

ORDER

PER BENCH :-

The above captioned appeals have been filed by the assessee for A.Ys 2007-08 to 2011-12 and cross appeals by the revenue for assessment years 2009-10 and 2010-11.

2. The first appellate authority has disposed off the appeals of A.Ys 2007-08, 2008-09 and 2010-11 by a consolidated order and has decided the appeal for A.Y 2009-10 by a separate order.

3. Since common issues are involved in all the seven appeals and were heard together, they are being disposed off by this common order for the sake of convenience and brevity.

ASSESSEE'S APPEALS

4. In assessee's appeals, the ld. AR argued only on two issues. Therefore, all the other issues raised in grounds of appeal go into oblivion. The first issue being on account of unaccounted cash receipts which is there in A.Ys 2007-08 to 2010-11 and in A.Y 2011-12, the

addition is in respect of unexplained money on account of gold coins found during the course of search. The ld. AR did not press this ground for the smallness of the amount involved and, therefore, the same is dismissed out right.

5. The issues raised by the Revenue shall be considered separately.
6. The representatives of both the sides were heard at length, the case records carefully perused and with the assistance of the ld. Counsel, we have considered the documentary evidences brought on record in the form of Paper Book in light of Rule 18(6) of ITAT Rules. Judicial decisions relied upon were carefully perused.
7. Facts on record reveal that a search and seizure operation was carried out in the case of the assessee and group companies on 13.05.2010. During the course of search operations, certain documents were seized from Indore Office of the assessee, named as Annexure LP I-25. A blue diary in the form of a Bank Pass Book was also seized. The entries in the loose sheets and the diary were thoroughly scrutinised by the Assessing Officer. It was found that the assessee is receiving consideration over and above the registered value of the

property, which was not incorporated in the regular books of account. On the basis of the entries found in the diary, the Assessing Officer came to the conclusion that the amounts reflected in the diary are unaccounted receipts and made the additions as under:

A.Y	<u>Addition</u>
2007-08	Rs. 4,75,000/-
2008-09	Rs. 1,18,16,735 & Rs. 24,26,940/-
2009-10	Rs. 57,82,100/- & Rs. 47,93,000/-
2010-11	Rs. 52,01,954/-

The main contention of the assessee is that there are some entries in the diaries, which are duplicate, and double additions have been made. The second contention of the appellant is that the Assessing Officer has also made additions in respect of debit entries and there are arithmetical errors in totalling the unaccounted receipts.

8. We have given a thoughtful consideration to the orders of the authorities below and have carefully examined the entries in the diary named as bank pass book, which is exhibited at pages 12 to 19 of the paper book filed by the department. The pattern is clear in as much

as the receipts have been shown as deposits and wherever the deposits have been of substantial amount, immediately the same have been transferred to Head Office account and the same are reflected on the withdrawal side of the pass book. For example, on 11.09.2007, there is a receipt from Shri S.C. Suri of Rs. 4,72,500/- which on 13.09.2007 was forwarded to Head Office through Shri B.P. Dhaka. Similarly, on 29.07.20117, there is a receipt from M/s Shalini Jaiswal/Bhagwan Jaiswal Rs. 8,41,500/- which on the same date has been forwarded to the Head Office. This pattern can be seen in all the entries reflected in the said diary [bank pass book]. Therefore, in our considered opinion, only the amount received which is shown under the column 'Deposits' can be considered as the unaccounted receipts of the assessee. In fact, the deposits column in the bank pass book reflect the credit entries and the withdrawals column reflect the debit entries.

9. However, we find that the entry on 1.10.2007 relating to Shri S. Bhatnagar Rs. 4,80,750/- is under the column 'Withdrawals' and the same has been added to the income of the assessee. Similar debit entries which have been added by the Assessing Officer are :

09.10.2007	Rs. 19,250/-
08.10.2007	Rs. 12,50,000/-
17.10.2007	Rs. 42,452/-
26.10.2007	Rs. 67,500/-
29.10.2007	Rs. 20,44,967/-
29.11.2007	Rs. 7,78,5000/-

10. We have only mentioned the sample entries to show that the additions on account of these debit entries is not justified since these debit entries are nothing but unaccounted receipts transferred to Head Office. Similar entries need to be examined and verified to arrive at the correct figure of unaccounted receipts from business.

11. We, therefore, restore this issue to the file of the Assessing Officer to examine the debit entries and if the same are in the nature of transfer to Head Office, then no addition is called for because the receipts only have to be added as unaccounted receipts. Here, we would like to make it clear that unaccounted receipts have to be taxed as unexplained income of the assessee subject to verification mentioned hereinabove.

12. It appears that there is some arithmetical error in the totalling done by the Assessing Officer. The same also needs to be rectified. For example, in A.Y 2008-09, there is a difference in total amounting to Rs. 5,93,134/-. Similar totalling error needs to be verified and corrected.

13. For the sake of completeness of the adjudication, the assessee has sold hundreds of flats to various persons from whom it has received consideration in cash which has not been accounted for in the books of the assessee. No cross verification has been done from the purchaser. It may be possible that even the purchasers have used their unaccounted money in the purchase of property. The revenue should take care of this also.

14. Another issue raised by the ld. AR is that in the loose sheets itself, there are entries of expenditure incurred by the assessee outside the books of account. It is the say of the ld. AR that if the unaccounted income is considered, then the unaccounted expenditure, which are noted in the same loose sheets, should also be considered. We direct the Assessing Officer to consider this plea of the assessee with the entries in the loose sheets and if found correct, only the net

receipts [i.e. unaccounted income minus unaccounted expenditure] should be added to the income of the assessee.

15. Another contention of the Id. AR is that the assessee has been receiving on money from the sale of flats but the same should be taxed in the respective A.Ys in which the sale deeds have been executed as per the method of accounting followed by the assessee.

16. We do not find much force in this contention of the Id. AR. The unaccounted receipts or the on money is the income of the assessee in the year in which it has been received and has been rightly taxed as such by the Assessing Officer.

17. To sum up, the on money received by the assessee is the unaccounted income of the assessee as per the notings in the diary [bank pass book] and loose sheet subject to verification of duplicate entries, arithmetical error in totalling and the amount transferred to the Head office being debit entries, wrongly added as income of the assessee. With the above directions, the common ground relating to addition on account of unaccounted cash receipts is allowed for statistical purposes.

18. As a result, the appeals of the assessee for A.Ys 2007-08 to 2010-11 are allowed for statistical purposes and appeal for A.Y 2011-12 is dismissed.

REVENUE'S APPEALS

19. The common grievance in both the appeals relates to the deletion of disallowance made u/s 14A of the Act r.w.r 8D of the Rules.

20. In assessment year 2009-10, disallowance is of Rs. 44,97,650/- and in assessment year 2010-11, the disallowance is of Rs. 80,04,260/-

21. The undisputed facts is that in the impugned assessment years, the assessee has not earned any exempt income.

22. The ld. DR strongly supported the disallowances made by the Assessing Officer and strongly relied upon the decision of the Hon'ble Supreme Court in the case of Rajendra Prasad 115 ITR 519 and Maxopp Investment Ltd 91 Taxmann 154. It is the say of the ld. DR that even if there is no exempt income

earned during the year under consideration, the disallowance u/s 14A is imminent and the ld. CIT(A) grossly erred in deleting the same.

23. On the contrary, the ld. counsel for the assessee strongly placed reliance on the decision of the Hon'ble jurisdictional High Court of Delhi in the case of Cheminvest Ltd 378 ITR 37 and in the case of Oil Industry Development Board in IT Appeal No. 197 of 2018.

24. We have heard the rival submissions and have given thoughtful consideration to the orders of the authorities below. As mentioned elsewhere, the assessee company has not earned any exempt income. The Hon'ble High Court of Delhi in the case of Oil Industry Development Board [supra] has held as under:

"1. The Revenue's appeal challenges an order of the Income Tax Appellate Tribunal (ITAT) which had set aside the disallowance of Rs. 1,62,49,000/- under Section 14A of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').

2. The Assessing Officer (AO) and later the CIT (A) made the disallowance by taking into account only the investment patterns of the assessee for the concerned assessment.

3. The ITAT relied upon the ailing of this Court in *Cheminvest Ltd. v. C/T* [2015] 378 ITR 33 which ailed in the absence of any exempt income, disallowance under Section 14-A of the Act of any amount was not permissible. Since the decision in *Cheminvest Ltd. {supra}* was followed, there is no substantial question of law that requires consideration.

4. The appeal is therefore dismissed."

23. The Hon'ble Supreme Court dismissed the SLP of the Revenue in SLP Civil Diary No. 2755 of 2019 order dated 08.02.2019 and the order reads as under:

- "1. Delay condoned.
2. In view of the decision of this Court in *CIT v. Essar Teleholdings Ltd. Through its Manager* [2018] 3 SCC 253, we see no reason to entertain this special leave petition under Article 136 of the Constitution of India.
3. The special leave petition is, accordingly, dismissed.
4. Pending application(s), if any, shall stand disposed of."

24. The order of the Hon'ble Supreme Court in the case of Maxopp Investment Ltd is dated 12.02.2018 whereas the order of the Hon'ble High Court of Delhi in the case of Oil Industry Development Board [supra] is dated 16.02.2018. As the decision of the Hon'ble jurisdictional High Court of Delhi [supra] is directly on the point, we decline to interfere with the findings of the ld. CIT(A). The common ground raised in both the appeals is dismissed.

25. Ground No. 2 in assessment year 2009-10 relates to the deletion of addition of Rs. 8 crores.

26. During the course of assessment proceedings and on the basis of information received from Investigation Directorate, New Delhi, the Assessing Officer came to know that the assessee company has taken accommodation entries totalling to Rs. 8 crores from Shri S.K. Jain group of companies during the F.Y. 2008-09 relevant to assessment year 2009-10, the details of which are as under:

Sl. No.	From company name	Name of the issuing bank	Cheque/RTGS/PO No.	Cheque date	Amount(Rs.)
(i)	(ii)	(iii)	(iv)	(v)	(vi)
1	Virgin Capital Services Pvt Ltd.	AXIS Bank	098315	03.11.2008	1,50,00,000
2	-do-	-do-	098314	-do-	1,00,00,000
3	VIP Leasing & Finance Pvt Ltd	-do-	014018	-do-	50,00,000
4	-do-	-do-	014025	-do-	1,00,00,000
5	-do-	-do-	014026	04.11.2008	1,00,00,000
6	Humtum Marketing Pvt Ltd.	-do-	094582	-do-	1,00,00,000
7	VIP Leasing & Finance Pvt Ltd	-do-	006622	21.11.2008	2,00,00,000
TOTAL					8,00,00,000

27. The Assessing Officer called for necessary details from the assessee to establish the genuineness of the transaction. The assessee filed detailed reply dated 26.03.2003 and the same reads as under:

"The assessee company is engaged in real estate development and received booking against its projects. The assessee company received amount from the companies against booking of various project in the normal course of business. The assessee company has not taken any accommodation entries from the said companies. It is further submitted that the booking of the said companies were subsequently cancelled on specific request from the respective buyers companies. Since, the amount received on booking subsequently refunded to them ,so the assessee company has not received any benefit

of accommodation entry as no amount has been introduced in the books of the assessee in the form of share capital, share application, capital gain, etc. on which tax is not payable ,but the assessee company has received the same as booking against its project which is taxable in the hands of the assessee .Moreover, the assessee company adopted percentage completion method for recognizing its revenue, which resulted in recognizing revenue on such booking amount. Since the assessee has not received any benefit of accommodation entry on receipt of booking amount against its projects and merely on the basis of information received from Investigation Directorate, New Delhi. That assessee company has received accommodation entries from the said companies without verifying the fact whether the assessee company has received any benefit of taking accommodation entry or not, it should not be treated accommodation entry. So, we hereby request your goodself that the amount received against projects of the company should not treated as bogus accommodation entries received by the assessee company."

28. Reply of the assessee did not find any favour with the Assessing Officer who proceeded by invoking the provisions of section 68 of the Act and on the basis of report from the INV Wing, the Assessing Officer made addition of Rs. 8 crores.

29. The assessee strongly agitated the matter before the ld. CIT(A) and once again contended that the money was received on account of booking in its various projects, part of which was refunded during the relevant year itself and the balance amount was refunded in the next year.

30. After considering the facts and submissions, the ld. CIT(A) was convinced that the Assessing Officer was not justified in making the addition of Rs. 8 crores as unexplained cash credit u/s 68 of the Act.

31. Aggrieved, the Revenue is before us.

32. The ld. DR strongly supported the findings of the Assessing Officer and placed strong reliance on the decision of the Hon'ble High Court of Delhi in the case of NDR Promoters Pvt. Ltd in ITA No. 49/2018 and the judgment of the Hon'ble Supreme Court in the case of NRA Iron and Steel Pvt Ltd in Civil Appeal No. 29855 of 2018. It is the say of the ld. DR that the assessee has grossly failed in discharging the initial onus cast upon it u/s 68 of the Act.

33. We have heard the rival submissions and have given thoughtful consideration to the orders of the authorities below and have carefully considered the judicial decisions relied upon. At the outset, we have to say that the Assessing Officer has not considered the transaction in true perspective and simply relied upon the report of the Inv Wing, New Delhi. The facts show that the transaction of Rs. 8 crores is not that of loan simpliciter. It is a business transaction and should have been considered from that angle.

34. The companies, namely Virgin Capital Services Pvt Ltd, VIP Leasing and Finance Pvt Ltd and Humtum Marketing Pvt Ltd have tendered money for booking flats in the projects of the assessee company. It appears that the Assessing Officer has not examined the transaction of booking flats by these companies. It also appears that after booking the flats in the projects of the assessee company, bookings were cancelled and subsequently, the money was refunded to these companies. Though the first appellate authority has deleted the addition but at the same time, he has also not gone into the details of booking of flats and subsequent cancellation.

In our considered opinion, the impugned transaction has to be looked upon not from the angle of section 68 but as a commercial transaction.

35. Our view is fortified from the fact that hundreds of flats/houses were booked in the projects of the assessee company and several of them were cancelled subsequently and no adverse inference has been drawn in so far as such bookings and cancellations are concerned. Therefore, there is no reason why the booking transactions with the three companies are singled out.

36. We, accordingly, restore this issue to the file of the Assessing Officer. The Assessing Officer is directed to examine the booking details of these companies and verify the flats booked by these companies in the projects of the assessee company, examine the cancellation of the bookings and whether the booking amount has been refunded by the assessee company and if satisfied with the verification, issue may be decided afresh. Accordingly, Ground No. 2 in assessment year 2009-10 is allowed for statistical purposes.

37. The only grievance in assessment year 2010-11 that survives for adjudication relates to the deletion of addition of Rs. 1,14,71,260/-, Rs. 70,10,140/- and Rs. 48,69,900/-.

38. Facts on record show that during the course of survey, action u/s 133A of the Act, at the premises of the assessee, at Faridabad, a diary titled Vamshi Retreats alongwith some loose papers was impounded. From the details in the diary, the Assessing Officer noticed that the sale of flats at Greenfield at Rs. 1,84,82,000/- has been mentioned alongwith total expenditure of Rs. 1,14,71,260/-. During survey proceedings, statement of Shri Vinod Kumar Chauhan, Deputy Manager [Marketing] was recorded and the same is exhibited at pages 2 to 4 of the Assessing Officer's order.

39. In his statement, Shri Vinod Kumar Chauhan categorically stated that the diary and loose papers pertaining to Vamshi Retreats belong to Azad Singh as these are his personal papers and who is one of the employees being Executive [Market] of the assessee company.

40. Summons u/s 131 of the Act was issued by the INV Wing to Shri Azad Singh to appear before the INV Wing. On enquiry, it came to the notice of the Assessing Officer that Shri Azad Singh was no more working with the assessee company. The assessee was asked to provide address of Shri Azad Singh. The address was provided but summons u/s 131 could not be served upon him.

41. The assessee was asked to explain the transactions appearing in the impounded documents and reconcile the same with its books of account. On receiving no plausible reply, addition of Rs. 1,84,82,000/- was made.

42. There was one more impounded document in respect of a property and measuring 647.50 sq yard which was purchased for a total consideration of Rs. 1.07 crores. The share holders of this plot were Shri Jagjit, Shri Titu, Shri Akash, Shri Rakesh Pankaj and Shri Pawan. The assessee was asked to explain the transactions noted in the impounded documents and reconcile the same with its books of account.

On receiving no plausible reply, the Assessing Officer made addition of Rs. 48,69,900/-.

43. The assessee strongly agitated the matter before the Id. CIT(A) and pointed out that during the survey proceedings itself, Shri Vinod Kumar Chauhan in his statement, has clearly stated that these impounded documents belonged to Shri Azad Singh and in respect of another property, it was brought to the notice of the Id. CIT(A) that in the impounded sheet itself, names of buyers have been mentioned who are not related to the assessee company.

44. On examining the statement of Shri Vinod Kumar Chauhan and finding various names in the impounded sheet who are not related to the assessee company, the Id. CIT(A) held as under:

"I have considered entire facts and circumstances of the case and arguments of Id. DR. During the survey proceeding itself Sh. Vinod Kumar Chauhan Deputy Manager 'of the company has clearly stated that these

impounded materials do not pertain to the company & the explanation may be taken from Sh. Azad Singh. This statement has been reproduced in the assessment order itself. In the assessment order where addition has been made for two properties, the Ld. assessing officer has mentioned that the impounded material annexure A-1 & A-3 clearly contain name of various persons who are owner of the project mentioning clearly percentage wise ownership & investment brought. These persons are not in any way linked to the appellant company by any investigation or enquiry. Therefore, in my opinion the provisions of section 292C of deemed ownership do not apply in view of specific mention of ownership of the project in the impounded material.

Considering the entire facts & circumstances of the case, I do not think that these impounded papers belong to the appellant company. Accordingly, I delete the entire addition made on the basis of impounded materials. These of appeal are allowed."

45. Before us, the ld. DR could not point out any factual error in the findings of the ld. CIT(A). There is no dispute that in the statement itself, Shri Vinod Kumar Chauhan, Deputy Manager [marketing] of the assessee company has

categorically stated that the impounded diary and other documents belonged to Shri Azad Singh. If at the time of enquiry Shri Azad Singh was no more an employee of the assessee company, it cannot be considered adversely against the assessee company. In our considered opinion, the Revenue should ask Shri Azad Singh about the contents of the diary and make necessary enquiry from Shri Azad Singh only.

46. In respect of the other property in the impounded sheet itself, the name of the joint owners alongwith their profit share is mentioned. It is not the case of the Revenue that the assessee has executed any project on the said piece of land mentioned in the impounded document. Moreover, there is no dispute that the assessee company is executing huge projects and would not go for such small projects comprising of six flats only. The loose sheets may have been found from the premises of the assessee company, but since the joint owners names are mentioned in the loose sheet with respective profit share ratio, no adverse inference can be drawn against the assessee company. Considering the facts of the case in totality, we do not find any error or infirmity

in the findings of the ld. CIT(A). This ground is accordingly dismissed.

47. In the result the appeal for assessment year 2009-10 is partly allowed and the appeal for assessment year 2010-11 is dismissed.

48. To sum up, in the result, the appeals of the assessee for A.Ys 2007-08 to 2010-11 are allowed for statistical purposes and appeal for A.Y 2011-12 is dismissed. The appeal of the Revenue for assessment year 2009-10 is partly allowed for statistical purposes and the appeal for assessment year 2010-11 is dismissed.

The order is pronounced in the open court on 22.04.2019.

Sd/-

**[K.N. CHARY]
JUDICIAL MEMBER**

Sd/-

**[N.K. BILLAIYA]
ACCOUNTANT MEMBER**

Dated: 22nd April, 2019.

VL/

Copy forwarded to:

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

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	