

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "D", MUMBAI**

**BEFORE SHRI AMIT SHUKLA, HON'BLE JUDICIAL MEMBER AND
SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER**

**ITA NOs. 4400 & 4438/MUM/2019
(A.Y: 2012-13 & 2013-14)**

ACIT – 12(3)(2) Room No. 128H, 1 st Floor Aayakar Bhavan, M.K. Road Mumbai - 400020	v.	M/s. Midcity Bhoomi Developers Pvt. Ltd., Sarkar Heritage, Hall No. 1 Jairajbhoy P. Khoja Sani Complex Junction of Kane and B.J. Road Bandstand, Bandra (W) Mumbai - 400050 PAN: AACCM6805E
(Appellant)		(Respondent)

Assessee Represented by	:	Shri Shreyash Shah, Shri Kunal Shah & Shri Ramesh Vora
Department Represented by	:	Shri Ashish Kumar
Date of Hearing	:	28.12.2022
Date of Pronouncement	:	23.03.2023

ORDER

PER S. RIFAUR RAHMAN (AM)

1. These appeals are filed by revenue against different orders of the Learned Commissioner of Income Tax-21, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 25.03.2019 for the A.Ys. 2012-13 and 2013-14.

2. Since the issues raised in both these appeals are identical, therefore, for the sake of convenience, these appeals are clubbed, heard and disposed off by this consolidated order. We are taking Appeal in ITA.No. 4400/MUM/2019 for Assessment Year 2012-13 as a lead appeal.

3. Brief facts of the case are, assessee filed its return of income on 28.09.2012 declaring total income of ₹.2,23,00,590/- and the same was processed u/s. 143(1) of Income-tax Act, 1961 (in short "Act") accepting the return of income. Subsequently, the case was selected for scrutiny and statutory notices u/s. 143(2) and 142(1) of the Act were issued and served on the assessee. In response, Authorised Representative of the assessee attended and submitted the relevant information as called for.

4. Assessee is engaged in the business of Builders and developers and investment in firm. During the assessment proceedings Assessing Officer observed that assessee had sold ten (10) flats during the year under consideration and the flats were sold much below the market value. The details are given below: -

Sl.No.	Name of the Party	Market Value	Rate Per Sq. Ft.	Date of 1st Advance Received	Agreement Value	Difference
502	A Sivaraman	1,07,35,399	6020	01.01.08	57,91,300	49,44,099
503	Mohan Punjabi & Anjali Arora	84,15,000	5696	31.10.06	54,80,000	29,35,000
504	Mohan Punjabi & Anjali Arora	84,15,000	5696	31.10.06	54,80,000	29,35,000

Sl.No.	Name of the Party	Market Value	Rate Per Sq. Ft.	Date of 1st Advance Received	Agreement Value	Difference
604	Manohar Dhanjani	84,55,598	4841	21.04.06	46,56,850	37,98,748
803	Harmesh C Arora	84,55,598	4754	11.10.06	43,73,400	40,82,198
804	Anil C Arora	84,55,598	4780	11.10.06	43,73,400	40,82,198
805	Mahiddin I K & A Hafiz	95,48,660	6143	13.11.06	59,09,320	36,39,340
806	A Hafiz I K Mohiddin	1,07,18,268	7731	13.11.06	74,37,580	32,80,688
1003	Indu Rasiklal Dodia	84,55,598	6445	11.05.11	62,00,000	22,55,598
1005	Surendra S Anand	1,08,16,683	6643	04.01.08	63,91,000	44,25,683
	GRAND TOTAL					3,63,78,552

5. The assessee was asked to explain the reasons for difference in agreement value and market value. In response assessee has submitted as under: -

"i. Explanation for difference in assessed market value and agreement value for the sales effected of various commercial premises in the said project. The following are the various reasons which could be attributed for fetching lower sale price from the buyers of the premises:

i) Jay Antariskh project was commenced in the financial year 2006-2007 and was completed in financial year 2011- 2012. At the relevant time, the entire area of Marol and Mathuradas Visanji Road in Andheri (E) was low lying area and was not fully developed. It was always flooded during heavy rains. This property is situate adjacent to Nalla and even today, the surrounding area around the Nalla is also not fully developed.

ii) This property is situated in Industrial Zone and surrounding area was completely occupied for commercial / industrial purposes. There are many Industrial estates surrounded in the same area on which the aforesaid project stands. The project commenced in the year 2006-2007 and completed in financial year 2011-2012 for such a medium magnitude of commercial project it is considered as long gestation period on account of various extraneous factors for constructing the project and therefore, the buyers / investors were not much enthusiastic for the said project.

iii) If your Honour notices from the sale chart of the year in reference in which the Assessee Company had sold 10 office premises and in almost all cases there has been Agreement value lower than the assessed market value. Copy of the chart is annexed herewith for your perusal. The reason for such lower agreement value and higher

assessed market value is that all the agreements are registered in the financial year 2011-2012. The Assessee Company had taken advances against the booking and allotment of these various premises in respect of all Nine (9) commercial premises in the year 2006-2007 and therefore, the sale price of the year 2006-2007 are applicable for the purpose of Agreement for Sale executed by and between the Assessee Company and the purchasers of the premises Whereas, for the registration purpose, the ready recknor price of financial year 2011-2012 is applicable and therefore, there has been differences in assessed market value and agreement value in the sales chart. Copies of the Ledger Account of all Nine (9) parties right from the year in which the advances are received till the financial year 2011-2012 are annexed herewith for your kind perusal.

iv) Further to the above, even premises which are sold for which the rates varies due to floor wise situation of the premises, facing front side or backside or adjacent side, inner and outer facing of the premises as well as near the entrance, away from the entrances, near washrooms etc. Therefore, there has been difference between the Agreement value for some of the Agreements for Sale and assessed market value by stamp authorities."

6. After considering the submissions of the assessee, Assessing Officer made the addition of ₹.3,63,78,552/- with the following observations: -

"a. Going to the facts and nature of business of the assessee company, the selling price has to be market driven. There has to be a reasonableness and some rationale behind business decisions.

b. There has to be a plausible explanation for the selling price so determined.

c. It is observed that the assessee has sold offices at various rates in the same premise and in the same month which are much below the market value determined by the Stamp duty valuation.

d. The assessee cannot sell offices at whatever rate he choses devoid of any reasonable basis. It has to be market driven. The contention of the assessee is not found to be tenable. The assessee company has given all possible reasons for the selling price to be below the market value.

e. Even if all the contentions of the assessee is accepted for sake of arguments, however, the arguments advanced by the assessee company fails to explain the variation in selling price in the same

month of booking the offices and that to in the same premises, other factors remaining constant,

f. From the details, it is seen that, the assessee company has sold offices at various rates to different parties in same month. During the month of October 2006 the assessee company has booked offices from rate Rs.4,754/- per sq. ft. to Rs.5,696/- per sq. ft. Difference of Rs.942/- per sq. ft.), other factors remaining constant.

Flat No.	Name of the Party	Market Value	Rate Per Sq. Ft.	Date of Booking(1st Advance Received)	Agreement Value	Difference
503	Mohan Punjabi & Anjali Arora	84,15,000	5696	31.10.06	54,80,000	29,35,000
504	Mohan Punjabi & Anjali Arora	84,15,000	5696	31.10.06	54,80,000	29,35,000
803	Harmesh C. Arora	84,55,598	4754	11.10.06	43,73,400	40,82,198
804	Anil C Arora	84,55,598	4780	11.10.06	43,73,400	40,82,198

g. Form the above tabularized information, it is seen that there is wide variation in the selling price of the offices in the same month.

h. From the details, it is apparent that the flats have been sold to related family members. The assessee has explained the reasons for the selling price not being at par with the Market value but the assessee has failed to explain the reasons for the wide fluctuation in selling price in the same premise, other factors being constant.

i. Further, it can be seen from the above chart, that the the Market Price has remained more or less the same in the range of 84 Lakhs. However, the selling price has shown fluctuation of more than 11 lakhs in the same month itself within a time span of 15 days. From the market value, it can be safely inferred that the market has not shown any fluctuation

j. The Income Tax is a civil liability and is not governed by strict laws of Evidence Act. It is governed by preponderance of probability On- Money is a prevailing practice in Real Estate. In the current scenario and under the facts and circumstances of the case, On-Money is the only plausible explanation for such wide variation in the same month of sale.

K. Further, on 13.11.2006 the assessee company has booked two offices from Rs.6,143/- per sq. ft. to Rs. 7.731/- per sq. ft. (Difference Rs. 1,588/- per sq. ft.).

Flat No.	Name of the j Party 1	Market Value	Rate Per Sq. Ft.	Date of Booking(1st Advance Received)	Agreement Value	Difference
805	Mahiddin I K & A Hafiz	95,48,660	6143	13.11.06	59,09,320	36,39,340
806	A Hafiz I K Mohiddin	1,07,18,268	7731	13.11.06	74,37,580	32,80,688

L. It is apparent from the above table, that on the same day, by the same buyer the assessee has charged differently for two offices.

m. Similarly, in the month of January 2008, the assessee company has booked offices for two offices from Rs.6,020/- per sq. ft. to Rs. 6,643/- per sq. ft. (Difference Rs.623/- per sq. ft.).

Flat No.	Name of the Party	Market "Value	Rate Per Sq. Ft.	Date of 1st Advance Received	Agreement Value	Difference
502	A Sivaraman	1,07,35,399	6020	01.01.08	57,91,300	49,44,099
1005	Surendra S Anand	1,08,16,683	6643	04.01.08	63,91,000	44,25,683

n. It is pertinent to mention that though the assessee has shown booking after a gap of two years, prices have further gone down. In the year 2011. the assessee has still! sold at a lesser rate.

o. It is an accepted principle that the flats are sold at a higher rate due to floor rise. But in the present case, offices at higher floor have been sold at lower rate.

p. In view of the above, it is seen that, the assessee company is having practice of booking offices at different rates which are much below the market rates. They show huge fluctuations in selling price in similar circumstances for which assessee company has not offered any explanation.

q. Under these circumstances, it is crystal clear that, the assessee company has not shown the true profit by way of booking offices at lower rate per sq. ft. The intention of the assessee company is to suppress Book Profit to evade tax. The same is evident from the facts that all offices, which the assessee company has sold, are situated at same area and under same Project / Premises. The assessee has not explained as to how the rates differ for booking of various offices under same Premises in the same month. The above

facts prove the intention of the assessee company to suppress the profit. The assessee company has shown lower book profit.

r. Therefore, though in the instant case, flats were held as stock in trade, the assessee has not produced any substantial documentary evidences during the course of assessment proceedings and any compulsion on his part, of selling such stock in trade below the market value as ascertained by the Stamp Duty Authority, which is considered to be the base value for transactions in immovable property.

s. Moreover, any business person aspecially in the reality sector will try to maximize the profits by selling stock in trade higher than the stamp duty value. Thus as is an established practice in Real Estate to accept On Money, the same cannot be ignored in the light of the reasoning's as mentioned supra.

In view of the absence of a plausible reason, the difference between the sale value and market value of Rs.3,63,78,552/- is added to the income of the assessee as undisclosed income."

7. Further, Assessing Officer observed that assessee has received a sum of ₹.38,37,986/- interest on loan given @12% per annum from its associate company. He observed that assessee has paid interest of ₹.6,04,750/- on loan taken from various parties @18% per annum. The assessee was asked to explain why the interest expenditure claimed u/s.36(1)(iii) of the Act should not be disallowed. In response assessee submitted its submissions vide letter dated 13.03.2015. After considering the submissions of the assessee Assessing Officer observed that assessee has taken interest bearing funds and if the money had not been advanced to associate concern at a lower rate it would have obviate the necessity of borrowing funds to that extent, with the above observations he disallowed the proportionate interest to the extent of ₹.2,01,583/-.

8. Further, Assessing Officer observed that assessee has earned interest income of ₹.38,37,986/-. He observed that assessee is engaged in the business of builders and developers. Considering the nature of the business of the assessee, it is clear that assessee is not in the business of financing activity at all by relying on the decision of the CIT v. Vidyut Corporation (2010) 324 ITR 221 (BOM) interest received by the company would be taxable under the head "income from other sources" and not from "income from business".

9. Aggrieved with the above order, assessee preferred an appeal before the Ld.CIT(A). Before Ld.CIT(A) assessee filed detailed submissions, for the sake of clarity it is reproduced below: -

"with regard to disallowance on account of sale of flats below market value, assessee submitted as under: -

(a) AO's contentions and appellant's Rebuttal thereto

I. AO's contentions [A(a) to A(c)]

i. There is wide variation in the selling price of the offices in the same month of booking and on-money is the only plausible explanation for wide variation in the same month of sale.

ii. It is an established practice in real estate to accept on- money

iii. The assessee company has not shown true profit by way of booking offices at lower rate per sq. ft. with the intention to suppress the profit to evade tax.

Rebuttal of AO's findings:

i) *There are various factors determining the sale price in the real estate sector such as time, location, floor, approach, demand, supply, circumstances of the buyer, bargaining capacity etc. There cannot be a uniform sale price. The AO failed to appreciate the contention made by the appellant during the assessment proceedings that rates in the same premises varies due to number of factors such as floor wise situation of the premises, facing front side or backside or adjacent side, inner and outer facing of the premises as well as near the entrance, away from the entrances, near washrooms etc.*

ii) *The conclusion arrived by the AO that the assessee company has accepted the on-money, merely on the basis of variation in sale price, is erroneous and purely based on surmises and conjecture. The appellant had disclosed all the material evidences and sale price charged to each customer, hence merely on the basis of assumption and presumption, no such addition can be made. For any additions to be made in the Assessment order, the same needs to be substantiated by proper corroborative evidences. It is well settled law that no income can be taxed as undisclosed income only on the basis of presumption.*

iii) *There is no evidence brought on record by the AO which suggest even remotely that the assessee had earned more income from sale of office premises than disclosed in sale agreements. The AO could have issued the notices u/s. 131/133(6) to the purchasers of the flats to find out, payment made, if any, of 'on money' for purchase of their flats to substantiate her claim as to receipt of on-money by the appellant.*

iv) *The accounts of the Appellant Company are audited and the Appellant Company has furnished tax audit report and also furnished voluminous details in support of its claim in the Computation of Total Income and no such discrepancies are noticed in respect of any financial transactions. No cash deposits in large proportions have been deposited in the bank account. All majority financial transactions are through Kotak Mahindra Bank and therefore, no inference can be drawn that the Appellant Company has understated the sale value for various premises as against assessed market value.*

v) *In K. P. Verghese Vs. CIT [131 ITR 597] (1981) (Pg. No.187 to 198), the Hon'ble Supreme Court held, in the context of s. 52(2), that unless there is evidence to show that the assessee has actually received something more than the declared sale consideration, the Revenue could not invoke provisions of s. 52(2) that empowered the Revenue to substitute fair market value in the place of the declared sale price. Though this judgment was rendered in the context of computation of capital gains, the underlying legal principle is that heavy burden lay on the Revenue to demonstrate that the declared*

sale consideration was understated by the assessee, i.e. the assessee has, in fact, received something more than the declared consideration.

vi) The appellant company further refers and relies on the following judgements.

a. CIT Vs. Appasamy Real Estates Ltd. 9 DTR 285 (Mad) dated 11.06.2008 (Pg. No. 199 to 204)

...

b. Aum Shiv Enterprises Vs. ACIT (ITA No.6985/Mum/2010) (Mum. Trib.) (Pg. No.205 to 209)

....

c. Commissioner of Income tax Vs. Discovery estates (P) Ltd. 31 Taxmann.com 180 (2013)(Delhi HC). (Pg. No.210 to 217)

...

The above verdict, dealing with the similar facts as that of the appellant, overwhelmingly and overridingly establish that the additions made by the AO in the case of the appellant are unsustainable and untenable in law.

II. AO's contentions:[A(d)]

The assessee company has not shown any compulsion for selling such stock-in-trade below the value ascertained by stamp duty authority which is considered to be the base value for transactions in the immovable property.

Rebuttal of AO's findings:

i) Jay Antariskh project was commenced in the financial year 2006-2007 and was completed in financial year 2011-2012. At the relevant time, the entire area of Marol and Mathuradas Visanji Road in Andheri (E) was low lying area and was not fully developed. It was always flooded during heavy rains. This property is situated adjacent to Nalla and even today, the surrounding area around the Nalla is also not fully developed.

ii) This property is situated in Industrial Zone and surrounding area was completely occupied for commercial / industrial purposes. There are many Industrial estates surrounded in the same area on which the aforesaid project stands. The project commenced in the year 2006- 2007 and completed in financial year 2011-2012. For such a

medium magnitude of commercial project, it is considered as long gestation period on account of various extraneous factors for constructing the project and therefore, the buyers/ investors were not much enthusiastic for the said project.

iii) Out of the impugned 10 commercial premises sold at Jay Antanksh, in respect of Nine (9) commercial premises, the Appellant Company had taken advances against the booking and allotment of premises in earlier years; for 7 premises in FY 2006-2007 and for 2 premises in FY.2007-08 Statement showing details of 1st advances received from various premises purchasers at the time of booking (Pg. 67) alongwith their ledger accounts in the books of the appellant is enclosed at Pg. No.68 to 129). In view of the same, the sale price of the year 2006-2007 & 2007-08 are applicable for the purpose of Agreement for Sale executed by and between the Appellant Company and the purchasers of the premises. The appellant is following project Completion method of accounting in respect of Jay Antariksh' construction project. As the project was substantially completed and the units are substantially sold by the appellant in F.Y.2011-12, it has declared sale of units in the accounts of the company in the year in reference and hence, the sales are accounted in F.Y.2011-12. As the Sale agreements are registered in F.Y.2011-12, for the registration purpose, the Ready recknor price of financial year 2011-2012 is applicable and therefore, there have been differences in assessed market value and agreement value.

iv) Further to the above, in case of remaining one premises i.e.No. - 1003, the Appellant Company had entered into an Agreement on 11th May, 2011 in respect of the premises No. 1003 purchased by Indu Rasiklal Dodia, where the Agreement value is Rs.64,54,971/- as against the Assessed market value is Rs. 84,55,598/-. Hence, there is a difference of Rs. 20,00,627/- The differences is on account the fact that the said property is situated on the top floor below the terrace which is subjected to leakages and it is very near to the Airport and hence, there is a tremendous noise pollution. In the year in reference, the market was very much depressed and in order to augment financial resources for the purpose of business as needed by the Assessee Company, the aforesaid premises has been sold at the prevalent market rate.

v) Further, the contention of the AO that value adopted by stamp duty authority is considered to be the base value for transactions in the immovable property is factually unacceptable. The said contention is made by the AO in the garb of Sec. 50C without specifically invoking the provision of Sec. 50C. The Assessee Company submits that Section 50C is not applicable for the various commercial premises sold by the Assessee Company as Section 50C applies only to the sale of land or building or both for the purpose of capital gains only. It does

not apply to income from the sale of premises which is computed under Chapter - IV-D i.e. under the head 'Profits and Gains of Business of Profession' for which the provisions of Section 50C has no applicability.

vi) The appellant company refers the Allahabad High Court in case of CIT v. Shri Chandranarain Choudhary 271 CTR 80 (2013)) (Pg. No.218 to 225) has held in para 10 that "Section 50C of the Act is a rule of evidence in assessing the valuation of property for calculating the capital gain. The deeming provision under Section 50C(1) of the Act is rebuttable. It is well known that an immovable property may have various attributes, charges, encumbrances, limitations and conditions. In the present case, it is stated that the property was under the tenancy of father of the purchaser since 1969 and thus, the assessee being landlord of the property, offered it for sale to the tenant, which could not have attracted fair market value, as a willing purchaser may have offered for a property in vacant condition. The Stamp Valuation Authority does not take into consideration the attributes of the property for determining the fair market value in the condition the property is offered for sale and is purchased. He is required to value the property in accordance with the circle rates fixed by the Collector. The object of the valuation by the Stamp Valuation Authority is to secure revenue on such sale and not to determine the true, correct and fair market value on which it may be purchased by a willing purchaser subject to and taking into consideration its situation, condition and other authorities such as its occupation by tenant, any charge or legal encumbrances".

vii) The appellant company further refers and relies on the judgment in case of ACIT Vs. Swami Complex (P.) Ltd. 23 SOT 27 (ITAT- Jaipur) (Pg.No. 226 to 232) wherein it was held that:

'In the instant case there was no positive evidence to show that the assessee had actually paid more than the consideration shown in the sale deed for the purchase of plot. The Assessing Officer was therefore, not justified in valuing the land on a higher amount as per DVO's report in the case of seller and the value adopted by Sub-Registrar for the purpose of stamp duty. The sale consideration of a property agreed upon by the parties depends upon several factors, like locality, size, availability, etc., of the properties, besides needs of the parties. It is always negotiable. Hence, the same cannot be equated with the general value fixed for the purpose of payment of stamp duty. The Commissioner (Appeals) had, thus, rightly deleted the addition under section 69 for an undisclosed investment in the case of the assessee. Therefore, the impugned order passed by the Commissioner (Appeals) deserved to be upheld."

viii) *The following judicial precedents are abundantly clear in holding that the provisions of Section 50C are applicable only in case of Capital Assets but not in case of stock in trade.*

a. *CIT v. Thiruvengadam Investments Pvt. Ltd. 320 ITR 345 (2010) in which the Hon'ble Madras High Court, on the identical facts, held:*

....

b. *Inderlok Hotels (P) Ltd. Vs. ITO [2009] 32 SOT 419(Mumbai- Trib.) The relevant Paras of the judgment are reproduced hereunder.*

...

ix) *The appellant also places reliance on the following case laws dealing with applicability of section 50C of the Act.*

i. *Income-tax Officer, 5(2)(1) v. Inderlok Infra-Agro (P.) Ltd. [2013] 35 taxmann.com 595 (Mumbai - Trib.)*

ii. *Commissioner of Income-tax-II v. Kan Construction and Colonizers (P.) Ltd.[2012] 20 taxmann.com 381 (All.)*

iii. *Commissioner of Income Tax Vs. Mukesh & Kishor Barot Co-owners (2013) 33 taxmann.com 87(Guj. HC)*

III. AO's contentions:[A(e) & A(f)]

a) *Any person in realty sector will try to maximize profit by selling stock-in-trade higher than the stamp duty value*

b) *The assessee cannot sell offices at whatever rate he chooses devoid of any reasonable basis. There has to be reasonableness and some rationale behind business decisions.*

Rebuttal of AO's findings:

i) *The appellant submits that the reasons given by the learned AO are hypothetical, arbitrary and devoid of any legal basis. The domain and sphere of the AO does not extend to judging as to reasonableness of rate at which appellant ought to sell the stock and the manner in which the Appellant should operate, conduct and manage its business inasmuch as he cannot in that regard challenge and question the businessman's prerogative, perception and prudence. The considerations which govern and dictate a business cannot be supplanted by department's narrow and pedantic revenue oriented approach to garner tax. It is well settled that the Assessing Officer cannot substitute his own view for that of the businessman. (CIT v. WALCHAND AND CO PVT LTD (1967) 65 ITR 381 (SC); JK WOOLEN*

MANUFACTURERS v. CIT (1969) 72 ITR 612 (SC) and not merely governed by revenue and tax considerations.]

ii) It is well settled and accepted that it is not open for the department to prescribe as to how and in what manner and in which way the Assessee company should conduct and operate its business, because it is for the businessman to decide how best to protect his interest and it is he who alone knows his interest best and the Revenue has no jurisdiction to substitute its own standard and yardstick and that of the businessman prudence and sagacity. Please refer CIT V. Dhanrajgiriji Raja (1971) 91 ITR 544, 550 (SC) and also S.A. Builders Limited V. CIT (2007) 288 ITR 1, 9 (Bom).

iii) The department cannot sit in the armchair of the businessman and pass judgment on the business decisions already implemented by the Assessee and question and dictate as what ought to have been done by the Assessee No businessman can be compelled to maximize its profit. The income tax authorities must put themselves in the shoes of the assessee and see how a prudent businessman would act. The authorities must not look at the matter from their own view point but that of a prudent businessman. Pl. refer CIT v. DALMIA CEMENT (B.) LTD (2002) 254 ITR 377 (DEL) affirmed in S.A. BUILDERS LTD v. CIT (2007) 288 ITR 1, 9(BOM)]

IV. AO's contention [A(g)]

The learned AO contended that the assessee has not produced any substantial documentary evidences that the impugned commercial units were held as stock-in-trade

Rebuttal of AO's findings:

i) The appellant is in the business of developing the properties and at the relevant time, it was engaged in developing the properties known as 'Thakoor House' and 'Jai Antriksh' at Andheri(East).

i) Further, in the books of accounts of the appellant which are duly audited, the unsold units are shown as "Inventories" under Current Assets and not under Fixed Assets. No specific defects and weaknesses have been found in the books of accounts maintained by the Appellant in the normal, ordinary and regular course of his business. Thus, it is evident that the units are held as stock in trade and not capital assets.

ii) Further, the Appellant Company has been carrying on the business of developing the properties and the sale from properties income is consistently assessed as business income and not capital gains. In the appellant's own case in Assessment Year 2008-09, 2010-11 and 2011-

12, the Hon'ble CIT(A) noted the findings that the income from sale of flats have been assessed by the AO as business income and the impugned flats have been treated by the AO as business assets and not capital assets of the assessee. The Hon'ble ITAT dismissed the revenue's appeal for A. Y 2008-09 while holding that assessee's assets have been treated as 'business assets' in place of 'capital assets and income as derived from business instead of capital gains.

iv) Thus, it is amply clear that the impugned transactions pertain to sale of stock in trade and not capital asset and thus, Sec. 50C is not applicable to the facts of the Appellant company.

V. AO's contentions:

The AO in Para (h) on pg. 5 has contended that it is apparent that flats have been sold to related parties.

Rebuttal to AO's findings:

The appellant submits that no offices are sold to related parties. Hence, the contention of the AO is erroneous.

VI. AO's contentions:

The AO has produced table on Pg. 5 and in pg. (g) has contended that there is wide variation in selling price of the offices in same month.

Rebuttal to AO's findings:

The appellant submits that the contention of the AO is erroneous since the offices No.503 and 504 for which 1 advance were received on 31.10.2006 were sold at same rate of 5696 per sq. ft. and office no. 803 and 804 for which 1 advance were received 11.10.2006 were sold at approx. same rate of around 4754 sq. ft.

AO's contentions:

The AO has contended in Pg (k) that on 13.11.2006, the appellant company has booked two offices at No. 805 and 806 with the difference of Rs. 1588/- per sq. ft.

Rebuttal to AO's findings:

The appellant submits that above two offices are adjoining offices sold to same buyer. Although, agreement value for both the offices are segregated for the sake of registration as different units, the average rate for both the offices is arrived at Rs.6937/- per sq. ft.

VIII.AO's contentions:

On Pg. No.6, Pt. (m) of the Assessment order, the learned AO has contended that the appellant company has booked offices no. 502 and 1005 in the Month of January, 2008 at the rate of 6020 and 6643 per sq. ft. respectively i.e there is difference in rate per sq. ft. of Rs. 623.

Rebuttal of AO's findings:

The Appellant submits that the difference in rate is due to the floor wise situation. It is accepted principle that the offices at higher floor are sold at higher rate which is also concurred by the AO in Pt. (o) on Pg. 6 of the Assessment order. Hence, office No.1005 at 11th floor will naturally fetch more price than office No. 502 at 5th floor. However, it is surprising that the after citing the comparative chart of offices No. 502 and 1005, the AO in Pt.(o) has mentioned that offices at higher floor have been sold at lower rate which is factually incorrect.

IX.AO's contention:

In para (n) of Pg. 6 of the assessment order, the AO has contended that in gone down the bookings made after gap of 2 years, the prices have further and in the year 2011, the assessee has still sold at lower rates. The Id. AO in Para (p) has also contended that there is huge fluctuation in selling price in similar circumstances for which the assessee company has not offered any explanation.

Rebuttal of AO's findings:

i) The appellant company submits that no such pattern of decline in prices can be established as contended by AO.

ii) The selling price is function of multiple factors such as market condition prevailing at the time of booking of flat, liquidity position, demand, supply, bargaining capacity of buyer, circumstances of the buyer, factors peculiar to the particular office such as exact location, floor, approach, brightness in the space, ventilation, (proximity to lift etc. Hence, it is not practically possible to sell all the offices at identical rates

(b) CIT(A)'s orders and ITAT orders in favour of appellant for A.Y.2008-09, 2010-11 and 2011-12

In respect of additions made by learned AO on the identical issue in A.Y. 2008-09, 2010-11, 2011-12, the appellant had preferred appeal before Your predecessor. The appeals were adjudicated in favour of

the appellant by your predecessor's order dated 21.04.2011 in Appeal No. IT/CIT(A)8/Cir.4/173/10- 11 for A.Y.2008-09, order dated 02.09.2013 in Appeal No. IT/CIT(A)- 8/Cir.4/179/2012-13 for A.Y.2010-11 and order dated 30.12.2014 in Appeal No.IT/CIT(A)-9/Cir.4/375/2013-14 for A.Y. 2011-12; which has been respectively affirmed by the Hon'ble Tribunal, Mumbai in ITA No. 5099/M/2011 for AY 2008-09 dated 15.06.2012 (Pg. No. 130 to 134) and in ITA. No. No. 6897/MUM/2013 for AY 2010-11dated 23.04.2015 (Pg. No. 135 to 137) and in ITA. No. 1142/Mum/2015 for A. Y.2011-12 dated 19.10.2016 (Pg. No.138 to 140). Hence, relying on the judgments of earlier years, the addition made in the year under appeal also be deleted.

(c) No suppression of sales- Agreement value less than the market value as per Stamp duty ready recknor-comparable in the year of bookings

i. Without prejudice to the above contention, the appellant submits that it has accepted advances towards booking of the commercial units from various purchases in earlier years against which the allotment letters are issued giving right, title, interest and claim in the property to be constructed by them for an agreed consideration. The consideration is always fixed at the time when the booking is done and the Allotment Letter is issued by the builder. The formal deed of agreement is entered into and registered either upon completion of the construction or on the delivery of the possession. In other words, a formal understanding is first reached between the buyer and the developer at the time of booking of the office and this understanding is formalized by way of Agreement which is duly registered

ii. The appellant company submits that for all these premises, for which Allotment Letters are issued, Market value as per Stamp Duty Ready Recknor at the time of booking of commercial premises was less than the Agreement value and there is no suppression of sale consideration as compared to Stamp Duty Ready Recknor. The Statement showing value as per Stamp Duty Ready Recknor for all Nine Agreements in the year of booking and its comparision with Agreement Value is enclosed (Pg. No.141)

(d) Insertion of new Sec. 43CA w.e.f. 01.04.2014

i) Further, Finance Act 2013 has inserted new Section 43CA under the I.T.Act, 1961 applicable from 01.04.2014, introducing the provisions of taxability of transfer of immovable property (land or building or both) held in the nature of stock-in-trade on the same lines which are applicable for immovable property held in the nature of capital asset under Sec. 50C of the I.T.Act, 1961. By introduction of this new section 43CA, it is now provided that the concept of section 50C of

adopting stamp duty valuation as full value of consideration will apply for computation of business income in the hands of seller who holds such property as stock-in-trade. Thus, it is apparent that the intent of the introduction of Sec. 43CA w.e.f. 01.04.2014 is to extend the concept of Section 50C applicable in the case of 'capital asset' to real estate developer/builder holding land or building as stock in trade. Thus, if the intention of the legislature was to apply Sec. 50C in case of the immovable property held as stock-in-trade, then Sec 43CA would not have been introduced at all.

ii) Further, in the Explanatory Memorandum to Finance Bill, 2013, the reason for introduction of Sec.43CA is clearly stated as reproduced hereunder:

'Currently, when a capital asset, being immovable property, is transferred for a consideration which is less than the value adopted, assessed or assessable by any authority of a State Government for the purpose of payment of stamp duty in respect of such transfer, then such value (stamp duty value) is taken as full value of consideration under section 50C of the Income-tax Act. These provisions do not apply to transfer of immovable property, held by the transferor as stock-in-trade.

It is proposed to provide by inserting a new section 43CA that where the consideration for the transfer of an asset (other than capital asset), being land or building or both, is less than the stamp duty value, the value so adopted or assessed or assessable shall be deemed to be the full value of the consideration for the purposes of computing income under the head "Profits and gains of business of profession'.

ii) In case of Neelkamal Realtors & Erectors India (P.) Ltd. Vs. Deputy Commissioner of Income-tax, Circle- 5(2), Mumbai (ITAT Mum.) 145 ITD 217 (2013) (Pg. No.233 to 242) the above issue is elucidated with ample clarity. The relevant portion of Para 7 is reproduced as under.

....

(e) The appellant respectfully prays that in view of the above referred judicial pronouncements, the judgement in appellant's own case on identical facts decided in its favour in respect of A. Y. 2008-09, 2010-11 and 2011-12 by the Hon'ble ITAT, Mumbai, introduction of Sec. 43CA by Finance Act, 2013 w.e.f. 01.04.2014 and the factual matrix, the additions made by the learned AO be deleted.

With regard to disallowance u/s. 36(1)(iii), assessee submitted as under: -

(a) Loan taken for the purpose of business-Satisfaction of requirement u/s. 36(1)(iii) of the Act.

i) During the assessment proceedings, the appellant had given detailed explanation stating that the all loans taken were utilized for business purpose.

ii) By now it is well settled that in order to claim deduction under Section 36(1)(iii) the following ingredients must be satisfied, namely:

1. the money must have been borrowed;

2. it must have been borrowed for the purpose of business;
and

3. the interest must have been paid on the borrowed amount and claimed as a deduction [CIT v. BOMBAY SAMACHAR LTD (1969) 74 ITR 723, 731 (BOM); S.A. BUILDERS LTD v. CIT (2007) 288 ITR 1, 9; CIT v RELIANCE UTILITIES & POWER LIMITED (2009) 18 DTR 1 (BOM)].

iii) Since all the conditions are satisfied in the appellant's case, the disallowance of a part of interest is not warranted.

iv) Further, the learned AO has failed to bring on record the non-utilization of the funds for the business purpose and failed to satisfy the onus shifted on her to prove the same.

v) Also, in case of CIT v. DALMIA CEMENT (B.) LTD (2002) 254 ITR 377 (DEL), the Hon'ble Delhi High Court held that if all the requisite conditions for allowance of interest are fulfilled, it is not open to revenue to make a part disallowance, unless there is a positive finding recorded that a part of the amount borrowed is not used for purpose of business. Once it is established that there was a nexus between the expenditure and the purpose of the business, the department cannot sit in the armchair of the businessman and pass judgment on the business decisions already implemented by the Assessee and question and dictate as what ought to have been done by the Assessee. The above judgment was affirmed by Hon'ble Supreme Court in case of S.A. Builders and Another Vs. CIT (2007) 288 ITR 1, 9(BOM)] and Hero Cycle (P) Ltd. Vs. CIT Central, Ludhiana in Civil Appeal No. 514 of 2008 dated 05.11.2015

vi) Further, In a complex nature of construction business, it is not possible to maintain the exact nature of funds borrowed for the purposes of relevant project However, on an overall broad analysis of

the funds borrowed and utilized for the purposes of the business, it is incumbent to analysis that the interest paid has been on the funds borrowed for the purposes of business.

(b) Availability of Interest free funds in the form of Share capital, Reserves and surplus and unsecured interest free loans received.

(i) The appellant company had access to huge interest free funds in the form of interest free loan received Rs. 10,67,78,546/- as on 31.03.2012, out of which Rs.10.31 Crores is from associate concern, M/s. Orville constructions. Further, there was Share capital Rs. 1,33,110/- and Reserves and Surplus Rs. 12,67,87,112/- as on 31.03.2012.

(ii) In a recent Judgement of Gujarat High Court, in the case of Comm. Of Income Tax, Ahmedabad. Vs. R. L. Kalthia Engineering & Automobiles (P) Ltd. 33 taxmann.com 14 (Guj.)(2013) (Pg. No.243 to 244) it was held that where Assessing officer had disallowed interest paid on borrowed fund on ground that appellant had diverted interest bearing funds for purpose of investment in shares and loans to sister concern, since sufficient interest free funds were available with appellant, disallowance of interest expenditure was not permissible.

(iii) In case of CIT Vs. Reliance Utilities and Power Ltd. (Bom) (2009) 313 ITR 340 (Pg. No.245 to 248), it is held that the appellant company possessed sufficient interest free funds which establishes that the investment in sister concerns were made by the assessee out of interest free funds and therefore no part of borrowing can be disallowed on the basis that investment were made out of interest bearing funds.

(iv) In case of SMS Pharmaceuticals Ltd. Vs. DCIT32 ITR(T) 220 (Hyd. Trib.), it was held that when there are own funds available with the Assessee, it cannot be presumed that assessee has diverted part of borrowed funds so as to make disallowance of interest paid on borrowed funds.

(v) In case of Hero Cycle (Supra), the Hon'ble Supreme Court observed that, 'Remarkably, as observed by the CIT(Appeal) in his order, the company had reserve/surplus to the tune of almost 15 crores and, therefore, the assessee company could in any case, utilize those funds for giving advance to its Directors.'

(c) AO's contention and appellant's Rebuttal

AO's contention

If the money had not been advanced to associate concern at lower rate, it would have obviated necessity of borrowing funds to that extent.

Appellant's rebuttal

i) By now it is well settled and accepted that it is not open for the department to prescribe as to how and in what manner and way the assessee should conduct and operate his business because it is for the businessman to decide how best to protect his interest and it is he who alone knows his interest best and the revenue has no jurisdiction to substitute its own standard and yardstick for that of the businessman's prudence and sagacity [CIT v. DHANRAJGIRJI RAJA (1971) 91 ITR 544, 550 (SC); S.A. BUILDERS LTD v. CIT (2007) 288 ITR 1,9(BOM)]

ii) It is respectfully submitted that in the light of the canon propagated by the Apex Court, the AO, with utmost respect, has no jurisdiction to ordain as to how and in what manner the Appellant ought to and should have advisedly and desirably planned and managed its financial and liquidity position. The domain and sphere of the AO does not extend to prescribing whether the Appellant ought to have resorted to borrowings or not in the light of his subjective opinion that ample funds were available and at the disposal of the Appellant and the manner in which the Appellant should operate, conduct and manage its business inasmuch as he cannot in that regard challenge and question the businessman's prerogative, perception and prudence. It is respectfully submitted that the financial liability of repaying the capital balances and the unsecured loans devolves on the Appellant and in law has to be discharged by it and not the revenue and in the premises, what is burdensome or otherwise cannot surely and indeed fall within the realm and orbit of the department. The considerations which govern and dictate a business cannot be supplanted by department's narrow and pedantic revenue oriented approach to garner tax.

iii. The Hon'ble Income Tax Appellate Tribunal, Kolkata in ITO Vs. Snow Tex Investment Limited (2016) 67 (11) ITCL 385 Kolkata B-Bench Tribunal (Pg. No. 249 to 257), wherein in para 3.3 after referring the decision of Reliance Utilities (supra) stated that:

"It is further submitted that there is no bar against advancing of loan interest-free or at a low rate of interest. There may be very many considerations, including business considerations,

for not charging interest or changing interest at a low rate. Dispute between the Revenue and the assessee often arises when money is borrowed with interest and loan is advanced interest-free or at a low rate of interest. In such a case the tendency of the assessing officer generally is to disallow the interest paid on the money borrowed either in full or proportionately depending upon the quantum of loan advanced and interest, if any, charged. But whether the assessee charged interest on loan advanced or not is not at all a relevant consideration for determining allowability of interest paid under Section 36(1)(iii) of the Act. As already explained, the relevant consideration is whether the moneys have been borrowed for the purposes of business or profession and whether interest paid.

In the interest of maintaining good business relation, interest-free loans or loans at a low rate of interest may be given to others with whom the assessee has business relation or with whom he expects to establish business connection or with whom he has other business obligations, present or past. There may be many other reasons also, both business or non-business. If interest-free loan or loan at a low rate of interest is given for business consideration out of the capital borrowed with interest then also the borrowing would be for the purposes of business, and interest paid on the borrowed capital would be allowable as deduction under Section 36(1)(iii) of the Act.

There is no compulsion that interest should always be charged on any lending, nor there is any requirement that income must be earned by utilizing the capital borrowed with interest so as to be entitled to the deduction under Section 36(1)(iii) of the Act. Merely for the reason that interest was not charged or charged at a low rate on the lending, the interest paid for borrowing cannot be disallowed. It is a matter of business prudence and entirely upto the assessee as to how he utilizes the fund in the interest of his business. The basic requirement is that the borrowed capital should be used for the purposes of business or profession. An argument may be advanced that if interest-free loan had not been given then the assessee could have reduced his debt and consequently the interest payment."

(d) Loans given to sister concern out of business expediency

Also, the appellant had given interest bearing loan to sister concerns, M/s. Midcity Infrastructure Pvt. Ltd. ('MIPL') at the rate of 12% p.a.,

which is very much secured and zero risk oriented. Hence, @12% per annum interest would be considered as fair and reasonable. The said loan was given in earlier year to carry out construction project of MIPL and thus advanced out of commercial expediency. Copy of ledger account of Midcity Infrastructure Pvt. Ltd.(earlier known as M/s. Karm Trading and Investment Pvt. Ltd.) in the books of the appellant for F.Y.2010-11 and F.Y.2011-12 is enclosed at Pg. No.146 and Pg. No.147 respectively. The copy of Acknowledgment of Return of Income alongwith the Statement of Income of Midcity Infrastructure Pvt. Ltd. for F.Y.2010-11 and F.Y.2011-12 relevant to A.Y.2011-12 and A.Y.2012-13 is enclosed at Pg. No. 148 to 158.

The appellant refers the Judgment of Hero Cycle (supra), wherein the apex court reiterating its own judgment in case of S.A. Builders held that - In the process, the Court also agreed that the view taken by the Delhi High Court in 'CIT v. Dalmia Cement (B.)Ltd.' [2002 (254) ITR 377] wherein the High Court had held that once it is established that there is nexus between the expenditure and the purpose of business (which need not necessarily be the business of the assessee itself), the Revenue cannot justifiably claim to put itself in the arm-chair of the businessman or in the position of the Board of Directors and assume the role to decide how much is reasonable expenditure having regard to the circumstances of the case.

(e) Pick and choose method- Not permissible for disallowing interest expenditure

The assessee company states that it is impermissible under the law to apply pick and choose method' in case of interest expenditure under Section 36(1)(ii) as claimed. What is more important is the overall finance borrowed by the assessee company and utilized for the purposes of the business by the assessee company

(f) Loans borrowed in earlier previous years and interest paid allowed.

The funds which were utilized have already been held as utilized for the purpose of business in the earlier years. The unsecured loans taken on which higher interest paid were loans borrowed the earlier years and therefore, it is absolutely unjustified to disallow the difference in the interest rate charged as against paid by the assessee company. The following documentary evidences are enclosed.

- i. Copies of ledger account of Interest paid for F.Y. 2009-10 and F.Y.2010-11 in the books of the appellant (Pg. No. 159 to 160)*

- ii. *Statement of unsecured loans of the appellant company for F.Y.2009-10, F.Y.2010-11 and F. Y. 2011-12 (Pg. No. 161 to 163)*
- iii. *Copy of Assessment order u/s 143(3) dated 11.01.2013 for A.Y.2010- 11(Pg. No. 164 to 167)*
- iv. *Copy of Assessment order u/s. 143(3) dated 26.02.2014 for A.Y.2011- 12(Pg. No. 168 to 174)*

Therefore, taking into consideration the above factual position and legal precedents, the Appellant states interest paid on borrowing which was taken for the purpose of business is fully allowable and no disallowance is called for

(g) Without prejudice alternatively, the appellant states that the AO, while calculating the proportionate disallowance of 6% on interest paid, by presuming that all the loan were received at the rate of interest of 18% p.a.; inadvertently ignored the fact that loan from Godhra Impex Pvt. Ltd. was received at the rate of interest of 12% p.a. Copy of ledger Account of Godhra Impex Pvt. Ltd. in the books of the appellant company is enclosed. (Pg. No.175) Thus, the disallowance of 6% as determined by AO would apply on the total interest paid other than interest paid to Godhra Impex Pvt Ltd. whereby the disallowance would be Rs. 1,44,083/- as calculated hereunder:

Total interest paid (Statement enclosed at Pg.)

Rs. 6,04,750

Less; Interest paid to Godhara Impex pvt. Ltd. @12% Rs.1,72,500

*Interest paid @18% on which proportionate disallowance apply
Rs.4,32,250*

*Amount of disallowance (Rs.432250/18*6) Rs. 1,44,083*

With regard to interest income as income from other sources, assessee submitted as under: -

(a) The contention of the AO that the impugned income is 'income from other sources' is erroneous and unlawful in view of the following:-

(i) The business activity of the assessee company is that builders and developers. Its associate concern, MIPL, is also in the business of builders and developers and the said loan was given to MIPL for its

construction project. Thus, the said loan was given out of commercial exigency and not with the specific aim of earning interest income

ii) It is respectfully submitted that as regards the above loan, the AO herself, while disallowing the interest expense u/s.36(1)(iii) in Para 7 of the Assessment order, considered the interest income as interest on loan and compared the rate of interest charged (12%) on the said loan against the rate of interest paid on loans received. Thus, the stand taken by the AO as regards the same interest income is inconsistent in that while disallowing interest u/s.36(1)(iii), the said interest income is considered as business income

(iii) The loan given to MIPL is purely a financial decision taken in the normal course of business. Such business decisions are taken on the basis of number of factors such as availability of funds and its immediate requirement, the effect on the business of associate concern etc.

(iv) The appellant company respectfully submits that loans given and taken are so inter-linked with the carrying on of the business, that it cannot be regarded de hors the carrying on of the business and is incidental to and directly springs from the carrying on of the business and, therefore, the interest should be regarded as income from business and not from other sources.

(b) In support of its claim, the assessee company places reliance on the following judgments:

1) In CIT v. Lok Holdings (2009) 308 ITR 356 (Bom) (Pg. No.258 to 261), the assessee engaged in the business of construction of flats received advance money from customers. The amounts were kept in deposit with banks till its actual usage and thereby the assessee earned bank interest. The taxability of such bank interest whether to be made under the head 'business' or under the head 'other sources' was the issue. The court held that the entire interest income had accrued on bank deposits and those deposits represent surplus funds parked temporarily. Accordingly, it was held that the interest income from business funds is taxable as business income. This is more so because the aspect of interest did not arise from any independent activity.

ii) In CIT v. A. P. Industrial Infrastructure Corporation Ltd. [1989] 175 ITR 361 (AP), the Hon'ble High Court held that 'instead of keeping the amount in its own custody, the assessee kept it in a bank. Evidently, the object was not to earn interest. It was only a mode of keeping the funds. The Tribunal was, therefore, justified in the circumstances of this particular case, in holding that the income on

such deposits should not be taxed as income from other sources, but should be treated as income from business."

iii) The assessee company also refers the judgment of Jurisdictional Bombay High Court in case of CIT v. Paramount Premises (P) Ltd (1991) 190 ITR 259 (Bom.)

(c) The AO has relied upon the following decision of CIT Vs. Vidyut Corporation (2010) 34 ITR 221 (Mum) to support her contention to treat the interest as income from other sources. However, the said ruling cannot be applicable to the case of the appellant as the said judgment was rendered in relation to Sec. 80IB to determine whether the interest earned by parking the surplus funds with a specific aim of earning interest would constitute 'Profit and gains derived from the industrial undertaking' in terms of Sec. 80IB of the Act.

(d) Based on the above contention, the appellant submits that the interest be regarded as income from business and not from other sources."

10. After considering the submissions of the assessee, Ld.CIT(A) allowed the ground raised by the assessee with regard to difference in agreement value of sale of commercial units below the assessed market value by the stamp authorities. Ld.CIT(A) decided the issue in favour of the assessee by relying on the decision of the ITAT in the A.Y. 2008-09 and 2010-11 and 2011-12 with the observation that the issue is recurring in nature, and observed as under: -

"6. I have considered the facts of the case and submissions of the appellant. The appellant agitated against addition of Rs.3,63,78,552/- to the total income of the assessee being difference in the agreement value of sale of commercial units below the assessed market value by the stamp authorities. The AO has discussed this issue at length in the assessment order. I have considered the facts of the case, reasons cited by the AO and submissions filed by the appellant. The issue is recurring in nature and squarely covered in the appellant's own case for AY 2008-09 vide CIT(A)'s order No CIT(A)/Cir-4/173/10-11 dated 21.04.2011 wherein

the issue was decided in favour of the assessee. On further appeal by the department, Hon'ble ITAT, Mumbai upheld CIT(A)'s order vide order ITA No 5099/M/2011 dated 15.06.2012. It may also be mentioned that similar issue was involved in the case of the assessee for AY 2010-11 and 2011-12 wherein following the previous years' orders and respectfully following the decision of Hon'ble Tribunal in the case of the appellant for AY 2008-09, my predecessor decided the case in favour of the appellant by directing the AO to delete the additions made on account of difference in/value of sale of commercial unit below the market value. Since, facts and circumstances of the case of this year are identical to that of AY 2008-09, respectfully following the decision of Hon'ble ITAT in appellant's own case for AY 2008-09, the AO is directed to delete the addition of Rs 3,63,78,552/- made to the total income of the assessee being difference between the sale value and market value adopted by the stamp valuation authority. Therefore, this ground of appeal is allowed."

11. With regard to interest expenditure, after considering detailed submissions of the assessee Ld.CIT(A) allowed the ground raised by the assessee with the following observations: -

"10. Decision: -

I have considered the facts of the case and submissions made by the appellant. I have perused the reasons cited by the Assessing Officer for the disallowance of interest of Rs: 2,01,583/- out of Rs. 6,04,750/- on account of differential rate of interest and also the contention of the Appellant in this regard. I notice that the Appellant Company had interest free funds in the form of share capital of Rs.1,33,110/-, reserves and surplus of Rs. 12,67,87.112/- and interest free funds in the form of interest free loan received Rs. 10,67,78,546/- Crores as on 31 March 2012. The Appellant had stated that it has not diverted any borrowed amount taken on higher interest rate to its associates company M/s. Midcity Infrastructure Private Limited as the Appellant Company has charged interest @ 12% per annum being the loans are secured, zero risk oriented and can be called upon to anytime and hence, 12% interest has been considered as fair and reasonable. The said loan has been continued from the earlier year and given out of commercial expediency and hence, disallowance of the proportionate interest is against the provisions of Section 36(1)(i) of the Act. I have noticed that the Appellant had large

amount of interest free funds and reserves and surplus and the advances given are out of commercial expediency.

10.2 The Appellant Company has also cited various decisions in cases of (a) CIT Vs Bombay Samachar Ltd (1969) 74 ITR 723, 731 (BOM); (b) SA Builders Ltd Vs CIT (2007) 288 ITR 1, 9; (c) CIT vs Reliance Utilities & Power Limited (2009) 18 DTR BOM) (d) Commissioner of Income Tax, Ahmedabad Vs R.L. Kalthia Engineering & Automobiles (P) Ltd 33 taxmann.com 14 (Guj) (2013); (e) CIT vs Reliance Utilities and Power Ltd (Bom) (2009) 313 ITR 340; (f) SM Pharmaceuticals Ltd vs DCIT 32 ITR(T) 220 (Hyd. Trib.) and (g) ITO Vs Snow Tex Investment Limited (2016) 67 (II) ITCL 385 Kolkata B-Bench Tribunal.

10.3 Considering the facts of the case and following the various legal precedents cited by the Appellant Company, the AO is directed delete the additions of Rs. 2,01,583/- made in the Assessment order and hence, this ground of appeal is allowed."

12. With regard to interest income taxable under the head "income from other sources", after considering the detailed submissions of the assessee Ld.CIT(A) allowed the ground raised by the assessee with the following observations:

"16. *Decision:-*

I have considered the facts of the case and submissions of the appellant. The appellant agitated against treatment of interest income of Rs 38,37,986/- under the head 'Income from other sources' as against 'Business income'. The appellant submitted that the said interest was earned from its sister concern Midcity Infrastructure Pvt Ltd (MIPL) which the AO has considered for disallowance u/s 36(1)(ii) of the Act during the year. The appellant placed reliance on Hon'ble Bombay High Court's judgements in the case of CIT Vs Lok Holdings (2009) 308 ITR 356 and CIT Vs Paramount Premises (P) Ltd (1991)190 ITR 259 (Bom) etc. I have perused the facts of the case, reasons recorded by the AO and submissions filed by the assessee. The AO has treated the income under the head business income for the reason that the appellant company is not engaged in the business of financing. However, interest income pertaining to any

advance/investment are treated as business income if the said advance/investment is made in the course of business and relates to commercial expediency. Interests earned from advances given wholly and exclusively for the purposes of the business or laid out wholly and exclusively for the purposes of the business have always been treated under the head Business Income. In this case, it is apparent that the appellant has given advances to its sister concern MIPL in the course of business and since the AO has not disputed the reason of advance given to the MIPL, there is no case for treating the interest income arisen from the said advance as business income. Thus, the AO is directed to treat the said interest income as business income. Therefore, this ground of appeal is allowed."

13. Aggrieved revenue is in appeal before us raising following grounds in its appeal: -

"1. Whether, on the facts and in the circumstances of the case and in Law, the Ld.CIT(A) erred in deleting the addition made by the Assessing Officer on account of under reporting considerations of shops/flats amounting to Rs.3,63,78,552/- without of sale appreciating the fact that there are huge variations in the sale consideration of shops/flats sold by the assessee during the relevant period as mentioned by the Assessing Officer.

2. On the facts and in the circumstances of the case and in Law, the Ld.CIT(A) erred in deleting the disallowance of interest claim of Rs.2,01,583/ ignoring the fact that the assessee had advanced loans at lower rate to sister concerns as compared to the interest paid on loans obtained by the assessee"

3. On the facts and in the circumstances of the case and in Law, the Ld.CIT(A) erred in treating the interest income of Rs.38,37,986/- as business income instead of 'income from other sources' assessed by the AO without appreciating the fact that the assessee is not in the business of financing and interest income should be treated as "income from other sources"

4. The appellant prays that the order of the Ld. CIT(A) on the grounds be set aside and that of the Assessing Officer be restored.

5. The appellant craves leave to add, amend or alter all or any of the grounds of appeal."

14. At the time of hearing, With regard to Ground No. 1, Ld.DR submitted that Ld.CIT(A) relying on the order of ITAT deleted the addition and however, he failed to observe that the ITAT has given the findings in the earlier Assessment Years which are in relation to section 50C whereas in the given case Assessing Officer has not invoked section 50C. Further, he submitted that section 43CA is applicable in the case of assessee and Assessing Officer has brought on record the suppression of value and the difference in recording the sale value which is the proper income of the assessee and he supported the findings of the Assessing Officer and prayed that the Assessment Order may be sustained.

15. On the other hand, Ld.AR brought to our notice various ITAT orders which are decided by the Coordinate Bench in favour of the assessee and further, he brought to our notice the provisions of section 43CA in particularly proviso, as per which the market value should be adopted on the date of allotment or date of agreement not on the date of actual registration. In this regard he brought to our notice Page No. 178 of the Paper Book a comparative chart to highlight the value of stamp duty on the date of booking and the agreement value and he prayed that the decision of the Ld.CIT(A) may be sustained.

16. Considered the rival submissions and material placed on record, we observe that assessee is in the business of construction and over the years assessee has sold the flats and it is the recurring issue as far the assessee is concerned, we observe that in the earlier Assessment Years similar additions were made by the Assessing Officer u/s. 50C and the Coordinate Bench has decided the issue in favour of the assessee holding that the relevant value of stamp duty to be applied on the date of booking or on the date of sale agreement not on the date of registration. This issue was decided in favour of the assessee over the years and in the present assessment year the Assessing Officer has observed similar variation in value of stamp duty and agreement value registered and accordingly he proceeded to make the additions. However, subsequently the provisions of section 43CA of the Act was introduced which are similar to the provisions contained in section 50C of the Act. For the sake of clarity Section 43CA(3) is reproduced below:-

"43CA(3) Where the date of agreement fixing the value of consideration for transfer of the asset and the date of registration of such transfer of asset are not the same, the value referred to in sub-section (1) may be taken as the value assessable by any authority of a State Government for the purpose of payment of stamp duty in respect of such transfer on the date of the agreement."

17. Since the provisions contained in section 43CA are similar to section 50C of the Act the value to be adopted where the value on the date of

agreement and the value of consideration on the date of registration of such transfer are not the same, the value referred to in sub-section (1) i.e., stamp duty valuation may be taken as on the date of agreement. Since the assessee has brought on record a comparative chart the respective stamp duty value as on the date of booking and the agreement value on the record, for the sake of clarity it is reproduced below: -

Office No.	Name of the Party	Value as per Stamp duty Ready Recknor rates in the year of booking of office	Agreement^ value
502	Sivaraman	37,97,933	57,91,300
503	Mohan Punjabi & n Anjali R Arora	37,97,712	54,80,000
504	Mohan Punjabi & n Anjali R Arora	37,97,712	54,80,000
604	Manohar Dhanjani	39,55,950	46,56,850
803	Harmesh C Arora	37,83,457	43,73,400
804	Anil C Arora	37,62,895	43,73,400
805	Mohiddin I K & A Hafiz I K Deshmukh r	39,56,180	59,09,320
806	A Hafiz I K & Mohiddin I K Deshmukh	39,56,180	74,37,580
1005	Surendra S Anand	39,56,180	63,91,000

18. Since the decision of the Ld.CIT(A) is in conformity with the findings of the Coordinate Bench even though which is in relation to section 50C

the provision contained in section 43CA are similar to the provisions in section 50C. We do not see any reason to interfere with the findings of the Ld.CIT(A). Accordingly, Ground No. 1 raised by the revenue is dismissed.

19. With regard to Ground No. 2 we observe that the Assessing Officer has disallowed proportionate interest claimed by the assessee with the observation that assessee has deviated the interest bearing funds by advancing the same to its sister concerns. After considering the submissions of the assessee and findings of the Ld.CIT(A) we observe that assessee has substantial interest free funds in the business and assessee has diverted certain amount to its sister concerns when compared to interest free funds available in the business, the funds given to its sister concerns are not substantial and moreover the funds borrowed by the assessee are applied for the purpose of business and it is a settled proposition that when interest free funds are available in the business the funds diverted for other purposes are presumed to be out of interest free funds available in the business. Accordingly, we do not see any reason to disturb the findings of the Ld.CIT(A). Hence the ground raised by the revenue is dismissed.

20. With regard to Ground No. 3, we observe that assessee has received some funds from its sister concern M/s. Midcity Infrastructure Private Limited and earned certain interest. The Assessing Officer treated the above said interest as "income from other sources" observing that the main business of the assessee is not financing hence the earning of interest should be charged to tax under the head "income from other sources". After considering the submissions of the assessee and findings of the Ld.CIT(A) we observe that the assessee has received interest income from the advance made by the assessee to its sister concerns. For the purpose of commercial expediency and the advances were given wholly and solely for the purpose of business. MIPL is a sister concern and advances were given in the course of business and Assessing Officer is not disputing the purpose of advances given to MIPL. Therefore, the advance given to its sister concerns are closely connected to the business of the assessee. Therefore, we do not find any reason to disturb the findings of the Ld.CIT(A). Accordingly, ground raised by the revenue is dismissed.

21. In the result, appeal filed by the Revenue is dismissed.

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22. Coming to the appeal relating to A.Y. 2013-14, since facts in this case are mutatis mutandis, therefore the decision taken in A.Y. 2012-13 is applicable to this assessment year also. Accordingly, this appeal is dismissed.

23. In the result, both the appeals filed by the revenue are dismissed.

Order pronounced in the open court on 23rd March, 2023.

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER
Mumbai / Dated 23.03.2023
Giridhar, Sr.PS

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum