

IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT
BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER AND
Dr. ARJUN LAL SAINI, ACCOUNTANT MEMBER
IT(SS)A No. 93 & 94/Srt /2022 (Assessment Year: 2014-15 & 2015-16)
ITA No. 357/Srt /2022 (Assessment Year: 2016-17)
(Physical hearing)

A.C.I.T., Central Circle-1, Surat.	Vs.	Kush Corporation, Crystal Heights, T.P. No. 9, F.P. No. 30, Block No. 111, Palanpor, Surat. PAN No. AALFK 7948 Q
Appellant/ Revenue		Respondent/ Assessee

C.O. No. 01/Srt/2023
(Arising out of ITA No. 357/Srt /2022 (Assessment Year: 2016-17))

Kush Corporation, Crystal Heights, T.P. No. 9, F.P. No. 30, Block No. 111, Palanpor, Surat. PAN No. AALFK 7948 Q	Vs.	A.C.I.T., Central Circle-1, Surat.
Appellant/ Assessee		Respondent/ Revenue

Department represented by	Shri Ritesh Mishra (CIT-DR)
Assessee represented by	Shri Rasesh Shah, C.A.
Date of hearing	07/06/2023
Date of pronouncement	05/09/2023

Order under Section 254(1) of Income Tax Act

PER: PAWAN SINGH, JUDICIAL MEMBER:

1. These three appeals by the revenue for the Assessment Year (A.Y.) 2014-15, 2015-16 and 2016-17 and cross objection by the assessee in the appeal for A.Y. 2016-17 are directed against the separate orders of learned Commissioner of Income Tax (Appeals)-4, Surat (in short, the Id. CIT(A) all dated 06/09/2022. In all these appeals, the revenue has raised similar grounds of appeal. Certain facts in all these years are

common, therefore, with the consent of parties all these appeals were clubbed, heard together and are being decided by this consolidated order to avoid the conflicting decision. For appreciation of facts, the appeal for the A.Y. 2014-15 in IT(SS)A No. 93/Srt/2022 is treated as a "lead case". In this appeal, the revenue has raised following grounds of appeal:

- “1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs.5,48,19,600/- made by the Assessing Officer on account of "On-Money" received during the year despite the fact that the assessee had booked 31 flats admeasuring 41520 SF during the year and evidences were found during the course of search that the assessee was selling the flats at much higher rate in comparison to the eventual sales booked in the books of accounts.*
- 2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in holding that the incriminating material available with the Assessing Officer in the absence of corroborative evidence were not sufficient to conclude that the appellant had indulged in such transactions of accepting on money despite the fact that CIT(A) in Para 6.4 of his order has held that it is an undisputed fact that the whatsapp chat relating to the rate which is treated as incriminating material were found during the Search relating to 7 flats.*
- 3. On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in not appreciating the fact that the on-money receipt should be taxed on the actual receipt basis rather than in the year of executing the registered document.*
- 4. On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in not appreciating the fact that the taxability of on-money is to be applied for the entire project, despite the fact that the details regarding the on-money receipts have been found and seized, which also is corroborated by the statement of the key person during the search proceedings.*
- 5. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition made by the AO on*

account of extrapolation of on- money based on the evidences that the assessee has received on-money on sale of flats which are justified based on legal jurisprudence on the issue and principles of preponderance of probability, which is applicable to proceedings under I.T. Act, 1961.

6. *On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition made by the Assessing Officer ignoring the principles of "Human Probability Test" i.e. preponderance of probabilities which is applicable for Income Tax proceedings.*
7. *Without prejudice to ground Nos. 1 to 6, on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in not issuing necessary directions with respect of the chargeability of on-money receipt in the year when the registered document is executed.*
8. *It is, therefore, prayed that the order of the Ld. CIT(A) may be set aside and that of the AO may be restored to the above extent."*

2. Brief facts of the case are that the assessee is a firm engaged in the business of development of residential complex namely Crystal Heights in Surat. A survey under Section 133A of the Income Tax Act, 1961 (in short, the Act) was conducted on the business premises of assessee on 04/12/2014. During the survey, a cash of Rs. 19.50 lacs were found at their premises, source of which could not be explained by partner of assessee. The survey was converted into search on 06/12/2014. During the search, one of the partner of firm namely Shri Fenil J Jasoliya admitted that the cash found from their premises was unaccounted income of the firm, and voluntarily made a discloser of same amount. Consequent upon such search action, notice under Section 153A of the Act was issued to assessee on 25/06/2015 for filing return of income for various assessment years. In response to

such notice, the assessee furnished return of income for A.Y. 2014-15 on 09/12/2015 stating that the original return filed under Section 139 on 07/09/2014 should be treated in response to such notice. In the said return, the assessee has declared NIL income. The case was selected for scrutiny. During assessment, the Assessing Officer recorded that in course of search, a backup of HTC mobile set of Shri Fenil J Jasoliya, partner of the firm was taken and impounded which contained the messages received from other partner Mr. Dharmesh M Koshiya communicated to Mr. Fenil J Jasoliya with regard to sale of flats. Such messages were downloaded and print out was taken. On perusal of SMS, it was revealed that selling price of flats in the said projects were between Rs. 2800/- to Rs. 2900/- per square feet, thus the Assessing Officer took average working of such rate at Rs. 2850/- per square feet. The Assessing Officer found that documented price of sale value on the registered document were shown at Rs. 1530/- per square feet for super built up area. The Assessing Officer further recorded that in the survey/search action, Rs. 19.50 lacs were found. The bundle of notes was bearing flat No. C-603. A cheque bearing No. 000031 of bank of Baroda reflecting amount of Rs. 1.00 lac was also found and seized. Xerox copy of cheque bears the name of Shri Sandeep R. Iwala and flat No. C-603 was introduced by assessee. The Assessing Officer noted that as on 31/03/2015, a total number of 63

flats were booked in the project. The Assessing Officer by multiplying the average rate of Rs. 2850/- per square feet with regard to 63 flats, issued show cause notice as to why addition of Rs. 5.48 crores for A.Y. 2014-15 and Rs. 5.60 crores for A.Y. 2015-16 should not be added to the total income of assessee as undisclosed business income on account of on-money received in respect of flats booked as on 31/03/2015. The Assessing Officer also recorded the area and number of flats of 2 BHK and 3 BHK flats with their total area and by extrapolation of rate @ Rs. 2850/- per square feet. The Assessing Officer in his show cause notice dated 23/11/2016 recorded that reply of assessee should be furnished within seven days.

3. The assessee filed its reply dated 14/12/2016. The contents of reply of assessee is recorded in para 5 of assessment order. In the reply, the assessee with regard to cash amount of Rs. 19.50 lacs stated that the partner of assessee in his statement has accepted the said amount as unaccounted income of the firm and made declaration thereof, thus the question of giving supporting evidence is not called for. On the print out of WhatsApp messages between the partners, the assessee explained about each and every messages by referring that messages on 09/07/2014, 11/07/2014 and 12/07/2014 relates to supplier of material, messages on 23/07/2014 for flat No. C-902-2865, the assessee explained that such rate per square feet was quoted to

customer, similar explanation was given with other messages. The assessee explained about all messages in respect of all seven flats. The assessee explained that partner of the firm in his statement recorded during the search and assessment proceedings had confirmed that these rates were quoted to the prospective customers. None of the partners in their statement have agreed or confirmed of having received on-money from customers against booking of flat to be sold to the customers. The contention in the show cause notice that rate mentioned in the mobile communication were resulted in generation of unaccounted income by way of on-money, is nowhere mentioned or corroborate from the communication or other papers or evidence found during the search action. With regard to cash found during the course of search at Rs. 19.50 lacs and reference of C-603, the assessee explained that flat No. C-603 was not booked at the time of search, which can be verified from the books of assessee. On the cheque of Rs. 1.00 lacs drawn by Shri Sandeep R. Iwala found during the search and on back side regarding noting by hand, the assessee explained that cheque was having writing of word "Void" on the left hand side of the cheque. Thus, the said cheque, though found on the date of search was not mean to be deposited in the bank account and the same was not confirmed by the drawer of the cheque. The write up on the cheque quoting the name of drawer, date and number of

flat was not made by partner of firm or its employee. Such fact was corroborated in the statement of partner recorded during the course of search, wherein he has specifically mentioned that he is not aware of the said fact. The presumption drawn by department that cash of Rs. 19.50 lacs found during the course of search as on money on each flat is illegal and bad in law. The person from whom the said amount was allegedly received categorically denied in his statement recorded under Section 131 of the Act that he has not booked the said flat No. C-603 during the impugned assessment year. The rates of flat mentioned in the communication between the partner via mobile was mere a proposal to the prospective customers and by no means a concrete and irrefutable evidence of receive or earning of unaccounted money by assessee. There is a huge gap of time between the communication and the actual date of booking of flats which is two to twenty months. Hence, it cannot be assumed that all flats were booked at the relevant time. A write up on a piece of paper or any document leading to automatically calculation of any amount exceeding the actual value received by assessee from its customer would not always result into earning of unaccounted real income. There is no single evidence which leads to justify that assessee firm has received Rs. 10.93 crores as unaccounted money from its customers for sale of flats. The assessee also explained that there is no evidence

of on money. The presumption drawn by Assessing Officer by extrapolating all flats booking during the year when actual seven flats were sold during the year. The assessee also submitted that the rate mentioned in any document or mobile communication are applicable to the built up area of the flat. Rates are not mentioned in any brochure or document. The rate per square feet is mere working derived on the basis of sale value of flats decided by its built up area, as mentioned in the sale deeds. The assessee finally submitted that the income accrues to the builder or developer when transaction of sale is complete and any advance received under the agreement for sale are mere earnest money and cannot taxed as an income before transaction of sale is complete. Transaction is complete for a builder when a proposed unit under the agreement for sale is constructed and ready for occupation and at least possession is handed over. To support such submission, the assessee relied on various decisions.

4. The reply of assessee was not accepted by Assessing Officer. The Assessing Officer summarized the contention of assessee in para 6 of assessment order. The Assessing Officer recorded that he asked the assessee to furnish break up of disclosure made in the form, details of transaction which leads to generation of undisclosed income, evidence of transaction leading to generation of undisclosed income and name and address of the persons from whom undisclosed income is

received. The assessee has not filed reply of such queries. If the assessee has owned on money found in the premises, the burden was upon the assessee to furnish complete details regarding source of cash and any receipt issued thereon. The partner of assessee during the course of statement, stated that the amount of Rs. 19.50 lacs so disclosed, relates to cash received from customer for some external work to be carried out in the flats, which is not substantiated by supporting evidence. Almost identical amount was mentioned in the messages, print out of which was taken from the partner's mobile phone. The Assessing Officer scanned the question No. 8 and 9 of statement of partner and their answers. The Assessing Officer also scanned the question Nos. 36 to 46 and their answers on page No. 13 to 15 of assessment order. The Assessing Officer recorded that 31 flats were booked as on 31/03/2014 and the total built up area of 2 BHK and 3 BHK is of 41530 square feet. The area of all flats were multiplied by Rs. 2850/- per square feet and worked out the total cost at Rs. 11,83,60,500/-. The assessee has shown sale consideration as per the sale deed @ Rs. 1530/- per square feet thereby giving set off of Rs. 6,35,40,900/- and made addition of Rs. 5,48,19,600/- in the following manner:

2 BHK = 20 x 1235 sqft	= 24,700 sqft
3 BHK = 11 x 1530 sqft	= 16,830 sqft
Total area of the booked flats	= 41,530 sqft

- i) Total sale consideration (including on money component) =
(Total area of the booked flats) X (Average rate per sq. ft) 41,530 *
2850 = Rs. 11,83,60,500/-
- ii) Total sale consideration as per sale deed (41530 * 1530) =
Rs. 6,35,50,900/-
- iii) Total on money component in respect of the booked flats (i-ii)
= Rs. 5,48,19,600/-
(Addition: Rs. 5,48,19,600/-)

5. On the basis of said working, the Assessing Officer made addition of Rs. 5,48,19,600/-. Similar addition for A.Y. 2015-16 of Rs. 5.60 crores on the basis of similar working in respect of booking of 32 flats admeasuring 42470 square feet were made in assessment order for A.Y. 2015-16. Further similar addition in respect of booking of 46 flats having area of 61530 of Rs. 8.12 crores were made in A.Y. 2016-17.
6. Aggrieved by the additions in the different assessment years, the assessee filed appeals before the Id. CIT(A). As recorded above, case for A.Y. 2014-15 is being considered as lead case, thus, submission filed in A.Y. 2014-15 before Id. CIT(A) is being referred hereinbefore. The assessee filed its detailed submission before the Id. CIT(A). The submission of assessee are recorded in para 6.2 of order of Id. CIT(A). Such submissions are reproduced by the Id. CIT(A) on page No. 6 to 32 of his order. The assessee in its submission in sum and substance submitted that the Assessing Officer in para 6 of assessment order alleged that the assessee has not been able to furnish source of seized cash, therefore, treated the cash of Rs. 19.50 lacs as on money in respect of sale of flat No. C-603. The assessee explained that

during the course of statement recorded in the search proceedings and subsequent proceedings, the assessee clearly explained that such cash was received from various customers for external work to be carried out in their flats. However, to avoid the litigation and peace of mind, the assessee disclosed the aforesaid cash for taxation in their disclosure. The Assessing Officer made extrapolation for calculation of 'on money' only on the basis of SMS recovered from the WhatsApp of one of partners of assessee. The assessee in its submission categorically negated the acceptance of cash from sale of flats. The assessee explained each and every SMS. During the search proceedings, no evidence was found about the receipt of on money on sale of flats. During post search proceedings, the department recorded statement of witnesses under Section 131A and none of them admitted for payment of a single penny on account of on money. The Assessing Officer treated super built up area instead of built up area for calculation of extrapolation of receipt of alleged on money. Once it is proved that the assessee has not received any on money, then working of super built up area *vis a vis* built up area become infructuous. The working of super built up area only for satisfaction of customer in some of the cases mainly for the calculation of difference in FSI (Floor Surface Index), available in the constructed part. The assessee also explained the time of

communication as found in the SMS with regard to flat numbers and the date of actual booking and the gap of period ranging from one month to seventeen months with respect to flat No. C-902, C-503, C-803, C-701, A-904, A-1004 and C-203 as mentioned on page No. 8 of Id. CIT(A) order. The assessee on relying upon the decision of Hon'ble Apex Court in Dhakeshwari Cotton Mills Ltd. Vs CIT (1954) 26 ITR 775-SC, on the ratio that the Assessing Officer has to act fairly as a reasonable person and not arbitrarily or capriciously. The assessee also relied on number of decisions wherein it was held by superior courts that additions on the basis of loose papers are not sustainable, addition on the basis of diary is not sustainable. Addition on the basis of rough notes, not sustainable. Writing on loose paper found with third party cannot be added as income of assessee. The burden is on the revenue to prove that figures in loose papers are assessed as undisclosed income. The addition on the basis of loose paper cannot be sustained unless there is corroborative material evidence.

7. The assessee further explained that during the assessment proceedings, the alleged booking party of flat No. C-603 was called by issuing summon under Section 131/133A of the Act and as per their knowledge and information, he has denied statement. On the addition, on the basis of working by extrapolation, the assessee submitted that making addition by extrapolation is not justified

without rejecting books of assessee and making addition on estimation basis. The addition of on money is not based on any evidence and based on extrapolation without rejecting the books of account. The assessee also explained that extrapolation was made by ignoring the statement of purchaser, ignoring comparable cases without proper verification, ignoring selling rates of flats in the books of assessee. The issue was not referred for Departmental Valuation Officer (DVO). The Assessing Officer made addition despite the fact that not a single iota of evidence was gathered. To support various contentions, the assessee relied upon number of decisions of Tribunal and Higher Courts.

8. The Id. CIT(A) after considering the submission of assessee and the assessment order held that it is undisputed fact that WhatsApp chat relating to the rates of flat was treated as incriminating material found during the search, is related to only seven flats namely C-902, C-503, C-803, C-701, A-904, A-1004 and C-203. In these seven chats only flats number and rates are mentioned. There is no reference of area of flats, names of buyers, address of buyers, date of receipt or information are missing. There is no clarity as to whether these flats were sold at Rs. 2850/- per square feet as held by Assessing Officer. There is no clarity of Rs. 2850/- per square feet is on built up area or for carpet area as no area is mentioned in the WhatsApp chat. The Id.

CIT(A) by relying on decision in the case of CIT Vs Maulik Kumar K Shah 307 ITR 137 (Guj) wherein it was held that corroborative material has to be brought on record apart from the incriminating material to prove that such sales were actually made and on money was received outside the books of account. The Id. CIT(A) noted that the Assessing Officer needs to examine the purchaser who have bought these flats to confirm the payment of on money. The onus for collecting corroborative evidence from incriminating material was on the Assessing Officer, mere entries in the seized material was not sufficient to prove that the assessee indulged in such transaction of accepting on money. The Id. CIT(A) further held that only evidence relate to seven flats, that too which is not complete in all respect and in absence of any cogent evidence, there was no scope of extrapolation as has been held by the Tribunal in Amar Corporation Vs CIT in ITA No. 2036/Ahd/2007. Further, the Tribunal in M.R. Corporation Vs ITO 35 taxmann.com 153 also held that the addition cannot be made on hypothetical computation on the basis of surmises and conjecture. Similar view was taken in Sayan Textile Park Ltd. Vs ITA No. 360/Ahd/2014 that unaccounted income should be taxed on the basis of incriminating evidence/material found during the course of search/survey. The Id. CIT(A) further held that audit report of assessee shows that the assessee is following project completion

method of accounting as per AS-9 for revenue recognition i.e. revenue is to be recognized at the time of execution of sale deed or handing over possession whichever is earlier. The profit has been offered in A.Y. 2016-17 when the project was completed and sale deed was executed. The Id. CIT(A) by referring decision of Hon'ble Jurisdictional High Court in CIT Vs Shivalik Buildwell Pvt. Ltd. 40 taxmann.com 219 (Guj) held that as per accounting standard, the assessee was entitled to claim entire income on completion of project on the same lines as offered in the preceding assessment years and accepted by revenue. Similar view was upheld in CIT Vs Happy Home Corporation 94 taxmann.com 292 (Guj). On the basis of aforesaid finding, the Id. CIT(A) held that all the decisions on this issue suggest that income accrues only when sale materialised and not on the date of bookings. None of the flats were sold as sale deed was not registered in the impugned assessment year. The assessee is following project completion method for accounting its profit. Thus, the Id. CIT(A) also held that no addition is warranted in the impugned assessment year. Thus, the Id. CIT(A) deleted the addition on two counts. Aggrieved by the order of Id. CIT(A), the revenue has filed present appeal before the Tribunal.

9. We have heard the submissions of the learned Commissioner of Income Tax-Departmental Representative (Id. CIT-DR) for the revenue

and the learned Authorised Representative (Id. AR) of the assessee and have gone through the orders of lower authorities carefully. The Id. CIT-DR for the revenue submits that the assessee is engaged in the business of development of residential complex. A survey was carried out on 04/12/2014 at the business premises of assessee. During the survey, a cash of Rs. 19.50 lac was found. Source of cash was not explained. Survey was converted into search on 06/12/2014. During the search, statement of one of the partner Shri Fenil J Jasoliya was recorded who voluntarily disclosed unaccounted income of Rs. 19.50 lacs in his disclosure. Further from the WhatsApp chat of partners, the search party found that one of the partner has quoted rate of Rs. 2850/- per square feet in respect of various flats. The assessee has executed sale deeds of various units at the rate of Rs. 1530/- per square feet. On the basis of such differences, the Assessing Officer worked out a difference at the rate of Rs. 1320/- per square feet. The assessee has made booking of 31 flats having total area of 41530 square feet. The Assessing Officer on the basis of difference worked out the figure of on money of Rs. 5.48 crores in respect of 31 flats for the assessment year under consideration. The Id. CIT(A) deleted the entire addition by accepting the submission of assessee that there was no corroborative material to make addition of on money. The Id. CIT-DR for the revenue submits that the Assessing

Officer made addition on the basis of evidence found from the back up of phone of partners which was the communication between the two partners. The Assessing Officer by calculating the difference of sale price and the price negotiated by partner with the customers, made a reasonable estimation of on money with respect of 31 flats booked for the impugned assessment year. The Id. CIT(A) accepted the version of assessee, which is not acceptable to revenue as the finding is not based on proper appreciation of seized material. There is practice in the Surat to accept on money at the time of booking and such fact is evidences from the cash seized during the course of search proceedings. The Id. CIT-DR for the revenue submits that the order of Id. CIT(A) may be reversed by restoring the addition in the assessment order.

10. On the other hand, the Id. AR of the assessee supported the order of Id. CIT(A). The Id. AR of the assessee submits that WhatsApp chat in the phone of partner was found in respect of seven flats only. There is no corroborative evidence to support such WhatsApp chat that assessee received such amount at the time of booking. The assessee during assessment, explained that such amount was quoted to the prospective customers. Such amount was quoted for super built up area which consists of a number of facilities like boundary wall, garden area, lift and other various facilities developed by assessee for its

customers. The assessee during assessment as well as first appellate stage explained about the date of communication of WhatsApp chat for seven flats and actual date of booking which were after a gap of several months. The Id. AR of the assessee by inviting our attention on page No. 8 of order of Id. CIT(A) wherein such explanation that assessee is recorded actual date of communication for flat No. C-902 is 23/07/2014 and actual booking is on 03/04/2015 i.e. after a gap of nine months. Similarly, for flat No. C-803, date of communication is 27/08/2014 and actual booking is on 18/11/2015 so on and so forth for other flat, however, flat No. C-203 was booked on 26/09/2014, however, the date of communication is 19/11/2014 which is not matching with the stand of Assessing Officer. The Id. AR of the assessee submits that no investigation was carried out by the Investigating Officer to collect the corroborative evidence to substantiate his stand. The Id. AR of the assessee submits that the assessee has learnt that purchaser of flat No. C-603 was called and his statement recorded and he has denied the theory of department. The Assessing Officer has not recorded in the assessment order about the statement of purchaser of flat No. C-603. So far as disclosure of Rs. 19.50 lacs is concerned, the Id. AR of the assessee submits that the assessee has declared such amount as additional amount and has not retracted from their statement. The Id. AR of the assessee submits

that no extrapolation is permissible as has been held by the Hon'ble Jurisdictional High Court in CIT Vs Standard Tea Processing Co. Ltd. (2013) 34 taxmann.com 31 (Guj), Karnataka High Court in CIT Vs B. Nagendra Baliga (2014) 47 taxmann.com 331 (Kar) and Ahmedabad Tribunal in ACIT Vs M/s Amar Corporation in ITA No. 2036/Ahd/2007 and in Sayan Textiles Park Ltd. Vs ACIT in ITA No. 360/Ahd/2014. The Id. AR of the assessee further submits that he fully supports the finding of Id. CIT(A) that profit in case of developer is arise/can be taxed only when sale is complete or document is executed. To support such view, the Id. AR of the assessee relied upon the decision of Hon'ble Gujarat High Court in CIT Vs. M. Otilal C Patel & Co 173 ITR 666 (Guj), CIT Vs Ashaland Corporation 133 ITR 55 (Guj) and CIT Vs Happy Home Corporation 94 taxmann.com 292 (Guj). To support the view that no addition can be made in absence of evidence or no addition is permissible on mere assumption or presumption, the Id. AR of the assessee relied upon the following case laws:

- CIT Vs P.V. Kalyanasundaram (2007) 294 ITR 49 (SC),
- Umacharan Shaw & Bros Vs CIT (1973) 37 ITR 271 (SC),
- Lalchand Bhagat Ambica Ram Vs CIT (1959) 37 ITR 288 (SC),
- Dhakeshwari Cotton Mills Ltd. Vs CIT (1954) 26 ITR 775 (SC),
- CIT Vs Maulikumar K. Shah 307 ITR 137 (Guj),
- CIT Vs Lavanya Land (P) Ltd. (2017) 83 taxmann.com 161 (Bom),
- Anvar P.V. Vs P.K. Baseer and others (2014) 10 SCC 473,
- Ravinder Singh Kaku Vs State of Punjab (2022) Live Law (SC) 461.

11. We have considered the rival submissions of both the parties and have gone through the orders of lower authorities carefully. We have also deliberated on various case laws relied by the lower authorities as well as by the Id. AR of the assessee. We find that the Assessing Officer made addition of Rs. 5.48 crores by making interpolation with respect to 31 flats as on 31/03/2014. The Assessing Officer recorded that the assessee booked 20 flats of 2BHK having area of 1235 square feet thereby total area of 24700 square feet, 11 flats of 3 BHK of 1530 square feet thereby total area of 16830 square feet, thus total area booked by assessee were of 41530 square feet. On the basis of SMS chat in the WhatsApp of partner, the Assessing Officer was of the view that the assessee made sale of entire area at the rate of Rs. 2850/- per square feet thereby collected Rs. 11.83 crores. The sale consideration as per sale deed is Rs. 6.35 crores i.e. 41530×1530 . The total money of the booking of flat was worked out at Rs. 5.48 crores and added as unaccounted income. As recorded above before the Id. CIT(A), the assessee filed exhaustive and detailed submission. The Id. CIT(A) deleted the entire addition on two counts i.e. firstly that alleged incriminating material/SMS found in the WhatsApp chat were relating to only seven flats. There was no reference of name of buyers, area, date of receipt or no clarity whether all seven flats were sold at Rs. 2850 per square feet. There is no clarity if area was super

built up area or carpet area. No corroborative material was brought on record to prove the incriminating material that sales were actually made and on money was actually received out of books of account. The Assessing Officer was required to examine the purchaser who have purchased the flats to confirm on money. The Id. CIT(A) by referring the decisions of Hon'ble Superior Courts and Tribunal has held that there is no scope of extrapolation in absence of any cogent evidence and not approved the addition. The Id. CIT(A) further held that the assessee is following project completion method and as per the decision of Hon'ble Jurisdictional High Court in CIT Vs Happy Home Corporation (Supra), income would be offered when final sale deed is registered on the basis of projection completion. The income accrues only when sale is materialized and not on the date of booking. The Id. CIT(A) thus also deleted the addition on this aspect as well.

12. We find that neither the search party examined the purchasers nor the Assessing Officer in assessment order recorded that the purchaser was called for any investigation. Though before us, the Id. AR of the assessee submits that the purchase party of flat No. C-603 was called, however, there is no such averment in the assessment order about calling of such purchaser either at the time of assessment or in post search investigation. We find that such fact was brought on record during first appellate stage by the assessee. Such fact is not

controverted either by Assessing Officer in raising various grounds of appeal or in the statement of fact filed in support of various grounds of appeal nor by the Id. CIT-DR at the time of making submission before us. We find that Hon'ble Jurisdictional High Court in CIT Vs Standard Tea Processing Co. Ltd. (supra) held that the addition for undisclosed income on account of inflated purchase price can be made only for the period to which document found during the search is related and not for the entire block period. The Hon'ble Karnataka High Court in CIT Vs B. Nagendra Baliga (supra) also held that the Assessing Officer has not entitled to extrapolate undisclosed income detected in the course of search for a particular period to entire block period on estimate basis. Further the Coordinate Bench of Tribunal in ACIT Vs M/s Amar Corporation Ltd. (supra) also held that question of extrapolation can only arise only in a situation when the documents give an indication that it was a regular occurrence in a systematic manner. Only in that situation, there is possibility of extrapolation otherwise not.

13. We also concur with the finding of Id. CIT(A) that alleged incriminating material in the form of message was in respect of seven flats only. From the submission of assessee filed before the Id. CIT(A), we find that there was huge difference of time gap between the date of alleged communication and the date of booking as explained by

assessee. The Assessing Officer has not counter such explanation of assessee by bringing corroborative evidence. The Assessing Officer worked out the addition in a strait jacket formula that the assessee has received on money in respect of each and every square feet or developed by assessee which is far from imagination in an ordinary manner. With this aforesaid observation, we affirm the order of Id. CIT(A). In the result, the grounds raised by revenue are dismissed.

14. In the result, the appeal of the revenue for AY 2014-15 is dismissed.

IT(SS)A No.94/Srt/2022 for AY 2015-16 by revenue.

15. As noted earlier the revenue as raised identical grounds of appeal as raised in AY 2014-15, which we have dismissed. Considering the facts that the facts leading to the addition in the assessment order in this assessment year are similar with preceding assessment year. The Id CIT(A) deleted the addition with similar direction as held in AY 2014-15, therefore, considering the principles of consistency the appeal for AY 2015-16 is also dismissed with similar observation.

ITA No. 357/Srt/2022 by revenue and CO No. 01/Srt/2023 for AY 2016-17 by assessee.

16. The assessee in its Cross Objections (C.O.) has raised following grounds of appeal;

- (1) *On the facts and circumstances of the case as well as law on the subject, the Id CIT(A) erred in confirming the addition of Rs. 25,93,800/- out of total addition of Rs. 8,12,19,600/- made on account of unexplained money receipt from the project Crystal Heights.*

(2) *It is therefore prayed that the additions made by assessing officer and partially confirmed by CIT(A) may kindly be deleted.*

17. We find that there is delay of 16 days in filing CO by assessee. The Id AR for the assessee has filed application for condonation of delay in filing such Cross Objection. The Id AR for the assessee submits that assessee has received notice of appeal by revenue only on 15.12.2022. The assessee could file its CO up to 14th January, however, the same is filed only on 27.01.2023, thus, there is delay of about 15/16 days in filing such CO. The delay in filing such CO is neither intentional nor deliberate but due to the reasons that the assessee was not properly advised by briefing CA. The assessee could not file such CO in time due to lapse of his briefing CA, the assessee was advised to file CO only on third week of January 2023. The Id AR for the assessee submits that the assessee has good case on the grounds raised in its CO and is likely to succeed if the assessee's plea in condoning the delay is allowed.

18. On the other hand, the Id CIT-DR for the revenue has not contested the plea of condonation of delay of assessee. The Id CIT-DR for the revenue submits that the bench may take appropriate call for considering the prayer of the assessee.

19. Considering the submissions of both the parties and finding that there is small delay of 15 days in filing the appeal and the Id AR for the assessee has explained the cause of delay. Hence, keeping in view of

the principle that when the technical consideration and cause of justice are pitted against each other, the cause of justice may be preferred. Therefore, the delay of 15 days in filing of CO are condoned. Now advertent to the adjudication of grounds on appeal and grounds raised in CO.

20. As recorded in para No.5 supra, the assessing officer made addition of Rs. 8.12 Crore in respect of booking of 46 flats having area of 61530 of Rs. 8.12 crores in A.Y. 2016-17. The Id CIT(A) held that the assessing officer has not discharged his onus in bringing corroborative evidence to prove the facts that the assessee indulged in accepting the on money in respect of all the flats. The messages between the partners of the firm were in respect of sale of seven flats bearing No. C-902, C-503, C-803, C-701, A-904, A-1004 and C-203. The Id. CIT(A) on the basis of super built up area and the rate of sale deed executed and the average rate as per SMSs of Rs. 2850 per square feet worked out the total on money of Rs. 1,29,69,000/- as mentioned in para 6.6 of his order. The Id. CIT(A) held that as per the order of Hon'ble Jurisdictional High Court in CIT Vs President Industries reported vide 258 ITR 654 and CIT Vs Gurbachan Singh Juneja 302 ITR 63 (Guj) and Neo Formulation Pvt. Ltd. 363 ITR 322 that only profit element to be taxed and not the entire gross receipt of alleged on money. The Id. CIT(A) recorded that profit element in the activities of builders are

ranging 8% to 20%. Therefore, by taking the maximum figure at 20%, the Id. CIT(A) confirmed the addition to the extent of 20% of Rs. 1,29,69,000/- which is Rs. 25,93,800/- and deleted the remaining addition.

21. The revenue has challenged the deleting of addition to the extent of Rs. 7.86 crores and the assessee has raised its cross objection against restricting the addition to the extent of 20% of alleged on money.
22. The Id. AR of the assessee submits that 20% of addition of on money is on the higher side, the assessee has already declared net profit @ 6.91%. The assessee has made declaration of Rs.19.50 lacs and has paid tax thereon. By adding 20% of addition in the profit, it will raise the abnormal figure of profit. The Id. AR of the assessee submits that he prayed for deleting the entire addition, however, in alternative submission, the estimation may be restricted to a reasonable percentage of addition.
23. On the other hand, the Id. CIT-DR for the revenue supported the order of Assessing Officer and would submit that entire addition made by Assessing Officer may be restored.
24. We have considered the submissions of both the parties and find that the grounds of appeal raised by Revenue are covered by our decision in A.Y. 2014-15 and 2015-16, thus the grounds of appeal raised by revenue are dismissed. So far as grounds raised in the cross objection

by assessee is concerned, we find that the assessee made declaration of Rs. 19.50 lacs at the time of survey/search action. The assessee has not retracted from such declaration. Considering the fact that the Id. CIT(A) has not accepted the addition on the basis of interpolation of figure of booking for all three years. At the same time, the Id. CIT(A) has confirmed the addition with respect to booking of seven flats, in absence of any supporting of corroborative evidence. However, keeping in view the possibility of revenue leakage, in our view, 10% of figure of on money estimated by Id. CIT(A) would be sufficient to meet the end of justice. In the result, grounds of cross objection raised by assessee is partly allowed.

25. In the result, appeal of revenue for the A.Y. 2016-17 is dismissed and the cross objection of assessee is partly allowed.

Order pronounced in the open court on 05th September 2023.

Sd/-

(Dr. ARJUN LAL SAINI)
ACCOUNTANT MEMBER

Surat, Dated: 05/09/2023

**Ranjan*

Copy to:

1. Assessee
2. Revenue
3. CIT
4. DR
5. Guard File

Sd/-

(PAWAN SINGH)
JUDICIAL MEMBER

By order

Sr.Private Secretary, ITAT, Surat