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

BEFORE SHRI PRASHANT MAHARISHI, AM
AND
MS. KAVITHA RAJAGOPAL, JM

ITA Nos. 2004 & 2005/Mum/2021
(Assessment Years: 2017-18 & 2018-19)

Aurum Platz Private Limited Gen 4/1, Industrial Area, Thane Belapur Road, Ghansoli, Navi Mumbai -400 710 **PAN No. AACCKK2851Q** **(Appellant)**	Vs.	The Deputy Commissioner of Income Tax Central Circle 8(4) Room No.659, 6th Floor, Aaykar Bhavan Maharshi Karve Road, Mumbai-400 051 **(Respondent)**

ITA Nos. 2300, 2301 & 2302/Mum/2021
(Assessment Years: 2015-16, 2016-17 & 2018-19)

The Deputy Commissioner of Income Tax Central Circle 8(4) Room No.659, 6th Floor, Aaykar Bhavan Maharshi Karve Road, Mumbai-400 051 **(Appellant)**	Vs.	Aurum Platz Private Limited Gen 4/1, Industrial Area, Thane Belapur Road, Ghansoli, Navi Mumbai -400 710 **(Respondent)**

Revenue by : Smt Shailja Rai, CIT DR
Assessee by : Shri Sashi Tulsiyan, AR

Date of hearing: 23.03.2023
Date of pronouncement : 20.06.2023

O R D E R

PER BENCH:-

01. This is the bunch of five appeals in case of Aurum Platz Private Limited [the Assessee/ Appellant] for three different assessment years i.e. AY 2015-16 to 2017-18. The assessee has filed two

appeals against Appellate orders passed by The Commissioner of Income Tax (Appeals)- 50, Mumbai [the ld CIT (A)] of the Act for A.Y. 2017-18 and A.Y. 2018-19 and The Deputy Commissioner of Income Tax Central Circle 8(4), Mumbai [The ld AO] has filed three appeals against appellate orders passed the Ld CIT (A) of the Act for A.Y. 2015-16, A.Y. 2016-17 and A.Y. 2018-19.

02. Assessee has raising the following Grounds of Appeal:

For A.Y. 2017-18:

(i) On the facts and in the circumstances of the case and in law, the Ld. CIT (A) erred in upholding the action of the Assistant Commissioner of Income Tax, Central Circle -8(4), Mumbai ("the Ld. AO") assessing the capital gain from sale of investment property by the Appellant under the head "Profit and Gains of Business or Profession" instead of "Income from Capital Gain".

(ii) The Appellant, therefore, prays that the action of the Ld. CIT (A) confirming action of the Ld. AO in treating the gain from sale of investment property as "Profit and Gain from Business or Profession" instead of "Income from Capital Gain" be held as ab inito or otherwise bad in law.

For A.Y. 2018-19:

(i) On the facts and in the circumstances of the case and in law, the Ld. CIT (A) erred in upholding the action of the Assistant Commissioner of Income Tax, Central Circle -8(4), Mumbai ("the Ld. AO") assessing the capital gain from sale of investment property by the Appellant under the head "Profit and Gains of Business or Profession" instead of "Income from Capital Gain".

(ii) The Appellant, therefore, prays that the action of the Ld. CIT(A) confirming action of the Ld. AO in treating the gain from sale of investment property as "Profit and Gain from Business or Profession" instead of "Income from Capital Gain" be held as ab inito or otherwise bad in law

(iii) On the facts and circumstances of the case and in law, the Ld. CIT (A) erred in confirming the addition made by the Ld. AO of Rs. 20,00,000/- on the ground of alleged unexplained expenditure u/s 69C of the Act.

(iv) The Appellant prays that the addition made on account of unexplained expenditure amounting to Rs. 20,00,000/- be deleted.

(v) On the facts and circumstances of the case and in law, the Ld. CIT (A) erred in upholding the disallowance made by the Ld. AO u/s 14A of the Act to the extent of exempt income earned by the Appellant.

(vi) The Appellant prays that the disallowance u/s 14A of the Act read with rule 8D be deleted or appropriately reduced.

03. The ld AO has raised following Grounds of Appeal:

For A.Y. 2015-16:

i. On the facts and circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals)-50, Mumbai, has erred in treating the proceeds received on sale of flats under consideration as capital gain, without appreciating the facts that the Investigation Wing has carried out thorough investigation to determine the actual object of the assessee company and the information unearthed by the Investigation Wing during the course search leads to the finding that intention of the assessee was never to lease out the property but merely work as a builder and developer.

ii. On the facts and circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals)-50, Mumbai, has erred in not appreciating that on similar grounds in the assessee's own case, he has confirmed the action of the AO in treating the capital gain as

business income and deleted the disallowance of interest u/s 36(1)(iii) in the order u/s 153A r.w.s. 143(3) dated 30.12.2019 for A.Y. 2017-18 and in the order u/s 143(3) dated 30.12.2019 for A.Y. 2018-19.

iii. On the facts and circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals)-50, Mumbai, has erred in deleting the disallowance u/s 36(1)(iii) of the Act amounting to Rs. 11,23,58,808/- without considering the detailed findings of the Assessing Officer that the investments made by the assessee are capital in nature and emanating from information unearthed by the investigation wing during the course of search on Aurum Group which are incriminating in nature.

For A.Y. 2016-17:

(i) On the facts and circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals)-50, Mumbai, has erred in treating the proceeds received on sale of flats under consideration as capital gain, without appreciating the facts that the Investigation Wing has carried out thorough investigation to determine the actual object of the assessee company and the information unearthed by the Investigation Wing during the course search leads to the finding that intention of the assessee was never to lease out the property but merely work as a builder and developer.

(ii) On the facts and circumstances of the case and in law, the learned Commissioner of Income Tax

(Appeals)-50, Mumbai, has erred in not appreciating that on similar grounds in the assessee's own case, he has confirmed the action of the AO in treating the capital gain as business income and deleted the disallowance of interest u/s 36(1)(iii) in the order u/s 153A r.w.s. 143(3) dated 30.12.2019 for A.Y. 2017-18 and in the order u/s 143(3) dated 30.12.2019 for A.Y. 2018-19.

(iii) On the facts and circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals)-50, Mumbai, has erred in deleting the disallowance u/s 36(1)(iii) of the Act amounting to Rs. 2,27,56,748/- without considering the detailed findings of the Assessing Officer that the investments made by the assessee are capital in nature and emanating from information unearthed by the investigation wing during the course of search on Aurum Group which are incriminating in nature.

For A.Y. 2018-19:

i. Whether on facts and circumstances of the case and in law, the Ld. CIT (A) was right in restricting the disallowance u/s 14A to the extent of exempt income earned by the assessee which is contrary to CBDT Circular No. 5/2014 which clarifies that Rule 8D r.w.s. 14A of the Act provides for disallowance of the expenditure even where taxpayer in a particular year has not earned any exempt income.

04. During the course of hearing assessee made a prayer for admission of Additional Ground of Appeal for A.Y. 2017-18 and A.Y. 2018-19 which are identical reads as under:

> "That in the facts and in the circumstances of the case and in law, the Ld. CIT-(A) erred in directing the Assessing Officer to treat the unsold flat as 'Stock-in-Trade' instead of 'Investment' which was not the subject matter of assessment thereby travelling beyond the scope of assessment."

05. After hearing the parties we find that it is a connected issue to the main issue in appeal. No fresh facts are required to be adjudicated. It is challenge to the power of the ld CIT (A) to give a direction which was not subject matter of appeal before him. Therefore this ground of appeal is admitted.

06. On perusal of grounds of appeal raised by the parties, certain common issues across different assessment years arose which are as under:

(i) Whether income from sale of flats is chargeable to tax under the head 'Profits and Gains of Business or Profession' or under the head 'Capital Gains';

(ii) Disallowance of interest expenditure u/s 36(1)(iii) for A.Y. 2015-16 and A.Y. 2016-17;

(iii) Additions made under section 153A of the Act for 'unabated years' i.e. for A.Y. 2015-16 and A.Y. 2016-17.

(iv) Treatment of Unsold flat as 'Stock-in-Trade' vis-à-vis Investment as shown by assessee in its return of income.

07. Two more independent issues which arise out of the appeals are as under:

(i) Addition of Rs. 20,00,000 u/s 69C of the Act on account of unexplained expenditure for A.Y. 2018-19.

(ii) Restriction of disallowance u/s. 14A of the Act r.w.r. Rule 8D of the Income Tax Rules, 1962 to Rs. 18,25,272/- being the amount of exempt income earned by the assessee for A.Y. 2018-19.

08. Lead appeal is appeal filed by the ld AO in ITA No. 2300& 2301/MUM/2021 for A.Y. 2015-16 and A.Y. 2016-17 respectively for unabated years:

ITA No. 2300/MUM/2021
[A.Y. 2015-16]
[By the ld AO]

09. Brief facts of the case are that the assessee filed its return of income [ROI] for AY 2015-16 on 30.10.2015 at income of Rs. 5,47,45,408/-. ROI was picked up for scrutiny and resulted in to assessment u/s 143(3) of the Income tax Act [The Act] on 23.12.2017 at returned income.

10. Search and seizure action u/s. 132(1) of the Act was carried out in case of the Aurum group and other related entities and persons on 22.03.2018 by The DDIT(Investigation) Unit-6(1), Mumbai. Consequently, notice u/s 153A of the Act was issued. In pursuance to the same, the assessee filed ROI on 17.07.2019 at Rs.5, 47, 45,408/-.

11. The LD AO made additions pertaining to income on sale of flats under the head 'Income from Business & Profession' which was offered by assessee under the head 'Capital Gains'. the ld AO also disallowed interest u/s 36(1)(iii) of the Act for following reasons :-

a. Assessee Company was incorporated on 25.09.2003 under the Companies Act, 1956 under the name 'Kupendra Builders Pvt. Ltd.' with a main object, to own buildings/ apartments and lease out those apartments on a long term basis for earning Rental Income.
b. Subsequently, the assessee company changed its name from 'Kupendra Builders Pvt. Ltd.' to 'Aurum Platz Pvt. Ltd.' w.e.f. 04.02.2011 and also altered its Memorandum of Association on 17.02.2011.
c. The main object clause of the assessee company after the alteration of MOA read as under:

> "To own and let out apartments in the building situated at C. S. No. 406, Part-I bearing D ward no. 2574(3), Street No. 58-70, 6A, Chowpatty Road of Malabar Hill Division at Pandita Ramabai Road, Babulnath Cross Lane, Mumbai – 400007 also known as Aurum Platz for rent."

d. The assessee company, before altering its MOA, in line with its objects had already purchased a plot of land on 31.01.2008 at C. S. No. 406, Part-I bearing D ward no. 2574(3), Street No. 58-70, 6A, Chowpatty Road of Malabar Hill Division at Pandita Ramabai Road, Babulnath Cross Lane, Mumbai – 400007 which was shown as investments in its Audited Financial Statements.
e. Assessee Company commenced the construction of the building on the said piece of land on 25.02.2010 and the occupation certificate of the project was received by the company on 05.09.2013. The project was finally named as '7, Marine Drive' which consisted of 7 duplex apartments in the 20 storied building. The total cost of construction including land declared by the company is Rs. 40.93 crores.
f. Sequence of events shows as under :-

Sr. No.	Particulars	Date
1.	Formation of Company as 'Kupendra Builders Pvt. Ltd.'	25.09.2003
2.	Purchase of Land for the purpose of constructing the building	31.01.2008
3.	Commencement of Construction of Building	25.02.2010
4.	Date of Change in name of the company	04.02.2011
5.	Date of Alteration of MOA	17.02.2011
6.	Receipt of Occupancy Certificate	05.09.2013

g. Units constructed by the assessee company are high end residential units intended to be leased out as a bare shell unit as each lessee may have different preferences and a standard furnishing would have restricted marketability and user preferences , thus, ability to target a larger segment. Common areas of the building were fully designed as per the good standards and the assessee company would furnish the common areas as per rational standards whereas the specific units would be furnished in accordance with the preferences of prospective lessees.

h. Assessee started to look for the prospective tenants like High Net-worth Individuals (HNIs), Diplomats etc. to enter into a long-term lease agreement after the construction of building was substantially completed but before the receipt of completion certificate. For this purpose, the assessee appointed broker -'M/s. Reflex Realty' and availed its marketing services to invite prospective lessees. However, even after substantial amount of time and efforts, broker was unable to procure a single tenant which was informed by the broker to the assessee. To substantiate this claim,

the assessee submitted copy of correspondence letters with the broker before LD AO per submission dated 23.12.2019. In the meantime, the assessee started getting inquiries from people who were interested in buying the property and since there was no prospect of a lessee in sight, assessee sold one of the apartments vide the sale deed dated 11.07.2014.

i. Before the LD AO assessee also claimed that since there was no prospective tenant in sight, it had to sell one of the apartments to recoup a part of the investment made by it towards the construction of the building.

j. The LD AO was of the view that the conduct of the assessee company was not in line with the main object clause of the company and that the assessee company was operating as a builder and developer and not as an investor.

k. Accordingly, he denied the claim of the assessee company of taxing the proceeds from sale of flats under the head "Capital Gains" and brought the said proceeds to tax under the head "Profits and Gains from Business and Profession".

12. The Assessing Officer also disallowed the interest claim of the assessee u/s 36(1)(iii) amounting to Rs. 11,23,58,808/- on the ground that amount of investment at the year-end is higher than the amount of interest-bearing loans taken by the assessee, therefore there is presumption that interest bearing funds have been used for non interest bearing investments.

13. Consequently assessment order us/ 153 A rws 143(3) of the Act was passed on 30/12/2019 determining the business income of the assessee and total income at Rs. 19,09,96,845/-. So the treatment of profit on sale of flats as long term capital gain was treated as business income of the assessee and also denying interest deduction u/s 36(1) (iii) of the Act.

14. Aggrieved, assessee preferred appeal before the LD CIT (A) who passed appellate order on 30/8/2021 holding that year under consideration is an unabated year in terms of provisions of Section

153A of the Act as no proceedings were pending under the act in relation to the said year on the date of search u/s 132. He further observed that the additions made by the AO were not based on any incriminating material found and seized during the course of search proceedings. Accordingly, he deleted the additions made by the Assessing officer on the ground that the impugned action of the AO in treating capital gain on sale of flats under consideration as 'business income' and disallowance of interest expenses u/s 36(1)(iii) has not been made on the basis of "books of account or other documents not produced in the course of original assessment but found in the course of search relying up on decision of Honourable Bombay High court in CIT V Continental warehousing Corporation [58 taxman .com 78] and various other judicial precedents without going into the merits of the case.

15. At the time of hearing, the Ld. DR, to substantiate that the addition/disallowance made by the AO were on the basis of incriminating material found and seized during the course of search action filed an application on 04.10.2022 under Rule 27 of the ITAT Rules to admit 'Additional Evidence' citing the reason that due to a major fire incident at Level IV Scindia House on 01.06.2018 all the material/documents including digital data was destroyed and only certain copies of seized documents were handed over to AO. The documents submitted through this application comprised of Board Resolution passed by the Board of Directors of the assessee company, copy of escrow account agreement entered with and undertaking given to IFCI Ltd. and copy of communication with the holding company of the assessee namely Aurum Ventures Pvt. Ltd. and IFCI Ltd. Later on, letter dated 22.12.2022 was filed by the Ld. DR wherein it was stated that in the application filed on 04.10.2022 Rule 29 of the ITAT Rules was inadvertently mentioned as Rule 27 and accordingly the same may be read as 'application under Rule 29 of the ITAT Rules'. Another piece of additional evidence was submitted by the Ld. DR during the course of hearing on 08.03.2023 in the form of

Memorandum of Association of the assessee company entered at the time of its incorporation.

16. The Ld. AR opposed the admissibility of these Additional Evidences and also the relevance and evidentiary value of the documents comprising such additional evidences. It was submitted that Rule 27 of the ITAT Rules does not provide for any application of additional evidence and that merely filing a letter admitting inadvertent error was not reason enough to rectify the mistake made by the revenue. That an affidavit should have been filed in terms of Rule 10 of ITAT Rules. It was also argued by the Ld. AR that the documents sought to be admitted under the garb of additional evidence were nothing but part of regular records and books of accounts maintained by the assessee which could have been very well called for by issue of notice dated 142(1) during the course of assessment proceedings. These documents did not relate to any undisclosed income of the assessee unearthed during the course of search proceedings and accordingly they cannot be termed as incriminating evidences or material for making any addition/disallowance in the hands of the assessee.

17. We have perused the material on record, the orders passed by the lower authorities and have given our thoughtful consideration to the contentions placed by the Ld. DR and Ld. AR. The crux of the matter under appeal which needs adjudication is whether addition or disallowance can be made during the course of assessment proceedings u/s 153A if no incriminating material or evidence was found during the course of search action in relation to those addition and disallowance. It is a settled position in law that completed assessments can be interfered with by the AO while making the assessment under Section 153A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original

assessment. Thus, it is sufficiently clear that the additions made during the course of assessment proceedings u/s 153A can only be made on the basis of incriminating material found and seized during the course of search and the earlier proceeding which has attained finality cannot be disturbed.

18. In the present case, the assessment proceeding for the year under consideration, was completed vide order dated 23.12.2017 u/s 143(3) of the Act i.e. before the date on which search was conducted. The addition made by the AO by treating the proceeds from sale of flats as income under the head 'Profits and Gains from Business and Profession' and disallowance of interest expenditure u/s 36(1)(iii) was not based on any 'incriminating material' seized during the course of search proceedings. This is evident from the fact that there is absolutely no reference of any incriminating material by the Assessing Officer in his assessment order. The documents relied upon by the AO were part of regular books of accounts maintained by the assessee and did not pertain to any undisclosed income earned by the assessee company.

19. It is the grievance of Ld CIT DR that ld CIT (A) had decided the appeal in favour of the assessee without appreciating that the Investigation Wing had carried out thorough investigation to determine the actual object of the assessee company and the information unearthed during the course of search proceedings leads to finding that intention of the assessee was never to lease out the apartments but act as a builder and developer.

20. We are not in agreement with the contention of the Ld CIT DR, for the reason that the treatment of income received from sale of apartments as business income of the assessee, was made by the AO based on the regular books of accounts maintained by the assessee and details called for during the course of assessment proceedings u/s 153A of the Act. There was no reference of any

incriminating material found during the course of search in the assessment order.

21. There is nothing on record which suggests that there was any undisclosed income earned by the assessee based on any material found during the year.

22. Even otherwise , the Ld CIT DR has submitted Board Resolution dated 26, November 2013 , escrow agreement, undertakings to lenders and security package where in the company intends to borrow money from IFCI limited. For this purposes various formalities are carried out, same is also reflected in its books of accounts. Naturally for borrowing, escrow accounts are to be opened and fixed deposits are to be pledged, further securities are to be given. Further the loan was not give of Rs 115 Crores to Assessee Company. As per undertaking at page no 24 of the submission of the LD CIT DR, the loan was given to Aurum ventures private Limited, which is holding company of the assessee for acquisition of 100 % shares of LOMA IT park developers Pvt Ltd by Aurum ventures Pvt Ltd. Repayment of loan is also stated to be, if flats are sold, sale proceeds to be deposited in escrow account only. This is the requirement of lender for loan given to holding company of the assessee and cannot decide the characterization of income in the hands of assessee. Further the documents are pertaining to loan obtained by aurum ventures private limited and are not of Assessee i.e. Aurum Platz private Limited. Thus these are, even if admitted, does not become incriminating material found during the course of search which has any impact on the taxability of unaccounted income of the assessee.

23. We find that additional evidence was part of regular records maintained by the assessee, more precisely it is statutory record under the companies act such as Minutes of meetings etc., and its holding company, and did not relate to any undisclosed income earned by the assessee. Even if such documents are admitted as

additional evidence, it did not have any bearing on the issue since these documents were executed during the period after which the assessee had decided to sell the apartments as there was no prospective tenant in sight. Thus, these documents cannot be a deciding factor to determine whether the intention of the assessee was to sell the apartments or hold it as an investment from the time of its incorporation.

24. Thus, we do not find any infirmity in the order of the LD CIT (A) in holding that there is no incriminating material found during the course of search to treat the income offered as capital gain on sale of flats as business income of the assessee. In our view, such additions made without any reference to incriminating material, cannot be permitted as it is against the provisions of the Act and also the decisions rendered by Hon'ble Bombay High Court and confirmed by Hon'ble supreme court in **[2023] 149 taxmann.com 399 (SC).**

25. As regards issue of disallowance made u/s 36(1) (iii) of the Act by the Assessing Officer, we find that there is no incriminating material on record to justify such disallowance. The said disallowance has been made by the AO without making reference to any incriminating material which is evident from the assessment order.

26. Accordingly we confirm the decision of LD CIT (A) and dismiss appeal of LD AO.

ITA No. 2301/MUM/2021

[A.Y. 2016-17]

[By the LD AO]

27. This appeal was also filed by the revenue challenging the order of Commissioner (Appeals)-50, Mumbai dated 30.08.2021. The Grounds of Appeal raised by the revenue, the facts of case in the present appeal are identical to the Grounds raised, facts of the case in ITA No. 2300/MUM/2021 for A.Y. 2015-16 with the only

difference of quantum of addition/ disallowances made. Thus, for the reason given by us in ITA No. 2300/MUM/2021 for A.Y. 2015-16 , the present appeal ITA No. 2301/MUM/2021 for A.Y. 2016-17 , order of the ld CIT (A) is confirmed and appeal of the ld AO is dismissed.

ITA Nos. 2004 & 2005/MUM/2021

For A.Y. 2017-18 and A.Y. 2018-19

By Assessee

28. Now we come to appeals filed by the assessee in ITA Nos. 2004 & 2005/MUM/2021 for A.Y. 2017-18 and A.Y. 2018-19 respectively, challenging the order of Commissioner (Appeals)-50, Mumbai wherein he has sustained the action of the AO of treating the proceeds received on sale of flats as income under the head 'Profits & Gains of Business and Profession' as against 'Capital Gains' declared by the assessee company in its Return of Income. These two years under appeal i.e. A.Y. 2017-18 and A.Y. 2018-19 are abated years in terms of provisions of Section 153A of the Act as the proceedings in relation to those years were 'pending' as on the date of search i.e. 22.03.2018 and thus need to be adjudicated on merits of the case as per the provisions of section 153A of the Act.

ITA No. 2004/MUM/2021

[A.Y. 2017-18]

[By Assessee]

29. As the ITA Nos. 2004 & 2005/MUM/2021 for A.Y. 2017-18 and A.Y. 2018-19 issue involved is that whether the income on sale of flats is chargeable to tax under the head capital gain as contended by assessee or under the head income from Business or profession as claimed by revenue. This is the concurrent finding of ld AO and Ld CIT (A) . Since the facts of the case with respect to the said issue are already discussed in detail while adjudicating the appeal in ITA No. 2300/MUM/2021, we proceed to record findings and contentions.

30. The main contention of the Ld. AR is that

i. The primary objects of the assessee company was 'to own and let out' apartments in the building at the specified location and 'earn rental income' out of the said activity which is evident from the main object clause of the company enunciated in its Memorandum of Association.

ii. That the assessee made conscious efforts to LEASE the flats by invoking services of a broker which is evident from the correspondence made with the broker. However, due to non-availability of the tenant the assessee could not lease out the apartments and had to sell the flats to recoup a part of the huge investment made by it in the project.

iii. as evident from facts on record, the assessee company did not sell the apartments within a period of one or two years from the date of commencement of construction or from the date of receipt of occupancy certificate, but it continued to hold the properties for long term i.e. for a period spanning from 5 to 13 years with respect to different apartments, hoping that they would find tenants for the property.

iv. That these apartments were not sold in a short span of time i.e. within a year or two as it is in the case of a typical builders and developers. Rather, these flats were sold over a substantially long period of 4 different assessment years which is a clear indication of the intention of the assessee of holding the said apartments as investment and not as stock in trade.

v. Holding Period during which the flats were held by the assessee company from the date of

commencement of construction and receipt of occupancy certificate were tabulated as follows:

Assessment Year	Date of Agreement	Time lapsed from the date of commencement of Construction	Time lapsed from the date of receipt of occupation certificate	Apartment No.
2015-16	July 11, 2014	4 years, 5 months	10 months	5
2016-17	May 07, 2015	5 years, 3 months	1 year, 8 months	3
2016-17	June 12, 2015	5 years, 4 months	1 year, 9 months	6
2016-17	December 29, 2015	5 years, 10 months	2 years, 3 months	2
2017-18	January 19, 2017	6 years, 11 months	3 years, 4 months	1
2018-19	September 21, 2017	7 years, 7 months	4 years	4

vi. Assessee had sold 6 out of the 7 constructed apartments over a period of 4 to 8 years from the date of commencement of construction and it still holding the 7th apartment as investment which has been leased out and against which it is earning rental income.

vii. Thus, assessee had a clear intention of holding the apartments as 'investment' and 'leasing it out' to the prospective tenants to earn rental income which could not be done due to lack of availability of such prospective tenants even after conscious efforts were made by the assessee.

viii. Intention of the assessee is further substantiated by the treatment of expenses incurred in relation to construction of the apartments i.e. all the expenditure was capitalized in the books of accounts maintained by the assessee company and classified as 'investment' right from the year when the land was purchased by the assessee till date.

ix. No changes or deviation has been made in relation to treatment and classification of apartments at any point in time.

x. Assessee never incurred any expenditure in relation to advertisement or promotion of the project in order to sell the apartments which are a very common practice in case of a person engaged in the business of builder and developer where most of the flats are already booked and sold even before the construction activity is completed.

xi. Assessee sold its first apartment 10 months after receipt of the occupancy certificate and 4 years and 5 months from date of commencement of construction and it still continues to hold the 7th flat which is leased out and against which it is earning rental income.

xii. It did not have any booking advances from the parties at all after start of construction or on completion thereof.

xiii. Assessee also did not enter in any other similar venture with a view to make profits by engaging in the activity of trading of properties.

xiv. Act of selling the apartments by the assessee did not have the essential elements of 'adventure in the nature of trade' i.e. there was no bulk purchase, no advertisement for sale of its properties, no similar venture was entered by the assessee and the properties were held for long span of time and thus the income on sale of flats was not chargeable under the head 'Profits and Gains of Business or Profession'. In support of this contention, the Ld. AR relied on the decision of Hon'ble Bombay High Court in the case of Ashok Kumar Jalan vs. CIT reported at 187 ITR 316 (Bom.), Hon'ble Delhi High Court in

the case of CIT vs. Dr. Indu Bala Chhabra 132 taxman 45 wherein the Hon'ble Court observed that income from sale of shops cannot be treated as business income as no prudent person would wait for ten or twenty years to dispose of a property.

xv. Even as per the provisions of Section 2(14) of the Act which defines 'Capital Asset', Section 2(29A) which defines 'Long term Capital Asset' and Section 2(42A) which defines 'Short Term Capital Asset' the period of holding of the properties in question before they were sold was more than 36 months as is evident from the above-mentioned chart and accordingly, the gains arising on sale of such assets was squarely covered by the provisions of Section 45 and accordingly they were taxable under the head 'Capital Gains 'which has been correctly done by the assessee while filing its return of income.

xvi. verification in relation to the nature of business activities conducted by the assessee company and long term capital gains earned on sale of flats was already made during the course of regular assessment proceedings u/s 143(3) for A.Y. 2015-16 vide issue of notice dated 30.10.2017 u/s 142(1) of the Act which has been filed by the Ld. AR vide his paper book dated 21.07.2022. After such verification, the AO came to a conclusion that no variation is warranted on the submissions made by the assessee and accordingly he passed the assessment order u/s 143(3) of the Act without making any additions. Similar position was also accepted by the department in the order passed u/s 143(3) for A.Y. 2014-15. It was contented that, the conclusion reached by the AO in the assessment order passed u/s 143(3) of the Act indicates that

department had already accepted the position that the proceeds received on sale of flats was taxable under the head Capital Gains and not under the head Profits and Gains of Business and Profession for two consecutive assessment years.

xvii. No incriminating material was found by the department during the course of search in case of the assessee group which could contradict the above settled and accepted position.

xviii. The addition/disallowance made by the Assessing Officer is in contradiction to the earlier accepted position which is just a change of opinion since there is no incriminating material on record to justify such contradictory action.

31. The Ld. CIT DR relied on the order passed by the Commissioner (Appeals)-50, Mumbai and also on the additional evidences submitted during the course of proceedings before us. The Ld. DR contended that A.O. has given specific findings in his assessment order and has justified the addition made by him by treating the income from sale of apartments as business income. She categorically summarized findings of the lower authorities and supported them :

i. That the assessee company had in its 'other objects' activity of carrying on business of construction of buildings, houses etc.

ii. That the assessee company has sold the flats in '7, Marine Drive' without basic furnishing which meant that there was no possibility of leasing out the flats, i.e. bear shell sale of flats

iii. That the first flat was sold on 11.07.2014 and from perusal of the sale agreement, it can be seen that a declaration dated 10.06.2014 was filed by the assessee-company under the Maharashtra

Apartment Ownership Act, 1970 through which the purchasers were granted proportionate share in common areas of the building apart from proportionate undivided interest in land.

iv. That the work of elevators and windows were completed in 2015, thus the assessee company cannot claim that the units at '7, Marine Drive' were meant to be leased out when the building itself was incomplete

v. That approximately 40% of payments to contractors were made after F.Y. 2013-14 i.e. after receipt of occupancy certificate.

vi. That the assessee had received advance towards flat prior to provision of water connection in the building which meant that the assessee had no intention of renting the flats since no person who has intention to lease the flats will offer it for sale prior to water connection being provided.

vii. That the assessee did not make any efforts to lease out the flats in the building.

32. Against these findings, the Ld. AR has filed submissions vide letter dated 21.07.2022 rebutting contentions placed by the LD AR. The relevant extract of the said submission is reproduced below:

" **A. Submission with respect to 'Other Object Clause' of the assessee:**

The Department has placed an argument that the Memorandum of Association of the Assessee Company also contains 'other objects' stating that the Assessee Company can engage in the business of real estate. The relevant portion of the other object clause is reproduced below for ready reference:

"To carry on the business of construction, purchasing, developing or otherwise dealing

> in buildings, houses, bungalows, factories, sheds, recreational clubs, and facilities including golf courses, sports and social clubs, trade premises, plant, machinery, public buildings, lands, farms or any other kinds of assets, estates or property, immoveable rights or chose in action."

In this regard it is submitted that, the object of carrying on the 'business of construction' was part of the 'other objects' of the company and not the 'main object' which, as explained earlier, was to own and lease out the flats in building constructed at 'C. S. No. 406, Part-I bearing D ward no. 2574(3), Street No. 58-70, 6A, Chowpatty Road of Malabar Hill Division at Pandita Ramabai Road, Babulnath Cross Lane, Mumbai – 400007'. During the years under consideration i.e. A.Y. 2017-18 and A.Y. 2018-19 as well as in the previous and subsequent years the assessee had carried out only the main object and no action was taken by it to carry out any other object which is evident from the fact that no other property was ever purchased by the assessee to construct a building or no flats in any other project were ever sold by the assessee.

The other object of business of construction, etc. was kept as a part of Memorandum of Association so as to keep an avenue open for the assessee company to enter into such business if at all such opportunity presents itself in the future which has not been done by the assessee till date. The inclusion of the business of construction as 'other object' in the MOA does not in any way undermine or overshadow the 'main object' of the assessee company. In fact, the specific purpose of formation of the assessee company which is included in its main object will always prevail over the general nature of 'other objects'. Therefore, the stand of the department that construction activity included in the

other object clause will cover the sale of flats of the project specified under the main object clause is devoid of merit and is not sustainable.

Even otherwise, for the sake of argument if it is assumed that the assessee had entered into other construction activity even in that case it would not affect the main purpose of the assessee company which was to own and lease out the flats in the building named '7, Marine Drive'. It is important to understand that there is no restriction on an assessee to engage in investment as well as business of the same product / commodity. The CBDT in the Circular No. 4/2007 dated 15.06.2007 (Copy attached at Page Nos. 1-2 of the Paper book-II) has clarified in the cases of sale of shares, a tax payer can hold both investment portfolio wherein the shares are held as an 'capital asset' as well as a trading portfolio wherein the tax payer holds the shares as 'stock-in-trade'. The relevant portion of the aforesaid circular is reproduced hereunder for ready reference:

"CBDT also wishes to emphasize that it is possible for a tax payer to have two portfolios, i.e., an investment portfolio comprising of securities which are to be treated as capital assets and a trading portfolio comprising of stock-in-trade which are to be treated as trading assets. Where an assessee has two portfolios, the assessee may have income under both heads i.e., capital gains as well as business income."

Reliance is also placed on the decision of Hon'ble Delhi Tribunal in case of ACIT v Delhi Apartment (P.) Ltd. reported at 147 TTJ 451(Copy attached at Page Nos. 135-154 of the Paper book-II), wherein the Hon'ble Tribunal has held as under:

> "The Commissioner (Appeals) has given a finding that the land was used by the assessee for

agricultural purposes before its sale. Therefore, it cannot be said that right from inception the intention was to sell the land. The assessee has carried on agricultural operations on the land and held it for more than 10 years. It is no doubt true that the MOA permits the assessee to carry on the business of purchase and sale of land. It had, in fact, carried on such business also. However, there is no bar on an investor in land to deal in land and vice versa. Thus, an assessee could be trader as well as investor in land to deal in land and vice versa. Thus, an assessee could be trader as well as investor in land simultaneously depending upon what his intention is and how he treats the asset in question. In the instant case, the land was purchased and shown as asset in the balance sheet. The land was used for agricultural purposes. It was held for a long period of time. There is no evidence that borrowed capital was used for the purchase. Therefore, the facts on record lead to an inference that the land was held as an asset. Hence, the gain arising on sale of the land has to be taxed under the head 'capital gain'. Therefore, the order of the Commissioner (Appeals) deserved to be upheld."

B. Submission with respect to the point of basic furnishing of the flats in the building**:**

It is alleged by the department that the flats could not be leased out since the basic furnishing of the flats was not provided. It is submitted that, as already explained in Para 23 and 24 above, the flats constructed by the assessee were high end residential units intended to be leased out bare shell. Since each lessee may have different preferences, a standard furnishing would have

restricted the ability to target a larger segment. The common areas of the building were fully designed as per the highest standards carrying a clear intention that as an investor, the Assessee Company would furnish the common areas as per rational standards whereas the specific units would be furnished in accordance with the preferences of prospective lessee.

Thus, the flats in the apartment were not fully furnished in order to accommodate the choice and preference of prospective lessees. If a standard furnishing was provided in the apartments then it would have restricted the prospective lessees, since in such high end flats the per month rent payments run into lakhs of rupees which can only be afforded by high net worth clients who prefer the furnishing to their specific choice and liking.

It is also pertinent to mention that, going by the logic given by the department that the assessee had no intention of leasing the flats due to the reason that flats were not furnished then in that case the assessee could not have sold the said unfurnished apartments. This is because whether a person approaches the assessee as a buyer or a lessee the ultimate purpose of the said person would be to stay in such apartment which is not possible in an unfurnished accommodation. Therefore, it is submitted that the condition of the apartment does not have any bearing on the intention of the assessee as the furnishing was left to the discretion of the lessee by the assessee. Thus, the said argument of the department is devoid of merits and is unsustainable.

C. Submission with respect to the sale of flat vide agreement dated 11.07.2014 and declaration dated 10.06.2014 filed by the assessee-company under the Maharashtra Apartment Ownership Act, 1970:

The assessee had sold first of the seven flats vide agreement dated 11.07.2014 for a total consideration of Rs. 28,10,00,000/-.

In this connection, the assessee had filed a declaration dated 10.06.2014 i.e. a month prior to the sale of flat under the Maharashtra Apartment Ownership Act, 1970 along with an amendment thereto dated 27.06.2014. Through this declaration the buyer was granted proportionate share in the common areas of the building apart from proportionate undivided interest in the land. (Copy of the declaration dated 10.06.2014 is attached at Page Nos. 114-126 of the Paper book-I). Based on this declaration, the ld. A.O. concluded that these concessions can hardly be afforded to the lessee's of the flats and because of this declaration the assessee was precluded from the possibility of leasing out the flats.

In this regard it is submitted that the above mentioned declaration was filed on 10.06.2014 i.e. just a month prior to the date of registration of sale deed of the first apartment. If the intention of the assessee was to sell the flats, this declaration would have been filed by the assessee very well in advance and it would not have waited till last moment to do the same. It is only when there were no prospective lessees available and the buyer of the flat who had already paid the advance was pressurizing the assessee for registration, the assessee filed the declaration. The conduct of the assessee clearly proves that it had acted as an investor right from the beginning and accordingly gains arising on sale of flats was correctly offered to tax under the head 'Capital Gains'.

Further, it is submitted that the declaration filed by the assessee under the Maharashtra Apartment Ownership Act, 1970 is a necessary legal requirement in case a flat is sold to another person wherein various details are required to be submitted with respect to the flat being sold. The relevant provisions of the Maharashtra Apartment Ownership Act, 1970 are reproduced below for ready reference:

Section 13 of the Maharashtra Apartment Ownership Act, 1970 - Declarations, Deeds of Apartments and copies of floor plans to be registered.

"13. (1) The Declaration and all amendments thereto and the Deed of Apartment in respect of each apartment and the floor plans of the buildings referred to in subsection (2) shall all be registered under the [Registration Act, 1908].

(2) Simultaneously with the registration of the Declaration there shall be filed along with it a set of the floor plans of the building showing the layout, location, apartment numbers and dimensions of the apartments, stating the name of the building or that it has no name, and bearing the verified statement of an architect certifying that it is an accurate copy of portions of the plans of the building as filed with and approved by the local authority within whose jurisdiction the building is located. If such plans do not include a verified statement by such architect that such plans fully and accurately depict the layout, location, apartment numbers and dimensions of the apartments as built, there shall be recorded prior to the first conveyance of any apartment, an amendment to the Declaration to which shall be attached a verified statement of an architect certifying that the plans theretofore filed, or being filed simultaneously with such amendment, fully and accurately depict the layout, location, apartment number and dimensions of the apartment as built.

(3) In all registration offices a book called "Register of Declaration and Deeds of Apartments under the Maharashtra Apartment Ownership Act, 1970" and Index relating thereto shall be kept. The book and the Index shall be kept in such form and shall contain such particulars as the State Government may prescribe.

(4) It shall be the duty of every Manager or Board of Managers to sent to the Sub-Registrar of the sub-district in which the property containing the apartment is situate, or if there is no Sub-Registrar for the area, to the Registrar of the district in which such property is situate, a certified copy of the Declaration and Deed of Apartment made in respect of every apartment contained in the building forming part of the property together with a memorandum containing such particulars as the State Government may prescribe.

(5) The Sub-Registrar, or as the case may be, the Registrar shall register the Declaration along with floor plans of the building and the Deed of Apartment in the Register of Declarations and Deeds of Apartments under the Maharashtra Apartment Ownership Act, 1970 and shall also enter particulars in the Index kept under subsection (3). Any person acquiring any apartment of any apartment owner shall be deemed to have notice of the Declaration and of the Deed of Apartment as from the date of its registration under this section.

(6) Except as provided in this section, the provisions of the [Registration Act, 1908], shall mutatis mutandis apply to the registration of such Declaration and Deeds of Apartments and the words and expressions used in this section but not defined in this Act, shall have the meanings assigned to them in the [Registration Act, 1908]."

Section 11 of the Maharashtra Apartment Ownership Act, 1970 - Contents of Declaration.

"11. (1) The Declaration shall contain the following particulars, namely :—

(a) Description of the land on which the building and improvements are or are to be located; and whether the land is freehold or leasehold 1[and whether any lease of the land is to be granted in accordance with the second proviso to section 2 of this Act];

(b) Description of the building stating the number of storeys and basements, the number of apartments and the principal materials of which it is or is to be constructed;

(c) The apartment number of each apartment, and a statement of its location, approximate area, number of rooms, and immediate common area to which it has access, and any other data necessary for its proper identification;

(d) Description of the common areas and facilities;

(e) Description of the limited common areas and facilities, if any, stating to which apartments their use is reserved;

(f) Value of the property and of each apartment, and the percentage of undivided interest in the common areas and facilities, appertaining to each apartment and its owner for all purposes, including voting; and a statement that the apartment and such percentage of undivided interest are not encumbered in any manner whatsoever on the date of the Declaration **;**

(g) Statement of the purposes for which the building and each of the apartments are intended and restricted as to use;

…..”

Section 13 of the Maharashtra Apartment Ownership Act, 1970 provides that the Declaration and all amendments thereto and

the Deed of Apartment in respect of each apartment and the floor plans of the buildings shall all be registered under the Registration Act, 1908**.** Further, Section 11 of the said Act provides for contents of such declaration which includes declaration of value of the property and of each apartment, and the percentage of undivided interest in the common areas and facilities, appertaining to each apartment and its owner for all purposes. Therefore, it is submitted that the registration of declaration dated 10.06.2014 was due to a statutory requirement and it did not preclude the assessee from leasing out the remaining flats. In fact, in Para 'Third' of the said declaration it was categorically stated that the assessee can retain the duplex apartments for the purpose of leasing them out in the future. The relevant extract of the said Para is reproduced below for ready reference:

"The Grantor can sell either all the duplex residential apartments or may sell some of them and retain the others with itself either for lease or for sale in future."

Therefore, based on above facts it is submitted that the assessee was still well within its rights to lease the apartments and was not precluded from doing the same. Consequently, the conclusion drawn by the Ld. A.O. is erroneous and factually incorrect and cannot form the basis for making addition in the case of the assessee.

<u>D. Submission with respect to the Installation of lifts and fixing of aluminum windows after the receipt of occupancy certificate:</u>

Further, it has been argued by the Department that the information was called from Mitsubishi Elevators India Pvt Ltd., it was tasked with installation of two elevator units (P1 & P2) in the building and Alfa Façade Systems Pvt Ltd was tasked with providing and fixing of aluminum windows in the building. It was

also stated by the Ld. AO that from the details submitted by Mitsubishi Elevators Pvt Ltd, P1 elevator was completed in 2013 itself whereas the work of the P2 elevator continued well into 2015. It was also stated by the Ld. AO that from the details submitted by Alfa Façade Systems Pvt Ltd, it was observed that the work of fixing aluminum windows in the building was majorly done in 2015.

With respect to the above, it is submitted that the building was supposed to be owned by the Assessee Company and flats were to be leased out based on the likings and preferences of prospective lessees and therefore it first installed one elevator and basic windows structure in each of the flats. Also, as stated above the Ld. A.O. had himself accepted the fact that one lift was installed in 2013 i.e. before the receipt of occupancy certificate and only the second lift i.e. 'P2' was completed in 2015. A building can very well function with one lift and there is no such mandate that all the lifts in the building should be always in perfect working condition so as to lease out the flats.

However unable to lease out the apartments, there was no choice with the Assessee Company but to upgrade the buildings with the hope that it would be able to lease out in future and therefore the basis windows were replaced by aluminum windows in each of the apartment for which the expenditure was incurred by the assessee. Even otherwise, the Ld. A.O. did not consider that the Occupation Certificate was already received by the Assessee Company on 05.09.2013 only after installation of first lift and basic windows in all the flats. The only thing pending was the internal furnishing of the flats which as submitted earlier was to be done based on the individual liking and preferences of the prospective tenants so that the assessee may target a larger segment. Besides, an occupation certificate is only granted by the local authority when the building and apartments are fit for occupation and not before that. Further, the first lift was

operational and the building contained windows and therefore it cannot be said that the flats were not ready to be given for rent as alleged by the Department.

Therefore, the contention of the department that the flats could not be leased out since the work of lift and windows was completed in 2015 is erroneous and factually incorrect since one lift was already installed and in perfect working condition and even the windows were installed before receipt of the occupancy certificate and thus no addition can be sustained based on such erroneous finding.

E. Submission with respect to the payment made to contractors after the receipt of occupancy certificate:

In Para 6.8 of the assessment order the Ld. A.O. has tabulated the amount paid to contractors by the assessee over the years. The said table is reproduced below for ready reference:

F.Y.	Amount paid to contractors
2010-11	1,87,23,391
2012-13	2,69,08,777
2013-14	6,32,06,754
2014-15	3,96,31,517
2015-16	2,31,76,652
2016-17	59,45,201
Total	17,75,92,292

On the basis of above table prepared by the Ld. A.O., he concluded that the flats were not ready for renting out as on the date of issue of occupancy certificate i.e. 05.09.2013 since according to him assessee had made payments of Rs. 6.87 crores after F.Y. 2013-14 which is approximately 40% of the total payments shown above.

In this regard firstly, it is submitted that the Ld. A.O. did not provide any basis or did not give any reference to the source from where such figures were collated by him. Further, the Ld. A.O. chose to conveniently ignore the figures for F.Y. 2008-09 in which land was purchased by the assessee for a consideration of Rs. 13.21 Crores and also skipped the payments made in F.Y. 2009-10 and 2011-12. If these payments would have been considered then the percentage of payments made after the receipt of occupancy certificate would have been significantly reduced. The Ld. A.O. cannot pick and choose the figures as per his convenience to suit his case and ignoring the complete picture.

The Actual Expenditure incurred by the assessee over the years from the time the land was first acquired which was capitalized in the books of accounts is given in the table below which was also reproduced by the Ld. A.O. in Para 6.12 of his assessment order:

F.Y.	Nature of Expenditure	Amount (Rs.)
2008-09	Land Purchase	13,21,53,000
2009-10	Construction Cost	2,05,000
2010-11	Construction Cost	2,06,51,632
2011-12	Construction Cost	2,60,74,804
2012-13	Construction Cost	4,45,42,406
2013-14	Construction Cost	10,83,38,478
2014-15	Construction Cost	7,73,60,830
Total		40,93,26,150/-
% of Expense incurred in		18.90%

FY 2014-15 after the receipt of occupancy certificate [7.73 Cr / 40.93 Cr]	

From the above table it is evident that only 18.90%of cost was incurred by the assessee after the receipt of occupancy certificate for the purpose of upgradation of the building i.e. replacement of basic windows with aluminum windows and completion of the 2nd lift. The services of Alfa Façade Systems Private Limited and Mitsubishi Elevators India Private Limited (for completion of 2nd lift) were engaged by the assessee only after receipt of O.C. since even after making efforts there were no inquiries from tenants and the assessee was left with no choice but to upgrade the building structure.

Sr. No.	Particulars	Amount (Rs.)
1.	Total expenditure incurred in F.Y. 2014-15	7,73,60,830/-
2.	Less: Expenditure incurred on replacement of basic windows with aluminum windows	3,10,59,361/-
3.	Net Expenditure incurred on construction in F.Y. 2014-15 [1-2]	4,63,01,469/-
4.	Total Cost of Construction incurred till 31.03.2015	40,93,26,150/-
5.	Percentage of Expenditure on construction incurred in FY 2014-15 after the receipt of occupancy	11.31%

	certificate [4.63 Cr / 40.93 Cr]	

Further, it is also pertinent to mention that out of the expenditure of Rs. 7,73,60,830/- incurred in F.Y. 2014-15, the expenditure of Rs. 3,10,59,361/- was incurred on purchase of material and construction work of aluminum windows which was done for the purpose of upgradation of the apartments. This expenditure being not a part of the regular construction cost has to be removed from the construction cost. If the said expenditure if deducted from the regular construction cost the revised percentage of expenditure incurred after the receipt of occupancy certificate in F.Y. 2014-15 can be worked out as follows:

From the above facts it is evident that only 11.31% of total construction cos**t** was actually incurred in F.Y. 2014-15 which is an insignificant amount as compared to the cost of construction incurred before the occupancy certificate was received by the assessee.

Therefore, it is submitted that the contention of the department is based on erroneous and incomplete set of facts and thus cannot be used against the assessee for alleging that the sale of flats were adventure in the nature of trade and not a capital gain transaction.

F. Submission with respect to the application and receipt of water connection in the building after the receipt of occupancy certificate:

It is submitted that the assessee had applied for permission of the water connection in the building on 30.10.2013 (Copy of the application letter is attached at Page Nos. 127-128 of the Paper book-I). The approval for water connection was received by the

assessee vide letter signed by the local authority on 31.01.2014 (Copy of the said letter is attached at Page No. 129-130 of the Paper book-I). These documents in relation to the application and approval of water connection were submitted during the course of assessment proceedings. The Ld. A.O. without appreciating the evidence submitted before him, solely based on the fact that the approval was received after the date of occupancy certificate concluded that the assessee had no intention to lease the flats since according to him 'no person who has the intention to put building on rent will offer it for sale prior to water connection being made'.

In this regard it is submitted that, the Ld. A.O. overlooked a crucial fact that the occupancy certificate is a mandatory document which is required to be submitted for making the application and getting the approval for water connection in the building. The assessee could not have made an application and got the approval from local authority for the water connection in the building until and unless occupancy certificate was received by it. The occupancy certificate was received by it on 05.09.2013 and the application for the water connection was made on 30.10.2013. After making the application, the assessee had no control whatsoever with respect to the time taken for receipt of approval from the local authority. In any case, the approval was received in 3 months from the date of application and no flat was sold during this period by the assessee. Therefore, the contention of the Ld. A.O. that the assessee had no intention to lease the apartments solely because the application and approval for water connection was made after the receipt of occupancy certificate is inherently flawed which is evident from the aforementioned facts and thus no addition is possible on this ground.

Further, the Ld. A.O. also alleged that 'no person who has the intention to put building on rent will offer it for sale prior to water

connection being made'. In this regard it is submitted that irrespective of the fact whether an apartment is sold or given on lease it would require a water connection since it is a bare minimum requirement for an accommodation to be habitable. No prudent person would ever enter into an agreement with the owner of an immovable property, either to purchase the flat or to take it on lease unless the very basic amenity of water supply is provided in the accommodation. The timing of making application and getting permission of water connection is immaterial since in every case i.e. sale or lease of flat it is a necessity and does not have any bearing on the intention of the assessee to lease the apartments.

Therefore, if the Ld. A.O. alleges that apartment cannot be leased out without water connection, then in that case the apartment cannot be sold without a working water connection. This fact was not at all considered by the Ld. A.O. while passing the assessment order and he conveniently chose to ignore this crucial aspect in an immovable property transaction. In fact, if the apartment could be sold without a water connection then it could have also been leased and water connection could have been put by the time the lessee would have come to live there. Thus, it is submitted that this contention of the Ld. A.O. does not have any bearing on the treatment of flats and consequent treatment of gains arising on sale of such flats.

Moreover, the pipeline fittings and connection for the purpose of water supply to each and every flat was already completed at the time of construction of the building and before the receipt of occupancy certificate since it is a part of structure of the building and cannot be done separately after the construction of building is completed. In fact, the occupancy certificate of the building would not have been granted without it. The only thing pending was the permission from the local authority so that the water supply to the building could be started which was received on

31.01.2014. The intention of the assessee was always to lease out the flats bare shell and as explained in Para 67 to 70 above the date of receipt of water connection from the local authority does not affect this intention of the assessee and therefore, this contention of the Ld. A.O. is devoid of merits and does not have any legs to stand.

G. Submission with respect to the efforts made by assessee to lease the flats:

This point raised by the Ld. A.O. is completely baseless and factually incorrect in as much as the assessee had hired the marketing services of the broker M/s. Reflex Realty in order to invite prospective lessees to enter into a long term lease agreement which can be verified from the correspondence between the assessee and the broker as explained in Para 24 above. The Ld. A.O. in Para 8.12 of his assessment order rejected this proof submitted by the assessee without any justification and also stated that no paper advertisements were published by the assessee for leasing out the property.

In this regard it is submitted that such high end flats cannot be leased out with a mere advertisement in newspaper since the flats were not to be leased as a standard residential unit but were to be leased as a luxurious flat based on the preferences of the prospective lessees. Such luxurious flats in a prime location are sold through contacts with High Net worth Individuals (HNIs) and for that purpose the assessee had specifically engaged the services of a broker who had made representations before the assessee of having extensive networking among the Real Estate professionals which is evident from the correspondence submitted by the assessee before the A.O.

Therefore, it is submitted that the allegation made by the Ld. A.O. that no efforts were made to lease the flats is factually

incorrect and no addition can be made based on such false allegation.

Apart from the above mentioned contentions of the assessee, it is submitted that whether a transaction will be considered as an adventure in the nature of trade has been a matter of judicial review. The tests laid down by decisions of various courts indicate that, in each case, it is the total effect of all relevant factors and circumstances that determine the character of the transaction. No one rule of thumb or yardstick can be established to determine the nature of transaction. Each case has to be determined on the total impression created by all the facts and circumstances of a particular case. One of the principal tests is the intention of the assessee and the conduct of the assessee over the period for which the asset is held by the assessee. If the asset is sold since an enhanced price could be obtained, that by itself is not enough to infer that an assessee is carrying on business.

In the case of Pari Mangaldas Girdhardas v. CIT reported at 1977 CTR (Guj.) 647 (Copy attached at Page Nos. 171-192 of the Paper book-II), the Hon'ble Gujarat High Court has formulated certain tests to determine as to whether an assessee can be said to be carrying on business, as under:

> "... a)The first test is whether the initial acquisition of the subject- matter of transaction was with the intention of dealing in the item, or with a view to finding an investment. If the transaction, since the inception, appears to be impressed with the character of a commercial transaction entered into with a view to earn profit, it would furnish a valuable guideline. b) The second test that is often applied is as to why and how and for what purpose the sale was effected subsequently. c) The third test, which is frequently applied, is as

> to how the assessee dealt with the subject-matter of transaction during the time the asset was with the assessee. Has it been treated as stock-in-trade or has it been shown in the books of account and balance sheet as an investment. This inquiry, though relevant, is not conclusive. d)The fourth test is as to how the assessee himself has returned the income from such activities and how the Department has dealt with the same in the course of preceding and succeeding assessments. This factor, though not conclusive, can afford good and cogent evidence to judge the nature of transaction and would be a relevant circumstance to be considered in the absence of any satisfactory explanation. e) The fifth test, normally applied in cases of partnership firms and companies, is whether the deed of partnership or the memorandum of association, as the case may be, authorizes such an activity. f) The last but not the least, rather the most important test, is as to the volume, frequency, continuity and regularity of transactions of purchase and sale of the goods concerned. In a case where there is repetition and continuity, coupled with the magnitude of the transaction, bearing reasonable proportion to the strength of holding, then an inference can readily be drawn that the activity is in the nature of business."

The tests laid down by the Hon'ble Gujarat High Court are discussed along with the facts of the case of the assessee as under:

a. First Test – Initial Acquisition of the subject matter:

It is an undisputed fact that the assessee had acquired land for the purpose of constructing flats, holding them and then leasing out for earning rental income which is clear from the Main object clause set out in the MOU. The said clause is reiterated and reproduced below for ready reference:

"To own and let out apartments in the building situated at C. S. No. 406, Part-I bearing D ward no. 2574(3), Street No. 58-70, 6A, Chowpatty Road of Malabar Hill Division at Pandita Ramabai Road, Babulnath Cross Lane, Mumbai – 400007 also known as Aurum Platz for rent."

Therefore, it is clear that at the time of acquisition, the intent of the assessee with respect to utilization of land was to hold it as an investment and earn rental income out of the same once the building was constructed. Therefore, the assessee has satisfied the criteria laid down in this test.

b. Second Test- Subsequent Sale:

As explained earlier, the assessee had sold its first flat on 11.07.2014 i.e. after 10 months from the date of receipt of occupation certificate. This was done by the assessee with a view to recover part of the huge investment made by it since there were no inquiries from any tenants to take the land on lease. Also, due to the prime location of the property the assessee received inquiries from prospective buyers. Thus, the initial sale of flat was done to recoup the investment which does not change the fact that the main object of the assessee was still to lease out the flats in the building. Therefore, the assessee has satisfied the criteria laid down in this test.

c. Third Test- Treatment of asset by the assessee:

It is an undisputed fact that the assessee from the very beginning i.e. from the time when the land was purchased till

date when the last of the flats is held by the assessee has classified it as an investment in its financial statements and no departure with respect to treatment and classification of property has been done by the assessee till date. In fact, as stated earlier, the department has also accepted this stand of the assessee in the orders passed u/s 143(3) of the Act for A.Y. 2014-15 and A.Y. 2015-16. Therefore, the assessee has satisfied the criteria laid down in this test.

d. Fourth Test- Disclosure of Income from such asset and subsequent treatment by the Department**:**

It is an undisputed fact that the assessee has consistently offered gains arising from sale of flats under the head 'Capital Gains' which was also accepted by the department in the orders passed u/s 143(3) of the Act for A.Y. 2014-15 and A.Y. 2015-16. Now, the department is contradicting its own stand in absence of change in facts and circumstances of the case. The Hon'ble Jurisdictional High Court in the case of Commissioner of Income Tax-25 Vs. Gopal Purohit cited above held that there ought to be uniformity in treatment and consistency when facts and circumstances are identical which is exactly the case of the assessee as there are no changes with respect to the subject matter of dispute i.e. treatment of income from sale of flats. Therefore, the assessee has satisfied the criteria laid down in this test.

e. Fifth Test- Reference in Memorandum of Understanding (MOU):

As explained in sub-Para (a) above, it is an undisputed fact that the MOU clearly stated that the assessee had acquired land for the purpose of constructing flats, holding them and then leasing out for earning rental income. Therefore, it is submitted that the main object clause itself stated the treatment and utilization of

land and building held by the assessee. Thus, the assessee has satisfied the criteria laid down in this test.

f. Sixth Test: Volume, frequency, continuity and regularity of purchase and sale transaction:

It is submitted that, the assessee had purchased a solitary piece of land and constructed a single project/ building on the said land with multiple flats. The time gap between the purchase of land (31.01.2008) and receipt of occupancy certificate (05.09.2013) was a substantial period of 5.5 years during which the funds of the assessee were blocked as an investment in the said project. Even after receipt of occupancy certificate, the assessee made efforts to lease out the apartments which is evident from the communication letters with broker as referred to in Para 24 above.

The first apartment was sold by the assessee vide agreement dated 11.07.2014 which is after a long gap of 6.5 years from the date of acquisition of land which was done because there was no option left with the assessee as there was no prospective tenant in sight for leasing the flat and this was the only flat sold in A.Y. 2015-16. Further, the assessee sold 3 flats in A.Y. 2016-17 and one flat each in A.Y. 2017-18 and A.Y. 2018-19. The assessee had waited for a substantial period of time before selling each of the flats to see if any of these flats can be leased out. Moreover, as discussed earlier the last apartment is still held by the assessee as an investment from which the assesee is earning a rental income of Rs. 3,00,000/- per month from October, 2018 (A.Y. 2019-20) till date.

The above facts clearly show that there was no volume, frequency, continuity or regularity with respect to purchase and sale as the time gap between the first purchase and first sale is a substantial gap of 6.5 years which is in complete contradiction to

a normal behavior of typical businessmen. No prudent businessman would wait for a period of 6.5 years to make a sale. Further, the remaining 5 flats were sold over a period of 3 years from A.Y. 2016-17 to A.Y. 2018-19. This conduct of the assessee proves that it was an investor from the very beginning.

Moreover, the assessee never engaged in any other construction project nor had bought any land/building for resale purpose which clearly shows that the assessee had a mindset of an investor and not a businessman. Therefore, it is submitted that there was no volume, frequency, continuity or regularity to conclude that it was an adventure in the nature of trade.

From the above explanation with respect to tests laid down by the Hon'ble High Court it is submitted that the assessee meets each and every criteria required as provided in the above judgment and has correctly offered the income under the head 'capital gains'.

Further reliance is placed on the case of judgment of Hon'ble Karnataka High Court in case of CIT v Kishan House Builders Association in ITA No. 326 of 2010(Copy attached at Page Nos. 193-197 of the Paper book-II), wherein the assessee had purchased a land in 1992 and subsequently sold the land in FY 2004-05. It was found that in accounts up to year 2004, property was mentioned as an asset and from perusal of entries in accounts it was evident that assessee had not conducted any other activity other than holding land as investment. The AO however, treated income arising from property as business income and not as capital gain. The High Court on basis of meticulous appreciation of evidence on record had recorded a finding that assessee had rightly disclosed income from property as long-term capital gains instead of business income. It was also

held that transaction was a capital transaction and had to be treated as long-term capital gain and not as business income.

"9 ……

The Division Bench of this Court in the case of Commissioner of Income Tax and another supra has laid down criteria for determining whether or not an income from the property is a business income or is a long term capital gain, which is reproduced below for the facility of reference:

(1) "There was a large time-gap between the dates of acquisition of the shares and the sale thereof.

(2) Thus, the intention to sell cannot be inferred at the point of time of the purchase.

(3) That merely because the sale had resulted in a profit did not mean that when the assessee purchased the shares, it was with an intention to sell them at a profit.

(4) That an investor may sell the shares when he gets a good price for the shares.

(5) That the assessee had shares in 25 to 30 companies and the value of the total holding was between Rs.57,000 and Rs.63,000, which was a very small amount considering the number of companies in which the shares were held, thus, denoting that the assessee was a small investor.

(6) That the numbers of transactions are not many every year and the assessee could not be said to indulge in several transactions of purchase and sale every year."

10. It has further been held that total fact of relevant factors and circumstances determining the character of the transaction and the volume, frequency continued and regularity of transactions of parties and sale on goods has also be taken into account. It has been held that the aforesaid question is a question of fact it has to be determined in the fact situation of the case.

11. In the light of aforesaid settled legal principles, the facts of the case may be examined. Admittedly, the properties were acquired by the assessee in the year 1992 and assessee had entered into an agreement for sale on 13.05.2002. Thereafter in the accounts up to the year 2004, the property was mentioned as an asset……..

12. Thus, from perusal of the aforesaid entries it is evident that the assessee has not conducted any other activity other than holding the land as investment. It is also pertinent to mention here that the revenue has not come up with any documentary evidence to suggest that assessee had earned income from the transaction to the land in question during the year 2003-04. The Tribunal thereafter on the basis of meticulous appreciation of evidence on record has recorded a finding that assessee has rightly disclosed the income from the property as long term capital gains instead of business income. The aforesaid finding by no stretch of imagination can be believed to either perverse or arbitrary."

In case of the Assessee Company, the intention of the Assessee Company at the time of acquisition of the land was to construct the building as an investor and to own and let out units in the building. The property has been shown as an investment in the balance sheet. This is also supported by the conduct of the Assessee Company as it has neither marketed nor sold any unit until construction of the property.

Therefore, based on above facts and circumstances of the case and in law it is submitted that the assessee had correctly offered income from sale of flats under the head capital gains and thus it is humbly prayed that relief in this regard be granted to the assessee and order of Ld. CIT-(A) be set aside."

33. We have heard the rival contentions, perused the orders of the lower authorities, written submissions and application made by the parties and judicial precedents relied upon. The only issue involved here is whether gain or profit on sale of 6 out of 7 flats sold by the assessee is chargeable to tax under the head capital gain or Business income. Honourable supreme court in CIT V Glow shine Builder and Developers Ltd 332 CTR 489 (SC) has categorically held that in order to examine whether a particular transaction is sale of capital assets or business income. , multiple factors like frequency of trade, volume of trade, nature of transaction over the years are required to be examined. Merely on the basis of recording of the inventory in the books of accounts transaction could not become stock in trade. Thus in the present case no doubt assesse has shown the constructed property as investment but that is not determinative at all whether the income from sale of such asset is chargeable to tax as capital gain or business income. All surrounding facts need to be examined and appraised. There are no straight jacket formulae or principles which fit in to all situations to give the answer.

34. In Sutlej Cotton Mills Supply Agency Ltd. [1975] 100 ITR 706 (SC) It was noted that "the difficulty arises where the transaction is outside the assessee's line of business and then, it must depend upon the facts and circumstances of each case whether the transaction is in the nature of trade". Thus, while neither continuity of similar transactions is necessary to constitute such a transaction as "adventure in the nature of trade" it will depend on the facts and circumstances of every case whether the assessee has been able to demonstrate, by placing relevant materials that the transaction undertaken by it was, in fact, in the nature of trade.

35. We also find that Honourable Karnataka High court in Commissioner of Income Tax (Central) Vs Bagmane Developers

(P.) Ltd.* [2017] 88 taxmann.com 486 (Karnataka)/has held that :-

> 13. We may also record that whether particular property can be considered as a 'stock-in-trade' or a part of 'inventory' or whether it can be treated as capital asset though a question may be touching to law but would essentially depend upon consideration of so many factual aspects germane to record the conclusion. At this stage, we may usefully refer to decision of the Division Bench of High Court of Gujarat in case of CIT v. Rewashanker A. Kothari [2006] 283 ITR 338/155 Taxman 214 wherein the question arose for various tests on the basis of which a finding can be recorded as to whether the asset is a 'stock-in-trade' or an 'inventory' or a 'capital asset'. In the said decision at paragraphs 9 to 11 it was observed thus:
>
> "9. Upon examination of the aforesaid record, the Tribunal recorded that the assessee had given an effective answer to the show-cause notice and thereafter, proceeded to record the following findings:
>
> (1) There was a large time-gap between the dates of acquisition of the shares and the sale thereof.
>
> (2) Thus, the intention to sell cannot be inferred at the point of time of the purchase.
>
> (3) That merely because the sale had resulted in a profit did not mean that when the assessee purchased the shares, it was with an intention to sell them at a profit.
>
> (4) That an investor may sell the shares when he gets a good price for the shares.
>
> (5) That the assessee had shares in 25 to 30 companies and the value of the total holding was between Rs.57,000 and Rs.63,000, which was very small amount considering the number of companies in which the shares were held, thus, denoting that the assessee was a small investor.
>
> (6) That number of transactions are not many every year and the assessee could not be said to indulge in several transactions of purchase and sale every year.
>
> 10. The tests laid down by various decisions of the Apex Court indicate that, in each case, it is the total effect of all relevant factors and circumstances that determine the character of the transaction. Each case has to be determined on the total impression created on the mind

of the Court by all the facts and circumstances disclosed in a particular case. One of the principal tests is whether the transaction is related to the business normally carried on by an assessee. The nature of the commodity was made with the intention to re-sell, if an enhanced price could be obtained, that by itself is not enough to infer that an assessee is carrying on business. However, though profit motive in entering into a transaction is not decisive, if the facts and circumstances indicate that the purchase of the asset factor for inferring that the transaction was in the nature of business.

11. In the case of Pari Mangaldas Girdhardas v. CIT [1977] 6 CTR 647 (Guj.), after analyzing various decisions of the Apex Court, this Court has formulated certain tests to determine as to whether an assessee can be said to be carrying on business.

(a) The first test is whether the initial acquisition of the subject- matter of transaction was with the intention of dealing in the item, or with a view to finding an investment. If the transaction, since the inception, appears to be impressed with the character of a commercial transaction entered into with a view to earn profit, it would furnish a valuable guideline.

(b) The second test that is often applied is as to why and how and for what purpose the sale was effected subsequently.

(c) The third test, which is frequently applied, is as to how the assessee dealt with the subject-matter of transaction during the time the asset was with the assessee. Has it been treated as stock-in-trade or has it been shown in the books of account and balance sheet as an investment. This inquiry, though relevant, is not conclusive.

(d) The fourth test is as to how the assessee himself has returned the income from such activities and how the Department has dealt with the same in the course of preceding and succeeding assessments. This factor, though not conclusive, can afford good and cogent evidence to judge the nature of transaction and would be a relevant

circumstance to be considered in the absence of any satisfactory explanation.

(e) The fifth test, normally applied in cases of partnership firms and companies, is whether the deed of partnership or the memorandum of association, as the case may be, authorizes such an activity.

(f) The last but not the least, rather the most important test, is as to the volume, frequency, continuity and regularity of transactions of purchase and sale of the goods concerned. In a case where there is repetition and continuity, coupled with the magnitude of the transaction, bearing reasonable proportion to the strength of holding, then an inference can readily be drawn that the activity is in the nature of business."

36. In this case following sequence of events are important :-

i Company was formed on 25/09/2003

ii Land was purchased on 31/1/2008

iii Commencement of construction on 25/2/2010

iv Change in MOA to let out the property as the main object 17/2/2011, In other ancillary object business as real estate developers was also

v Occupancy certificate received on 5/9/2013

vi Appointed broker for tenancy in FY 2012-13

vii MOA was for the earning of leasing of property and earn lease rent as per main object

viii In other ancillary object business as real estate developers was also

ix Brokers unable to find out the tenant

x First sale deed of one flat was executed in 11/7/2014

xi Three flats were sold in Financial year 15-16

xii One flat is sold in FY 2016-17

xiii One flat is sold in 2017-18

xiv One flat is still lying unsold

xv One lift was already installed in 2013

xvi Second Lift was installed in 2015

xvii Assessee did not purchase any property other than the impugned property

xviii For water connection it is mandatory to have building occupation certificate so water connection was applied after obtaining OC

37. Now whether the intention of the assessee was to hold the apartments as investment or to sell them to earn profit and whether the conduct of the assesee is that of a businessman or that of an investor. As regards the intention of the assessee, it is observed that the assessee had intention of holding the apartments as investment and leasing it to the tenants to earn rental income which is substantiated by the documentary evidences submitted before us in the form of Memorandum of Association of the assessee company, correspondence letters with the broker, audited financial statements of the company wherein the land & building are capitalized and treated as investment and also the fact that the said asset was held by the assessee for a very long duration. With respect to the conduct of the assessee company i.e. the question whether the act of sale of apartments by the assessee is 'an adventure in the nature of trade' or 'income from capital gains' can be decided in light of the tests laid down by various judicial precedents. These tests act as a yardstick for determination and taxability of income.

38. As on the date of acquisition of land, the intention of the assessee was to hold that land, construct the apartment and lease them out which is evident from the MOA formed at the time of its incorporation. Even on initial acquisition of the building i.e. at the time of receipt of occupancy certificate on 05.09.2013, the intention of the assessee was to lease the apartments which are evident from the altered MOA.

39. As is clear from the records, the first sale post initial acquisition of land was made after a lapse of approximately 6.5 years from that date and 10 months after the receipt of occupancy certificate. This conduct of the assessee does not resemble of a builder and developer as no prudent businessman would hold his inventory for such a long period of time that too without making any conscious efforts in the form of advertisement and marketing. Even after the first sale the subsequent sale of other five flats were made over a period of 3 different assessment years which again shows that the assessee was not acting as a businessman but was conducting its affairs as an investor who had to sell its assets due to lack of availability of prospective tenants in sight.

40. Assessee, right from the initial acquisition, has consistently shown the asset under consideration as an investment in its audited financial statements and there has been no change in such treatment till date, which is evident from the said financial statements filed before us.

41. If the LD AO has any doubt about the statement made by the broker about not getting any client for taking apartment on rent, he should have examined that broker and also should have enquired about the enquiry made by broker, his capability in renting of apartment etc.

42. It is an undisputed fact that the income from sale of apartments has been offered to tax under the head 'Income from Capital Gains' by the assessee in its return of income filed for all the years after initial acquisition and there has been no change with respect to such treatment. Further, even the department has accepted this position in the assessment proceedings completed u/s 143(3) of the Act for AY 2014-15 and AY 2015-16 as discussed above. The current dispute has only arisen as a result of search proceedings conducted in case of Aurum Group, during the course of which no incriminating material was found by the department which has already been discussed at length. As such there being no change in facts and circumstances of the case and in law, there is no reason to deviate from such stand

taken by both the parties. Where an inquiry has been made in the earlier assessments years and income was inferred as capital gain, there can be no jurisdiction to assess the income as business income in subsequent years, merely saying that it was decided wrongly in those years. There could have been an action u/s 147 or u/s 263 of the Act, if it is wrong.

43. We find that the assessee company did not engage in any other such real estate project and therefore there is no volume, frequency, continuity or regularity with respect to purchase and sale. Only because the assessee company has sold apartments does not mean that they are engaged in business activities. There is only one time purchase of land and only one project was conducted on such land which was sold apartment by apartment spanning over a number of years and out of which even today one apartment remains unsold.

44. Even the Hon'ble Bombay High Court in the case of Ashok Kumar Jalan (supra) held that the transaction, must have some trappings of a business nature before it can be considered as an adventure in the nature of trade, such as bulk purchase, advertising for its sale, similar other profitable ventures, no likelihood of retaining purchased item for one's own use, etc. In the present case, none of these features have been established by the Department and are further demonstrated by the assessee in light of the decision of Hon'ble Gujarat High Court. There is no such evidence which proves that assessee acted as a businessman and not as an investor.

45. On perusal of documents submitted by the LD CIT DR it is observed that all these documents were executed after the broker informed the assessee that the it is unable to find any suitable tenants. The reasoning given by the broker for his inability to find tenants vide his letter dated 29.10.2013 was that the apartments built by the assessee were premium and high-end and the market is not ready to absorb such high-end rental as contemplated by the assessee. As submitted by the assessee, the inability of both assessee and broker to find suitable tenants who are ready to pay rent for such high-end apartments, forced the assessee to sell one of the flats to recoup a

part of the huge investment made in the project. The documents submitted as additional evidence in the shape of Board Resolution, Escrow Account Agreement, communication with the lender etc. were all executed after the above-mentioned communication received from broker i.e. in the month of November and December, 2013, showcasing his inability to find the tenants. We find that intention of the assessee of leasing the apartments and subsequently selling them due to non-availability of suitable tenants is duly supported by the sequence of events and documents executed by the assessee. These events and documents show the intention of the assessee of leasing the apartments from the very beginning i.e. right from the date of its incorporation. Thus, we hold that the assessee had intention of renting out the apartments from the very beginning. If the assessee had the intention of selling the flats from the very beginning, it would have executed such documents well in advance i.e. around the time of commencement of construction of property so that apartments could be sold even before the occupancy certificate was received which is a normal practice in case of builders and developers. As against this, the assessee had been holding the land and the property for more than 6.5 years from the date of acquisition of land in F.Y. 2007-08 before being forced to sell one of the apartments in the month of July, 2014. Furthermore, with respect to the Memorandum of Association entered at the time of incorporation of the assessee company which was submitted by the Ld. DR before us, enforces the contention of the assessee and works in the favour of the assessee rather than revenue. This can be explained with the terms of the main object clause and objects incidental or ancillary to the main object clause of the said memorandum. The relevant paras are:

Main Object Clause:

"2. To carry on the business of owners of lands, flats maisonattes, dwelling houses, shops, offices, industrial estates, lessees of lands, flats and other immovable properties and for

these purposes to purchase, take on lease or otherwise acquire and hold any lands or Buildings of any tenure or description wherever situated, or rights or interests therein or connected therewith, to prepare building sites, and to construct, re-construct, pull down, renovate, alter, improve, decorate and furnish and maintain flats, maisonettes, dwelling houses, shops, offices, blocks, buildings, industrial estates, works and conveniences of all kinds, and sell the same on ownership basis, installment basis, hire purchase basis or lease basis and transfer such building to cooperative society, limited companies or association of persons or individual as the case may be, to lay out roads, pleasure garden, recreation, grounds, auditoriums, theatres, and sports pavilion, to plant, Drain or otherwise Improve land Building or any part thereof."

Other Incidental or Ancillary Objects to the Main Object Clause:

"6. To acquire, buy, obtain, hire, take on lease and sell, dispose of, let on hire, give on lease, develop, improve upon level and otherwise deal in land, quarries, metal ores, mines, coal mines and forests, farms, gardens and other immovable properties and to act as estate agents, representatives and distributors."

46. Both the main object clause as well as the other objects clause as reproduced above contained provisions to enable them to let out the apartments on hire which establishes the intention of the assessee to hold the properties as investment and not as stock in trade. Subsequently, after acquisition of land in F.Y. 2007-08 for the construction of the building and after commencement of such construction in w.e.f. 25.02.2010 the assessee altered its MOA to make specific changes in the main object clause to bring it in line with the activities of the assessee company. These changes were

made vide Board Resolution dated 17.02.2011. Even after altering the MOA, the assessee continued to hold the apartments for a period of approximately 3.5 years before making first sale i.e. vide agreement dated 11.07.2014. A rational builder will sale property to make quick profits and would never hold such property for such a long period of time , project if considered as business has spread over 13 years from the date of acquisition which is unusual in case of business , this period of 13 years can be summarized as under:

Sr. No.	Events	Date of such event	Period of Holding of apartments from the date of acquisition of land
1.	Date of Purchase of Land	31.01.2008	-
2.	Date of Commencement of Construction	25.02.2010	-
3.	Receipt of Occupancy Certificate	05.09.2013	5 years, 8 months
4.	Sale of First apartment	11.07.2014	6 years, 6 months
5.	Sale of Second apartment	07.05.2015	7 years, 4 months
6.	Sale of Third apartment	12.06.2015	7 years, 5 months
7.	Sale of Fourth apartment	29.12.2015	7 years, 11 months
8.	Sale of Fifth apartment	19.01.2017	9 years
9.	Sale of Sixth apartment	21.09.2017	9 years, 8 months

Last flat is still held by the assessee and still classified as an investment in its books of accounts. Above event chart shows period of holding of the apartments is one of the factor which shows conduct of the assessee as an investor and not a businessman. Intention shown from the main object clause of memorandum of Association and conduct of the assessee shown

from the accounting treatment and period of holding of the apartments are also another factor showing as investor looking to earn income from rental and appreciation in the value of assets held by it. In view of above facts we hold that conduct of the assessee is more like to earn the lease rent from the property and not to exploit these properties as business assets. Assessee has not undertaken any other projects of similar nature which could even remotely indicate that the assessee had intention and mindset of a businessman looking to earn profits by taking risks and engaging in multiple activities at once.

47. Moreover, the position that the assessee's activities are in the nature of an investor and it is not acting as a builder and developer was accepted by the revenue in the course of regular assessment proceedings u/s 143(3) of the Act for A.Y. 2014-15 and A.Y. 2015-16. It is true that the principle of res judicata does not apply to income tax proceedings as each assessment year is treated as a distinct unit, but that does not mean consistency in manner in which assessment proceedings are conducted should be ignored especially when there are no material changes in the facts and circumstances of the case. The authorities are not permitted to take a different view in subsequent years when the law and facts are the same as earlier years. This position has been made sufficiently clear by the Hon'ble Supreme Court in the case of Bharat Sanchar Nigam Ltd and another v. Union of India and ors. (2006) 282 ITR 273 (SC). Further, the Hon'ble Apex Court in the case of Radhasoami Satsang vs CIT (193 ITR 321) stated that an accepted position in one assessment year cannot be allowed to be changed in a subsequent assessment year where the parties have allowed that position to be sustained by not challenging the order. Further Honourable Bombay High court in case of CIT V Mahindra Life space Developers Ltd [2013] 34 taxmann.com 83 (Bombay) has held that

> "**3**. So far as question (c) and (d) are concerned, the Assessing Officer has recorded a finding of fact that on a similar issue for earlier assessment year 2003-04

the income earned from the sale of land has been assessed to capital gain. The revenue has accepted the order of the Assessing Officer for assessment year 2003-04. The Tribunal by impugned order while applying rule of consistency held that it is not permissible for the revenue to agitate the same issue when in the earlier assessment year 2003-04 the same being taxable as capital gains has been accepted by the revenue. In that view of the matter, we see no reason to entertain the questions (c) and (d)."

48. In Assistant Commissioner of Income-tax v. Shree Ami Office Owner's Association [2023] 148 taxmann.com 130 (Ahmedabad – Trib) coordinate bench on identical facts and circumstances has held as under :-

"10. The second issue for consideration before us is whether in the instant set of facts, it can be held that the above sale of property was capital gains or adventure in the nature of trade and hence taxable as business income. We are in agreement with the order of Ld. CIT (Appeals), wherein he has held that the mere fact that the assessee AOP purchased the land and made construction thereon itself would not be sufficient to hold that income earned on such sale of property would qualify as "business income". We note that it was on 19-01-1994 that initially the assessee taken possession of the aforesaid property. It was finally sold in financial year 2007-08. Thus, there is a long holding duration between which the assessee took possession of the property and the date when the land was finally sold after making construction thereon. The entire purchase was funded by the members of the AOP. No interest-bearing loan was taken for the purpose of purchase of said property and construction thereon. No change in land user of the property was affected in order sell the aforementioned property. It is not the case of the Department that when initially the assessee AOP purchased the land and took possession thereof on 19-01-1994, the buyers were

identifiable and thus the whole purpose of purchase and subsequent construction was for the purpose of selling the same and not earning any rental income. Accordingly, in view of the facts and circumstances cited above, in our considered view, the said sale of property would be taxable as capital gains and not business income, and we find no infirmity in the order of ld. CIT(A)."

[Underline supplied by us]

49. Based on the facts of the case discussed above, evidences produced before us , we reversing the order of the ld CIT (A) direct the AO to treat the proceeds received on sale of properties as income from 'Capital Gains'. Accordingly, the Appeal filed by the assessee is allowed.

50. The assessee has also filed additional grounds of appeal challenging the direction given by Commissioner (Appeals)-50, Mumbai to treat the last unsold flat as 'Stock-in-Trade' instead of 'Investment'. In this regard we state that in view of our finding earlier on the matter of treatment of income from sale of apartments and quashed the order of ld cit [A] directed the AO to treat the proceeds received on sale of apartments as income from 'Capital Gains'. Therefore, it follows that the remaining unsold flat which is still held by the assessee and also generating rental income for it, cannot be treated as stock in trade of the assessee. Accordingly, this direction given by ld CIT [A] is not valid and is hereby quashed.

ITA No. 2005/MUM/2021 [A.Y. 2018-19]:

51. This appeal was also filed by the assessee challenging the order of Commissioner (Appeals)-50, Mumbai dated 30.08.2021. The Grounds of Appeal raised by the assessee, the facts of case and the law applicable in the present appeal are identical to the Grounds raised, facts of the case and the law applicable in ITA No. 2004/MUM/2021 for A.Y. 2017-18 with the only exception of quantum of addition/ disallowances made. Therefore, the decision rendered in relation to ITA No. 2005/MUM/2021 for A.Y. 2017-18

shall apply mutatis mutandis to the appeal filed by the assessee for A.Y. 2018-19. Accordingly, the present appeal bearing ITA No. 2005/MUM/2021 for A.Y. 2018-19 is hereby allowed and we direct the AO to treat the income from sale of property as income under the head 'Capital Gains'.

Addition of Rs. 20,00,000/- u/s 69C of the Act
[ITA No. 2005/MUM/2021]:

52. The facts of the case in brief in relation to this addition are that a word document was found from the computer of accountant Ms. Supriya Rajeshirke during the course of search action u/s 132 of the Act conducted in case of the assessee group. The said word document contained a declaration that one Mr. Vishal Singh, the administration manager was carrying cash of Rs. 20,00,000/- for purposes of payment for purchases. The statement of Shri Vishal Singh was recorded u/s. 132(4) of the Act wherein he stated that the document pertained to delivery of cash on 08.09.2017 to one individual Mr. Nazir who is an electrical contractor.

53. During the course of assessment proceedings, the assessee was asked to explain why an addition u/s 69C of the Act should not be made based on the findings of the search and the statement of Mr. Vishal Singh wherein he had explained the said transaction. Against this, the assessee vide submission dated 23.12.2019 explained that Mr. Vishal's statement was taken under duress and cannot be relied upon in absence of any other corroborative evidence. In support of this claim, the assessee furnished an affidavit of Mr. Vishal Singh dated 30.12.2019 wherein he had retracted his statement recorded u/s 132(4) of the search proceedings.

54. However, the Assessing Officer rejected this explanation of the assessee and made an addition of Rs. 20,00,000/- u/s 69C of the

Act based on the word document found and seized during the course of search proceedings and the statement of Mr. Vishal Singh recorded u/s 132(4) of the Act, the Assessing Officer and rejecting the affidavit filed by the assessee stating it as an afterthought and self-serving document.

55. The assessee, aggrieved by the action of the Assessing Officer, challenged the said addition before the Commissioner ld CIT [A] who , decided the appeal against the assessee and upheld the addition made by the Assessing Officer relying on the findings of the assessing officer. Aggrieved, assessee is in appeal before us.

56. At the time of hearing, the Ld. Counsel appearing for the assessee submitted that the CIT (A) has erred in sustaining the addition made by the assessing officer overlooking the crucial factual as well as legal aspects of the case. He submitted that nothing has been brought on record to show that the assessee had actually incurred the expenditure as alleged by the Department and that the statement being relied upon by the department of Shri Vishal Singh has been retracted by an affidavit as it was taken under duress. This affidavit retracting the statement was submitted before the Assessing Officer during the course of assessment proceedings itself. It was also submitted that the statement of Mr. Vishal Singh is not in line with the contents of the word document and is contradictory in as much as the declaration found in the word document stated that the payment was for purchases whereas as per the statement recorded u/s 132(4), the said amount was allegedly paid to one Mr. Nazir for electrical works. It was also submitted that the said document was unsigned, undated and it there was nothing in the said document which could conclusively prove that such expenditure was incurred by the assessee. Further, the department also failed to identify any person by the name Nazir to whom such payment was allegedly made. This being the case, the statement cannot be relied upon for making any addition especially when no corroborative evidence

was placed by the department to prove that any such payment was actually made. In support of his claim, the Ld. AR has relied on the decision of Hon'ble Supreme Court in case of Central Bureau of Investigation vs. V.C. Shukla wherein the Hon'ble Apex Court observed that even correct and authentic entries in books of account cannot without independent evidence of their trustworthiness; fix a liability upon a person. He also relied up on another decision of Hon'ble Supreme Court in case of Common Cause (A Registered Society) vs. Union of India, 245 taxman 214 (SC). Further, the Ld. AR also relied on the decision of Hon'ble Bombay High Court in the case of Lavanya Land Pvt. Ltd. 397 ITR 246 (Bom.) wherein, the Hon'ble Court on similar facts held that addition u/s 69C of the Act cannot be made merely on strength of admission of one party which was subsequently retracted when the conditions u/s 69C of the Act were not fulfilled and there was nothing on record to show that huge amounts of cash revealed from seized documents had actually exchanged hands.

57. Ld. CIT DR strongly relied on the order of Ld CIT (A) and AO and submitted that there was sufficient evidence on record in the form of word document seized during the course of search in case of the assessee and the statement of Mr. Vishal Singh explaining the said word document. She also submitted that the affidavit of Mr. Vishal Singh retracting his statement filed by the assessee was nothing but an afterthought and self serving as the same was not filed immediately after the search but during the course of assessment proceedings.

58. We have heard the rival submissions and perused the material on record. The sole matrix of the disputed issue is that whether addition under provisions of section 69C of the Act can be made based on a word document found during the course of search proceedings and statement recorded u/s 132(4) of the Act in relation to such word document. It is an undisputed fact that the word document found on the computer during the course of search proceedings mention in relation to payment of Rs. 20,00,000/- for

purchases. However, the department could not identify the purpose of payment, the date of making such payment, by whom such payment was authorized and the identity of person to whom such payment was purportedly made. There is no evidence placed on record to corroborate such loose document and to prove that payment of Rs. 20,00,000/- was actually made. The facts of the case, are supported by the decisions of Hon'ble Apex Court in case of V.C. Shukla (supra) and Common Cause (A registered society) wherein the Hon'ble Court had categorically held that even the entries made in regular books of accounts without independent evidence, fix a liability upon a person. In the case at hand, the document relied upon by the department was not even a part of regular books of account but merely a loose document which did not even have a date of such transaction which are essential features of an authentic document. No doubt it is a computer document so there is no question of any signature or handwriting , to that extent the argument of the ld AR is rejected. But no doubt same also needs to be corroborated. Decision of Hon'ble Bombay High Court in case of Lavanya Land Pvt. Ltd. (supra) is also directly applicable to the facts of the case at hand. In that particular case, the Hon'ble Court had observed that the department had not placed on record any evidence to prove that huge amounts of cash had actually exchanged hands. In the present case also, there is no material on record to show that payment of Rs. 20,00,000/- was actually made to a person named 'Nazir' as mentioned by Mr. Vishal Singh in his statement recorded u/s 132(4) of the Act which was subsequently retracted. Accordingly, the addition of Rs. 20,00,000/- made u/s 69C of the Act by the Assessing Officer and sustained by ld CIT [A] is reversed and addition is directed to be deleted.

Disallowance u/s 14A r.w.r. 8D of the Act for A.Y. 2018-19 [ITA No. 2005 & 2302/MUM/2021]:

59. The facts of the case are that during the year under consideration, the assessee had earned income of Rs. 18,25,272/- being dividend income from the investment made in mutual funds which was claimed as exempt under the provisions of section 10(34) of the Act. In the return of income filed by the assessee, it has made a suo moto disallowance of Rs. 2,11,997/- u/s 14A r.w.r. 8D of the Act. During the course of assessment proceedings, the Assessing Officer called for details of investments made by the assessee and working of the disallowance made by it u/s 14A of the Act. The said working was submitted by the assessee at the time of assessment proceedings. However, the Assessing Officer rejected the working and disallowance made by the assessee and re-computed the disallowance under Rule 8D of the Income Tax Rules, 1962 at Rs. 1,99,02,871/-. Accordingly, he made and addition of Rs. 1,96,90,874/- after deducting the disallowance already made by the assessee in the return of income. Aggrieved by the action of the Assessing Officer, the assessee challenged the disallowance made u/s 14A of the Act before The ld CIT [A] . The Commissioner (Appeals) on the basis of various decisions of the Hon'ble Courts gave partial relief to the assessee and restricted the disallowance to Rs. 18,25,272/- i.e. to the extent of exempt income earned by the assessee during the year. Now, both the assessees as well as the revenue are in appeal before us i.e. the assessee has challenged the decision of Commissioner (Appeals)- to the extent of addition sustained by him and the revenue has challenged his decision to the extent of relief granted by him to the assessee.

60. The Ld. AR appearing for the assessee submitted that CIT(A) has erred both in law as well as on facts in sustaining the addition to the extent of exempt income earned by the assessee. It was submitted that the Assessing Officer did not find any flaw or did not point out any defect in the suo motu disallowance made by the assessee and no valid satisfaction was recorded by the AO before invoking the provisions of Rule 8D. To support this contention the

Ld. AR relied upon the decision of Hon'ble Supreme Court in case of Maxopp Investment Ltd. (2018) 402 ITR 640 (SC) wherein the Hon'ble Court held that AO is bound to record satisfaction that suo motu disallowance made by the assessee is not correct before invoking the provisions of Rule 8D. Further, the Ld. AR also submitted that the assessee made a suo motu disallowance even though it did not incur any substantial expenditure to earn the exempt income. Moreover, it was also contended that the AO overlooked the fact that the assessee had sufficient amount of own funds to make investment in mutual funds which yielded exempt income. In this regard, the Ld. AR submitted a comparative chart showing the position of own funds and investments both at the beginning and at the end of the year. The said chart is reproduced below:

Assessment Year	Position of the shareholders fund as on 31st March, 2017 (Rs.)	Position of the shareholders fund as on 31st March, 2018 (Rs.)	Opening Balance of Investment in Exempt Income Yielding 'Mutual Funds' as on 1st April, 2017	Closing Balance of Investment in Exempt Income Yielding 'Mutual Funds' as on 31st March, 2018(Rs.)
2018-19	65,54,24,318/-	80,56,97,958/-	15,50,00,002/-	Nil

61. From the above chart it is evident that the assessee had sufficient amount of own funds to cover the investment made in mutual funds which yielded exempt income. In support of this contention the Ld. AR relied upon the decision of Hon'ble Supr eme Court in case of Sintex Industries Ltd. (2018) 255 taxman 171 (SC) wherein the Hon'ble Apex Court dismissed the SLP filed by the department against the decision of Hon'ble Gujarat High Court wherein it was held that disallowance u/s 14A was not at all warranted where the interest free own funds of the assessee were sufficient enough to cover the investment made by it. Similarly,

reliance was also placed by the Ld. AR on the decision of Hon'ble Bombay High Court in the case of HDFC Bank Ltd. (2014) 366 ITR 505 (Bom.) wherein the Hon'ble Court held that where the assessee had sufficient interest free funds, then it could not be presumed that it utilized borrowed funds for making investments.

62. The Ld. CIT DR relied on the order passed by the Assessing Officer and contented that the disallowance had to be computed by invoking the provisions of Rule 8D of the Act as the assessee did not compute the disallowance correctly which is evident from the substantial difference in the amount of disallowance made by the assessee and made by the Assessing Officer. It was also contented on behalf of the revenue that even if there is no exempt income earned by the assessee then also a disallowance was under section 14A r.w.r. 8D was warranted as the assessee had made investment in securities which had the potential of earning exempt income. In support of this contention, reliance was placed on the Circular No. 5/2014 issued by CBDT which clarifies that disallowance is warranted even in cases where assessee did not earn any exempt income during the year.

63. We have heard the rival contentions and perused the material on record. The issue under consideration is with respect to both the applicability of Section 14A r.w.r 8D as well as the quantum of disallowance, if any, to be made. From the details submitted by the Ld. AR it is sufficiently clear that the assessee had sufficient non-interest bearing funds to cover the amount of investment in mutual funds which yielded exempt income. Accordingly, presumption is available that the investment was made by the assessee out of its own funds and no interest bearing funds were utilized and no expenditure incurred in order to earn exempt income. This leads to a conclusion that no interest disallowance is warranted under the provisions of section 14A r.w.r. 8D of the Act.

64. However with respect to administrative expenses u/r 8D (2) (iii) of The IT Rules we direct the ld AO to restrict the disallowance to

the extent of only 0.5% of average of exempt income yielding investments. In this case the average of such mutual fund investments is Rs 7,25,00,000/- [Rs 15,50,00,000/ -/2] is RS 362500/-. Therefore, based on the facts of the case and respectfully following the decisions of Hon'ble Supreme Court and Hon'ble Bombay High Court we partly allow the appeal of the assessee.

65. In result, the appeals filed by the assessee are partly allowed and appeals filed by the Revenue are dismissed.

Order pronounced in the open court on 20.06.2023.

Sd/-	Sd/-
(KAVITHA RAJAGOPAL)	(PRASHANT MAHARISHI)
(JUDICIAL MEMBER)	(ACCOUNTANT MEMBER)

Mumbai, Dated: 20.06.2023
Sudip Sarkar, Sr.PS/ Dragon
Copy of the Order forwarded to :

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

BY ORDER,

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai