Dcit Cent. Cir. -5(3) (Erstwhile Dcit ... vs Sumer Builders, Mumbai on 8 January, 2021

IN THE INCOME TAX APPELLATE TRIBUNAL
"F" BENCH, MUMBAI

BEFORE SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER AND
SHRI M. BALAGANESH, HON'BLE ACCOUNTANT MEMBER

ITA NO.4915/MUM/2016 (A.Y: 2011-12)

M/s. Sumer Builders 201, Commerce House 140, NM Road, Fort Mumbai - 400 023 PAN: AAAFS2829R	v.	Dy. Commissioner of Income-tax Central Circle - 5(3) {Erstwhile DCIT, Central Circle - 36} Room No. 1906, 19th Floor Air India Building, Nariman Point Mumbai - 400 021
(Appellant)		(Respondent)

ITA NO.5130/MUM/2016 (A.Y: 2011-12)

Dy. Commissioner of Income-tax Central Circle - 5(3) {Erstwhile DCIT, Central Circle - 36} Room No. 1906, 19th Floor Air India Building, Nariman Point Mumbai - 400 021	v.	M/s. Sumer Builders 201, Commerce House 140, NM Road, Fort Mumbai - 400 023 PAN: AAAFS2829R
(Appellant)		(Respondent)

Assessee by	:	Shri Nishit Gandhi
Department by	:	Shri A. Mohan
Date of Hearing	:	09.11.2020
Date of Pronouncement	:	08.01.2021

ORDER

PER C.N. PRASAD (JM)

1. Both these appeals are cross appeals filed by the Assessee as well as the Revenue against the order of the Learned Commissioner of Income Tax (Appeals) - 53, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 23.03.2016 for the A.Y. 2011-12.

2. The assessee has raised the following grounds in its appeal: -

> "1. (a) The learned Commissioner of Income Tax (Appeals) erred in law in upholding the action of the learned Deputy Commissioner of Income tax, Central Circle 36, Mumbai (herein after referred to as the Assessing officer) in disallowing the entire expenditure of .57,16,72,184/- from the work-in-progress account of the on-going project at Prabhadevi (the Project) representing application of appellant's undisclosed income of .47,16,72,184/- and its sister concern's undisclosed income of .10,00,00,000/- (representing booking advance received for flats by the appellant).
>
> (b) The learned Commissioner of Income tax (Appeals) erred in making certain observations/ findings in order to arrive at the conclusion that the aforesaid expenditure is not allowable which the appellant submits are factually incorrect, bad in law, based on assumptions, conjectures and surmises and ought to be rejected.
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> (c) The appellant submits that the amounts referred to in Para l(a) above have been applied for the purposes of its business and the same ought to be allowed as an addition to the work in progress.
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> 2. The appellant submits that the learned Commissioner of Income tax (Appeals) ought to have held that (a) only the profit embedded in the On-money of .47,16,72,184/-received by the ITA NO.4915 & 5130/MUM/2016 (A.Y: 2011-12) M/s. Sumer Builders appellant is taxable; and (b) the amount of .l0,00,00,000/- be allowed as addition to WIP.
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> 3. (a) The appellant submits that the learned Commissioner of Income tax (Appeals) erred in not admitting the additional ground that only 10% of the undisclosed income ought to be subjected to tax in the year under appeal and balance be carried forward for taxation in the year of completion of project based on the accounting policy of revenue recognition consistently and regularly followed by the appellant and accepted by department in its own case.
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> (b) The appellant submits that the additional ground involve a question of law without requiring to call for any additional facts and in the interest of natural justice ought to be admitted.
>
> 4. (a) The learned Commissioner of Income tax (Appeals) ought to have held that based on the accounting policy consistently and regularly followed by the appellant and accepted by the department only 10% of the On-money received in respect of Prabhadevi Project should be subjected to tax in the year under appeal and the remaining be taxed in the year of completion of the project by matching the total receipts with the total project cost.

(b) The Learned Commissioner of Income Tax (Appeals) in arriving at the conclusion that the entire On-money received by the appellant is taxable in the year under appeal have made certain observations/findings which the appellant submits are factually incorrect, bad in law, based on assumptions, conjectures and surmises and ought to be rejected.

5. (a) The learned Commissioner of Income Tax (Appeals) erred in law in holding that proportionate interest expenditure out of the total interest expenditure of .14,94,85,240/- on the funds borrowed for the Project be added to work in progress of the on-going Project.

(b) The learned Commissioner of Income Tax (Appeals) erred in holding that as per the provisions of section 36(1)(iii) of the Act interest expenditure is allowed only if the funds ITA NO.4915 & 5130/MUM/2016 (A.Y: 2011-12) M/s. Sumer Builders borrowed are utilized for the purpose of business of the assessee who borrowed the funds and that the appellant diverted interest bearing funds to its sister concerns for non-

business purposes or extra-commercial considerations.

(c) The appellant submits that it has sufficient own interest free funds to cover the interest free funds provided to its sister concerns and that said funds were advanced out of the commercial expediency for the smooth functioning of the business and the same were utilized by the sister concerns for its business."

3. The assessee has also raised additional grounds of appeal which are as under: -

"1. In the facts and circumstances of the case and in law the learned Commissioner of Income Tax (Appeals) - 53, Mumbai ["the CIT (A)"] erred in upholding the assessment order passed by the learned Assessing Officer ("the AO") under section 143(3) r.w.s. 153C of the Income Tax Act, 1961 ("the Act") in the case of the Appellant for the relevant assessment year.

1.1 While doing so the Ld. CIT (A) failed to appreciate that:

(a) The necessary pre-conditions for the initiation as well as completion of an assessment under section 153C of the Act were not fulfilled in the present case;

(b) No satisfaction as contemplated under section 153C of the Act was recorded by the AO in the present case so as to frame an assessment under section 153C of the Act; and

(c) In any case, the documents on the basis of which the assessment has been framed did not belong to the Appellant and as a consequence the AO had no jurisdiction at all

to frame an assessment under section 153C of the Act.

1.2 Without prejudice to the above, the Appellant further submits that the order passed by the AO under section 143(3) r.w.s. 153C of the Act is unsustainable also because the same has been passed without obtaining the necessary, proper and judicious approval as ITA NO.4915 & 5130/MUM/2016 (A.Y: 2011-12) M/s. Sumer Builders contemplated under section 153D of the Act which fact is also evident from the assessment records of the Appellant including the order sheet notings of the AO after framing the said assessment. 1.3 The Appellant therefore prays that the assessment so framed by the AO and as affirmed by the Ld. CIT (A) is bad in law and deserves to be quashed.

2. Without prejudice to the above grounds already raised, the Appellant submits that in the facts and circumstances of the case and in law, the Ld. CIT (A) erred in upholding the action of the AO in denying the application of income amounting to Rs. 57,16,72,184/- treated as additional project WIP cost, sourced out of the income disclosed at the time of search, merely on the ground that no explanations / supporting were furnished by the Appellant regarding the same.

2.1. While doing so the Ld. CIT (A) failed to appreciate that:

(a) No specific show-cause notice was issued by the AO calling for the details of the above application of income incurred in additional project WIP cost;

(b) No specific details as regards the said claim were called for by the AO or the Ld. CIT (A) at the time of assessment proceedings or the Appellate proceedings; and

(c) In any case the denial of the said application of income incurred in the form of additional project WIP cost is also in contravention to the settled judicial position in this regard and also in complete ignorance of the nature of the said expenditure."

4. At the outset, Ld. Counsel for the assessee submitted that Ground Nos. 1 to 1.3 of the additional grounds are not pressed. In view of the submissions of the assessee the additional Ground Nos. 1 to 1.3 are dismissed as not pressed. We find that the other additional Ground No.2 is only an argument of an aspect of the main grounds and therefore this ITA NO.4915 & 5130/MUM/2016 (A.Y: 2011-12) M/s. Sumer Builders ground is disposed off along with the regular grounds and no admission is required.

5. Briefly stated the facts are that there was a search and seizure operation in M/s. Sumer Group of cases on 23.12.2010 and the Assessee is part of M/s. Sumer Group. In the case of the present assessee however, there was no search but the site office at Prabhadevi was subjected to survey u/s 133A of the Act at the same time. During the course of search, statement u/s 132(4) of one Mr. Ramesh Shah, partner of Sumer Corporation was recorded wherein he admitted to having received on- money in cash in respect of the project undertaken by the Assessee though he is not a partner in the Assessee firm. Based on the said statement the Assessee had disclosed an amount of .47,16,72,184/- as on-money received in cash on sale of flats and parking from the ongoing Prabhadevi project and the same was offered in its return of income for A.Y 2011-12. Further,

another associate sister concern of the Assessee, M/s. Vighnaharta Projects Pvt. Ltd. (for short "VPPL") had also disclosed an amount of .10 Crores during the said search which was offered by it in its return of income for A.Y 2011-12. These two amounts were accepted by the Assessing Officer based on the disclosure made by the Mr. Ramesh Shah in his statement recorded u/s 132(4) of the Act.

ITA NO.4915 & 5130/MUM/2016 (A.Y: 2011-12) M/s. Sumer Builders Admittedly no cash was either found or seized during the course of search in the Sumer Group as well as survey at the site office of the assessee. While recording the statement, in response to Q. No. 24 Mr. Ramesh Shah had also stated that he would also provide details as to the application of the said amounts in the on-going project of the Assessee at Prabhadevi known as "Sumer Trinity Towers". The said details of application of such income was subsequently provided by the Assessee, vide letter dated 31.03.2011 which is furnished at page No. 52 to 56 of the Paper book filed by the Assessee.

6. At the time of Assessment, the Assessing Officer called for an explanation on the addition to work in progress [WIP] account of the assessee not only for the A.Y.2010-11 and the A.Y.2011-12 which is under appeal. The explanation in regards thereto was given by the assessee and it was stated by the Assessee that an addition of .57.16 Crores to WIP Account was on account of application of income declared as on- money cash receipts by the Assessee and its sister concern, VPPL. So far as the on-money disclosure is concerned, the assessee offered the same in its return of income. However, the Assessing Officer disallowed the application of income of .57.16 Crores on the ground that no evidence ITA NO.4915 & 5130/MUM/2016 (A.Y: 2011-12) M/s. Sumer Builders of expenditure was furnished by the Assessee. As such the said amount was reduced from the WIP of the Assessee.

7. The Assessing Officer also disallowed an amount of .14.94 Crores u/s. 36(1)(iii) of the Act which was expenditure in the nature of interest on loans utilized for the purpose of the project. The said amount was also reduced from WIP. The Assessing Officer made these disallowances while completing the assessment u/s. 143(3) r.w.s. 153C of the Act. The Assessee preferred an appeal before the Ld.CIT(A) challenging these two disallowances. Further, at the time of hearing before the Ld.CIT(A), the Assessee filed additional grounds stating that out of the on-money declared as income only 10% was taxable in the current Assessment Year and the balance was taxable in the year of completion of project since the Assessee is following Project Completion Method in respect of the said project. As per the said method only 10% of incremental receipts are offered to tax every year and the balance receipts as well as costs incurred on the project are carried forward year after year till the completion of the project and income therefrom will be offered in the year of completion of the project and the subsequent sale thereof. It was contended that the said treatment has also been accepted by the Department in all the earlier years and subsequent years. It was therefore submitted that only ITA NO.4915 & 5130/MUM/2016 (A.Y: 2011-12) M/s. Sumer Builders 10% of the on-money be taxed in this year and the balance be carried over and brought to tax in the year of completion of the project. The Ld.CIT(A) partly allowed the appeal of the assessee.

8. So far as the disallowance on account of application of income is concerned, the Ld. CIT(A) confirmed the order passed by the Assessing Officer primarily on the ground that the expenditure incurred by the assessee was mostly that which would be in violation of section 37(1) of the Act in

the absence of evidences. He further disallowed the application of income on the ground that no evidence of expenditure was found during the search and therefore also the same is not allowable. He, further, relying on certain documents furnished by the assessee observed that, the project was in advance stages and was substantially completed and therefore there was no need to incur any further expenditure on the said project. As far as application of income offered by VPPL is concerned he observed that application could be allowed only in the hands of the person who has actually offered the income. Since VPPL and the Assessee are two different entities, he held that the Assessee is not entitled to claim application of income in its hands, the income offered by VPPL. Thus, the claim of application of income as made by the assessee was denied.

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9. As far as the claim of interest is concerned the same was partly allowed after relying on the remand report as furnished by the Assessing Officer. The Ld. CIT(A) however, rejected the additional grounds raised by the Assessee. The Ld. CIT(A) firstly observed that the said grounds are inadmissible and thereafter rejected the same after discussing the merits.

10. We have heard the rival contentions, perused the orders of the lower authorities and also the material on record including the paper books and written propositions filed by the Assessee, it was noticed that the Assessee filed a paper book on additional evidence before us. As such, the preliminary issue raised by the bench was as to the admissibility of the paper book on additional evidence. We therefore asked the Ld. Counsel for the Assessee to satisfy us as to the admissibility of the Paper book on additional evidence. To this, the Ld. AR relied on the detailed Application for admission of additional evidence filed in this regard and stated that the same were furnished in order to justify the claim of application of income raised in the grounds and which were to essentially support the finding of the Assessing Officer at Page No. 1 as well as the stand of the assessee that the project on which application of income was claimed is still under construction and not substantially completed, as ITA NO.4915 & 5130/MUM/2016 (A.Y: 2011-12) M/s. Sumer Builders wrongly observed by the Ld. CIT(A) in his order without any notice to the assessee.

11. Ld. Counsel for the assessee referring to documents at Sr. No.5 of additional evidence Paper Book [AEPB] read with para 4.3.6 of the Ld.CIT(A) order submitted that out of the total additional evidence documents furnished, majority documents are those which had already been filed with the Ld. CIT(A) pursuant to his own query or are already a part of the Assessee's records with the Revenue. Ld. Counsel for the assessee submits that Sr. Nos. 6 to 9 of AEPB which are nothing but assessment orders and assessment records for subsequent years. He submits that the documents at Sr. No. 1 are nothing but photographs of the current stage of the project while those at Sr. No.2 is a published list of tenants as per MHADA who occupied the property on which the project is being developed and is available in public domain and those at Sr.No.4 are copy of High Court Orders evacuating the tenants, etc. It was therefore submitted that there was no fresh or private evidence furnished except those documents mentioned at Sr. No.3 of AEPB and which are nothing but a mere confirmation of High Court Order evacuating the tenants.

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12. Ld. Counsel for the assessee further submitted that these evidences had to be furnished since the Ld.CIT(A) after calling for some documents which were duly furnished, made an incorrect and patently false observation in the impugned order that the project is substantially completed. This observation in the order was based on mere assumptions and without even apprising and confronting to the assessee. Therefore, it was submitted that the evidence was essentially to refute the patently false and incorrect observations of the Ld.CIT(A) at Para No. 4.3.6 of his order that there was no need to incur further expenditure since the project was substantially completed, which run contrary to the facts on record. Therefore, it was submitted that the additional evidences are filed only to counter these observations of the Ld.CIT(A) that the project was substantially completed.

13. Ld. Counsel for the assessee submitted that, during the appellate proceedings the Ld.CIT(A) had remanded certain issues in appeal to the Assessing Officer for his remand report. However, no remand report was called from the Assessing Officer as regards the claim of application of income to the extent of .57.16 Crores on the only project undertaken by the assessee and on which the expenditure was incurred despite the fact that the Ld.CIT(A) had himself called details regarding the current stage ITA NO.4915 & 5130/MUM/2016 (A.Y: 2011-12) M/s. Sumer Builders of completion of the project. Therefore, it was argued that the approach of the Ld.CIT(A) was biased and it in fact led the assessee believe that the CIT(A) was convinced that the project was still under construction which required substantial quantum of work to be done. It is only because the Ld.CIT(A) neither intimated the assessee that he required some further evidences/documents nor his intention to make observations contrary to the facts on record, that the assessee had no choice but to file these documents in the form of additional evidence before the Hon'ble ITAT. It is the argument of the Ld. Counsel for the assessee that this was further fortified by the fact that the Ld.CIT(A) did not send this issue for remand before the Assessing Officer though remand report from him was called as regards the other grounds in appeal.

14. Ld. Counsel for the assessee further argued that the whole purpose of the Additional Evidences is to merely show that the project is still under construction and substantial work is still required to be done which is even otherwise a matter of fact and also accepted by the same Assessing Officer in scrutiny assessment for subsequent years. The said project had many laches in the form of tenants' resistance due to which litigation happened and for which the tenants were compensated and recompensated before the project was back on track. As such, it was ITA NO.4915 & 5130/MUM/2016 (A.Y: 2011-12) M/s. Sumer Builders argued that there is no new or fresh claim made by way of these additional evidences.

15. Ld. Counsel for the assessee further referring to Para No. 4.3.3 at Page No. 9 of Ld.CIT(A) order submitted that, the Ld.CIT(A) has himself accepted incurring of the expenditure and the Revenue has not challenged this finding in its appeal and it has therefore become final. It is submitted that there was a survey at the site office of the Assessee where this project was undertaken, however, neither during search nor during survey any cash was unearthed which in itself would lead to a strong inference that the cash was actually utilized in the project itself and therefore an application of income was claimed. Ld. Counsel for the assessee submits that the fact that the income was applied and a break-up thereof would be furnished was even stated in the Statement u/s.132(4) of

the Act of Mr. Ramesh Shah taken on oath at the time of search. Ld. Counsel for the assessee submits that the Department was not at all justified in relying on only one part of the statement and reject the other part and on this proposition a number of case laws were relied upon. It was therefore argued that the only purpose of filing additional evidence was to refute the incorrect basis of rejection of the claim of the assessee on the observation that the project was substantially completed and there was ITA NO.4915 & 5130/MUM/2016 (A.Y: 2011-12) M/s. Sumer Builders no need to incur further expenditure. It was urged that otherwise, the claim is simply allowable since the Ld.CIT(A) has himself accepted incurring of expenditure in cash and particularly when despite the search on the entire group including residences of partners no cash was actually found or seized.

16. The Ld. Counsel for the assessee further argued that as per Rule 29 of the ITAT Rules a party is entitled to produce additional evidence if the Assessing Officer has passed the order without giving sufficient opportunity of being heard to the Assessee. Pointing out to the order of the Assessing Officer as well as the order noting's at Page No. 71 of Paper Book, it was argued that the Assessing Officer passed the order admittedly without issuing any show cause notice as regards the claim of expenditure or even without seeking any further clarification in the matter. Before the Ld.CIT(A), as well the evidences as required by him were furnished from time to time and the Ld.CIT(A) without calling for any further documents decided the issue against the assessee on observations totally contrary to the facts on record despite the fact that he himself accepted incurring of the expenditure by the assessee. As such the disallowance was made without granting a sufficient opportunity of being heard to the assessee and the additional evidence was therefore admissible.

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17. The Ld. Counsel for the assessee further submitted that remanding the issue back to the Assessing Officer would in fact amount to giving a second innings to the Assessing Officer to correct his lapses in the Assessment despite the fact that the person aggrieved is not the Assessing Officer but the assessee who has been wrongly denied the claim without any notice whatsoever. It was therefore urged that, the Tribunal is within its power to admit the additional evidence and adjudicate the same. Ld. Counsel for the assessee further argued that it has been held in numerous judgements that when the entire evidences and documents are already before the Tribunal, it must decide the issue instead of remanding the same back to the file of the Assessing Officer. Ld. Counsel also cited numerous case laws in support of this proposition.

18. Ld. Counsel further argued that once the Ld.CIT(A) has accepted the incurring of the expenditure, it would be beyond the power of the Tribunal to vacate this finding and remand the issue back to the file of the Assessing Officer since the Revenue is not in appeal against the said finding of the Ld.CIT(A) and it would amount to rendering a finding adverse to the assessee even without any appeal from the other side thereby making the assessee worse off than it was before filing of the Appeal. Ld. Counsel further argued that in the facts of the present case ITA NO.4915 & 5130/MUM/2016 (A.Y: 2011-12) M/s. Sumer Builders a remand back to the Assessing Officer would in fact be detrimental to the assessee and in such a case the power of remand could not be invoked.

19. Ld. Counsel lastly argued that even independent of the Additional evidence, the Assessee had offered .47.16 Crores and its sister concern .10 Crores during the course of search and as such there was no dispute about the existence of the source of funds in order to incur the expenditure. Therefore, even on this count there was no reason to deny the claim of expenditure since no cash was either found or even seized from any of the persons searched.

20. In response to the above, Ld.DR submitted in his written submissions as under: -

> "At commencement of proceedings, I had sought adjournment so that the case comes to physical hearing considering the complexity of issues raised, mainly the additional grounds.
>
> At conclusion of hearing, I had promised to submit some of the arguments in writing and this note is submitted accordingly.
>
> Matter concerning to Assessee appeal In the instant case, it can be seen that the returned income and assessed income remain same i.e .48,56,82,421. The main disputed decision is in paragraph 7 and Assessing Officer has reduced WIP.
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> ITA NO.4915 & 5130/MUM/2016 (A.Y: 2011-12) M/s. Sumer Builders Additional Ground of appeal and additional evidence:
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> The reports of Assessing Officer (one dated 9.8.18 and other dated 29.10.18, the latter already submitted before members on 04.12.18) is enclosed and the same may kindly be considered. The additional ground of appeal may kindly be not admitted. In addition to submission of Assessing Officer, no bona fide reasons (inter alia, good and sufficient reasons as to why it is raised for first time now and why not raised before Assessing Officer) are adduced to admit the additional grounds. Also the views of Assessing Officer in regard to additional evidence may kindly be considered."

21. In reply Ld. Counsel for the assessee submitted in his written reply as under: -

> "At the outset, it is most respectfully submitted that the above appeals have come up for hearing on various dates viz., 23.04.2018, 05.06.2018, 11.06.2018, 31.07.2018, 25.07.2019 on which date the Ld.DR had sought adjournments on some or the other ground. Finally, the appeal was heard on 12.09.2019. Thereafter, due to technical reasons the appeal was released and fixed for Virtual Hearing on 29.07.2020. Again on the said date the Ld. DR sought adjournment seeking time to prepare for the matter and the same was graciously granted by the Bench and the matter was fixed on 02.09.2020. Again on the said date the appeals were adjourned at the request of the Ld. DR on the very same ground and also for physical hearing in the matter. The adjournment was again granted by the Hon'ble bench graciously though there was strong objection raised by the Assessee's Counsel in the matter. The matter was next posted on 14.10.2020. On the said date again the Ld. DR sought an adjournment. The

same was again graciously granted by the Hon'ble Bench and the matter was fixed for hearing on 09.11.2020. It must be noted that while granting the said date it was amply clarified by the Hon'ble Bench that on the next occasion no further date would be granted and the matter would be proceeded with and in case the Ld. DR wants to argue the matter in physical hearing, the Hon'ble Bench would hear the Assessee's Counsel and the Ld. DR could argue in physical hearing, if he so desires. The Ld. DR was so directed and he in fact accepted the same and even stated that no adjournment would be sought for by him on the next occasion whether the hearing is virtual or physical. However, on the hearing posted on 09.11.2020, the very same Ld. DR who had appeared on the earlier occasion i.e. 14.10.2020 appeared and again sought an adjournment in the matter on the ground of physical hearing. To this request a strong objection was again raised by the Assessee's Counsel since the ITA NO.4915 & 5130/MUM/2016 (A.Y: 2011-12) M/s. Sumer Builders matter was already delayed for more than two years, most of the issues were covered and it was therefore, requested that the matter be heard. As a result, the Hon'ble Members confronted the Ld. DR as to whether he wants a physical hearing in the matter and if so, why the Ld. Counsel for the Assessee should not be heard through Virtual Mode and thereafter the Ld. DR be heard in physical hearing. It was also pointed out that the very same Ld.DR had agreed on the earlier occasion that he would appear on the next date whether it is a virtual hearing or a physical hearing. It is only after the Ld. DR agreed for arguing the matter in Virtual Hearing that the same was heard by the Hon'ble Bench. As such, it is most respectfully submitted that a more than fair and reasonable opportunity of being heard is granted to the Ld. DR in the matter. Hence, the statement made by him in the first paragraph is inconsequential."

22. We have heard both the parties in detail, perused the order of the Authorities below and the additional evidences. We have also perused written submissions filed by the Ld.DR along with the reports of the Assessing Officer sent to the Office of the CIT(DR) for his assistance to present the case of the revenue. We observe that the notes sent by the Assessing Officer on admission of additional evidences as well as on merits of the additions/disallowances for the assistance of the Ld.DR to present the case is of only a repetition of averments already made in the Assessment Order. On a perusal of the application for additional evidence, the paper book containing documents on additional evidence and the arguments on both sides we observe that the Additional evidence furnished mostly pertains to the documents which are already on the record of the assessee with the Revenue. It also needs mention that the order of the Assessing Officer in disallowing the expenditure is short and ITA NO.4915 & 5130/MUM/2016 (A.Y: 2011-12) M/s. Sumer Builders cryptic and as pointed out no specific show cause was issued by the Assessing Officer nor any specific query was raised at the time of assessment as regards the claim of expenditure incurred. Before the Ld.CIT(A), the assessee filed certain documents in order to establish its claim. These documents pertained primarily to the current stage of the project since the Ld.CIT(A) had not disputed the incurring of the expenditure though he held that the expenditure would be mostly in violation of section 37(1) of the Act. Further, after taking the same on record, the Ld.CIT(A) chose not to remand the issue to the file of the Assessing Officer and in fact denied the claim of the assessee on one of the grounds that there was no need to incur any further expenditure since the

project was substantially completed. We are unable to gather from where the Ld.CIT(A) had the information and evidence to observe that the project is almost complete and to come to a conclusion that the project was substantially completed. It appears to us this was never confronted to the assessee. It is this observation of the Ld.CIT(A) which has been challenged by the assessee and to refute which further evidences have been furnished and which are in support only of the documents furnished before the Ld.CIT(A). It is a settled law that the Tribunal has the authority and it is in fact its duty to arrive at a correct finding of fact.

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23. It is also a settled law that if the order has been passed by the lower authorities without granting a sufficient opportunity of being heard then the Assessee must be allowed to file additional evidences, for this we draw support from Keshav Mills v. CIT [56 ITR 365 (SC)], Roshan v. CIT [107 ITR 938 (SC)] and Prabhavati S. Shah v. CIT [231 ITR 1]. Further in numerous cases including those of the Hon'ble Jurisdictional High Court it has been held that when all the evidences are before the Tribunal, it must necessarily decide the issue instead of remanding the same.

24. Another important aspect of the matter is that the Ld.CIT(A) has made certain observations in his order which have not been challenged by the Revenue in its appeal. Therefore, those observations and findings are final. It is a settled law that the assessee cannot be worse off after filing an appeal before the Tribunal especially when there is no appeal by the Revenue. The Tribunal is not empowered to render even a finding adverse to the assessee on issues decided in his favour by the Ld.CIT(A) unless an appeal is preferred by the Revenue against such a finding as held in Puranmal Radhakishan v. CIT [31 ITR 294 (Bombay)], New India Assurance Co. v. CIT [31 ITR 844 (Bombay)]. We also find force in the argument of the Ld. AR that any remand at the present stage would amount to rendering an adverse finding against the assessee without any ITA NO.4915 & 5130/MUM/2016 (A.Y: 2011-12) M/s. Sumer Builders appeal from the Revenue which is also impermissible as per the Judgement of the Hon'ble Madras High Court in case of Ramaswamy v. CIT [40 ITR 377] wherein it has been held that, where decision of Commissioner is detrimental to Revenue, Revenue could appeal to Tribunal under section 33(3) of 1922 Act and in the absence of such appeal, Tribunal could only deal with only actual subject matter before it; namely appeal of assessee and where remand is intended for benefit of Respondent or where it would inevitably result in prejudice to appellant, there can obviously be no power to remand in such a case.

25. In the circumstances, considering various arguments raised and particularly because majority of the evidences are either Assessment Orders of subsequent years or Hon'ble High Court order or the evidences already on the record of the Revenue, we are inclined to admit the additional evidence as furnished and adjudicate the same at this stage itself. Our view is further supported by the various Judgements stated above on the issue of admission of additional evidence and its adjudication.

26. Now we shall take up Ground Nos. 1(a) to 1(c) along with the additional Ground Nos. 2 & 2.1 of the grounds of appeal raised by the assessee. These grounds pertain to denial of application of income to the ITA NO.4915 & 5130/MUM/2016 (A.Y: 2011-12) M/s. Sumer Builders Assessee in respect of on-money declared by the Assessee and its sister concern. In this regard the arguments of

the Ld. Counsel for the assessee are summarized as follows: -

27. Ld. Counsel for the assessee submitted that the Assessing Officer as well as the Ld.CIT(A) erred in rejecting the claim of the Assessee since no disallowance could at all have been made in the absence of a specific show cause notice regarding the same to enable the assessee a reasonable opportunity to set out its case. Reliance was placed on Tin Box Co. v. CIT [249 ITR 216 (SC)], Zenith Processing Mills Ltd. v. CIT [219 ITR 721 (Gujarat)] and Ester Industries Ltd. v. CIT [316 ITR 260 (Delhi)]. Referring to the respective orders it was stated that neither the Assessing Officer nor the Ld.CIT(A) have denied the fact that the expenditure was actually incurred by the Assessee for the on-going Prabhadevi project. It was submitted that the said approach was also correct in view of the fact that neither any undisclosed cash was found nor seized at the office premises and even at the site office where survey was undertaken.

28. It is submitted that the Ld.CIT(A) accepted the fact that expenditure was actually incurred by the Assessee on the project. He however, sustained the disallowance merely on surmises, conjectures and ITA NO.4915 & 5130/MUM/2016 (A.Y: 2011-12) M/s. Sumer Builders assumptions that the same is incurred in violation of Explanation to section 37(1) of the Act. It was stated relying on Dhirajlal Girdharilal v. CIT [26 ITR 736 (SC)] and Dhakeshwari Cotton Mills v. CIT [26 ITR 775 (SC)] that in the absence of any evidence whatsoever of violation of Explanation to section 37(1) of the Act, the expenditure could not be disallowed by the Ld.CIT(A) on mere assumptions. It was further argued that once it is established that the expenditure was actually incurred, the Ld.CIT(A) erred in rejecting the same on the ground that the project was substantially completed and there was no need to incur any further expenditure. It was urged that the observation of the Ld.CIT(A) that the project is substantially completed is patently erroneous. In order to establish the same, the Assessee relied on current photographs of the project and the assessment orders of the subsequent years wherein the Assessing Officer has himself accepted that the project is under construction. Further, the Assessing Officer in the present proceedings in his assessment order observed that the project is still under construction. In fact, even the Ld.CIT(A) has merely relied on part Occupancy Certificate to render such an erroneous finding since the project is admittedly of four towers and even as per the Ld.CIT(A), the part OC is received only for two towers. As such, the basis of the Ld.CIT(A) in ITA NO.4915 & 5130/MUM/2016 (A.Y: 2011-12) M/s. Sumer Builders denying the claim is contrary to the facts on record. It was also pointed out that in any case the Ld.CIT(A) is not empowered to decide on the commercial wisdom of the Assessee in incurring expenditure. It is argued that Revenue cannot sit in the armchair of a businessman to decide on the necessity of incurring expenditure or otherwise.

29. Ld. Counsel for the assessee further relying on the decision of the Hon'ble Gujarat High Court in the case of DCIT v. Panna Corporation [Tax Appeal Nos. 323 and 325 of 2000], Mumbai Bench of the Tribunal in the case of DCIT v. Prime Developers in ITA Nos. 175 to 178 and 321 to 324/Mum/2010 and other judgements, argued that the Assessing Officer as well as the Ld.CIT(A) erred in not appreciating the fact that the nature of expenditure is such that it may not have any direct evidence and that cannot be the sole basis to disallow the same as held in the above judgements.

30. Ld. Counsel for the assessee further argued that if the application of undisclosed income is denied by disallowing the same, it would in fact amount to double taxation whereby the source is already taxed, however, the application thereof is denied and disallowed, it leads to re-taxing the expenditure as well by way of disallowance. Further relying on the decision of the Hon'ble Bombay High Court in the case of CIT v. Golani ITA NO.4915 & 5130/MUM/2016 (A.Y: 2011-12) M/s. Sumer Builders Brothers [250 Taxman 446 (Bombay)] it was urged that once on-money is taxed any expenditure out of it cannot be disallowed. He further stated that once receipts from the same project are taxed then any utilization thereof in the same project must be allowed.

31. Ld. Counsel for the assessee further argued that the source has been taxed on the basis of the statement of Mr. Ramesh Shah who is not even a partner in the Assessee firm. The same was honoured and offered to tax by the Assessee. In that very statement, Mr. Ramesh Shah also stated that an application of these income would be provided to the Department and which was in fact provided which forms part of Page Nos. 52 to 56 of Paper book and which has not at all been disputed by the Department in any other concern. Ld. Counsel for the assessee therefore argued that once the statement is relied on by the Department, it must be relied on fully and the Department cannot pick and choose to rely only on that part of the statement which is favorable to it and not rely on the other part which is adverse to it. For this reliance was placed on various judgements.

32. Ld. Counsel for the assessee further argued that as far as the application of income of .10 Crores declared by VPPL in its returns but telescoping claimed in the hands of the Assessee are concerned, it was ITA NO.4915 & 5130/MUM/2016 (A.Y: 2011-12) M/s. Sumer Builders unjustly denied by the Ld.CIT(A) on the ground that application of income could be allowed only in the hands of the person who has offered undisclosed income. Ld. Counsel for the assessee stated that such an approach was contrary to the judicial precedents in the case of Elite Developers v. DCIT [73 ITD 379 (Nagpur)], J B Education Society v. ACIT [28 ITR (Trib) 284 (Hyderabad)] and Rajni M Patel v. DCIT [43 ITR (Trib) 628 (Ahmedabad)]. Ld. Counsel for the assessee therefore urged that the denial of application of income by the Assessing Officer and its affirmation by the Ld.CIT(A) is bad in law and such an action needs to be reversed.

33. Ld. CIT, DR argued that during the course of search no documentary evidence of expenditure was found and therefore the disallowance was justified. Ld. DR further argued that the observations of the Ld.CIT(A) have been read piecemeal and on a holistic reading of the order, the disallowance sustained by him is justified. Ld. DR next argued that the assessee has not provided any evidence of the expenditure incurred and therefore the disallowance is justified. Ld. DR stated that though no specific showcause notice was given by the Assessing Officer, however, the assessee also failed to produce the evidence before the Ld.CIT(A) and therefore the Assessee's claim of non-grant of sufficient opportunity is ITA NO.4915 & 5130/MUM/2016 (A.Y: 2011-12) M/s. Sumer Builders wrong. Ld. DR further argued that if the application of income is allowed it would nullify the effect of disclosure made by the Assessee and therefore the same cannot be allowed. As regards the claim of application of income offered by VPPL is concerned, Ld. DR strongly urged that the same could be made only by VPPL and not the Assessee. Ld. DR further argued that the Ld.CIT(A) order is well reasoned and deserves to be affirmed.

34. Ld.DR submitted that with regard to matter concerning to assessee appeal, in the instant case, it can be seen that the returned income and assessed income remain same i.e. .48,56,82,421/. The main disputed decision is in paragraph 7 and Assessing Officer has reduced WIP.

35. Ld.DR apart from arguing the matter orally also filed written submissions which are as under: -

> "A legal objection to the issues raised: This pertain to categorization of income in dispute as profits and gains of business and profession. Unaccounted income is, in my view, in the instant case is to be categorized as income from other sources. Once categorized as income from other sources (section 68/69/69A/69B) normal deductions under section 30 to 38 does not arise nor do Accounting Standards relevant to business activity apply. The appellant in counter to my arguments has stated that the Assessing Officer has accepted that the income falls under profit and gains of business and profession. Even if it is so, when amendments to assessment is sought for in appeal (it is legally settled principle that selective or pick and choose approach cannot be taken on an integrated issue and a wrong is to be corrected at the earliest instance), when the root of the issue is faulty, then the fault also needs correction. In this connection I submit the following: -
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> ITA NO.4915 & 5130/MUM/2016 (A.Y: 2011-12) M/s. Sumer Builders If the previous decision is plainly erroneous, there is a duty of the Court of review it and not perpetuate the mistake i.e. A vital point was not considered or when an earlier relevant statutory provision has not been brought to the notice of Court. [Union on India & Anr. Vs Reghubir Singh (SC) 178 ITR 548, Sri Agasthyar Trust Vs CIT (SC) 236 ITR 23].

To perpetuate an error in no heroism [Distributors (Baroda) P. Ltd. Vs Union of India &ors. (SC) 155 ITR 120]. To justify that the income in dispute (unaccounted income brought out by a search under section 132, which at the primary stage itself is not a 'mistaken belief' eventhough this is countered by assessee with the argument that the claim made in appeal is supplemental to an admitted issue and is a 'mistaken belief', in my view the argument may not be accepted as the genesis of issue arises from search under section 132 where unaccounted income is detected) is to be treated as income from other sources, I rely on enclosed decisions and the essence of the decisions (the decisions pertain to finance business carried out by cooperative society) is that unaccounted income falls under head as income from other sources.

(i). M/S.Perungazhi Service Co-Op v. ITO Wd-2(5), TVM, Trivandrum on 09 July, 2019 I.T.A. No.158/Coch/2018.

(ii). The Income Tax Officer, Ward-2(3), Range-2, Trivandrum. v. M/s. Mundela Service Co-operative Bank Ltd., No. 2433, Mundela Post, Vellanad, Trivandrum I.T.A. Nos.151/Coch/2018, 128/Coch/2019 & 143/Coch/2019 Assessment Years: 2011-12, 2014-15 & 2015-16.

Hence, while deciding on the grounds raised and additional grounds, if admitted, business deductions under section 30 to 38 or Accounting Standards applicable in computation under profits and gains of business and profession may kindly be not granted. Once categorised as income from other sources, the same will not be part of WIP, it stands separate. The disputed income may be treated as income from other sources and the decision of Assessing Officer may kindly be upheld.

matter concerning departmental appeal The matter concerns interest disallowance. It is pleaded that it may kindly be disposed of with direction to Assessing Officer to recompute ITA NO.4915 & 5130/MUM/2016 (A.Y: 2011-12) M/s. Sumer Builders disallowance, if any, taking into account net worth of assessee and commercial expediency in regard to each of the loans extended."

36. In reply Ld. Counsel for the assessee submitted as under: -

> "2. coming to the core of the submission on merits made by the Ld. DR, it is humbly submitted that the Ld. DR has sought to argue completely contrary to the Assessment Order and even the order to the Ld. CIT(A). The crux of his argument is that undisclosed income offered during search must be taxed under the head Income from Other Sources and the Assessing Officer has erred in taxing the same under the head Profits and Gains of Business and Profession. This fact is also admitted by the Ld. DR in his note. However, it is respectfully submitted that there is ample authority on the proposition that the Revenue cannot raise grounds contrary to its own order passed by the Assessing Officer. Under the scheme of the Income Tax Act, 1961 ("the Act" for short) the Department is not entitled to argue and appeal against the Assessment Order. In this regard a useful reference can be made to the following:
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> Mahindra & Mahindra Limited v. DC1T [(2010) 122 ITD 216 (Mum-SB)] [Affirmed by the Hon'ble Jurisdictional High Court in CIT v. Mahindra & Mahindra Limited [365 ITR 560 (Bombay)]. Department did not challenge on the ruling of the Hon'ble Tribunal as regards the limitation on DR's powers to argue / make out on entirely new case contrary to the assessment order] ACIT v. Ms. Aishwarya K Rai - (2010) 1271TD 204 (Mumbai) Kwal Pro Exports v. ACIT - (2008) 110 ITD 59 (Jodhpur) Eiscsson AB v. DD1T (Intl. Tax) - (2012) 191TR(T) 341 (Delhi) Slocum Investment (P) Ltd. v. DCIT (2017) 106 ITD 1 (Delhi) Further in the case of CIT v. Maersk Global Service Centre (I) Pvt Ltd (ITA No.692 and 693 of 2012 dated 22-08-2014 before the Hon'ble Bombay High Court) it has been held that the Revenue cannot raise grounds before the Tribunal to get over the defects and lacunas so also any discrepancies in the order of the Transfer Pricing Officer. As such the position that the Ld. DR cannot argue contrary to the Assessment Order is far too settled and does not deserve any further deliberation in the humble submission of the Assessee.
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> 3. It is submitted that once it is so held that the income has been rightly considered under the head Profits and Gains of Business and Profession then the further argument of the Ld. DR that the application of income from the said income disclosed during search ITA NO.4915 & 5130/MUM/2016 (A.Y: 2011-12) M/s. Sumer

> Builders would not be permissible becomes inconsequential. In any case, it needs reiteration that the Ld. CIT(A) has himself admitted that the expenditure has been incurred and then made observations pertaining to section 37 of the Act. As such, it is respectfully submitted that the said argument made by the Ld. DR also deserves to be rejected.
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> 4. As regards the judgements relied on by the Ld. DR, it is respectfully submitted that the same are on totally different set of facts peculiar to business of co-operative credit society and co-

operative banks. The issue therein is primarily on the application of section 80P of the Act. Further it also needs mention that in those judgements the very issue before the Honourable Tribunal was in respect of chargeability of the income under the head business or profession vis-a-vis income from other sources unlike the present appeal. Further, it is undisputed that the Assessee has only one project under construction and based on the seized documents and the very admission of Mr. Ramesh Shah, it is receipt from the said project. After duly noting these facts the Assessing Officer has taxed the same under the head Profits and Gains of Business and Profession. Further it is settled law, when the Assessee has only one business / project, all the income unearthed during the search have to be treated as being earned from the said business [Ref. CIT v. Mhaskar General Hospital -- Tax Appeal No.1474 of 2009 and CIT v. Suman Paper and Boards Ltd. -- (2009) 314 ITR 119 (Guj)]. In any case, it is a settled law, that as per the scheme of the Act all the other heads of income must be exhausted / excluded first before taxing an income under the head "Income from other sources" [Ref:

> S.G. Mercantile Corporation P. Ltd. v. CIT [83 ITR 700 (SC)], CIT v. T.P. Sidhwa [133 ITR 840 (Bombay)] & Bihar State Co-operative Bank Ltd. v. CIT [39 ITR 115 (SC)]. Hence even on this count the argument of the Ld. DR is contrary to the above and therefore unsustainable.
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> 5. So far as the issue of disallowance of interest is concerned, the same has been dealt with adequately in the propositions already filed before the Hon'ble Tribunal earlier and the same may be decided on the basis thereof."

37. The Ld. Counsel for the assessee further stated that, the Revenue has not disputed the finding and observation of the Ld.CIT(A) that the expenditure was actually incurred. As such, the same is final and binding ITA NO.4915 & 5130/MUM/2016 (A.Y: 2011-12) M/s. Sumer Builders on the revenue in the absence of any appeal. It is also not disputed by them that the project is still under construction which is accepted by the Assessing Officer himself in the Assessment Order for the relevant year as well as subsequent years. He further stated that, if the above findings remain unchallenged then there cannot be a dispute as to the factum of incurring of expenditure. Ld. Counsel for the assessee further stated that the Revenue has not stated as to how the judgements relied on by the Assessee are not applicable to its case. Finally, it was argued that, the Application of income as claimed by the Assessee apart from being accepted in principle on facts by the Ld.CIT(A) is also supported by various judgements and must therefore be allowed.

38. However, the Ld. AR submitted without prejudice that since the assessee has sought to offer income at 10% of the on-money received of .47.16 Crores its claim of application be allowed to the extent of the difference between the on-money received and the profit offered in the current year i.e. .47.16 Crores minus 10% i.e. the profit offered in the current year.

39. We have heard the rival contentions, perused the judgements cited by either parties and also perused the material on record including the written synopsis of arguments filed by the Assessee as well as the paper ITA NO.4915 & 5130/MUM/2016 (A.Y: 2011-12) M/s. Sumer Builders books filed by it. We have also perused written submissions filed by the Ld.DR along with the reports of the Assessing Officer sent to the Office of the CIT(DR) for his assistance to present the case of the revenue. We observe that the notes sent by the Assessing Officer on admission of additional evidences as well as on merits of the additions/disallowances for the assistance of the Ld.DR to present the case is of only a repetition of averments already made in the Assessment Order. At the outset we notice that the Assessing Officer has taxed the income offered by the Assessee on the basis of statement of one Mr. Ramesh Shah (Refer Q. No. 22 at Page No. 45 of paper book). In that very statement Mr. Ramesh Shah had also stated that the detailed statement showing application of the said receipts would be furnished (Refer Q. No. 24 at Page No. 47 of paper book). This was again re-affirmed in his statement taken post search proceedings before the Assessing Officer (Refer Q. No. 5 at Page No. 50 of paper book). Thereafter even the statement reflecting detailed application of income was furnished to the Department vide letter dated 31.03.2011 which is placed at Page Nos. 52 to 56 of the Paper Book. As noticed above the Assessing Officer as well as the Ld.CIT(A) have completely by passed an important aspect of the matter that no cash was seized during the proceedings and the primary basis of taxing the on-

ITA NO.4915 & 5130/MUM/2016 (A.Y: 2011-12) M/s. Sumer Builders money was the statement of Mr. Ramesh Shah. If such a statement is to be relied on then the same must be relied on completely and not in parts to suit the convenience of either. A statement sought to be used as evidence must be read as a whole and the Assessing Officer or the Ld.CIT(A) cannot accept part of a statement and conveniently ignore the other part. We therefore find that the Assessee is justified in claiming that as income was taxed on the basis of statement even the application thereof must be granted on the basis of such statement. This view is further supported by the judgements in the case of Glass Lines Equipments Co. Ltd. v. CIT [253 ITR 454 (Guj)], Chander Mohan Mehta v. ACIT [71 ITD 245 (Pune)], ACIT v. Vasantlal C. Mehta [77 ITD 76 (Rajkot)] & Ramanlal P. Chordia v. ACIT [87 TTJ (Pune) 713] relied on by the Assessee at the time of hearing.

40. We further find that it has been held in various judgements that in respect of such expenditure which is on account of search operation there can generally be no evidence and the insistence on documentary evidence regarding the claim of expenditure may not be justified. In this regard the Hon'ble Gujarat High Court has accepted the said position in the case of Panna Corporation (supra) which has been followed by the co-ordinate ITA NO.4915 & 5130/MUM/2016 (A.Y: 2011-12) M/s. Sumer Builders bench of the Tribunal in the case of Prime Developers v. DCIT in ITA Nos 175 to 178 of 2010 wherein it has been held by the Tribunal as under: -

"42. Further, from the judgment in case of Panna Corporation (supra), it is settled proposition that there is no need for the assessee to demonstrate the genuineness of the claim of unaccounted expenditure in the cases of this kind. The underlined logic is that the unaccounted expenditure is always unevidenced and never maintained. Therefore, transferring onus on to the assessee in matters of this kind is not approved. Ex consequent, it is for the Assessing Officer allow necessarily reasonable deduction towards such unaccounted expenditure without demanding evidences, considering the nature of industry and also evidences relating to extents of net profits earned by the assessee. Considering the above legal position on the matter, we are of the clear-cut opinion, the Assessing Officer's conclusions on this issue are certainly erroneous".

41. We find that in the case of the CIT v. Golani Brothers (supra) the Hon'ble Bombay High Court held as under: -

"19. We have with the assistance of Mr. Suresh Kumar and Mr. Nitesh Joshi perused the paper-books, including the order of the Assessing Officer and that of the First Appellate Authority and equally the Tribunal. On a perusal thereof and particularly in the backdrop of Section 69C of the I.T. Act, 1961, we have no hesitation in agreeing with Mr. Nitesh Joshi.

20. The Tribunal had before it several issues for consideration in the appeals of the Revenue as well as the assessee. The principal issue being the deals and transactions with those who are interested in buying shops, book them in advance and pay certain sums in cash. The initial disclosure of the assessee on this cash receipt was not found to be satisfactory. It was rather a misleading explanation and which led to several actions, including search and seizure. After the materials were seized, including incriminating documents, the Assessing Officer went about the exercise of scrutinising the revised return of income. During the course of the same, several queries and questions were raised. The 'on money' deals were probed in the backdrop of a contract awarded by the Jalgaon Municipal Council to the respondent/assessee-contractor and developers. There were ITA NO.4915 & 5130/MUM/2016 (A.Y: 2011-12) M/s. Sumer Builders certain shops which were to be allotted to the nominees of the Municipal Council and certain shops could have been sold in open market. It is in relation to the shops and sold essentially in the open market that the issue arose for determination. The sums received in cash so as to book the shops were paid by the interested parties. These interested parties were identified, equally the shops and the consideration determined. If the total consideration was determined and certain component of it was received in advance or as 'on money' in cash, then, the Tribunal concluded that the Assessing Officer could have treated that as a receipt. That was a receipt of income which was not disclosed but discovered on account of operations such as search and seizure carried out at the office premises as also the residence of the partners of the assessee firm. During the course of such scrutiny, the Assessing Officer has found that there were

shops and specific in number to be allotted to the nominees of the Municipal Council, shops to be sold in open market, all of which were located floor-wise. Therefore, he ought to have carried out a proper exercise, according to the Tribunal. The 'on money' could not have been treated as uniform irrespective of the location of the shop. There are specific advantages derived by the location of the shop on the ground floor, or basement and with frontage to the road. Therefore, all these factors and test not being applied, the Tribunal modified the Assessing Officer's order. The Tribunal, to be fair to both sides, did not probe or scrutinise the source of the power of the Assessing Officer in making reference to the DVO. It proceeded on the footing that such a reference could have been made and if made, what are the consequences thereof. Thus, the consequences then have been considered, properly analysed and to the extent the law permits, the order of the Assessing Officer has been maintained.

21. When it was disturbed and interfered with, the Tribunal found that there was indeed a justification for such interference. If the unaccounted expenditure is determined, then, necessarily the question which would arise for consideration before the Tribunal is whether the Assessing Officer was justified in making addition under Section 69C for the years under consideration. The Tribunal, in para 39 of the order under challenge, found that the explanation as derived from the records and placed by both can be traced to the 'on money' received at the time of booking/sale of shops. The statement of the senior partner is referred. The senior partner admitted that the sums have been received as 'on money' and at the stage aforesaid. Therefore, both the amounts, namely the 'on money' as well as the unexplained expenditure cannot be brought to tax, according to the Tribunal. If the unaccounted expenditure so incurred was from the 'on money' received by the assessee, then, the question of making any addition under ITA NO.4915 & 5130/MUM/2016 (A.Y: 2011-12) M/s. Sumer Builders Section 69C does not arise because the source of the expenditure is duly explained. It is only the 'on money' which can be considered for the purpose of taxation. That is what the Tribunal therefore concluded and once the 'on money' is considered as revenue receipt, then any expenditure out of such money cannot be treated as unexplained expenditure, for that would amount to double addition in respect of the same amount."

42. In fact in the present case, the Ld.CIT(A) himself in Para No.4.3.6 of his order has observed that the Assessee has incurred expenditure in the project and this finding of the Ld. CIT(A) has not been challenged by the Revenue. Thus, the claim of the assessee as regards application of income could not be denied. We also find that the Ld.CIT(A) erred in sustaining the disallowance of application simply on the ground that the project of the Assessee was substantially completed and no further expenditure was required to be incurred is also baseless since the Assessing Officer himself in Para No.2 of the assessment order observed that the project is under construction. The observation of the Ld.CIT(A) is not based on any evidence on record. We further observe that even in the assessment orders for subsequent years the same position is accepted by the Revenue. Thus, the Ld.CIT(A) is not justified in rejecting the claim on such a ground which is clearly contrary to the facts on record. It is needless to say that even otherwise the Ld.CIT(A) is not justified in siting ITA NO.4915 &

5130/MUM/2016 (A.Y: 2011-12) M/s. Sumer Builders on the judgment of the necessity or otherwise of the need for incurring expenditure by an Assessee in running his business.

43. As regards the apprehension of the Ld. DR, that if the claim for application of income is allowed it would nullify the effect of disclosure made by the Assessee, is concerned, we find that once the income has been offered by the Assessee then the application thereof could not be denied because essentially what has been claimed by the Assessee is merely telescoping of the said income into the increase in its WIP of the project from where such receipts were generated. On this we find support from the Judgement of the Honourable Supreme Court in the case of CIT v. S. Neliiappan [66 ITR 722 (SC)] in which it has been held as under:

> "It is true that there is no direct evidence of any connection between the cash credit entries and the income withheld from the books of account by the assessees. But if the Tribunal inferred that there was a connection between the profits withheld from the books and the cash credit entries, it cannot be said that the conclusion is based upon speculation"

It was therefore held that even in the absence of direct evidence it could be inferred that cash credits reflected incomes kept out of the books by the Assessee and therefore no additions could be made in this respect.

44. Coming to the last aspect of the matter i.e. addition in respect of income offered by VPPL we notice that a similar view has been taken by ITA NO.4915 & 5130/MUM/2016 (A.Y: 2011-12) M/s. Sumer Builders the Tribunal in the case of J.B. Education Society v. ACIT [28 ITR (T) 284 (Hyderabad)] wherein during search at assessee, an educational society, certain documents were seized which showed that the society had collected amounts over and above the prescribed fees for the A.Ys.2009-10 and 2010-11, and that amounts were not brought in the books of account. Facts revealed that one K, being manager of the assessee-society, was in a position to collect the money from the students who were seeking admission in the assessee's college and he used his position to collect these impugned receipts from the students and while passing the assessment order the same was treated in his hands as undisclosed income and he accepted himself for being assessed by the Department. On these facts it was held that in the event of K paying the tax on the unaccounted income from the receipts in his hands, the same unaccounted receipts could not be brought to tax in the hands of the assessee once again. Similar view was taken in the case of Rajni M. Patel v. DCIT [43 ITR (T) 628 (Ahmedabad)] wherein a search and seizure operation was carried out at premises of the assessee and various firms and associated concerns. The Assessing Officer added certain undisclosed income of the assessee. Similar addition was also made in case of firms. The assessee claimed that since he was partner in ITA NO.4915 & 5130/MUM/2016 (A.Y: 2011-12) M/s. Sumer Builders firms, he should be given telescopic benefit of income disclosed by the firm against addition made. On these facts it was held that, the Assessing Officer had agreed that the assessee is entitled for telescopic benefit but, while giving actual benefit to the assessee, he restricted all these to a sum of .13 lakhs which is the amount the assessee himself disclosed. Once an estimated addition on account of household expenses, investment in land, investment on foreign travel are being made and the source of such expenditure is stated to be flowing from the firm which has suffered tax as

undisclosed income, then, telescopic benefit should be given to the total amount. Similar view is taken in the case of Elite Developers v. DCIT [73 ITD 379 (Nagpur)]. The Ld. DR has not cited any contrary judgements and in that view we respectfully following the above judgements of the Tribunal allow the claim of telescoping to the Assessee.

45. However, as regards the amount of claim of telescoping/application of income of .47.16 Crores offered by the Assessee we observe that before the Ld.CIT(A), the Assessee has claimed that 10% of the said receipts is liable to be taxed in this year and the balance will be carried forward till the completion of the project. In that view of the matter, only the differential amount is allowed to be telescoped i.e. the claim of application is restricted to .42.44 Cr (.47.16 Crore (-) 10%) since to the ITA NO.4915 & 5130/MUM/2016 (A.Y: 2011-12) M/s. Sumer Builders own admission of the Assessee, 10% is the estimated profit element and the balance is on account of expenditure incurred. Accordingly, Grounds Nos. 1(a) to (c) and Additional Grounds 2 to 2.1 are partly allowed.

46. Ground Nos.2, 3 and 4 are on taxability of on-money declared by the Assessee in its return of income. The Assessee had however, raised additional grounds before the Ld. CIT(A) stating that since the Assessee is following project completion method of accounting, and each year it has been offering income at 10% of the incremental project receipts, hence, only 10% of on-money received is taxable in this year and the balance is taxable in the year of completion of the project, since only at that point in time the actual real income from the project could be arrived at. The Ld.CIT(A) however, refused to admit the said grounds and thereafter rejected the same even on merits. Against such rejection of the Ld.CIT(A) the Assessee has raised the Ground Nos. 2 to 4 as stated above.

47. At the outset, the Ld. Counsel for the assessee stated that the Ld.CIT(A)'s action of not admitting the additional grounds is bad in law since the same were purely legal in nature and should have been admitted in view of the Judgement of the Hon'ble Supreme Court in the case of NTPC v. CIT [229 ITR 383] and in the case of CIT v. Pruthvi Brokers and ITA NO.4915 & 5130/MUM/2016 (A.Y: 2011-12) M/s. Sumer Builders Shareholders Pvt. Ltd. [349 ITR 336 (Bombay)]. As such, the order of the Ld. CIT(A) is bad in law since the same is contrary to the above judgements.

48. It was further argued that the Ld.CIT(A) erred in adjudicating the additional grounds on merit once he had himself refused to admit the additional grounds. Therefore, his action is self-contradictory.

49. Ld. Counsel for the assessee argued that there is no estoppel against statute and therefore, it is open to the Assessee to claim before the authorities that a particular item of income is not taxable despite having offered the same in its return of income or even having accepted the same as taxable before the authorities or even in the books of accounts. For this proposition he relied on the decision of the Hon'ble Bombay High Court in the case of Nirmala Mehta v. CIT [269 ITR 1] and others. Therefore, it is submitted that there was no bar against the Assessee in claiming that the income erroneously offered in the return of income could not be withdrawn or revoked.

50. Ld. Counsel for the assessee further argued that only the profit element embedded in the on-money could be taxed in the relevant assessment year, since the Assessee is following the project

completion ITA NO.4915 & 5130/MUM/2016 (A.Y: 2011-12) M/s. Sumer Builders method, the profit is ascertainable only in the year of completion of the project and as such no profit could be taxed till such time as the project is completed irrespective of the cash received during the year. It is submitted that, the Assessing Officer himself accepted the said method in respect of the project receipts in cheque by the Assessee, but however, denied the said treatment in case of cash receipts in respect of the same project. Therefore, it is submitted that the Ld.CIT(A) erred in taxing the entire on-money in the year of receipt itself. Ld. Counsel for the assessee also relied on the judgements in the case of ACIT v. Videocon Atithi Shelters Pvt. Ltd. in ITA Nos. 3496 to 3499/Mum/2009, Wall Street Constructions Pvt. Ltd. v. JCIT [101 ITD 156 (Mum) (SB)] and JCIT v. K. Raheja Pvt. Ltd. [102 ITD 414 (Mumbai)] to contend that in such cases where project completion method is followed the income is to be taxed only in the year of completion of the project irrespective of the amount of receipts or expenditure during the year.

51. Ld. Counsel for the assessee further contended that the Assessee has been regularly and consistently following the Project Completion Method of accounting for Prabhadevi Project which has also been accepted by the Department in earlier as well as in subsequent years. Ld. Counsel for the assessee further submitted that, it was categorically ITA NO.4915 & 5130/MUM/2016 (A.Y: 2011-12) M/s. Sumer Builders pointed out to the Ld.CIT(A) that the on-money was erroneously offered as income in A.Y 2011-12 in violation of the assessee's Accounting Policy and accounting system without understanding certain fundamental accounting concepts and conventions. Reference was made to Page Nos. 119 to 122 of Paper book. However, the Ld.CIT(A) after denying to admit the said grounds dealt with the merits of the case and thereafter dismissed the said grounds as held in Para Nos. 5.2.1 and 5.2.2 of his order. Ld. Counsel for the assessee submits that such an approach, apart from being unjust was also contrary to the settled binding judicial precedents. Reliance was placed on CIT v. Shoorji Valabhdas & Co [46 ITR 144 (SC)], Morvi Industries v. CIT [82 ITR 835 (SC)], Godhra Electricity Co. v. CIT [225 ITR 746 (SC)]. It was further argued that entry or absence in the books of accounts is not determinative of taxability of income or allowability of a deduction under the Act. Therefore, it is submitted that the Ld.CIT(A) erred in not allowing the said grounds merely on the basis that the said on-money receipts were reflected income in the books of accounts for A.Y 2011-12.

52. Ld. Counsel for the assessee further stressed that it was repeatedly pointed out to the Ld.CIT(A) that the said entire on-money was erroneously offered as income in A.Y 2011-12 under an erroneous ITA NO.4915 & 5130/MUM/2016 (A.Y: 2011-12) M/s. Sumer Builders understanding and such erroneous offer could not lead to taxing the same. Ld. Counsel relied on Abdul Qayumme v. CIT [184 ITR 404 (All)], Mayank Poddar v. ITO [262 ITR 633 (Cal)] and SAIL DSP Employees Association v. UOI [262 ITR 638 (Cal)], to urge that any amount of admission or misapprehension could not make an item taxable which is otherwise not taxable.

53. Ld. Counsel for the assessee further referring to Page No.3, Para 4 of the Assessment order stated that, even as per the Assessing Officer on-money has been treated as merely receipt and part of sale consideration and not income, under the Act only income is liable to be taxed and not receipt. He also relied on various judgements to contend that on similar facts, similar issue of taxability of on-money has been decided by various judgements of the High Courts wherein it has been held that

in case of receipts of on-money/unaccounted cash receipts only the profit embedded therein is liable to be taxed and not the entire receipt. For this he relied on the decisions of the Hon'ble Bombay High Court in the case of CIT v. Hariram Bhambhani in ITXA 313 of 2013 and CIT v. Prime Developers in ITXA 2452 of 2013, Hon'ble Gujarat High Court in the case of CIT v. President Industries [258 ITR 654], DCIT v. Panna Corporation in Tax Appeal Nos. 323 and 325 of 2000 and also in the case ITA NO.4915 & 5130/MUM/2016 (A.Y: 2011-12) M/s. Sumer Builders of Dhanvarsha Builders and Developers Pvt. Ltd. v. DCIT [102 ITD 375 (Pune)] and DCIT v. Prime Developers in ITA Nos. 175 to 178 and 321 to 324/Mum/2010. Ld. Counsel for the assessee therefore urged that so far as the present year is concerned the profit could not be ascertained since the project is not complete and hence the entire on-money could not be taxed in this year, except to the extent of 10% consistently offered by the assessee.

54. It was further argued as regards Ground Nos. 3 and 4 that the Prabhadevi project from which the on-money cash receipts were generated is still not complete even as on date. Further, the books of accounts of the Assessee have not been rejected by the Assessing Officer or Ld.CIT(A) and therefore, in accordance with its regularly followed accounting policy for income tax purposes, only 10% of incremental project receipts are liable to be offered to tax in the current year and the balance at the completion of the project. Ld. Counsel for the assessee contended that, this treatment has been upheld in various judgements, ACIT v. Guruprerna Enterprises in ITA Nos. 255 to 257, 544 & 545/Mum/2010 and 4836/Mum/2009 (affirmed by the Hon'ble Bombay High Court in CIT v. Guruprerna Enterprises in ITA 1849 of 2011), Fort Projects P. Ltd. v. DCIT [145 TTJ 340 (Kolkata)], Dhanvarsha Builders and ITA NO.4915 & 5130/MUM/2016 (A.Y: 2011-12) M/s. Sumer Builders Developers Pvt. Ltd. v. DCIT [(102 ITD 375 (Pune)] and Runwal Homes Pvt. Ltd. v. DCIT in ITA No. 5621/Mum/2017.

55. Ld. Counsel for the assessee further argued that these grounds were even remanded to the Assessing Officer for his remand report. However, in his remand report, the Assessing Officer has nowhere said that the claim as made by the assessee regarding taxability of on-money is not legally admissible, but simply stated that the claim is not allowable firstly because the same was accepted by Mr. Ramesh Shah in his statement u/s. 132(4) of the Act which was not retracted and secondly because the said claim was not made by way of a revised return. Ld. Counsel for the assessee argued that both the reasons are untenable in view of the fact that the offer of income was under an erroneous understanding of law and there is no bar to make a claim as to taxability before the Appellate Authorities even without filing revised returns.

56. Ld. Counsel for the assessee further argued that, the last reason for the Ld.CIT(A) to dismiss the said grounds was that if the same are entertained it would lead to granting of a relief whereby the assessed income would be below the returned income. Ld. Counsel for the assessee urged that it has been held in various judgements, Gujarat Gas Co. Ltd. v. JCIT [245 ITR 84 (Gujarat)], CIT v. Milton Laminates ITA NO.4915 & 5130/MUM/2016 (A.Y: 2011-12) M/s. Sumer Builders [218 Taxman 108 (Gujarat) (Mag)], that the Assessed Income could well be below the returned income if certain item is taxed which is otherwise not taxable in law.

57. Ld. Counsel for the assessee lastly contended that the apprehension of the Ld.CIT(A) that allowing the said grounds would enlarge the scope of relief or lead to assessed income being below the returned income or change the entire complexion of the case, is totally ill-founded since the entire claim made by the assessee seeking taxation of the on-money at 10% in the current year is in fact a tax neutral exercise, since the same would have to be offered to tax in the year of completion of the project. Thus, it was therefore argued that the said grounds be allowed.

58. Ld. DR vehemently supported the orders of the authorities below. Ld. DR firstly contended that the Ld.CIT(A) has rightly rejected the said grounds raised by the Assessee as additional grounds before him. Ld. DR argued that the claim made by the assessee is not supported by a revised return was therefore not admissible in view of the Judgements of the Supreme Court in the case of Goetze India Ltd. [284 ITR 700 (SC)]. Ld. DR further argued that even otherwise there is no dispute about the receipt of the cash by the Assessee in the relevant year and in that view of the matter the offer has been rightly made and rightly taxed by the ITA NO.4915 & 5130/MUM/2016 (A.Y: 2011-12) M/s. Sumer Builders Assessing Officer irrespective of the year of completion of the project. Ld. DR further relied on the statement of Mr. Ramesh Shah recorded at the time of search and argued that the same has not been retracted and in view of the same, the cash receipts in respect of on-money were liable to be taxed in the relevant year and therefore no fault could be found with the order of the Ld.CIT(A). Ld. DR further argued that if the assessee's ground is allowed then it would amount to granting him relief beyond that claimed in the return and would in effect amount to retracting its own return and accounts. Such an approach is impermissible. Ld.DR next contended that even otherwise the additional grounds are not entertainable in view of the detailed order of the LD. CIT(A). He placed strong reliance on the order of the LD. CIT(A) in this regard.

59. We have heard the rival contentions, perused the orders of the lower authorities and also the material on record including the synopsis and paper books furnished. We find that the Assessee had declared the on-money receipts in its return of income for A.Y 2011-12 pursuant to the statement u/s 132(4) of the Act of Mr. Ramesh Shah made during the search on Sumer Group. The said statement has not been retracted by him. However, it needs mention that as argued by the assessee in the earlier grounds, Mr. Ramesh Shah is not a partner in the Assessee firm.

ITA NO.4915 & 5130/MUM/2016 (A.Y: 2011-12) M/s. Sumer Builders Further, though his statement was not retracted by him, so far as the Assessee is concerned, it is entitled to claim that the offer was wrongly made by it. This fact was even put to the Ld.CIT(A) that the Assessee had erroneously offered the entire on-money as its income under an erroneous understanding of law. It was stated at the bar that post assessment there was a change in the advisor of the Assessee and pursuant to his advice additional grounds were raised before the Ld.CIT(A) claiming that only 10% of the on-money receipts are taxable in the relevant year and the balance is taxable in the year of completion of the project. We find that the Assessee was represented by two different consultants before the Assessing Officer and the Ld.CIT(A) respectively. We further find that, even otherwise, the claim raised by the Assessee is a purely legal claim and the Ld.CIT(A) erred in not admitting the same.

60. Now coming to the merits of the claim, we find that the Assessing Officer has himself accepted that the Assessee is following the project completion method and has accepted the method of

offering income at 10% of the incremental receipts in the project and the balance is carried forward to the year of completion of the project. This method has been consistently followed by the Assessee and has been accepted by the Department in earlier as well as subsequent years. Further, it needs ITA NO.4915 & 5130/MUM/2016 (A.Y: 2011-12) M/s. Sumer Builders specific mention that what has been claimed by the assessee is nothing but postponing the recognition of income to the year in which the project gets completed pursuant to the method regularly followed and even accepted by the Department every year. It is also not in dispute that the on-money is nothing but part of sale consideration of the flats and parking were sold by the assessee. When once it is part of sale consideration only 10% of such on money is liable to be taxed in this assessment year as per consistent method of accounting followed by the assesse. Thus, the grounds on this issue deserve to be allowed merely on the principle of consistency as laid down by the Hon'ble Supreme Court in the case of Radhasoami Satsang [193 ITR 321, 1992 AIR 377] and CIT v. Excel Industries [358 ITR 295 (SC)]. Further, admittedly the on-money is merely receipts of sale proceeds as noted by the Assessing Officer in his order at Page No. 3 and what could be taxed is only income and not receipts. We further note that in various judgements relied on above it has been categorically held that on-money receipts are in the nature of sale price and not income per se. In the case of CIT v. President Industries [258 ITR 654 (Guj)] it has been held that the entire sum of undisclosed sale proceeds cannot be treated as income. Similar view has been taken by the Hon'ble Bombay High Court in the case of CIT v. Hariram Bhambhani ITA NO.4915 & 5130/MUM/2016 (A.Y: 2011-12) M/s. Sumer Builders in ITXA No. 313 of 2013. Further in the case of Guruprerna Enterprises (supra) relying on Abhishek Corporation v. DCIT [63 TTJ (Ahd) 651] it has been held as under: -

> "Even though it is established from seized documents that assessee was receiving premium/'on money' on booking of flats belonging to third parties, entire receipts of 'on money'/premium cannot be treated as undisclosed income of assessee; only net profit rate can be applied on unaccounted sales/receipts for making addition."

The other judgements relied on by the assessee also support its case. The Ld. DR has not brought on record any contrary judgements. We, therefore, agree with the consistent view expressed in these judgements that on-money receipts are in the nature of undisclosed receipts and not income per-se and therefore only profit element embedded therein be liable to be taxed and not the entire on-money receipts.

61. Now coming to the next aspect of the matter as to the year of taxability of on-money. We find that in the case of Dhanvarsha Builders (supra) cited by the Assessee the Pune Bench of the Tribunal held as under: -

> "... The third issue in this case is whether the amount will be taxable in assessment year 1996-97 or in some other year. The case of the learned counsel was that the assessee has been following project completion method for computing its profits. This has been demonstrated by referring to the returns already filed by the assessee where only day-to-day expenses were claimed and, ITA NO.4915 & 5130/MUM/2016 (A.Y: 2011-12) M/s. Sumer Builders therefore, it transpires that the assessee has been following project completion method. This is also clear from the discussion on page 1

of the assessment order under the head "Part-B". The conduct of search and seizure operation in a particular year does not lead to an inference that the undisclosed income detected as a consequence thereof has to be taxed in the assessment year relevant to the previous year in which search was conducted. In other words, accounting of profits have yet to be made on the basis of method of accounting followed by the assessee. No elaborate discussion has been made in this regard in the assessment order. Therefore, it would be appropriate that this matter is restored to the file of the Assessing Officer to find out the method of accounting, namely, whether the assessee has been accounting the profits-(i) on year to year basis, (ii) on sale basis or (iii) on project completion method. The impugned undisclosed income of Rs. 14.74 lakhs may be brought to tax as per the method of accounting of the assessee. Accordingly, it is held that the undisclosed income of the assessee amounted to Rs. 14.74 lakhs, which is taxable as per the method of accounting followed by the assessee for recognition of the income"'.

62. This has been followed by the Mumbai Bench of the Tribunal in the case of Guruprerna Enterprises (supra), holding that on-money received is taxable in the year of completion of the project and not in the year of receipt. The said judgement has been affirmed by the Hon'ble Jurisdictional High Court in the case of CIT v. Guruprerna Enterprises. The Revenue has failed to bring on record any contrary decisions and as such, respectfully following the same, we hold that only 10% of the on-money receipts are liable to be taxed in the relevant assessment year and the balance at the time of completion of the project based on the project completion method regularly followed by the Assessee which has ITA NO.4915 & 5130/MUM/2016 (A.Y: 2011-12) M/s. Sumer Builders been approved even by the Department consistently every year in the earlier as well as subsequent years.

63. The other arguments raised by the Ld. DR in respect of non-filing of revised return to make this claim are addressed by the judgements of the Honourable Supreme Court in the case of NTPC (supra) and Pruthvi Brokers (supra). We also note that it is by now a settled law that assessed income could be below the returned income of an Assessee and any circulars contrary to the same are void as held in the case of CIT v. Gujarat Gas Ltd. [245 ITR 84 (Gujarat)] and other judgements cited above. In any case we find that the grievance of the Ld. DR that allowing this ground will amount to retraction of the returns and statement of the Assessee are concerned, we find that the same stands addressed by the judgements in the case of Nirmal L Mehta (supra) holding there is no estoppel against statute and the assessee could claim that its income is not taxable even if the same is offered in the return of income. In the cases of Abdul Qayumme (supra) and SAIL DSP (supra) it has been held that no amount of admission could lead to taxing an item if it is not otherwise taxable under the Act. In view of the above facts and judicial precedents, we find in favour of the Assessee and Grounds Nos. 2,3 and 4 are allowed.

ITA NO.4915 & 5130/MUM/2016 (A.Y: 2011-12) M/s. Sumer Builders

64. Now we take up the next ground, Ground No. 5 of the Assessee's Appeal and the Grounds raised in the Department's appeal since these grounds arises on the same issue of disallowance of interest

expenditure. During the relevant year, the assessee had incurred an amount of .14.94 Crores as interest on borrowed capital which was added to WIP. The Assessing Officer held that the entire interest is not allowable since the same is on borrowings diverted by the Assessee to its sister concerns for non-business purposes. The Ld.CIT(A) after remanding the issue to the Assessing Officer, held that out of the total loans of approximately .222 Crores, the amount of .49 Crores (approximately) was utilized for the purpose of business of the Assessee. This was held relying upon the findings of the Assessing Officer himself in his remand report. The interest pertaining to the said loans was ordered to be allowed and the balance disallowance was confirmed by him. Against the part of interest expenditure allowed by the Ld.CIT(A) the Department is in appeal and against the disallowance confirmed by him the Assessee is in appeal.

65. The Ld. Counsel for the assessee at the outset referring to Page Nos. 25, 122 to 132 of paper book and relying on the judgements in the case of Hero Cycles Pvt. Ltd. v. CIT [379 ITR 347 (SC)], CIT v. Reliance Utilities and Power Ltd. [313 ITR 340 (Bombay)] and CIT v. HDFC Bank ITA NO.4915 & 5130/MUM/2016 (A.Y: 2011-12) M/s. Sumer Builders Ltd. [366 ITR 505 (Bombay)] contended that it had sufficient owned funds in order to advance the same to the sister concerns and as such no disallowance could be made u/s 36(l)(iii) of the Act on the ground of diversion of borrowed funds. He further contended that even otherwise, it was not disputed by the Assessing Officer or the Ld.CIT(A) that the assessee as well as its sister concerns are in the same line of business and that any impact or lag in any of the projects carried out by them is likely to impact the group as a whole. As a result of the above it was necessary to keep the projects on-going without any disruption due to lack of funds. Thus, the funds were advanced so as to ensure no damage to the projects carried on by the Assessee. Such utilization of funds was also for the purpose of business of the Assessee and this proposition was upheld in the case of Hero Cycles Pvt. Ltd. v. CIT [379 ITR 347 (SC)], CIT v. Reliance Communication Infrastructure Ltd. [260 CTR (Bom) 159], Hindalco Industries Co. v. CIT [389 ITR 430 (Allahabad)] and ACIT v. Nishta Mall Management Pvt. Ltd. in ITA No. 2747/Mum/2013.

66. Ld. Counsel for the assessee further contended that on the amount of loan of .20 crores said to be diverted to Mr. Ramesh on which disallowance was sustained, referring to Page No. 208 of Paper Book it is submitted that the assessee had actually received interest (refer page 208 ITA NO.4915 & 5130/MUM/2016 (A.Y: 2011-12) M/s. Sumer Builders of paper book) which was offered to tax and as a result the disallowance of interest on this amount was not proper.

67. As regards the Department's appeal Ld. Counsel for the assessee contended that the Ld.CIT(A) has deleted the disallowance referring to and relying upon the remand report of the Assessing Officer himself and therefore the Department was not justified in sustaining the disallowance on such amount.

68. On the other hand, the Ld. DR has contended that that the Assessing Officer has made an analysis of the utilization of funds in his remand report and thereafter held that the amount of interest was rightly disallowable. Ld. DR further heavily relied on the order of the Assessing Officer in order to contend that the disallowance of interest was justified in the present case.

69. We have heard the rival contentions and perused the order of lower authorities as well as the material on record including the synopsis and the paper books as furnished. We note that the Ld. DR has not controverted the fact that the assessee had sufficient amount of interest free funds available with it in order to advance the same to its sister concerns. Even otherwise, the Honourable Jurisdictional High Court has ITA NO.4915 & 5130/MUM/2016 (A.Y: 2011-12) M/s. Sumer Builders in the case of Reliance Communication Infrastructure (supra) observed as under: -

> "Where the assessee, as in the present case, has significant interest in the business of the subsidiary and utilizes even borrowed money for furthering its business connection, there is no reason or justification to make a disallowance in respect of the deduction which is otherwise available under Section 36(l)(iii) of the Act...In the present case, when the assessee advanced an amount to RIL that was with a view to furthering the business of the assessee. RIL in turn was to execute counter guarantees in favour of financial institutions for the benefit of the discharge of the EPCG obligations by the assessee. That was a security for the guarantees which those institutions were required to execute under the EPCG Scheme. The funds which were invested in the wholly owned subsidiary were again for the purposes of the business of the assessee. There is evidently a significant interest of the assessee in the business of its subsidiary since both the assessee and the subsidiary are engaged in providing telecommunication services. Consequently, we are not inclined to interfere with the order of the Tribunal. There is a finding of fact that interest free funds borrowed are not utilized for the purposes of both the transactions. But quite apart from that, the finding is that the funds were deployed as a matter of commercial expediency and to further the business of the assessee. The latter finding is independent of whether borrowed funds were or were not utilized, for in view of the judgment of the Supreme Court held, the fact that borrowed funds were utilized for making investments or, as the case may be, for making advances would not disentitle the assessee to the deduction so long as business expediency exists"

70. A similar view has been taken in the case of Nishta Mall (supra) wherein again it has been held as under: -

> "Ld. counsel for the assessee before us clearly stated that the assessee and its sister concerns are engaged in the business of real estate and this fact was argued before LD. CIT(A) by assessee. He explained that the assessee has embarked upon setting up ITA NO.4915 & 5130/MUM/2016 (A.Y: 2011-12) M/s. Sumer Builders malls/business centre in a very big way in India. Developing and managing malls/shopping complexes is a very complex specialized business activity. It requires huge capital investment, manpower and, above all, expertise and knowledge in retail market and consumer behavior. The sister concerns of the assessee were in mall management and development business since many years due to which they had acquired relevant expertise and knowledge in the field of Mall Management Co. Ltd. As these concerns were already in mall business and the assessee had advanced amounts to these concerns as a part of its short term and long term strategy to expand its mall

business, including construction of premises for the assessee in popular commercial centre for enabling the assessee to establish itself mall business. In view of the above facts and circumstances, we are of the view that the LD. CIT(A) has rightly deleted the disallowance of interest and we confirm the same. This ground of revenue's appeal is dismissed."

71. The Ld. DR has not controverted this basic fact as stated by the Assessee, that the Assessee as well as its sister concerns were in the same line of business. In view of the said facts and the law as laid down by the above judgements, the disallowance made by the Assessing Officer and as affirmed by the Ld.CIT(A) deserves to be deleted.

72. So far as the Department's appeal is concerned, admittedly the same is agitating against the relief granted by the Ld.CIT(A) relying upon the Remand Report of the Assessing Officer himself. In our view, when the Assessing Officer has himself held that the borrowing is for the ITA NO.4915 & 5130/MUM/2016 (A.Y: 2011-12) M/s. Sumer Builders purpose of business and after considering the same the Ld.CIT(A) has deleted proportionate disallowance, then the same must be affirmed. In view of the above we reject the grounds raised by the Department.

73. In the result, appeal of the assessee is partly allowed as indicated above and appeal of the Revenue is dismissed.

Order pronounced on 08.01.2021 as per Rule 34(4) of ITAT Rules by placing the pronouncement list in the notice board.

Sd/-	Sd/-
(M. BALAGANESH)	(C.N. PRASAD)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Mumbai / Dated 08/01/2021
Giridhar, Sr.PS

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file. //True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum