terms of the Award Dated 16.03.2017 by the Sole Arbitrator. That on 24.03.2017 assessee had received the aforesaid compensation. Copy of the Account of Ledger of MIPL in the books of the assessee is placed at Page 578 of the Paper Book in the case of Shri Basant Bansal and copy of the Bank A/c is placed at Page-581 of the said Paper Book. Accordingly, the assessee filed a return of income for the assessment year under appeal declaring long term capital gains of Rs.7,37,78,840/-. The A.O. on these facts proceeded to frame assessment under section 153B read with section 143(3) of the I.T. Act, 1961 Dated 18.12.2018 in the present case and has accepted the returned income after examining the issue in detail after calling for the

explanation of assessee by issuing statutory notices and questionnaire. The A.O. discussed the matter with the Joint Commissioner of Income Tax ["JCIT"]. The assessee also placed on record Arbitration Award and other details before A.O. for completion of the assessment along with BBA, Copy of the Complaint and Copy of the Civil Suit etc., The A.O. also discussed the draft Order with the JCIT and ultimately, obtained the approval of the JCIT in accordance with Section 153D of the I.T. Act, 1961 and after getting the approval of JCIT under section 153D of the I.T. Act, 1961, the A.O. framed the assessment order Dated 18.12.2018, which the Learned PCIT considered it to be erroneous in so far as it is prejudicial to the interests of Revenue. Copy of the Notice under section 263, explanation of assessee before Learned PCIT and findings of Learned PCIT under section 263 of the Act are reproduced above.

5. Learned Representatives of both the Parties have argued the appeal as well as placed on record their written submissions on several points in which it is highlighted on behalf of the assessee that proceedings under section 263 of

the I.T. Act could not have been initiated against the assessee on several grounds and on behalf of the Revenue. It is contended that the transaction of making investment in Villa is a 'Sham Transaction', therefore, Learned PCIT has rightly rejected the Arbitration Award and that proceedings under section 263 have been rightly initiated in the matter and that the compensation is revenue receipt in nature and as such was taxable in the hands of the assessee in assessment year under appeal on various grounds.

6. After considering the rival contentions and the points raised in the written submissions, we find that several issues have arisen for consideration with regard to validity of the proceedings under section 263 of the I.T. Act, 1961. We, therefore, decide the present appeal in various grounds in the light of submissions of both the parties as under :

ISSUE No.1 – Whether assessment order under section 153B(1)(b) read with Section 143(3) of the I.T. Act, 1961, Dated 18.12.2018 which is approved by the JCIT under

section 153D of the I.T. Act, 1961, could be revised by the  
Learned PCIT under section 263 of the I.T. Act, 1961 ?

7. It is submitted on behalf of the assessee that assessment order have been admittedly passed after approval under section 153D of the I.T. Act, 1961 and the A.O. before completion assessment has discussed the matter with the JCIT several times and later on got his approval under section 153D of the I.T. Act, 1961 and passed the impugned assessment order. Therefore, in such circumstances, once an Order have been passed under section 153B/143(3) of the I.T. Act, 1961, after obtaining necessary approval under section 153D of the I.T. Act, the same cannot be the subject matter of Revision under section 263 of the I.T. Act, 1961. The assessee in support of this contention has placed reliance upon the Judgment of Hon'ble Allahabad High Court in the case of CIT vs., Dr. Ashok Kumar in ITA.No.192/2000 Dated 06.08.2012 [PB-112 of the Judgment Paper Book]. The assessee has also placed reliance upon Order of ITAT, Mumbai Bench in the case of Shri Surendra L. Heera Nandani vs., Pr.CIT in

ITA.No.3226/Mum./2017 etc., Dated 14.02.2018 [PB-182 of Judgment Paper Book] in which the Tribunal following the decision of Hon'ble Allahabad High Court (supra) and other decisions of the Coordinate Benches of the Tribunal, had decided the issue in favour of the assessee. Learned Counsel for the Assessee submitted that same view have been taken by different Benches of the Tribunal that *"once approval have been obtained under section 153D of the I.T. Act, then, CIT cannot exercise jurisdiction under section 263 of the I.T. Act."* The citation of the Orders of different Benches of the Tribunal are as under :

|     |                                                                                 |
|-----|---------------------------------------------------------------------------------|
| 1.  | ITA.No.637 to 641/Pune/2018 Dated 14.11.2018 M/s. BU Bhandari Schemes vs., PCIT |
| 2.  | ITA.Nos.596, 597 & 599/Pune/2015 Vishwa Infraways (P) Ltd., vs., CIT (Central). |
| 3.  | ITA.Nos.1102 to 1107/Pune/2014 Rasi Kalal M. Dhariwal HUF vs., CIT.             |
| 4.  | ITA.Nos.967 & 968/Pune/2016 Shri Ramamoorthy Vasudevan vs., PCIT                |
| 5.  | 2017 (1) TMI 260 (Pune) Dhariwal Industries vs., CIT                            |
| 6.  | ITA.Nos.1150-1151/Hyd./2015 Dated 09.08.2017 Smt. Nama Chinnamma vs., DCIT      |
| 7.  | ITA.Nos.584-589/Hyd/2015 Dated 04.12.2015 Trinity Infraventures Ltd., vs., DCIT |
| 8.  | ITA.Nos.901/Hyd/2014 S. Satyanarayana vs., Mr. Syed Rasiuddin                   |
| 9.  | ITA.No.288/LUCK/2014 Dated 18.11.2014 Mehtab Alam vs., DCIT                     |
| 10. | 48 taxmann.com 53 (JP) Dharmendra Kumar Bansal                                  |

7.1. Learned Counsel for the Assessee submitted that the Learned PCIT has not accepted the contention of assessee that the decisions relied upon in the impugned order did not apply to the facts of the case. He has submitted that the decisions relied upon by the Learned PCIT are not applicable to the approval under section 153D of the I.T. Act. He has further submitted that in the absence of Revision of Order of approval under section 153D of the I.T. Act, the action under section 263 of the I.T. Act, 1961 is not permissible. Learned Counsel for the Assessee relied upon Explanation-1 to Section 263(1) of the I.T. Act and submitted that the Order of assessment passed with the approval under section 153D of the I.T. Act could not have been revised under section 263 of the I.T. Act. He has submitted that it is well settled that the Judgment is a proposition what is actually decided and not what logically or remotely reduce therefrom as has been held in many cases and relied upon Judgments of Hon'ble Supreme Court in the cases of Goodyear India Ltd., vs., State of Haryana

[1991] 188 ITR 402 (SC) and CIT vs., Sun Engineering Works Pvt. Ltd., [1992] 198 ITR 297 (SC).

8. On the other hand, Ld. D.R. relied upon the impugned order of Learned PCIT and submitted that the plain reading of provisions of Section 263 of the Act makes it clear that CIT may call for and examine “*any proceeding under this Act*”. Thus, proceedings under section 153D are very well covered under such proposition. The Learned PCIT has jurisdiction to proceed under section 263 of the I.T. Act even in such circumstances where approval is obtained under section 153D of the I.T. Act. The jurisdiction under section 263 could be exercised by the Commissioner and not by the JCIT. Explanation-1 to Section 263(1) do not prohibit the PCIT from proceeding under section 263 of the I.T. Act. The Ld. D.R. relied upon the Order of the ITAT, Panaji Bench in the case of Dr. William Britto vs., CIT, Karnataka (Central) [2015] 56 taxmann.com 170 (Panaji-Tribu.) in which it was decided that the power of revision under section 263 of the I.T. Act is very much available to the PCIT while reviewing the Order of the A.O. approved

under section 153D of the I.T. Act. The Ld. D.R. also relied upon Judgment of the Hon'ble Chattisgarh High Court in the case of Param Transport Pvt. Ltd., 102 taxmann.com 327 (Chattisgarh-HC) in which it was held that *"revisional powers can be exercised by the Commissioner in all cases where assessment is made and once he exercises his revisional powers, then the provision of Section 153(2A) of the I.T. Act will also apply. The Court did not agree with the view that revisional powers of 263 could not be applicable to assessments under search and seizure."* The Ld. D.R, therefore, submitted that Learned PCIT has rightly exercised the jurisdiction under section 263 of the I.T. Act.

9. We have considered the rival submissions. It is not in dispute that search was conducted in the case of assessee on 21.07.2016. The A.O. proceeded to pass the assessment order under section 153B(1)(b) of the I.T. Act read with Section 143(3) of the I.T. Act, 1961. It is also not in dispute that the A.O. at the assessment stage as well as after completion of the assessment discussed the matter in issue with the JCIT under section 153D of the I.T. Act and

after getting approval of the JCIT under section 153D of the I.T. Act passed the impugned assessment order Dated 18.12.2018. We may note that the Order under section 143(3) read with Section 153B of the I.T. Act cannot be revised without revising the approval of the JCIT. It is also an admitted fact that the Learned PCIT did not revise the approval of JCIT given under section 153D of the I.T. Act. The Hon'ble Allahabad High Court in the case of CIT vs., Dr. Ashok Kumar (supra) considered the identical issue and has reproduced the findings of the Tribunal in the Judgment as under :

“5.2. *In the last it is also relevant fact that the AO was fully alive about the facts of the case and that is why he got necessary approval of Addl. Commissioner before completing the assessment orders for all the assessment years and once that is not disputed by the Revenue than the CIT would not be justified in interfering in the approval accorded by the Addl. CIT for framing the assessment order*

*and thus there was no case for setting aside the assessment orders for the assessment years in question. On the basis of facts and circumstances of the case I am of the opinion that the impugned order is liable to be quashed accordingly.”*

9.1. The findings of the Hon’ble Allahabad High Court in Para-9 of its Order is reproduced as under :

*“9. We find that the Tribunal has not committed any error of law in setting aside the order of CIT passed under Section 263 of Income Tax Act for the assessment year 1991-92 to 1995-96.”*

9.2. The ITAT, Mumbai Bench, Mumbai in the case of Surendra L. Heera Nandani vs., PCIT (supra) [Page-182 of PB] considered the identical issue and following the Judgment of Hon’ble Allahabad High Court in the case of Dr. Ashok Kumar (supra) and other decisions of the Coordinate Benches of the Tribunal held as under :

“(II) CIT has revised the assessment order passed u/s 143(3) r.w.s. 153A of the Act without revising the approval granted by Addl. CIT

“25. We find that assessment order u/s. 143 r.w.s. 153A of the Act was passed after getting approval of ACIT as per provisions of section 153D of the Act. We find that the order U/s.143A r.w.s. 153 of the Act cannot revise without revising the approval of ACIT. We find that as per the decision of Hon’ble Allahabad High Court in the case of CIT Vs. Dr. Ashok Kumar in I.T. Appeal No. 192 of 2000 wherein it is held that the assessment order approved by the ACIT U/s.153D of the Act cannot subject to revision u/s.263 of the Act. The learned DR could not file any evidence to show that such permission was revised by ACIT in present case, therefore, CIT cannot revise the order passed by AO u/s. 153 of the Act. As per section 153A of the Act.

26. *Tribunal in case of Trinity Infra ventures Ltd v. DCIT CC 2(1) in ITA. Nos. 584-589/Hyd/2015 dated 04.12.2015 wherein, the Hon'ble Tribunal has held that the assessment order passed u/s 143(3) r.w.s. 153A of the Act cannot be revised without revising the approval of Addl. CIT :*

*5.4. The Ld. Counsel for the assessee has further submitted that the assessment under section 143(3) read with section 153C was passed after getting approval of Addl. CIT under section 153D of the I.T. Act and therefore such an assessment cannot be revised without revising the directions of the Addl. CIT under section 153D of the I.T. Act. The Ld. Counsel for the assessee, has relied upon the decisions of this Tribunal in the case of Ch. Krishna Murthy vs. ACIT, C.C. 3, Hyderabad in ITA No. 766/Hyd/2012 dated 13.02.2015 and also the decision of Lucknow Bench of ITAT in the case of Mehtab Alam*

*288/Luck/2014 dated 18.11.2014 in support of this contention. He has also placed reliance upon the decision of Hon'ble Allahabad High Court in the case of CIT vs. Dr. Ashok Kumar in I.T. Appeal No. 192 of 2000 wherein it has been held that the assessment order approved by the Addl. CIT under section 153D, cannot be subjected to revision under section 263 of the I.T. Act. In view of the above decision also, we hold that the revision order under section 263 of the I.T. Act is not sustainable. Accordingly, we allow the grounds of the assessee".*

27. *Hon'ble Tribunal in case of Dhariwal Industries Ltd v. CIT in ITA Nos. 1108-1113/Pn/2014 dated 23.12.2016 wherein, the Hon'ble Tribunal held as under :*

9. *Referring to the decision of the Hyderabad Bench of the Tribunal in the case*

*of M/s. Trinity Infra Ventures Ltd. Vs. DCIT vide ITA Nos. 584 to 589/H/2015 order dated 04-12- 2015 for A.Yrs. 2005- 06 to 2010-11 he submitted that the Tribunal in the said decision, following various decisions including the decision of Hon 'ble Allahabad High Court in the case of CIT Vs. Dr. Ashok Kumar vide Income Tax Appeal No. 192/2000 order dated 06-08-2012, has held that assessment order approved by the Addl.CIT u/s,153D cannot be subjected to revise u/s.263 of the I.T. Act.*

12. We have considered the rival arguments made by both the sides, perused the orders of the AO and the Ld. CIT and the paper book filed on behalf of the asses see.

14. We find merit in the above submission of the Ld. Counsel for the assessee. We find the Lucknow Bench of the

*Tribunal in the case of Mehtab Alam Vs. ACIT vide ITA Nos.288 to 294/Lkw/2014 order dated 18-11-2014 while deciding an identical issue has observed as under.*

14.1. We find the Hyderabad Bench of the Tribunal in the case of CH. Krishna Murthy Vs. ACIT vide ITA No.766/Hyd/2012 order dated 13-02-2015 following the decision of the Lucknow Bench of the Tribunal in the case of Mehtab Alam (Supra) held that CIT is not justified in assuming jurisdiction u/s.263 when the order has been passed in terms of section 153D of the Act.

14.2. We find the Hyderabad Bench of the Tribunal in the case of M/s. Trinity Infra Ventures Ltd. (Supra) had an occasion to decide an identical issue and it held that the assessment order approved by the Addl.CIT u/s.153D cannot be subject to revision

*u/s.263 of the I.T. Act. The relevant observation of the Tribunal at Para 5.4 of the order reads as under.*

28. *Since in the instant case also the Assessing Officer has passed the order after obtaining necessary approval from Addl.CIT u/s.153D of the I.T. Act, therefore, respectfully following the above-mentioned decisions of the Coordinate Benches of the Tribunal we are of the considered opinion that the CIT has no power to revise the order u/s.263 of the I.T. Act in the instant case since the same has been passed with the approval of the Addl.CIT u/s. 153D of the I.T. Act. We respectfully following the decision of ACIT Vs.Dr. Ashok Kumar, ITA 192 of 2000. We find that in the instant case the original approval was granted by Addl. CIT and this assessment order is cannot be revise without approval of Addl. CIT.”*

9.3. Since in the present case A.O. passed the impugned assessment order after getting approval from the JCIT under section 153D of the I.T. Act, therefore, following the above decisions, we are of the view that the Learned PCIT has no power to revised the Order under section 263 of the I.T. Act, without revising the approval of the JCIT under section 153D of the I.T. Act, 1961. Explanation-1 (a) (i) (ii) of Section 263(1) of the I.T. Act, 1961 is reproduced as under :

- “(a) an order passed on or before or after the 1st day of June, 1988 by the Assessing Officer shall include—*
- (i) an order of assessment made by the Assistant Commissioner or Deputy Commissioner or the Income-tax Officer on the basis of the directions issued by the Joint Commissioner under [section 144A](#);*
- (ii) an order made by the Joint Commissioner in exercise of the powers or in the performance of the functions of an Assessing Officer conferred on, or assigned to, him under the orders or*

*directions issued by the Board or by the Principal Chief Commissioner or Chief Commissioner or Principal Director General or Director General or Principal Commissioner or Commissioner authorised by the Board in this behalf under [section 120](#);*”

9.4. It is evident from the plain reading of the aforesaid Explanation that an Order passed on or before or after 1<sup>st</sup> Day of June, 1988 by the A.O. shall include (i) an order of assessment made by the Assistant Commissioner or Deputy Commissioner or the Income-tax Officer on the basis of the directions issued by the Joint Commissioner under [section 144A](#); (ii) an order made by the Joint Commissioner in exercise of the powers or in the performance of the functions of an Assessing Officer conferred on, or assigned to, him under the orders or directions issued by the Board or by the Principal Chief Commissioner or Chief Commissioner or Principal Director General or Director General or Principal Commissioner or Commissioner authorised by the Board in this behalf

under [section 120](#). It may be noted that Order of assessment passed with the approval of JCIT under section 153D of the I.T. Act, 1961 could not be revised under section 263 of the I.T. Act, 1961. The Ld. D.R. has, however, relied upon the Order of ITAT, Panaji Bench, but, has not explained whether the Judgment of Hon'ble Allahabad High Court in the case of CIT vs., Dr. Ashok Kumar (supra) or different Benches of the Tribunal have been considered in this case by the Panaji Bench. It is not decided in this case that assessment order cannot be revised without revising the approval under section 153D of the I.T. Act and Explanation-1 to Section 263 of the I.T. Act has also not been considered. Therefore, this decision relied upon by the Ld. D.R. would not apply to this case. Further the Judgment in the case of Param Transport Pvt. Ltd., of Hon'ble Chattisgarh High Court (supra) is not with regard to approval obtained under section 153D of the I.T. Act because in this case it was held that revisional power under section 263 of the I.T. Act is applicable to assessments under search and seizure. However, it is not explained by

the Ld. D.R. whether in this case the approval under section 153D have been revised by the Learned PCIT. It may also be noted that it is well settled Law that if two views are possible, then the view which is in favour of the assessee should be made applicable. We rely upon Judgment of Hon'ble Supreme Court in the case of CIT vs., Vegetable Products 88 ITR 192 (SC). It may also be noted here that the Hon'ble Allahabad High Court is one of the jurisdictional High Court of Delhi Bench, therefore, preference shall have to be given to the Judgment of the Hon'ble Allahabad High Court as reproduced above. In the totality of the facts and circumstances of the case and following the decisions referred to above, we are of the view that the Learned PCIT was not having jurisdiction to proceed under section 263 of the I.T. Act, 1961 in the matter in issue and as such the Order passed by the Learned PCIT is nullity and *void abinitio*. We therefore, decide this issue in favour of the assessee.

ISSUE No.2 – Whether the compensation received by the Assessee is capital receipt of revenue receipt ? And Whether such compensation is taxable under the Head “Capital Gains” ?

9.5. It is not in dispute that assessee entered into an agreement with MIPL for allotment of Villa on 31.03.2010 and assessee invested a sum of Rs.110.18 crores. It is not in dispute that possession of the property in reference could not be handed-over to the assessee for about 07 years. It is also not in dispute that assessee filed a Complaint before the Sole Arbitrator for claiming compensation for non-delivery of the Villa under Builder-Buyer Agreement. It is also not in dispute that the Arbitrator has passed the Arbitration Award on 16.03.2017 and assessee received a sum of Rs.91.33 crores in assessment year under appeal on cancellation of Builder-Buyer Agreement Dated 31.03.2010 in terms of Award Dated 16.03.2017. Section 2(47) of the Income Tax Act provides ‘transfer’; in relation to a capital asset, includes – (i) the sale, exchange or relinquishment of

the asset, sub-clause (ii) the extinguishment of any right thereon. It is clear from the material on record that the assessee invested the amount for specific purpose to acquire Villa i.e., capital asset. The assessee had acquired a legal right as per Builder-Buyer Agreement and so the amount received for giving-up that right would amount to capital receipt under section 2(47) of the Income Tax Act for relinquishment of the asset or extinguishment of any right therein. It is, therefore, clear that the compensation is inextricably linked to allotment of Villa and, therefore, determination of capital gains on cancellation of the agreement for allotment of Villa by the A.O. based on the claim of assessee is in accordance with Law. The Arbitration Award is final and binding and, therefore, any adverse observation thereon, which we would consider in detail in subsequent paras, apart from being factually incorrect, legally misconceived and without jurisdiction. The compensation did not arise in the course of any trading activity, but arises on cancellation of the agreement. It is not related to any stock-in-trade. It is, therefore, capital

receipt. The Arbitrator has dealt with the issue based on the material on record i.e., the Builder-Buyer Agreement, plan approved, payments made by assessee and the time being essence of the contract to deliver possession of the demised property to the assessee. The Arbitration Award dealt with contractual obligation and the time being essence for Builder-Buyer Agreement. The Arbitration Award in Para-9 specifically mentioned *“it was earlier opined by me that although the claimants being in a position to influence the decision of the Respondent-Company, that would not absolve the Respondent-Company from its contractual obligations and as such the claimants were entitled to compensation on account of the non-delivery of the Villas booked by them.”* The Arbitration Award also in para-13 find mentioned *“In view of the same, there is no doubt that the claimants being the purchaser of the units [viz., Villas] in the Project to be developed by the Respondent-Company are legally and lawfully entitled to demand for and receive compensation on account of non-delivery of the Villas as booked by them as per the agreed time lines being an essence of the contract.”*

The Arbitration Award in Para-16 also noted that the possession of the Villas was to be handed-over by the Respondent-Company to the claimants within the period of 24 months from the date of commencement of the construction as per the terms of the respective Villa Agreement with a further grace period of 06 months. However it is an admitted position that there has been an inordinate delay of almost 07 years which includes the period of the contract. Section 55 of the Indian Contract Act reads as under :

“55. *Effect of failure to perform at fixed time in contract in which time is essential. – When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the*

*intention of the parties was that time should be of the essence of the contract.”*

9.6. Section 73 of the Indian Contract Act reads as under :

*“73. Compensation for loss or damage caused by breach of contract. — When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.*

*Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.”*

9.7. The above provisions contained in Sections 55 and 73 of the Indian Contract Act clearly specifies that if

time is essence of the contract and as such contract is not performed, the same is voidable at the option of the promisee and the promisee would be entitled for compensation when contract has been broken. In our view, these provisions have been taken care by the Sole Arbitrator while passing the Arbitration Award and as such it is wrong to say that assessee is not entitled for compensation as per the observation of the Learned PCIT because no clause is mentioned in the agreement for payment of compensation. These provisions clearly provide for general compensation to be provided in case of breach of an obligation on the part of the promisor. It may also be noted here that Section 74 of the Indian Contract Act provides for 'Breach of Contract' where penalty is stipulated in the agreement. Therefore, these are different provisions under the Act which have been misconstrued by the Learned PCIT that there is no clause in the agreement for making compensation to the assessee because Section 74 of the Indian Contract Act may not apply in the case of the assessee, but, certainly provisions of Sections 55 and 73 of the Indian Contract Act

would apply which have been taken care by the Sole Arbitrator in the matter.

9.8. It may also be noted here that the Learned PCIT considered the transaction under agreement to be 'sham', but, he did not dispute execution of the Builder-Buyer Agreement, substantial payment made by assessee, delay in handing-over the possession of the demise property to the assessee and that the same issue have also been considered in preceding A.Ys. 2010-2011 and 2013-2014. The Builder-Buyer Agreement was correctly executed on 31.03.2010 as earlier licenses were granted on 16.10.2007 and 28.08.2009. The Hon'ble Supreme Court in the case of CIT, Mysore vs., Canara Bank Ltd., [1966] 62 ITR 328 (SC) held as under :

*“Held, on the facts, that the appreciation of the money did not arise in the course of any trading operation. Assuming that the amount of Rs.3,97,221 was originally stock-in-trade, when it was blocked and sterilised and the bank was*

*unable to deal with that amount, it ceased to be its stock-in-trade and the increase in its value owing to exchange fluctuation was a capital receipt.*

*If by virtue of exchange operations profits are made during the course of business and in connection with business transactions, the excess receipts on account of conversion of one currency into another would be revenue receipts. But if the profit by exchange operations comes in, not by way of business of the assessee, the profit would be capital.”*

9.9. The Hon’ble Delhi High Court in the case of PCIT vs., Aeren R Infrastructure Ltd., [2018] 404 ITR 318 (Del.) held as under :

*“The assessee, engaged in the business of real estate, entered into a consortium agreement with its associates which defined the role, rights and responsibilities of the parties thereto. This*

*consortium entered into an agreement to sell with JMA, the seller, for purchase of 10 acres of land for a consideration of Rs.15 crores. The seller JMA defaulted in its commitment within the prescribed and extended time limit. Ultimately, upon the parties resorting to the arbitration, a settlement was arrived at and an award was made based upon the parties' eventual settlement. The amount received by the assessee as a part of its entitlement as consortium was credited in its books of account as a capital receipt. The Assessing Officer held that the amounts were revenue in nature as the land would have been part of the stock-in-trade. The Tribunal held that the amount which was intended to be ultimately used as stock-in-trade purposes was immobile and sterilised, rendered non-offerable and therefore when received as part of the arbitration award, fell into the capital stream. On appeal :*

*Held, dismissing the appeal, that the purpose of the ultimate use of the assessee's land when acquired was rendered irrelevant on account of the seller defaulting in its commitment. This rendered the amount expended by the assessee immobile. The eventual receipt of the amounts determined as compensation or damages, therefore, fell into the capital stream.”*

9.10. The Hon’ble Supreme Court in the case of CIT vs., D.P. Sandu Bros, Chembur P. Ltd., [2005] 273 ITR 1 (SC) held as under :

*“Held, (i) that the tenancy right was a capital asset, surrender of the tenancy right was a “transfer” and the consideration received therefor was a capital receipt within the meaning of section 45.”*

9.11. The Hon’ble Delhi High Court in the case of Saras Metals Pvt. Ltd., vs., CIT & Another [2017] 399 ITR 270 (Del.) held as under :

*“The main object for which the assessee-company was incorporated was to carry on the business of manufacturing, processing, importing, exporting and dealing in all kinds of ferrous and non-ferrous material meant for industrial and non-industrial use and to carry on the business of casting, fabrication, cold or hot rolling, re-rolling, sheeting, stamping, pressing, etc., of all kinds of steel and other metals. According to the assessee by a resolution of its board of directors dated October 24, 2005 it decided to commence the business of dealing in immovable property in terms of clauses 45 and 46 of "Other objects" of the memorandum of association. It stated that in view of the above decision, the assessee purchased a plot in Noida. Another freehold plot in Vasundhara, Ghaziabad was purchased on March 3, 2006. The assessee maintained that it showed these plots as "inventories" under "current assets" and as "stock" in its balance-sheet and profit and loss accounts.*

*After a few months, the plot in Noida was sold and deducted from the stock. It was stated that the assessment for the assessment year 2008-09 during which the earlier transaction took place attained finality. The assessee stated that it showed the property, at Ghaziabad as its stock-in-trade in the subsequent year as well. Some time in December, 2008 and January, 2009, the assessee learnt that some unauthorised persons had illegally taken possession of the plot of land. The assessee stated that it lodged a complaint dated January 7, 2009 seeking help to regain peaceful possession of the property. It was claimed that since the property was in adverse possession, the assessee was compelled to sell it in March, 2009 for a value much below the market value. For the assessment year 2009-10 the assessee filed a nil return. The Assessing Officer rejected the stand that the property in question which was sold had been held by it as "stock-in-trade". Accordingly, the*

*plot of land was treated as investment of the assessee and section 50C of the Act was applied to arrive at a net short term capital gains of Rs.39,04,000, which was then added to the income of the assessee. This was upheld by the Commissioner (Appeals) and the Tribunal. On further appeal:*

*Held, dismissing the appeal, that there were only two properties shown as "stock-in-trade" by the assessee. The mere fact that the sale of the property in the earlier assessment year and the resultant reduction of the "stock-in-trade" was not questioned by the Assessing Officer would not relieve the assessee from having to demonstrate that the sale of the plot in question in the assessment year under consideration was not by way of an investment resulting in short-term capital gains. There was nothing perverse in the factual and concurrent determination of the*

*Assessing Officer, the Commissioner (Appeals) and the Appellate Tribunal that the plot in question was the investment of the assessee and not its "stock-in-trade". The assessment as short-term capital gains was justified."*

9.12. Learned Counsel for the Assessee also argued that the decision considered by the Learned PCIT of Madras High Court in the case of K.R. Sreenath vs., ACIT 268 ITR 436 (Mad.) is in favour of the assessee. We find the submissions of the Learned Counsel for the Assessee to be correct and it was wrongly considered in favour of the Revenue by the Learned PCIT because in this case the CIT took a view that assessee had acquired a legal right from the earlier agreement Dated 03.04.1986 and so the amount received for giving-up that right is liable to capital gain. The view of the CIT is confirmed by the ITAT and Hon'ble High Court considering the provisions of Section 2(47)(i)(ii) of the I.T. Act, 1961 and did not find any merit in the appeal and same were dismissed. This Judgment will support the claim of the assessee in the present appeal. Considering the

totality of the facts and circumstances of the case and discussion above, it is clear that the compensation received by the assessee on cancellation of the Builder-Buyer Agreement is capital receipt and taxable as capital gains. The view of the A.O. was, therefore, in accordance with Law and cannot be impeached by the Learned PCIT. In view of the above, we do not subscribe to the view of the Ld. D.R. that since no compensation is mentioned in the Builder-Buyer Agreement are to be payable as per agreement, then, the compensation is revenue in nature. It is devoid of merit as discussed above. We also do not agree with the submissions of the Ld. D.R. that payment of compensation was a colourable device to evade the taxes. The Ld. D.R. referred to the emails and other papers seized from the computer of Shri Gaurav Jain, Ex-Employee of the M3M Group to support the case of the Revenue. However, we do not agree with such view and discuss this issue separately about the admissibility of the documents found from the computer of Shri Gaurav Jain. In view of the above findings, we hold that the compensation received by the assessee on

account of cancellation of the Builder Buyer agreement is capital receipt and was rightly offered as capital gain in the return of income and correctly accepted by the A.O. in the impugned assessment order Dated 18.12.2018. Therefore, the Order of the assessment is in accordance with Law. This issue is decided in favour of the assessee.

ISSUE No.3 – Whether Arbitration Award is reasonable, based on material facts, final, binding and admissible in Income Tax proceedings ?

10. Section 35 of the Arbitration and Conciliation Act, 1996 reads as under :

*“Subject to this part an Arbitral Award shall be final and binding on the parties and persons claiming under them respectively.”*

10.1. Section 36 of the Arbitration and Conciliation Act, 1936 provides Enforcement of the Award and provides that Award shall be enforced as if it were a Decree of Court.

Learned Counsel for the Assessee relied upon the Judgment of the Hon'ble Supreme Court in the case of Cheran Properties vs., Kasturi & Sons Ltd., in CA.No.10025-10026/2017 Dated 24.04.2018 in which it was held that "*it may be relied upon in a litigation between the parties relating to the same subject matter.*" It was also held that "*the Award under section 35 be enforced as Decree of Court and has attained finality.*" Learned Counsel for the Assessee also relied upon the Order of the ITAT, Bangalore Bench in the case of Canara Housing Developing Company vs., JCIT 165 ITD 76 in which it was held that "*Business loss consequent to Arbitration Award has been duly allowed as deduction.*" It was also held that in the transaction of payment of compensation as per outcome of the Arbitration Award cannot be held as a colourable device. Learned Counsel for the Assessee submitted that Arbitration Award is admissible evidence in Income Tax proceedings and relied upon unreported decision of the Tribunal in the written submissions. Learned Counsel for the Assessee submitted that the Learned PCIT relied upon Judgment of the Hon'ble

Supreme Court in the case of Madhowji Dharamshi Manufacturing Co. Ltd., vs., CIT 78 ITR 62 in which the assessment year involved was 1951-1952 which was prior to enactment of Arbitration and Conciliation Act, 1996 which do not deal with Sections 35 and 36 of this Act. Thus, this Judgment would not support the case of the Revenue. He has submitted that investment made by assessee in A.Y. 2010-2011 is not disputed by the Learned PCIT and considered in that assessment year. Learned PCIT did not dispute the BBA, cancellation of agreement and Arbitration Award given by the Sole Arbitrator. The Learned PCIT has merely disputed the transaction to be coloured and sham without assigning any valid reasons. The issue of deduction under section 54F based on BBA has already been considered in preceding A.Y. 2010-2011 and later on in A.Y. 2013-2014 which have attained finality and could not be the subject matter in assessment year under appeal i.e., 2017-2018. He has filed complete details with regard to queries raised by the A.O. and reply submitted by assessee along with all documentary evidences in A.Ys. 2010-2011

and 2013-2014 in the written submissions to show that transaction has already been examined by the A.O. in preceding A.Ys. 2010-2011 and 2013-2014 in assessment orders under section 153A(1)(b) of the I.T. Act, 1961. Therefore, the transaction could not have been considered to be sham to evade taxes. Learned Counsel for the Assessee referring to Para-9.2 of the impugned order under section 263 of the I.T. Act submitted that Learned PCIT has noted that certain facts have not been considered in the Arbitration proceedings. Learned Counsel for the Assessee referred to the written submissions in which all these paras have been replied by the assessee as under.

“Para-9.2 of the impugned order under section 263 of the I.T. Act.”

|     |                                                                                                                                                                                                                                                               |
|-----|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| (a) | Execution of BBA on 31.03.2010 has not been disputed by the authorities below which have been accepted in assessment order for the A.Y. 2010-2011 under section 153A of the I.T. Act, 1961 on account of deduction claimed under section 54F of the I.T. Act, |
|-----|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

|                        |                                                                                                                                                                                                                                                                                                                                                                                                                                   |
|------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|                        | 1961 with the approval of JCIT under section 153D of the I.T. Act, 1961. So, it cannot be disputed now.                                                                                                                                                                                                                                                                                                                           |
| (b)                    | Booking rates of MIPL cannot be determinative for the payment of compensation. The booking rates depends upon location and commercial consideration and as such rates were higher than the circle rates. Also booking rates of assessee and other family was of Rs.19,000/- per sq. feet which is a matter of record and has not been disputed. The same have also been considered in A.Y. 2010-2011 which has attained finality. |
| (c)                    | The BBA was produced before Arbitrator which have been considered and Arbitrator considered contractual obligation of assessee and time being essence of the agreement. So, no motive could be attributed to the assessee and others post the Award.                                                                                                                                                                              |
| (d)<br>(e)<br>&<br>(f) | The assessee made investment in A.Y. 2010-2011 and claimed exemption under section 54F which have been accepted. The assessee surrendered the exempt income                                                                                                                                                                                                                                                                       |

|                              |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
|------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|                              | <p>under section 54F in A.Y. 2013-2014 which have been accepted in assessment order under section 153A of the I.T. Act, 1961 with the approval of JCIT under section 153D of the I.T. Act, 1961. The Investigation Wing got the report of M.N. Bhagat, Government Registered Valuer with regard to construction on Group Housing Scheme, M3M Golf Estate, Gurgaon and assessment have been framed for A.Y. 2013-2014. Therefore, no adverse inference should be drawn against the assessee. The assessee during the assessment proceedings for the A.Ys. 2010-2011 and 2013-2014 has filed detailed reply, all material before A.O. and assessments have been framed accordingly. All details of the cost incurred by the builder etc., were also produced which have been examined.</p> |
| <p>(g)<br/>&amp;<br/>(h)</p> | <p>The findings in these paras are not relevant. It was submitted that nature of payment in the hands of buyer is not deciding/relevant factor for deciding the nature of receipt in the hands of assessee. Learned</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |

|                 |                                                                                                                                                                                                                                                                            |
|-----------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|                 | Counsel for the Assessee relied upon Judgment of the Hon'ble Supreme Court in the case of Empire Jute Co. Ltd., vs., CIT 124 ITR 1                                                                                                                                         |
| (i)             | No adverse inference can be drawn with respect to Arbitration Proceedings.                                                                                                                                                                                                 |
| (j)             | The agreement was between the assessee and MIPL. Therefore, Mangalam was not party to the Arbitration Proceedings is not relevant consideration.                                                                                                                           |
| (k)             | It is wrong to say that no compensation was ever paid to any allottee by MIPL. It was submitted that assessee received the compensation in pursuance of Arbitration Award Dated 16.03.2017. Copies of the Ledger A/c and Bank A/cs are filed in support of the contention. |
| (l)             | The Orders for A.Ys. 2010-2011 and 2013-2014 have become final with respect to claim made under section 54F and surrendered. Therefore, it cannot be the subject matter in the present appeal.                                                                             |
| (m)<br>&<br>(n) | The Arbitration Award is based on report of M/s. Grant & Thornton India LLP which is based on comparison as                                                                                                                                                                |

|     |                                                                                                                                                                                                                                                                                                                                                                                                                     |
|-----|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|     | to the increase in market rates, circle rate, location and compensation awarded to third party and judicial precedence which is in public domain as to the compensation ordered to be paid by builder/developer. Hence, it could not be said to be against the assessee.                                                                                                                                            |
| (o) | It is not in dispute that assessee made investment in Villas to be constructed by MIPL and Arbitration Award has granted compensation to the assessee. Learned Counsel for the Assessee, therefore, submitted that as per allegation that there is a colourable device or artificial devise adopted by the assessee to evade taxes is without substance and merit. The claim of assessee is in accordance with Law. |

11. The Ld. D.R. however, submitted that Arbitrator was presented with wrong facts and Investors were having legitimate right to claim refund and compensation on account of non-delivery of the Villas booked by them. MIPL never objected to the claim of assessee for compensation and there is no reference to compensation in the BBA. The

Ld. D.R. submitted that agreement and transaction was coloured and sham to evade taxes. The Ld. D.R. relied upon Para-9.2 of the impugned order under section 263 of the I.T. Act and, therefore, submitted that Award can be challenged by the Learned PCIT.

12. We have considered the rival submissions. The Learned PCIT has observed in the impugned order that certain facts were not considered and brought on record during the Arbitration Proceedings in Para-9.2 of the impugned order under section 263 of the I.T. Act. Learned Counsel for the Assessee explained each para above to show that all the material facts and documentary evidences have been considered by the Arbitrator and all facts were brought to the notice of the Arbitrator. These details were explained in the written submissions which have not been rebutted by the Revenue. We may also note that BBA Dated 31.03.2010 have not been disputed by the Revenue Department. The investment can be made much earlier because licenses were granted to the Builder on 16.10.2007 and 28.08.2009. The BBA have been considered in preceding of A.Ys. 2010-2011

and 2013-2014 and have been accepted in the assessment orders under section 153A of the I.T. Act, 1961. Therefore, same cannot be subject to dispute in the present proceedings merely because the date of 06.05.2010 have been mentioned in the BBA. The Learned PCIT cannot dispute the correctness of the assessment orders for the A.Ys. 2010-2011 and 2013-2014 in the present proceedings unless the same have been revised separately under section 263 of the I.T. Act, 1961. The rates are settled by the parties. It is well settled Law that inadequacy of consideration is not relevant for entering into an agreement. The assessee has also explained that for other family Members also the booking rate was same which have not been disputed. Merely because there was no provision for compensation provided in BBA, it would not preclude the assessee from claiming compensation for non-delivery of the Villas in question because assessee would be entitled to invoke provisions of Sections 55 and 73 of the Indian Contract Act against the Builder which we have already dealt in detail on issue No.2 and as such the Learned PCIT

cannot take any adverse view against the assessee. It is not in dispute that ultimately the BBA was cancelled on account of Arbitration Award and compensation received by the assessee. M/s. MIPL was not party to the civil litigation because it did not own the land. The land was owned by Mangalam. Merely because no efforts have been made to get the stay vacated, is no ground to have any adverse view against the assessee, who has an independent title of making investment in the Villas. As regards cost of construction of the builder, it may not be relevant in the case of assessee because assessee is an Investor who has made investment in the Villas. Merely because MIPL has offered the profit under Project Completion Method ["POCM"] in assessment year under appeal, it cannot be presumed that assessee tried to evade the taxes. The Learned PCIT has merely re-appreciated evidences on the same facts in the proceedings under section 263 of the I.T. Act, 1961, which is not permissible in Law. When the Civil Court has granted stay in respect of the property in question, it is binding on the parties and no construction

could have been raised. It is wrong to say that assessee did not receive any compensation from the Builder because the assessee has produced copy of the ledger A/c, Bank statement on record to show that ultimately amount of advance paid to the Builder have been refunded and compensation is also paid by the Builder to the assessee. The assessment orders for the A.Ys. 2010-2011 and 2013-2014 have reached finality by passing the assessment orders under section 153A of the I.T. Act with respect to claim of assessee under section 54F of the I.T. Act, 1961. Therefore, those Orders have become final and cannot be challenged in the present proceedings by the Learned PCIT. Merely because report is given by M/s. Grant Thornton India LLP is no ground to challenge its finding because it is based on various factors like location, commercial viability etc., and based on the precedence in which compensation is paid by the Builders to the Buyers. No defect have been pointed-out in the report of this party. The rates of the construction are based on facts and advance booking rate for the assessee and other family Members were also the

same. The intention can be seen on facts which is not disputed by the Learned PCIT. Considering these facts on record, it is clear that all material facts and evidences have been considered by the Arbitrator before granting Award in the matter. The Learned PCIT did not dispute the above facts. The case Law relied upon by the Learned PCIT are based on finding of fact recorded by the Tribunal. All the facts were before A.O. as well as before the Arbitrator. The issue of documents seized from the residence of Shri Gaurav Jain from his computer will be considered separately. The Hon'ble Allahabad High Court in the case of CIT vs., Ratan Lal [2006] 284 ITR 162 (All.) held as under :

*“Section 293 of the Income-tax Act, 1961, applies when an action or order of the income-tax authority constituted under the Act is being sought to be challenged before the civil court. A dispute of partition inter partes vis-a-vis shares and eligibility entitlement can more appropriately be adjudicated upon by the civil court and not by the income-tax authorities and, therefore, the decree and the order*

*passed by the civil court is binding between the parties and consequential effect is to be given by the income-tax authority while passing the assessment order. A decree or order passed in a suit in which the parties do not contest or which is passed ex-parte is binding upon the parties in the same manner as a decree or order passed after contest unless it is set aside or modified in appeal or revision by a competent court of law.*

*The assessee owned land. The land was acquired by the State Government and compensation was awarded and paid. The assessee was also awarded interest under the Land Acquisition Act. The assessing authority taxed the interest so received in the assessment years 1983-84 to 1988-89. The respondent had claimed that he had only a 1/5<sup>th</sup> right in the said agricultural land and in support of his claim he placed reliance on the order of the Civil Judge*

*made in a declaratory suit filed by the assessee's son. The Assessing Officer was of the view that the land revenue record showed the assessee as the owner and therefore, the interest was assessable in the hands of the assessee which order was upheld by the Deputy Commissioner (Appeals). However, in further appeal the Tribunal upheld the claim of the assessee. On a reference :*

*Held, that as under the decree of the civil court each of the parties had been given a 1/5<sup>th</sup> share and it was a declaratory suit, the assessee had rightly been held to be taxable in respect of 1/5<sup>th</sup> share of the interest income.”*

12.1. The quantum of compensation is calculated in accordance with the Report Dated 28.02.2017 of M/s. Grant Thornton India LLP which is based on comparison as to the increase in the market rate, circle rate of the area in which the project of the MIPL is located, comparison with compensation awarded to the third parties, consumer and

precedence as in public domain, in which compensation is paid by the Builders to the Customers. Ultimately, it is a fact that there was a delay of 07 years in not handing-over possession of the Villas by the Builder to the Assessee. Therefore, the Arbitrator considering the entire material facts on record rightly considered that time was the essence of the agreement and that there is a contractual obligation of the Builder to pay compensation to the assessee on account of non-delivering of the Villas. Therefore, the Award is based on scientific examination of the relevant facts and as such the Learned PCIT was not justified in rejecting the Arbitration Award in the matter. It may be reiterated again that Arbitration Award is final and binding on the parties and enforceable as it were the Decree of the Court. Therefore, considering the facts and circumstances of the case, we do not find any justification for the Learned PCIT to reject the Arbitration Award or to hold that agreement and transaction was coloured and sham. We, therefore, hold that Arbitration Award is final, binding and is admissible in Income Tax proceedings in the case of the assessee and

compensation granted in the Award is reasonable which is ultimately paid to the assessee. Issue No.3 is, therefore, decided in favour of the assessee.

ISSUE No.4 – Whether copies of documents, emails and Power Presentations found from Computer of Shri Gaurav Jain, Ex-Employee of M3M Group seized in search from his residence on 21.07.2016 is admissible in evidence ?

13. According to the Learned PCIT these copies of emails and Power Presentation etc., found from the Computer of Shri Gaurav Jain, Ex-employee of M3M Group shows that M3M Group and assessee have made planning to evade taxes. Therefore, agreement and transaction are coloured and sham. It is, therefore, clear that the copies of documents, emails and Power Presentations found from the Computer of Shri Gaurav Jain were not recovered from the assessee or MIPL. These are third party documents. Therefore, it is contended that same cannot be read in evidence against the assessee, in the absence of any corroborative evidence. Learned Counsel for the Assessee

submitted that the alleged material, if any, even otherwise and in the absence of corroborative evidence found from the possession of the assessee, cannot form the basis for making the addition. He has relied upon Judgments of Hon'ble Delhi High Court in the cases of CIT vs., D.K. Gupta [2009] 308 ITR 230 (Del.) and CIT vs., Kulwant Rai [2007] 291 ITR 36 (Del.). He has submitted that Section 65A of the Indian Evidence Act provides for special provisions as to evidence relating to electronic records. It provides that the contents of electronic records may be proved in accordance with the provisions of Section 65B of the Indian Evidence Act. Learned Counsel for the Assessee submitted that Section 65B (4) contemplates a Certificate, both regarding the information and device which is a Certificate signed by a duly Authorised Person [Occupying a responsible official position in relation to operation of the relevant device or the management of the relevant activities] certifying the specific details relating to the origin of the said record, the device, the manner in which it was produced etc., must be filed along with the electronic record. He has relied upon

Judgment of the Hon'ble Bombay High Court in the case of Ark Shipping Co. Ltd., vs., GRT Shipping Management Pvt. Ltd., 2008-(1) ARBLR-317 in which the petitioner has filed an Affidavit along with hard/printed copies of the print-outs/emails duly certified by the Concerned Officer/Employee and, therefore, it was held that the Affidavit is sufficient compliance of Section 65B of the Indian Evidence Act. He has also relied upon Judgment of the Hon'ble Supreme Court in the case of Anwar PV s., PK Basheer [2014] 10 SCC 473 (SC) in which it was held that *"An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under section 65B are satisfied. Thus, in the case of CDs, VCDs, Chip etc., - the same shall be accompanied by the Certificate in terms of Section 65B of the Indian Evidence Act obtained at the time of taking the documents, without which, the secondary evidence pertaining to that electronic record is inadmissible"*. Learned Counsel for the Assessee submitted that in the case of the assessee the requirement of Section 65B(4) are not satisfied in the absence of the Certificate

required by Law. Therefore, the material found from the computer of Shri Gaura Jain is not admissible in evidence.

14. The Ld. D.R. relied upon the impugned order under section 263 of the I.T. Act and submitted that contents of the seized record (emails) found from the Computer of Shri Gaurav Jain throws light on the perspective of MIPL with reference to the transactions in question which will reveal that apparent was not real and there was a planning to evade the taxes.

15. Considering the rival submissions, it is clear that the copies of the documents, emails and Power Presentations found from the Computer of Shri Gaurav Jain Ex-employee of M3M Group who is a third party. No incriminating material was found from the possession of the Assessee or MIPL. No corroborative evidence has been brought on record to support the material found from the Computer of Shri Gaurav Jain. Therefore, in the absence of any corroborative evidence, same is not admissible in evidence. Further, no Certificate under section 65B(4) of the

Evidence Act have been brought on record to prove the contents of copies of documents, emails and Power Presentation found from the Computer of Shri Gaurav Jain. Therefore, same is not admissible in evidence. The decisions relied upon by the Learned Counsel for the Assessee squarely apply to the facts and circumstances of the case. Thus, the Learned PCIT considered an inadmissible evidence in proceedings under section 263 of the I.T. Act, 1961. Therefore, the Order under section 263 is perverse. So, no planning is proved by the Revenue if at all for evading the taxes in the matter. Issue No.4 is decided in favour of the assessee.

ISSUE No.5 – Whether compensation received by assessee is taxable as income under section 2(24)(i)(vi) and (iv) of the Income Tax Act, 1961 **OR** under section 2(28A) of the Income Tax Act, 1961 ?

16. The Learned PCIT in the show cause notice has referred to Section 2(24)(i)(vi) of the Income Tax Act to

propose that compensation is taxable as revenue/income and ultimately taken aid of these Sections to hold that the compensation so received by assessee is revenue in nature and income. Section 2(24)(i) provides that income includes – “profits and gains”. It is, however, not explained as to how the assessee has earned profit and gains in the transaction of cancellation of BBA on account of non-delivery of possession of the property in question and ultimately, compensation received on account of Arbitration Award. Section 2(24) (vi) provides income includes – any capital gain chargeable under section 45 of the Income Tax Act which assessee has already declared in the return of income. Therefore, there is nothing wrong for the A.O. to accept that compensation received by assessee as capital receipt on account of which capital gain arises. Therefore, there is nothing wrong in the assessment order so as to exercise jurisdiction under section 263 of the Income Tax Act. It may further be noted that the Learned PCIT while giving findings at Pages-53 and 54 of the impugned order has mentioned that additionally compensation is taxable

under sections 2 (24) (iv) and 2 (28A) of the Income Tax Act on account of value of any benefit or perquisite or interest. The Learned PCIT has, however, not issued any show cause notice on these two items. Since no notices have been given under section 263 of the I.T. Act as to the taxability of the compensation under these Sections, the Learned PCIT was not justified in holding that the compensation is taxable under sections 2 (24) (iv) and (28A) of the Income Tax Act, 1961. Since no notice have been given to the assessee for applying these provisions, therefore, Learned PCIT cannot use these Sections to hold that income is taxable under sections 2 (24) (iv) and (28A) of the Income Tax Act, 1961. In support of our findings, we rely upon the following decisions:

16.1. Judgment of Hon'ble Delhi High Court in the case of CIT vs., Contimeters Electricals P. Ltd., [2009] 317 ITR 249 (Del.) in which it was held as under :

*“Held dismissing the appeal, that the Tribunal had arrived at the correct conclusion that the*

*requirement of filing the audit report along with the return was not mandatory but directory and that if the audit report was filed at any time before the framing of the assessment, the requirement of section 80-IA(7) would be met. The Tribunal was also right in holding that the Commissioner did not even call for any explanation of the assessee and the issue of fulfillment of the conditions of section 80-IA had not been part of the show cause notice. Therefore, it could not form the basis for revision of the assessment order under section 263. No substantial question of law arose.”*

16.2. Judgment of Hon’ble Delhi High Court in the case of PCIT vs., Krishak Bharati Co-operative Ltd., [2017] 395 ITR 572 (Delhi) in which it was held as under :

*“Held, dismissing the appeals, (i) that the order under section 263 dealt with issues which were not covered by the show cause notice issued to the assessee. This was not permissible.”*

16.3. Since the Order under section 263 of the I.T. Act, 1961 dealt with these Sections which are not covered by the show cause notice issued to the assessee, therefore, it is not permissible to decide the issue against the assessee. It may also be noted that we have already held on Issue No.2 that the compensation received by the assessee is capital in nature on which assessee has correctly declared capital gains, therefore, it is not taxable in the hands of the assessee as income as is held by the Learned PCIT. Issue No.5 is decided in favour of the assessee.

ISSUE No.6 – Whether the Learned PCIT was justified in invoking the jurisdiction under section 263 of the Income Tax Act, 1961 ?

17. Learned Counsel for the Assessee submitted that assessment order was in accordance with Law. It was not erroneous in so far as prejudicial to the interests of the Revenue. Therefore, it cannot be revised under section 263 of the I.T. Act, 1961. The view of the A.O. is sustainable in Law. He has relied upon Judgment of the Hon'ble Delhi

High Court in the case of CIT vs., DLF Ltd., [2013] 350 ITR 555 (Del.); Judgments of Hon'ble Supreme Court in the cases of CIT vs., Max India Ltd., [2007] 295 ITR 282 (SC) and Malabar Industrial Co. Ltd., vs., CIT [2000] 243 ITR 83 (SC). He has submitted that since compensation received by assessee is for non-delivery of the Villas and, therefore, determination of capital gain on cancellation of BBA for allotment of Villas by the A.O. based on the claim of assessee is in accordance with Law. Therefore, proceedings under section 263 of the I.T. Act, 1961 by the Learned PCIT are not valid. The Learned PCIT has to be proceeded by some minimal enquiry which has not been done in the present case and relied upon Judgment of the Hon'ble Delhi High Court in the case of PCIT s., Delhi Airport Metro Express Private Limited [2017] 398 ITR 8 (Del.). There is no lack of enquiry or lack of investigation on the part of the A.O. Mere allegation of wrong opinion cannot confer jurisdiction by the Learned PCIT. The A.O. passed the assessment order after taking into consideration submissions of the assessee and documentary evidences

produced before him. Therefore, the Learned PCIT should not have invoked the jurisdiction under section 263 of the I.T. Act. He has referred to the Order Sheet and the replies and documentary evidences filed before A.O. to show that A.O. has applied his mind to the material on record before accepting the claim of assessee made in the return of income.

18. On the other hand, the Ld. D.R. relied upon the Order of the Learned PCIT passed under section 263 of the I.T. Act, 1961 and submitted that the Learned PCIT was justified in invoking the jurisdiction under section 263 of the I.T. Act because the A.O. passed the Order without making enquiries or verification.

19. We have considered the rival submissions. Section 263 of the Income Tax Act, 1961 reads as under :

*“263. Revision of orders prejudicial to revenue :*

*(1) The [Principal Commissioner or] Commissioner may call for and examine the record of any*

*proceeding under this Act, and if he considers that any order passed therein by the [Assessing] Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he, may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.*

*[Explanation-1] For the removal of doubts, it is hereby declared that, for the purposes of this sub-section,*

*(a) an order passed [on or before or after the 1st day of June, 1988] by the Assessing Officer shall include-*

*(i) an order of assessment made by the Assistant Commissioner [or Deputy*

*Commissioner] or the Income- tax Officer on the basis of the directions issued by the [Joint] Commissioner under section 144A;*

*(ii) an order made by the [Joint] Commissioner in exercise of the powers or in the performance of the functions of an Assessing Officer conferred on, or assigned to, him under the orders or directions issued by the Board or by the [Principal Chief Commissioner or] Chief Commissioner or [Principal Director General or] Director General or [Principal Commissioner or] Commissioner authorised by the Board in this behalf under section 120;*

*(b)" record" [shall include and shall be deemed always to have included] all records relating to any proceeding under this Act available at the time of examination by the [Principal Commissioner or] Commissioner;*

*(c) where any order referred to in this sub- section and passed by the Assessing Officer had been the subject matter of any appeal, [filed on or before or after the 1<sup>st</sup> day of June, 1988], the powers of the [Principal Commissioner or] Commissioner under this sub-section shall extend [and shall be deemed always to have extended] to such matters as had not been considered and decided in such appeal.]*

*[Explanation-2] For the purpose of this section, it is hereby declared that an order passed by the Assessing officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal Commissioner or Commissioner, -*

*(a) The Order is passed without making inquiries or verification which should have been made;*

*(b) The order is passed allowing any relief without inquiring into the claim;*

*(c) The order has not been made in accordance with any order, direction or instruction issued by the Board under section 119; or*

*(d) The order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person.]*

*[(2) No order shall be made under sub-section (1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed.]*

*(3) Notwithstanding anything contained in sub-section (2), an order in revision under this section may be passed at any time in the case of an order which has been passed in consequence of, or to give effect to, any finding or direction contained in an order of the*

*Appellate Tribunal, [National Tax Tribunal] the  
High Court or the Supreme Court.*

*Explanation. - In computing the period of  
limitation for the purposes of sub- section (2),  
the time taken in giving an opportunity to the  
assessee to be reheard under the proviso to  
section 129 and any period during which any  
proceeding under this section is stayed by an  
order or injunction of any court shall be  
excluded.”*

19.1. The Hon’ble Punjab & Haryana High Court in the  
case of CIT vs., Deepak Mittal [2010] 324 ITR 411 (P&H) in  
which it was held as under :

*“Change of opinion by reappraising the evidence is  
not within the parameters of revisional jurisdiction  
of the Commissioner under section 263 of the  
Income-tax Act, 1961.*

*Held, dismissing the appeal, that the Tribunal had found that the Assessing Officer had given a categorical finding that the assessee was engaged in the process of manufacturing of products and accordingly he had granted concession under section 80-IB. The claim of the assessee had been found to be genuine. The Assessing Officer had also examined the various workers of the assessee and then recorded the finding. The Assessing Officer was justified in granting the special deduction under section 80-IB. The order of revision disallowing the special deduction was not valid”*

19.2. The Hon’ble Bombay High Court in the case of CIT vs., Fine Jewellery (India) Ltd., [2015] 372 ITR 303 (Bom.) in which it was held as under :

*“Held dismissing the appeal, that the order of the Tribunal did record the fact that specific queries were made during the assessment proceedings*

*with regard to the details of expenditure claimed under the head "miscellaneous expenses" aggregating to Rs.2.94 crores. The assessee had responded to the queries and on consideration of its response, the Assessing Officer held that only an amount of Rs.17.98 lakhs incurred on account of repairs and maintenance out of Rs.2.94 crores was capital expenditure. This itself would be an indication of application of mind by the Assessing Officer while passing the order. The fact that the assessment order did not contain any discussion with regard to the balance amount of expenditure of Rs.1.76 crores, i.e., Rs.2.94 crores less Rs.17.98 lakhs claimed as revenue expenditure would not by itself indicate non-application of mind to this issue by the Assessing Officer in view of the specific queries made during the assessment proceedings and the assessee's response to it. Moreover, from the nature of expenditure as explained by the assessee to the Assessing Officer*

*during the assessment proceedings the view that the expenses were in the realm of revenue expenditure, was a possible view. Therefore, there was no fault in the order of the Tribunal having followed the binding decision of the Supreme Court while allowing the appeal before it.”*

19.3. The Hon’ble Supreme Court in the case of Malabar Industrial Co. Ltd., vs., CIT [2000] 243 ITR 83 (SC) held as under :

*“Every loss of revenue as a consequence of an Order of the Assessing Officer, cannot be treated as prejudicial to the interests of the Revenue, for example, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue or where two views are possible and the Income-tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue unless*

*the view taken by the Income-tax Officer is unsustainable in law.”*

19.4. The Hon’ble Gujarat High Court in the case of CIT vs., Amit Corporation [2012] 21 taxmann.com 64 (Gujarat) held that *“Where A.O. after detailed verification of record and making enquiries had framed assessment, the CIT cannot revise under section 263 of the Income Tax Act.”* The Hon’ble Allahabad High Court in the case of Krishnacap Box (P) Ltd., [2015] 372 ITR 310 held that *“when A.O. called for details and assessee responded, the A.O. however, did not discuss the same in the Order, no proceeding under section 263 lies.”* The Hon’ble Gujarat High Court in the case of Ginger Properties (P) Ltd., [2017] 396 ITR 496 (Gujarat) held that *“when specific queries raised by the A.O. and replied by the assessee, no proceedings under section 263 lies.”* Learned Counsel for the Assessee has produced on record of Order-Sheet to show that A.O. has examined the issue of capital gain based on Arbitration Award and BBA and other material. The A.O. discussed the matter with the JCIT before passing of the assessment order and also

obtained his approval under section 153D of the Income Tax Act, 1961 after completion of the enquiry at the assessment stage. This issue is considered in detail based on all material evidences on record. Thus, the A.O. passed the assessment order after making enquiries and verification. The A.O. allowed relief to the assessee after making enquiry into the claim. The view of the A.O. that compensation received by assessee on account of cancellation of BBA is in accordance with Law and is sustainable in Law. Therefore, there is no failure on the part of the A.O. to examine the issue in detail. In A.Ys. 2010-2011 and 2013-2014 also, the A.O. examined the issue on merits based on BBA and other material with reference to the claim under section 54F of the Income Tax Act based on the identical facts. Those Orders have already become final and cannot be subject matter of Review in the present proceedings. It is well settled Law that even if two views are possible, one view of the A.O. cannot be revised under section 263 of the Income Tax Act, to which, the Learned PCIT did not agree. We have already held that view of the A.O. that compensation received by

assessee on cancellation of the BBA is capital receipt and liable for capital gain is in accordance with Law and is sustainable and if the Learned PCIT did not agree with the same view, the same is not revisable under section 263 of the Income Tax Act, 1961. The Learned PCIT is not entitled to re-appreciate the same evidences and material nor come to a different conclusion. The Learned PCIT did not make any independent enquiry as to how the assessment order is erroneous and prejudicial to the interests of Revenue. The Learned PCIT has not pointed-out as to how there is an incorrect application of Law or incorrect application of facts. It is also not explained as to how there was non-application of mind on the part of the A.O. and as to how the compensation is taxable as revenue receipt when it is inextricable link to the allotment of Villa. The Learned PCIT has referred to the rates of sales unofficially obtained from some broker in the notice. These are not relevant being unauthenticated and based on no evidence. Inadequacy of consideration in the agreement would not make the contract void or voidable under Indian Contract Act. In notice, report

of Registered Valuer Mr. M.N. Bhagat in October, 2012 to the Investigation Wing for change in area/construction etc., already on record and considered in A.Y. 2013-2014 which have become final. Considering the facts of the case above, it is clear that conditions of Section 263 of the Income Tax Act are not satisfied in the present case. Therefore, the Learned PCIT was not justified in invoking the jurisdiction under section 263 of the Income Tax Act, 1961 in the matter. Issue No.6 is decided in favour of the assessee.

ISSUE No.7 – Whether cryptic Order of the assessment can be revised under section 263 of the Income Tax Act ?.

20. The Ld. D.R. submitted that since the assessment order is cryptic and is not self-contained Order giving relevant facts and reasons for coming to the conclusion, therefore, it was correctly revised by the Learned PCIT. He has relied upon Judgment of the Hon'ble Supreme Court in the case of Toyota Motor Corporation vs., CIT [2008] 306 ITR 52 (SC).

21. Learned Counsel for the Assessee, however, submitted that A.O. examined the issue in detail and passed the impugned assessment order in accordance with Law, therefore, same cannot be revised under section 263 of the I.T. Act, 1961.

22. We have considered the rival submissions. The Hon'ble Allahabad High Court in the case of CIT vs., Goyal Private Family Specific Trust [1988] 171 ITR 698 held as under :

*“There is no finding by the Commissioner that the Income-tax Officer reached an erroneous conclusion and that, on the facts and circumstances of the case, the conclusion would have been different. The orders of the Income-tax Officer may be brief and cryptic, but that by itself is not sufficient reason to brand the assessment orders as erroneous and prejudicial to the interest of the Revenue. Writing an order in detail may be a legal requirement, but the order not fulfilling this*

*requirement, cannot be said to be erroneous and prejudicial to the interest of the Revenue. It was for the Commissioner to point out as to what error was committed by the Income-tax Officer in having reached the conclusion that the income of the trust was exempt in its hands and was assessable only in the hands of the beneficiaries. The Commissioner having failed to point out any error, no error can be inferred from the orders of the Income-tax Officer for the simple reason that they are bereft of details. If the order is not erroneous, then it cannot be prejudicial to the interest of the Revenue. There is nothing to show in the order of the Commissioner that the Income-tax Officer would have reached a different conclusion had he passed a detailed order. So, the conclusion of the Commissioner that the orders of the Income-tax Officer are erroneous and prejudicial to the interest of the Revenue are based merely on suspicion and*

*surmises in the absence of any enquiry having been made by him.”*

22.1. The Hon’ble Bombay High Court in the case of CIT vs., Gabriel India Ltd., [1993] 203 ITR 108 (Bom.) held as under :

*“Held, that the Income-tax Officer in this case had made enquiries in regard to the nature of the expenditure incurred by the assessee. The assessee had given a detailed explanation in that regard by a letter in writing. All these were part of the record of the case. Evidently, the claim was allowed by the Income-tax Officer on being satisfied with the explanation of the assessee. This decision of the Income-tax Officer could not be held to be “erroneous” simply because in his order he did not make an elaborate discussion in that regard. Moreover, in the instant case, the Commissioner himself, even after initiating proceedings for revision and hearing the assessee,*

*could not say that the allowance of the claim of the assessee was erroneous and that the expenditure was not revenue expenditure but an expenditure of capital nature. He simply asked the Income-tax Officer to re-examine the matter. That was not permissible. The Tribunal was justified in setting aside the order passed by the Commissioner of Income-tax under section 263.”*

22.2. In the present case the issue based on BBA was coming-up from A.Y. 2010-2011 and with reference to Section 54F of the Income Tax Act, 1961, the issue have been examined by the Revenue Department in A.Ys. 2010-2011 and 2013-2014 and assessment orders have been passed under section 153A of the Income Tax Act, 1961. Those Orders have become final and cannot be commented upon in the present proceedings. The copies of the show cause notice, Order-Sheets, replies submitted by the assessee along with documentary evidences in the proceedings for the assessment year under appeal are filed in the Paper Book which shows that A.O. examined the

issue in detail after conducting detailed enquiry. The A.O. also discussed the matter in issue with his Administrative Senior Officer i.e., JCIT. Since the compensation was received on account of cancellation of the BBA, therefore, A.O. accepted the claim of assessee of capital gains. The entire material on record clearly show that A.O. has applied his mind and even if the details of enquiry are not mentioned in the assessment order would not make the assessment order to be cryptic or liable for revision under section 263 of the Income Tax Act, 1961. The assessment order is also passed after getting approval under section 153D of the Income Tax Act, 1961, therefore, unless the same is also revised, the assessment order cannot be revised by the Learned PCIT. In view of the above, issue No.7 is decided in favour of the assessee.

#### ALTERNATE PLEA OF THE ASSESSEE

ISSUE No.8 – Whether where an approval under section 153D of the Income Tax Act, 1961 is not valid, then the assessment order under section 153B/143(3) of the Income

Tax Act, 1961 is vitiated, so same cannot be revised under section 263 of the Income Tax Act, 1961 ?

23. Learned Counsel for the Assessee submitted that it is well settled if approval under section 153D of the Income Tax Act, 1961 has been granted in a mechanical manner, the Order of assessment is illegal and *void abinitio* and, therefore, same cannot be subject matter of revision under section 263 of the Income Tax Act, 1961. He has submitted that even Learned PCIT himself at Page-36 in Para-6.5 of the impugned order has stated as under :

“6.5. Without prejudice to the above, since the A.O. and the JCIT both failed to consider the claim made by assessee in the return of income properly and framed the assessment order mechanically without application of mind itself, makes the assessment order erroneous in so far as it is prejudicial to the interest of the Revenue.”

23.1. He has submitted that on the face of these findings of the Learned PCIT no proceeding under section 263 of the I.T. Act, 1961 lie. He has relied upon the Orders

of ITAT, Delhi Bench in the cases of M/s. M3M India Holdings vs., DCIT 71 ITR 51 (Tribu.); Shri Sanjay Duggal vs., ACIT in ITA.No.1813/Del./2019 Dated 19.01.2021; Rishabh Buildwell P. Ltd., vs., DCIT in ITA.No.2122/Del./2018 etc., Dated 04.07.2019. Learned Counsel for the Assessee, therefore, submitted that since the approval is not valid as per Learned PCIT, therefore, assessment order is null and void and as such the same cannot be the subject matter of revision under section 263 of the I.T. Act, 1961. He has submitted that validity of the assessment proceedings can be raised in collateral proceedings and relied upon the Order of ITAT, Delhi Bench in the case of M/s. Supersonic Technologies (P) Ltd., vs., PCIT [2019] 69 ITR 585 (Tribu.-Del.) and Judgment of Hon'ble Bombay High Court in the case of PCIT vs., Smt. Shreelekha Damani [2019] 174 DTR 86 (Bom.).

24. On the other hand, the Ld. D.R. relied upon the Order of the Learned PCIT and relied upon Judgment of the Hon'ble Delhi High Court in the case of Sonia Gandhi

W.P.(Civil) No.8482/2018 in which it was held that the word “*Yes I am satisfied*” is sufficient to show cause the application of mind. He has submitted that since no appeal is filed against the assessment order, therefore, this point cannot be raised in the present proceedings under section 263 of the Income Tax Act, 1961.

25. We have considered the rival submissions. Learned Counsel for the Assessee relied upon several decisions of the Tribunal in which it was held that if the approval under section 153D is not valid, entire assessment order would vitiate. It is also held in the case of M/s. Supersonic Technologies (P) Ltd., vs., PCIT (supra) that assessee can challenge the validity of the re-assessment proceedings in collateral proceedings. Since in the present case the Learned PCIT himself in Para-6.5 of the impugned Order held that the assessment order is framed mechanically without application of mind by A.O. and JCIT, therefore, these decisions would apply in favour of the assessee and would clearly disentitle the Learned PCIT to

initiate the proceedings under section 263 of the Income Tax Act, 1961. Issue No.8 is also decided in favour of the assessee.

25.1. Considering the totality of the facts and circumstances of the case and discussion above, we are of the view that the A.O. was justified in passing the assessment order Dated 18.12.2018 accepting the returned income because his view was in accordance with Law that compensation received by assessee on account of cancellation of BBA through Arbitration Award is capital receipt and liable for tax as capital gain. Therefore, the Learned PCIT was not justified in invoking the jurisdiction under section 263 of the Income Tax Act, 1961. We, accordingly, set aside the impugned order of the Learned PCIT passed under section 263 of the Income Tax Act, 1961 and restore the assessment order. Appeal of the Assessee allowed.

26. In the result, ITA.No.383/Del./2021 of the assessee allowed.

ITA.No.384/Del./2021 – Shri Pankaj Bansal - A.Y. 2017-18

ITA.No.385/Del./2021 – Shri Basant Bansal - A.Y. 2017-18

ITA.No.386/Del./2021 – Shri Roop Kumar Bansal - A.Y. 2017-18

27. In these remaining appeals, the issue is same under section 263 of the Income Tax Act, 1961 on same facts as have been considered in the case of Smt. Abha Bansal in ITA.No.383/Del./2021 for the A.Y. 2017-2018 (supra). We, therefore, following reasons for decision in the case of Smt. Abha Bansal (supra), set aside the impugned orders of the Learned PCIT passed under section 263 of the Income Tax Act, 1961 and restore the assessment orders. All the appeals of the Assesseees are allowed.

28. In the result, all the appeals of the Assesseees are allowed.

29. To sum-up, all the appeals of the Assesseees are allowed.

*ITA.Nos.383, 384, 385 & 386/Del./2021 Smt. Abha Bansal,  
Sh Pankaj Bansal, Sh Basant Bansal And  
Sh Roop Kumar Bansal, Gurgaon.*

Order pronounced in the open Court.

Sd/-  
(O.P. KANT)  
ACCOUNTANT MEMBER

Sd/-  
(BHAVNESH SAINI)  
JUDICIAL MEMBER

Delhi, Dated 31<sup>st</sup> May, 2021

VBP/-

Copy to

|    |                            |
|----|----------------------------|
| 1. | The appellant              |
| 2. | The respondent             |
| 3. | CIT(A) concerned           |
| 4. | CIT concerned              |
| 5. | D.R. ITAT 'A' Bench, Delhi |
| 6. | Guard File.                |

// BY Order //

Asst. Registrar : ITAT Delhi Benches :  
Delhi.