

**IN THE INCOME TAX APPELLATE TRIBUNAL
"D" Bench, Mumbai**

**Before Shri Shamim Yahya, Accountant Member
and Shri Amarjit Singh, Judicial Member**

**ITA Nos.3034 & 3035/Mum/2018
(Assessment Years: 2012-13& 2013-14)**

M/s DBS Realty
Ground Floor, Dynamix House,
Gen. A.K. Vaidya Marg,
Goregaon (East),
Mumbai- 400 063
PAN – AAFFD8341L

Pr. CIT-31,
R. No. 301, C-13,
Vs. 3rd Floor, Pratyakshakar Bhavan,
BKC,
Mumbai - 51

(Appellant)

(Respondent)

Appellant by: Shri Vijay Mehta &
Shri Anuj Kisnadwala, A.Rs

Respondent by: Shri H.N. Singh, D.R

Date of Hearing: 05.02.2019

Date of Pronouncement: 08.03.2019

ORDER

PER SHAMIM YAHYA, AM

These are appeals filed by the assessee against the order of Id. Commissioner of Income Tax-31, passed under Sec. 263 of the IT Act for assessment year 2012-13 and 2013-14, respectively. Since the issues are common, these appeals were heard together and are being disposed of by this consolidated order.

2. Since facts are similar, we are referring to grounds of appeal and facts of the case from ITA No. 3034/Mum/2018. The grounds raised as under:

"1. *The Learned Pr. Commissioner of Income Tax ("Pr. CIT") erred in fact and in law by invoking the provision of Section 263 of the*

Act without appreciating the fact that the Learned Assessing Officer ("LAO") passed order u/s 143(3) of the Act after making detailed and adequate inquiries/verification/examination with respect to amount received on sale of TDR.

2. *The revision order passed u/s 263 by the Learned Pr. CIT is bad in law and deserves to be set aside.*
3. *The Ld. Pr. CIT erred in alleging that the appellant is engaged in the trading of TDRs without appreciating the fact that the release entitlement and sale of TDR is sine-qua-non for developing, construction, completion, and handover of single, inseparable, indivisible and composite SRA project to the SRA Authority.*
4. *The Ld. Pr. CIT erred in Facts and in law in concluding that the percentage completion method followed by the appellant for revenue recognition is not applicable to the assessee's business.*
5. *The Ld. Pr. CIT has grossly erred in directing the LAO to tax the amount received on sale of TDR of Rs. 53,35,24,118/ without appreciating the facts of the case."*

2.1 At the outset there is a delay of 96 days in the appeal filed by the assessee. The Ld. Counsel for the assessee submitted that delay was on account of wrong advice of the consultant in this regard. The acceptance letter for wrong advice by the consultant was duly submitted. Upon hearing both counsel and perusing the records in the substantial interest of justice we are inclined to condone the delay. The delay is accordingly condoned.

3. In this case the assessee is engaged in the business of development and construction of land and building particularly Slum Rehabilitation Authority (SRA). The assessment order was passed under Sec. 143(3) on 29.03.2015.

4. Subsequently, the CIT observed that the ongoing through the assessment records, it was noted that during the assessment proceedings for A.Y. 2014-15, the firm had submitted the details of TDRs (Transferable Development Rights) received against the SRA Project. As per the submissions, the firm had sold total TDR amounting to Rs.3,04,43,99,698/- out of which TDR of Rs.53,35,24,118/- was sold during the F.Y. 2011-12 relevant to

A.Y. 2012-13. However, the firm had not booked the above mentioned sale on TDRs in A.Y. 2012-13. The TDRs received from the development of SRA Project was sold but no development had been made by the firm itself. Therefore, Ld. CIT opined that sale of TDRs should have been disclosed as income on accrual basis. Therefore, he held that as this income was not disclosed, the order passed by the Assessing Officer for A. Y. 2012-13 under section 143(3) of the Act was considered erroneous in so far as it is prejudicial to the interest of the revenue in view of clause (a) to Explanation 2 of sub-section (1) of section 263 of the Act It was therefore proposed to exercise power under section 263 of the Act in respect of the assessment order under section 143(3) of the Act dated 29.03.2015.

Accordingly, noticed under Sec. 263(1) was issued to the assessee. The ld. CIT thereafter noted following extracts from the assessee's submission in this regard as under:

"5....It is incorrect to state that the firm is not making any development. The reality is that the first the firm invest from its own resources reaches the particular milestone (sic) and files progress report of development with the SEA authority. The project development is inspected than the authorities based on which eligible TDRs is issued by the MHADA Thus income of TDRs. receipt of TDRs by assessee is when development of SEA project is achieved.

5.1....b) There is an express agreement between SRA Authority and assessee firm which entitle the assessee to TDRs to recoupe its expenditure on construction on reaching various stages of development of SEA project.

7.1....b) the assessee has been consistently following Percentage completion method for revenue recognition./or its real estate project since its incorporation. It can also be referred from note no 2. 7 Revenue recognition of the audited financial statement for the year which clearly mentions that revenue recognition policy of the company for real estate project is Percentage completion method.

h) Further, the Institute of Chartered Accountant of India (ICAI), came up with guidance note on Revenue Recognition by Real Estate Developer which prescribed Percentage Completion Method for revenue recognition. As per the guidance note, revenue from construction and development of the project will be recognised only after the work has progressed to the extent of 25% of the total construction cost excluding land cost and other parameters are fulfilled. The total project work completed up to March 31, 2012 is 11%. Accordingly,

revenue will be recognised in the year in which the firm fulfils the desired threshold.....

10. We emphatically state that from the records of the hearing taken place during the course of assessment proceedings, the A.O. has passed his order after making proper and thorough inquiries/verification which should have been made.

11. We may also point-out that, the assessment for 2012-13 has been recommended for 263 action by your goodself on the basis of AOs action of taxing the sales proceed of TDR received from MCGM/SRA for A Y 2014-15. A Os action of taxing the TDR for A Y 2014/5, is based on /TAT judgement in the case of Hillside construction Co. Pvt. Ltd., wherein assessee had parted with the development rights in two, while in our case we remain part of the large project which is apparent from the facts that, we will construct sale building on the some piece of land after handing over all the buildings, schools, aangan-wadis and hospital

etc. 10 SRA/MHADA authorities. Thus, the company remains part of larger composite/integrated project being developed by DBS Realty for self as well as for SRA etc. Further, reliance is placed on Order passed by Hon'ble Mumbai ITAT in the case of M/s Chembur Trading Vs. ITO 22(3) (2) [2009] 3 ITAT India 818 (Mum), which states that the assessee has a right or privilege to adopt any one of the two method of accounting for determining its profits We would request your honour before applying the ratio of the judgment in hillside Construction Co. Pvt. Ltd., please compare the facts of both the judgments and facts of the DBS Realty.

.....it is hereby submitted that no revision action u/v 263 of the Act should be initiated. The said revision of order is bad in law and accordingly notice u/s. 263 of the Act should be withdrawn and the proceedings initiated by our goodself should be dropped.”

Considering the above the ld. CIT observed that it had been stated that TDRs consist of land TDR and construction TDR and the assessee is following percentage completion method. Thereafter ld. CIT quoted paras from the agreement between the assessee and the Government of Maharashtra through slum rehabilitation authority. After quoting from the said agreement, the ld. CIT observed that from the perusal of the agreement with SRA submitted by the assessee during the course of assessment proceedings for assessment year 2014-15 following facts emerge:

“1. Upon the approval of Slum Rehabilitation Proposal by SRA, the developers are liable to and will convey the said plot of land admeasuring 93,23 [sq.ft.](#) as identified against grant of 100% land component of TDRs. The 100% TDRs in respect of land

component was given at the time of the signing of the agreement on 24.04.2009. Thereafter, the developers have to construct the tenements in a phase wise manner and based on phase wise and stage wise construction of the same, the assessee will be gaining construction/building component Of TDRs from time to time and the same shall be released by SRA as per the terms of the SRA agreement.

2. From the facts mentioned in the SRA agreement, the assessee shall be granted Total Land TDRs of 93,623 sq. mts. and Construction TDRs of 4,78,527.75 sqmts.
 3. The assessee was granted Land TDRs component of 93,623 sq. mts, on 8th June 2009 immediately after execution of the SRA agreement dated 24th April, 2009 with SRA. The construction TDRs were allotted to the assessee as per clause 21 of the SRA agreement.
- 5.1 During the assessment proceedings for A.Y. 2014-15 before the assessing officer, the assessee submitted that following details of TDRs received against the ongoing SRA project:

DRC No.	Date of issue	Financial Year	Areas as per DRC sqmt.	Area sold in sqmt.	Sale Consideration received	Area unsold sqmts.
SRA/8/19/LAND	08.06.2009	2009-10 2010-11	93,623	93,623	152,57,98,600	0
SRA/957/CONSTN	11.08.2011	2011-12	22,510	22,510	53,35,24,118	0
SRA/994/CONSTN	09.05.2012	2012-13	21,790	21,790	63,07,78,539	0
SRA/1035/CONSTN	20.12.2012	2012-13	12,640	12,640		0
SRA/1056/CONSTN	16.08.2013	2013-14	8,820	5,460	35,42,98,441	3360
Total			1,59,383	1,56,023	304,43,99,698	3360

From the above table Id. CIT observed that it is evident that the assessee has sold total TDRs amounting to Rs.304,43,99,698/- till date out of which TDRs of Rs.53,35,24,118/- were sold during the year under consideration relevant to the A.Y. 2012-13. However, the assessee has not recognised the revenue on the above mentioned sale on account of TDRs in A.Y. 2012-13 and the assessee has shown the same under the head "current liabilities" as amount received, from sale of TDRs of Rs. 304,43,99,698/-.

5. Further Id. CIT observed that there is no clause in the agreement which requires the assessee to return the TDRs upon happening of certain contingency as he held that hence, TDRs awarded to the assessee were absolute & unconditional as regards

the Land component & subject to the stage of completion for the construction component and the assessee was the absolute owner of his right, and it was not a current liability as has been projected by the assessee. He observed that, it has been judicially held that the TDR is a separate right in itself, and is an asset which can be transferred separately disjoined from the transfer of the Land or Building to which it is related. Therefore, he held that being a separate asset the sale of TDRs ought to have led to revenue recognition by way of business profits as the assessee was found to be trading in TDRs, which has not been done. He noted that in this case, the assessee is developing the project which has been allotted on account of the SRA, however the TDRs which have been received by the assessee have been sold and no development has been made by the assessee himself relating to the sold TDRs. He therefore, concluded that such sale of TDRs is nothing but trading transaction as held by the Assessing Officer in the course of the assessment proceedings for the A.Y. 2014-15 and is not related to the development of any project. Therefore, he held that sale of TDRs should have been disclosed as income on accrual basis.

6. Thereafter he Id. CIT referred to guidance account of real estate transactions which was also referred by the A.O in assessment order of AY.2014-15. Thereafter he observed that:

“On perusal of the above mentioned guidance note on Sale of Transferable Development Rights (TDRs), it is clearly established that the assessee has transferred development rights to the buyers. The amount of revenue can also be measured reliably as the sale of TDRs has already been executed by the assessee with its buyers. The cost incurred in respect of sale of TDRs transactions can also be measured reliably.

6.4 In the case of the assessee, there is sale of TDRs entered into by the assessee. Accordingly revenue on sale of TDRs shall be recognized on accrual basis for which rules mentioned in guidance note for accounting of sale of TDRs, as explained

above, have been framed. Therefore, the assessee should have recognized the sale of TDRs on accrual basis as and when sale of TDRs agreements were executed.

7. The sum of Rs. 53.35 Cr. is stated to be advanced, and as stated in the submission, the AR is relying on the Guidance note of ICAI of 2012 on revenue recognition by real estate developers. But, the said guidance note is related to revenue from construction & development of the construction project. As regards the clause in the agreement with SRA relating to returning of TDRs to the MCGM, the Ld. AR failed to point out the same as stated above and in fact no such clause exists. Therefore, treating this receipt as Current Liability is not correct.”

7. Thereafter the ld. CIT referred to provisions of section 263 and quoted some case laws. He also referred to explanation 2 below subsection 1 of Sec.263. Thereafter, he held that the assessing officer has failed to examine and conducted inquiries as regards the nature of TDRs and sale proceeds of TDRs vis-a-vis the agreement with SRA. He further held he was satisfied that assessing officer failed to examine the issue mentioned within notice under Sec. 263 of the Act to the extent the assessment order passed was erroneous insofar it was prejudicial to the interest of the revenue. He directed the A.O to pass order under the supervision of the joint CIT. We may gainfully refer to the conclude in part of para 8.2 of the Ld. CIT order as under:

- “9. The assessing officer failed to examine & conduct the inquiries as regards the nature of TDRs & sale proceeds of TDRs vis-a-vis the agreement with SRA. The TDR is a separate right available to the assessee, the sale of which is not consequent upon construction of the project nor its revenue recognition from its sale can be tied up with percentage of completion of construction, as is incorrectly being claimed by the assessee and the receipts are taxable. Hence, the order is held to be erroneous in so far as it is prejudicial to the interests of the revenue.
10. In the circumstances, I am satisfied that the Assessing Officer failed to examine the issues mentioned in the notice u/s 263 of the Act. To this extent, the assessment order passed by the Assessing Officer is erroneous in so far as it is prejudicial to the interest of revenue, in view of the facts, the assessment order passed by the Assessing Officer is hereby set aside for assessing the amount of TDRs sold during the F.Y. 2011-12 relevant to AY 2012-13. The Assessing Officer is directed to pass the order under guidance/supervision of the Jt. CIT, Range-31(1), Mumbai, preferably

within a period of 3 months in accordance with law & after affording an opportunity of being heard to the assessee.”

In I.T.A. No. 3035/Mum/2018 for A.Y. 2013-14, on similar reasoning the learned CIT has exercised his powers u/s. 263 of the Act. While giving final direction, the learned CIT observed as under:

“The assessment made is therefore, set aside with the following directions to the Assessing Officer:

18.1 The assessment be made by de novo by considering one of the following methods of income computation for the year. 18.1.2 (Method 1) (holistic method)

18.1.2.1 The profit realisable based on the Costing of the entire project and estimated sales and revenue according to the project reports as outlined and narrated in Paras 16 to 9 be made afresh, A percentage of the profit which bears the same ratio to the extent of construction cost incurred as a percentage of total costs can be seen and taken as profit for the year.

18.1.2.2 To illustrate if the total profit from the project is estimated at say 700 cr as done in para 9, then , $700 \times 155/821\text{cr} = 132 \text{ cr}$ represents profit till 31/3/2013. From this, profit till 31/3/2012 ca be subtracted to arrive at profit for AY 200.3-14. Profit for AY 2012-13 and earlier can be similarly worked out considering the percentage of construction cost incurred till 31/3/12 to the total estimated cost of 821 cr. 18.1.3(Method 2) (profit from TDRs)

18.1.3.1 To rework the attributable cost of each TDR sold every year. In doing so, the construction cost incurred vis a vis TDRS released proportionately should be seen. Thus, cost of const and land cost indicated in WIP (for instance 244 cr as on 31/3/17 including land cost) should be compared with number of FDRS released at 133618(including 23405 held back by SRA Authorities! to arrive at cost of TDR.

18.1.3.2 A trading acct of TDRS should be formed year wise with allotted/accrued TDR and unsold TDR appearing at cost value in closing stock which would be opening stock for next year. This is a variation of what the AO did in AY 2014-15 as it takes into account the method of costing of TDRs and accrued but unsold TDRs lying with assessee .The year wise accrual of TDRs can be worked out on the basis of extent of work completed as per SRA agreement milestones marked there in like completion of plinth level, completion upto 13th floor etc) and claims submitted accordingly to SRA authorities for verification of milestone reached.

19. The assessment made is therefore set aside to be done de-novo. The AO may compute profits according to the above two suggested methods

after giving fair opportunity to assessee and then select one method that is fair and consistent for all the years.”

8. Aggrieved, the assessee's appeal before us we have heard both the counsel, perused the records. We have also gone through the precedents relied upon. Id. Counsel of the assessee stated that assessing officer has passed the order after proper examination of all the aspects mentioned by the Id. CIT. In this regard he referred to the reply given to the Id. CIT attached in the paper book Page No. 33. In this letter dated 20.03.2017, it was duly submitted that entire detail of the assessee's method of accounting along with party wise detail of sale of TDR made during the relevant year was submitted to the assessing officer. It was submitted therein that the assessee submitted following relevant/material document before assessing officer in the course of the assessment proceedings:

- a) Copy of SRA Agreement*
- b) Copy of TDR sale agreement*
- c) Copy of Deed of Conveyance for handing over land to SRA authority.*
- d) Architect Certificate for percentage of work completed in respect of SRA project.*
- e) Extract of Guidance Note on Revenue Recognition by Real Estate Developers issued by Institute of Chartered Accountant of India.”*

In the said letter it was duly stated that the AO has passed the assessment order after through examination of all submission and document.

Further, the Id. Counsel submitted that assessee is following percentage completion method of accounting of profits. He submitted that this method has been consistently followed. He further submitted that as per the method of accounting by the assessee profit is offered beyond completion of project to a certain stage of 30%. He referred to the architect certificate attached in paper book for the proposition that

only 11% of the project was complete during the year hence no profit was offered. The ld. counsel further submitted that the ld. CIT has clearly erred in holding that there is no obligation against the receipt of TDRs. He submitted that the assessee received TDR for the purpose of financing cost of its development work and construction activities. He referred to the agreement for the proposition that the assessee is under undisputed obligation to complete the SRA project in which huge expenditure are to be incurred. The ld. Counsel submitted that till the project is complete and the assessee has discharged its obligation as per the agreement the TDR receipt has been kept in current liabilities. He reiterated that the assessee will be entitled to the same as income only after obligation under the SRA project is complete. In this regard the ld. Counsel of the assessee submitted the decision of the ITAT in the case of ACIT Vs. Skylark Build ITA No. 4307/Mum/2009 and ITA No. 4308/Mum/2009 vide order dated 17.06.2011. In this case it was held that TDR were received against the work in progress and hence it was held that the assessee has rightly adjusted the receipt against the work in progress. It was held that it cannot be treated as income. Referring to the above ld. counsel of the assessee submitted that in the present case the assessee has treated TDR receipt as liability and it has not reduced the same from work in progress. He claimed that assessee's position is on a better footing than in the above case. Hence ld. counsel of the assessee submitted that the assessee has rightly not accounted for the sale of TDR as income.

9. Per contra, the ld. D.R supported the order of the ld. CIT he submitted that in the agreement there is no clause for refund of TDR receipt. He further submitted that despite receiving the amount on account of sale of TDR the assessee has not offer the same for income.

Ld. DR submitted that the method of accounting applied by the assessee is not correct. In this regard he quoted from ITAT decision the case of DCIT Vs. Vertex Homes Pvt. Ltd. 140 ITD 300. Hence the Ld. DR submitted that ld. CIT has rightly invoked the provisions of Sec.263 he submitted that the order of the ld. CIT should be sustained.

10. Before proceeding further we may gainfully refer to the provisions of section 263 of the IT Act, as under:

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

Explanation 1.—For the removal of doubts, it is hereby declared that, for the purposes of this sub-section,—

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

(i) an order of assessment made by the Assistant Commissioner or Deputy Commissioner or the Income-tax Officer on the basis of the directions issued by the Joint Commissioner under [section 144A](#);

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

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

(c) where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal filed on or before or after the 1st day of June, 1988, the powers of the Principal Commissioner

or] Commissioner under this sub-section shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in such appeal.

Explanation 2.—For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal Commissioner or Commissioner,—

(a) the order is passed without making inquiries or verification which should have been made;

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

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

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

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

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

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

11. We find that the Learned Commissioner of Income Tax in this case has heavily relied upon assessment order of the assessee for assessment year 2014-15. He has also referred to the submissions in AY 2014-15, Relying upon the finding of the AO in assessment year 2014-15, Ld. CIT has passed an order under section 263 of the IT Act. In this order he has observed that assessee has not offered income

from sale of capital TDR on accrual basis. He has also held that assessing officer has not examined the tax-ability of TDR.

12. We note that it is undisputed by the revenue that assessing officer has examined the issue of assessee's method of accounting as well as issue of receipts from sale of TDR.

13. This is evident by the submission of the assessee before the AO and the Ld. CIT. Before the Ld. CIT assessee has duly submitted that following materials were submitted before the AO in course of assessment proceedings:

- a) Copy of SRA Agreement*
- b) Copy of TDR sale agreement.*
- c) Copy of Deed of Conveyance for handing over land to SRA authority.*
- d) Architect Certificate for percentage of work completed in respect of SRA project.*
- e) Extract of Guidance Note on Revenue Recognition by Real Estate Developers issued by Institute of Chartered Accountant of India."*

14. It was further submitted that assessee method of accounting along with party wise details of sale of TDR made during the year was submitted before the AO. The assessee has also given following note on revenue recognition to the AO vide letter dated 17/03/2015.

Under the instructions from our above client in response to details called by your good self we are enclosing/submitted herewith details as under:

1) Note on Revenue Recognition:

The assessee firm follows percentage completion method for revenue recognition. The method of revenue recognition followed by the assessee is in line with the guidelines issued by the institute of Chartered Accountants of India (ICAI), which prescribed the Percentage of Completion Method for revenue recognition for real estate business. As per said guidance note,

firm will start recognising revenue from construction and development of the project only, in case all the following condition are simultaneously satisfied:

- a) All the critical approvals necessary for commencement of the project have been issued;*
- b) At least 25% of the construction cost and development cost (excluding cost incurred in relation to acquisition of land) is incurred);*
- c) At least 25% of the saleable project area is secured by contracts or agreement with buyers;*
- d) And at least 10% of the total revenue as per the agreement of sale or any other legally enforceable documents are realised at the reporting date.*

2. We are enclosing herewith cop of the architect's certificate as Annexure 1. Which certifies that the project has reached only 11% completion of the SRA Project as on 31/03/2012. Accordingly, revenue will be recognised in the year in which the assessee firm fulfils the above threshold criteria.

15. For A.Y. 2013-14, the assessee had given following detailed submissions to the ITO vide letter dated 30.11.2015, submitted at pages 24 and 25 of the paper-book.

Under the instructions from our above client and in response to the details as called for by your goodself in the previous hearing, we are herewith enclosing/submitting the following details:

- 1. Copy of Lease Agreement with Pawar Charitable Trust is enclosed herewith as **Annexure 1.***
- 2. Copy of Project Status Certificate of Orchid hills situated at Chandivali, Andheri as on 09.05.2013 of an independent architect is enclosed herewith as **Annexure 2.***
- 3. Copy of Partnership deed of the assessee is enclosed herewith as **Annexure 3.***
- 4. Details of Interest income with supporting documents is enclosed herewith as **Annexure 4.***
- 5. Details of Sundry Creditors in the specified format as required by your goodself are enclosed herewith as **Annexure 5,***
- 6. Details of Opening and Closing stock of TDK are enclosed herewith as **Annexure 6.***
- 7. Details of TDR Sales made during the relevant P. Y. are enclosed herewith as **Annexure 7.***
- 8. Copy of Assessment Order of A. Y. 2012-13 is enclosed herewith as **Annexure 8.***
- 9. Copy of 1TR-V of all the partners of the firm is enclosed herewith as **Annexure 9.***

10. Note on Revenue Recognition:

" The Institute of Chartered Accountants of India has issued Guidance Note on "Recognition of Revenue by Real Estate Developers" on 11th February, 2012 in consensus with AS-9 Revenue Recognition. To follow the Guidance Note the firm has revised its policies on Revenue Recognition as follows:

Revenue from construction and development of the project shall be recognized on the basis of percentage of Completion Method. The initial revenue shall be recognized after the work has progressed to the extent of 25% of the total construction cost excluding cost incurred in relation to acquisition of land and its development rights and at least 25% of the saleable project area is secured by contracts pr agreements with buyers.

Further, revenue shall be recognised out of the secured contracts/agreements only if 10% of the revenue as per the enforceable documents is realised and there is no uncertainty towards realisation of balance amount."

However, from certificates received from architect your goodself will appreciate that the assessee has not reached the prescribed threshold limit upto 31st March, 2013. Hence, the assessee has not recognized the revenue."

From the above note it is clear that the issue of income and receipt arising out of sale of TDR, the detailed thereof and the method of accounting for profit recognition adopted by the assessee were duly available before the AO. Hence from the above it is evident that Ld. CIT is totally incorrect in observing that the sale of TDR and the profit method of the assessee was not examined by the AO.

16. The issue now emerges whether the method of accounting adopted by the assessee and accepted by the AO is a legally permissible one not. As per the method of accounting of the assessee the accounting method is percentage completion method. According to

which the assessee offers profit for taxation after 25%/30% completion of the project. In the current assessment year, the project has been completed 11%. Hence the assessee has not offered profit for taxation. In A.Y.13-14 the projection completion is 22.65%.

17. The method of revenue recognition that is percentage of completion of method of revenue recognition has been claimed to be in line with the guidelines issued by the institute of Chartered Accountants of India (ICAI). In fact, the assessee has duly placed reliance upon the Hon'ble Mumbai ITAT in the case of M/s Chembur Trading vs ITO 22(2) (2) [2009] 3 ITAT INDIA 818 [MUM]. In this regard we may refer to the submission of the assessee before the Ld. CIT in response to the notice u/s 263

(II) Note on Taxability of receipts from sale of TDR:

- a) *In this respect, we would like to submit that the assessee firm has acquired/hold TDR entitlements which are allotted by Government/SRA and not otherwise. The said TDR are for the purpose of the project which is loaded with heavy charge of incurring all the construction and other related expenses till the completion of the project. Thus there is no doubt that the TDR's are directly related to the said project and sales proceeds of these TDRs are to be recognised as revenue receipt on the basis of Percentage completion method as discussed below and that to on fulfilment of desired threshold.*
- b) *The sale of TDRs does not constitute profit and the profitability of the same can be determined only at the stage when revenue will be recognised in accordance with Percentage completion method on fulfilling the desired threshold. Thus taxability of the same can be considered only at that stage.*
- c) *WE would like to inform your good self that, the assessee firm has to construct and complete the entire SRA project with its own fund. Thus the TDRs which is received/to be received is nothing but the*

contribution by the government to enable the assessee to complete the construction of the SRA project. Thus TDR awarded to the assessee firm are for the purpose of the SRA project the sale proceeds of which is subsequently utilised for incurring the construction cost and other related expenses till the completion of the project.

- d) Undisputedly, the transfer of land to SRA authority is the part of the composite agreement and sale proceeds of TDR, received on account of transfer of land, was utilised by the assessee for construction of the tenements as per the terms of the agreement.
- e) Further the government is determined to get these projects completed through the assessee firm and accordingly provide TDRs with a view to facilitate them to complete the projects as early as possible. The assessee firm cannot get away with the project at their own sweet will, because these matters are taken up by the public before the Hon'ble High Courts also through Public Interest Litigations (PILs)
- f) We would like to submit that the assessee company is engaged into the business of real estate development. In the case of real estate developers there are mainly two kind of accounting policies for revenue recognition:
 - i. Project completion method
 - ii. Percentage completion method

In the present case, the assessee has been consistently following Percentage completion method for revenue recognition for its real estate project since its incorporation. It can also be referred from note no. 2.7 "Revenue recognition" of the audited financial statement for the year which clearly mentions that revenue recognition policy of the company for real estate project is Percentage completion method.

- g) Further, reliance is placed on order passed by Hon'ble Mumbai ITAT in the case of M/s Chembur Trading vs ITO 22(2) [2009] 3 ITAT INDIA 818 [MUM] wherein Hon'ble ITAT held as follows:

"The recognised method of accounting in the case of construction are mainly two methods:

- i. Project completion Method
- ii. Percentage Completion Method.

The assessee has a right or privilege to adopt any one of the method of accounting for determining its profits.:

The assessee submitted the copy of said judgment during the course of assessment proceedings

Hence, the percentage completion method should be applied in the case of the assessee.

- h). Further, the Institute of Chartered Accountant of India (ICAI), came up with guidance note on Revenue Recognition by Real Estate Developer which prescribed Percentage Completion Method for revenue recognition.

As per said guidance note, revenue from construction and development of the project will be recognised only after the work has progressed to the extent of 25% of the total construction cost excluding land cost and other parameters are fulfilled. The total project work completed up to March 31, 2012 is 11%. Accordingly, revenue will be recognised in the year in which the firm fulfils the desired threshold. The assessee submitted the Architect certificate for percentage of work completed as on 31-03-2012 in respect of SRA project.

18. We further note that the method of accounting and the accounting of receipts from TDR were duly disclosed in financial statements. We also find that assessee has been following this method of accounting consistently from earlier year. In this regard revenue has not found any defect and the Commissioner of income tax is placing great reliance on the assessment order of 2014-15. In the said order the assessing officer has held that percentage completion method adopted by the assessee is not applicable on the sale of TDR. The AO also held that the accounting method adopted by the assessee cannot over right the provision of the income tax Act.

19. In this regard we note that the AO has further referred to the guidance note on accounting of real estate transaction in case of TDR. The AO has also placed reliance upon ITAT decision in the case of Hillside construction company private Limited.

20. In this regard, we note that the observations of the revenue authority on the incorrectness of the method of accounting adopted by the assessee are not by reference to any Accounting Standards or any provision of the Act. As a matter of fact, as noted above the assessing

officer has noted that the method of accounting adopted by the assessee cannot over ride the Income tax Act. Here we note that there is no specifications as to which provision of income tax provides that the method of accounting adopted by the assessee is incorrect. We find that the percentage completion method for revenue recognition in case of assessee engaged in real estate development is well recognized as per the ICAI guidelines as well as case laws in this regard. In this regard, we may refer that the Hon'ble Supreme Court explained the 'Project Completion Method or Completed Contract Method' and 'Percentage of Completion Method' in the case of C.I.T. Vs. Bilahari Investment Pvt. Ltd. (299 ITR 1) as under:

Under the Project Completion Method or Completed Contract Method, the revenue is not recognized until the project/contract is complete. Under the said method, costs are accumulated in a WIP Account during the course of the project/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 project/contract is completed. This method leads to objective assessment of the results of the project/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 the 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.”

Thus, we note that the adverse comments passed on the assessee's method of accounting is in contravention to settled accounting principle and case laws.

21. We find that learned counsel of the assessee submission is quite germane that the sale of TDR cannot be considered in isolation of the assessee obligation under the SRA agreement to complete the slum rehabilitation project.

22. The reading of the agreement in this regard clearly shows that assessee was under obligation to complete the slum rehabilitation project as per the agreement. The said agreement has to be considered on an overall basis and the construction of the parts of the agreement has to be done in a harmonious manner. As rightly contended by the Ld. Counsel of the assessee TDRs were meant to provide finance to the assessee company to complete the project. In such circumstances the assessee has credited the amount received on sale of TDR to current liability which is utilized in the development of the project. We further note that this treatment by the assessee finds support from ITAT decision in the case of Skylark Build (supra). We may gainfully refer to the following observation of the ITAT in paragraph 8 of the said order.

8. On careful consideration of the entirety of the facts and circumstances we are of the view that approach adopted by the Assessing Officer for assessing the income from TDR independently without deducting the expenses incurred is not justified. The assessee has been following project completion method which is an accepted method of accounting in construction business and also recommended as per accounting standard AS7 of ICAI. Therefore, in such cases the income from the project has to be computed in the year of completion. The TDRs received are directly linked to the execution of the project and therefore, before the completion of the project the income from TDR or any other receipt inextricably linked to the project will only go to reduce costs of the project. Therefore, in our view the assessee had rightly set off TDR received against work-in-progress. The addition

made by the Assessing Officer in 2006-07 on account of TDR receipt is not justified. Further even if TDR receipt is assessed as independent item, deduction has to be allowed on account of the expenses incurred. The TDRs have been received in lieu of handing over of constructed transit buildings and therefore, cost of those buildings has to be deducted against income from sale of TDR. The cost of the buildings is claimed to be more than income from TDR, full details of which were given to the CIT(A) and therefore, even on this ground no income can be assessed in case of the assessee. In the Assessment Year 2006-07, the project was not complete and there is no dispute about this fact. Therefore, in Assessment Year 2006-07, TDR received has to be set off against WIP and cannot be assessed separately as income. We therefore, confirm order of CIT(A) deleting the addition made in Assessment Year 2006-07.

23. From the above it is evident that it has been recognised in the ITAT decision above that assessee's income from TDR cannot be considered independently without deducting the expenses involved. It has also been held that TDR receipts are directly linked to the execution of the project. It has been observed that income from TDR is inextricably linked to the project and its cost. It was further held that TDRs have been received in lieu of handing over the construction buildings and therefore cost of building have to be deducted against income from sale of TDR.

24. We note that understanding of the receipt from the sale of TDR and treatment thereof as observed by the ITAT in the above case is fully applicable to the facts of the present case. Here also assessee has received the TDR in connection with the slum rehabilitation project. The assessee's plea is that sale of TDR is linked with the assessee's obligation to complete the project as per the agreement. Hence the credit of the receipt from sale of TDR to current liability awaiting the discharge of assessee's total obligations under the slum rehabilitation project is quite an acceptable method.

25. The reference to guidance on treatment of real-estate transactions in the context of TDR borrowed by the Ld. CIT from the assessment order of the AO for A.Y. 2014-15 does not actually help the case of the revenue. It nowhere mentions that's sale of TDR should be accounted for in complete disregard to the terms of agreement more particularly the SRA agreement as in this case, and the assessee's obligations therein. In this regard, we may refer to the relevant quotation of learned CIT regarding accounting of real estate transaction in case of TDS as contained in para 6 of his order

*"6, In this regard, the guidance note on accounting of real estate transactions in ease of **Transferable Development Rights** is summarised as under:*

Transferable Development Rights (TDRs) are generally acquired in different ways as mentioned hereunder:-

- (a) Direct purchase.*
- (b) Development and construction of built-up area*
- (c) Giving up of rights over existing structures or open land.*

6.1 *When development rights are acquired by way of direct purchase or on development or construction of built-up area, cost of acquisition would be the cost of purchases or amount spent on development or construction of built-up area, respectively. Where development rights are acquired by way of giving up of rights over existing structures or open land, the development rights should be measured in accordance with the principles of exchange of assets enunciated in paragraphs 45 to 47 of Ind AS 38, Intangible Assets.*

When development rights are utilized in a real estate project by an entity, the cost thereof-as arrived at in accordance with the principles stated in paragraph above should be added to the project costs.

6.2 *When development rights are sold or transferred, revenue should be recognized when the following conditions are fulfilled:*

(a) The entity has transferred to the buyer the significant risks and rewards of ownership of development rights;

(b) The entity retains neither continuing managerial involvement to the degree usually associated with ownership nor effective control over the development rights sold;

(c) The amount of revenue can be measured reliably;

(d) It is probable that the economic benefits associated with the transaction will flow to the entity; and

(e) The costs incurred or to be incurred in respect of the transaction can be measured reliably.”

A reading of the above makes it amply clear that the said guidelines duly provide that sale revenue from transfer of development rights should be recognized when the amount of revenue can be measured reliably and the cost incurred or to be incurred in respect of transaction can be measured reliably. Examining the present case on the touchstone of aforesaid, the assessee's submission is quite germane that in the present case the cost to be incurred for the completion of the SRA project are remaining to be incurred and assessee's obligation under SRA agreement will be over when the entire project construction is over. Hence, sale of TDR even in view of the aforesaid guidelines cannot be accounted for in isolation of the cost likely to be incurred by the assessee in meeting this obligation under the SRA agreement.

26. From the above it is abundantly clear that the method adopted by the assessee is a legally permissible one. The observation of the Ld. Commissioner of income tax while concluding his directions that **“TDR is a separate right available to the assessee, the sale of which is not consequent upon construction of the revenue not the revenue recognition from its sale can be tied up with the percentage of completion of construction”** is itself fallacious on the facts and circumstances of the case and also does not pass the exposition of the ITAT as in the case of Skylark above, or even the guidance note on which learned CIT is himself placing reliance. For A.Y. 2013-14, the learned CIT has similarly based his order on assessment order of 2014-15 and order u/s 263 passed by CIT for A.Y.2012-13. However, in giving final direction he has further misled himself by specifying method for accounting of TDR sale, with hypothetical example with no reference to any accounting principle or case law it is claimed to be in consonance with.

27. Be as it may, it is abundantly clear that the method adopted by the assessee and accepted by the assessing officer is legally permissible one. Once it is held that the method adopted is a legally permissible one, it has been held in the Catena of case laws that learned Commissioner of income tax cannot exercise of jurisdiction under section 263 of the act if he is of a different opinion.

28. In this regard we may gainfully refer to the Honourable Apex Court decision in the case of Malabar Industrial Co. Ltd. and CIT vs. Max India (2207) 295 ITR 282 (SC) that if two views are possible and the AO has adopted one view, with which the ld CIT is not in agreement, the order cannot be said to be liable to be visited with the revisionary order of the learned CIT.

29. Thus the view adopted by the assessing officer is a permissible one. Hence, we are of the considered opinion that exercise of jurisdiction under section 263 of the IT Act by the learned Commissioner of income is liable to be quashed.

As we have already noted in our order as above that assessing officer has duly examined the receipt from sale of TDR and the method of accounting adopted by the assessee. Hence, in the background of the aforesaid discussion and precedent, we are of the considered opinion that the method of accounting and the receipt from sale of TDR has been duly examined by the A.O. and he has taken a legally permissible view. Hence, the ld. CIT is not within the jurisdiction to pass an order u/s 263 of the Act. We order accordingly.

30. We also note that though it is accepted that learned Commissioner of Income tax can exercise his jurisdiction under section 263 of the I.T Act upon information brought to his notice by lower authorities. However, it is also noted that the application of

mind by the learned Commissioner of Income tax should be of his own. In the present case we find that the learned Commissioner of Income tax has heavily borrowed the observations and reference to the Accounting guideline mentioned in assessment order of 2014-15. In the present case it is questionable as to whether there is any independent application of mind by the learned CIT. Be as it may, since, we have already quashed the order of learned CIT on merit, as above, adjudication on this technical aspect is only of academic nature, we are hence not engaging into the same.

31. In the result, appeals filed by the assessee stands allowed.

Order pronounced in the open court on this day of 08/03/2018.

Sd/-
(Amarjit Singh)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक 08 03.2019

Sd/-
(Shamim Yahya)
ACCOUNTANT MEMBER

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent.
3. आयकरआयुक्त(अपील) / The CIT(A)-
4. आयकरआयुक्त/ CIT

5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/
DR, ITAT, Mumbai
6. गार्डफाईल / Guard file.

सत्यापितप्रति //True Copy//

आदेशानुसार/ BY ORDER,

सहायकपंजीकार (Asstt. Registrar)
आयकरअपीलीयअधिकरण, मुंबई / **ITAT, Mumbai**

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