IN THE INCOME TAX APPELLATE TRIBUNAL
AMNRITSAR BENCH, AMRITSAR
BEFORE SHRI N.K. CHOUDHRY, JUDICIAL MEMBER
AND SHRI O.P.MEENA, ACCOUNTANT MEMBER

आ.अ.सं./I.T.A No.648/ASR/2017

निर्धारण वर्ष/A.Y.:2014-15

Assistant Commissioner of Income Tax, Circle-2, Rail Head, Complex, Panama Chock, Jammu.	**Vs.**	Shri Raju Choudhary, 56-A/D, Gandhi Nagar, Jammu. **[PAN:ABSPK 3429 J]**
अपीलार्थी Appellant		**प्रत्यर्थी/Respondent**

निर्धारिती की ओर से **/Assessee by**	Shri P. N. Arora , Advocate
राजस्व की ओर से **/Revenue by**	Shri Alok Kumar, CIT (D.R.)

सुनवाई की तारीख/ Date of hearing:	19.12.2019
उद्घोषणा की तारीख/Pronouncement on:	16.03.2020

आदेश /O R D E R

PER O. P. MEENA, ACCOUTANT MEMBER:

1. This appeal by the Assessee is directed against the order of learned Commissioner of Income tax (Appeals)-J & K, Jammu (in short "the CIT(A)") dated 29.06.2017 pertaining to Assessment Year 2014-15, which in turn has arisen from the assessment order passed under section 143 (3) dated 30.12.2016 of Income Tax Act,1961 (in short 'the Act') by the Assistant Commissioner of Income Tax, Circle-2, Jammu (in short "the AO").

2. The grounds of appeal raised by the Revenue are as under:

i. On the facts and in the circumstances of the case, the Ld.CIT(A) has erred in deleting the addition of Rs.43,64,994/- on account of unverified creditors, on the basis of furnishing of confirmations from the creditors by the assessee during the appellate proceedings in violation of Rule 46A of Income Tax Rules, 1962 .

ii. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in deleting the addition of Rs.4,32,985 out of manufacturing expenses, Rs.84,659 out of Admin expenses, and Rs.4,22,587 out of other expenses claimed by the assessee, by relying on the books of accounts furnished by the assessee during the appellate proceedings, that too in the form of merely pen drive, when the assessee had failed to produce the books of accounts and original bills in support of the claim, during the course of assessment proceedings to justify these expenses, which were partly incurred in cash.

iii. On the facts and in the circumstances of the case, the Ld.CIT(A) has erred in deleting the addition of Rs.8,75,03,317 on account of unexplained investment made by the assessee in construction of Commercial Complex at Gulab Singh Marg, Jammu on the basis that, if at all addition on account of undisclosed investment had to be made, it had to be made in the hands of third party and not the assessee, when, despite various opportunities provided to the assessee during the assessment proceedings, the assessee failed to establish that the construction was being done by the third party and not by the assessee.

iv. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in deleting the addition of Rs.8,73,465 on account of Municipal Fees paid out of unexplained sources, by admitting additional evidence produced by the assessee in violation of Rule 46A of Income Tax Rules. When, during the course of assessment proceedings, despite various opportunities provided to the assessee, the assessee failed to give details of source of payment of Municipal Fees.

v. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in deleting addition of Capital Gains of Rs.2,21,49,975/- accruing to the assessee on the lease of land to M/s. K. C. Sports Club and Capital gains of Rs.21,73,33,352 on the lease of land to M/s. K. C. City Centre Pvt. Ltd. by holding that "This is not a transfer of capital asset within the meaning of section 2 (47) of Income Tax Act and hence, the question of charging capital gain would not arise." The lease deeds for the properties were executed by the assessee for a period of 20 years and 25 years (which is more than 12 years amounting to transfer of property under the property under the Transfer of Property Act). Reliance is placed on the following judicial decisions:

i. CIT v. C. F. Thomas [2007] 158 Taxman 310 (Ker) of Hon`ble Kerala High Court

ii. CIT v. Sujatha Jewellers [2007] 290 ITR 631 (Mad) of Hon`ble Madras High Court.

3. The assessee is an individual and is doing business of manufacturing of ferrochrome and steel ingots in the name of two

Industrial units namely M/s. Tawi Chemical Industries Lane- 4, SIDCO Industrial Complex, Bari Brahmana Jammu and M/s. Tawi Chemical Industries Unit- I & Unit -II , Lane -4 SIDCO. He has also given in his two buses on hire to M/s. Lucky Travels and is deriving income from house property from rent from K.C. Education Society, Saar Estate Pvt. Ltd. Pinnacle Property and Mangolias and income from other sources. The assessee has filed return of income on 02.01.2015 declaring total income of Rs.1,02,44,600. A survey under section 133A was carried out on 27.07.2016 at various business concerns pertaining to M/s. K. C. Group of cases in which the assessee and his family members were having substantial interest. The assessment was made under section 143 (3) of the Act on 30.12.2016 after making addition of Rs.33,45,63,200 against which the assessee has filed an appeal before CIT(A), who allowed substantial relief against which the Revenue has agitated before this Tribunal, which are being discussed as per grounds of appeal in succeeding paras.

4. Ground No.1 relates to addition of Rs.43,64,494 on account of unverifiable sundry creditors.

5. Succinct facts are that the assessee has shown sundry creditors at Rs.1,39,41,202 in Schedule of accounts of M/s. Tawi Chemical Industries, Unit-I, Jammu and Rs.1,49,23,543 in schedule of accounts of M/s. Bari Brahma, Unit-II, Jammu. In order to verify genuineness of creditors, the AO issued notice under section 133(6) of the Act in some of the creditors in whose cases, the assessee has provided the address for communication. However, in respect of parties, namely M/s. Naseeb Singh & Sons, Rs.13,32,500, M/s. Calcutta Carbide (P) Ltd. Rs.6,30,340, M/s. Mahajan & Co. Bishna Rs.10,01,438, M/s. S.V. Traders, Rs.5,57,569 and M/s. Durga Traders, Rs.8,42,647 aggregating to Rs.43,64,494. The verification letters were received back "undelivered". The AO, therefore, added a sum of Rs.43,64,494, to total income of the assessee for want of confirmation from these parties.

6. Being, aggrieved, the assessee filed an appeal before the Ld.CIT(A). Wherein it was submitted that the AO sought explanation of the assessee seeking confirmation of the parties on 27.12.2016 and the same was produced before the AO on 30.12.2016 at 10 AM, but the AO did not consider that and made the addition. The appellant has also submitted a copy of the same as Annexure-C of the submissions. The confirmations received as above were remanded to the AO for his comments vide letter dated 27.03.2017. The AO by his letter dated 13.06.2017 duly forwarded by the Addl. CIT Range-2, Jammu, submitted a remand report and he stated therein that

"As a matter of test check, certain creditors from the Jammu were issued letters under section 133 (6) of the Act, 1961 in order to vouchsafe the credits shown by the assessee against their names. The letters were issued on the communicable address given by the assessee during the assessment proceedings, but these were returned by the Postal Authorities undelivered, as mentioned in the assessment order under appeal. However, the final opportunity was given to the assessee on 27.12. 2016, to produce all the above creditors along with the books of accounts for examination of the credits fixing the case for 30.12.2016 at 11 AM, but none attended on the date physically.

However, the confirmation from the parties have been provided by the assessee now, and kept on record, but during assessment proceedings assessee has failed to provide such valid confirmations."

7. In view of these facts, the Ld. CIT(A) observed that since, the AO, in his remand report has admitted that the confirmations from the creditors which were provided by the assessee and have been placed on record, there is no reason to sustain the addition of Rs.43,64,494/- and hence, it was deleted.

8. Being aggrieved, the Revenue has filed this appeal before the Tribunal. The ld. CIT (DR) submitted that the CIT(A) has admitted the additional evidence under Rule 46A and allowed the relief of the assessee, whereas the assessee has failed to furnish confirmations before the AO inspite of giving final opportunity.

9. *Per contra,* the ld. counsel for the assessee submitted that the assessee has furnished a reply before the AO, and produced the books of accounts. It was further submitted that the ld.CIT(A) has mentioning order that the confirmation was produced before the AO on 13-12-2016 at 10 AM but the AO did not consider the same and made the addition. The appellant`s counsel has also filed a copy of Annexure-C with his submission. The ld. A. R. of the assessee submitted the ld.CIT(A) has called for a remand report from the AO. The AO vide his remand report dated 13-06-2017 submitted that the confirmation from the parties have been provided by the assessee now a copy on record but during assessment proceedings assessee has failed to provide of such confirmations. Thus, the CIT(A) has duly allowed opportunity to the AO by obtaining remand report; therefore, there is no violation of Rule 46A of the I.T. Rules. Further, the assessee has filed the details, confirmations, which are placed at paper book at page no. 111 to 116 which have been duly examined by the AO. The learned counsel for the assessee relied in the case of Shahrukh Khan v. DCIT [2007] 13 SOT 61 (Mum-Trib) / [2006] 25 CCH 506 (Mum-Trib) wherein it was held that after calling of remand report from AO on merit as envisaged in sub- rule(3) of Rule 46A, CIT(A) had no discretion to refuse to admit additional evidence. It was further relied in the case of M/s. Saraswati Builders v. ACIT-Central Circle- Amritsar [I.T.A.No. 252(Asr) 2013/A.Y. 2009-10 dated 20.05.2016] in which it was held that the ld.CIT(A) has rightly admitted additional evidences which were necessary form arriving at the justice, therefore, the contentions of learned D.R. that learned CIT(A) should not have accepted, do not carry any force. The learned CIT(A) has passed a reasoned and speaking order and has passed the order after obtaining remand report from the Assessing Officer therefore, we do not find any conformity in the same and therefore, the appeal of the Revenue is dismissed.

10. We have heard the rival submissions and perused the material available on record. Since, the assessee has claimed that he has filed confirmation before the CIT(A) on 13-12-2016 at 10 AM, but same appears to have not been accepted by the AO. Therefore, the assessee has furnished the said confirmations during the appellate proceedings also which were remanded, to the AO for his comments and examinations. The AO in his remand report made comment that the assessee has now filed confirmation from the parties, which are placed on record. Thus, the AO has examined the confirmation and did not make any adverse comments thereon. In view of this fact, we find that the ld.CIT(A) has rightly admitted additional evidences which were necessary for arriving at the justice. The learned counsel for the assessee relied in the case of Shahrukh Khan v. DCIT [2007] 13 SOT 61 (Mum-Trib) / [2006] 25 CCH 506 (Mum-Trib) wherein it was held that after calling of remand report from AO on merit as envisaged in sub-rule(3) of Rule 46A, then the ld.CIT(A) had no discretion to refuse to admit additional evidence. It was further relied in the case of M/s.Saraswati Builders v. ACIT- Central Circle-Amritsar [I.T.A.No. 252(Asr) 2013/A.Y. 2009-10 dated 20.05.2016] wherein it was held that the ld.CIT(A) has rightly admitted additional evidences which were necessary for arriving at the justice, therefore, the contentions of learned D.R. that learned CIT(A) should not have accepted do not carry any force. The learned CIT(A) has passed a reasoned and speaking order and has passed the order after obtaining remand report from the Assessing Officer therefore, we do not find any conformity in the same and therefore, the appeal of the Revenue is dismissed. We find that the ld. CIT(A) after considering the facts and passed the order after obtaining remand report. In view of these facts, we do not find any infirmity in the order of the CIT(A).

Therefore, the same is upheld. Accordingly, this ground of appeal of the Revenue is dismissed.

11. Ground No. ii: Relates to deleting the addition of Rs.4,32,985/- out of manufacturing/Admin and other expenses.

12. Briefly stated the facts of this ground are that the AO during the assessment proceedings noticed that the assessee has claimed manufacturing expenses in the trading account as well as administrative expenses in the profit and loss account in Tawi Chemical Industries, Unit-1. The AO, therefore, asked the assessee to produce bills/vouchers of these expenses to explain the mode of expenses etc. However, the assessee could not produce such documents for test check before the AO. The AO, therefore, presumed that these expenses made have been incurred partly in cash and disallow 5% of the total expenses claimed under the head manufacturing out of Rs.4,32,985/- and added the same to the total income of the assessee. Similarly, the AO, added a sum of Rs.84,659/- being 5% of the total expanse claimed at Rs.16,93,189/- under the head “Administrative Expenses”. The AO, further added a sum of Rs.4,22,587/- being 5% of the total expenses claimed at Rs.84,51,747/- in the profit and loss account again on the ground that bills/vouchers of these expenses were not produced by the assessee.

13. Being aggrieve, the assessee filed an appeal before the ld.CIT(A). During the appellate proceedings the appellant's counsel in his submission has stated that all the expenses claimed as above have been spent purely for business purpose and all the bills and vouchers duly audited were produced before the AO and again submitted during the appellate proceedings for verification. The appellant's submission dated 22-03-2017 was sent to the AO for his comments/objections. The AO in his remand report has admitted that "now", the assessee has produced computerized books of accounts in the shape of a Pen Drive as well as vouchers for the expenditure claimed which were test checked and found to be in order. Since, the AO, has already made the necessary verification of the genuineness of the expenses and nothing adverse was found, the additions of Rs.4,32,985/-, Rs.84,659/- and Rs.4,22,587/- made by the AO were deleted.

14. Being aggrieved, the Revenue has filed this appeal before the Tribunal. The ld. CIT(DR)relying on the order of the AO and submitted that CIT(A) was not justified to deleting the addition.

15. *Per contra*, the ld. counsel for the assessee relied on the finding of the ld.CIT(A) and submitted that the CIT(A) has called for a remand report from the AO. The AO vide his remand report has admitted that the assessee has produced the computerized books of accounts as well as vouchers for the expenditure claim which were test checked and found to be in order. Therefore, CIT(A) has rightly disallowance of expenses made by the AO.

16. We have heard the rival submissions and perused the relevant material available on record. We find that the AO during the course of remand proceedings had verified the expenses and test check of the same and found the same to be in order as per remand report. Therefore, CIT(A) has correctly deleted the additions of disallowance out of expenses made by the AO, hence, same is uphold this ground of appeal therefore dismissed.

17. Ground No. iii: relates to deletion of the addition of Rs.8,75,03,317/- on account of unexplained investment made by the assessee in construction of commercial complex at Gulab Singh Marg, Jammu.

18. Brief facts of apropos ground are that the addition of Rs.8,75,03,317/- was made on the ground that during the course of survey, it was found that the assessee has constructed a commercial complex at Gulab Singh Marg and in which he has claimed to have invested a sum of Rs.15,20,00,000/- in the building account up to date of survey under section 133A of the Act, but he did not produce details of the investment made during course of survey investigation. The AO, therefore, worked out the actual cost of construction, the details of which were given in Para 7 of the assessment order which is as under:-

Valuation		
Assessment of Value		
1.	Total built up area at Basement-level-1 27700 sq ft @Rs.1,500 sq ft	4,15,50,000
2.	Total built up area at Basement-level-2 27700 sq ft @Rs.1,500 sq ft	4,15,50,000
3.	Total built up area at ground floor 18,178 sq ft @Rs.1,500 sq ft	2,72,67,000
4.	Total building area at first floor = 18000 sq ft @Rs.1,500 sq ft	2,70,00,000
5.	Total	13,73,67,000
Services		
1.	Add 10% for electrification of house and connected system	Rs.1,37,36,700
2.	Add 10% for sanitary fittings and connected system	Rs.1,37,36,700
	Miscellaneous	
1.	Boundary wall and gate	Rs.10,00,000
2.	Add value of lift	Rs.1,70,00,000
3.	Add value of swimming pool	Rs.50,00,000
4.	Add value of glass work	Rs.40,00,000
5.	Add value of verified tiles, rubber tiles and wall tiles and HV AC	Rs.1,55,00,000
	Total A	**Rs.20,73,40,400**

19. The AO has taken the cost of construction at Rs.1,500/- per sq. ft. on the basis of various market enquiries and consultations with the approved department valuer and also on the basis of valuation adopted by the approved valuer Shri Navneet Gupta in the case of

M/s. K. C. Sports assessee's own case. The AO also noticed that the assessee has made a lease deed dated 30-10-2013 with M/s. K. C. City Centre P Ltd (a private limited company), according to which M/s.K.C. City Centre Private Limited has allowed to make construction from the roof of first floor onwards. The AO found that the estimated cost of construction of 2nd floor, service area, and third floor, fourth and fifth floor as per the details in the given portion of order at page no.16. Accordingly, the AO estimated the entire cost of construction of said building at Rs.35,45,96,400/- till the date of survey and then the AO has apportioned 30% of that construction cost for the financial year 2013-14, the previous year under consideration and worked out the estimated investment at Rs.10,63,78,920. Since, the assessee has already disclose the investment during the financial year 2013-14 at Rs.1,88,75,603/-, the difference of the amount of Rs.8,75,03,317/- i.e. [10,63,78,920 - 1,88,75,603] was proposed to be added by the AO has undisclosed investment u/s.69A of the Act by way of show cause notice issued by the assessee. The assessee vide reply dated 26-09-2016 stated that though the construction was started in the year 2013, it is still under construction year to be completed also was seen at the time of survey operation conducted on 27-07-2016. However, the AO was not convinced with the reply of the assessee and added the sum of Rs.8,75,03,317/- as unexplained investment in the said building on the ground that the assessee produced only unaudited balance sheet. It could not produce the details of the entries like (building work in progress), capital work & sundry creditor etc. The assessee also did not produce the books of accounts bills and vouchers. The assessee also could not furnish the cash flow statement and reconciliation of accounts for the period under consideration. In support of his claim that the assessee has claimed investment of Rs.15.20 crore in construction of commercial complex at Gulab Singh Marg, Jammu but could not furnish the details in support of the same. Therefore, in absence of proper details/evidences and books of accounts and cash flow statement an amount of Rs.8,75,03,317/- was added to the total income of the assessee and treated as unexplained investment u/s.69A of the Act.

20. Being aggrieved, the assesse carried the matter before the CIT(A), wherein the assessee gave a detail submission vide letter dated 22-03-2017 along with books of accounts and other supporting documents and raised several objections against the said addition made in the Section 69A of the Act. The CIT(A) has summarized the objections of the assessee is under:-

> *1. The fact is that the construction work commenced during the year under consideration on 04.12.2013 and*

no substantial expenditure has been incurred during the year except that shown in Balance sheet as on 31.03.2014 and presented before the AO along with bills, vouchers and other supporting evidences where the investment of Rs.1,88,75,6037- stands recorded. That appellant has done only excavation and rafting work during the assessment year under construction. The rest of the construction was done in subsequent years and the construction work is still under construction. This has been duly certified independent Architect requisitioned by the Survey-Party. The certificate of the architect contains schedule of payments and clearly depicts the status of construction vis-a-vis fee paid to him till 31/03/2014.

2. *The copy of Balance sheet as on 31/03/14, where a sum of Rs.l,88,75;603/-was invested on excavation and rafting work was also produced before the AO as an evidence but the A.O. rejected this Balance sheet on the ground that the same was not audited and unreliable but the AO himself has accepted the figures as given in that Balance Sheet while calculating the undisclosed investment.*
3. *That the cost of construction adopted by the AO at Rs.1500 per Sq. Ft on the basis of valuation of K. C. Sports Club is misleading as on perusal of the said valuation report it will reveal that average cost of construction is only Rs.850/- per sq. ft.*
4. *That AO is concerned only with A.Y.2014-15 yet he has estimated the cost of construction upto the date of survey and presumed that that 30% work was done upto 31.03.2014.*
5. *That it may be appreciated that the cost of construction of the entire commercial complex can only be determined after completion of_construction and, therefore, the appellant cannot be expected to provide details of costs which are yet to be incurred.*
6. *That without prejudice to what has been stated above, it is further submitted that under section 69 of the Act, no addition can be made simply on the basis of*

apropos estimation of alleged unaccounted investment, in view of the settled legal position.

7. *That sections 68, 69, 69A to 69D of the Act are deeming provisions and as such the conditions precedents for invoking such provisions are required to be strictly construed. The facts and circumstances giving rise to the presumption have to be established with reasonable certainty. The assessing officer cannot first make certain assumption and thereafter apply the deeming provisions based on such assumption.*

8. *That during the course of survey conducted on 27.07.2016 under section 133A of the Act no incriminating evidence was found from the premises of the assessee, which, in anyway, lead to any inference that the assessee had made undisclosed investment in the aforesaid property.*

9. *That even in the show-cause notice, the ld. A.O. has not pin-pointed out any corroborative evidence found during the course of survey, to the effect that the assessee had actually made payments or incurred expenses which have not been recorded in the books of accounts of the assessee in the relevant assessment year.*

10. *That the instant show-cause notice has been issued as a consequence of survey operations undertaken under section! 3 3A of the Act in the case of the assessee on 27.07.2016, i.e. in the previous year relevant to the assessment year 2017-18 and the information/details available as on the date of survey was used for the purpose of making assessment in the case of the assessment for the assessment year 2014-15 i.e., the year under consideration, which, in our respectful submission, have no bearing on the proceedings for the instant assessment year.*

11. *In the aforesaid circumstances, the question of any addition on account of the value of investment in the commercial property in the hands of the assessee on the basis of assumptions, without any corroborative evidence, do not arise at all.*

21. The above objections along with Annexure and books of accounts produced in the pen drive were sent to the AO for his comments in his remand report on the issues raised by the appellant. The AO vide his remand report dated 13-06-2017 stated that the additions were made on account of unexplained investment on the basis of estimated amount incurred by the assessee towards construction/investment in the commercial complex at Gulab Singh Marg after assuming that 30% of the building was completed during the year under consideration. In the case of construction, the AO has worked out expenses for all the floors including cost of those floors which are stated to be constructed by M/s.K.C.City Centre P Ltd. It is a fact that construction of this building started during the year under consideration and the construction worked was going on at the time of survey of u/s.133A on 27-07-2016. The AO further submitted that during the remand proceedings, the assessee furnished a certificate from the architect, wherein it has been mentioned that only excavation and raft work was completed as on 31-03-2014. Another certificate from the approved valuer Shri R.C. Gupta has also been furnished by the assessee valuing the cost of building of Rs.180.43 lakh as on 31-03-2014. During the assessment proceeding, the assessee has neither produced any document about the approval of side plan by the municipality nor the expenditure ledger to substantiate to when the first expenditure was incurred by the assessee or to find out the start of the construction. During the remand proceedings the assessee also furnished through other documents in support of his claim, working the cost of Rs.850/- per sq. ft. instead of Rs.1,500/- per sq. ft. as worked out by the AO at the time of assessment. The AO, therefore observed that it issues a matter of fact that this documents were never produce before him during the course of assessment proceedings. Further, there is no doubt that M/s. K.C. City Centre P Ltd. is a separate entity but as no details of expenditure incurred by it was produced during the course of assessment proceedings. It was gather that the whole of the expenditure had been incurred by the assessee in his individual capacity. Considering this facts, the CIT(A) observed that the construction work commenced on 04-12-2013 that is during the assessment year under consideration and thus the addition could be made only on the basis of investment made during this period in the construction of said building. It is evident from the facts stated in the assessment order as well as in the remand report that no evidence was found to controvert assessee's claim that only excavation and raft work was done during this period. This fact was duly certified by an independent architect requisition by the survey party i.e. the appellant has done only excavation and raft work during the assessment year under consideration. The rest of the construction was done in the subsequent years and the construction work was still under process at the time of survey. This certificate of the architect has also been filed by the appellant. The AO has also admitted in his remand report that the assessee has furnished a certificate from the architect, wherein it has been mentioned that only excavation and raft work were completed as on 31-03-2014 and another certificate from the approved valuer Shri R.C. Gupta has also been furnished by the assessee valuing the cost of building at Rs.180.43 lakhs as on 31-03-2014. The CIT(A) further observed that the AO did not find any cogent evidence to suggest that the assessee had actually made an investment of Rs.10,63,78,920/- till the date of survey i.e., 27-07-2016. The survey party also did not find any incriminating document during the course of survey conducted u/s.133A of the Act which could suggest that this sum has been invested in the said building. The addition u/s.69 cannot be made on estimated basis. The AO has to brought it on record of some material evidence which could substantiate the actual investment. The AO has failed to bring out such material, the AO has also not pointed out any corroborative evidence in his show cause notice as found during the course of survey to the fact that the assessee has actually made payments or incurred expenses which have not been incurred in the banks of accounts of the assessee in the respective assessment year. Further, the rate of Rs.1,500/- per sq. ft. adopted by the AO also not on basis as same valuer has taken to different rates of varied between Rs.850/- per sq. ft. to Rs.1,500/- per sq. ft. and that is too an estimate and not the actual rate applied of construction of the said building. The CIT(A) further observed that on the one hand the AO has rightly made balance sheet of the assessee being entity, however, on the other hand, it has accepted the figure of the balance sheet where sum of Rs.1,88,78,603/- was invested on excavation and rafting work. Therefore, the CIT(A) observed that the contention of the appellant was found to be correct that cost of construction of the entire complex can only be determined after completion of construction and the appellant cannot be accepted to provide details of cost which are year to be incurred. In view of this fact, the CIT(A) observed that no addition can be made u/s.69 of the Act simply on the basis of apportioned estimation of alleged investment in view of the settled legal position. The ld.CIT(A) further observed that Section 68, 69, 69A & 69D are deeming provision and as such an addition precedent for the excavation such provision are required to be strictly construed. The facts and circumstances given rise to the presumption have to be established with reasonable certainty. The AO cannot first make certain estimation and therefore after apply the deeming provision based on such assumption. During the remand proceedings, the AO has not denied that the appellant had produced the site plan approved by the municipality in June, 2013. The AO has also admitted that hotel is a separate entity and would not have been clubbed with the assessment of appellant. Thus, if at all the undisclosed investment had to be made; it had to be made in the hands of the hotel and not the appellant. Therefore, CIT(A) observed that the addition u/s.69 can be made on the basis of concrete or material found as a result of survey operation or in the investment conducted during the assessment proceedings. Accordingly, the CIT(A) was of the view, there was no basis for the addition of Rs.8,75,03,317/- as undisclosed investment in the said property, hence, the addition made by the AO was deleted.

22. Being aggrieved, the Revenue filed this appeal before this Tribunal. The ld. CIT(DR) submitted that the AO has estimated the cost of construction of the entire building at Rs.34,45,96,400/- till the date of certificate on the basis of taking construction rate at

Rs.1,500/- per sq. ft., and apportioned 30% of the total cost in the financial year 2013-14 and worked out the estimated investment at Rs.10,63,78,920/- for the assessment year under consideration as against which the assessee has disclosed the investment at Rs.1,88,75,603/-. Accordingly, the different amount of Rs.8,75,03,317/- was added by the AO as undisclosed investment. It has been claimed by the assessee that the construction work was commenced during the year under consideration from 04-12-2013 and only expenditure up to excavation and rafting was incurred during the assessment year under consideration. Since, the AO has made the estimate of construction and the assessee has also filed estimated cost of construction based on a certificate from architect. Therefore, in absence of the proper evidences and actual cost of construction during the year under consideration up to the end of the financial year i.e. 2013-14, the matter needs to go back to the AO/CIT(A) for actual investment in cost of construction. Therefore, it was requested that the issue may be set-aside to the file of the AO to work out actual cost of construction for the year under consideration after reconsideration of the facts and details of the investment made in construction for that assessment year under consideration.

23. On the other hand, the ld.Counsel for the assessee submitted that the survey u/s.133A was conducted on 27-07-2016, and the assessment was made for the period ending on 31-03-2014. The building was not constructed during the year under consideration and only part of excavation and rafting work done during the year under consideration. The rest of construction work done in subsequent year under, the assessee has filed balance sheet as on 31-03-2014 showing the total construction is appearing at paper book page no.26. The CIT(A) has discussed this fact at page no. 112 to 116 of his order and relying therefore the CIT(A) was relied on the order of the CIT(A) and submitted that the CIT(A) has correctly deleted the addition made by the AO which was made on the estimated basis without bringing out any evidence on record.

24. We have heard the rival submissions and perused the relevant material available on record. We find that the construction work has been claimed to have commenced with effect from 04-12-2013. It has been claimed by the assessee that no substantial expenses were incurred during the year except that shown in the balance sheet as on 31-03-2014 presented before the AO with bills and vouchers and other supporting evidences for investment of Rs.1,88,75,603/-. The assessee has also filed a certificate from the architect wherein it was mentioned that only excavation and rafting work was completed as on 31-03-2014. We find that the AO has estimated the total cost of construction at Rs.35,45,96,400/-in construction of commercial complex and considered 30% cost of construction for the year under consideration at i.e. Rs.10,63,78,920/-. This has been done by applying the rate of 1500/- per sq. ft. for construction cost based on based on material provided by the assessee. We observe that the ld.CIT(A) has mentioned that cost in construction business has to be to be considered after total cost of construction determined after completion of construction. Therefore, the cost of whole project is to be worked out and same needs to be apportioned for assessment year under consideration on the basis of construction has been completed during assessment year under consideration. Therefore, the AO would required to ascertained actual cost of construction up to 31.03.2014 by considering the rate of cost of construction shown in by the assessee in K.C. Sports Club and others. In view of this fact, we are of the considered opinion that the issue needs to be re-examined by the AO to ascertain total cost of construction of the project and cost of construction incurred for the assessment year under consideration by obtaining necessary details from the assessee. In view of this fact, the issue is set-aside to the file of the AO for calculation and estimation of actual cost of construction up to 31.03.2014 out of total cost of construction incurred for the building, on the basis of evidences as may be produced by the assessee. The AO will allow the assessee necessary opportunity to place all evidences as available with the assessee to justify that the cost of construction incurred work during assessment year under consideration with the necessary evidences. Therefore, this ground of appeal is set-aside to the file of the AO for *de novo* consideration, after taking into consideration of actual cost and cost incurred up to financial year under consideration after allowing due opportunity of hearing to the assessee and to allowing to admit necessary evidence which the assessee wants to rely.

25. Ground No. iv: relates to deletion of addition of Rs.8,73,465/- on account of municipality fees paid out of unexplained sources by admitting evidential sources under Rule 46Aof Income-Tax Rules, 1962.

26. Short facts of the cases are that the assessee has paid various fees in cash including fees paid to Jammu Municipality on various dates amounting to Rs.10,66,440/- paid on 02-01-2013, Rs.6,89,239/- paid on 01-05-2013 and Rs.1,84,216/- paid on 01-05-2013 respectively. The assessee was, therefore, asked to explain the source of cash deposit, about the cash flow statement in response to which it was submitted that the assessee had ample cash in hand to incur the said expenditure and has withdrawn Rs.25,00,000/- from M/s. K.S. Profiles, Bari Brahmana, Jammu in which assessee was a partner, M/s. K.S. Profiles had received that amount in cash from on Mr. Hamid Ali as advance for sale of machinery. The copies of fees paid to municipality and agreement for sale of machinery were submitted before the AO. However, the AO found that there was contradictions in the replies filed by the assessee, therefore the AO made the addition of Rs.8,73,465/-i.e.[Rs.1,84,216-Rs.6,89,249/-] on the ground that the assessee has failed to explain sources of deposits of municipal fees.

27. Being aggrieved, the assessee carried the matter before CIT(A), wherein it was submitted that municipal fees was paid out of cash available with the assessee which he has received from Mr. Hamid Ali against sale of machinery by the firm M/s. K.S. Profiles in which the assessee was also a partner. The documentary evidence in the shape of sales of machinery was submitted before the AO during the assessment proceedings and during the appellate proceedings enclosed as 'Annexure-L'. The appellate has also filed a copy of complaint filed against M/s. Hamid Ali in the court of law u/s.138.

The copy of which has also been enclosed as 'Annexure-M'. This above submissions of the appellant stated as above were sent to the AO for a remand report. However, the AO has not made any comment on the veracity of the claim of the appellant. The ld.CIT(A) has considered the document submitted by the assessee and on verification of these documents, the contention of the appellant was found to be correct i.e. appellant had sufficient funds available with him to deposit the said fees. Therefore, the addition amounting to Rs.8,76,465/- was deleted.

28. Being aggrieved, the Revenue filed this appeal before this Tribunal. The ld. CIT(DR) relying on the order of AO submitted that the assessee has made contradictory submissions, therefore the AO has disallowed the payment of municipality fees as sources of the sale was not properly explained.

29. *Per contra,* the ld. counsel for the assessee submitted that the assessee has furnished necessary documentary evidences in the shape of sale deed of the machinery before the AO during the assessment proceedings and also during the appellate proceedings as per 'Annexure-L'. These documents were forwarded to the AO for his comments in the remand proceedings. However, the AO did not make any comments on the aforesaid claim of the payment, therefore the

CIT(A) after verification of these documents found the contention of the assessee as correct as the assessee had sufficient funds available with him to deposit the said fees. There is no violation of Rule 46A of the I.T. Rules as alleged by the Revenue, as the CIT(A) has duly forwarded documentary evidences to the AO for his comments. Further, these documentary evidences were filed by the AO during the course of assessment proceedings.

30. We have heard the rival submissions and perused the relevant material available on record. We find that the assessee has withdrawn a sum of Rs.25,00,000/- from M/s. K.S. Profiles who had received the said that amount in cash from one Mr. Hamid Ali, as advance against sale of machinery. The assessee has also filed a copy of complaint filed against Shri Hamid Ali under section 138 of Negotiable Act by the assessee to prove the genuineness of transaction. The assessee has also filed a copy of fees paid to municipality and agreement for sale of machinery before the AO as well as during the appellate proceedings. These documents were forwarded to the AO for his comments; however, the AO has not made any comments. Thereafter, examining the same, the CIT(A) found that the assessee had sufficient funds available with him to deposit the municipality fees. In view of these facts, we find that there is no violation of Rule 46A of I.T.Rules. The AO was duly given an opportunity to rebut the evidences filed by the assessee in his remand report. Therefore, the CIT(A) has followed the due procedure of law and admitted evidences, which were necessary to decide the issue under consideration. In the light of this circumstances, we do not find any infirmity in the order of CIT(A), accordingly the same is upheld. This ground of appeal is therefore dismissed.

31. Ground No. v: relates to deletion of addition of capital gain of Rs.2,21,49,975/- accruing to the assessee on the lease of land to M/s. K.C. Sports Club and capital gain of Rs.21,73,33,252/- on the lease of land of M/s. K.C. City Centre Pvt. Ltd by holding that this is not a transfer of capital asset within the meaning of section 2(47) of the Act and hence the question of charging capital gain would not arise.

32. Brief facts of the cases are that during the course survey conducted in the business premises of the assessee u/s.133A on 27-07-2016, a registered lease deed executed between the assessee, Mr. Raju Chowdhury and M/s. K.C. Sports Club, a registered firm was found and impounded. As per the lease deed the following terms and conditions were agreed upon by the lessor and lessee:-

> *1. Land majoring 10 Kanal and 19 marla, a freehold land, owned by the assessee at Ploura, Jammu was leased in*

favour of M/s. K.C Sports Club, a partnership firm vide lease deed dated 5th June, 2013 for 20 years.

2. According to the lease deed the K. C. Sports club will pay yearly rent of Rs.1,20,000/- at the first instance for 20 years.

3. That the lessee will not sublet his rights under the lease without the consent in writing of the lessor.

4. That the said premises shall be used only for the purpose of club and for no other purpose.

5. That the lessee will pay all rates taxes and charges which are now payable or may hereafter be payable in respect of the said land.

6. That whenever any part of the rent shall be in-arrears for a year the lessor may re-enter on the said land and terminate the lease.

7. That there shall be no escalation or security deposits in respect of which the parties may enter to a supplementary deed.

8. That the rights and obligation shall be as per the Transfer of Property Act and will be observed by both the parties in true sense.

33. Further, another supplementary lease deed was executed on 3rd of August, 2013 again between the assessee, Sh. Raju Chowdhary and *M/s*. K.C. Sports Club, a partnership firm and it was agreed upon that the second party, the lessee, would be at liberty to mortgage the (ease hold rights to any bank or financial institution for obtaining a loan on the same with an under taking to liquidate the same during the currency of the lease deed itself. There was also a another supplementary lease deed was executed on 16th Dec.2016 between the assessee, Sh. Raju Chowdhary and M/s. K.C. Sport Club, a partnership firm with following terms and conditions:-

> *1. That the lessee has only been granted limited and restricted right to occupy and use the said premises.*
>
> *2. That on the expiry of the stipulated period of 20 years, unless the same is further extended by mutual consent, the possession of the entire land and built up premises would revert back to the lessor.*
>
> *3. That the lessee has not acquired any right or title" in the lease property and the lessor continues to remain the sole and absolute owner thereof.*
>
> *4. That the lessor reserves the right to cancel the lease deed in case it is found that the lease premises is not being used for the intended purpose/objective as set out in the primary lease deed.*
>
> *5. That without prejudice to clause 4 above, the lease can be terminated at the instance of the Lessor prior to the stipulated period of 20 years, subject to the prior written consent of the lessee and also payment of adequate fair compensation by the lessor to the lessee in respect of the value of the club constructed on the leased premises by the lessee, as may be mutually decided by both the parties.*
>
> 6. *That without prejudice to clauses 4 and 5 above, the lease can be terminated at the instance of the lessee prior to the stipulated period of 20 years, subject to the prior written consent of the lessee without any right to claim compensation in respect of the value of the club constructed on the leased premises by the lessee, though it would be open to the lessor and the lease to mutually arrive at fair value of the compensation.*

34. The AO observed that there is another lease deed dated 30.10.2013, executed between the assesses and M/s. K.C. City Centre Pvt. Ltd. at Gulab Singh Marg, Jammu, was found during the course of assessment proceedings. According to this lease deed the assessee has given, on lease, the roof of first floor along with demarcated area in the first floor, Ground floor, Basement level-I and level-II for a period of 25 years at the first instance over which the lessee would built up Hotel consisting of 2nd floor, a service floor then 3rd floor, 4th floor and 5th floor with terrace, the details *of which are mentioned in site plan annexed with the lease deed. Following terms and conditions were agreed upon by the lessor and lessee:-*

> *1. Whereas yearly rent of Rs.3 lakh is fixed which the party of the 2nd part would pay to the party of the 1st part every year in cash or through cheque against proper receipt. It is further agreed that the payment of the rent would start after delivery of possession but from the dare of start of commercial activities by the party of 2nd part with the further following rights and liabilities of parties.*
>
> *2. That lessee will not transfer or sublet his rights under this lease without the consent in writing of the lessor.*
>
> *3. That it is agreed in between the parties that the party of the 2nd part would be at liberty to mortgage the lease hold rights viz-via premises the subject matter of the lease deed with any bank of financial institution and obtain the loan on the same with an undertaking to liquidate the same during the currency of the lease deed itself.*
>
> *4. That lessee will pay all rates, taxes and charges which may hereafter, on start of commercial activities, be*

payable in respect of the said, Ground Floor, first floor basement level I and level II as demarcated in the site plan.

5. That as agreed there shall be no escalation or security deposit, in respect of which the parties may enter to a supplementary deed. It is however, agreed that the possession of the premises will be taken over by the lessee immediately after the building of First Floor.

6. That the rights and obligations shall be as per the transfer of property act and will be observed by both the parties in true sense.

7. That the parties have further agreed that they can extend the lease by their mutual consent for a term which they may desire.

8. That the parties to the deed are state subject.

9. That the Stamp Duty-of Rs.1,05,7507/- was paid and attached herewith.

35. A supplementary lease deed was made on 16th day of December, 2016 between the assesses Sh. Raju Chowdhary and M/S. K.C. City Centre Pvt. Ltd whereby following terms and conditions were agreed upon:

1. That the lessee has only been granted limited and restricted rights to occupy and use the above referred premises in the

2. That on the expiry of the stipulated period of 25 years, unless the same is further extended by mutual consent, the possession of entire built up premises would revert back to the lessor.

3. That by virtue of the aforesaid lease deed the lessee has not acquired any right or title in the leased property and the lessor continues to be sole and absolute owner thereof.

4. That the lessor reserves the right to cancel the lessee deed in case it is found that the leased premise is not being used for the intended purpose/objectives as set out in the primary lease deed.

5. That without prejudice to clause 4 above, the lease can be terminated at the instance of the lessor prior to the stipulated period of 25 years, subject to the prior written consent of the lessee and also payment of adequate fair compensation by the lessor to the lessee in respect of the value of building constructed on the leased premises by the lessee, as may be mutually decided by both the parties.

6. That without prejudice to clauses 4 and 5 above, the lease can be terminated at the instance of the lessee prior to the stipulated period of 25 years, subject to the " prior written consent of the lessor, without any right to claim on the leased premises by the lessee, though it would be open to the lessor and the lessee to mutually arrive at fair value of the compensation.

36. In view of above, the AO considered the above, lease deeds and treated these lease as “Transfer” u/s 2(47) of the Income Tax Act on the ground that the lands were leased out of M/s K. C. Sports and M/s K. C. City Centre for more than 12 years, the transferee would be enjoying the said property received by way of lease deed and the lease of property is basically a right to use an asset. A lease is a contract by which one party (lessor) gives the use and possession of land and building to another party (Lessee) for a specific period of time, usually in return for a specific rent. Hence, an assignment 'of a lease is the 'legal term used for the sale of a lease. A grant of a lease is the creation of a new asset. The person who owns the property grants a lease to a tenant for a specific period of time, however, the rights in the property will eventually revert back to the freehold landlord. The AO then placed reliance on decision of Mumbai Bench of Income tax Appellate Tribunal (the Tribunal) in the case of ACIT v. United Motors P. Ltd. (2009-TIOL-693-ITAT-Mum.), wherein it has been held that income from transfer of a leased premises without transferring its own business amounts to extinguishment of the taxpayer's right in the capital asset as per section 2 (47) of the Income tax Act, 1961. The AO observed that as per section 2(14) of the Act any kind of property of the assessee with the capital asset and as per section 2(47) the extinguishment of any right in a capital asset will attract on the capital asset of capital gain. The AO therefore on the basis of market enquiries adopted the value of land at Rs.3,50,000/- per maria and worked out the value of the said land at Rs.7,66,50,000/- on the value of determined at Rs.7,66,50,000/-. The AO computed the capital gain of Rs.7,38,33,250/- by reducing the cost of acquisition at Rs.28,16,750/-. Further, in the case of lease property at Gulab Singh Marg, Jammu the capital gain was computed at Rs.21,73,33,252/- by taking value of land at Rs.31,11,00,000/-

37. Being aggrieved, the assessee filed an appeal before the ld.CIT(A), wherein it was contended that the addition of Rs.2,21,49,975/- on account of notional capital gain in respect of land lease to K.C. Sports Club at Rs.21,73,33,252/- in lease to roof portion to K.C. City Centre (Hotel) P Ltd. is illegal based upon incorrect application/interpretation of the law. When no profits or gains in the form of capital gain either arose or accrued factually and no considerations were based on and even the property lease to hotel was not in existence on and the agreement was not in operation during the year under consideration. The ld. AO has computed an alleged capital gain of Rs.7,38,33,250/- on the land measuring10 Kanals 19 Marias falling under Khasra No.1331 Khata No.807 Kewat No.89 situated at Paloura leased out to M/s. K.C. Sports Club, a partnership firm of appellant and his son Arjun Chowdhary. Therefore, having worked out this gain, the ld. AO restricted the addition of extent to 30% amounting to Rs.2,21,49,975/- which was the share of Arjun Chowdhary. The AR of the appellant submitted that when the landlord grants a lease, he is treated as making a part disposal of his interest in the property. But this fact cannot be appreciated always. In a normal buy to let business, where tenant just pays the rent, no capital gain tax is charged. The result of is simple, no capital sum has been paid, but if a premium was to be paid this sum would be in addition to the rental payment. The AR of the appellant has invited the attention of the ld.CIT(A) to lease deed agreement enclosed as 'Annexure-N' along with copy of supplementary lease deed dated 30-08-2013 and 16-12-2013 enclosed as an 'Annexure-O' and 'Annexure-P' respectively about leasing the captioned land by the appellant to K.C. Sports Club. This form part of the assessment records. It was submitted that M/s. K.C. sports Club, a partnership firm, as partner from a same family having 70% shares of Shri Raju Chowdhary and plot of his son Arjun Chowdhary. The family was established to contract and rent the sports club. No outside party was involved in this lease deed, the lessee envisage the yearly rent of Rs.1,20,000/- shall be paid to the assesses. The sub-lease has not right to transfer or subject it's to right under the lease and the premises shall be a use only for club, and in case of default, the assessee shall have right to re-entered on demise land and determine the lease. It was agreed that right and obligation of the parties shall be as per Transfer of Property Act at J&K, no security deposit or lump sum premium is received by assessee from lessee. It was submitted that as per provision section 45(3) of the Act, the profit of transfer of capital asset by a partner to a partnership firm would be assessable in the hand of the partner at the value at which such asset the record with the books of the partnership firm. In the instance case, since M/s. K.C. Sports Club, the partnership firm, has not recorded amounts in the books of accounts arising out of on account of lease deed, the full value consideration received by the assessee, M/s. Raju Chowdhary would be considered as 'Nil'. Accordingly, no capital gains arise. However, the ld. AO patently failed to appreciate the legal position and has applied a case on altogether different facts by placing reliance on the decision of ACIT v. United Motors Pvt. Ltd (supra). The said case is distinguishable as the premium has been paid to acquire the lease hold rights which are not the facts of the case which is under appeal before the CIT(A). Since, there is no dispute that no premium or security for use of lands have been determined or paid. Only rent is to be paid. Rent as defined in Section 194-I of the IT Act envisages such payments made under a lease only for use of land, without there being any corresponding acquisition of larger rights in the said leasehold plots. Further, the explanation of section 105 of the Transfer of Property Act, 1882 defines a lease of an immovable property as transfer of right to enjoy the property, made a certain time in consideration of a price. The section further distinguishes between lease premium and rent. Rent is defined u/s.105 of the Transfer of Property Act, 1882 to mean money paid periodically or on specified occasion to the transfer of land. Premium is not paid for the use of land. Premium on the other hand means a consideration of a price paid for transfer of right to enjoy the property. Thus, there is a difference between rent and premium. Premium is not paid for the use of land. This use were supported by the decision of Hon'ble Supreme Court and the decision in the case of A.R. Krishnamurthy V. CIT (1989) 176 ITR 417 (SC), wherein the assessment in favour of the Revenue as in this case premium have been paid for acquiring lease hold rights, wherein the Supreme court has held that what is paid for the cost of acquisition of right in a property known as lease on right does not rent but a premium which is a capital receipt for the recipient. Consequently, section 2(14) of the Act recognize lease hold interest as a separate, distinct and independent right in an immovable property capable of being transferred for a consideration. Thus, in the case of assessee, the rent to be received by the lesser and accordingly, it will not be construed as a capital receipt for lease hold rights in an immovable property and as no premium for transfer of land has been paid and the lessor will not be taxable in the form of capital gains u/s.45 of the Act. The reliance was also placed on the decision of Hon'ble

Supreme Court in the case of CIT v. Panbari Tea Co. Ltd (1965) 57 ITR 422 (SC) , wherein it was held that when the interest of the lessor is parted with for a price, the price paid in premium or Salami. But the periodically payments made for the continuous enjoyment of the benefits under the lease are in the nature of rent. Therefore, it was contended that the action of AO in making addition of Rs.2,21,49,975/- and Rs.2,17,33,252/- for letting out the rights to use the rights of lands for hotel to K.C. City Centre P Ltd. are unjustified, unlawful and totally against the facts of the case and may please be deleted. The CIT(A) forwarded the above submissions of the assessee to the AO for a remand report. The AO in his remand report has simply stated that the decision of Hon'ble Supreme Court were not brought to his knowledge during the assessment proceedings and therefore the AO relied upon the decision of Hon'ble ITAT, Mumbai. Considering the above facts, the CIT(A) observed that the assessment involved in both the lease deeds are identical, these are being adjudicated together. The CIT(A) observed that it emerges from the issue in question whether the lease two parties at Ploura, Jammu & Gulab Singh Marg, Jammu constitute to 'transfer' within the meaning of 'transfer' as provided u/s.2(47) of the IT Act ? if yes, then of course, the assessee would be liable to pay capital gains. The

CIT(A) further observed that he has considered the terms and conditions of the lease deeds executed on various dates between the assessee and M/s. K.C. Sports Club and between the assessee and K.C. City Centre Pvt. Ltd. As per the terms and conditions agreed upon by the lessor and lessee, in the said lease deeds, it is found that the agreement is revocable. The property go back to the owner after termination of the lease property and in between also if any of the terms and conditions are not adhered to, the assessee is and will remain the absolutely owner of the property, the premises cannot be used for any other purpose other than what is stated in the lease deed, the property cannot be sub-leted and the rights and obligation shall be as per the Transfer of Property Act and will be observed by both the parties in true sense. Therefore, the CIT(A) observed that it is not correct on the part of the AO to hold that through this lease deeds, the rights of the assessee are extinguished. In all kind of lease, the property is transferred to the lessee for the enjoyment of property for a certain period but all such lease cannot be termed as transfer comes within the meaning of section 2(47) of the Act. Since, there is no transfer of possession of the property, it is not correct on the part of the AO to hold that this a transfer, within the meaning of clause (v) and (vi) of section 2(47) of the Income Tax Act read with clause (d) of Section 269UA on the ground that property has been transferred on long term lease for more than 12 years as a part performance u/s.53A of the Transfer of Property Act. Otherwise, also these properties cannot be transferred to a firm or a company because of special status of J&K where Transfer of Property Act of State of J & K is applicable. This is the reason why section 269S of the IT Act has been provided in the statute. Since, there is no transfer the applicability of section 2(47) of the Act does not arise. The CIT(A) further observed that the AO has held it as a transfer by driving strength from the ITAT, Mumbai decision in the case of ACIT v. United Motors P Ltd., wherein the Hon'ble ITAT has held that income from transfer of a lease premises without transferring its own business amounts to extinguishment of the tax pay right in the capital asset as per section 2(47) of the IT Act. Whereas the appellant on the other hand has placed reliance on the two decision of Hon'ble Supreme Court in the case of AR Krishan Murti v. CIT (1989) 176 ITR 417 (SC) and CIT v. Panbari Tea Company Ltd. (1965) 57 ITR 422 (SC). The CIT(A) observed that in the case of CIT v. Panbari Tea Co. Ltd. (supra). It has been clearly held that when the interest of the lessor is parted with for a price, the price is premium or salami. But the periodical payments made for the continuous enjoyment of the benefits under the lease are in the nature of rent. The former is a capital income and letter is a Revenue receipt. Since, no premium was paid by the lessee, it is clearly in the nature of rent and is a Revenue receipt as held by the Hon'ble Supreme Court (supra). In view of these facts and considering the facts and circumstances and prevailing legal position, the ld.CIT(A) held that this is not a transfer of capital asset within the meaning of section 2(47) of the IT Act and hence, the question of charging capital gains would not arise. Therefore, the addition of Rs.2,21,49,975/- and Rs.21,73,33,252/- made by the AO were therefore deleted.

38. Being aggrieved, the Revenue has filed this appeal before the Tribunal. The Ld. CIT (DR) submitted that the property under consideration is capital asset, which is not in dispute, hence, it is capital asset under section 2(14) of the Act. The lessee has given the property on lease, which is more than 15 years. Therefore, transfer of property by way of lease by the assessee would partake the character of transfer and hence, liable to be to capital gains. The Ld. CIT (DR) had placed reliance on the decision of Hon`ble Madras High Court in the case of CIT V. Sujatha Jewellers [2007] 290 ITR 631 (Mad) / 160 Taxman 183 (Mad) in which it was held that when the assessee transfers his leasehold rights in the land in his occupation by way of a sub-lease to another person, it amounts to extinguishing his rights in the property and since his leasehold rights had created an interest in the land, i.e. enjoyment and possession thereof, it would definitely come within the definition of capital asset under section 2(14) of I.T. Act. The learned counsel for the assessee therefore, submitted that sublease is covered by the definition clause of section 2(47) of the Act. It was submitted that where the transfer is for more than 20 years by way of sublease, the perpetual right is extinguished. The Ld. CIT (DR) submitted that Transfer of Property Act, 1882 does not apply to J & K, State; hence, lease is not registered. The assessee has made part performance of under section 153A of Transfer of Property Act. Hence, the AO has rightly brought to tax it as capital gains. The Ld. CIT (DR) further supported his view by placing reliance in the case of CIT v. C. F. Thomas [2006] 284 ITR 557 (Kerala) /158 Taxman 310 (Kerala) where transaction by way of any agreement or arrangement, where the assessee has received a sum of Rs. 10 lakhs as pakidi, which has the effect of transferring or enabling the enjoyment of an immovable property is within the meaning of section 53A of Transfer of Property Act,1882. Therefore, learned CIT(D.R.) contended that in the instant case the assessee has received a rent as per agreement of sublease hence, it amounts to extinguishment of right hence, it amounts to transfer of immovable property on which capital gains has been rightly taxed by the AO. Therefore, Ld. CIT(A) was not justified in deleting the addition made by the AO.

39. *Au contraire*, the learned counsel for the assessee submitted that the AO made an addition of Rs. 2,21,49,975 to the returned income on account of the lease transaction as notional capital gains accruing to the assessee on the lease of land to M/s. K.C. Sports Club. Similarly the AO made addition of Rs. 21,73,33,252 on account of treating the lease transaction as notional capital gains in respect of roof portion lease to K.C. City Centre (Hotel) (P) Ltd. The ld. CIT(A) has deleted both the addition by making his observation as Page No. 117 to 139 of the appeal order by passing a well-reasoned order after considering the submissions of the assessee, which are placed at Paper Book Page No. 1 to 24. The ld. CIT(A) has categorically observed that it is a clear case of lease of property whereas the AO has tried to bring out a new case by treating the whole transaction as capital gains. The learned counsel for the assessee referring to the `copy of lease deed dated 05.06.2003 with M/s. K. C. Sports Club placed at Paper Book Page No. 57 to 62 and supplementary lease deed dated 03.08.2008 and 16.12.2016 placed at Paper Book Page No. 63 to 70 submitted that the property was leased out to K. C. Sports Club, a partnership firm at Rs.1,20,000 per annum and Shri Raju Choudhary enjoys 70% share in the firm K. C. Sports Club and the firm was established to run sports club. No outside party was involved in the deed of lease and the whole transaction was routed through agreements. Similarly, the property was leased to K. C. City Centre (P) Ltd. at Rs.3,00,000 per annum of which lease deed is placed at Paper Book Page No. 31 to 42 of Paper Book, followed by copy of supplementary lease deed placed at Paper Book Page No. 43 to 46. Learned Counsel stated that when landlord grants a lease he is treated as making a part disposal of his interest in the property. It is just like a rent. If the property is rented out on leased out. It does not tantamount to sale. From the lease deeds and supplementary lease deeds, it would be appreciated that it is only a case of renting out of the property. The ownership of the said property always vest with the assessee and not with the person to whom the property is rented out. Neither the lessee can sell the property, nor can lessor can sell the same. Had it been the intention of the legislature to treat the property, which is let out as a sale then it would have been covered by the provisions of section 50C also. By leasing out the property, no premium was received, as it was not leased to any other outsider. It is no body`s case that the property was not leased out at the prevailing market rate. As such, this case does not fall within the mischief of section 45 (3) of the Act as section 45 (3) of the Act deals with the transfer of capital asset by Partner to the partnership firm. The learned Counsel referred the provisions of section 45(3) which says *"the profits or gains arising from the transfer of a capital asset by a person to a firm or other association of persons or body of individuals (not being a company or a co-operative Society) in which he is or becomes a partner or a member, by way of capital contribution or otherwise, shall be chargeable to tax as his income of the previous year in which such transfer takes place and, for the purpose of section 48, the amount recorded in the books of accounts of the firm, association or body as the value of the capital asset shall be deemed to be the full value of the consideration received or accruing as a result of the transfer of the capital asset."* It was further submitted that the AO did not appreciate that Jammu and Kashmir enjoys a special status under the Transfer of Property Act. Under the said law, the properties cannot be transferred by an individual to firm or a company because of its special status of the J&K, where Transfer of Property Act of State of Jammu and Kashmir is applicable. Thus, it is clear that an individual cannot sell any property to a partnership firm, to a company, or to any outsider from

Jammu and Kashmir resident. Thus, in view of these circumstances, this fact has not been appreciated by the AO. As such, there was no question of invoking the provisions of capital gains. The learned Counsel further submitted that the assessee had filed written submissions before the Ld. CIT(A), who has forwarded the same to the AO asking to furnish the remand report. A remand report was duly furnished by the AO to the Ld. CIT(A), which is placed at Paper Book Page No. 71 to 75. The learned Counsel referred the relevant portion of the remand report in which it is stated by the AO that the A.R. of the assessee has now submitted that "*since no premium or security for use of land have been determined or paid in case of lease deeds entered between the assessee and M/s. K.C. Sports Club and M/s. K.C. City Centre Pvt. Ltd. As such, there cannot be any capital gains. For justifying this, reliance has been placed on two judgements adjudicated by the Honourable Apex Court, wherein it has been held that when interest of lessor is parted with for a price, the price paid is premium." These case laws were not brought to the knowledge of the undersigned during the course of assessment proceedings. On the basis of the facts available on record, the case law of Hon`ble ITAT, Mumbai Bench was applied while framing the assessment. This report is being submitted under rule 46A of the AT Rules 1962 on the basis* *of fresh facts & circumstances brought on record, during the remand proceedings and your good self is requested to kindly decide the grounds of appeal on merits of the case, considering factual position at the time of assessment*". The learned Counsel, further the submitted that from the plain reading of the remand report of the AO, it is conclusively proved that the Department had duly accepted the facts given in writing before the Ld. CIT(A) and the Department has nowhere made any adverse comment on the same. Thus, impliedly it is clear that the Department has accepted our submissions in toto. The only point which has been raised and requested to the CIT(A) by the AO that the case may be decided on merits. In view of these circumstances, the Department has no reason and occasion for coming in appeal before the Tribunal and the appeal of the Department may be dismissed. The learned Counsel for the assessee further submitted that in the instant case, the partnership firm M/s. K.C. Sports Club has not recorded any amount in the books of accounts arising on account of lease deed. As such, there is no question of any capital gain. The AO has relied and applied certain case laws, of which facts are altogether different and are not applicable to the present facts and circumstances of the case. It was further submitted that under the provisions of Income Tax Act, 1961, different treatment cannot be given to same payment under different sections i.e. in the hands of the lessor as consideration taxable under the head capital gains under section 45 and in the hands of the lessee as rent for the purpose of deduction of tax under section 194I of the Act. Thus, the authority cannot take a separate stand. Thus, no capital gain arises as no payment has been made towards lease premium for acquisition of land and only rent is paid. Further, this case is covered within the meaning of section 105 of the Transfer of Property Act, 1882, which defines a lease of an immovable property as a transfer of right to enjoy the property, made in consideration of a price. This section further distinguishes between lease premium and rent. Rent is defined under section 105 of the Transfer of Property Act 1882 to mean money paid periodically or on the specified occasion to the transfer of land. Premium on the other hand means a consideration of the price paid for transfer of a right to enjoy the property. Thus, there is a difference between rent and premium. The learned counsel for the assessee submitted the AO in his remand report has simply stated that the decision of Supreme Court of India was not brought to his notice during assessment proceedings, therefore, the AO relied upon the decision of ITAT Bombay Bench. It is impliedly a case where the AO has admitted the facts which proved that there was no justification in charging capital gain. As such, the Department has case or reason and basis for coming in appeal before the Tribunal, hence, the appeal of the Revenue may be dismissed. The learned Counsel further submitted that the case laws relied by the learned CIT (D.R.) are distinguishable on facts and hence, not applicable. In the case of CIT V. Sujatha Jewellers (supra), the property was transferred for lease of 22 years on which the assessee had received a sum of Rs.10 Lakh, as interest free advances, whereas in the case of no such advance has been received. Further, in said case the property was transferred to third party, whereas in the case of assessee, the property was leased out to the firm in which the assessee had enjoyed 70% his shares. Therefore, there is no extinguishment of rights of the assessee. Further, in the case of CIT v. C.F. Thomas [2006] 284 ITR 557 (Ker)/ 158 Taxman 310 (Ker) (supra) the assessee had received a sum of Rs.10 lakhs by way of Pakadi, whereas no such facts exist in the case of the assessee as no premium has been received by the assessee. Therefore, the above two case laws relied by the learned CIT (D.R.) are not applicable to the facts of the case. In view of these facts and circumstances, the learned counsel for the assessee contended that the CIT(A) has rightly deleted the addition made on account of capital gains on lease deed basis.

40. We have heard the rival submissions and perused the relevant material on record. The perusal of the copy of lease deed dated 05.06.2003 with M/s. K. C. Sports Club placed at Paper Book Page No. 57 to 62 and supplementary lease deed dated 03.08.2008 and 16.12.2016 placed at Paper Book Page No. 63 to 70 reveals that the property was leased out to M/s. K. C. Sports Club, a partnership firm, at a rent of Rs.1,20,000 per annum in which the assessee enjoys 70% of share as partner in the firm K. C. Sports Club. The said firm was established to run sports club. The perusal of clause 3 of supplementary lease deed dated 16.12.2016, (PB-69) with M/s. K.C. Sports Club, shows that lessee has not acquired any right, title in the leased property and the lessor continues to remain the sole and absolute owner thereof. Similar provisions were also made in clause 4 of original lease deed dated 05.06.2013 (PB-57 to 62). Under clause 4 of supplementary lease deed, the lessor has the option to terminate/ cancel the lease deed, prior to stipulated period, if not found used as per terms of agreement Thus, the assessee has not transferred his right nor there is extinguishment of any rights. The learned counsel for the assessee has placed reliance on the decision of Hon`ble Supreme Court in the case of CIT V. Panbari Tea Co. Ltd. [1965] 57 ITR 422 (SC) in which the Hon`ble Supreme Court held of which catch note read a:- that consideration received by way of premium and annual rent – of the premium certain amount was payable at the time of execution and balance in instalments-premium received in addition to rent in instalments is capital receipt not liable to tax. Thus, the Hon'ble Supreme Court held that premium is capital receipt and rent is revenue receipt. In the instant case, the assessee has not received any premium, hence, rent received is chargeable as revenue receipt, and there being no premium hence, no capital gains is chargeable to capital gains. We further find that there is no outsider was involved in the lease deed and the whole transaction has been routed through agreements. Similarly, the property was leased to M/s. K. C. City Centre (P) Ltd. for a rent of Rs.3,00,000/- per annum as discernible from copy of lease deed placed at Paper Book Page No. 31 to 42, and copy of supplementary lease deed placed at Paper Book Page No. 43 to 46. The learned counsel for the assessee has contended that when landlord grants a lease by making a part of disposal of his interest in the property it is a akin to rent only. If the property is rented out by way of lease deed, it cannot be said to be sale of property. Ongoing through the copy of lease deeds under consideration, it is noticed that the ownership of the said property was always vested with the assessee and not with the person to whom the property is rented out. Neither the lessee can sell the property, nor can lessor can sell the same. Had it been the intention of the legislature to treat the property as sale on lease, then the provisions of section 50C would have covered it also, but it is not covered by that section. We also note that the assessee through lease deed received no premium and it was not given to any other outsider. Further, it is not the case of the AO that the property was not leased out at the prevailing market rate. In view of these facts and circumstances, we are of the considered opinion that this case does not fall within the mischief of section 45 (3) of the Act as section 45 (3) of the Act deals with the transfer of capital asset by partner to the partnership firm. The provision of section 45(3) says *"the profits or gains arising from the transfer of a capital asset by a person to a firm or other association of persons or body of individuals (not being a company or a co-operative Society) in which he is or becomes a partner or a member, by way of capital contribution or otherwise, shall be chargeable to tax as his income of the previous year in which such transfer takes place and, for the purpose of section 48, the amount recorded in the books of accounts* *of the firm, association or body as the value of the capital asset shall be deemed to be the full value of the consideration received or accruing as a result of the transfer of the capital asset."* Thus, this section applies where the partner has transfered the property by way of capital contribution or otherwise to partnership firm and the firm has recorded the said amount of contribution in its books of accounts, the same may be treated as transfer and chargeable to tax. However, in the case of the assessee, the firm has not recorded any contribution from partners in his books of accounts and the firm is paying only rent to the assessee. Therefore, this does not amounts to transfer or property, hence, not exigible to capital gains. The ld.CIT(A) further observed that he has considered the terms and conditions of the lease deeds executed on various dates between the assessee and M/s. K.C. Sports Club and between the assessee and K.C. City Centre Pvt. Ltd. As per the terms and conditions agreed upon by the lessor and lessee in the said lease deeds, it was found that the agreement is revocable. The property go back to the owner after termination of the lease property and in between also if any of the terms and conditions are not adhered to , the assessee is a will remain the absolutely owner of the property, the premises cannot be used for any other purpose other than what is stated in the lease deed, the property cannot be sub-leted and the rights and obligation shall be as per the Transfer of Property Act and will be observed by both the parties in true sense. We observed that the AO has held that through lease deeds, the rights of the assessee are extinguished. In all kind of lease, the property is transferred to the lessee for the enjoyment of property for a certain period but all such lease cannot be termed as transfer within the meaning of section 2(47) of the Act. Since, there is no transfer of possession of the property, it is not correct on the part of the AO to hold that this a transfer within the meaning of clause (v) and (vi) of section 2(47) of the Income Tax Act read with clause (d) of Section 269UA on the ground that property has been transferred on long term lease for more than 12 years as a part performance u/s.53A of the Transfer of Property Act. Otherwise, also these properties cannot be transferred to a firm or a company because of special status of J&K where Transfer of Property Act of State of J & K is applicable. This is the reason why section 269S of the IT Act has been provided in the statute. Since, there is no transfer, the applicability of section 2(47) of the Act does not arise. Learned Counsel has also submitted that the AO did not appreciate that Jammu and Kashmir enjoys a special status under the Transfer of Property Act. Under the said law, an individual cannot transfer the properties to firm or a company because of its special status of the J&K, where Transfer of Property Act of State of Jammu and Kashmir is applicable. Thus, it is clear that an individual cannot sell any property to a partnership firm, to a company, or to any outsider from Jammu and Kashmir resident. Thus, in view of these circumstances, the AO has not appreciated these facts clearly; hence, there was no occasion to invoke the provisions of capital gains. The learned Counsel has submitted that the assessee had filed written submissions before the Ld. CIT(A), who has forwarded the same to the AO asking to furnish the remand report. A remand report was duly furnished by the AO to the Ld. CIT(A), which is placed at Paper Book Page No. 71 to 75. The AO is his remand report *"since no premium or security for use of land have been determined or paid in case of lease deeds entered between the assessee and M/s. K.C. Sports Club and M/s. K.C. City Centre Pvt. Ltd. As such, there cannot be any capital gains. For justifying this, reliance has been placed on two judgements adjudicated by the Honourable Apex Court, wherein it has been held that when interest of lessor is parted with for a price, the price paid is premium." These case laws were not brought to the knowledge of the undersigned during the course of assessment proceedings. On the basis of the facts available on record the case law of Hon`ble ITAT,* *Mumbai Bench was applied while framing the assessment. This report is being submitted under rule 46A of the AT Rules 1962 on the basis of fresh facts & circumstances brought on record, during the remand proceedings and your good self is requested to kindly decide the grounds of appeal on merits of the case, considering factual position at the time of assessment."* Thus, in remand report the AO has clearly admitted and accepted that it is not the case of capital gains hence, he has not made any adverse comment on the same and impliedly accepted that there is no case of capital gains to be charged in this case. We find that that in the instant case, the partnership firm M/s. K.C. Sports Club has not recorded any amount in the books of accounts arising on account of lease deed. As such, there is no question of any capital gain. The AO has relied in the case of ACIT v. United Motors (I) Ltd. [2009] 32 SOT 399 (Mumbai- Trib) in which the assessee had received non-refundable signing amount as premium for a fairly a long period, was treated as capital receipt chargeable to capital gains. Further, in said case the assessee had transferred and shifted his own business from that premises, whereas, in the case in hands, there is no such premium receipts of non-refundable nature, nor the assessee has shifted his business premises rather the assessee has his 70% interest in the said lessee firm, hence, the facts of said case are altogether different and are not applicable to the present facts and circumstances of the case. We are also agree with submissions of the Learned Counsel that under the provisions of Income Tax Act, 1961, different treatment cannot be given to same payment under different sections i.e. in the hands of the lessor as consideration taxable under the head capital gains under section 45 and in the hands of the lessee as rent for the purpose of deduction of tax under section 194I of the Act. Thus, the authority cannot take a separate stand. Thus, no capital gain arises as no payment has been made towards lease premium for acquisition of land and only rent is paid. Further, this case and does not cover within the meaning of section 105 of the Transfer of Property Act, 1882, which defines a lease of an immovable property as a transfer of right to enjoy the property, made a certain time in consideration of a price. This section further distinguishes between lease premium and rent. Rent is defined under section 105 of the Transfer of Property Act 1882 to mean money paid periodically or on the specified occasion to the transfer of land. Premium on the other hand means a consideration of the price paid for transfer of a right to enjoy the property. Thus, there is a difference between rent and premium. The AO in his remand report has simply stated that the decisions of Supreme Court of India were not brought to the notice of him during the course of assessment proceedings, hence, he relied upon the decision of ITAT Bombay Bench. Thus, it is impliedly case where the AO has admitted the facts which proved that there was no justification in charging capital gain. We also observed that the case laws relied by the learned CIT (D.R.) are distinguishable on facts and hence, not applicable. In the case of CIT V. Sujatha Jewellers (supra), the property was transferred for lease of 22 years on which the assessee had received premium a sum of Rs.10 Lakh, as interest free advances and there the assessee has transferred his leasehold rights in land in his occupation by way of sub-lease to another person, which amounted to extinguishment of his rights in the property, whereas in the instant case, this is not a case of sub-lease, there is no such advance receipts and clause 4 of supplementary lease deed contained right to cancel or terminate the lease deed before stipulated press also and there is no third party lease deed entered between the parties. Further, in said case the property was transferred to third party, whereas in the case of assessee, the property was leased out to the firm in which the assessee had enjoyed 70% as his share in the property. In view of this matter, the said decision is distinguishable on facts hence, not applicable to present facts and there being no extinguishment of rights of the assessee. Further, the ld.CIT(DR) relied in the case of CIT v. C.F. Thomas [2006] 284 ITR 557 (Ker)/ 158 Taxman 310 (Ker) (supra), in which the assessee had received a sum of Rs.10 lakhs by way of Pakadi, whereas no such facts exist in the case of the assessee as no premium has been received by the assessee. Therefore, the above two case laws relied by the learned CIT (D.R.) are not applicable to the facts of the case. In the light of above discussion, we find that as per the terms and conditions of the lease deeds executed on various dates between the assessee and M/s. K.C. Sports Club and M/s. K.C. City Centre Pvt. Ltd. the lease deed are revocable, the property can go back to the owner after termination of the lease property and in between also if any of the terms and conditions are not adhered to , the assessee is a will remain the absolutely owner of the property, the premises cannot be used for any other purpose other than what is stated in the lease deed, the property cannot be sub-leted and the rights and obligation shall be as per the Transfer of Property Act and will be observed by both the parties in true sense. Though, the property is transferred to the lessee for the enjoyment of property for a certain period but all such lease cannot be termed as transfer within the meaning of section 2(47) of the Act. Since, there is no transfer of possession of the property, it is not correct on the part of the AO to hold that this a transfer within the meaning of clause (v) and (vi) of section 2(47) of the Income Tax Act read with clause (d) of Section 269UA on the ground that property has been transferred on long term lease for more than 12 years as a part performance u/s.53A of the Transfer of Property Act. There cannot be transfer of property due special status of J&K, where Transfer of Property Act of State of J & K is applicable. This is the reason why section 269S of the Act has been provided in the statute. Since, there is no transfer the applicability of section 2(47) of the Act does not arise. In view of these facts and circumstances, we are of the considered view that the ld.CIT(A) has rightly deleted the addition made on account of capital gains on lease deed basis. In the light of above facts and circumstances, the appeal of Revenue on this ground is therefore, dismissed.

41. In the result, the appeal of the Revenue is partly allowed.

42. This order is pronounced on 16.03.2020

Sd/-	Sd/-
(N.K.CHOUDHRY)	**(O.P.MEENA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Amritsar: Dated: 16th March, 2020/opm
Copy of order sent to - Assessee/AO/Pr. CIT/ CIT (A)/ ITAT (DR)/ Guard file of ITAT.

By order

// TRUE COPY //

Asst. Registrar, ITAT, Amritsar Bench