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

Before Shri D.T. Garasia (JUDICIAL MEMBER)

AND
Shri G Manjunatha (ACCOUNTANT MEMBER)

I.T.A No.3738/Mum/2013 - AY 2008-09
I.T.A No.3739/Mum/2013 - AY 2009-10

Shri Nilesh Janardan Thakur 1-C, Viceroy Court, Thakur Village, Kandivali (E), Mumbai 400 101 PAN : AFFPT1207E	vs	ITO, 25(1)(4), Mumbai
APPELLANT		**RESPONDEDNT**

Appellant by	Dr K Shivram,Sr Counsel / Rahul K Hakani
Respondent by	Shri R.S. Arneja

Date of hearing	12-10-2017
Date of pronouncement	-11-2017

O R D E R

Per G Manjunatha, AM:

These two appeals filed by the assessee are directed against separate, but identical orders of CIT(A)-35, Mumbai dated 31-01-2011 and 21-07-2012 and they pertain to assessment years 2008-09 & 2009-10. Since common facts are involved and issues are also common, these appeals were heard together and are disposed of by this common order.

2. At the time of hearing, the Ld.AR for the assessee submitted that there is

a delay of 312 days in filing the appeal before ITAT, for which the assessee has filed a petition for condonation of delay alongwith affidavit. In the affidavit, the assessee deposed as under:-

"AFFIDAVIT

I, SHRI NILESH JANARDHAN THAKUR, *aged 46 years, Indian inhabitant of Mumbai and having address at I-C, Viceroy Court, Thakur Village, Kandivali (East), Mumbai 400 101, solemnly affirms on oath as under:-*

I, *That a copy of an order dated 29th March 2012 passed by the Commissioner of Income Tax (Appeals)-35, Mumbai for income tax assessment year 2008-09 was affixed on the outside of my premises at 4/153, Yoganand Society, Lokmanya Tilak Road, Vazira Naka, Borivali {W}, Mumbai 400 092 on 3rd May 2012, at which time I was not present in the said premises. I was incidentally residing at I-C, Viceroy Court, Thakur Village, Kandivali (E), Mumbai 400 101.*

1. When the news of this affixture was learnt from my neighbours, the affixed order was collected by my employee within a span of two days or so.

2 That an appeal against this order was required to be filed to the Income Tax Appellate Tribunal Mumbai within sixty days of receipt of the order and the said appeal is now being filed in the month of May 2013 along with an application seeking condonation of delay in filing the appeal

In support of this application, this affidavit is being made explaining the circumstances in which the filing of the appeal was delayed.

3. That I am a proprietor of a business concern called PRS Enterprise. Sometime in June 2007, the said concern was appointed by one, Shapoorji Pallonji and Co. Ltd to assist it in acquiring tracts of lands not exceeding 900 acres with clear and marketable titles and free from all encumbrances situated in Alibaug, Pen, Panvel and other areas in and around Raigad district and ensuring transfer of the same in the name of this Company.

The said company periodically advanced me monies totalling Rs. 84,50,00,000 for carrying on this assignment.

4. That a dispute developed between this company and me, pursuant to which this company filed a suit no. 2576 of 2011 in the Bombay High Court on 6th September 2011 for recovery of the properties and fixed deposits alleged to have been acquired from the monies advanced to me,

Thereafter, I could ultimately reach an understanding with this company to settle the suit in an amicable manner and pursuant to this understanding and for this purpose, consent terms were filed by both parties in the Bombay High Court.

5. That I state that that the Bombay High Court passed a decree on 19"'October 2011 decreeing the suit on the basis of the consent terms filed and on the terms and conditions more particularly stated in the decree.

Pursuant to this consent decree, I agreed to return immovable properties, fixed deposits, vehicles and monies lying in bank accounts of various concerns controlled by me.

6. That I am also a proprietor of another business called PRS Developers. In this business, 1 was appointed by one S.D. Corporation Pvt. Ltd. vide its letter dated 7t1i December 2007 and also agreement dated 291 August 2008 as its 'Project Consultant' for its project involving development of 'Samtanagar' (consisting of various societies/ buildings) at Kandivali [East), Mumbai 400101 occupying approximately 2,00,0000 square metres of land on plots situate on CTS no. 837 to 840, 55, 56 consisting of about 1,784 tenements.

I state that this company paid me advances towards my fees totalling Rs. 95,00, 00,000 {Rupees Ninety Five Crores only) for this consultancy work and deducted tax at source thereon against which payments I was obliged to incur expenditure necessary for executing my assignment.

I state that this assignment was also stopped sometime in 2009 or so.

7 That I state that the above developments caused severe

disruptions to both my business career and private life and instead of having lucrative businesses in my hand that I dreamt about, I got saddled with liabilities and commitments which I find difficult to discharge. was also left with no reliable source of income to sustain my family and meet the liabilities.

8. To add to my misfortunes, due to my exposure to some family business entities and also more particularly due to complaints filed by my enemies in my adverse business times, 1 got entangled into needless litigations with government agencies more particularly the Enforcement Directorate and the Crime Branch.

The litigations, prompted by my enemies, acquired disproportionate publicity from the media more particularly when my brother, an ex-Deputy Collector, Shri Nitesh Thakur's name came to be mentioned in the cases where corruption with government agencies was alleged by the Anti Corruption Bureau.

Because of these litigations, I have to constantly run pillar to post in New Delhi & Mumbai right from 2011 onwards in order to attend these legal proceedings even at the short notices.

9. That because of these development, my family relations with my brother got strained beyond repair and we parted with serious differences, which are unresolved even today. In the process, sometime in the first half of the year 2012, due to my estrangement with my brother, I gradually lost professional association and contact with the chartered accountants, who had erstwhile commonly represented my family (when undivided) in income tax matters.

These chartered accountants had consistently represented me in my income tax assessment for Assessment Years 2008-08 and 2009-10 and also in my appeal to the Commissioner {Appeals} for Assessment Year 2008-09, All I had to do at that time was to forward my tax related impers to them and they used to take care of all responses required win income tax and appe1latt'QeedIngs without much involvement from my side.

But with my family rifts, I lost professional contact with these

chartered accountants and as result,I had no clarity about status of my tax matters and pending compliances. Besides-m- exposure to proceedings with government agencies, including threat of arrests looming over my head, I was left in such a state of confused mind that I could not assign priority to income tax matters over other government litigations. My situation was such that I had to attend whichever proceedings he was called by the concerned authorities in the nearest time without any option of even thinking of proceedings with other authorities. The calls from the authorities were not just by written notices and summons issued to me but also by frequent calls on my mobile.

To make matters worse, whenever the authorities felt that the whereabouts of my brother were not known, I was summoned and questioned by them at shortest notices, even though the matters relating to my brother should not have concerned me.

10. That for the financial year ended 31-3-2008, i.e. Assessment Year 2008-09, 1 ai[l] e income tax department had passed an order on 31-12-2010 assessing me at an income of Rs. 75,44,2 1,627 and raised a demand of Rs. 39,22,46,296. In this assessment order, the Assessing Officer has treated the advances totalling Rs. 43,50,00,000 received by me Shapoorji Pallonji and Co as my taxable income disregarding the fact that these amounts do not belong to me but have been advanced to me by the company to acquire properties on its behalf. In fact, these advances form the very subject matter of the amounts decreed by Bombay High Court in the consent decree to be returned by me to this company.

In the assessment order, the Assessing Officer has also treated the entire advances totalling Rs. 3 1,67,50,000 received by ne from S.D. Corporation to me towards my fees as my taxable income without allowing any deduction for expenditure contractually required to be borne by me

My properties have been attached by the Income Tax Department in recovery proceedings in respect of the tax demand for this year. This has added to my woes and mental distress.

11. That for the financial year ended 3 1-3-2009, i.e. Assessment Year 2009-10, 1 state that the income tax department had passed

an order on 28-12-2011 assessing me at an income of Rs. 99,89,57,370 and raised a demand of Rs. 48,87,5 1,210. In this assessment order, Assessing Officer has treated the advances totalling Rs. 4 1,00,00,000 received by me from Shapoorji Pallonji and Co as my taxable income disregarding the fact that these amounts do not belong to me but have been given to me by the company to acquire properties on its behalf. In fact, these advances form the very subject matter of the amounts decreed by Bombay High Court in the consent decree to be returned by me to this company.

In the assessment order, the Assessing Officer has also treated the entire advances totalling Rs. 58,87,75,500 received by me from S.D. Corporation towards my fees as my taxable income without allowing any deduction for expenditure contractually required to be borne by me,

12. That the recovery proceedings of the income tax department are in addition to attachment proceedings initiated by other government agencies. Therefore, as regards the properties in my name, coupled with the fact that most of them are decreed to be handed over by the Bombay High Court to Shapoorji Pallonji Ltd under the consent decree, these properties are subject matter of multiple attachments in proceedings initiated by various government agencies.

13. That a copy of an order dated 29th March 2012 passed by the Commissioner of Income Tax (Appeals}-35, Mumbai for income tax assessment year 2008-09 was affixed on the outside of my premises at 4/153. Yoganand Society, Lokmanya Tilak Road, Vazira Naka, Borivali {W}, Mumbai 40092 on 3 rd May 2012, at which time I was not present in the said premises.

When the news of this affixture was learnt from my neighbours, the affixed order was collected by my employee within a span of two days or so. I remember instructing my member to send the copy of the order to my chartered accountants for necessary action.

In my mental distress, I forgot to pursue this and being continuously distracted by proceedings relentless pursued by one

government agency or other in the subsequent months, I lost track of the whole matter. It is pertinent that in the period May 2012 to November 2012, I had no opportunity to interact with the income tax department. Otherwise, I would become alerted to look in to my income tax matters as well and would have learnt that my appeal was not fled with the Tribunal.

I clarify that it is not my intention to say that attending to income tax matters is not important. But, the pre-occupation of my mind with criminal proceedings initiated by government agencies was so intense because of its frightening implications that it became beyond my mental capacities to direct my attention to other government compliances

14. That it was sometime in December 2012 that I had to attend to appear before the Income Tax Commissioner {Appeals}-35,Mumbai in connection with my appeal filed against the assessment order passed for Assessment Year 2009-10. Since I had lost my professional association with my previous chartered accountants (who maintained my file and papers), I began to attend the appeal proceedings personally and alone without any papers on hand. At that time, I learnt that as per income tax department's records, I had not filed any appeal to the Tribunal against the Commissioner {Appeals}'s order for the prior year i.e. Assessment Year 2008-09.

Immediately thereafter, I searched my residence for papers and I was shocked to find in one of my cupboards the original copy of the Commissioner {Appeals}'s order for Assessment Year carrying an endorsement that the same had been affixed outside my premises at my premises at 4/153. Yoganand Society, Lokmanya Tilak Road, Vazira Naka, Borivali {W}, Mumbai 40092 on 3rd May 2012. To my anxiety, when I did not find any appeal papers filed against this order, I inquired with my family members and found that none of them recollect instructing my previous chartered accountants about this order.

15. I sought professional advice and was instructed that for filing an appeal with the Tribunal, along with the copy of the Commissioner {Appeals}'s order, one will have to also attach copies

of the assessment order and grounds of appeal filed with the Commissioner {Appeals}. Since I had \no such papers readily on hand, I requested the office of Commissioner {Appeals} -5 to furnish me the copies of these documents. The office of the Commissioner {Appeals} was kind enough to furnish me these copies some time after mid- February 2013 or so.

16. That as I could not trust my luck after the serious of misfortunes consistently visiting me. I became apprehensive that if the Tribunal would not admit my belated appeal for any reason, I would be in serious trouble as the assessment order passed against me, would become became final without even the merits of my case being considered. In such a situation, I would be permanently fastened with a huge tax demand of Rs. 39,22,46,29 against me.

I also became apprehensive that any dismissal of my appeal for Assessment Year 2008-09 by the Tribunal may have effect on my similar appeal being filed for the next year i.e. Assessment Year 2009-10 as both the assessment order and the Commissioner{Appeals}'s order for this year has been passed against me on the same lines as for Assessment Year 2008-09.

In this situation, I had decided to pursue my application of condonation of delay aggressively from whatever legal angle in my sight as the fate of the tribunal appeal would make a difference of life and death to me. This included the option of challenging the propriety of service of the appellate order by affixture.

17 That I requested the Commissioner {Appeals} -35 to show me the copies of all documents authorising the affixture of his order for Assessment Year 2008-09 at the exterior of my premises at my premises at 4/153 Yoganand Society on 3rd May 2012 in order to ascertain whether due legal process has been followed by his office to making such affixture After repeated visits to his office, I followed up with a written application dated 14th March 2013 which was filed in his office on 15th March 2013. In this application, I sought copies of his office records evidencing due compliance of the procedure followed for serving the order by affixture as per Rules. I also made it clear in this application that these copies were required urgently by me in order to file my application to the Tribunal for condonation of delay in filing my appeal and that I

intend to annex the copies to the application in order to refer to the same at the time of hearing of the appeal by the Tribunal.

18. That I made repeated visits to the office of the Commissioner {Appeals} -35 for this purpose. But, I was informed that that the service of the order by affixture was done by the office of the Assessing Officer in this regard and that the concerned file contains the copies of the records sought by me had been sent to the Office of the Concerned Commissioner/ Chief Commissioner in charge.

19. At as on date, I have not received the copies of the documents sought by me from the office of Commissioner {Appeals}-35 . I have therefore decided to file my belated appeal to the Tribunal without any further delay along with letter of condonation of delay based on the facts and circumstances averred in this affidavit.

20. That despite all my adverse circumstances, I have been duly compliant in attending to all income tax proceedings including recovery and appellate proceedings. In the coths. of my appellate proceedings before the Commissioner {Appeals}-35 for Assessment Year 208-09, I have even offered to have my business income determined on any reasonable estimated basis in absence of proper records in my hand, which offer was not accepted. All these actions should also show that I am a person who is earnest in getting my tax assesii1s resolved amicably and not allowing the same to linger.

I, therefore state that the delay in filing of my appeal to the Tribunal for Assessment Year 2008-09 may be seen as an outcome of a bona fide and unintentional oversight and not on account of any indifference to law from my side.

Solemnly affirmed at Mumbai this 9th day of MAY month of the year 2013.

Sd/-

(Shri Nilesh Janardhan Thakur – Deponent)"

3. The Ld.Senior Counsel for the assessee submitted that in the previous occasion, the Bench had taken up the issue and after hearing both the sides, has condoned the delay in filing the appeal and heard the matter at length. However, because of some reasons, the file had been released for fresh hearing. He submitted that the petition filed for condonation of delay has been treated as heard and allowed by the bench. When the bench asked a specific question, whether any formal order has been passed by the bench for condoning the delay in filing the appeal, the Ld.Senior Counsel fairly accepted that no formal order has been passed. Therefore, the bench has directed the counsels to argue afresh on the issue of condonation of delay.

4. The Ld.Senior Counsel for the assessee submitted that there is a delay of 312 days in filing the appeal for which the assessee has filed petition for condonation of delay along with affidavit explaining the reasons for delay in filing the appeal. The reasons given by the assessee for condoning the delay as stated in the affidavit has been extracted above.

5. The Ld.Senior Counsel submitted that there is a reasonable cause in not filing the appeal within the time allowed under the Act, before the ITAT, as the order passed by the CIT(A) was affixed at the old premises of the assessee, at 4/153, Yoganand Society, Lokmanya Tilak Road, Vazira Naka, Borivali on 03-05-

2012 at which time, the assessee was not present. At that time, the assessee was residing at another address, therefore, he was not aware of the order passed by the CIT(A). Therefore, he was not able to file the appeal in time. The assessee, immediately on coming to know of the CIT(A)'s order took measures to file the appeal before the Tribunal. Therefore, there was a delay in filing the appeal. The Ld.Senior Counsel further stated that there was tremendous pressure on the assessee because of his personal problems narrated in the affidavit, therefore, the delay in filing the appeal before the Tribunal may be condoned and admit the appeal for hearing. In this regard, the assessee has relied upon a plethora of case laws, including the decision of Hon'ble Supreme Court in the case of Collector, Land Acquisition vs MST Kattiji & Ors 167 ITR 471 (SC).

6. On the other hand, the Ld.DR strongly opposed the condonation of delay in filing the appeal. The Ld.DR further submitted that there is an inordinate delay of 312 days in filing the appeal which has not been explained by the assessee with necessary evidence. No doubt, the Courts are empowered to condone the delay in filing the appeal. But it is incumbent upon the assessee to explain the reasons for delay in filing the appeal beyond doubt. In this case, the reasons given by the assessee for condoning the delay in filing the appeal appears to be not a reasonable cause. Therefore, the petition filed by the

assessee for condoning the delay shall not be admitted.

7. We have heard both the parties and perused the material available on record. In this case, admittedly, there is a delay of 312 days in filing the appeal. The assessee filed an affidavit explaining the reasons for delay in filing the appeal and prayed for condonation of delay. As per the reasons stated by the assessee, there is a reasonable cause for not filing the appeal within the time allowed under the Act as he was not aware of the order passed by the CIT(A) as the same has been affixed on the door of his old premises where the assessee was not residing at the relevant time. Incidentally, the assessee was residing at a different address because of which he was not aware of the order passed by the CIT(A). The assessee further stated that he was under tremendous pressure because of various family problems for which he could not attend to his tax matters. Otherwise he, all along co-operated with the income-tax proceedings and by not filing appeal before ITAT, he was put himself under pressure. Therefore, there is no deliberate reasons for not filing the appeal within the time. The assessee further submitted that immediately on coming to know of the order passed by the CIT(A), he rushed to the authorities for collecting the order and also co-ordinated with his tax consultants. In the meantime there was a delay of 312 days in compiling of various documents and assisting the tax consultants for preparing the appeal.

Therefore, there is a reasonable cause for not filing the appeal within the time allowed under the Act. The assessee further submitted that he is not a habitual offender of not co-operating with the department nor prosecuting the appeal at appellate stage which is evident from the fact that he had filed the appeals for the subsequent years within the time, therefore, the delay in filing appeal cannot be looked into in a narrow compass as if the appeal filed by the assessee is dismissed on technical grounds, the substantial justice required to be done by the Courts would not have been rendered in the given facts of the case.

8. Having heard both the sides, we find force in the arguments of the assessee for the reason that when technicality and substantial justice are pitted against each other, substantial justice should prevail over the technicalities. We further observe that the assessee cannot get any undue benefit by not filing the appeal within the time which is evident from the fact that there is a huge demand on the assessee out of various additions made by the AO. If the assessee could not file the appeal and prosecute the appeal before appellate authorities assessee was himself put under tremendous trouble. Therefore, we do not see any purported reasons for not filing the appeal in time. We further observe that the Hon'ble Supreme Court in the case of Collector, Land Acquisition vs MST Kattiji & Ors (supra) laid down six

principles while condoning the delay in filing the appeal. The principles laid down by the Hon'ble Apex Court are as follows:_

> "(1) Ordinarily, a litigant does not stand to benefit by lodging an appeal late.
>
> (2) Refusing to condone delay can result in a meritorious matter being thrown at the very threshold and cause of justice being defeated. As against this, when delay is condoned, the highest that can happen is that a cause would he decided on merits after hearing the parties.
>
> (3) Every day's delay must he explained" does not mean that a pedantic approach should he made. Why not every hour's delay, every seconds delay? The doctrine must he applied in a rational. common sense and pragmatic manner.
>
> (4) When substantial justice and technical consideration are pitted against each other the cause of substantial justice deserves to be preferred, for the oilier side cannot claim to have vested right in injustice being done because of a non-deliberate delay.
>
> (5) There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala *fides.* A litigant does not stand to benefit by resorting to delay. In fact, he runs a serious risk.
>
> (6) It must he grasped that the judiciary is respected not on account of its power to legalise injustice on technical grounds hut because it is capable of removing injustice and is expected to do so."

9. In this case, admittedly, the assessee has stated the reasons which was beyond his control. The order passed by the CIT(A|) has been affixed at the old address of the assessee which had not come to the notice of the assessee. The assessee immediately, after coming to know that the CIT(A) has passed the order, rushed to the authorities and filed the appeal. Therefore, we are of the

considered view that there is a reasonable cause for not filing the appeal within the time allowed under the Act. We further observe that the Tribunal is vested with the power to condone the delay in filing the appeal, if it is satisfied with the reasons given for condonation of delay. Therefore, considering the overall facts and circumstances of the case and also respectfully following the judgement of Hon'ble Apex Court in the case of Collector, Land Acquisition vs MST Kattiji & Ors (supra), by exercising the power u/s 253(5), we condone the delay in filing the appeal and admit the appeal for adjudication, on merits.

ITA 3738/Mum/2013

10. The assessee has raised common grounds of appeal for both the assessment years. For the sake of brevity, grounds of appeal for AY 2008-09 in ITA No.3738/Mum/2013 are reproduced below:-

> "1. *On facts and circumstances of the case and in law, the learned Commissioner {Appeals} erred in confirming the addition of Rs. 43,50,00,000 made by the learned Assessing Officer u\s 56(2)(vi) of the Income Tax Act to the Appellant's income in respect of advances received from Shapoorji Pallonji Company Ltd.*
>
> *The learned Commissioner {Appeals} also erred in sustaining the findings of the learned Assessing Officer that this sum of Rs. 43,50,00,000 was alternatively taxable either as unexplained cash credits u\s 68 or as business gains u\s 28 (iv).*

2. On facts and circumstances of the case and in law, the learned Commissioner {Appeals} erred in confirming the addition of Rs. 3 1,67,50,000 made by the learned Assessing Officer as income from other sources in respect of consultancy charges received from S.D. Corporation Ltd.

The learned Commissioner {Appeals} here failed to appreciate that -

[a] the income from the consultancy work was chargeable to tax under the head 'profits & gains from business or profession' and not 'income from other sources'

[b] based on the nature of the Appellant's work and the method of accounting employed by him, the consultancy charges of Rs. 31,67,50,000 were not chargeable to tax in the year under appeal and

[c] without prejudice to the above, the expenses incurred by the Appellant in rendering the consultancy work require to be deducted from the said consultancy charges in the computation of his business income.

3. On facts and circumstances of the case and in law, the learned Commissioner {Appeals}also erred in confirming the addition of Rs.5,00,000 made by the learned Assessing Officer as unexplained cash credit u/s 68 in respect of the Appellant's opening capital balance in his balance sheet.

4. On facts and circumstances of the case and in law, the learned Commissioner {Appeals} also erred in confirming the addition of Rs.21,7 1,627 000 made by the learned Assessing Officer in respect of interest received during the course of his project work.

The learned Commissioner {Appeals} more particularly lost sight of the fact that, based on the nature of the Appellant's work and the method of accounting employed by him, the interest receipts were not chargeable to tax as income in the year under appeal

5. On facts and circumstances of the case and in law, the learned Commissioner {Appeals} further erred in confirming the action of the learned Assessing Officer in disallowing the carry forward of the Appellant's closing work in progress of Rs. 15,39,11,744 to the next year in his assessment order.

6. Both the learned Commissioner {Appeals} and the learned Assessing Officer erred in passing their impugned orders without granting the Appellant an adequate opportunity of being heard.

The orders passed by them are in contravention of the principles of natural justice and therefore, deserve to be set aside in apea1."

11. The brief facts of the case are that the assessee is an individual, filed his return of income for the assessment year 2008-09 declaring total income at Nil. The case was selected for scrutiny and notices u/s 143(2) & 142(1) were issued. In response, the assessee alongwith his authorized representative attended from time to time and furnished various details, as called for. During the course of assessment proceedings, the AO noticed that the assessee is engaged in the business of construction and development through four proprietory concerns, M/s PRS Developers, M/s PR Enterprises, Ishwarya Properties and Ajinkya Hotel & Resorts. The AO further noticed that the assessee has shown a sum of Rs.75,17,50,000 as sundry creditors. To verify the nature and source of credit, the AO called upon the assessee to furnish necessary details of creditors along with confirmation letter from parties, bank statement and nature of payment. In response to notices, the assessee has filed a letter on 15-11-2010

and filed various details called for by the AO. The AO further observed that the assessee has received a sum of Rs.43,50,00,000 from M/s Shapoorji Pallonji & Co Ltd and a sum of Ras.31,67,50,000/- from M/s S.D. Corporation P. Ltd (SDCL). The assessee further stated that he had received advances from M/s Shapoorji Pallonji & Co Ltd for procurement of land for which necessary agreement had been entered into with the company. The AO also issued notice u/s 13(6) to M/s Shapoorji Pallonji & Co Ltd and SDCL calling for various details. In response to notice, M/s Shapoorji Pallonji & Co Ltd (SPCL) vide their letter dated 10-11-2010 submitted that it has paid advance to Shri Nilesh J Thakur towards acquisition of land with clear and marketable title in and around Alibaug and other areas of Raigad District. SPCL stated that it has entered into an agreement with the assessee with terms and conditions for procurement of land for its project for which it has paid advance. SPCL also filed various details called for by the AO including ledger extracts of the assessee and bank statement to prove the payments. The AO, upon receiving information from SPCL called upon the assessee to furnish further evidences to justify money received from the company for procurement of land. In response to notice, assessee attended the office on 14-12-2010 and a statement on oath u/s 131 was recorded. In the statement of oath, the assessee dealt upon various facts in his support. The AO has raised specific query with regard to the

amount received from M/s Shapoorji Pallonji & Co Ltd (SPCL) and also asked the assessee to file necessary evidence to justify advance received for procurement of land in the light of his business activity as well as his expertise in this line of business. The assessee in the statement recorded u/s 131, admitted that he had received money from SPCL for the purpose of procurement of land in and around Raigad district for which necessary agreement has been entered into. The AO further called upon SPCL to file additional information with regard to understanding with the assessee and brokers of procurement of land. In response SPCL has filed copies of agreement entered into with the assessee alongwith copies of board resolution authorizing the board to procure land and to pay advance to the assessee.

12. The AO, after considering the relevant submissions of the assessee and also taking into account the materials available on record observed that despite giving several opportunities to the assessee to produce books of account, the assessee failed to produce books of account or any other documentary evidence regarding his business activities to substantiate and corroborate its submissions through various letters and books. The assessee initially claimed that he has associated with construction and other activities but has not been able to produce any single evidence in support of his claim. Throughout his submissions, the assessee has been putting undue emphasis on his claim of

partnership with SPCL, but he has failed to submit any documentary evidence to substantiate his claim that he is a partner of SPCL. On the contrary, SPCL stated that they have advanced money to procure land and they have paid fee to the assessee. The AO further observed that the only thing which is clear from the facts gathered during the course of assessment is that there is huge influx of funds in assessee's accounts by cheque from those two concerns, viz. SPCL & SDCL. The assessee has shown amount received from above concerns as sundry creditors in his unaudited balance-sheet. The opening capital shown by the assessee is not substantiated by way of documentary evidence, a third party confirmation. The assessee is not able to produce any written agreement copies to state that he has been appointed as agent for SPCL for procurement of land. Therefore, he opined that the facts gathered during the course of assessment proceedings coupled with statement and other evidence filed by the assessee proves the fact that the assessee is not able to prove that he is engaged in the activity of construction of buildings and other activities.

13. The AO further observed that the assessee shown to have received Rs.43.50 crores from SPCL during the financial year 2007-08. The said amount had been credited in the bank account maintained in the name of M/s PR Enterprises, a proprietory concern of the assessee. The same was shown as sundry creditors in the balance-sheet of the assessee. Though the assessee as

well as the creditor have stated that the amount received from SPCL is towards procurement of land with clear and marketable title, the conduct of the assessee after receipt of funds from the creditor goes to prove the fact that the assessee has received amount without any consideration. The AO further observed that the assessee initially claimed to have associated with SPCL in its project, later changed his version on the basis of submission of the creditor that he had received advance for procurement of land. The assessee as well as SPCL failed to establish with supporting and corroborating evidence the that the amount represents advance for procurement of land. The AO further observed that the assessee is a man of modest living; in the balance-sheet shown an opening capital account of Rs.5 lakhs. It is pertinent to mention here that the assesse has filed return of income for the first time. The AO further observed that the assessee being a man of modest living does not have any experience in the field of construction, received a huge influx of funds from a corporate giant SPCL for procurement of land. Though both the parties have produced certain evidences to prove that these are advances received for procurement of land, the conduct of the assessee and the manner and mode in which the company has given advance to the assessee clearly proves the fact that the money received by the assessee from the company is for without any consideration.

14. The AO has referred various documents filed by the assessee and also statement of the assessee recorded during the course of assessment proceedings to come to the conclusion that the assessee does not have any capacity to carry out the business as narrated in the agreement between the assessee and the company. The AO further observed that it is surprising to note that a corporate giant like SPCL has given huge money to the assessee for procurement of land without any documentation. The AO further observed that SPCL is a corporate giant having its own machinery for legal, technical, marketing / financial departments and huge experience in dealing in property and construction activities, advanced such a huge amount to a man like the assessee raises serious doubts about the nature of transaction. The money was received by the assessee almost three years back, but so far no settlement of the account has been done. No action for recovery has been taken by SPCL. No land has been purchased by the assessee in the name of SPCL as has been confirmed by the assessee. No interest is charged on the amount received by the assessee. Moreover, the assessee has purchased various assets out of the money received from SPCL in his individual name and also kept money in FD. All these factors raise serious doubt about the genuineness of the transactions. Therefore, he opined that the assessee has received money from SPCL without any consideration in the nature referred to in section 56(2)(vi) of the Act.

Accordingly, made addition of Rs.43.50 crores u/s 56(2)(vi) of the Act.

15. Alternatively, the AO observed that without prejudice to above addition, even for sake of discussion, if it is presumed that the money received by the assessee represents loan, it still raises serious doubts about the genuineness of the transaction and section 68 of the Act comes into operation. Though the assessee has filed necessary evidence to prove the identity of the party, the genuineness of transaction is under serious doubt because of the conduct of the assessee as well as the creditor. Therefore, in case in appellate proceedings the assessee takes the plea that the amount represents loan, the provisions of section 68 of the IT Act, comes into operation as the genuineness of the transaction is not established as discussed above. The AO further observed that at the appellate stage, the assessee takes a plea that the amount represents business advance / loan, then with paucity of time and from the conduct of the assessee in utilizing it like his own money, it takes the colour of his own money and section 28(iv) of the Act, comes into operation. Since addition has been made u/s 56(2)(vi), the provisions of section 68 and the provisions of section 28(iv) has not been invoked.

16. Aggrieved by the assessment order, the assessee preferred appeal before the CIT(A). Before the CIT(A), the assessee has reiterated his stand taken

before the AO. The assessee further submitted that the AO was incorrect in treating advance received from SPCL as amount received without any consideration as per the provisions of section 56(2)(vi) despite he had furnished necessary details of money received from SPCL. The assessee further submitted that the AO has called for enormous details with respect to money received from SPCL and right from it, he had taken a stand that the money has been received for the purpose of procurement of land from SPCL. The assessee further submitted that the AO had called for details from the creditor u/s 133(6) for which SPCL has filed all details called for by the AO and categorically stated that it has paid advances to the assessee for procurement of land. The AO, without appreciating the fact has merely on conjectures and surmises brought amount received from SPCL as income of the assessee within the meaning of section 56(2)(vi) of the Act. The assessee further contended that the AO further erred in alternatively bringing the amount under the purview of provisions of section 68 of the Act, despite the assessee has filed necessary evidences to prove the identity, genuineness of transactions and creditworthiness of the parties. The AO completely erred in bringing the amount under the purview of section 68, therefore, by no stretch of imagination, the same can be brought to tax u/s 68 of the Act. The assessee has filed clear details to prove the impugned amount is a business advance

from the creditor which is further supported by the deposition of the creditor wherein the creditor has categorically stated before the AO that it has paid money for the purpose of procurement of land. The AO ignoring the substance of the transactions, went on to discuss the issue on hypothetical manner to say that the amount received from the company is in the nature of money received without consideration.

17. The CIT(A), after considering the relevant submissions of the assessee and taking into account the documents available on record, confirmed the findings of the AO to bring the impugned amount to tax u/s 56(2)(vi). The CIT(A) further observed that the reply of SPCL is also not plausible as nobody will advance such a huge sum without a written agreement. Finance against purchase of land is given to a person, who is owner of the land and not to the third party. The assessee is a novice man and has no experience in property related matters. As discussed, whereas SPCL is a corporate giant having its own machinery of legal, technical, marketing / financial departments and huge experience in dealing in property and construction activities, then a question of advancing a huge sum to the man like assessee raises serious doubts. The money received by the assessee a few years back. No settlement of the account has been done. No action for recovery has been reported by SPCL. No land has been proved to be purchased by the assessee in the name of SPCL as

has been confirmed by assessee as well as SPCL. On the other hand, the assessee has purchased huge assets in his personal name and also kept money in fixed deposits at various banks. All these factors raise doubts about the genuineness of the transaction. Therefore, the CIT(A) was in agreement with the AO in treating the amount of Rs.43.50 crores as has been received without consideration.

18. Insofar as the alternative finding of the AO with regard to provisions of section 68 of the Act, the CIT(A) observed that since addition was made u/s 56(2)(vi) of the Act and the AO did not invoke provisions of section 68, the matter does not need any further discussion. Insofar as the second alternative observation of the AO, the CIT(A) observed that since addition has been made u/s 56(2)(vi), there is no relevance to discuss the issue under the provisions of section 28(iv) of the Income-tax Act, 1961. Aggrieved by the order of CIT(A), the assessee is in appeal before us.

19. The Ld.Senior Counsel submitted that the Ld.CIT(A) was erred in confirming addition made by the AO towards advance received from SPCL u/s 56(2vi) ignoring all evidence filed by the assessee to prove the transaction is merely an advance received for procurement of land which has been confirmed by both the parties. The Ld.Senior Counsel further submitted that the AO went

on discussing this issue purely on conjectures and surmises ignoring the fact that to tax a particular receipt as income of the assessee whether it comes under any of the provisions as narrated by the AO is to be seen. The AO has brought to tax the impugned amount us 56(2)(vi) of the Act without appreciating the fact that the business advances cannot be brought to tax under the provisions of section 56(2) of the Act. The assessee has filed various details to prove the transactions and also filed necessary evidences in the form of agreement with the creditor. The AO ignored all evidences filed by the assessee and also the creditor which is evident from the fact that the AO has discussed the issue on hypothetical manner. The creditor has filed all the evidences before the AO and from it categorically stated that it has paid advance to the assessee for procurement of land. Though the assessee initially stated that he is associated with SPCL in its project, subsequently he has filed an affidavit stating that money received from SPCL is on account of advance for procurement of land. The Ld.Senior Counsel further submitted that the CIT(A) as well as the AO were factually incorrect in coming to the conclusion that SPCL has not taken any action on the assessee. But the fact remains that the creditor has filed suit before Bombay High Court on 06-09-2011 for recovery of the properties & FD acquired from the monies advanced to the assessee. The Bombay High Court has passed a decree on 19-10-2011 decreeing the suit on

the basis of consent terms filed and on the terms and conditions stated in the court. In this regard, he filed a copy of consent decree passed by the Hon'ble Bombay High Court in Suit No.2576 of 2011. The Ld.Senior Counsel further submitted that the creditor SPCL has also filed an execution petition before Raigad Court for execution of consent decree passed by the Hon'ble Bombay High Court. All these facts go to show that the creditor had initiated recovery proceedings on money paid to the assessee. Therefore, the lower authorities were incorrect in holding that no action has been taken to recover the amount received from the assessee.

20. The Ld.Senior Counsel further submitted that whether a particular receipt is taxable or not in the hands of the assessee has to be examined in the light of the provisions of the Act. The AO has taxed the impugned amount u/s 56(2)(vi) of the Act. The AO also discussed the issue in the light of provisions of section 68 and 28(iv) of the Act. In this case, if you look into the transactions, the impugned amount cannot be brought to tax under any of the provisions discussed by the AO as the assessee has proved with necessary evidence that it is merely an advance received for procurement of land. Even assuming, but not accepting for the moment, the impugned amount cannot be taxed under section 68, as the assesse has proved the three ingredients provided u/s 68, i.e. identity, genuineness of transactions and creditworthiness of the parties.

Therefore, the AO cannot bring to tax advance received from SPCL as assessee's income. The Ld.Senior Counsel further submitted that in the case of SPCL, the ITAT, vide its order dated 10-04-2015 for AY 2008-09 & 2009-10 has observed that the amount advanced to the assessee were given for land aggregation who admitted to have received funds from the SPCL. The ITAT, after considering the facts has deleted additions made by the AO towards disallowance of interest u/s 36(1)|(iii|) on the advance given to the assessee by holding that these advances are business advances, therefore, interest cannot be disallowed for diversion of funds. The Ld.Senior Counsel further submitted that the lower authorities failed to appreciate the facts in right perspective and made additions purely on conjectures and surmises, therefore, the addition made by the AO towards advance received from SPCL should be deleted.

21. The Ld.DR, on the other hand, strongly supporting the order of the CIT(A) submitted that the facts gathered during the course of assessment proceedings and conduct of the assessee as well as SPCL goes to prove the undoubted fact that the monies have been paid for without any consideration and the AO has rightly brought to tax the impugned amount u/s 56(2)(vi). The Ld.DR further submitted that the conduct of the assessee on receipt of the money is crucial for deciding the issue whether the particular amount is a business convenience or money received without any consideration. In this case, the assessee has

purchased huge properties in his personal name and also kept fixed deposits in various banks out of money received from SPCL. Though the creditor has filed case before the Bombay High Court for recovery of dues, it is only after the assessment was completed by the AO, that too, in the nature of compromise petition. Therefore, no credence can be given to the decree passed by the Bombay High Court to decide the issue. The Ld.DR further submitted that Anti Corruption authorities including ACB and ED framed the assessee along with his brother, Shri Nitesh J Thakur and in the charge sheet filed by the authorities also contains the name of the assessee. The Ld.DR further submitted that though there is no apparent conclusion drawn in the charge sheet, whether money belong to Shri Nitesh J Thakkar or the assessee, the case filed by the authorities are pending for adjudication. The Ld.DR further submitted that though the assessee claims to have received advance from SPCL for procurement of land, right from beginning, not furnished any copy of agreement entered into with the creditor which is evident from the fact that in the assessment proceedings, the assessee has categorically stated that he does not have any written agreement with SPCL. The A.O. has given number of reasons for treating impugned amount as income of the assessee and his order should be upheld.

22. We have heard both the parties, perused the material available on record

and gone through the orders of authorities below. The factual matrix of the case which leads to the impugned addition is that the assessee has received a sum of Rs.43.50 crores in the financial year relevant to AY 2008-09. Similar amount has been received in AY 2009-10. The AO has made addition towards amount received from SPCL u/s 56(2)(vi) on the ground amount has been received without any consideration. The AO has brought out various reasons for treating the impugned amount as income of the assessee u/s 56(2)(vi) of the Act. According to the AO, the assessee has failed to establish any business nexus and also failed to prove necessary expertise and experience in doing similar kind of business. The AO further observed that initially, the assessee claims to have associated with SPCL in their project. Subsequently, the assessee has changed his stand after the company stated that it has paid amount towards procurement of land. These contrary statements given by the assessee as well as the company give rise to various doubts about the genuineness of the transaction. The AO further observed that on one side, the assessee stated to have received money towards procurement of land for the company, on the other hand, purchased various immovable and movable properties in his personal name and also kept money in FD in various banks. The AO further observed that the company has paid money in the financial year 2007-08 and 2008-09. Though the company has paid huge influx of funds, no

agreement has been entered into with the assessee nor has any follow up action been taken to get the lands in its name. No action has been taken even after the expiry of 3 years. No steps have been taken to recover the money from the assessee. No interest has been charged on the money given to the assessee. All these facts leads to an that the company has paid money to the assessee without any consideration.

23. It is the contention of the assessee that he had received money from SPCL under agreement for procurement of lands for the company in Raigad District. The assessee further submitted that he had entered into an agreement with SPCL as per the letter dated 16-07-2007 wherein terms and conditions of procurement of land has been specific and accepted by both the parties. According to the assessee, he has agreed to procure land for the company for which the company has paid advances. The assessee further contended that the AO has sought for various informations from the company for which the company has filed necessary details and also stated that it had paid advances to the assessee for procurement of land. The AO has recorded statement from the representative of the company u/s 131, wherein the company has categorically stated that it has paid advance for procurement of land. The company has filed copies of agreement along with board resolution copies for approving the payment of advance to the assessee for procurement of land.

The assessee further contended that whether they have acted upon the terms and conditions of the agreement or not is not relevant to decide the particular receipt is taxable in the hands of the assessee or not. To tax a particular receipt as his income, it should be in the nature of income referred to under the provisions of section 56(2) or 68 or 28(iv) of the Act as discussed by the AO. The AO has taxed impugned amount on conjecture ad surmise, despite furnishing of evidences to prove that the impugned amount is merely an advance received and there is no element of income in such advances. The AO has discussed various issues to come to the conclusion that the particular receipt is in the nature of income referred to u/s 56(2)(vi) of the Act. But the basic fact remains that the company has confirmed that it is an advance payment for procurement of land which fact has been conveniently ignored by the AO to tax the particular receipt as his income.

24. During the course of hearing, the Ld.DR brought out new facts of the case to argue that the ACB has filed charge sheet in the name of assessee's brother Shri. Nitesh.J. Thakur for various irregularities in which the assessee is also named. The Ld. Ld. D.R further clarified that as per the material available on record, there is no apparent conclusion about money received by the assessee belongs to Shri Nitesh J Thakur. The relevant copy of letter filed by the revenue is reproduced below.

"OFFICE OF THE

INCOME TAX OFFICER - 33(2)(4),

C-12, ROOM NO.6 10, 6th FLOOR,

PRATYAKSHKAR BHAVAN, BANDRA KURLA COMPLEX.

BANDRA (EAST), MUMBAI 400051

☎ *022-26570219*

No.ITO-33(2)(4)/ITAT/Nilesh J. Thakur/20 17-18Date : 09.10.2017

To

The Commissioner of
Income-tax (DR).
ITAT' 'B' Bench,
R.No.340, PrathisthaBhavan,
Old CGO Building, 3' Floor,
M. K. Road,
Murnbai - 400 020.

(Through Proper channel)

Sir,

***Sub:** Submission of report in the case of ShriNileshJanardan Thakur for A.Y. 2008-09 and 2009-10 - ITA No. 3738 and 3739/M/2013— Reg.*

Kindly refer to the above.

2. The report called for by you on the following points is as under:-

I. ***Give a report regarding whether this money is the same money belonging to Shri Nitesh Thakur ?***

As per the material available on record, I would like to

mention here that there is no apparent connection with the money received by the assesse Shri Nilesh J. Thakur with the money belonging to Shri Nitesh J. Thakur)"

Considering the fact that here is no apparent connection is established between amount received by the assessee and charge sheet filed by the ACB/ED in assessee brother case, we are of the view that, there is no need to go into the controversy of chargesheet filed by the ACB/ED, in the name of assessee's brother and discuss the issue whether the impugned amount received by the assessee from SPCL is taxable in the hands of the assessee and if so, under what provisions of the Act. Moreover, it is not the case of the AO, as well as the CIT(A) that there is a nexus between the charge sheet filed by the ACB and ED in the case of assessee's brother to the amount received by the assessee. The lower authorities have not taken into account the charge sheet filed by the agencies at the time of deciding the issue. Therefore, without going into the additional details filed by the DR, we proceed to decide the issue before us in the light of the facts brought out by the Ld.AO as well as the CIT(A) in their orders.

25. The AOs case is that the assessee has received money without any consideration which is taxable under the provisions of section 56(2)(vi) of the Act. The AO has brought out number of reasons to come to the conclusion that money is taxable u/s 56(2)(vi) of the Act. The sum and substance of the

findings of the AO in his order is that the assessee is not capable of doing business as stated in his statement and also does not have relevant experience in dealing in the business for which he suppose to have paid by SPCL. Though the assessee as well as the creditor has accepted that money is received towards advance for procurement of land, conduct of the assessee as well as the company goes to prove undoubted fact that this amount is received without any consideration. The AO brought out the conduct of the assessee after receipt of the money to state that the assessee has procured various properties in his personal name out of money received from the company. The AO further stated that the company has failed to take any action for recovery of money even after lapse of three years. Therefore, he came to the conclusion that the purported transaction between the assessee and the company give rise to various doubts and hence opined that the impugned amount is taxable u/s 56(2)(vi) of the Act.

26. The provisions of section 56(2)(vi) deals with cases where any sum of money, the aggregate value of which exceeds Rs.50,000 is received without any consideration by an individual or hindu undivided family, in any previous year from any person or persons on a specified date, then the whole of the aggregate value of such sum will be treated as income of the assessee. As a general rule, certain transactions are brought to tax when the provisions of

section 56(2)(vi) like gift received from individuals and receipt of properties for inadequate consideration between the parties. Therefore, to decide whether a particular receipt is taxable under the provisions of section 56(2)(vi), the facts of the case have to be examined in the light of the provisions and its intended purpose. In this case, the AO has treated amount received by the assessee from SPCL on the ground that the transactions give rise to suspicion because of the conduct of both the parties. Except this, the AO has not brought out any cogent materials to treat the particular receipt as income of the assessee which is taxable u/s 56(2)(vi) of the Act. To tax a particular receipt u/s 56(2)(vi), which should be in the nature of income as referred under the said provisions. A receipt cannot be taxed merely on conjecture or surmises. The AO needs to bring on record evidence which proves that the particular receipt is taxable under the provisions of the Act. No doubt, the assessee has received advances from the company which has been treated as sundry creditors in its balance-sheet for the relevant financial year. The assessee, right from day one has stated that he has received money from the company for procurement of land. This fact has been further supported by the statement of the company which also categorically stated that it has paid amount to the assessee for procurement of land in its project in Raigad district. The company also filed various details including agreement entered into with the assessee, copies of

board resolutions, bank statements and its financial statement to prove that the same has been treated as advance in its books of account. Therefore, we are of the considered opinion that merely because the assessee has not acted upon as per the terms and conditions of the agreement with SPCL and also the fact that the assessee has purchased properties in his personal name cannot be a sound reason for addition towards money received from SPCL; despite, both the parties have proved with necessary evidence that the impugned amount is mere advance payment for procurement of land. The AO necessarily has to examine the issue in the light of the provisions to bring to tax a particular receipt which has to be taxed. Merely on assumptions and presumptions, addition cannot be made. In this case, the assessee as well as the creditor has filed enough materials to prove that it is advance amount and the same has been treated as advance in their respective books of account; hence, we are of the considered view that the AO was incorrect in bringing to tax the amount under the provisions of section 56(2)(vi) of the Act.

27. Coming to the other observations of the AO. The AO has observed in his assessment order that SPCL has not taken any action for recovery of the amount, even after lapse of three years from the date of payment. The AO further observed that though the assessee has procured various immovable properties in his personal name, the company has failed to initiate necessary

proceedings to get the land procured in their name or return the money given to the assessee. No interest has been charged on money paid to the assessee. All these facts goes to prove undisputed fact that the transactions are not genuine, therefore, the AO opined that impugned amount is taxable under the provisions of section 56(2)(vi) of the Act. We do not find any merit in the findings of the A.O. for the reason that merely because the person, who paid the amount does not initiate any action for recovery of money should not be not a reason for making addition towards amount received as assessee's income. The AO has to prove beyond doubt a particular receipt is taxable in the given circumstances within the meaning of the said provision. In this case, the assessee has filed all details which prove that the company is in continuous contact with the assessee for procurement of land. We further notice that the company also filed a petition before Bombay High Court vide suit No.2576 of 2011 for recovery of money advanced to the assessee. The Hon'ble Bombay High Court on 19th October, 2011 has passed a decree decreeing the suit on the basis of the consent terms filed by the parties and on the terms and conditions stated in the decree. As per the petition before the Hon'ble Bombay High Court, both the parties agreed to settle the dispute as per which the assessee has agreed to refund the money along with interest which is evident from the order of decree passed by Hon'ble Bombay High Court. We further notice that

SPCL has filed an execution petition before Raigad Court for recovery of dues from the assessee. All these facts go to prove an undisputed fact that SPCL has paid advance to the assessee for procurement of land on certain terms and conditions. Therefore, we are of the considered view that the AO was erred in bringing to tax the impugned advance received from SPCL under the provisions of section 56(2)(vi). The CIT(A), without appreciating the fact has reiterated the findings of the AO to confirm the addition made by the AO. Therefore, we set aside the order passed by the CIT(A) and direct the AO to delete the addition made towards advance received from SPCL u/s 56|(2)(vi) of the Act.

28. Coming to the alternative findings of the AO in his assessment order. The AO has discussed the issue under the provisions of section 68 and 28(iv) of the Act. The AO observed that without prejudice to the finding under the provisions of section 56(2)(vi), if at all in appellate proceedings if the assessee taken a plea that the impugned amount revceived by the assessee is an advance , then the money received by the assessee represents loan which raises serious doubts about the genuineness of the transactions and section 68 of the Act come into operation. We do not find any merits in the observation of the AO for the reason that to make addition towards a particular receipt under the provisions of section 68, the AO has to examine three ingredients, i.e. identity, genuineness of transaction, and creditworthiness of the parties. In

this case, the assessee has proved the identity of the parties, genuineness of transaction and creditworthiness of the parties which is evident from the fact that SPCL has filed all evidences to prove impugned amount is an advance paid for procurement of land. We further notice that SPCL has filed its financial statement wherein the money paid to the assessee has been disclosed as business advances. This fact has been further supported by the findings of ITAT, in the case of SPCL in their appeal in ITA No.5766 & 5767/Mum/2013 for the assessment years 2008-09 and 2009-10, wherein the co-ordinate bench has given a categorical finding that the impugned amount paid to the assessee is business advance and hence, the AO was incorrect in disallowing proportionate interest u/s 36(1)(iii) of the Act. Though the findings of the co-ordinate bench is under different aspect, the amount involved is the same which is paid to the assessee, therefore, once a particular finding has been reached by the Tribunal on facts, a different conclusion cannot be reached at this stage. The relevant portion of the order of ITAT is extracted below:-

> *"4.1 f the factual finding recorded by the Ld.Commssioner of Income Tax (Appeals), we note that (as contained in para-13.4) Shri Nilesh Thakur, during the course of assessment proceedings for AY 2008-09 and 2009-10 duly explained that he received the amounts and during the course of enquiries before various authorities he took a consistent stand that advances were given for land aggregation and admitted _to have received the funds from the assessee*

company. Shri Nilesh Thakur alsoadmitted before the Hon'ble High Court regarding true nature of transaction and took a diametrically opposite stands on the nature of purpose of advances. The admitted stand of Nilesh Thakur in appellate proceeding for AY 2009-10 is duly supported by the record, which is further supported by the letter of the assessee company dated 6/07/2007 and subsequent acceptance vide letter dated 19/07/2007 given by Shri Thakur to the assessee company. In para 13.6 (page-45) of the impugned order the id. Commissioner of Income Tax (Appeals) has duly examined the availability of own funds as on 31/03/2007 the availability of own funds as on 31/03/2007 and 31/03/2008, wherein the net profit of the year was Rs.126,19,01,513/- which includes current years overdraft maintained with the bank and the assessee has not made specific borrowing for advancing the funds to Shri Nilesh Thakur. The Id. Commissioner of income Tax (Appeals) has already placed reliance from the decision from Hon'ble Apex Court in Munjal Sales Corporation, CIT vs Reliance Utilities, and Power Ltd. from Hon'ble Bombay High Court and the decision of the Tribunal in Reliance Industries Ltd. vs DCIT (ITA No.3082/Mum/2006) order 28/05/2012. In para 13.8 (page-48), there is a finding that the own funds of the assessee were to the tune of Rs.500.81 crores which is consisting of capital and reserves as on 31/03/2008 and the assessee advanced Rs.43.50 crores to Shri Nilesh Thakur for aggregating the land. We further note that the Id. Commissioner of Income Tax (Appeals) while deliberating upon the issues has duly met with the observation made in the assessment order and justifiably reached to a conclusion. Thus, on merit also, the assessee is having a strong case; consequently, we affirm the uncontroverted finding of the Ld.Commissioner of Income Tax (Appeals). Thus, from this angle also the Revenue has no case at all."

29. In this view of the matter and considering overall facts and circumstances, we are of the view that the AO was incorrect in making an alternate finding in the light of provisions of section 68, as well as section 28(iv) of the Act. Accordingly, we reject alternate findings of the A.O. to make additions. Hence, we direct the A.O. to delete additions of Rs. 43.50 crores made u/s 56(2)(vi) of the Act.

30. The next issue that came up for our consideration is addition made by the AO towards amount received from M/s SD Corporation Pvt Ltd (SDCL) under the head 'income from other sources'. During the financial year relevant to AY 2008-09, the assessee has received Rs.31,67,50,000 from S.D. Corporation Limited through his proprietory concern M/s PRS Developers. The assessee has shown amount received from SDCL under liabilities. During the course of assessment proceedings, the AO called upon the assessee to explain the nature and source of credit found in the name of SDCL. The AO also issued notices u/s 133(6) to SDCL. In response, the assessee has filed various details and submitted that he had received amount from SDCL towards consultancy charges for their project for which the company has deducted tax at source @10%. The assessee further contended that he is involved in providing consultancy services to the company for their project for which a formal appointment letter has been issued by the company on 07-12-2007. The

assessee further submitted that both the parties have entered into consultancy agreement dated 29-08-2008 specifying the terms and conditions of consultancy services and also fees payable to such consultancy. Since he had received part payment during the financial year relevant to AY 2008-09, he did not recognise the revenue from the consultancy charges and whatever expenses incurred in relation to execution of consultancy work has been treated as WIP. In this regard, he furnished copies of agreement alongwith financial statements to prove the expenditure incurred in relation to his business. Similarly, SDCL has filed details sought by the AO in response to notice issued u/s 133(6) and also confirmed tht they have paid consultancy charges to Shri Nilesh Thakur, prop of M/s PRS Developers in connection with their project. SDCL further confirmed that they have deducted TDS on consultancy charges paid to the assessee. In this regard, the assessee furnished necessary copies of agreements and other details to prove work done by the assessee and also total payment made to the assessee.

31. The AO, after considering the submissions of the assessee observed that the assessee has failed to establish any business connections with SDCL so as to claim receipt of consultancy charges. In the absence of any corroborate evidence that he has done any work relating to any project of SDCL, the claim of the assessee that he has received consultancy charges from SDCL cannot be

accepted. The AO further observed that the assessee being a novice man does not have required qualification to carry out the nature of work to be executed to SDCL, failed to prove providing consultancy services as narrated in the agreement between the parties to prove the amount received towards professional charges. Though SDCL has confirmed that they have paid consultancy fees to the assessee in relation to their project, in the light of fact that the assessee has not been able to prove providing consultancy services with necessary evidence and also not incurred any expenditure, the claim of the assessee with regard to the receipt towards professional charges cannot be accepted. The AO further observed that the assessee has shown amount received from SDCL as advance in its balance-sheet and also not incurred any expenditure in relation to carrying out consutancy services. This clearly goes to establish that the assessee has not incurred any expenditure of whatsoever during the FY 2007-08. The amount was not received by the assessee for rendering any professional services but was received for some other unknown reasons. Therefore, he opined that the amount received from SDCL is clearly in the nature of revenue receipts in the hands of the assessee, but neither the assessee nor SDCL has submitted any documentary evidence for rendering of service to SDCL; therefore, treated the total amount received from SDCL as assessee's income from other sources. The AO further denied the benefit of

carry forward of WIP shown by the assessee in his financial statement towards expenditure incurred for providing consultancy services on the ground that the assessee has failed to prove any business activity undertaken in the relevant financial year. Aggrieved by the order of AO, assessee preferred appeal before CIT(A).

32. Before CIT(A), the assessee reiterated his submissions before the AO. The assessee further submitted that the AO was incorrect in making addition towards amounts received from SDCL under the head ' Income from other sources purely on the basis of surmises and conjectures ignoring all evidences filed by the assessee to prove that the impugned amount has been received for the purpose of providing consultancy services to SDCL. The assessee further submitted that he had entered into an agreement with SDCL for providing consultancy and the nature of consultancy services to be provided has been narrated in the agreement dated 29-08-2008 entered into between the company and himself wherein the terms of agreement has been clearly specified. The assessee further submitted that the nature of work to be carried out for SDCL has been detailed under clauses 4(a) to 4(m) of the agreement. The developer has agreed to pay total consultancy charges of Rs.95 crores. The mode of payment and period of payment has been specified in the agreement. Accordingly, the company has paid a sum of Rs.31,67,50,000 during the

financial year relevant to AY 2008-09 and the same has been treated as advance received from the company pending execution of work. The assessee further submitted that he had incurred various expenditure in connection with the project work which has been debited in the P&L Account. Since the work is not fully completed, the expenditure incurred during the year has been shown as WIP. Therefore, the AO was incorrect in treating the amount received from SDCL as income of the assessee under the head 'Income from other sources'.

33. The CIT(A), after considering relevant submissions of the assessee and also taking into account the findings of the AO in the assessment order, came to the conclusion that the AO was right in making additions towards amount received from SDCL under the head, 'Income from other sources'. The CIT(A) further observed that though both the parties have confirmed that the money has been received for providing consultancy services, the conduct of the parties goes to prove that the money is received for other unknown purposes. The CIT(A) further observed that the assessee could not be able to prove the genuineness of rendering of services to SDCL. He was also not been able to file any evidence to prove the expenditure incurred in connection with the execution of work for SDCL. With these observations, the CIT(A) confirmed the additions made by the AO. Aggrieved by the order of CIT(A), the assessee is in appeal before us.

34. The Ld. Ld.Senior Counsel for the assessee submitted that the Ld.CIT(A) was erred in confirming the addition of Rs.31,67,50,000 made by the AO as Income from other sources in respect of consultancy charges received from SDCL. The Ld.Senior Counsel further submitted that the AO as well as the CIT(A) went on to discuss the issues purely on surmises and conjectures without bringing on record any evidences to prove that the amount received from SDCL is other than for consultancy charges. The assessee has proved receipt of money along with necessary evidences. The company, SDCL has filed all the details called for by the AO during the course of assessment proceedings. All these factors go to prove the undisputed fact that the assessee has received consultancy charges from SDCL and the company has paid the amount towards consultancy charges. The Ld.Senior Counsel further submitted that th assessee has not offered any income from consultancy charges for the assessment year under consideration because he is following project completion method of accounting for recognition of revenue and hence, the revenue recognition from the services has been postponed as the project has not been completed. But, that by itself cannot be a ground for the AO to hold that the amount is not received for consultancy services but for other unknown purposes. The facts gathered during the course of assessment proceedings by the AO himself proves that the money is received for the

purpose of consultancy services which is evident from the fact of confirmation by SDCL. The Ld.Senior Counsel further submitted that if at all the income from consultancy services has to be recognised in the relevant financial year, only a reasonable net profit from gross receipts may be estimated. The assessee has filed all the relevant materials to prove providing of consultancy services and also filed necessary evidences to prove expenditure incurred. Therefore, once the receipt is treated as income, corresponding expenditure should be allowed. The AO, without appreciating the fact has treated total amount received from the company as 'Income from other sources' which is incorrect.

35. On the other hand, the Ld.DR strongly supported the order of the CIT(A). The Ld.DR further submitted that the conduct of the assessee goes to prove an undisputed fact that the money has been received for some unknown purposes, but not for the purpose of providing consultancy services. Though both the parties agreed that they have entered into a consultancy agreement for providing consultancy services for the project undertaken by SDCL, the assessee has filed to prove providing of any type of consultancy services. The assessee being a novice man, does not have any required experience in the field of consultancy services to a mega project has stated that he has provided consultancy services. SDCL is a part of a corporate giant has paid such a huge sum of money to the assessee without a proper agreement. In the absence of

any evidence to provide consultancy services, the claim of the parties cannot be accepted. The AO, as well as the CIT(A) has drawn a right conclusion based on the evidence gathered during the course of assessment proceedings to treat the impugned amount as income from other sources and, their order should be upheld.

36. We have heard both the parties, perused material available on record and gone through the orders of authorities below. The factual matrix of the case which leads to the impugned addition are that the assessee has received a sum of Rs.95 crores from SDCL. Out of the said amount, the assessee has received a sum of Rs.31,67,50,000 during the financial year relevant to AY 2008-09. The assessee has shown amount received from SDCL under the head 'current liabilities'. The AO made addition on the ground that amount received from SDCL is not for the purpose of providing consultancy services, but for some unknown purposes. The AO came to the conclusion based on his own findings. According to the AO, the assessee does not have required experience and expertise in providing consultancy services. The AO further observed that the assessee has not been able to prove providing any kind of services to SDCL. The assessee also was not able to prove incurring of any expenditure in relation to providing of consultancy services. Therefore, he opined that amount received from SDCL is not for the purposes of providing consultancy services,

but for some unknown reasons. It is the contention of the assessee that he had entered into a formal agreement with SDCL for providing consultancy services as per which he agreed to provide consultancy services for their project. The assessee further contended that the terms and conditions of the consultancy services has been clearly set out in the agreement dated 29-08-2008. As per clauses 4(a) to 4(m), the nature of services to be provided has been illustrated. The clause 5 of the agreement clearly says the fees to be payable. All these facts goes to prove an undoubted fact that he had received amount from SDCL for providing consultancy services. The assessee further contended that the AO has conducted independent enquiry during the course of assessment proceedings by calling for various details from SDCL for which the company has filed all necessary details and also confirmed to have paid amount to the assessee. The company has deducted tax at source @10% on total amount paid. All these facts have been filed before the AO. The AO has conveniently ignored evidences filed to make addition purely on surmises and conjectures without bringing any cogent evidence to prove that the impugned amount is received for other than consultancy services.

37. The AO has made addition on the ground that the assessee has failed to prove providing any consultancy services to SDCL. The AO further observed that the assessee being a novice man does not have required experience and,

therefore, cannot provide consultancy service to a corporate giant like SDCL. According to the AO, the assessee has failed to provide any evidence to prove existence of consultancy agreement between the company and the assessee and also failed to prove incurring of any expenditure towards consultancy services. Therefore, he opined that the amount received from SDCL is not for the purposes of providing consultancy services but for some unknown reasons. We do not find any merit in the findings of the AO for the reason that additions cannot be made to any receipts, merely on the basis of surmises and conjectures on the basis of conduct of the assessee. If the AO wants to tax a particular receipt as income of the assessee, then he should bring on record material evidence to suggest that a particular receipt is taxable within the parameters of the law. If a particular income is not taxable under the Income-tax Act, it cannot be taxed on the basis of estoppel or any other equitable doctrine. Therefore, the issue to be decided in the given facts and circumstances of the case is whether amount received from SDCL is taxable in the hands of the assessee, if so, under what head of income. The AO has taxed the gross receipts received from SDCL under the head 'Income from other sources'. The AOs findings are based on the theory of probabilities. The AO has not brought out any materials to show that the impugned receipt is income of the assessee. On the other hand, the assessee has filed all evidences to

prove amount received from SDCL is for providing consultancy services. The assessee also filed necessary evidence to prove expenditure incurred in relation to providing consultancy services. The evidences filed by the assessee in the form of appointment letter issued by SDCL dated 07-02-2007 and further consultancy agreement entered into between the parties on 29-08-2008 clearly goes to prove the undoubted fact that there existed a service agreement between the parties and that SDCL has paid consultancy fee. The agreement filed by the assessee has narrated the nature of service to be provided. In fact, SDCL has accepted before AO during the assessment proceedings that the assessee has provided consultancy services. We further notice that SDCL also deducted tax at source @10% on total payments. All these facts lead to an undoubted conclusion that the AO has made addition merely on the basis of conjectures and surmises without there being any material to show that amount received from SDCL is income of the assessee. Therefore, we are of the view that the AO was incorrect in treating the amount received from SDCL as income of the assessee under the head 'Income from other sources'.

38. Having said so, let us examine whether the assessee is able to prove expenditure incurred in relation to his business activity of providing consultancy services to SDC L. The assessee claims to have incurred various expenditure in relation to work executed for SDCL which has been filed before

the AO. The assessee further contended that because he is following project completion method for recognising revenue from the work, whatever expenditure incurred for the project has been shown under WIP, pending recognition of revenue. The assessee further contended that during the financial year relevant to AY 2008-09, he has incurred various expenditure which have been debited to P&L account in PRS Developers & PRS Enterprises. The AO has conveniently ignored evidences filed by the assessee to make addition towards gross receipts received from SDCL.

39. No doubt, the assessee has proved beyond doubt the impugned receipt from SDCL is for the purposes of providing consultancy services. The assessee also filed certain evidences to prove various expenditures incurred in relation to consultancy services. Income cannot be earned without incurring any expenditure. Income and expenditure are two paces of a single coin. To earn income necessary expenditure has to be incurred for providing consultancy services. The assessee has filed his financial statements as per which various expenditures have been incurred. If the AO is not satisfied with the details filed by the assessee to prove the expenditure, the total expenditure incurred for earning income cannot be doubted. It is now well settled that if the AO is making best judgement assessment, he should make an intelligent, well founded estimate. Such estimate must be based on adequate and relevant

materials. The mere fact that the material placed by the assessee before the assessing authority is unreliable does not empower those authorities to make an arbitrary order. The power to make assessment on the basis of best judgement is not an arbitrary power. If the AO is not satisfied with the evidence filed by the assessee to prove the expenditure, he should have proceeded to estimate the income from the activity of the assessee on best judgement. In this case, the AO has taxed gross receipts without allowing deductions for expenditure incurred by the assessee. Since there is always nexus between income generated and expenditure incurred, levying tax on gross receipts without allowing any deduction for expenditure is arbitrary. The Ld. Ld.Senior Counsel for the assessee submitted that the assessee has recognised revenue on project completion method, therefore, if at all the income from the activity of the assessee is to be recognised during the relevant financial year, a reasonable profit may be estimated from the gross receipts. We find merits in the arguments of the assessee for the reason that total receipts cannot be taxed as income of the assessee. The assessee has incurred various expenditures which have been debited to his P&L Account. Though, the assessee claims to have incurred various expenditures, failed to file complete details of expenditures incurred, to the satisfaction of the AO. Under these circumstances, what needs to be done is reasonable estimates of net

profit from the business, taking into account the facts & circumstances. In this case, the assessee is in the business of providing consultancy services. In the case of professional and consultancy services, section 44AD provides for taxation of income from profits and gains of profession on presumptive basis. Though, provisions of section 44AD strictly not applicable to the present case, the analogy provided under the said provisions can be taken as basis for determining the profit. In the cases of profession, profit ranging from 10% to 25% is reasonable. Therefore, taking into account overall facts and circumstances of the case, we deem it appropriate to direct the AO to estimate net profit of 20% on total gross receipts received from SDCL. We, ordered accordingly.

40. The next issue that came up for our consideration is addition towards opening capital of Rs.5 lakhs. The AO made addition of Rs.5 lakhs u/s 68, on the ground that the assessee has failed to prove opening capital with necessary evidence. The AO further observed that the assessee has filed return of income for the first time for the assessment year 2008-09 and hence, failed to prove opening balance with any evidences. It is the contention of the assessee that he was earning since the age of 18, however, he did not file return of income because his income for the previous years was below the taxable limits. We do not find any merit in the arguments of the assessee for the reason that

the assessee has filed to file any evidence to prove the existence of opening capital of Rs.5 lakhs. The assessee has filed return of income for the first time, therefore, carry forward of opening balance of Rs.5 lakhs is not justified with any evidence. Therefore, we are of the view that the AO was right in making addition towards opening capital u/s 68 of the Act. The CIT(A), after considering relevant submissions of the assessee has rightly upheld the addition made by the AO. We do not find any error or infirmity in the order of CIT(A). Hence, we are inclined to uphold the findings of the CIT(A) and reject ground raised by the assessee.

41. The next issue that came up for our consideration is addition towards interest income from FD for Rs.21,71,627. The AO made addition towards interest received on FD under the head Income from other sources. The AO further observed that interest income from FD is assessable under the head Income from other sources. It is the contention of the assessee that interest earned from FD is having direct nexus with business activity of the assessee and hence, interest forms part of gross receipts from business. We do not find any merits in the argument of the assessee for the reason that at no stretch of imagination, interest from FD can be considered as business receipts of the assessee. Though the assessee has earned interest income out of money received from the business, interest on FD is not generated from the core

business activity of the assessee. Therefore, we are of the view that AO was right in treating interest on fixed deposit under the head 'Income from other sources'. The CIT(A), after considering the relevant submissions has rightly upheld additions made by the AO. We do not find any error in the order of CIT(A). Hence, we are inclined to uphold the order of the CIT|(A) and reject ground raised by the assessee.

42. The next issue that came up for our consideration is denial of carry forward of closing work in progress of Rs.15,39,11,744. The AO denied work-in-progress shown by the assessee on the ground that the assessee has failed to prove any business activity. It is the contention of the aswsessee that he had followed project completion method for recognition of revenue from his business. Accordingly expenditure incurred during the relevant financial year has been shown under WIP and carry forwarded to next year. We find that the issue of carry forward emanates from the impugned issue of treatment of amount received from SDCL under the head 'Income from other sources'. Since we have already given our finding in the preceding paragraph regardeing amount received from SDCL and directed the AO to estimate income from the receipts, the issue of carry forward of WIP becomes academic in nature. Hence, we reject grounds raised by the assessee.

43. In the result, appeal filed by the assessee for AY 2008-09 in ITA

No.3738/Mum/2013 is partly allowed.

44. ITA No. 3739/Mum/2013

45. The facts and issues involved in this appeal are identical to the facts and issues in ITA No.3738/Mum/2013. In this appeal, the assessee has challenged addition made by the AO towards amount received from SPCL for Rs.41 crores u/s 56(2)(vi) of the Act. We have considered an identical issue in ITA.No. 3738/M/2013 and for detailed discussions in paragraphs no. 22 to 29, we decided the issue in favour of the assessee. The facts considered and reasons given in ITA.No. 3738/M/2013 shall mutatis and mutandis apply to this appeal. Therefore, for the detailed discussion in our order in the preceding paragraph in ITA No.3738/Mum/2013, we direct the AO to delete additions made towards amount received from SPCL for Rs.41 crores. Accordingly, the ground raised by the assessee in ground No.1 is allowed.

46. In grounds No.2 & 3, the assessee has challenged additions made by the AO towards amount received from SDCL under the head 'Income from other sources' and denial of carry forward of WIP. But for the figures, a similar issue has been discussed in ITA No.3738/Mum/2013. The facts considered and reasons given in ITA.No. 3738/M/2013 shall mutatis and mutandis apply to this appeal. Therefore, for the detailed discussion in the preceding paras, we direct

the AO to treat the impugned amount received from SDCL under the head ' Income from business or profession and also direct him to estimate net profit of 20% on gross receipts. Insofar as carry forward of closing WIP, since we have directed the AO to estimate income on year to year basis, the issue of carry forward of WIP becomes academic in nature and hence, it is not adjudicated specifically.

47. In the result, appeal filed by the assessee in ITA No.3739/Mum/2013 is partly allowed.

48. As a result, both the appeals filed by the assessee are partly allowed.

Order pronounced in the open court on 17th November, 2017.

Sd/-	sd/-
(D.T. Garasia)	(G Manjunatha)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dt : 17th November, 2017
Pk/-

Copy to :

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

/True copy/ By order

Asstt. Registrar, ITAT, Mumbai