* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **INCOME TAX APPEAL NO.928/2011**

Reserved on : November 04, 2011.
% **Date of Decision** :November 15, 2011.

COMMISSIONER OF INCOME TAX (CENTRAL)-I .... Appellant
Through: Mr. Sanjeev Rajpal, Advocate.

VERSUS

MANISH BUILD WELL PVT. LTD. …..Respondent
Through : Mr.Siddharth S. Dev, Advocate.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V. EASWAR

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not ? Yes
3. Whether the judgment should be reported in the Digest? Yes

R.V. EASWAR, J.:

This is an appeal filed by the Revenue against the order passed by the Income Tax Appellate Tribunal (Tribunal, for short), New Delhi in ITA No.3062/(Del)/2010 dated 22.12.2010. The following questions have been

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raised in the appeal and the Revenue seeks admission and disposal as substantial questions of law under Section 260A of the Income tax Act 1961 :

> "1. Whether the assessing officer was not right in law in raising the adverse inference qua the cancellation charges amount to Rs.10,97,850/- retained by the respondent while adding it to its income for the relevant year which the respondent failed to explain to his satisfaction?
>
> 2. Whether the assessing officer wrongly held that the determination of income by the respondent on completion of its projects amounts to deferment of payment of taxes which is assessable annually under the existing tax law of the land?
>
> 3. Whether the addition of Rs.28,21,000/- made by the assessing officer to the income of the respondent for the relevant year based on percentage completion method was not correct as held by the ITAT?
>
> 4. Whether the undisclosed transfer charge/s received by the respondent from sale of space to its buyers was not liable to be added to its income @ 3.6% during the relevant year?
>
> 5. Whether the amount of Rs.3,82,94,536/- recoverable by the respondent for payment of stamp duty including the electrification charges for spaces sold out was not liable to be added back to its income being revenue in nature as held by the ITAT?
>
> 6. Whether the assessing officer incorrectly invoked the provision of Sec.68 of the Act, in the case of the respondent qua to the advances received by it for sum of Rs.1,61,67,000/- from its buyers in the relevant year

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though it failed to lead positive evidence to rebut the statutory presumption under the law?

7. Whether the ITAT rightly upheld the action of the CIT (A) as correct in law while taking the evidence led by the respondent before him in to consideration without any opportunity in rebuttal to the assessing officer which the respondent did not furnish during the assessment proceeding?."

2. The assessee is a private limited company engaged in the business of development of real estate projects. On 16.3.2007 the Income Tax Department conducted a search on the assessee's premises and on the basis of the materials found during search an assessment order was passed under Section 153A read with Section 143(3) on 31.12.2008. The first addition made therein is the sum of Rs. 10,97,850/- as cancellation charges. It was found from the seized documents that the assessee charged 25% earnest money amounting to Rs.4,17,425/- on cancellation of the booking of a shop from Kailash Chand Khandelwal. On the basis of the seized document, the assessing officer asked the assessee to show cause why 25% of the earnest money should not be added in all cases where the bookings were cancelled. The assessee raised several objections to the proposal, the main objection

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being that from a single instance found in the seized document an inference that in all such cases the assessee was forfeiting a part of the booking amount, which should be assessed as its income, cannot be drawn. It was also pointed out that the seized document did not relate to any transaction which Khandelwal had with the assessee. These objections were over-ruled by the assessing officer who held that the booking forms seized during the search revealed that they were all identical to one another and in each case it was mentioned that in the event of cancellation, cancellation charges would be levied. He found that the booking forms in respect of the connected firms and companies carrying on the same business as that of the assessee were identically worded. In this view of the matter, he added 25% of the total value of the space whose booking was cancelled during the relevant accounting year. The total cancellation amount was Rs.43,91,400/- of which 25%, namely Rs.10,97,850/- was added.

3. On appeal the CIT (Appeals) noted that no evidence was found during the search to suggest that any cancellation charges were received by the assessee outside the books of accounts. He, therefore, held that in the absence

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of any adverse material brought on record, no addition could be made. He further noted that the transaction of Kailash Chand Khandewala was related to the case of M/s. K.K. Enterprises which was a separate assessee though belonging to the assessee's group and in that case 25% of the earnest money was forfeited for default in paying the instalments in spite of repeated demands. It was noted by the CIT (A) that it was a specific case of forfeiture and not cancellation of the booking. Thus on a factual analysis of the matter he came to the conclusion that the addition for cancellation charges was not justified.

4. On appeal by the Revenue to the Tribunal it was held in paragraph 17 of the order of the Tribunal that there was no infirmity in the order of the CIT (A) inasmuch as the addition was made by the assessing officer on the ground that the assessee ought to have charged cancellation charges from customers who cancelled their bookings and not on the basis of any material found during search. In this view of the matter, the decision of the CIT (A) was confirmed.

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5. It will be seen from the above discussion that question No.1 sought to be raised by the Revenue as a substantial question of law is a pure question of fact. The income tax authorities as well as the Tribunal have decided the matter on the basis of the facts brought on record including the seized document. The CIT (A) has examined the facts as well as the seized document and took the decision that there was no basis for the addition. His decision was upheld by the Tribunal. In our opinion, no substantial question of law arises from the order of the Tribunal. We, therefore, decline to admit question No.1.

6. Questions Nos. 2 and 3 are connected. They assail the decision of the Tribunal rendered in paragraph 20 of its order. An addition of Rs.28,21,000/- was made by the assessing officer on the footing that the assessee was adopting the project completion method or the completed contract method, which was not proper and the profits of the business should be computed on the basis of the percentage completion method under which the profits of the development and construction business of the assessee get assessed over a period of years, keeping pace with the progress in the

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construction/development of the project. The CIT (A) however held that the assessee had no reason to withhold the handing over of possession of the space to the purchaser in respect of a project which is completed and that wherever possession was not handed over to the purchaser, it was for the reason that the project was not completed. He further found that a buyer who has paid the entire sale consideration would immediately demand possession and the entire sale consideration could be received by the assessee only on completion of the project. On these facts it was noted by the CIT (A) that unless the buyer makes full payment the assessee could not hand over possession nor get the sale transaction registered. A further finding recorded by the CIT (A) was that the impugned project was completed only in the accounting period relevant to the assessment year 2008-09 and in support of this finding, he noted that a copy of the completion/occupancy certificate was placed on the record of the Assessing Officer. He further recorded a finding that after the issue of the occupancy certificate and till the date of the assessment order, possession of almost 75% of the developed area was handed over to the buyers who made full payment and the sale deeds were also executed. Thereafter, possession of 20% of the remaining area was

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handed over to the buyers. The possession of the balance 5% of the developed area could not be handed over to the remaining buyers because they could not make full payment and take possession. On these findings the CIT (A) held that the allegation of the assessing officer that the assessee was adopting a method of accounting namely the project completion method, to suit its convenience to book income was baseless. A further finding recorded by the CIT (A) is that there was no manipulation in the books of accounts. So far as the method of accounting is concerned, the CIT (A) held that the project completion method is a well recognized and accepted method of accounting and was the only method suitable for any developer who has to deliver a completed product to the buyer. Ultimately the CIT (A) held as under:-

> "Thus on overall perusal of the assessment order it is seen that neither any defect has been pointed out by the assessing officer in the method of accounting followed by the appellant nor any finding has been given that true and fair profits cannot be deduced following the said method of accounting. No evidence was found during the course of search to show that the books of account are not properly maintained by the appellant. The main thrust of the assessing officer in making the addition is that the assessee is deferring the payment of taxes. But this allegation of the assessing officer cannot be accepted as the assessee is consistently following a method of

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> accounting which is well recognized in development business and has been accepted by the assessing officer also in the other group cases. Thus the addition is hereby deleted."

7. The aforesaid finding of the CIT (A) was approved by the Tribunal with the observation that the department has accepted the assessee's method of accounting namely, the project completion method and therefore there was no justification for adopting the percentage completion method for one year on selective basis.

8. It is well settled that the project completion method is one of the recognized methods of accounting. In ***Commissioner Income-Tax And Another v. Hyundai Heavy Industries Co. Ltd. (*2007) 291 ITR 482 (SC)** the Supreme Court held as follows:-

> "Lastly, there is a concept in accounts which is called the concept of contract accounts. Under that concept, two methods exist for ascertaining profit for contracts, namely, "completed contract method" and "percentage of completion method". To know the results of his operations, the contractor prepares what is called a contract account which is debited with various costs and which is credited with revenue associated with a particular contract. However, the rules of recognition of cost and

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> revenue depend on the method of accounting. Two methods are prescribed in Accounting Standard No.7. They are "completed contract method" and "percentage of completion method".

This view was reiterated by the Supreme Court in ***Commissioner of Income-Tax v. Bilahari Investment P. Ltd. (2008) 299 ITR 1 (SC)*** with the following observations:

> "Recognition/identification of income under the 1961 Act is attainable by several methods of accounting. It may be noted that the same result could be attained by any one of the accounting methods. The completed contract method is one such method. Similarly, the percentage of completion method is another such method.
>
> Under the completed contract method, the revenue is not recognized until the contract is complete. Under the said method, costs are accumulated during the course of the contract. The profit and loss is established in the last accounting period and transferred to the profit and loss account. The said method determines results only when the contract is completed. This method leads to objective assessment of the results of the contract.
>
> On the other hand, the percentage of completion method tries to attain periodic recognition of income in order to reflect current performance. The amount of revenue recognized

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> under this method is determined by reference to the stage of completion of the contract. The stage of completion can be looked at under this method by taking into consideration the proportion that costs incurred to date bears to the estimated total costs of contract.
>
> The above indicates the difference between the completed contract method and the percentage of completion method." (underlining ours)

9. After the above judgments of the Supreme Court it cannot be said that the project completion method followed by the assessee would result in deferment of the payment of the taxes which are to be assessed annually under the Income Tax Act. Accounting Standards 7 (AS7) issued by the Institute of Chartered Accountants of India also recognize the position that in the case of construction contracts, the assessee can follow either the project completion method or the percentage completion method. In view of the judgments of the Supreme Court (Supra), the finding of the CIT (A), upheld by the Tribunal, does not give rise to any substantial question of law. Further, the Tribunal has also found that there was no justification on the part of the assessing officer to adopt the percentage completion method for one year (the

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year under appeal) on selective basis. This will distort the computation of the true profits and gains of the business. For these reasons, we are of the view that no substantial question of law arises. We, therefore, decline to admit question Nos. 2 and 3.

10. So far as the question No.4 is concerned, it is seen that before the Assessing Officer, in response to a query raised by him, the assessee submitted that merely on the basis of the seized material showing one transaction in respect of which the assessee had received transfer charges at 3.6% of the cost of the shop it should not be assumed that similar transfer charges had been received from all customers in whose cases such transfers were effected. The assessing officer did not accept the contention and proceeded to make an addition of Rs.2,19,701/- at 3.6% of Rs. 61,02,800/- which was the value of flats/space transferred during the relevant accounting year. The CIT (A) held on a perusal of the seized receipt that it mentioned the names of only the seller and the purchaser and the name of the assessee was not mentioned therein either as recipient or payer. He also found that the receipt did not mention any transfer charges being received by the assessee.

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It was found to mention that allied charges were "to be paid" by the buyers from which the CIT (A) concluded that the receipt cannot be taken as evidence for actual payment of any transfer charges to the assessee. In this view of the matter and for lack of any evidence he deleted the addition. In the appeal filed by the Revenue to the Tribunal we do not find any ground taken to challenge the decision of the CIT (A) to delete the addition of Rs.2,19,701/-. The order of the Tribunal also does not show that any additional ground was filed by the Revenue which was admitted and adjudicated upon. In this view of the matter, question No.4 does not arise from the order of the Tribunal and we, therefore, decline to admit the same.

11. Question No.5 relates to the addition of Rs.3,82,94,536/- being stamp duty and electrification charges recoverable by the assessee. This issue is dealt with in paragraph 7 of the assessment order. The Assessing Officer stated that the seized documents revealed that the assessee was charging registration charges @ 7% and was showing the same as loans and advances recoverable from the customers. According to him this was a wrong method of accounting. A similar procedure was found to have been adopted by the

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assessee in respect of electrification charges which were charged @ 15% and shown to be recoverable as loans and advances. According to the assessing officer these were not items of revenue expenditure since they related to the flats/space and formed part of the cost thereof and therefore they were not adjustable against the revenue of the assessee. According to the assessing officer these items of expenditure could be capitalized and added as part of the work in progress. On these facts he called upon the assessee to explain why the registration and electrification charges collected from customers cannot be added as revenue receipts. The assessee submitted that according to the system of accounting followed, the registration and electrification charges were not included either in the cost of land or in the work in progress or as cost of the project and they were rightly shown to be recoverable from the buyers. It was also explained that in case there is any surplus of the registration and electrification charges collected from the customers over the amounts paid to the State Government, the surplus would be shown as income in the year of receipt. The assessing officer rejected the explanation on the ground that revenue receipts and capital expenditure cannot be adjusted

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against each other. He, therefore, added the amount of Rs.3,82,94,536/- as the assessee's income.

12. On appeal the CIT (A) recorded the following findings:-

a) The assessee declared the amount as advances recoverable in its balance sheet.

b) The electrification and registration charges did not represent capital expenditure because they were incurred in relation to the construction of the mall project which was stock-in-trade for the assessee as he is engaged in the business of developing and selling real estate.

c) The amount paid has not been claimed as expenses in the profit and loss account and was shown in the asset side of the balance sheet as recoverable from the customers.

d) When the registration and electrification charges are recovered from the buyer later they are duly recorded in the books of accounts. This is at the time of handing over possession or execution of sale deeds. Neither the payment of the registration and electrification charges nor the recovery

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thereof from the buyers is shown in the profit and loss account and thus there is no revenue effect.

e) The finding of the AO that the capital expenditure has been adjusted against revenue receipts is not factually correct since no such adjustment has been made in the books of accounts.

13. On the above factual findings, the CIT (A) deleted the addition of Rs.3,82,94,536/-.

14. On appeal by the Revenue to the Tribunal it was held that the assessee could have adopted two ways of recording the transaction – either by crediting the amount received from the buyers in the cost of the project account and claiming the payment of the registration and electrification charges as an expense on the debit side or to make an entry in such a manner that the amount is shown as recoverable from the buyers, credit the account with recoveries made from the buyers and if there is any surplus of the recoveries over and above the amount shown as recoverable, offer the same for income tax. The Tribunal held that the assessee has adopted the second of these two methods and both the methods were acceptable. It was also found

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by the Tribunal that when the assessee paid the registration and electrification charges they were not claimed as deduction in the profit and loss account. On these findings of fact the Tribunal agreed with the CIT(A) that the amount cannot be added.

15. The aforesaid discussion would show that the decision of the Tribunal is based on factual findings recorded by the CIT (A) with which it agreed. No material was brought before the Tribunal or before us to disturb the factual findings recorded by the aforesaid authorities. The decision of the Tribunal is not therefore open to the challenge as being perverse. Further since the Tribunal's decision is based on findings of fact recorded on the basis of the entries made in the books of accounts, no question of law can be said to arise from the order of the Tribunal on this point. Question No.5 is therefore not admitted.

16. Question Nos.6 and 7 can be taken together. The brief facts in this connection are that the Assessing Officer noticed that the assessee made huge investments in the purchase of land. He also noticed that a large amount of advances were shown to have been received by the assessee from its

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customers. In order to verify the genuineness of the advances the assessee company was asked to furnish the relevant details. The assessee filed its reply submitting the relevant details from which the Assessing Officer noticed that in many of the cases there were a number of customers who had booked flats/spaces against which the sales were still to be shown. The Assessing Officer, therefore, called upon the assessee to submit confirmation letters from these customers. The assessee was not able to furnish such conformation letters in respect of many of the parties. Taking the view that the assessee did not discharge the burden placed on it under Section 68 of the Act, the assessing officer held that all the advances received by the assessee were unexplained cash credits. In all there were 28 customers who had advanced an aggregate amount of Rs. 1,61,67,600/-. This amount was added under Section 68.

17. On appeal it was pointed out by the assessee that the assessing officer had required him to furnish confirmations only from those customers who had advanced the monies in cash and in respect of cheque receipts, the AO had not required the assessee to furnish any confirmation. It was also pointed out

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that in compliance with this requirement the assessee had furnished confirmations from those parties who advanced the monies in cash. The assessee also submitted a list to show that possession of the flats or space booked by the 19 customers out of the 28 customers had already been given to them and corresponding sales were also recorded. It would appear that before the CIT (A) the assessee submitted the confirmations from all the customers – those who paid monies in cash as well as those who paid monies by cheque. It was submitted that these confirmations cannot be treated as fresh evidence to attract Rule 46A of the Income Tax Rules, 1962 because the failure to furnish the confirmation letters from all the customers, including those who advanced monies by cheque, was not attributable to the assessee as the Assessing Officer had never required the assessee to furnish them. On these facts it was pleaded that the addition should be deleted.

18. The CIT (A) disposed of the ground in the following manner:-

> "7.2 I have considered the assessment order and submissions including the evidences placed on record by the assessee. On perusal of the questionnaire dated 21/10/08 placed in the paper book, it is seen that the assessing officer asked details of advance received against sale of property otherwise than through account payee cheques and giving complete details and confirmations

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from such buyers/parties. The appellant submitted those and no addition has been made for the said advances received. Thus it is clear that the assessing officer never desired to submit any confirmation for the advances received against sale through account payee cheques and therefore correctly the same were not submitted by the appellant. However, the confirmations along with copies of ledger accounts of the said buyers in the books of the assessee were filed by the assessee during the course of appellate proceedings.

7.3 The same technically is fresh evidence to attract rule 46A as the assessing officer never called for the said confirmations. However, even if those are treated so yet the appellant was prevented from filing the said evidences which are relevant to the ground of appeal. I hereby admit the said evidence as the assessee has fulfilled the condition prescribed u/r 46A.

7.4 On perusal of the confirmations on record, it would be seen that the complete details like names, addresses, cheque number, bank details and PAN of the buyers have been duly mentioned therein. On perusal of the list submitted by the appellant, it would be seen that the sale has also been booked for 19 out of 28 buyers in the books of the appellant. Since these advances were received through account payee cheques and were duly recorded in the books of account as part of the sale proceeds and the buyers confirmed the transactions, it is clear that the appellant has discharged its onus regarding the said buyers. Thus the addition made u/s 68 stands deleted."

19. In the appeal filed before the Tribunal the Revenue contested the decision of the CIT (A) to delete the addition and in ground Nos. 6 and 7also

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challenged the admission of fresh evidence by the CIT (A) allegedly in violation of Rule 46A. In ground No.7 the Revenue took a specific plea to the effect that a specific query in paragraph 27 (b) was raised by the AO in the notice issued under Section 142(1) on 21.10.2008 calling upon the assessee to furnish the confirmation letters. It was also pleaded in the aforesaid grounds that the additional evidence was admitted by the CIT (A) without affording any opportunity to the AO which was also in violation of Rule 46A.

20. The Tribunal dismissed the grounds taken by the Revenue in the following manner:-

> "21. Coming to the last issue about deletion of addition u/s 68 i.e. ground no.5, 6 & 7 we have gone through the entire material on records in this aspect and the notice issued by AO u/s 142(1). The requirement of confirmations was in respect of advances received in cash and not by account payee cheques. It is peculiar that AO has made no addition in respect of cash advances received by assessee and the same has been made in respect of advances received by account payee cheques. Be that as it may, revenue has questioned the violated Rule 46A. In our view, assessee addresses and permanent account numbers of the customers with books of accounts before AO, which is not disputed. The basis of addition i.e. non furnishing of confirmation has not been (sic) specifically insisted by AO and addition was made ignoring addresses and PAN nos. Assessee filed a specific ground of appeal before CIT(A) challenging the AO's finding for asking such confirmations. In the

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> circumstances, assessee produced before CIT(A) the relevant confirmations form the same customers and their ledger accounts in their books of account claiming that 19 customers have been already sold the flats by the time of first appeal.
>
> 22. In our view of these facts and circumstances it cannot be held that CIT(A) (sic) violated Rule 46A, he had acted in a judicious and proper manner and his order being based on proper appreciation of facts and record cannot be called violative of a procedural provision. CIT(A) is statutory first appellate authority and has independent power of calling for information and examination of evidences and poses conterminous power of assessment apart from appellate powers. In our view CIT(A)'s order is to be upheld. The matter should not be set aside on general ground as it amounts to causing the assessee injustice and giving the AO another innings. Besides it is not explicit that AO insisted for confirmations. In our view CIT(A) has decided the issue in just and proper manner the same is upheld."

21. In our opinion, substantial questions of law do arise out of the order of the Tribunal in respect of its decision regarding the addition of Rs.1,61,67,600/- made under Section 68. We, accordingly, re-frame the following substantial questions of law:-

> "1. Whether on the facts and in the circumstances of the case and on a proper interpretation of Rule 46A of the Income Tax Rules, 1962, the Tribunal was right in law in taking a decision on the merits of the addition made under Section 68 without affording an opportunity to the assessing officer of being heard as envisaged in sub-Rule (3) of Rule 46A?"

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> 2. Whether on the facts and in the circumstances of the case the Tribunal was right in law in holding that since the CIT (A) possesses co-terminus powers over the assessment apart from appellate powers, there was no violation of Rule 46A committed by him ?"

22. As we have with the consent of the learned counsel, heard them on merits, we proceed to decide the aforesaid substantial questions of law. Since the CIT (A) himself refers to Rule 46A and has also admitted that the confirmation letters adduced by the assessee before him were technically fresh evidence, it is not possible to accept the plea of the learned counsel for the assessee that the CIT (A), in examining the confirmation letters, was exercising his independent powers of enquiry under sub-Section (4) of Section 250 of the Income tax Act. It is true that the CIT (A) as first appellate authority has conterminous powers over the sources of income constituting the subject matter of the assessment, except the power to tackle new sources of income not considered by the Assessing Officer, and can do what the Assessing Officer can do and can direct the Assessing Officer to do what he has failed to do, as held by the Supreme Court in the case of ***Commissioner of Income-Tax, U.P. v. Kanpur Coal Syndicate, (1964) 53 ITR 225,*** but in this case, the CIT (A) did not exercise this right. This power, which is

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recognized in sub-Section (4) of section 250, has to be exercised by the CIT (A) and there should be material on record to show that he, while disposing of the appeal, had directed further enquiry and called for the confirmation letters from the assessee even in respect of receipt of monies from customers by way of cheques. Rule 46A is a provision in the Income Tax Rules, 1962 which is invoked, on the other hand, by the assessee who is in an appeal before the CIT (A). Once the assessee invokes Rule 46A and prays for admission of additional evidence before the CIT (A), then the procedure prescribed in the said rule has to be scrupulously followed. The fact that sub-Section (4) of Section 250 confers powers on the CIT (A) to conduct an enquiry as he thinks fit, while disposing of the appeal, cannot be relied upon to contend that the procedural requirements of Rule 46A need not be complied with. If such a plea of the assessee is accepted, it would reduce Rule 46A to a dead letter because it would then be open to every assessee to furnish additional evidence before the CIT (A) and thereafter contend that the evidence should be accepted and taken on record by the CIT (A) by virtue of his powers of enquiry under sub-Section (4) of Section 250. This would mean in turn that the requirement of recording reasons for admitting the additional evidence,

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the requirement of examining whether the conditions for admitting the additional evidence are satisfied, the requirement that the assessing officer should be allowed a reasonable opportunity of examining the evidence etc. can be thrown to the winds, a position which is wholly unacceptable and may result in unacceptable and unjust consequences. The fundamental rule which is valid in all branches of law, including Income Tax Law, is that the assessee should adduce the entire evidence in his possession at the earliest point of time. This ensures full, fair and detailed enquiry and verification. A 7-Judge Bench of the Supreme Court in ***Keshav Mills Co. Ltd. v. Commissioner of Income-Tax, Bombay North, Ahmedabad (1965) 56 ITR SC 365*** had observed as under:-

> "Proceedings taken for the recovery of tax under the provisions of the Act are naturally intended to be over without unnecessary delay, and so, it is the duty of the parties, both the department and the assessee, to lead all their evidence at the stage when the matter is in charge of the Income-tax Officer."

23. It is for the aforesaid reason that Rule 46A starts in a negative manner by saying that an appellant before the CIT (A) shall not be entitled to produce

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before him any evidence, whether oral or documentary, other than the evidence adduced by him before the assessing officer. After making such a general statement, which is in consonance with the principle stated in the above judgment, exceptions have been carved out that in certain circumstances it would be open to the CIT (A) to admit additional evidence. Therefore, additional evidence can be produced at the first appellate stage when conditions stipulate in the Rule 46A are satisfied and a finding is recorded. Rule 46 A reads:-

> **"Production of additional evidence before the** [**Deputy Commissioner (Appeals)**] [**and Commissioner (Appeals)**]**.**
>
> **46A.** (1) The appellant shall not be entitled to produce before the [Deputy Commissioner (Appeals)] [or, as the case may be, the Commissioner (Appeals)], any evidence, whether oral or documentary, other than the evidence produced by him during the course of proceedings before the [Assessing Officer], except in the following circumstances, namely :
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> (*a*) where the [Assessing Officer] has refused to admit evidence which ought to have been admitted ; or
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> (*b*) where the appellant was prevented by sufficient cause from producing the evidence which he was called upon to produce by the [Assessing Officer] ; or
>
> (*c*) where the appellant was prevented by sufficient cause from producing before the [Assessing Officer] any evidence which is relevant to any ground of appeal ; or

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(*d*) where the [Assessing Officer] has made the order appealed against without giving sufficient opportunity to the appellant to adduce evidence relevant to any ground of appeal.

(2) No evidence shall be admitted under sub-rule (1) unless the [Deputy Commissioner (Appeals)] [or, as the case may be, the Commissioner (Appeals)] records in writing the reasons for its admission.

(3) The [Deputy Commissioner (Appeals)] [or, as the case may be, the Commissioner (Appeals)] shall not take into account any evidence produced under sub-rule (1) unless the [Assessing Officer] has been allowed a reasonable opportunity

(*a*) to examine the evidence or document or to cross-examine the witness produced by the appellant, or

(*b*) to produce any evidence or document or any witness in rebuttal of the additional evidence produced by the appellant.

(4) Nothing contained in this rule shall affect the power of the [Deputy Commissioner (Appeals)] [or, as the case may be, the Commissioner (Appeals)] to direct the production of any document, or the examination of any witness, to enable him to dispose of the appeal, or for any other substantial cause including the enhancement of the assessment or penalty (whether on his own motion or on the request of the [Assessing Officer]) under clause (*a*) of sub-section (1) of section 251 or the imposition of penalty under section 271.]

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We are highlighting these aspects only to press home the point that the conditions prescribed in Rule 46A must be shown to exist before additional evidence is admitted and every procedural requirement mentioned in the Rule has to be strictly complied with so that the Rule is meaningfully exercised and not exercised in a routine or cursory manner. A distinction should be recognized and maintained between a case where the assessee invokes Rule 46A to adduce additional evidence before the CIT (A) and a case where the CIT (A), without being prompted by the assessee, while dealing with the appeal, considers it fit to cause or make a further enquiry by virtue of the powers vested in him under sub-Section (4) of Section 250. It is only when he exercises his statutory suo moto power under the above sub-section that the requirements of Rule 46A need not be followed. On the other hand, whenever the assessee who is in appeal before him invokes Rule 46A, it is incumbent upon the CIT (A) to comply with the requirements of the Rule strictly.

24. In the present case, the CIT (A) has observed that the additional evidence should be admitted because the assessee was prevented by adducing

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them before the assessing officer. This observation takes care of clause (c) of sub-rule (1) of Rule 46A. The observation of the CIT (A) also takes care of sub-rule (2) under which he is required to record his reasons for admitting the additional evidence. Thus, the requirement of sub-rules (1) and (2) of Rule 46A have been complied with. However, sub-rule (3) which interdicts the CIT (A) from taking into account any evidence produced for the first time before him unless the Assessing Officer has had a reasonable opportunity of examining the evidence and rebut the same, has not been complied with. There is nothing in the order of the CIT (A) to show that the Assessing Officer was confronted with the confirmation letters received by the assessee from the customers who paid the amounts by cheques and asked for comments. Thus, the end result has been that additional evidence was admitted and accepted as genuine without the Assessing Officer furnishing his comments and without verification. Since this is an indispensable requirement, we are of the view that the Tribunal ought to have restored the matter to the CIT (A) with the direction to him to comply with sub-rule (3) of Rule 46A. In our opinion and with respect, the error committed by the Tribunal is that it proceeded to mix up the powers of the CIT (A) under sub-

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section (4) of Section 250 with the powers vested in him under Rule 46A. The Tribunal seems to have overlooked sub-rule(4) of Rule 46A which itself takes note of the distinction between the powers conferred by the CIT (A) under the statute while disposing of the assessee's appeal and the powers conferred upon him under Rule 46A. The Tribunal erred in its interpretation of the provisions of Rule 46A vis-à-vis Section 250(4). Its view that since in any case the CIT (A), by virtue of his conterminous powers over the assessment order, was empowered to call for any document or make any further enquiry as he thinks fit, there was no violation of Rule 46A is erroneous. The Tribunal appears to have not appreciated the distinction between the two provisions. If the view of the Tribunal is accepted, it would make Rule 46A otiose and it would open up the possibility of the assessees' contending that any additional evidence sought to be introduced by them before the CIT (A) cannot be subjected to the conditions prescribed in Rule 46A because in any case the CIT (A) is vested with conterminous powers over the assessment orders or powers of independent enquiry under sub-section (4) of Section 250. That is a consequence which cannot at all be countenanced.

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25. For the above reasons, we answer the substantial questions of law framed in paragraph 21 above, in favour of the Revenue and against the assessee. The issue relating to the addition of Rs. 1,61,67,600/- made under Section 68 of the Act is restored to the CIT (A) who shall comply with the requirements of Rule 46A and take a fresh decision on the merits of the addition in accordance with law.

26. The appeal filed by the Revenue is disposed of accordingly. No costs.

(R.V. EASWAR)
JUDGE

(SANJIV KHANNA)
JUDGE

NOVEMBER 15, 2011
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IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'E', NEW DELHI

BEFORE SHRI R. P. TOLANI, JUDICIAL MEMBER
&
SHRI A.K. GARODIA, ACCOUNTANT MEMBER

ITA No. 3062/Del/2010
Assessment Year: 2005-06

DCIT, Central Circle 11, New Dlehi. New Delhi.	Vs.	Manish Buildwell P. Ltd., 2nd Floor, Usha Chamber, 37-38, Ashok Vihar-1, New Delhi. ABFPG1603F
(Appellant)		(Respondent)

Appellant by : Smt. Sangeeta Gupta, CIT(DR)
Respondent by : Sh. Vinod Kr. Bindal & Ms. Vidhi Goel, CA's

ORDER

PER R. P. TOLANI, J.M.

This is revenue's appeal. Following grounds are raised are as under: -

1. *"The order of the ld. CIT(A) is not correct in law and facts.*
2. *On the facts and circumstances of the case, the ld. CIT(A) has erred in law in deleting the addition of Rs. 10,97,850/- on account of cancellation charges realized from clients default in payments of installment seven though such entries of realization are recorded in seized material and there is litigation by the assessee to realize the same from defaulters in the courts of law. In doing so, the ld. CIT(A) ignored contents of seized documents and rather relied on mere argument of the assessee that no*

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enquiries were made from concerned parties.

3. *On the facts and circumstances of the case, the ld. CIT(A) has erred in law in deleting the addition of Rs. 3,82,94,536/- on account of registration and electrification charges received from clients on the ground that such expenditure are revenue in nature whereas AO held such payments as capital expenditure.*
4. *On the facts and circumstances of the case, the ld. CIT(A) has erred in law in deleting the addition of Rs. 28,21,000/- on the basis of percentage completion method as against project completion method adopted by the assessee whereas the method of project completion method is not in accordance with mercantile method of accounting adopted by the assessee in maintaining books of accounts and by way of following incorrect method the assessee intended to postpone chargeability of profits in his construction business.*
5. *On the facts and in the circumstances of the case, the order of the ld. CIT(A) has erred in law in deleting the addition of Rs. 1,61,67,600/- towards unexplained cash credits u/s 68 of Income Tax Act, 1961 whereas the assessee failed to substantiate genuineness and creditworthiness of depositors and genuineness of transactions.*
6. *On the facts and circumstances of the case, the order of the ld. CIT(A) has erred in law in admitting of additional evidence in the form of confirmations from depositors without affording opportunity to the AO on the ground that the assessee was prevented by sufficient cause in producing such evidence as AO had not desired such details thus, violating provisions of Rule – 46A of Income Tax Rules, 1962.*
7. *On the facts and circumstances of the case, the order of the ld. CIT(A) has erred in law in admitting of additional evidence in the form of confirmations from depositors without affording opportunity to the AO on the ground that the assessee was prevented by sufficient cause in producing such evidence as AO had not desired such details, which is contrary to the facts of the case as AO made specific query in para 27(b) of notice issued u/s 142(1) on 21.10.08.*

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8. The appellant craves leave to add, alter or amend any/all of the ground of appeal before or during the course of the hearing of the appeal."

2. Brief facts are the assessee is real estate developer books are duly maintained audited u/s 44AB. The regular method of accounting and revenue recognition adopted by the assessee is project completion method. In all these grounds there is no allegation about the defects in the books of account. Search and seizure operations were carried out in assessee's premises on 16.3.07 in the premises of the assessee and associated concerns. During the course of assessment proceedings assessee field relevant details and the assessment have been framed u/s 143(3) read with sec. 153(c) of the I.T. Act.

3. Brief facts apropos, ground no. 2 are assessee is in the business of development of commercial real estate and during the relevant period it was developing a mall and commercial complex at Dwarka New Delhi. The appellant agreed to sell several spaces therein to various prospective buyers and received advances in installments from them during the construction period. The appellant recognizes its income only when the possession was handed over to the buyer or registration of the agreement to sell/sale deed whichever was earlier as till then the buyer was free to exit from the project. Assessee adopted project completion method of accounting to recognize its income.

4. Ground no. 1 as per the agreement between assessee and customers there was a condition that in case a booked flat is cancelled by the customer

earnest money will be forfeited. In the assessee's case though there was cancellations of booked flat the assessee had not shown any income by way of forfeiture of earnest money consequent to such cancellation. During the course of search in the associate concern M/s K.K. Enterprises in case of a cancellation by Mr. Kailash Khandelwal earnest money was forfeited. Assessee contended that it was policy of the company to insure that customers do not cancel the flats. However, in such event it was the discretion of the company to go for forfeiture of earnest money. This was in order to maintain good customer relations and market reputation, since is no cancellation amount has been received by the assessee the notional addition should not be made. The AO made the addition holding that assessee ought to have forfeited the 25% of the amount in respect of cancellation of booking out of a flat booked for Rs. 4391400/-. In first appeal CIT(A) deleted the addition by holding as under:

> *"As regards the statement of Mr. Manish Aggarwal given in the legal suit filed by one Mr. Kailash Chand Khandelwal, it was stated that the same was given in the case of M/s K.K. Enterprises which is a separate assessee. However, further on reading of the statement of Mr. Manish Aggarwal submitted before the Court in the civil suit as mentioned in the assessment orders itself, it is seen that Mr. Manish Aggarwal stated that the said plaintiff, i.e. Mr. K. C. Khandelwal defaulted in payment of installments. The plaintiff failed to pay the installments in spite of the repeated demands and therefore, the booking was cancelled and the earnest money of Rs. 417425/- was forfeited. Thus, it was a specific case of forfeiture and not of cancellation. In the said case, the Mr. Khandelwal never applied for cancellation and consequent refund. Forfeiture of the booking*

amount due to non fulfillment of stipulated conditions is different from charging any amount against cancellation and the same cannot be equated. Thus, even the said statement of Mr. Manish Aggarwal does not suggest that the said amount was taken as cancellation charges.

Undisputedly no evidence was found during the course of search to suggest that any cancellation charges were received by the assessee outside the books of account as nothing has been mentioned in the assessment order. In the absence of any such evidence found during the course of search and no adverse material brought on record by the AO suggesting the receipt of cancellation money out of books of account and in view of the evidences placed on record by the appellant that no cancellation charges were taken by the appellant, no adverse cognizance can be taken against the assessee merely on the opinion that no addition can be made on presumption for cancellation charges. Thus, the addition of Rs. 10,97,850/- is hereby deleted."

5. Ground no. 3: In the ground of appeal the appellant has challenged the addition of Rs. 3,82,94,536/- made by the AO on account of Registration and Electrification charges paid to the government, agencies and shown as recoverable from the buyers. At the best they could be capitalized and added to the cost of work in progress. The addition has been made stating that setting off revenue receipts against capital expenditure is not an acceptable principle of accountancy.

In this regard the appellant submitted that the appellant incurred stamp duty charges for registration of the plot of land purchased for development of

the mall. Similarly, the appellant incurred expenses for provision of the electricity in the mall complex. These expenses were recoverable from the buyers of the space in the mall over and above the sale price but only at the time of handing over the possession or execution of sale agreement whichever is earlier. Therefore, the amounts paid were shown independently in the balance sheet as recoverable for a proper monitoring and computation of recovery from each buyer. These amounts were not included in the work in progress nor debited in the profit and loss account in any manner. This amount was not the capital expenses for the appellant as it was to be defrayed on behalf of customers. It was further submitted that whatever surplus would be available from the recoveries would be offered as income in the year of receipt. Nothing was recovered from the buyers on this account till 31.3.05 as neither any possession nor any agreement of sale of any space was given or executed till then. Thus, the same was shown as receivable. AO considered the same as income of the appellant though the said amount was spent but not claimed as an expense. Further even if it is held that the said amount recoverable should be shown as income of the year yet no addition could be made as neither any amount for the expenses incurred was claimed in the profit and loss account nor any amount was due for recovery. Moreover there is no evidence that the appellant received any amount outside the books of account from the flat buyers on this account. Thus, the addition must be deleted.

6. The AO made the addition aggrieved assessee preferred first appeal, where CIT(A) held that from the perusal of balance sheet these amounts were

received by the assessee and declared as advances recoverable and these amounts were paid by the assessee towards payment of stamp duty and electrification charges in respect of the mall project. It was held to be revenue in nature by following observations -

> *"The said amount can be recovered in the books of account in two ways as an expense or as recoverable from buyer.*
> *i. If the same is debited as expense then the amount will be a part of work in progress till the project is completed and will increase the cost of the project. When the amount from buyers is received against the same, the same will be treated as part of the sale proceeds and the profit will be computed after deducting the cost of the project from the sale proceeds, or alternatively.*
> *ii. If the same is shown as recoverable from buyers, then the same is adjusted against the amount recovered from then and surplus if any is offered for taxation.*
> *In both ways, the said amount incurred gets adjusted against receipts from the buyers on this account. The assessee has adopted the second method and did not claim any expenditure on this account in the profit and loss account.*
>
> *Any amount can be added in the hands of the appellant only when it is an income or a capital expenditure claimed as revenue or expenditure incurred for non business purpose is debited to profit and loss account to reduce the taxable income. In this case, it is not an income as the amount has been paid by the appellant from the declared source in the books of account and not received by him. Further, this is also not a capital expenditure as no asset of enduring nature or benefit is coming into existence but the same is related to the stock-in-hand. This is a payment of revenue in nature made for the purpose of the*

business. However, the same has not been claimed in the profit and loss account at all and therefore, the same cannot be added in any manner as the same has never been claimed as an expense in the computation of assessable income. Further, no amount towards these charges has been recovered in the year under consideration nor it is case wherever such amounts were recovered but were not shown in the profit and loss account. Thus, the amount so paid and shown as recoverable has not been adjusted against any revenue receipt as has been alleged in the assessment order but without any basis. In view of the above findings, no addition for the registration and electrification charges can be made in the hands of the appellant and the addition of Rs. 3,82,94,536/- stands deleted."

7. Ground no. 4, the facts are though assessee has been following a consistent method based on project completion method i.e. to recognize the revenue on the completion of project. The AO however, held that the assesee in this year should pay tax on percentage of completion method and made the addition of Rs. 28,21,000/-. Aggrieved, the assessee preferred first appeal, where the addition was deleted by CIT(A) by following observations: -

CIT(A) held that (i) the assessee is consistently following project completion method for revenue recognition and it has been allowed to assessee in earlier years as well as associate concern cases. Project completion method was one of them recognize method for recognizing profits in construction business reliance was placed on Nandi Housing (P) Ltd. Vs. DCIT, 80 TTJ (Bangalore) 750 and ACIT Vs. Rajesh Builders 3 SOT 917 (Mumb.);

(ii) No adverse material has been referred to by AO to alleged that there was

any discrepancy in the books of account and ascertainment of profits was being unduly derived.

(iii) Books of accounts have neither been rejected nor any discrepancy in books of account have been pointed out by AO.

8. Assessee following one of the recognize methods cannot be subjected to a new treatment without there being a material available on record. The addition was deleted by following conclusion: -

> *"Thus, on overall perusal of the assessment order it is seen that neither any defect has been pointed out by the AO in the method of accounting followed by the appellant nor any finding has been given that true and fair profits cannot be deduced following the said method of accounting. No evidence was found during the course of search to show that the books of account are not properly maintained by the appellant. The main thrust of the AO in making the addition is that the assessee is deferring the payment of taxes. But this allegation of the AO cannot be accepted as the assessee is consistently following a method of accounting which is well recognized in development business and has been accepted by the AO also in the other group cases. Thus, the addition is hereby deleted."*

9. Ground no. 5, 6 & 7 raises one issue in respect of deletion of addition of Rs. 16167600/- by CIT(A) u/s 68 contravening provisions of Rule 46A in admitting additional evidence. The AO made the addition holding as under:

> *"It was noticed that the assessee company has made huge investments in purchase of land and a large portion of the money used to finance the purchase of land ahs been*

withdrawn from the current account of the assessee company. It was also noticed that the assessee is showing a large amount of advances from customers its books of accounts which are the main source of finance of the purchase of these lands and construction activity shown by the assessee company. To verify the genuineness of the advances, the assessee company was asked to file the details of advances received against sale of property. The assessee has field reply giving details of advances received against bookings. The assessee submitted details. It was noticed that in many of the cases there were a number of customers who have booked flats/spaces against which sales have still not been shown. The assessee was asked to submit confirmations from these customers to confirm that the advances were actually given by them. However, he was not able to produce confirmations in respect of many of the parties. Since the assessee has not produced many of the confirmations he has not discharged the burden placed on him under the provisions of sec. 68 of the Act. Accordingly, all such advances are held to be unexplained cash credits and added back to the income of the assessee as below: -

1) Shaily Singla, 2) Arun Moga, 3) Manju Paliwal, 4) Raminder Singh, 5) Rubina Wadhwa, 6) Onkar Lal Aggarwal, 7) S. Sunpreet Singh and S. Gurcharan Singh, 8) Tatheget Jain, 9) Tathgset Jain, 10) Om Prakash, 11) B.M. Builders, 12) L.K. Jain & Vipin Dang, 13) Kamal Kishore Kain, 14) Ajay Kumar Kain, 15) Archana Saini, 16) Manju Bala, 17) Indovest Financial Service Ltd., 18) Shahi Goel, 19) Mukesh Kumar, 20) Inder Sain Arora, 21) Raj Chopra, 22) Ashish Comboj, 23) Jagvinder Singh Solanki, 24) Lt. Col. Meher Singh, 25) Prem Sancheti, 26) Sarita Sharma, 27) Om Prakash Lohani, 28) Mohan Lal. Total advance from these persons for the period ending 31.3.06 amounting to Rs. 1,61,67,600/- are added to the income of the assessee as

neither the sales in these cases have been effected though more than three years have elapsed, nor proper confirmations have been filed."

10. Aggrieved, against this addition assessee preferred first appeal: -

"In this regard, the appellant submitted that the AO desired confirmations only from those buyers who had made some payment in cash for booking the spaces. He never desired to file any confirmation from those buyers who made the entire payments by cheque. A photocopy of the requirement letter dated 21.10.08 given by the AO for the purpose was placed on record wherein para 27 he desired to file confirmations only from those buyers who had given payment otherwise than through account payee cheque. Therefore, the appellant submitted confirmations from those parties only who have made payment otherwise than account payee cheque. Photocopies of the confirmations from all the said 28 buyers who made the payments through account payee cheques but for whom additions have been made were placed on record. A list was also submitted to show that possessions of the spaces booked by them have already been given to 19 buyers and the corresponding sales have also been recorded on the respective dates. It was further submitted that since the AO never desired to file the said confirmations, those cannot be termed as fresh evidence to attract Rule 46A of the Income Tax Rules because the failure to furnish the same was not at all on account of the appellant. It is the sole prerogative of the AO as to which information he wanted to call. If he did not ask the assessee to submit some information, then the appellant could not be held responsible for not filing the same. Thus, the said addition must be deleted as the same was made not only without

confrontation but also against the facts on record in the books of account."

11. CIT(A) deleted the addition by following observations:

"I have considered the assessment order and submissions including the evidences placed on record by the assessee. On perusal of the questionnaire dated 21.10.08 placed in the paper book, it is seen that the AO asked details of advance received against sale of property otherwise than through account payee cheques and giving complete details and confirmations from such buyers/parties. The appellant submitted those and no addition has been made for the said advances received. Thus, it is clear that the AO never desired to submit any confirmation for the advances received against sale through account payee cheques and, therefore, correctly the same were not submitted by the appellant. However, the confirmations along with copies of ledger accounts of the said buyers in the books of the assessee were filed by the assessee during the course of appellate proceedings.

The same technically is fresh evidence to attract rule 46A as the AO never called for the said confirmations. However, even if those are treated so yet the appellant was prevented from filing the said evidences which are relevant to the ground of appeal. I hereby admit the said evidence as the assessee has fulfilled the condition prescribed u/s 46A.

On perusal of the confirmations on record, it would be seen that the complete details like names, addresses, cheque number, bank details and PAN of the buyers have been duly mentioned therein. On perusal of the list submitted by the appellant, it would be seen that the sale has also been booked for 19 out of 28 buyers in the books of the appellant. Since these advances

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were received through account payee cheques and were duly recorded in the books of account as part of the sale proceeds and the buyers confirmed the transactions, it is clear that the appellant has discharged its onus regarding the said buyers. Thus, the addition made u/s 68 stands deleted."

12. Ld. DR apropos ground no. 2, 3 & 4 relied on the order of AO. Apropos issue of addition u/s 68 in ground no. 5, 6 & 7 which is contended that the assessee had not furnished confirmations in respect of customers which are mentioned in his order, therefore, the addition was made. CIT(A) admitted the additional evidence and has not given any opportunity to AO to verify these confirmations. Therefore, the matter may be set aside restored back to the file of AO.

13. Ld. Counsel for the assessee referred to the AO's notice u/s 142(1) dated 21.10.08 in which question 27(a) is reproduced as under: -

(a) "Please give details of the deposits accepted as well as repaid during the year specifying cases which are otherwise than through Account Payee Cheque/Draft.
(b) Give details of advances against sale of property' received otherwise than through Account Payee Cheque/Draft giving complete address of the person particulars of property booked, amount of transaction, amount of advance paid, date of transfer or property and date of receipt of balance amount. These facts should be got confirmed from the parties."

14. Ld. Counsel for the assessee relied upon CIT(A)'s order for ground 2, 3

& 4 and in respect of ground 5, 6 & 7 contended that all these details were called for in respect of advance amounts received by assessee otherwise then by account payee cheques i.e. by way of cash. These details were filed and there is no addition u/s 68 in respect of advances received by cash. In respect of booking amounts received by account payee cheques no detailed documents were asked for and assessee had given complete addresses with PAN numbers before AO which have not been denied by him. Since assessee during the course of assessment was never asked to furnish confirmations in respect of advances received by account payee cheques they were not furnished. Thus, the AO made the addition without calling for such information. The assessee in first appeal before CIT(A) has raised a specific ground of appeal no. 5 as under: -

> *"The Assessing Authority erred in law and on facts in making an addition of Rs. 1,61,67,600/- u/s 68 as unexplained cash credit for advances received from some customers mentioned in the assessment order alleging that confirmations from those customers were not filed by the appellant; whereas the appellant was never asked to file such confirmations and without issuing summons u/s 131 to those persons even when their complete addresses with PAN numbers had been furnished in writing by the appellant. Thus, the addition so made on surmises and conjectures must be deleted."*

15. CIT(A) on perusal of the entire record has held that AO during the course of assessment did not require the assessee to submit confirmations of advances received by account payee cheques. As a matter of caution

assessee filed the copies of confirmations and ledger accounts before CIT(A). CIT(A) held that it is only technically fresh evidence and assessee was prevented by a sufficient reason from filing it as it was not asked for. Since the AO did not ask for confirmations and made the addition on this observation only, CIT(A) verified the entire record and being satisfied deleted the addition. The CIT(A) is a higher appellate authority and apart from appellate functions has powers of enquiry coterminous with AO. Therefore, no violation of Rule 46A has been caused by CIT(A)'s order.

16. We have heard the rival contentions and perused the material available on record.

17. Apropos the first issue about notional addition of cancellation charges, we find no infirmity in the order of CIT(A), in as much as the addition has been made by AO on the ground that assessee should have charged the cancellation charges from customers who cancelled their bookings. In our view the AO cannot step into the shoes of businessman and review the business expediency of the assessee's decision of not charging cancellation charges. Assessee contends it to be in the interest of market reputation and customer's relations. It has not been alleged that assessee have received cancellation charges and did not disclose in the books. Assessee having not received any such charges CIT(A) has rightly deleted this addition.

18. Apropos, ground no. 3 in respect of registration and electrification

charges.

19. In our view CIT(A) has considered this aspect in right prospective by observing that the assessee could have adopted two ways i.e. by crediting the amount received from buyers in this behalf in cost of project account and claiming debit at the time of payment for registration and electrification connection of the customers. The other way was to show the account as recoverable from buyers and adjust it against amount recovered and if there is any surplus to offer it for taxation. The assessee having adopted one of the proper method the amount cannot be held as capital in this accounting period. Besides the amount has not been claimed in profit and loss account as the receipts were separately accounted for. In our view considering the entirety of facts and circumstances the addition has been rightly deleted by CIT(A).

20. Apropos ground no. 4 we see no infirmity in the order of CIT(A) as department has accepted assessee's method of accounting on project completion method. There is no justification in adopting percentage completion method for one year on selective basis. We uphold the order of CIT(A) deleting the addition of Rs. 28,21,000/- in this behalf.

21. Coming to the last issue about deletion of addition u/s 68 i.e. ground 5, 6 & 7 we have gone through the entire material on record in this aspect and the notice issued by AO u/s 142(1). The requirement of confirmations was in respect of advances received in cash and not by account payee cheques. It is

peculiar that AO has made no addition in respect of cash advances received by assessee and the same has been made in respect of advances received by account payee cheques. Be that as it may, revenue has questioned the violation of Rule 46A. In our view, assessee supplied addresses and permanent account numbers of the customers with books of accounts before AO, which is not disputed. The basis of addition i.e. non furnishing of confirmations has not been specifically insisted by AO and addition was made ignoring addresses and PAN nos.. Assessee filed a specific ground of appeal before CIT(A) challenging the AO's finding for asking such confirmations. In the circumstances, assessee produced before CIT(A) the relevant confirmations from the same customers and their ledger accounts in their books of account claiming that 19 customers have been already sold the flats by the time of first appeal.

22. In our view in these facts and circumstances it cannot be held that CIT(A) violated Rule 46A, he has acted in a judicious and proper manner and his order being based on proper appreciation of facts and record cannot be called violative of a procedural provision. CIT(A) is a statutory first appellate authority and has independent powers of calling for information and examination of evidence and possess coterminous powers of assessment apart from appellate powers. In our view CIT(A)'s order is to be upheld. The matter should not be set aside on general grounds as it amounts to causing the assessee injustice and giving the AO another innings. Besides it is not explicit that AO insisted for confirmations. In our view CIT(A) has decided the issue in

just and proper manner the same is upheld.

23. In the result, the revenue appeal is dismissed.

Order pronounced in the Open Court on 22.12.10

(A.K. GARODIA)
ACCOUNTANT MEMBER

(R. P. TOLANI)
JUDICIAL MEMBER

Dated: *Kavita Chopra

Copy forwarded to: -

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT

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By Order,

DEPUTY REGISTRAR

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