IN THE INCOME TAX APPELLATE TRIBUNAL
[DELHI BENCH : 'A' NEW DELHI]

BEFORE Dr. B.R.R. KUMAR, ACCOUNTANT MEMBER

AND

SHRI YOGESH KUMAR US, JUDICIAL MEMBER

I.T.A. No. 109/PUN/2007 (A.Y. 2003-04)

Sahara India Power Corporation Limited, Amby Valley, Sahara Lake City, Village Ambavane, Distt. Lonavala, Pune–410401, Maharastra. **PAN No. AAGCS8313P**	Vs.	ACIT, Circle : 6, Pune.

I.T.A. No. 1155/DEL/2009 (A.Y. 2004-05)

Sahara India Power Corporation Limited, Amby Valley, Sahara Lake City, Village Ambavane, Distt. Lonavala,Pune–410401, Maharastra. **PAN No. AAGCS8313P**	Vs.	DCIT, Central Circle : 6, New Delhi.

I.T.A. No. 5067/DEL/2013 (A.Y. 2005-06)

DCIT, Central Circle : 6, New Delhi.	Vs.	Sahara India Power Corporation Limited, Amby Valley, Sahara Lake City, Village Ambavane, Distt. Lonavala, Pune–410401, Maharastra. **PAN No. AAGCS8313P**

AND

C. O. No. 55/DEL/2014
[IN I.T.A. No. 5067/DEL/2013] (A.Y. 2005-06)

Sahara India Power Corporation Limited, Amby Valley, Sahara Lake City, Village Ambavane, Distt. Lonavala, Pune– 410401, Maharastra. **PAN No. AAGCS8313P** **(APPELLANTS)**	Vs.	DCIT, Central Circle : 6, New Delhi. **(RESPONDENTS)**

Assessee by : **Shri Ajay Vohra, Sr. Advocate; &**
Shri Aditya Vohra, Advocate; &
Shri Arpit Goel, Advocate.

Department by : **Shri Kanv Bali, Sr. D. R.;**

Date of Hearing	**28.02.2023**
Date of Pronouncement	**28.04.2023**

ORDER

PER YOGESH KUMAR U.S., JM

The ITA No. 109/Pun/2007 & ITA 1155/Del/2009 are relate to assessment years 2003-04 & 2004-05 filed by the assessee directed against order of CIT(A) dated 23/10/2006 and 13/01/2009 respectively. The appeal in ITA No.5067/Del/2013 filed by revenue and C.O. 55/Del/2014 filed by the Assessee for the assessment year 2005-06 are directed against order of the CIT(A) dated 27/06/2013. Since the issues in all these assessment years are common in nature, hence, they are clubbed together, heard together and disposed of by this common order for the sake of convenience.

2. The grounds in assessment year 2003-04 in ITA No. 109/PUN/2007 filed by the Assessee are as follows:

1. *That the Learned CIT(A) is not justified in confirming the addition of Rs.32,11,500/-made by the Learned Assessing Officer by treating the advance received by the appellant from Sahara India Commercial Corporation Limited as taxable receipt.*

2. *That the Learned CIT(A) has not correctly appreciated the facts and circumstances of the case, the terms of the agreement entered into between the appellant company and M/s. Sahara India Commercial Corporation Limited and the nature of work involved against which advance was received by the appellant company which in the hands of the appellant company was utilized for work in progress and there was no justification in subjecting the difference between the two amounting to Rs.32,11 ,500/- to tax as income.*

3. *That the Learned CIT(A) has failed to appreciate that there was no accrual of income till the work of preparation of feasibility reports, layout, plans etc. contracted with M/s. Sahara India Commercial Corporation Limited was complete in the hands of the appellant company as total investments made by sub-contracting and making payment to EDCL and EDCL-PPL the sub-contractors was in the nature of work in progress and, therefore, there was no justification in subjecting an hypothetical income which had neither accrued nor arisen to tax.*

4. *That the Learned CIT(A) is not justified in confirming the addition of Rs.27,625/- made by the learned Assessing Officer against the second aspect of the work as per agreement which was sub-contracted to Cummins Diesel Sales and Services (India) Limited.*

5. *That the Learned CIT(A) is wrong in holding that the difference between the total payment made and the total sum received tantamounted to income in the hands of the appellant company as the sum paid included advance also to the sub-contractors, therefore on the facts and circumstances of the case there was no justification in confirming the addition of Rs.27,625/- in the hands of the appellant.*

6. *That in any view of the matter the Learned CIT(A) has not correctly appreciated the facts and circumstances of the case, the terms of MOU between the appellant company and M/s. Sahara India Commercial Corporation Limited, the nature of work which was executed pursuant to the agreement and the explanations submitted during the course of assessment proceedings as well as appellate proceedings and is wrong in confirming the additions made by the Ld. Assessing Officer.*

7. *That the order passed by the Learned CIT(A) is without proper opportunity and bad in law.*

8. *That the order passed by the Learned CIT(A) is against the merits, circumstances and legal aspects of the case.*

9. *That the appellant craves leave to add, alter, amend or withdraw any or all the grounds of appeal on or before the date of hearing.*

3. The grounds in assessment year 2004-05 in ITA No. 1155/Del/2009 filed by the Assessee are as follows:

1. *That the learned CIT(A) is not justified in confirming the addition of Rs 40,48,500/-made by the Learned Assessing officer by treating the advance <u>received</u> by the appellant from Sahara India Commercial Corporation Limited as taxable receipt.*

2. *That the Learned CIT(A) has not correctly appreciated the facts and circumstances of the case, the terms of agreement entered into between the appellant company and M/s Sahara India Commercial Corporation Limited and the nature of work involved against which advances was received by the appellant company which in the hands of the appellant company was utilized for work in progress and there was no justification in subjecting the difference between the two amounting to Rs 40,48,500/-to tax as income.*

3. *That the Learned CIT(A) has failed to appreciate that there was no accrual of income till the work of preparation of feasibility reports, lay-out, plans etc. contracted with M/s Sahara India Commercial Corporation Limited was complete in the hands of the appellant company as total investment made by sub-contracting and making payment to EDCL and EDCL-PPL the sub-contractors was in the nature of work in progress and, therefore, there was no justification in subjecting an hypothetical income which had neither accrued nor arisen to tax.*

4. *That the Learned CIT(A) is not justified in confirming the addition of Rs 7,541/- made by the Learned assessing officer against the second aspect of the work as per agreement which was sub contracted to Cummins Diesel Sales and Service (India) Limited.*

5. *That the Learned CIT(A) is wrong in holding that the difference between the total payment made and total sum received tantamounted to income in the hands of the appellant company as the sum paid included advance also to the sub-contractors, therefore on the facts and circumstances of the case there was no justification in confirming the addition of Rs 7,541/- in the hands of the appellant.*

6. *That in any view of the matter the Learned CIT(A) has not correctly appreciated the facts and circumstance of the case, the terms of MOU between the appellant company and M/s Sahara India Commercial' Corporation Limited, the nature of work which was executed pursuant to the agreement and the explanations submitted during the course of assessment proceeding as well as appellant proceedings and is wrong in confirming the addition made by the Ld. Assessing Officer.*

7. *That the order passed by the Learned CIT(A) is without proper opportunity and bad in law.*

8. *That the order passed by the Learned CIT(A) is against the merits, circumstance and legal aspects of the case.*

9. *That the appellant craves leave to add, alter. Amend or withdraw any or all the grounds of appeal on or before the date of hearing.*

4. The grounds in Revenue's appeal for assessment year 2005-06 in ITA No. 5067/DEL/2013 are as follows:

1. *"The CIT(A) is not correct in law and facts.*

2. *On the facts and circumstances of the case the Ld. C1T(A) has erred in cancellation of assessment order passed by AO in response to proceedings initiated u/s 148 of IT Act whereas at the same time he has uphold the addition on merit and treated the initiation of proceeding u/s 147/148 as void, which was taken by AO well within the time and well founded.*

3. *The appellant craves leave to add, alter or amend any/all of the grounds of appeal before or during the course of the hearing of the appeal."*

5. The grounds in Assessee's Cross Objection for assessment year 2005-06 in C.O. No. 55/Del/2014 are as follows:

"1. That the ld. CIT(A) is fully justified in canceling the order passed under section 143(3) read with section 147 of the Income Tax Act on the facts and circumstances of the case as well as in law.

2. That without prejudice the ld. CIT (A) is not justified in confirming the action of the Assessing Officer in subjecting to tax on hypothesis by making up 10% over the payment made by the respondent to various parties for power project work amounting to Rs.3,00,19,717/- which was debited to work in progress and treating the same as income of the respondent of the year under appeal.

3. That without prejudices the ld. CIT(A) has erred in law and on facts of the case in making up payment of Rs. 4,47,52,000/- made to EDCL-PPL and subjecting the said mark up of Rs. 44,75,200/- to tax on hypothesis and surmises without any material on record.

4. That without prejudices the ld. CIT(A) has erred in law and on facts and circumstances of the case in recasting the income and expenditure account of the respondent and working out profit of Rs.78,43,649/- as against Rs.5,58,927/- shown by the respondent.

5. That without prejudices the ld. CIT(A) has erred in law and on facts of the case in not appreciating that the agreement entered into by the appellant with M/s. Sahara India Commercial Corporation Limited stood terminated with effect from 30.09.2005 and consequent thereto no income has accrued to the appellant which has been subjected to tax on hypothesis and surmises.

6. That the ld. CIT(A) has erred in law and on facts and circumstances of the case in confirming the addition of Rs.1,38,04,350/- under section40(a)(ia) of the Income Tax Act and concurring with the observation of the Assessing Officer that the deduction of payment will be available to the respondent in the subsequent year, i.e. A.Y.2006-07.

7. That the Id. CIT (A) has erred in law and fact and circumstances of the case in not treating the amendment brought by the Finance Act 2008 to be in the nature of curative amendment having retrospective effect and thereby confirming the addition under section 40(a) (ia) of the Income Tax Act.

8. That the respondent craves leave to add, alter, amend or withdraw any or all the grounds of cross-objection on or before the date of hearing."

6. First, we will take up Assessee's appeals in ITA Nos. 109/Pun/2007 & 1155/Del/2009 for assessment years 2003-04 & 2004-05. As the issues involved in both the Appeals are identical, for the sake of convenience we will consider the facts in the assessment year 2003-04.

7. The facts of the case from the assessment order are that the assessee entered into contract with Sahara India Commercial Corporation Ltd. (SICCL) which is developing and managing Amby Valley project near Lonavala for energy management and maintenance of the above referred valley effective from the month of September 2002. The return of income was filed at Rs.4,68,545/-on account of interest from FDRs against which an expenditure of Rs.4,02,057/- was claimed. The assessee had already entered into a MOU with Energy Development Corporation Ltd. (EDCL) on 05/04/2002. The said agreement was further entered into with EDCL Power Project Ltd. w.e.f. 01/11/2002 wherein it was stated that M/s SICCL was developing a township in the state of Maharashtra and it had entered into an agreement with the assessee for assessing, planning, designing procuring, constructing and managing generating stations, existing and future, their operations and maintenance, transmission and distribution of electricity in Amby Valley and all its future projects. The assessee also entered into a contract with Cummins Diesel Sales & Services India Ltd (CDSSL) for providing after sales services to Cummins Engines and parts thereof and diesel generating sets fitted with Cummins engines installed in Amby Valley from 5'h July 2002. It was seen by the Assessing Officer that advance of Rs.21,05,000/- was given to M/s CDSSL while a bill of Rs.2,49,645/- was shown as payable under the

head current liabilities and provisions. The assessee filed a revised return on 11/03/2005 declaring an additional income of Rs.1,82,875/. It was stated that the necessity of revising the return had arisen because during the finalization of accounts for the A.Y.2004-05, it was noticed that certain income which related to A.Y.2003-04 had incorrectly been received and accounted for in A.Y.2004-05. The Assessing Officer, however did not agree that the revised return was filed during the finalization of the accounts of A.Y.2004-05 as the return for that assessment year had already been filed on 1.12.2004 whereas the revised return was filed on 11.3.2005. Later on, the additional income declared in the revised return was explained in so far as a bill dated 1.10.2003 was raised by the assessee on SICCL "being the services rendered for period 5.3.2003 to 4.4.2003 for the operations and maintenance of DG set at Amby Valley as per the contract between the SICCL and SICCL". An amount of Rs.19,25,000/- was increased to 109.5% and the amount was arrived at Rs.21,07,875/-. It was stated that a bill was raised by M/s Cummins Diesel Sales and Services during the year 2002-03 amounting to Rs.19,25,000/- and since the assessee was to receive 10% of the total project as per clause 8 of the agreement between assessee and SICCL the amount was increased and the prior period income(net) of Rs.1,82,875/- was shown over and above the income already declared in the assessment year under consideration.

8. The Assessing Officer verified from CDSSL and found certain discrepancies in the amount of payments made to them. According to CDSSL an amount of Rs.21,02,042/- was received by them in view of various invoices raised by them whereas in the balance sheet an advance of Rs.21,05,000/- was shown to M/s. CDSSL (incorrectly

shown as Rs.2,08,00,000/- by the Assessing Officer in para 7 of the assessment order). It was stated by the assessee that M/s. CDSSL was to be paid Rs.2,75,000/- per month and mobilization advance ofRs.2 lakhs which was to be adjusted from the 7thRA bill of Rs.20,000/- per month. The total amount said to have been paid as per page 7 of the assessment order was Rs.21,05,000/-. The Assessing Officer wondered as to how Rs.2,49,645/- was shown as expenditure payable in the balance sheet and as to how the assessee had arrived at a figure of Rs.19,25,000/- while working out additional income. The Assessing Officer further noted that since bill of Rs.21,07,875/- has been issued to SICCL, the same is not reflected in the amount receivable from SICCL and M/s SICCL is not shown as sundry debtors in the books of SICCL. On the basis of the above, the Assessing Officer stated that these payments were reflected as advance in the return while those were not advances but payments made on account of bills raised by M/s CDSSL as M/s CDSSL furnished the details of 7 invoices raised amounting to Rs.2,75,000/- each. It was held that assessee was entitled for minimum consultancy charges of 10% on Rs.21.02,042/-. An addition of Rs.27,625/- was made to the income of the assessee.

9. Regarding the contract given to EDCL/EDCL Power Project Ltd. to whom advance of Rs.2,08,00,000/- and Rs.1,13,15,000/- had been given for services already referred above as on 31/3/2003, it was stated that the bills which were raised by EDCL/EDCL Power Project Ltd. on the assessee were for various feasibility reports, assessment of the power requirement, setting up of transmission and distribution network, their plans and layouts etc. It was stated that the work carried out was in the nature of WIP in the hands of the assessee as

the assessee company was to be reimbursed only 10% of the actual expenditure incurred pursuant to clause 8 of the agreement of the assessee with SICCL. Till such time the work was completed, the assessee was not in position to know as to what was the total expenditure on the project and, therefore, the entire expenses in relation thereto stood capitalized by the assessee under the head WIP. It was stated that due to accounting mistake the payment made to EDCL were shown as advance but the mistake stood rectified in the subsequent year where these payments have been transferred to WIP. The Assessing Officer, however, did not agree to the contention of the assessee and after referring to the terms and conditions between the assessee and SICCL that the assessee shall be reimbursed all its actual expenses incurred for operation and maintenance of existing facilities on actual basis and shall be paid consultancy charges also came to the conclusion that income had actually accrued to the assessee. The Assessing Officer found that no payment had been made by SICCL to assessee since the assessee had not raised any bills on SICCL. He proceeded to reject the contention of the assessee that the amount can be received only when the final reports are submitted by the assessee to SICCL since in the contract there was no mention that the payment will be made only on completion of the project and that SICCL will not make any payment on non fulfillment of the agreement. Non raising of the bill by the assessee, according to the Assessing Officer, does not entitle the assessee to claim the same as WIP. The Assessing Officer also gave an illustration wherein he mentioned the case of M/s Raj Promoters and builders who were contractors of SICCL and sub contractors of Gora Projects Ltd., a contractor of SICCL. M/s Raj Promoters & Builders have issued running bills to Gora project ltd. and also to SICCL. The Assessing Officer was also aware that assessee

though closely related to SICCL were independent legal entities. CDSSL & EDCL/ EDCL PPL had already raised bills on assessee. It meant that certain amount - of work had already been crystallized and was quantifiable. As to why no bill had been raised by the assessee especially when no mobilization advance had also been received was instrumental in persuading the Assessing Officer to hold that the assessee had not raised any bills on SICCL only to reduce the incidence of income during the year. The discussion on the issue was summarized as under:

> "SIPCL is a contractor of SICCL SIPCL has sub contracted the work to Cummins and EDCL
>
> Cummins and EDCL raised bills of work done by them for SIPCL
>
> SIPCL has made the payment to Cummins and EDCL
>
> For the bill raised by Cummins, SIPCL has raised the bill on SICCL and shown income on it @ 10%
>
> However, SIPCL had not raised any bill for work done by EDCL/EDCL PPL on SICCL
>
> Once EDCL/EDCL PPL and Cummins (sub contractors of SIPCL) have raised a bill on it, it has to raise a running bill to SICCL as per agreement of contract. WIP shall be in respect of any work for which Cummins and EDCL has not raised the bill but they have done the work. However, there is no such pending work for which bill is yet to be raised by sub-contractors. Non issue of the bill by SIPCL does not entitle the assessee to claim the same as WIP."

10. On the basis of above, it was held that assessee has not shown the income which has actually accrued to it. As per the contract between SICCL and the assessee the assessee is entitled to consultancy charges subject to maximum of 10%. The assessee had made payments of Rs.3,21,15,000/- to EDCL/EDCL-PPL. The Profit &

Loss account and balance sheet were re-casted by the Assessing Officer as given on page 13 of the assessment order and the income was assessed at Rs.34,88,488/-.

11. The facts in assessment year 2004-05 are similar that of Assessment Year 2003-04 except the differences in the denominations.

12. The crux of the various grounds raised by assessee in the Assessment Year 2003-04 are with regard to treating of the advance paid to SICCL – Rs.21,05,000/-, EDCL Power Corporation – Rs.2,08,00,000/- and EDCPL – Rs.1,13,15,000/-. The lower authorities are of the opinion that amount advanced the said parties are towards the work done by them on behalf of the assessee in respect of contract undertaken by assessee with SIPCL. The ld. AO found that SIPCL is a contractor of SICCL and observed as under:

- SIPCL is a contractor of SICCL. SIPCL has sub contracted the work to Cummins and EDCL.
- Cummins and EDCL had raised bills of work done by them for SIPCL.
- SIPCL has made the payment to Cummins and EDCL.
- For the bill raised by Cummins, SIPCL has raised the bill on SICCL and shown income on it @ 10%.
- However, SIPCL that' not raised any bill for work done by EDCL on SICCL.

13. It was observed that SIPCL is - contractor for SICCL. Once EDCL and Cummins (sub-contractors of SIPCL) have raised the bill on it, it has to raise a running bill to SICCL as per agreement of contract Work In Progress (WIP) shall be in respect of any work for which Cummins and EDCL has not raised the bill, but they have done the work. However, there is no such pending work for which bill is yet to be raised by sub-contractors. Non issuance of the bill by SIPCL does not entitle the assessee to claim the same as WIP.

14. In fact, contractor can raise number of bills during the year. For illustration, the ld. AO mentioned the case of Raj Promoters & Builders who were contractors of SICCL and sub-contractors for Gora Projects Ltd. (contractor of SICCL). Raj Promoters and Builders have not only issued running bill to Gora Projects Ltd. but also to SICCL. The ld. AO observed that in a year number have been raised on the contractee by Raj Promoters.

15. The next question arises is that if SIPCL shows WIP for the work done by it and will not raise a bill then from when it will make payment to its sub- contractors. SIPCL though sister concern of SICCL is an independent legal entity. When Cummins and EDCL have raised a bill on SIPCL, it means certain amount of work has been crystallized and work done is quantifiable, then it should simultaneously raise the bill on SIPCL, especially when no mobilization advance is received by it. The assessee company has shown the work done by it as WIP till 2005 and has not yet finalized the bill. In the circumstances, it is apparent that SIPCL is not showing the income which has actually been accrued.

16. The ld. AO further observed that as per contract between SICCL and SICPL, the SICPL is entitled to consultancy charges subject to maximum of 10%. Since the actual cost in such case are the payments made to EDCPL, income from consultancy charges has become due to the SICPL in the case of EDCPL also. The company has made payment of Rs. 3,21,15,000 to EDCPL, it is entitled to 10 % of profit incurred on these expenses.

17. The ld. AO mentioned that the amount of Rs. 3,21,15,000 should have been shown as receivable from SICCL and should have been reflected in the balance sheet of SICPL as sundry debtor and in the balance sheet

of SICCL as Sundry Creditors, whereas company has shown this amount only as advances to EDCL. In view of these findings, the profit and loss account and the balance sheet of SICPL is re-casted by the ld. AO as under:-

EXPENDITURE		**Income**	
Expenditure as per return	402057	Interest on FDR	468545
Payment to Cummins Diesel Sales& Services Ltd	2105000	Bill issued toSICCL (again contract given to Cummins)	2315500
Payment to EDCL Power Corporation Ltd	20800000	Bills issued SICCL (against work allotted to EDCPL)	22880000
Payment to Energy development Co Ltd	11315000		12446500
Profit	6488488		
	38110545		**38110545**

18. Very similar is the position in assessment year 2004-05 too. The contention of ld. A.R. is that, assessee has been following Contract Completion method and contract completion method is one of accepted methods of computing income of assessee and percentage completion method is not mandatory in these assessment years and the AO disturbing consistent method of accounting followed by the assessee by substituting percentage completion method which give the distort picture of income of the assessee, which shall be avoided. Thus, he has submitted as follows:

19. The Ld. A.R. submitted that the assessing officer and CIT (A) have grossly erred in increasing the taxable income of the Appellant by making addition on the basis of hypothetical income. The lower authorities have not correctly appreciated the facts of the case, terms of the agreements between parties and revenue recognition method provided in AS-9 which was followed by the assessee.

20. The lower authorities laid much weight-age on the fact that income received from CDSSL was offered to tax by the assessee whereas no income was shown in respect of work sublet to EDCL/ EDCL-PPL. It has not been appreciated that the agreement as entered with CDSL was for the maintenance of generating sets installed at Aamby valley site for an agreed amount of Rs.2,75,000 per month, on which assessee charged its markup and raised bills on SICCL, and income received thereon was offered to tax. The income received from CDSSL neither had any contingency element in it nor the amount of bill to be raised on SICCL was unascertainable.

21. The assessing officer held that once EDCL/ EDCL-PPL had raised bill on the assessee, the assessee ought to have also raised bill on Sahara India Commercial, ignoring the fact that there were altogether different agreements entered into by the assessee with the said parties. In this regard, the ld. A.R. submitted that EDCL/ EDCL-PPL was a sub-contractee and the final feasibility report to be prepared by EDCL/ EDCL-PPL was to be submitted with SICCL within the time frame as agreed, failing which SICCL may terminate the agreement. Therefore, since the assessee was required to raise bill on SICCL of an amount mutually determined on the basis of assessment and final feasibility report which was to be accomplished by EDCL/ EDCL-PPL, the assessee was neither in the position to know the actual amount of bill to be raised on SICCL nor it was sure about the income accrual since it was contingent on timely

submission, therefore, the assessee booked the amount paid to EDCL/ EDCL-PPL as WIP, instead of expenditure and for the amount received from SICCL as advance from vendor under creditor in current liabilities in the financial statement.

22. In view of the aforesaid, the ld. A.R. submitted that the assessing officer as well as CIT(A) erred in treating both the agreements in parity.

23. The ld. A.R. submitted that the aforesaid amount per se does not contain any element of income accrued to the assessee, i.e., if the feasibility report was not completed and submitted with SICCL on time, the assessee would not be entitled for any income. Therefore, the accrual of income is very much contingent on completion of feasibility report.

24. The CIT(A) erred in relying on Accounting Standard ("AS") -7 'Construction Contract" as the case of the assessee does not fall within the scope of AS-7. The construction contract in AS-7refers to the construction of bridges, tunnels, roads, buildings, etc., and services rendered which are directly related to the construction of the assets. Therefore, preparation of various feasibility reports, assessment of power generation requirement, identification of back-up, setting up of transmission and distribution network does not fall within the scope of AS-7. The relevant extract of AS-7 is reproduced hereunder:-

"Definitions

> *A construction contract is a contract specifically negotiated for the construction of an asset or combination of assets that are closely*

interrelated or interdependent in terms of their design, technology and function or their ultimate purpose or use.

3. A construction contract may be negotiated for the construction of a single asset such as a bridge, building, dam, pipeline, road, ship or tunnel. A construction contract may also deal with the construction of a number of assets which are closely interrelated or interdependent in terms of their design, technology and function or their ultimate purpose or use; examples of such contracts include those for the construction of refineries and other complex pieces of plant or equipment.

4. For the purposes of this Statement, construction contracts include:

(a) contracts for the rendering of services which are directly related to t construction of the asset, for example, those for the services of project managers and architects; and

(b) contracts for destruction or restoration of assets, and the restoration of the environment following the demolition of assets."

25. The AO and CIT(A) grossly erred in ignoring the basic accounting as per AS-9 "Revenue Recognition" where in case of rendering of services, it has been provided that revenue shall be recognized on the basis of "Completed Service Contract Method" where performance consists of execution of a single act, i.e., submission of feasibility report in the present case. The relevant extract of AS-9 is as under:

"7. *Rendering of Services*

7.1 Revenue from service transactions is usually recognized as the service is performed, either by the proportionate completion method or by the completed service contract method.

(ii) Completed service contract method. - Performance consists of the execution of a single act. Alternatively, services are performed in more than a single act, and the services yet to be performed are so significant in relation to the transaction taken as a whole that performance cannot be deemed to have been completed until the execution of those acts. The completed service contract method is relevant to these patterns of performance and accordingly revenue is recognized when the sole or final act takes place and the service becomes chargeable.

26. In the aforesaid circumstance, the ld. A.R. submitted that the assessee had to deliver the feasibility report to SICCL post which the Assessee would be in a position to determine the amount to be billed to SICCL, i.e., the Assessee would earn right to receive once the services promised are delivered to SICCL and therefore, no interim invoices could have been issued to SICCL under any assumption.

27. Reliance in this regard is placed by the ld. A.R. on the decision of the Supreme Court in the case of **E.D. Sassoon & Co Ltd vs CIT: [1954] 26 ITR 27 (SC)** wherein it has been held that for an income to be considered as accrued, there must be right to receive the income. The relevant extract of the decision is as under:

"Income may accrue to an assessee without the actual receipt of the same. The assessee acquires a right to receive the income, the income can be said to have accrued to him though it may be received later on its being ascertained. The basic conception is that he must have acquired a right to receive the income. There must be a debt owed to him by somebody. There must be as is otherwise expressed debitum in praesentisolvendum in futuro. Unless and until there is created in favour of the assessee a debt due by somebody it cannot be said that he has acquired a right to receive the income or that income has accrued to him."

28. Reliance is further placed on the decision of the Hon'ble Delhi High Court in the case of CIT vs Dinesh Kumar Goel: [2011] 331 ITR 10 (Del), wherein the Court held as under:

"15. *After considering the respective submissions, we are not in a position to take a view different from what is taken by the Tribunal in the instant case. In the facts of this case, it is apparent that at the time of admission, the students are required to deposit the whole fee of the entire course, but that would only remain a 'deposit' or 'advance' and it cannot be said that this fee had become 'due' at the time of deposit. Fee is charged in advance for the entire course, presumably because of the reason that there should not be any default in making the said by the students during the period of course. Interestingly, the Assessing Officer in his assessment order has himself stated that "students were required to deposit the fee for the whole module of course at the time of registration itself'. The Assessing Officer has used the expression 'deposit'. In the very next breadth, he draws the conclusion that this would mean that the fee had become 'due'. Thus, the Assessing Officer knew the significance of the expression 'deposit' viz-a-viz 'due', though he committed the mistake in treating the said deposit as the fee becoming due. When we applies the principles of law laid down in E.D. Sassoon & Co. Ltd.'s case (supra) and Calcutta* **Co.** *Ltd.* ***v.*** *CIT [1959] 37 ITR*

1 (SC), it becomes apparent that the fee was not due the time of deposit. The services in respect of financial year 1997-98, for which also the payment was taken in advance were yet to be rendered. Therefore, applying the principle in the case of Calcutta Co. Ltd. (supra), this could only be treated as advance otherwise it would lead to an anomaly situation, highly derogatory to die assessee, which is not intended in law, viz., even when the very amount received, expenses pre to be deducted to arrive at the net income and those expenses are yet to be incurred (which may be incurred in the next financial year), the entire receipts become income which would be exigible to much higher tax. It is for this reason, the following principle was enunciated by the Supreme Court in Calcutta Co. Ltd.' case (supra)

"The expression "profits or gains" in section 10(1) of the Income-tax Act has to be understood in its commercial sense and there can be no computation of such profits and gains until the expenditure which is necessary for the purpose of earning the receipts is deducted therefrom - whether the expenditure is actually incurred or the liability in respect thereof has accrued even though it may have to be discharged at some future date."

16. *We may also, at this stage, usefully refer to another judgment of the Apex Court in the case of CIT v. Shri Goverdhan Ltd. 119681 69 ITR 675 in the following terms :*

"It is, however, well-established that the income may accrue to an assessee without actual receipt of the same and if the assessee acquires a right to receive the income, the income can be said to have accrued to him though it may be received later on, on its being ascertained. The legal position is that a liability depending upon a contingencyis not a debt in praesenti or in futuro till the contingency happens. But if it is a debt the fact that the amount has to be ascertained does not make it any the less a debt if the liability is certain and what remains is only a quantification of the amount: debitum in praesenti, solvendum in futuro."

17. The judgments cited by the learned counsel for the Revenue do not concern the issue, which we are dealing with these appeals.

18. We, thus, answer the question in the affirmative and as a consequence, dismiss these appeals."

(emphasis supplied)"

29. The ld. A.R. for the assessee further relied in the case of ACIT vs National Builders: [2012] 137 ITD 277 (Ahmd Trib.), the assessee was in the business of business of construction of civil work and road construction and had entered into an agreement with Gujarat State Road Transport Corporation ("GSRTC") for the development of a shopping complex. The assessee as a developer was allowed to find intending allottees and to collect sale consideration from such lessees. However, a significant clause was that the intending lessees could become allottees only on approval by GSRTC. Due to the said reason, an enforceable transaction could take place only on approval by GSRTC. Therefore, the assessee followed Completion of Project method and capitalized the cost to work-in-progress. The assessing officer applied the Percentage Completion method and computed 10% of work-in-progress amount as taxable income. The Ahmedabad Tribunal, after elaborately discussing AS-7 vis-à-vis AS-9, held that where the earning of income is contingent on the approval of GSRTC, no part of the advance received can be said to have accrued in the current assessment year. The relevant extracts of the decision are as under:

"6. We have heard both the sides at some length... ...

The definition of a "construction contract" is a contract specifically negotiated for the construction of an asset or a combination of assets that are closely interrelated or interdependent in terms of their design, technology and function or their ultimate purpose or use. Whereas a "cost plus contract" is a construction contract in which the contractor is reimbursed for allowable or

otherwise defined costs, plus percentage of these costs or a fixed fee. In the present case, the assessee had entered into an agreement with GSRTC for the development of a shopping complex. The assessee as a developer has been allowed to find intending allottees and to collect sale consideration from such lessees. However, a significant clause was that the intending lessees could become allottees only on the approval by the GSRTC. Due to the said reason, it was vehemently contested that an enforceable transaction could take place only on approval by GSRTC. Hence, the assessee's stand for recognition of revenue was that it could be recognized at the time only upo obtaining such approval. According to assessee, the assessee could legally earn income on the occasion of granting of approval by GSRTC for the allotment to such lessees. Rather it has been emphasized that the collection although made before such approval, in case of denial of approval, was to be refunded. The provisions of AS-7 have thus kept in mind such eventuality as well. Although the recognition of Revenue as per AS-7 is upto the stage of completion of a contract but it has also been prescribed that an enterprise is generally able to make reliable estimates after it has agreed to a contract which establishes each parties enforceable rights regarding the assets to be constructed ...

6.3. Therefore, AS-9 as per the question of uncertainties not remained untouched and that eventuality has also been prescribed therein. Thus AS-9 has prescribed that the recognition of Revenue requires that Revenue is measurable and that at the time of rendering of service it would not be unreasonable to expect ultimate collection. Where the ability to assess the ultimate collection with reasonable certainty is lacking, then Revenue recognition is to be postponed to the extent of uncertainty involved. It has therefore been prescribed vide Para-9 that it is appropriate to recognize revenue only when it is reasonably certain that the ultimate collection will be made... ... "

30. Therefore, in the aforesaid circumstances, the ld. A.R. submitted that the Assessee had correctly treated the amount paid to the EDCL/ EDCL-PPL as WIP and the amount received from SICCL as advance under the head 'sundry creditors', since it was impossible to raise bill on SICCL and recognize revenue at a stage when the work was underway. Therefore, the ld. A.R. submitted that the hypothetical income as brought to tax by the lower authorities deserves to be deleted in toto.

31. The ld. A.R. submitted that It is most pertinent to mention that subsequently in year 2005 the Government of Maharashtra laid electrify lines in Lonawala near Aamby Valley because of which Aamby Valley was able to get electricity at very low rates and as a result of which the work of assessment of the total power requirement and feasibility study in respect of various options of power availability and work allied nature was suspended and ultimately terminated vide termination agreement dated 30.09.2005 and 1% of total value of WIP as per book of account of the Assessee as on date was given to the Assessee by the way of compensation. Therefore, the actual compensation received by the Assessee for the services rendered to SICCL from 28.03.2002 to 30.09.2005 was Rs.22,45,659 which is reported as other income in the financial statement and offered for tax in the return of income filed for AY 2006-07. The said amount of income was accepted in the order of CIT(A) passed under section 154 r.w.s. 250 of the Act. *(emphasis supplied)*

32. In the aforesaid circumstances, the ld. A.R. submitted that the addition made by the assessing officer in respect to the payment made to EDCL/EDCL-PPL was hypothetical, since the sole basis of addition i.e., the agreement, got terminated in future and no addition in the income of the Assessee could have been made on the basis of an agreement which was subsequently cancelled and the transaction never materialized.

33. Reliance in this regard is placed on the decision of the Supreme Court in the case of CIT vs Balbir Singh Maini: 398 ITR 531 (SC) wherein the apex Court held that recognition of revenue on the basis of an unregistered JDA which was subsequently cancelled shall tantamount to taxation of hypothetical income. The pertinent findings of the Court are as under:

> *"27. In the facts of the present case, it is clear that the income from capital gain on a transaction which never materialized is, at best, a hypothetical income. It is admitted that, for want of permissions, the entire transaction of development envisaged in the JDA fell through. In point of fact, income did not result at all for the aforesaid reason. This being the case, it is clear that there is no profit or gain which arises from the transfer of a capital asset, which could be brought to tax Under Section 45 read with Section 48 of the Income Tax Act.*
>
> *In the present case, the Assessee did not acquire any right to receive income, inasmuch as such alleged right was dependent upon the necessary permissions being obtained. This being the case, in the circumstances, there was no debt owed to the Assessees by the developers and therefore, the Assessees have not acquired any right to receive income under the JDA. This being so, no profits or gains "arose" from the transfer of a capital asset so as to attract Sections 45 and 48 of the Income Tax Act.*
>
> *We are, therefore, of the view that the High Court was correct in its conclusion, but for the ret ons stated by us hereinabove. The appeals are dismissed with no order as to costs." (emphasis supplied)"*

34. Specific attention is invited to the decision of Bombay High Court in the case of CIT v. Lok Housing & Constructions Ltd: 120151 232 Taxman 159 (Bom),wherein the High Court held that iv subsequent cancellation of agreement, no hypothetical income of the assessee could be brought to tax. The relevant extract of the judgement is as under:

> *"12. On both counts, the Tribunal has in a detailed discussion of more than 40 paragraphs found that there is no substance in the objections of the Revenue. If the Revenue is trying to show that the relevant transactions were sham and not real, then it has to bring in satisfactory material. The Tribunal found in paras 37 to 40 of the impugned order that the income which was earlier disclosed was not as such because the Agreements were terminable or could have been cancelled. Once they were cancelled, the properties have reverted back to the assessee. They are duly reflected in the balance sheet and as assets of the assessee. There were revised accounts and which were also scrutinized. They were found to be in order and meeting the accounting practice adopted. Therefore, the accounting policy also could not have been faulted. In para 42 of the impugned order, the Tribunal held that income could not have really accrued because of the fact that these Agreements were cancelled. Then the issue of their cancellation has been zone into, and in extensive details. The correct le2a1 principles were applied and a finding of fact is arrived at in para 48, that no income could be said to have really accrued to the assessee as a result of the five transactions in the immovable properties and which income was chargeable to tax in the year under consideration. Once income had not accrued to the assessee in the real sense, then the original return represents wrong statement which was corrected by the assessee by filing a revised return. Therefore, no hypothetical income of the assessee could have been brought to tax. "*
>
> (emphasis supplied)

35. Reliance is further placed by the ld. A.R. on the decision of this Hon'ble Tribunal dated 24.08.2020 in the case of ITO vs Ritesh Properties & Industries Ltd: ITA No.3336/Deli,2011. In the said case, the assessee, a public limited company, was engaged, *inter alia,* in the business of real estate. Permission for development of Integrated Industrial Park at Ludhiana, Punjab was granted to the assessee. Despite the fact that said permission was hedged with various conditions, including in particular, prohibition on pre-launch of the Project, the assessee, on pre-launch basis, entered into agreement for sale of part of the Project, resulting in recognition of notional amount of Rs.9crores as revenue, which was subsequently cancelled. Accordingly, revised audited financial statements were prepared which were duly approved by the members, wherein an amount of Rs.9 crores erroneously recognized as revenue in the original financial statements was excluded. In the assessment proceedings, the assessing officer, however, held that the revised audited financial accounts were not acceptable, and income was assessed based on the originally audited accounts. On appeal, the CIT(A) accepted the revised accounts and consequently, deleted the addition made by the assessing officer. On further appeal by the Revenue, this Hon'ble Tribunal held as user:

> *"7. We have heard both the parties and perused the material available on record. It is pertinent to note that the assessee has revised the audited account and has given the relevant documentary evidence before the CIT (A) upon which the Assessing Officer has also commented through the remand report. The Assessing Officer has not pointed out any defects in the audited accounts which are allowed to be revised as per the guidelines issued by the Ministry of Finance and Company*

Affairs. Thus, the CIT(A) rightly held that the artificial and hypothetical income created by mere general entries which were subsequently reversed cannot be brought to tax. Besides that the assessee made the statement before us that the income derived from the said project in subsequent Assessment Years has been offered to tax by the assessee. Thus, the Revenue is not at loss at any point of time and hence the treatmentgiven by the CIT(A) by directing the Assessing Officer to allow the claim of Rs. 9,00,00,000/- on account of revision of financial accounts is just and correct. The appeal of the Revenue is dismissed."

(emphasis supplied)"

36. Reliance is also placed by the ld. A.R. on the following decisions wherein it has been categorically held that income-tax cannot be levied on hypothetical income:

- Godhra Electricity Co. Ltd. v. CIT : 225 ITR 746 (SC)
- CIT v. Excel Industries Ltd :358 ITR 295 (SC)
- CIT v. Shoorji Vallabhdas &Co : 46 ITR 144 (SC)
- Airport Authority of India v. CIT : 340 ITR 407 (Del.)
- CIT v. Ferozepur Finance (P.) Ltd : 124 ITR 619 (P&H)
- CIT v. Motor Credit Co. (P.) Ltd : 127 ITR 572 (Mad.)

37. In the aforesaid circumstances, where the income of the Assessee never materialized and agreement under consideration was subsequently cancelled, the ld. A.R. submitted that there arises no question of bringing to tax any hypothetical income; therefore, the addition made by the assessing officer and sustained by the CIT(A) deserves to be deleted.

38. Even otherwise, the ld. A.R. submitted that the income accruing to the assessee has already been offered to tax in AY 2006-07 and accepted as such. Therefore, bringing the same income to tax in the subject assessment year would lead to double taxation.

39. Reliance in this regard, is placed on the following decisions wherein it has been held that Revenue should not agitate issues relating to allowability of expenditure or recognition of income in one year or different years, since such issues are revenue neutral and do not affect the tax liability of the assessee likely to be collected by the Revenue as a whole:

- CIT vs Glaxo Smithkline Asia (P) Ltd: 195 Taxman 35 (SC)
- CIT vs Nagri Mills Company Ltd: 33 ITR 681 (Born)
- Shri Ram Pistons & Rings Ltd: 220 CTR 404 (Del)
- CIT vs Triveni Engineering Industries Ltd: 239 CTR 216 (Del)

40. For the reasons stated above, the ld. A.R. submitted that the addition made by the assessing officer and sustained by the ld. CIT(A) deserves to be deleted.

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41. The ld. A.R. submitted that the Assessee, during the previous year, had made payment of Rs.19,25,000 to CDSSL {i.e., Rs.2,75,000/month for 7 months} for maintenance of generating sets installed at Aamby Valley site. The Assessee raised a corresponding invoice of Rs.21,07,875 on SICCL {Rs.19,25,000 * 109.5%) and offered as income, the amount of Rs.1,82,875 {Rs.21,07,875 — Rs.19,25,000} in the revised computation of income filed before the assessing officer. As per the terms of agreement with CDSSL, the Assessee had to pay mobilization advance of Rs.2,00,000 which was to be amortized in 10 equal installments. The amount of loans and advance to

CDSSL in the financial statements stood at Rs.21,05,000 i.e., [19,25,000 + (2,00,00020,000)].

42. The assessing officer calculated the amount of income received from CDSSL as Rs.23,15,500 {21,05,000 * 110%} and expenditure at Rs.21,05,000, thereby arriving at net income of Rs.2,10,500 instead of actual income of Rs.1,82,875. Thus, taxable income was inflated by the assessing officer by Rs.27,625.

43. The ld. CIT(A) upheld the addition made by the AO without appreciating the facts of the case. The CIT(A) affirmed the AO's action of including the amount of unamortized mobilization advance while calculating income of the Assessee from CDSSL and action of the AO in attributing mark-up of 10% instead of actual mark-up of 9.5%.

44. In this regard, the ld. A.R. submitted that the assessing officer erred in considering the unamortized mobilization advance made by the Assessee to CDSSL amounting to Rs.1,80,000, as invoiced by CDSSL. 10% mark-up applied to the same leas, therefore, erroneous, resulting into addition of Rs.18,000.Further, the Assessee had invoiced SICCL by applying markup of 9.5% to the cost, however, the AO and CIT(A) erred in considering mark-up of 10% on the cost, ignoring the copies of invoices submitted before them wherein mark-up of 9.5% was shown, resulting into addition of Rs.9,625. It is further submitted that the correct amount of income was offered to tax by the Assessee in the subject assessment year and addition of Rs.27,625 deserves to be deleted.

45. The ld. D.R. strongly relied on the order of the lower authorities.

46. We have heard the rival submissions and perused the materials available on record. In this case the assessee is following the method of contract completion method for recognizing the income for assessment year 2003-04 & 2004-05 with regard to contract with SICCL. The assessee after taking the contract from SICCL given the sub-contract to CDSSL, EDCL & EECL. The assessee has given advance to these 3 companies. However, these 3 parties have raised the bills on SIPCL (present assessee) and the assessee is having income at 10% of the above bills. SIPCL has not raised any bill for work done by these 3 sub-contractors. According to the AO, since the assessee is having income at 10% on the work done by these 3 agencies, he treated the income on the work done by these 3 contractors as income of the assessee though the present assessee has not raised the bill for the same.

47. At this stage, it is appropriate mention the Third member decision in the case of JCIT Vs. Magnum International Trading Company Ltd. (84 ITD 113) (Third Member) (Del.) wherein held that:

> *"Assessee following project completion method, AO not justified in rejecting the method midway and estimated profit more so on when it was not permissible for the assessee or for the revenue to correctly work out the profit by changing the method of accounting in midway and make estimate of the income from ongoing contract for which there is no specific allocation of expenditure."*

48. In the case of Haware Constructions (P) Ltd. Vs. ITO 30 CCH 425 (Mum. Trib) wherein held that:

> *"Assessee builder having regularly employed project completion method which is an accepted method of accounting and the AO having accepted the same in the preceding assessment year, there is no justification to reject the said method to apply the percentage*

completion method when the assessee has offered the income in the year of completion of the project."

49. In the case of ACIT Vs. National Builders 137 ITD 227 (Ahd Trib) wherein held that:

"AS-7 has also made a provision that advances received from customers may not necessarily reflect work performed. Outcome of a contract cannot be estimated reliably, therefore, no profit can be recognized. Clauses of agreement dated 1st March- 2002 prescribe that lease of units agreed to be allotted by assessee to intending allottees become legally en forcible only upon GSRTC approving allotment and uptill that time, there would be no legally tenable transaction by appellant in favour of intending lessee. Such approvals have in fact been granted by GSRTC in F.Y. 2004-05 relevant for A.Y. 2005-06 onwards. Vide order dated 18/5/2004 District Collector has restrained assessee from leasing in any manner whatsoever any of shop in GSRTC project. Therefore, AO has incorrectly applied AS-7 on assessee. Since the assessee can be termed as a contractor as also a developer, therefore Revenue can be recognized in terms of AS-9 guidelines. As per statement made by assessee, completion certificates of respective projects were obtained on 15.3.2005, 10.8.2004 and 31.12.2004. AO is empowered to examine this aspect and in view of guidelines and position of law narrated hereinabove, can take appropriate action prescribed under law. It was wrong on part of AO to assess income irrespective of year of completion of project when amount received in advance has not reached certainty and that too AO has merely estimated 10% as

recognition of Revenue of construction contract, without assigning any specific basis of such an estimation, such an estimation is not approved. Order of CIT(A) is upheld - Appeals dismissed."

50. In the case of DCIT Vs. Maxworth Infrastructure P. Ltd. 63 CCH 151 (Del.) that:

"Accounting Standard AS-7 relied upon by the Assessing Officer is applicable strictly in the case of construction contracts only. Further, the assessee is following consistently this method of revenue recognition in prior years as well as in subsequent years and which has been accepted by the revenue and thus rule of consistency also demand that in the year under consideration the assessing officer is not justified in deviating the consistent approach of the Department. In view of above, there is no error in the order of the CIT(A) on the issue in dispute. Revenue's appeal dismissed."

51. In the case of DCIT Vs. Ankit Chirag Developers Pvt Ltd. 40 CCH 18 (Jodh) (Trib). held that

"On perusal of clause 10 & 11 of AS-9 it is noted that in the appellant's case the retractions involving of sale of good, the performance can be regarded as achieved when conditions laid down in clause 11 are fulfilled. In this connection it may be noted that the appellant has not transferred to the buyers the property i.e. flats in as much as significant risk and rewards of ownership have not been transferred. No sale deeds of sale of flats or any legally enforceable documents have been executed by the appellant. Though the AO has mentioned in the assessment order that sale agreements were executed but such findings appear to be factually incorrect in as much as in assessment order or in

subsequent remand report there is no reference of any sales agreement. The appellant has also denied to have executed any sale agreement for sale of flat. It may also be noted that the appellant during assessment proceedings, vide written submission dated 8.1.2011 (para 2) also brought to the notice of the AO that no sales was made during the A.Y. under consideration as alscs that even during search proceedings, no sale agreement were found which may be-said to be of legally enforceable. Therefore in the absence of any sale agreement or execution of any sale deed it cannot said that accounting standard AS-9 for revenue recognition was applicable in the appellant's case. It may further be stated that the appellant company in earlier A.Y. followed project completion method and in the background of above discussion when AS-7 and AS-9 are prima facie not found to be applicable therefore there was no basis of determination of income by percentage completion method.

(Paras 8)

Conclusion: In the absence of any sale agreement or execution of any sale deed it cannot said that accounting standard AS-9 for revenue recognition was applicable in the appellant's case.

Conclusion: Rejection of books of accounts by application of provisions of sec. 145(3) was not justified when there was nothing on record which may indicate that any item of income was suppressed or any item of expenditure was suppressed or inflated."

52. In the case of S.K. Properties Vs. ITO 162 ITD 419 (Bang.) (Trib) wherein held that:

"Appellant firm had recognized the income in respect of sale of plots by adopting Completed Contract Method, whereas, the Assessing Officer is of the view that income should be offered to tax received on year to year basis based on the stage of receipt of consideration, irrespective of the fact that the title in the plots have been passed on the buyer or not. It is an undisputed fact that the plots forms a part of stock-in-trade in the business of appellant firm and are immovable properties. The title in the immovable property can be passed on only in terms of the provisions of Transfer of Properties Act.

(Para 6)

Provisions of section 2(47) of the Act have no application to the transactions of stock-in-trade. In this case, the stock-in-trade in immovable property and the title in immovable property can be transferred or alienated in accordance with the provisions of the Transfer of PropertiesAct. The right, title or interest in the immovable property can be transferred only by way of registering the conveyance deed executed in this behalf. Even the accounting standard 9 dealing with the recognition of income also lays down that the income in respect of transfer of immovable property can be recognized only when the risks, rewards and ownership of the property is transferred to the buyer. Therefore the matterrequires fresh examination by the Assessing Officer in the light of the above position of law. Therefore, court remand this matter back to the file of the Assessing Officer with a direction that the income in respect of sale of plots can be recognized only in the year in which conveyance deed executed is registered in favour of the buyers and to allow the development expenditure incurred as

expenditure or the expenditure likely to be incurred on the plots sold as expenditure. And this direction also goes in line in consonance with the provisions of accounting standard 9 which clearly lays down that matching is required to be done on accrual basis in respect of the income offered to tax and upheld byHon'ble Supreme Court in the case of CIT Vs. Taparia Tools Ltd."

53. In the case of Prestige Estate Projects (P) Ltd. Vs. DCIT 129 TTJ 680 (Bang) (Trib) wherein held that:

"The appellant undertakes construction activity for those persons to whom it intends to sell the super-built area along with undivided share of land in a project which it is developing as a developer. Hence, the assessee is not a construction contractor and revised AS-7 was considered as not applicable. Accounting Standard-7 has not been specified by the Central Government under s. 145(2). Hence, the AD could not have rejected the accounts under s. 145(3) on the ground that the assessee has not followed the prescribed method of accounting. As per s. 145(1), income is to be computed in accordance with system of accounting regularly employed by the assessee. The assessee was employing regularly the project completion method and the project completion method is an accepted method of accounting. The assessee has changed the method of accounting from project completion method to percentage completion method in the subsequent year. Hence, the change in this year will be revenue neutral. Moreover, the assessee was under the bona fide belief that it was adopting a method of accounting, which was applicable to it as per the expert committee report of the ICAI. This bona fide belief is evident from

the fact contained in letter dt. 3rd Sept., 2007 addressed to AO. In view of this, revised AS-7 cannot be applied in the case of the assessee. —CIT vs. Khoday Distilleries Ltd. (ITRC Nos. 19, 20 & 21 of 1993) and H.M. Constructions vs. Jt. CIT (2004) 90 TTJ (Bang) 510 : (2003) 84 ITD 429 (Bang) followed; CIT vs. Bilahari Investment (P) Ltd. (2008) 215 CTR (SC) 201 : (2008) 3 DTR (SC) 329 : (2008) 299 ITR 1 (SC) relied on.

(Paras 3.17 to 3.21)

In case the revised AS-7 is to be applied then the opening inventories are also to be valued as per revised AS-7 though revised AS-7 is not applicable in the case of the assessee. Also on the principle of consistency, the Revenue should have accepted the method of accounting adopted by the assessee as the same was being followed for the last so many years. When the guidance note provided that revised AS-7 is applicable to real estate developers, the assessee has itself changed the method of accounting. Hence the AO is directed to accept the project completion method of accounting for the year under reference.—Motor Industries Company Ltd. vs. Asstt. CIT (ITA Nos. 335 & 336/Bang/2005, dt. 12th June, 2008) followed.

(Para 3.25)

Conclusion:

Assessee developer having regularly employed project completion method which is an accepted method of accounting, and the Central Government having not notified AS-7 under s. 145(2), AO could not

reject the accounts under s. 145(3) on the ground that the assessee had not followed the percentage completion method."

54. In the case of CIT Vs. Banjara Developers & Constructions P. Ltd. 425 ITR 673 (Karn.) wherein held that:

"7. We have considered the submissions made on both the sides and have perused the record. Section 145 of the Act deals with method of accounting. Section 145(1) provides that income chargeable under the head 'profits and gains of business or profession' or 'income from other sources' shall subject to provisions of sub-section (2) be computed in accordance with either cash or mercantile system of accounting regularly employed by the assessee. It is noteworthy that section 145 came to be amended w.e.f. 1-4-1987 and has not been given retrospective operation. The supreme court in the case of Bilahari Investments (P.) Ltd. supra has held as under:

"Every assessee is entitled to arrange its affairs and follows the method of accounting which the department has earlier accepted. It is only in those cases where the department records a finding that the method adopted by the assessee results in distortion a profits that the department can in substitution of the existing method."

8. In the instant case, admittedly the assessee is following mercantile system of accounting and as per notes to the accounts, the assessee is following completed contract method of accounting for contracts. The aforesaid method of assessment has been accepted by the department in the past and therefore, in view of law laid down by the Supreme Court in BilahariInvestments Pvt. Ltd., the Commissioner of Income-tax (Appeals) as well as the

tribunal has rightly held that there was no justification on the part of the assessing officer to change the earlier method adopted by the assessee and to determine the income on estimate basis.

9. The submission made on behalf of the revenue that the directions issued by a bench of this court vide order dated 23-9-2010jn I.T.A.No.36/2006 appears to be attractive at the first blush but on careful scrutiny of the order it is evident that the tribunal has referred to the decision of this court in the case of Skytop Builders (P.) Ltd. (supra) as well as the decision of the supreme court in Bilahari Investments (P.) Ltd. supra and has held that the assessee was following completed contract method which was accepted by the department in .-the past as well and therefore, there is no justification for the assessing officer to change the same. For the aforementioned reasons the submission made on behalf of the revenue cannot be accepted. Similarly, the contention that the controversy involved in this case is covered by decision of this court dated 9-9-2014 rendered in I.T.A.No.835-837/2008 is concerned, suffice it to say that substantial questions of law involved in the aforesaid appeals were entirely different. By reading the order of the tribunal as a whole, it is evident that the tribunal has taken note of the effect of Section 145 of the Act. Therefore, the aforesaid submission made on behalf of the revenue also does not deserve acceptance.

10. In view of preceding analysis, the substantial question of law framed by this court is answered against the revenue and in favour of the assessee. In the result, we do not find any merit in this appeal, the same fails and is hereby dismissed."

55. In the case of CIT Vs. Prestige Estate Projects P. Ltd. 440 ITR ***343*** *(Karn.) wherein held that*

> *"10. In the instant case, assessee entered into a Development Agreement with M/s. Karnataka Realtors Private Limited, under which agreement the assessee was to develop the property and after development of the property, the owner and the developer were entitled to a specified percentage of super built area and both were free to sell the super built area allotted to their respective shares before construction of the built up area fallen to the share of the assessee, it (assessee) entered into agreement with the proposed buyer to construct the portion as per their specification. In other words, construction is undertaken by the assessee on behalf of the proposed buyer. However, for the purposes of stamp duty payable on the sale of undivided share of land sold to the buyer, only value of the land is taken and assessee had followed consistently this method of accounting to declare the profit namely, on project completion method as per the provisions of the Companies namely, section 211(3A) the Profit and Loss Account and balance sheet of the company has to comply with the Accounting Standard. As per proviso to section 211(3C), Standards of accounting specified by the ICAI are deemed to be Accounting Standard until the Accounting Standards are prescribed by the Central Government. In other words, the companies are required to adopt and follow the Accounting Standards as prescribed by ICAI. In the event of such prescribed Accounting Standards are not being followed, then, such companies are required to disclose in its Profit and Loss Account and Balance sheet the reasons as prescribed under section*

211(3B) of the Companies Act. To put it differently, the Companies Act also provided for deviation from the Accounting Standards also. There is no dispute to the fact that AS-7 effective from 01.04.2003 is applicable to all construction contractors. The objective of AS-7 reads:

"The objective of this Standard is to prescribe the accounting treatment of revenue and costs associated with construction contracts. Because of the nature of the activity undertaken in construction contracts, the date at which the contract activity is entered into and the date when the activity is completed usually fall into different accounting periods. Therefore, the primary issue in accounting for construction contracts is the allocation of contract revenue and contract costs to the accounting periods in which construction work is performed. This Standard uses the recognition criteria established in the Framework for the Preparation and Presentation of Financial Statements to determine when contract revenue and contract costs should be recognized as revenue and expenses in the statement of profit and loss. It also provides practical guidance on the application of these criteria."

Thus, assessee-company which is required to follow Standard as prescribed by ICA' will have to necessarily take into account the reply furnished by the Institute for the Expert Committee, which reads as under:

(i) the seller of the goods has transferred to the buyer the property in the goods for a specific price or on significant risks and rewards of ownership has been transferred to the buyer and the

seller retains no effective control of the goods transferred to a degree usually associated with ownership;

(ii) no significant uncertainty exists regarding amount of consideration that has been derived from the sale of the goods.

In the instant case, it has been noticed by the appellate Tribunal that assessee was in the activity of projects and was not a construction contractor. Thus, the revised AS-7 would be applicable to an enterprise undertaking construction activities on their own account as a venture of commercial nature. Whereas, the assessee undertakes construction activities for those persons to whom it intends to sell super built area along with undivided share of land in a project which it is developing as a developer.

11. There cannot be any dispute to the fact that every assessee being entitled to arrange its affairs and follow the method of accounting, which the Department has earlier accepted. Under similar circumstances as obtained from the facts on hand, Hon'ble Apex Court in the case of CIT v. Bilahari Investment (P) Ltd. [2008] 168 Taxman 95/299 ITR 1 has held:

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

Under the completed contract method, the revenue is not recognized until the contract is complete. Under the said method,

costs are accumulated during the course of the contract. The profit and loss is established in the last accounting period and transferred to the profit and loss account. The said method determines results only when the contract is completed. This method leads to objective assessment of the results of the contract.

On the other hand, the percentage of completion method tries to attain periodic recognition of income in order to reflect current performance. The amount of revenue recognized under this method is determined by reference to the stage of completion of the contract."

56. In the case of SN Builders & Developers 431 ITR 241 (Karn)

"7. Now we may deal with the second substantial question of law. The Tribunal relied upon the decision in the case of Prestige Estate Projects (P.) Ltd. (supra), rendered by it and held that for the Assessment Year 2005-06 the Accounting Standard 7 was not applicable to the real estate developers. Therefore, percentage completion method cannot be thrust upon the assessee and the assessee was right following the project completion method of accounting as per Accounting Standard 9. The aforesaid decision has been upheld by this Court in Prestige Estate Projects (P.) Ltd. (supra). Besides it, once the first substantial question of law is answered in favour of the assessee, the second substantial question of law is otherwise even rendered academic. The Institute of Chartered Accountants has issued a clarification wherein it has been clarified that revised Accounting Standard 7 is not applicable to the enterprises undertaking construction activities. Therefore, the

second substantial question of law is also answered against the revenue and in favour of the assessee."

57. In the case of SN Builders & Developers 739 of 2018 dated 20.1.2018 (Karn) wherein followed the earlier judgement in 431 ITR 241 cited (supra).

58. In the case of DCIT Vs. Varun Developers (440 ITR 354) (Karn.)

4. We have considered the submissions made by learned counsel for the parties and have perused the record. The first three substantial questions of law are answered in favour of the assessee for the reasons assigned by learned Senior counsel for the assessee in the judgments referred to supra. So far as fourth substantial question of law is concerned, it is pertinent to note that under section 145(1) of the Act, the income chargeable under the head Profits and Gains of Business shall be computed in accordance with either cash or mercantile system of accounting regularly employed by the assessee. The general provision is subject to accounting standards that the Central Government may notify. The assessee is a builder and developer and not a construction contractor simplicitor. Accounting Standard 7, titled construction contracts is applicable only in case of contractors and does not apply to the case of developers and builders which is evident from opinion rendered by expert advisory committee of ICAI. It is pertinent to note that the assessee had offered the income for. Assessment Year 2007-08 and no income from the project was offered for the Assessment Year 2007-08 on the basis of project completion method and that either method of accounting finally lead to the same results in terms of profits and therefore, revenue neutral.

In view of preceding analysis, the fourth substantial question of law is also answered against the revenue and in favour of the assessee.

In the result, the appeal fails and is hereby dismissed."

59. In the case of DCIT Vs. Esteem Classic in ITA No.842 of 2018 dated 22.3.2021 (Karn)

"8. We have considered the submissions made on both sides and have perused the afore-mentioned decisions carefully. On perusal of the afore-mentioned decisions referred to supra rendered by this Court in the case of PRESTIGE ESTATE PROJECTS, BANJARA DEVELOPERS & CONSTRUCTIONS (P) LTD., VARUN DEVELOPERS, S.N. BUILDERS & DEVELOPERS IN ITA 393/2014 AND ITA 739/2018 as well as the decisions of the Hon'ble Supreme Court in EXCEL INDUSTRIES and in BILAHARI INVESTMENTS supra and taking into account the fact that the Revenue itself has recognized the completed contract method for computation of the subsequent Assessment years, that is 2013-2014 and 2014-2015, we answer the substantial questions of law against the Revenue and in favour of the assessee.

In the result, the appeals preferred by the Revenue fail and are hereby dismissed."

60. In the case of Investment Ltd. Vs. CIT reported in (1970) 77 ITR 533 (SC), Hon'ble Supreme Court held as under:-

"assessee is free to employ for the purpose of his trade, his own method of keeping accounts, and for that purpose to value his stock-in-trade either at cost or at market price. A method of

accounting adopted by the trader consistently and regularly cannot be discarded by departmental authorities on the view that he should have adopted a different method of keeping accounts or of valuation. The method of accounting regularly employed may be discarded only, if, in the opinion of taxing authorities, income of the trade cannot be properly deduced there from (as per provisions of 1922 Act in force at that time, presently only if case falls in sub section (3) of section 145)".

30. Further in another judgment of Hon'ble Supreme Court in the case of CIT V/s Krishna Swamy Mudiliar reported in (1964) 53 ITR 122 (SC), their Lordship's of Apex court while dealing provisions of section 13 of 1922 Act (the provisions of which are in pari-materia of section 145 of 1961 Act) have held as under: "Section 13 of 1922 Act merely prescribes that the computation of taxable profits shall be made according to the method of accounting regularly employed. Where in the opinion of the ITO the income, profits and gains cannot be properly deduced from the method of accounting, it is open to ITO to compute the income upon such basis and in such manner as he may determine". Comparing the provisions with the English provisions, it is held, "the only departure made by section 13 of 1922 Act from tax legislation in England is that whereas under English legislation the commissioner is not obliged to determine profits of a business venture according to method of accounting adopted by the assessee, under the Indian Income Tax Act, prima-facie, the ITO has for purposes of section 10 & 12 of 1922 act to compute income, profits and gains in accordance with method of accounting regularly employed. If, therefore, there is a system of accounting regularly employed and by appropriate

adjustments from the accounts maintained taxable profits may be properly deduced, the ITO is bound to compute profits in accordance with method of accounting. but where in the opinion of ITO, the profits cannot be properly deduced from eth system of accounting adopted by assessee it is open to him to adopt a more suitable basis for computation of true profits. Their Lordships then also dealt with method of accounting and observed as under-

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

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

assessee. Their Lordship's further held that the position of law is further well settled that regular method adopted by assessee cannot be rejected merely because it gives benefit to assessee in

32. Examining the facts of instant appeal we in light of above judgments we find that the method of accounting along with following project completion method for treatment of advances received from proposed buyers the assessee has been consistently followed this method and appellant's assessment has been completed by the Ld. AO for first two years viz, A.Y. 2010-11 & 2011-12. In both these years also the appellant has credited the advance received against proposed sales of flats to a separate account and shown as a liability in balance sheet. At this stage it may be relevant to mention that in those years also the appellant has credited the advance received against proposed sale of flats to the Advance against sale of Flat A/c and not treated the same as income for said years on the basis that revenue in respect of sale of said flats would be recognized only on execution and registration of sale deeds of flats. The assessment of the said years have been completed by AO by the same common order, accepting the method of accounting and method of recognition of revenue. Thus the method followed by appellant is a consistent method which has been accepted by AO for two years i.e. AY 2010-11 & 2011-12 Since the said method has been consistently followed by appellant and even accepted by department, the same cannot be deviated in the present two years without there being any finding as contemplated u/s 145(3) on the basis of satisfaction required by that section viz., (1)about correctness or completeness of the accounts of the assessee or (2) about the fact

that the assessee has not regularly employed the method of accounts provided in section 145(1) or (3) that the income has not been computed in accordance with the standards notified u/s 145(2).

33. Now it is an admitted fact based on the financial statement and audited reports for 2010-11 and 2011-12 accepted by the revenue authorities in the assessment proceedings u/s 143(3) read with respect of 153(A) of the Act that the assessee has been consistently following project completion method/completed contract method for the treatment of advances received from proposed buyers through developer JSM DPL. In the light of the above fact we observe that Hon'ble Gujarat High Court in the case of Manjusha Estates (P) Ltd Vs ITO reported in (2017) 393 ITR 644 (Guj,) adjudicating similar issue i.e. "Whether on the facts and in the circumstances of the case, the Tribunal was right in law in rejecting the project completion method which was followed consistently by the assessee and instead applying work in progress method and taxing 80 per cent. Thereon as net profit? held that "as assessee has followed the method which is consistent considering the decision in the case of CIT v Shivalik Buildwell P Ltd (2013) 40 taxmann.com 219 (Guj))(supra) and CIT Vs. Umang Hiralal Thakur (2014) 42 taxmann. com 194 (Guj)(supra) and therefore this court is are of the opinion that the view taken by the Tribunal and the Commissioner of Income Tax is not correct. Issue decided in favour of assessee.

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

"On the Revenue's appeal, the Tribunal confirmed the view of the Commissioner of Income Tax (Appeals), however, on slightly different ground, namely, that the assessee being a developer of the project, profit in his case, will arise on transfer of title of the property and receipt of any advances or booking amount cannot be treated as trading receipt of the year under consideration.

The Tribunal further noted that such method of accounting followed by the assessee had been accepted by the Revenue in earlier years. The Tribunal was, therefore, of the opinion that the Assessing Officer's decision to reject the book results during the year under consideration was not justified. We are of the opinion that the Tribunal committed no error. If as per the accounting standard available, the assessee was entitled to claim the entire income on completion of the project and if such accounting standard was accepted by the Revenue in the earlier years, in the present year, the Assessing Officer could not have taken a different sand and that too, without hearing the assessee".

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

"In the present case, it is not the Assessing Officer's case that the appellant is not reporting or under reporting its income. In fact, I find in the subsequent assessment year, i.e. the assessment year 2007-08, the appellant has disclosed substantial income from the projects undertaken in the business proprietary concerns, viz, M/s. Neelkanth Enterprises, M/s. Ghanshyam Enterprises and M/s. Swaminarayan Enterprises. In the subsequent year, i.e. the

assessment sear 2007-08 the profit declared from the projects run by these three proprietary concerns ranges from 43 per cent to 46 per cent. The Supreme Court in the case of Sanjeev Woolden Mills v. CIT (supra), has clearly held that to attract the proviso to section 145(1) of the Act, the Assessing Officer should be of the view that the accounts are correct and complete but the method employed is such that the income cannot be property deduced there from. The choice of method of accounting regularly employed by the assessee lies with the assessee but the assessee would be required to show that the assessee's regular method would not be rejected as improper merely because it gives the assessee the benefit in certain years or that as per the Assessing Officer, the other method would have been more preferable. If the method adopted does not afford true picture of profit, it would be rejected, but then such rejection should be based on cogent evidence and should be done with caution. In the present case, the appellant has declared substantial profits on the basis of project completion method in the subsequent years. In construction, the project completion method and percentage completion methods, both have also been recognized by the Central Board of Direct Taxes in the instruction No.4 of 2009 dated June 30, 2009. Therefore, the Assessing Officer is not considered justified in bringing to tax the profit of Rs.1,66,70,811 in the year under consideration, particularly when such profits have already been offered to tax by the appellant in the assessment year 2007-08. The addition of Rs.1,66,70,811 are directed to be deleted".

36. Further the co-ordinate Bench of Ahmedabad Tribunal in the case of Vraj Developers passed in ITA No.19/AHD/2008 which

attained finality as it is not challenged by the department before the high forum observed as follows; "The learned Departmental representative supported the order of the learned Assessing Officer and the learned authorized representative of the assessee supported the order of the learned Commissioner of Income tax (Appeals) and also placed reliance on the Bangalore Bench of the Tribunal in the case of Nandi Housing P. Ltd v. Deputy CIT (2003) 80 TTJ (Bang) 750, wherein the Tribunal followed the decision of the Karnataka High Curt in the case of Khoday Distillers Ltd, in ITRC Nos. 19m to 21 of 1993. This, it is observed that the issue which requires our adjudication is that the income in the instant case is to be computed as per system of accounting followed by the assessee or as per accounting followed by the assessee or as per accounting standard AS7 for the purpose of charging of income tax. We find that the issue is to be decided in accordance with the provisions of section 145 of the Act shows that the business income which is assessable under the Income tax Act is to be computed in accordance with the consistent system of accounting followed by the assessee unless such system, of accounting is defective and/or from such system of accounting, profit cannot be deduced. Thus, in our considered opinion, the option for choosing the system of account is with the assessee and not with the learned Assessing Officer provided the system chosen by the assessee is consistently followed by him and such system is not a defective system. In our considered view, provisions of AS7 cannot override the provisions of section 145 in so far as the computation of business income under the Income Tax Act for the purpose of determining income is concerned. In the instant case, we find that the learned Assessing Officer has brought no material on record to

show that the system of accounting adopted by the assessee for the year under appeal was not consistently followed y the assessee or the system adopted was a defective system. In our considered view, even a project completion method is also a recognized system of accounting. Simply the Institute of Chartered Accountants of India has recommended the percentage completion method does not mean that project accounting or the same is a defective system of accounting. The learned Commissioner of Income-tax (Appeals) has recorded a finding after pursuing the assessment records of the subsequent years that the assessee has offered for taxation its income in the. subsequent year as per the consistent system of accounting followed by the assessee. The learned Departmental representative could not point out any error in the above finding of the learned Commissioner of Income-tax (Appeals). In view of the above discussion, we do not find any error in the order of the learned Commissioner of Income-tax (Appeals) and therefore, the same is upheld and the appeal of the Revenue is dismissed. It is reported that the decision of Appellate Tribunal in the case of Vraj Developers (supra) has attained the finality as the said decision is not challenged by the Department before higher forum. In view of the above and more particularly, when it has been found that the assessee is consistently following the accounting system of percentage completion method, which is permissible and accepted by ICAI and the Central Board of Direct Taxes with respect to construction work, it cannot be said that the learned Appellate Tribunal has committed any error/or illegality, which call for the interference of this court. We see no reason to see to interfere with the impugned judgment and order passed by the learned Commissioner of Income tax (Appeals) deleting the

addition of Rs.1,66,70,881 which was made by the Assessing Officer on rejecting the accounting system on percentage completion method followed by the assessee. No question of law much less any substantial question of law arise in the present appeal. Hence, the present appeal deserves to be dismissed and is accordingly dismissed."

37. We further find the co-ordinate bench of Mumbai in the case of Prem Enterprises Vlncome Tax Officer (2012) 25 taxmann.com 179 (Mum.) deal with the similar issue wherein the assessee was constructing a project and was consistently following project completion method and the assessing officer rejected the method of project completion adopted by the assessee on observing that 8% of the total project has been incurred up to the relevant assessment year the income should have declared on the percentage completion method. The Co-ordinate Bench decided in favour of the assessee holding that the results declared by the assessee on the basis of method of accounting consistently followed and the entire profit of the project has been offered in subsequent assessment year therefore there is no justification in rejecting the method of accounting followed by the assessee and substituting the same by adopting accounting AS-7 issued by ICAI and followed it for accounting. 38. Similarly Hon'ble High Court of Punjab & Haryana in the case of Commissioner of Income Tax (Central), Gurgaon V. Principal Officer, Hill View Infrastructure (P) Ltd (2017) 81 taxmann. corn 58 (Punjab &Haryana) order dated 13.8.2015 confirmed the view taken by the Tribunal deciding in favour of the assessee relating to the issue of the project completion method adopted by the assessee vis-a-vis percentage

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

deferment of payment of taxes. Therefore, considering the discussion above, I do not find any merit on the part of the AO to have worked out the income by applying the percentage completion method". The Tribunal affirmed the order of the CIT(A). It was concluded that project completion method and percentage completion method are accepted standards of accounting and the assessee has option to adopt any one of them. The relevant findings recorded by the Tribunal read thus:-

"We have heard the rival contentions and perused the record. The issue arising in the present appeal before us is in relation to the method to be applied for recognizing the revenue generated by the assessee in the course of carrying on the business of real estate developers. The case of the assessee is that it is following one of the accepted accounting standards approved by ICAI for recognizing the revenue generated by it. The assessee had followed project completion method which had been consistently followed by the assessee for the preceding years also. The Assessing Officer on the other hand, had applied percentage completion method to compute the income in the hands of the assessee. The Commissioner of Income Tax (Appeals) had allowed the claim of the assessee. Both the methods of accounting are i.e. project completion method and percentage completion method is accepted standards of accounting and either of the methods can be applied by the assessee. In the facts of the present case before us, the assessee had chosen to compute its income on the basis of project completion method i.e. recognizing the income on -the completion of the project and not from year to year whereas the case of the revenue was that it should account for the income as it

is generated in the hands of the assessee i.e. from year to year on the basis of the work completed being relatable to the revenue generated from year to year. The Hon`ble Supreme Court in CIT Vs. Bilahari Investment (P) Ltd (supra) had held that "recognition/identification of income under the 1961 Act is attainable by several methods ,of accounting. It may be noted that the same result could be attained by any one of the accounting methods. Completed contract method is one such method.

"It was further held that "Every assessee is entitled to arrange its affairs and follow the method of accounting which the Department has earlier accepted. It is only on those cases where the department records a finding that the method adopted by the assessee results in distortion of profits, the Department can insist on substitution of the existing method". Applying the above said principles to the facts of the present case we find that the assessee before us has been following the systematic method of accounting from year to year which has been accepted by the department and no defects have been pointed out by the department in the method of accounting adopted by the assessee and thus, there is no reason to reject the same. The Hon'ble Delhi High Court in CIT v Manish Buildwell (P) Ltd (supra) had held that "It is well settled that the project completion method is one of the recognized methods of accounting. It cannot be said that the projection completion method followed y the assessee would result in deferment of the payment of the taxes which are to be assessed annually under the IT Act. AS-7 issued by the ICAI also recognizes the position that in the case of construction contracts, the

assessee can follow either the project completion method or the percentage completion method. "

Where the assessee was following a particular method of accounting consistently, which has been accepted by the department from year to year and in the absence of any defect being pointed out by the Assessing Officer that t4 following such method, income had escaped assessment, we find no merit in the order of the Assessing Officer in holding that percentage completion method should be applied to the assessee for the year under consideration. It is the prerogative of the assessee to arrange its affairs in such a manner and follow any recognized method of accounting to compute its profits. In view thereof, we find no merit in the order of the Assessing Officer in recomputing the income in the hands of the assessee. Upholding the order of Commissioner of Income Tax (Appeals), we dismiss ground of appeal raised by the revenue." The Delhi High Court in CIT V. Manish Build Well (P) Ltd. (2011) 16 taxmann.com 27(2002) 204 Taxman 106 noted that project completion method is one of the recognized methods of accounting. It was held as under:- "It is well settled that the project completion method is one of the recognized methods of accounting. It cannot be said that the project completion method followed by the assessee would result in deferment of the payment of the taxes which are to be assessed annually under the IT Act" The assessee respondent had been consistently following one of the recognized methods of accountancy, i.e project completion method, for computation of its income. In the absence of any prohibition or restriction under the Act for doing so, it cannot be held that the approach

of the CIT (A) and the Tribunal was erroneous or illegal in any manner so as to call for interference by this Court. No substantial question of law arises. Consequently, finding no merit in these appeals, the same are dismissed."

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

"Lastly, there is a concept in accounts which is called the concept of contract accounts.

Under that concept, two methods exist for ascertaining profit for contracts, namely, "completed contract method" and "percentage of completion method".

To know the results of his operations, the contractor prepares what is called a contract account which is debited with various costs and which is credited with revenue associated with a particular contract. However, the rules of recognition of cost and revenue depend on the method of accounting. Two methods are prescribed in Accounting Standard No.7. They are "completed contract method" and "percentage of completion method".

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

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

Under the completed contract method, the revenue is not recognized until the contract is complete. Under the said method, costs are accumulated during the course of the contract. The profit and loss is established in the last accounting period and transferred to the profit and loss account. The said method determines results only when the contract is completed. This method leads to objective assessment of the results of the contract. The On the other hand, the percentage of completion method tries to attain periodic recognition of income in order to reflect current performance. The amount of revenue recognized under this method is determined by reference to the stage of completion of tht contract. The stage of completion can be looked at under this method by taking into consideration the proportion that costs incurred to date bears to the estimated total costs of contract.

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

40. After the above judgments of the Supreme Court it cannot be said that the project completion method followed by the assessee would result in deferment of the payment of the taxes which are to be assessed annually under the Income Tax Act.

Accounting Standards 7 (AS7) issued by the Institute of Chartered Accountants of India also recognize the position that in the case of construction contracts, the assessee can follow either the project completion method or the percentage completion method. In view of the judgments of the Supreme Court (Supra), the finding of the CIT(A), upheld by the Tribunal, does not give rise to any substantial question of law. Further, the Tribunal has also found that there was no justification on the part of the assessing officer to adopt the percentage completion method for one year(the year under appeal) on selective basis. This will distort the computation of the true profits and gains of the business. For these reasons, we axe of the view that no substantial question of law arises. We, therefore, decline to admit question Nos. 2 and 3."

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

months from the date of agreement i.e. from 1.4.2009. The Ld.A.0 also ignored the fact that right to sale its share of constructed area with the assessee was only from April, 2014 onwards and the assessee has offered the revenue for taxation from F.Y 2014-15 onwards as and when the sale deed has been registered. As held by various courts as discussed above that the method of adopting project completion method is not ultra virus and the assessee is free to adopt either the percentage completion method or project completion method with the only rider that it should be consistently adopted and in case of any deviation the effect of profit or loss should be offered to tax as the case may be. Revenue has not disputed this fact that assessee has offered the impugned advances to tax in the subsequent years i.e. from financial year 2014-15 based on sale deed registered which proves that there has been no loss to the revenue. Mere postponement of tax as a result of method employed by assessee has not been viewed adversely by courts so long as the method is regularly and consistently employed as held by Hon'ble Apex Court in the case of Excel Industries Ltd (2013) 358 ITR 295."

61. In the case of ACIT Vs. Satyam Developers Ltd. 56 CCH 370 (Ahd) (Trib) wherein it was held as under:-

"The taxability on estimated income from the development and construction project of building is in controversy. As noticed by the CIT(A) as well as pointed out on behalf of the assessee, assessee is engaged as a developer and constructor of the building project and is not a mere Civil Contractor. Thus, the AO could not challenge the project completion method adopted by the assessee to the percentage completion method unless all

significant risks and rewards of ownership have been transferred to the buyer and the seller retains no effective control of the goods transferred to a degree usually associated with ownership. The assessee has referred to BU permission etc. and has demonstrated on facts that the risks associated with the project continued with the developer in a significant way during the year under consideration. It is also not in dispute that the income has been ultimately offered in the later assessment year and duly assessed. Thus, the entire exercise of the AO is revenue neutral. The CIT(A) has correctly appreciated the facts and circumstances of the case and has taken note of the revenue recognition in the later year. The assessee has also demonstrated that the revenue recognized from project has been actually assessed and accepted in 143(3) r.w.s. 263 of the Act proceedings.

(Para 8)

62. As seen from the above judgments, the Courts time and again held that method of accounting followed by the assessee, which is project completion method of recognizing the revenue is permitted by law and followed by assessee. Thus, it is settled proposition that the judicial discipline requires consistency in its proceedings and same to be followed year to year. There is no allegation by the present AO that the assessee has changed the method of accounting from one year to another year. In other words, the assessee is continuously and consistently following the same method of accounting year to year. This is only revenue neutral.

63. The issue whether the assessee has to follow contract completion method or percentage completion method and both being species of mercantile system of accounting, the assessee has a right to chose one of the two methods. The AO cannot thrust upon the assessee to follow particular method of accounting

and both options is available to the assessee. Further, the assessee having chosen the project completion method, it is impermissible for the AO to modify it by recasting the Assessee's profit and loss account when the various courts have approved the project completion method, the method adopted by the lower authorities is unsustainable in law. In these circumstances, we have to examine whether income generated from these transactions was offered to tax in subsequent years. If it is offered to tax in subsequent assessment years as said earlier, it is only revenue neutral and it cannot be brought to tax in these two assessment years without considering the offering of same income in subsequent assessment years. For this purpose, we place reliance on the judgement of Hon'ble Supreme Court in the case of Bilahari Investments Pvt. Ltd., [2008] 299 ITR 1/168 Taxman 95wherein held as under:-

> *"15. Recognition/identification of income under the 1961 Act is attainable by several methods of accounting. It may be noted that the same result could be attained by any one of the accounting methods. Completed contract method is one such method. Similarly, percentage of completion method is another such method.*
>
> *16. Under completed contract method, the revenue is not recognized until the contract is complete. Under the said method, costs are accumulated during the course of the contract. The profit and loss is established in the last accounting period and transferred to P & L account. The said method determines results only when contract is completed. This method leads to objective assessment of the results of the contract.*
>
> *17. On the other hand, percentage of completion method tries to attain periodic recognition of income in order to reflect current performance. The amount of revenue recognised under this*

method is determined by reference to the stage of completion of the contract. The stage of completion can be looked at under this method by taking into consideration the proportion that costs incurred to date bears to the estimated total costs of contract."

64. From the above it is clear that percentage completion method and completed contract method are recognized methods of construction project only and not applicable to assessee who receives his consideration due to him on entering into contracts. Further, the Hon'ble Supreme Court in the case of CIT Vs. Hyundai Heavy Industries Company Ltd. (291 ITR 482), wherein held as follows:-

"24. From the above it is clear that percentage completion method and compete contract method are both recognised method of construction project. Similar proposition was laid down by Hon'ble Supreme Court in the case of CIT v Hyundai Heavy Industries Co. Ltd (2007) 291 ITR 482 wherein Hon'ble. Apex Court held as follows:-

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

25. Thus, we note that completed contract method and percentage complete method both were recognised method of accounting for computation of gains from construction contract. Section 43CB was inserted by the Finance Act, 2018 w.e.f. 1.4.2017 which provides that profits and gains arising from a construction contract or a contract for providing services shall be determined on the basis of percentage of completion method in accordance with the income computation and disclosure standards. However, this section was not in existence and applicable in the assessment year 2014-15 which we are concerned with. Thus it is amply clear that percentage complete method and completed contract method were both acceptable method and accounting of construction contract in the impugned period. We note that the assessee has all along treated the said project as capitalised item and debited all the expenses to the capital account. This method has been accepted by the Revenue in the past. It is also undisputed that in the current year project is not at all complete. Redevelopment is still in progress. The assessee has also to recoup expenditure from other co-owners. Agreement to sale has not been registered, possession of the property has not been handed over. In these circumstances, assessee cannot be thrust upon percentage of completion method of accounting by the Assessing Officer.

65. Hence, in our opinion, the percentage completion method cannot be applied to the Assessee's case.

66. Furthermore, we find that the main issue before us is only revenue neutral as and when assessee raised bills, the income would be eligible to tax. Thus, the effect is only revenue neutral as revenue shall collect necessary taxation when the assessee actually raised bills. At this point of time, it is appropriate to place reliance on the judgment of Hon'ble Supreme Court in the case of UOI &Ors. Vs. Exide Industries &Anr. In Civil appeal No.3545/2009 dated 24.4.2020 wherein held that

> *"Accordingly, we hold that on the facts and circumstances of the case, thrusting of percentage completion method upon by the revenue on assessee is not sustainable. Hence, computation of gains adopting the said percentage completion method is not sustainable."*

67. The Assessee has adopted the project completion method of recognition of revenue and has been consistently following it over the years. It is observed that it is not open to the revenue to reject the method which has been consistently followed by the Assessee merely because the learned assessing officer is of the opinion that another method is preferable. The following judgments support the case of Assessee:

i) CIT v. Aditya Builders (2015) 378 ITR 75 (Born.) wherein held that

> *"Assessee had chosen/adopted the Project completion method of accounting and had been consistently following it over the years. It was not open to the revenue to reject a method because, according to the Assessing Officer, another method was preferable. Moreover, the most appropriate method of accounting to correctly reflect the true financial statement is a matter of opinion and debate, Issues of debate are not amenable to the revisional jurisdiction under section 263."*

(ii) CIT v. Manish Build Well (P.) Ltd. (2011) 245 CTR 397 (Del.) wherein held that:

"It is well settled that the project completion method is one of the recognized methods of accounting. In CIT v. Hyundai Heavy Industries Co. Ltd. [2007] 291 1TR 482 / 161 Taxman 191 (SC) the Supreme Court held as follows:-

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

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

> *"Recognition/identification of income under the 1961 Act is attainable by several methods of accounting. It may be noted that the same result could be attained by any one of the accounting methods. The completed contract method is one such method. Similarly, the percentage of completion method is another such method.*
>
> *Under the completed contract method, the revenue is not recognized until the contract is complete. Under the said method, costs are accumulated during the course of the contract. The profit and loss is established in the last accounting period and transferred to the profit and loss account. The said method determines results only when the contract is completed. This method leads to objective assessment of the results of the contract.*
>
> *On the other hand, the percentage of completion method tries to attain periodic recognition of income in order to reflect current performance. The amount of revenue recognized under this method is determined by reference to the stage of completion of the contract. The stage of completion can be looked at undies this method by taking into consideration the proportion that costs incurred to date bears to the estimated total costs of contract.*
>
> *The above indicates the difference between the completed contract method and the percentage of completion method." (underlining ours)*

After the above judgments of the Supreme Court it cannot be said that the project completion method followed by the assessee would result in deferment of the payment of the taxes which are to be assessed annually under the Income Tax Act. Accounting Standards 7 (AS7) issued by the Institute of Chartered Accountants of India also recognize the position that in the case of construction contracts, the assessee can follow either the project completion method or the percentage completion method. In view of the judgments of the Supreme Court (Supra), the finding of the CIT (A), upheld by the Tribunal, does not give rise to any substantial question of law. Further, the Tribunal has also found that there was no justification on the part of the assessing officer to adopt the percentage completion method for one year (the year under appeal) on selective basis. This will distort the computation of the true profits and gains of the business. For these reasons, we are of the view that no substantial question of law arises. We, therefore, decline to admit question Nos. 2 and 3."

(iii) Radhasoami Satsang v. CIT (1992) 193 ITR 321 (SC)

"One of the contentions which the learned senior counsel for the assessee-appellant raised at the hearing was that in the absence of any change in the circumstances, the revenue should have felt bound by the previous decisions and no attempt should have been made to reopen the question. He relied upon some authorities in support of his stand. A Full Bench of the Madras High Court considered this question in T.M.M. Sankaralinga Nadar & Bros. v. CIT 4 ITC 226. After dealing with the contention the Full Bench expressed the following opinion:

> *"The principle to be deduced from these two cases is that where the question relating to assessment does not vary with the income every year but depends on the nature of the property or any other question on which the rights of the parties to be taxed are based, e.g., whether a certain property is trust property or not, it has nothing to do with the fluctuations in the income; such questions if decided by a Court on a reference made to it would be res judicata in that the same question cannot be subsequently agitated...." (p. 242)*

One of the decisions referred to by the Full Bench was the case of Hoystead v. Commissioner of Taxation 1926 AC 155. Speaking for the Judicial Committee, Lord Shaw stated :

> *"Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity*

is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle. Thirdly, the same principle - namely, that of setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has not been traversed. In that case also a defendant is bound by the judgment, although it may be true enough that subsequent light ˙or ingenuity might suggest some traverse which had not been taken."

These observations were made in a case where taxation was in issue.

12. This Court in Parashuram Pottery Works Co. Ltd. v. ITO [1977] 106 ITR 1 stated:

". . . At the same time, we have to bear in mind that the policy of law is that there must be a point of finality in all legal proceedings, that stale issues should not be reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity...." (p. 10)

Assessments are certainly quasi-judicial and these observations equally apply.

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

12. On these reasonings in the absence of any material change justifying the revenue to take a different view of the matter—and if there was no change it was in support of the assessee—we do not think the question should have been reopened and contrary to what had been decided by the Commissioner in the earlier proceedings, a different and contradictory stand should have been taken. We are, therefore, of the view that these appeals should be allowed and the question should be answered in the affirmative, namely, that the Tribunal was justified in holding that the income derived by the Radhasoami Satsang was entitled to exemption under sections 11 and 12."

68. In view of the above, we are of the opinion that department is precluded from changing the method of accounting which has been consistently followed by the assessee from year to year in middle of the duration of the project. At the same time, we are aware of the fact that the concept of res-judicata does not apply to income tax proceedings as each assessment year is being independent assessable unit, what is

decided in one year may not apply in the following assessment year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and the parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in the subsequent year.

69. In view of this, we hold that if the income generated from these above three impugned transactions is offered to tax by assessee in any subsequent assessment year, the same cannot be brought to tax in these assessment years. The assessee has to provide necessary details of offering the income generated from these transactions in any subsequent assessment years, then AO shall not make any additions. With this observation, we remit the issue in dispute in both the assessment years to the file of AO for fresh consideration.

70. In the result, both the appeals filed by the assessee in AYs 2003-04 & 2004-05 in ITA Nos.109/Pun/2007 and 1155/Del/2009 are partly allowed for statistical purposes.

I.T.A. No. 5067/DEL/2013 (A.Y. 2005-06)

71. The main ground in this appeal is with regard to quashing of assessment framed u/s 143(3) r.w.s.147 of the Act. The facts of the issue are that the assessee has challenged the proceedings under section 147 of the Income Tax Act on various legal grounds, particularly the issue of notice u/s 148 even when the time limit for the proceedings u/s 143(3) had not expired. In this regard, the submissions of the assessee are that in this case return of income was filed on 31.10.2005. The said return was processed under section 143(1) of the Income Tax Act. Thereafter on 02.02.2006 notice under section 148 of the Income Tax Act was issued on the appellant. As per the proviso to subsection (ii) of section143(2) the assessing officer had the power to issue a notice under section 143(2) of the Income Tax Act within a period

of 12 months from the end of the month in which the return was furnished by the assessee. Since in this case the return was furnished on 31.10.2005 a notice under section 143(2) could have been validly issued by the Assessing Officer on the same return filed which was pending before him up to 31.10.2006. Instead of issuing a notice under section 143(2) the Assessing Officer issued a notice under section 148 of the Income Tax Act on the-appellant on 02/01/2006 itself. Therefore, it will be appreciated that there is no justification at all for initiation of the proceedings under section 147 of the Income Tax Act more particularly when the department had sufficient time available to make regular assessment of the appellant on the basis of return which was filed and, therefore, the notice issued u/s 148 of the Income Tax Act is void ab-initio and bad in law and consequent thereof the entire proceedings are liable to be quashed. The ld. A.R. submitted that the Hon'ble Delhi High Court has held consistently that re-assessment under section147 cannot be completed within the time available for issue of notice under section 143(2) and for completion of assessment u/s 143(3).In this connection, he placed reliance on the judgment of the Hon'ble Delhi High Court in the case of KLM Royal Dutch Airways vs. A.D.I.T. 292 ITR 49 (Del.). Similar view has been taken in the following judgment:

C.I.T. Vs TCP Ltd. 323 ITR 346(Mad.).

C.I.T. Vs Qatalys Software Technologies Ltd. 308 ITR 249 (Mad.).

In the case of C.I.T. Vs TCP Ltd. The Horeble Madras High Court has held as follow:

"That the Tribunal was right in holding that notice under section 148 of the Income Tax Act could not be issued for making an assessment under section 147 of the Act, when time limit was

available for issue of notice under section 143(2) of the Act for making, an assessment under section 143(3) of the Act."

72. Lately, the Hon'ble Kerala High Court in the case of C.I.T. vs Abad Fisheries (2012) 246 CTR (Ker.) 513 has also taken the similar view in the matter following the judgment of Madras High Court and Delhi High Court cited herein above.

73. In light of the above legal position, coupled with the facts and circumstances of the Assessee's case, the ld. A.R. submitted that the notice issued under section 148 of the Income Tax Act and consequent assessment framed under section 143(3)/148 of the Income Tax Act is invalid and, therefore, the entire assessment framed is void ab-initio and bad in law.

74. The ld. CIT(A) placing reliance on the judgment of jurisdictional High Court in the case of KLM Royal Dutch Airways Vs. ADIT (292 ITR 49) quashed the assessment order. Against this revenue is in appeal before us.

75. We have heard the rival submissions and perused the materials available on record. The main contention of the ld. A.R. is that the assessee has filed the return of income for assessment year 2005-06 on 31.10.2005. The said return was processed u/s 143(1) of the Act. No assessment u/s 143 of the Act has been made by issuing notice u/s 143(2) of the Act within the stipulated time. Later, notice u/s 148 of the Act was issued to the assessee on 02/02/2006 though there was a time available to the AO to issue notice u/s 143(2) of the Act so as to complete the original assessment u/s 143(3) of the Act. As such, assessment was bad in law. Thus, the contention of the ld. A.R. is that the ld. AO could have issued notice u/s 143(2) of the Act so as to complete the assessment u/s 143(3) of the Act instead of reopening the assessment u/s 147 r.w.s. 148 of the Act. It is not possible to say to accept this submission of the assessee that notice u/s 147 & 148 of the Act cannot be issued when AO could

have issued u/s 143(2) of the Act to complete original assessment. In the present case, the original return was only processed u/s 143(1) of the Act and there was no original assessment. The AO rightly recorded the reason that reopening of assessment so as to bring the escaped income into tax. There is no dispute with regard to this. The notice issued by AO u/s 147 r.w.s. 148 of the Act is not time barred on the reason that the AO has not initiated the proceedings by issue of notice u/s 143(2) of the Act. For this proposition, we rely on the judgment of Delhi High Court in the case of Acorus Unitech Wireless Pvt. Ltd. & Anr. Vs. DCIT reported in 345 ITR 228 (Del), wherein it is held as under:-

"14. In the case of Commissioner of Income Tax vs. Rajesh Jhaveri Stock Brokers (P) Ltd., (2008) 14 SCC 208, it has been held as under:-

> *"19. Section 147 authorizes and permits the assessing officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word "reason" in the phrase "reason to believe" would mean cause or justification. If the assessing officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the assessing officer should have finally ascertained the fact by legal evidence or conclusion. The function of the assessing officer is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers.*
>
> *20. As observed by the Delhi High Court (sic the Supreme Court) in Central Provinces Manganese Ore Co. Ltd. v. ITO for*

initiation of action under Section 147(a) (as the provision stood at the relevant time) fulfilment of the two requisite conditions in that regard is essential. At that stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is "reason to believe", but not the established fact of escapement of income. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the assessing officer is within the realm of subjective satisfaction [see ITO v. Selected Dalurband Coal Co. (P) Ltd.; Raymond Woollen Mills Ltd. v. ITO].

21. The scope and effect of Section 147 as substituted with effect from 1-4-1989, as also Sections 148 to 152 are substantially different from the provisions as they stood prior to such substitution. Under the old provisions of Section 147, separate clauses (a) and (b) laid down the circumstances under which income escaping assessment for the past assessment years could be assessed or reassessed. To confer jurisdiction under Section 147(a) two conditions were required to be satisfied, firstly, the assessing officer must have reason to believe that income, profits or gains chargeable to income tax have escaped assessment, and secondly, he must also have reason to believe that such escapement has occurred by reason of either omission or failure on the part of the assessee to disclose fully or truly all material facts necessary for his

assessment of that year. Both these conditions were conditions precedent to be satisfied before the assessing officer could have jurisdiction to issue notice under Section 148 read with Section 147(a) but under the substituted Section 147 existence of only the first condition suffices. In other words if the assessing officer for whatever reason has reason to believe that income has escaped assessment it confers jurisdiction to reopen the assessment. It is however to be noted that both the conditions must be fulfilled if the case falls within the ambit of the proviso to Section 147. The case at hand is covered by the main provision and not the proviso."

15. A Division Bench of the Delhi High Court in Mahanagar Telephone Nigam Ltd. Vs. Chairman, Central Board of Direct Taxes and Another(2000) 246 ITR 173 had specifically examined the question whether an Assessing Officer can initiate re-assessment action even when the Assessing Officer has not exercised option to issue scrutiny notice under Section 143(2) within the time limit prescribed. The said contention was rejected holding that as long as the ingredients of Section 147 are fulfilled, the Assessing Officer is free to take action under the said provision and failure to take steps or issue notice under Section 143(2) would not render the Assessing Officer powerless to initiate proceedings, even when intimation under Section 143(1) has been issued.

16. Further the facts of the present case are clearly distinguishable from the factual disposition in Ved & Co. (supra) in Appeal (civil) 3058 of 2004.

. *In the present case, the Assessing Officer has not issued notice pursuant to the return of income, but under Section 147/148 of the*

Act. This notice has been issued when the Assessing Officer could have also initiated the proceedings under Section 143(2) of the Act. The Assessing Officer is not trying to do anything indirectly which could not have been done directly.

17. The argument that in case the notice under Section 143(2) was issued, then the Assessment order should have been passed on or before 31st December, 2011 is too specious and has to be also rejected for several reasons which are noticed below. As recorded above, the Assessing Officer has proceeded on the basis that he has initiated assessment proceedings under Section 147 of the Act and time for completion of assessment should be calculated/computed accordingly. We may now notice some interesting facts which are apparent and clear from the original records and the averments made in the writ petition. The petitioner accepts that notice under Section 147 dated 5 thJuly, 2011, was served on them. Date of service is not indicated or disclosed. However, the assessment records reveal that the notice was served as per the stamp of the petitioner company, on 6 thJuly, 2011. Thereafter, two notices both dated 23rdAugust, 2011, under Sections 142(1) and 143(2) were issued to the petitioner to appear in connection with the proceedings for the assessment year 2009-10. The petitioner appeared and filed several documents and details which were sought for by the Assessing Officer vide various letters. The petitioner has also answered various queries in terms of the questionnaire dated 7 th October, 2011, issued by the Assessing Officer under Section 142(1) of the Act. The assessment proceedings have continued in this manner. An order under Section 281B for provisional attachment of assets was passed on 3rd January, 2012. As noted above, on 10th

April, 2011, an order under Section 143(1) of the Act was earlier passed.

18. The petitioner claims that on 30th March, 2012, they were for the first time served with the reasons to believe recorded by the Assessing Officer before issuing notice dated 5th July, 2011 under Section 147. It appears that the petitioner had earlier on 9th August, 2011, written to the Income Tax Officer, Ward 1(1) to furnish copy of the reasons to believe. In the writ petition, it is stated that the petitioner had submitted that return of income filed on 6th October, 2010, may be treated as return filed in response to the notice under Section 148. This is not stated in the letter dated 9th August, 2011. Learned counsel for the petitioner has stated that this submission was made orally. We may note that there is no such written averment or statement in any letter/communication by the petitioner which has been brought to our notice. Reasons to believe are to be supplied only after the return of income is filed or statement is made that the return filed earlier may be treated as a return in response to the notice under Section 148. We may record that the petitioner during this period from 9th August, 2011 till 30th March, 2012, did not ask for furnishing a copy of reasons to believe or object to the reassessment proceedings. He did not protest or submit that the reassessment proceedings were bad for want of jurisdiction as notice could have been issued under Section 143(2) on the date when the notice dated 5th July, 2011 under Section 148 was issued by the Assessing Officer. The petitioner deliberately and intentionally kept the matter pending and continued to appear and neither protested nor objected till 30th March, 2012. It is only after

30th March, 2012, that the petitioner objected to the reassessment proceedings raising the aforesaid ground and issue.

19. In these circumstances, we do not think that the Assessing Officer is prevented and barred from recording reasons in writing and issuing fresh notice under Section 148 of the Act in view of the objections raised by the petitioner to the present proceedings or in view of the decision of this Court in Ved & Co. (supra). Of course, the petitioner will be entitled to question the reassessment proceedings if initiated on other grounds or reasons as per law."

76. In the case of Elegent Chemicals Enterprises (P.) Ltd. vs. Assistant Commissioner Of Income Tax, 2004 271 ITR 56 Hyd, the Tribunal, relying on the decision of Hon'ble Andhra Pradesh High Court in the case of A. Pusa Lal, held as under :

"The Legislature in its wisdom has given two options to the Assessing Officer to reopen assessments : (a) accepting the return of income by merely processing it under section 143(1) of the Income-tax Act, 1961, without making investigation, and (b) taking up the case for scrutiny and completing the assessment under section 143(3) of the Act. Merely because the Assessing Officer has two options for reopening the matter processed under section 143(1), non-exercise of option under section 143(2) to correct the assessment made under section 143(1), does not exclude the Assessing Officer's power to reopen the assessment under section 147 of the Act."

77. In the case of Commissioner of Income Tax Vs. Abad Fisheries reported in 2002 258 ITR 641 Ker the Hon'ble Kerala High Court has held as under :

"So long as the ingredients of section 147 of the Income-tax Act, 1961, are fulfilled, the Assessing Officer is free to initiate proceedings under section 147 and failure to take steps under section 143(3) will not render the Assessing Officer powerless to

initiate reassessment proceedings even when intimation under section 143(1) had been issued."

78. The Hon'ble Allahabad High Court in the case of Pradeep Kumar Har Saran Lal reported in [1998] 229 ITR 46 (All.), has observed as under :

"The scheme of section 143(1)(a) of the Income-tax Act, 1961, and the clarificatory circular dated 31-10-1989, issued by the Central Board of Direct Taxes, makes it amply clear that unlike the past practice, assessments are not required to be made in each and every case and assessment orders will be passed only in a very limited number of cases, selected for scrutiny. Under section 143(1)(a), the Assessing Officer has to accept the return on its face value and make minor adjustments consistent with the information given in the return without touching upon debatable and controversial issues. There is a lot of difference between an assessment and an intimation, as contemplated by section 143(1)(a) and if it were not so, then Parliament would not have used the word intimation as a substitute for assessment. The intimation under section 143(1)(a)(i) is only fictionally taken as a notice of demand under section 156. From all this it follows that the intimation is nothing but an acknowledgement slip to the effect that the return filed has been accepted and the Assessing Officer has acted upon that and for the purposes of recovery, that shall be deemed to be a notice of demand as if issued under section 156. Jurisdiction to make adjustment under the provisions of section 143(1)(a) is co-extensive and coterminous with the jurisdiction vested in the Assessing Officer under section 154 for making obvious corrections, as no item of debatable nature can be corrected under section 154 of the Act. Similarly, the Assessing Officer cannot enter into any controversial

item to make permissible adjustments under the proviso to section 143(1)(a).

The only requirement of section 147 is that Assessing Officer must have good reason to believe that some income had escaped assessment. One this belief is well-founded, recourse to reassessment proceedings cannot be said to be illegal. So long as the ingredients of section 147 are fulfilled, the Assessing Officer is free to initiate reassessment proceedings and failure to take steps under section 143(2) will not render the Assessing Officer powerless to initiate the reassessment proceedings."

79. The Hon'ble Patna High Court (Ranchi Bench) in the case of Deepak Kumar Poddar reported in [1997] 224 ITR 95 (Pat.), has held as under :

"Following the filing of returns by the assessee's for the assessment year 1992-93, notices were issued to them under section 143(2) of the Income-tax Act, 1961. While the proceedings in terms of section 143(3) of the Act were pending pursuant to the notices, on the basis of the materials seized in the course of a search at the petitioners' premises, the Assessing Officer found that there were sufficient grounds for initiating proceedings under section 147 and, hence, notices under section 148 of the Act were issued to the petitioners. In writ petitions, the petitioners contended that it was not open to the Assessing Officer to initiate proceedings under section 147 and issue notices under section 148 of the Act before concluding the proceedings under section 143(3) and without passing a final order in those proceedings; and that Explanation 2(b) to section 147 did not apply to scrutiny cases :

Held, dismissing the petitions, that a provision cannot, contrary to its plain meaning, be given a limited meaning on the basis of the explanatory note submitted before Parliament at the time of presentation of the Bill. Explanation 2(b), therefore, was applicable to scrutiny cases. Moreover even the explanatory note did not say that Explanation 2(b) to section 147 would apply only to the "non-scrutiny" cases or that cases picked up for scrutiny would not be covered by it."

80. In the case of Pramod Kumar Rakesh Kumar & Co. v. ITO [1990] 186 ITR 637, the Hon'ble Allahabad High Court has held as under :

> *"In the absence of any specific provision in the circulars issued by the Central Board of Direct Taxes we are not inclined to hold that just because an assessment was made under section 143(1)(a) on the basis of the returns said to have been filed under the Amnesty Scheme, the power of the Income-tax Officer under sections 147 and 148 is taken away. It is, therefore, not possible for us to quash the impugned notices on the said ground."*

81. In the case of Jorawar Singh Baid reported in [1992] 198 ITR 47 (Cal.), it was held under :

> *"In our view, the power that can be exercised under section 143(2) to correct the assessment made under section 143(1) does not exclude the power of the Assessing Officer to reopen the assessment under section 147 if the ingredients of section 147 are satisfied. It is open to the Assessing Officer to invoke the jurisdiction under section 147, notwithstanding the fact that there are other remedies open to him under the Act. It cannot, therefore, be accepted that the reassessment under section 147 is vitiated because the Assessing Officer failed to invoke his power to correct the assessment already completed under section 143(1) by issuing a notice under section 143(2) of the Act."*

82. In the case of Mahanagar Telephone Nigam Ltd. reported in [2000] 246 ITR 173 Delhi (HC) , it was held as under :

> *"Another plea taken by the petitioner was that within that prescribed time-limit action for assessment under section 143(3) was not taken. We find no substance in this plea.*
>
> *So long as the ingredients of section 147 are fulfilled, the Assessing Officer is free to initiate to proceed under section 147 and failure to take steps under section 143(3) will not render the Assessing Officer powerless to initiate reassessment proceedings even when intimation under section 143(1) had been issued. A similar view has been taken in A. Pusa Lal v. CIT[1988] 169 ITR 215 (AP) ; Jorawar Singh Baid v. Asstt. CIT [1992] 198 ITR 47 (Cal.) and Pradeep Kumar Har Saran Lal v. Assessing Officer [1998] 229 ITR All.)."*

83. The decision of the Hon'ble Madras High Court (Single Member) in the case of Sri Krishna Mahal v. Asstt. CIT[2001] 250ITR 333 was affirmed by Division Bench in the judgment reported in Sri Krishna Mehal v. Asstt. CIT[2002] 257 ITR 283 (Mad.).

> 11. *On going through the entire judgement of the Coordinate Bench of the Tribunal (supra) the present case is squarely covered in favour of Revenue. In the judgment the details for issuing notice have been discussed elaborately after discussing many judgments regarding the issue of notice under Section 148 of the Act after satisfying the conditions of Section 147 of the Act. The case cited by the ld. D.R. is also applicable to the facts of the present case. While deciding the issue the ITAT Lucknow Bench, has concluded that the notice under Section 148 of the Act can be issued by the AO even if there is time limit for issuance of notice under Section 143(2) of the Act has not been expired in pursuance of return filed under Section 139 of the Act for completing regular assessment under Section 143(3) of the Act. The Assessing Officer has only to show that there is a case of under assessment as mentioned in either of the three clauses to Explanation 2 to section 147. Thus, whether return of income is filed or not, even if it is filed assessment is made or not, what has to be pointed out in the reasons recorded by the Assessing Officer is that there is a case of under assessment. The argument of ld. AR that clause (b) to Explanation 2 will come into operation only when time period for issuance of notice under section 143(2) is expired and assessment is not made, is not acceptable as this will put another condition in Explanation 2(b) which is otherwise not inserted by the Legislature. As pointed out earlier, statute provides commencement of assessment proceedings in at least three ways. They can merge into each other but they do not cancel each other. Ultimate object is to make assessment of correct income and, therefore, Legislature has thought it fit to consider commencement of assessment or reassessment proceedings in at least three streams which can subsequently merge into one, if they are pending at the same time. They will ultimately result in an order under section 143(3). A case where assessment proceeding is completed would fall in clause (c). In the present case, we are only concerned with the operation of clause (b) to Explanation 2 and this clearly provides that where assessment is not completed, still then there could be a case of deemed escapement of income and notice under section 148(1) can be issued irrespective of the fact whether assessment*

proceedings initiated by virtue of filing the return or assessment proceedings by way of issuance of notice under section 143(2) are concluded or not. Thus, in fact, following situation emerged from the above discussion:

(i) *after filing the return of income, processing is not done/ acknowledgement is not issued, i.e., return filed is pending. Thus, there is a case of assessment having not done. This will fall in clause (b) to Explanation 2.*

(ii) *Where return of income is filed, processing is done/ acknowledgement issued. The proceedings initiated by way of filing of return is concluded though technically, it may not be said to be an assessment completed as held in various Court judgments. This will also fall in clause (b) to Explanation 2.*

(iii) *Where return of income is filed, processing is not done/ acknowledgement is not issued but notice under section 143(2) is issued. If Assessing Officer still finds escapement of income then he has two options. He can cover such escaped income in the proceedings initiated under section 143(2) or he can initiate proceedings under section 147 read with Explanation 2(b) as assessment is not complete and there is a case of deemed escapement of income.*

(iv) *Return of income is filed, processing is done/ acknowledgement is issued and thereafter notice under section 143(2) is issued within the specified time. Such cases would also be cases of deemed escapement of income if conditions laid down in Explanation 2(b) are satisfied.*

(v) *Return of income is filed, processing is done or not done, acknowledgement is issued or not issued as intimation, the time period for issuance of notice under section 143(2) is expired. This would be again a case which will fall in Explanation 2(b) as assessment is not done.*

(vi) *Where assessment is done under section 143(3) after filing the return of income and Assessing Officer finds escapement of income then such case would fall in Explanation 2(c).*

(vii) *Were no return of income is filed at all then such case would fall in Explanation 2(a).*

12. *We also found substance in the submissions of the ld. D.R. that the period of notice shall be counted from the relevant assessment year for the limitation of issuing notice under Section 148 of the Act which period also covers the period of notice to be issued as per Section 143(2) of the Act. Considering the entire issue and judgements relied by both the parties as well as cited by us (supra), we allow the appeal of Revenue and set aside the order of the CIT(A). Since the CIT(A) has not decided issue on merit, the issue on merits shall be considered by the CIT(A) and for this purpose, the case is remanded to the CIT(A) to decide merits of the appeal after due hearing afforded to the assessee.*

13. *In the result, the appeal filed by the Revenue is allowed for statistical purpose."*

84. In the present case also, we do not find any infirmity in reopening assessment by issuing notice u/s 148 of the Act though there was time available to issue notice u/s 143(2) of the Act to frame regular assessment and framing assessment u/s 143(3) r.w.s. 147 of the Act. Accordingly, we reverse the order of the Ld. CIT(A) on this issue and allow the Ground of Appeal of the Revenue.

85. In the result, the appeal filed by the revenue for the **AY 2005-06 in I.T.A. No. 5067/DEL/2013 is allowed.**

C.O No. 55/Del/2014 in I.T.A. No. 5067/DEL/2013 (A.Y .2005-06)

86. The Assessee has filed the present Cross Objection in support of the order of the Ld. CIT(A) and also challenged the reopening of the assessment. In view of deciding the Appeal filed by the Revenue in ITA No. 5067/Del/2013 (A.Y 2005-06) the Ground No. 1 regarding reopening of the assessment has become in-fructuous. Accordingly, the Ground No. 1 of the C.O. is dismissed for having become in-fructuous.

87. Ground No. 2 to 4 of the Cross Objection is on the merits. The similar issues have been dealt and decided by us in ITA No. 109/Pun/2007 and ITA No. 1155/Del/2009 for the Assessment Year 2003-04 & 2004-05), by directing the assessee to provide necessary detail of offering the income generated from the transactions in any subsequent assessment years, in such case observed that the AO shall not make any additions and thereby remitted the issue in dispute in A.Y 2003-04 & 2004-05 to the file of AO for fresh consideration. Considering the fact that the issue involved in Ground No. 2 to 4 of the present Cross Objection are similar to the above issue involved in Assessment Year 2003-04 and 2004-05, the same direction with *mutatis mutandis* applies to present Appeal.

88. In the result, Cross Objection filed by the Assessee is partly allowed for statistical purpose.

Order pronounced in the open court on : **28/04.2023.**

Sd/-	**Sd/-**
(Dr. B.R.R. KUMAR)	**(YOGESH KUMAR U.S.)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated : 28/04/2023

MEHTA/R.N, Sr. PS

Copy forwarded to :-

1. Appellant
2. Respondent
3. CIT
4. CIT (Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI