

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "D", MUMBAI

BEFORE SHRI G.S. PANNU, VICE PRESIDENT AND
SHRI AMARJIT SINGH, JUDICIAL MEMBER

ITA No	A.Y.	Appellant	Respondent
7177/Mum/16	2009-10	Deputy Commissioner of Income Tax, CC-3(4), Central Range-3, Mumbai	M/s. Dev Land and Housing P Ltd., 10 th Floor, Dev Plaza, Opp: Fire brigade, S V Road, Andheri, Mumbai [PAN: AACCD3656L]
7178/Mum/16	2010-11		
7179/Mum/16	2013-14		
7180/Mum/16	2013-14		M/s. Mars Realtors Pvt. Ltd., 10 th Floor, Dev Plaza, Opp: Fire Brigade, S V Road, Andheri(W), Mumbai [PAN: AAECM5228K]

Appellant by : Shri T. Kipgen, CIT-DR
Shri Chaitanya Anjaria, Sr.AR-CIT

Respondent by : Shri Vijay Mehta

Date of Hearing : 10-01-2019

Date of Pronouncement : 05 - 04-2019

ORDER

PER G.S. PANNU, VICE PRESIDENT:

1. The captioned are four appeals filed by the Revenue pertaining to two different assesseees belonging to the same group in relation to the assessment years 2009-10, 2010-11 and 2013-14. Since the appeals involve a common issue, they have been clubbed and heard together and a consolidated order is being passed for the sake of convenience and brevity.

Firstly, we take up the appeals in the case of Dev Land and Housing Pvt. Ltd., for assessment years 2009-10, 2010-11 and 2013-14. The facts being same in all the years, we take assessment year 2009-10 (ITA No. 7177/M/2016) as a lead case. The said appeal is directed against an order passed by the CIT(A)- 51, Mumbai dated 26.09.2016, which in turn, arises out of an order passed by the Assessing Officer under section 143(3) of the Income Tax Act, 1961 (in short 'the Act') dated 31.03.2016.

2. The Grounds of appeal raised by the Revenue for Assessment Year 2009-10 read as under:-

"(i) "On the facts and in the circumstances of the case and in law, the Ld. CIT(A), erred in deleting the addition made on account of unexplained cash credit u/s 68 of the I.T. Act amounting to Rs. 8.70 crore on the ground that 'on money' generated in AY 2006-07 and AY 2007-08 are the source of bogus loan shown in the AY 2009-10 without appreciating the fact that director of assessee company admitted in statement recorded u/s. 132(4) during the search proceedings regarding undisclosed income of Rs.8.70 Crores for A.Y. 2009-10 and also not relying on the decision of Supreme Court in the case of B. Kishore Kumar Vs. DCIT 234 Taxman 771 wherein Supreme Court dismissed SLP of assessee against High Court order holding that when the assessee himself admitted in search in sworn statement about undisclosed income, it has to be taxed on basis of admission without scrutinising documents."

(ii) "On the facts and in the circumstances of the case and in law, the Ld. CIT(A), erred in placing reliance on paper found in survey regarding on-money received in A.Ys. 2006-07 & 2007-08 ignoring the fact that this paper was not found during search conducted in 2013 and also paper does not contain all the details like dates of receipt of on-money, the names of the persons giving on-money and the assessee not giving any other corroborative evidences of on-money received in earlier years. It is assessee onus to prove it independently and not of the AO as held by CIT(A).

(iii) On the facts and in the circumstances of the case and in law, the Ld. CIT(A), erred in not appreciating that u/s. 68 of the IT Act, it is onus of the assessee to prove the credit entries and it cannot be held as proved by mere entries found in survey regarding on-money received in earlier years without any corroborative evidence and also CIT(A) failed to appreciate that assessee never

showed it as income in the earlier year and also did not prove that amount received in earlier years were not spent elsewhere and remained intact and also failed to prove nexus”.

3. Briefly put, the relevant facts are that the respondent-assessee is a company incorporated under the provisions of the Companies Act, 1956 and is, interalia, engaged in the business of development of land and constructing residential flats and commercial complexes. A search action u/s 132(1) of the Act was carried out by the Department in the premises of the assessee on 10.12.2013. In a statement recorded u/s 132(4) of the Act at the time of search, the director of the assessee-company admitted that assessee-company had received on-money to the extent of Rs. 33,05,10,000/- from assessment year 2006-07 to 2012-13 from some of its customers and this on-money was introduced in the books of account in the form of un-secured loans which were nothing but accommodation entries i.e., Cash equivalent to the stated loan was given to accommodation entry provider. Subsequently, a survey action was carried out by the Department at the business premises of the assessee on 05.10.2015 in connection with purchase of Transferable Development Rights (hereinafter referred to as 'TDR') by the assessee company for which it was found to have paid cash of Rs. 2.20 crores. The statement recorded and documents impounded during survey revealed that on-money was received by the assessee in connection with certain projects. As a consequence, proceedings u/s 153A of the Act were initiated by the Assessing Officer for the period from assessment years 2008-09 to 2013-14 and in response, assessee filed returns for each of the said assessment years on 18.12.2015 i.e. after the survey conducted in the premises of the assessee. In returns of income so filed u/s 153A of the Act for assessment

year 2008-09 to 2013-14, assessee offered additional income on account of on-money as under:

Sr. No.	A.Y.	Amount (Rs)	Remarks
1.	2006-07	6,92,80,000	No return of income was filed as the period was falling beyond block period.
2.	2007-08	16,10,90,000	
3.	2010-2011	3,92,90,000	
4.	2011-2012	2,71,50,000	
5.	2012-2013	3,37,00,000	
		33,05,10,000	

4. The position of unsecured loans shown by the assessee during assessment years 2009-10 to 2013-14 was as under:

Sr. No.	A.Y.	Amount (Rs)	Remarks
1.	2009-2010	8,70,00,000	
2.	2010-2011	10,50,00,000	
3.	2012-2013	2,00,00,000	
4.	2013-2014	11,54,00,000	Loan is reflected in the books of Mars Realtors Pvt. Ltd
		32,74,00,000	

Since the director of the assessee-company admitted in the statement recorded u/s 132(4) of the Act that on-money received were introduced in the account books in the form of unsecured loan, the Assessing Officer issued notices for assessment years 2009-10, 2010-11 and 2013-14 show causing as to why addition on account of bogus loans should not be made u/s 68 of the Act. In reply, assessee submitted that on-money, as evidenced by papers impounded in survey conducted on 05.10.2015, wherever received by assessee from assessment years 2008-09 to 2013-14 was offered to tax in respective assessment years. It was submitted that on-money received in assessment years 2006-07 and 2007-08 was beyond

the block period. It was submitted that the bogus loans obtained by the assessee are only application of above income by way of on-money and hence no separate addition was required to be made in respect of bogus loans u/s 68 of the Act. The Assessing Officer did not accept the submissions of assessee, as according to him, it was not possible that the assessee had received huge on-money in assessment years 2006-07 and 2007-08 and no on money in assessment years 2008-09 and 2009-10. The Assessing Officer was of the view that on-money received in assessment years 2006-07 and 2007-08 was utilized for some other purpose and the source of bogus loans obtained by the assessee in assessment years 2009-10 and 2010-11 was not known, and accordingly made addition u/s 68 of the Act for bogus loans taken during the year.

5. Before the CIT(A), assessee contended that the statement deposed during the search showed that the source of obtaining bogus loans was the on-money received by the assessee. It was further submitted that during the survey proceedings an 'Excel Sheet' was found by the survey team wherein complete details of on money taken by the assessee, including date, name of person and project for which on money was taken, was mentioned. In view of the same, it was submitted that the on-money generated from sale of flats was used for obtaining loans. It was further submitted that the on money earned by assessee from assessment years 2008-09 to 2013-14 was offered to tax in the respective years. It was further submitted that on-money received in assessment years 2006-07 and 2007-08 could not be offered to tax. Merely because on-money was not offered to tax, it cannot be said that the source of bogus loan is not proved. It was further submitted that in assessment year 2012-13, the

Assessing Officer has accepted the contention of the assessee that the source of bogus loan is on money received by assessee and has not made any addition u/s 68 of the Act. Assessee also contended that no evidence has been brought on record by the Assessing Officer to show that on-money earned was spent elsewhere. Further, the fact that on-money is used for obtaining bogus loans has been accepted by Assessing Officer in assessment year 2012-13 since on-money offered by assessee in assessment year 2012-13 has been accepted by the Assessing Officer as such and no separate addition has been made in assessment year 2012-13 u/s 68 of the Act on account of bogus loan taken during the year. It was further submitted that a loose paper, which is part of the impounded documents found during survey, gives the detail of the utilization of the total on-money received of Rs. 33.05 crores. It is clearly mentioned therein that out of the on-money received, accommodation entries of Rs. 29.24 crores have been obtained. Assessee explained that this page also shows that on-money has also been used for purchasing TDRs to the extent of Rs.2.20 crores.

6. It was further submitted that the seized documents being relied by the Assessing Officer for making addition ought to be accepted fully. Once it is accepted on the basis of seized paper that on-money has been received by the assessee then it is not open for the Assessing Officer to disregard the subsequent notings in the seized document showing the utilization of on-money for obtaining bogus loans.

7. The CIT(A) accepted the submissions of the assessee and deleted the addition made by Assessing Officer u/s 68 of the Act. He also rejected the

conclusion of the Assessing Officer that no reasonable person would keep on money received in assessment years 2006-07 and 2007-08 for so much time. The CIT(A) was of the view that the onus to prove that money was used somewhere else was on the Assessing Officer since the notings on the seized documents demonstrated that on-money received by assessee was used for obtaining bogus loans. He further held that the statements recorded during the search and survey proceedings also supported the contention of the assessee that on money was used for obtaining bogus loans. In view of the above, CIT(A) deleted the addition made by the Assessing Officer u/s 68 of the Act against which the Revenue is in appeal before us.

8. Before us, Id. DR relied upon the reasoning of the Assessing Order in order to justify the impugned addition and since we have already noted the same in earlier paras, the same is not being reported for the sake of brevity. The Id. DR further placed reliance on the decision of Hon'ble Madras High Court in the case of B. Kishore Kumar vs. DCIT in ITA No. 738 to 744 of 2014, which has also been referred in the assessment order, to say that when there is a clear and categorical admission of the undisclosed income by the assessee himself, there is no necessity to scrutinize the documents.

9. On the other hand Ld.Representative for the assessee submitted that the assessee, during the search itself, in the statement recorded u/s 132(4) of the Act has admitted that accommodation loans were obtained from the on-money received by the assessee from sale of flats. He also

referred to the relevant deposition made u/s 132(4) of the Act during the course of search which is reproduced hereunder:

STATEMENT OF SHRI VIJAY THAKKAR RECORDED U/S 132(4) OF THE ACT ON 14.12.2013

Q-14 In response to the question above you have stated that you had taken an accommodation entry in the nature of 'unsecured loan' from M/s Kush Gems P Ltd by paying an equivalent amount in cash. You are requested to explain the source of cash payment to M/s Kush Gems P Ltd.

Ans. Sir, the cash was paid to get the accommodation entry in the nature of unsecured loans was generated out of the 'on money' received from my business operations and the 'on money' received is my unaccounted income/receipts..."

It was submitted that similar reply was given by the assessee in response to question no. 17, 20, 23, etc. in respect of other loans (Placed at Page No. 5, 11, 12 and 13 of the Paper Book). In view of the above, it was submitted that accommodation loans were obtained from on-money received by the assessee.

10. Further, it was pointed out that during the course of survey action, certain loose papers were also found which are placed in the Paper Book at pages 61 to 71 which clearly reflect the details of on-money received in various years. An 'Excel Sheet' containing details such as name of the buyer, cash receipt date, agreement date, Registration date, Flat / office no, Area, total agreement value, cash component, total deal value (placed at pages 63 to 67 of the Paper Book) which clearly give evidence of on-money received in various years was also referred to.

11. It was also pointed out that the copy of the seized paper placed at page 71 of the Paper Book clearly shows utilization of on-money received by assessee. It is evident from the said paper that the on-money received by the assessee was utilized for obtaining accommodation entries of loans. It is submitted that once the Assessing Officer accepts that assessee has received on-money on the basis of the seized documents, it cannot deny the fact of utilization of on-money which is also evident from the very same seized material. The relevant portion of the statement recorded during the course of survey was relied upon, which is reproduced hereunder:

STATEMENT OF SHRI VIJAY THAKKAR RECORDED U/S 131 OF THE ACTON 05.10.2015

“...Q23 Kindly provide the details about the manner in which the payment of INR 2.20 crores was made to Bhoomi Group

*Ans. Sir, the TDR was purchased at the rate of 5400 rupees per square feet. The part of the payment was made in cash ie. out of INR 5,400/-per sft the amount as per the rate INR1,400/-per sqft was paid in cash. Out of total TDR purchased ie. 1460 square meter of TDR that was purchased amount of INR2.20 crore (15715 sft *1400 - Rs 2.20,00,000/-) was paid in cash at the rate of INR1,400 per sft (1460 square meter =15715 square feet).*

Q24 As the page shows that INR2.20 crores of cash was paid as a part of total consideration for the TDR. Kindly provide the source of the same.

Ans. Few clients who insist on paying the part of the consideration for purchase of flat in cash, popularly known as "on money" is the source for making the above payment for the TDR in cash...

Q26 During the survey proceedings u/s 133A some loose papers found from your premises, annexured as A-1 containing 1-69 pages please confirm the same and explain the nature of the paper and the amount that is mentioned

Ans. Sir, I confirm that the papers that were found from the premises has been impounded and shown to me. These papers relates to the sale

consideration of various units in various projects in M/s. Dev Land and Housing Pvt. Ltd. The hand written papers pasted on a blank sheet represents the total amount of consideration ie. received for the sale of unit in various projects and the copies of pages of the agreement represents the value at which the agreement was done. Hence in nutshell the amount ie hand written and pasted on the plain sheet represents the total cash amount and cheque amount as consideration of the sale of flats in various projects. The last three pages represent the voucher of cash expenses to HashmukhRai & Co. and to Harishchandra BalajiAngre.

Q.27 As per the reply of your above question kindly show the entries in the books of account reflecting the cash received as sale consideration of flats in various projects in Dev Land and Housing Pvt. Ltd.

Ans. Sir, the cash received as "on money" as a part of sale consideration of flat in various projects are not accounted and out forming part of the regular books of accounts..."

STATEMENT OF SHRI VJAY THAKKAR RECORDED U/S 131 OF THE ACTON 11.12.2015

.. Q.5 I am showing you the statement recorded during the course of survey proceedings conducted at your office premises on 05.10.2015 In reply to the Q.24 thereof you have stated that the source of the above income is 'on money: Kindly state whether 'on money" was received in all the years?

Ans. I have received "on money" in some years and this can be seen from money" as under

Sr. No.	F.Y.	A.Y.	Amount (Rs)
1.	2005-2006	2006-2007	6,92,80,000
2.	2006-2007	2007-2008	16,10,90,000
3.	2007-2008	2010-2011	3,92,90,000
4.	2010-2011	2011-2012	2,71,50,000
5.	2011-2012	2012-2013	3,37,00,000
	Total		33,05,10,000

As can be seen above, a lot of cash got generated out of on money over the course of years. In order to reduce the risk of keeping so much cash in hand, I obtained accommodation entries in form of unsecured loans which were arranged from several parties. The facts relating to the same are mentioned in my statement recorded during the search action carried out at my premises. The entries were arranged in the books of my companies, Dev Land and Housing Private Limited and Mars Realtors Private Limited amounting to INR 34.44 crores.

Out of the remaining available cash, I have paid INR 2.20 crores to Mr Manoj Gourav, a broker, for purchase of TDR during FY 2015-16 which is duly mentioned during last survey proceedings conducted on 5.10.2015."

It is evident from the above statements recorded of Shri Vijay Thakkar (Director of the assessee company) during the search and survey proceedings that the source of cash of accommodation entries was stated to be on-money generated from sale of flats.

12. Our attention of on-money received and its utilization for obtaining accommodation entries, which is as under:

Sr. No.	A.Y.	Receipts on account of 'on money'	Payment for the purpose of accommodation loans		Income Taxed by the AO	
			DLH	Mars	DLH	Mars
1.	2006-07	6,92,80,000	-	-	-	-
2.	2007-08	16,10,90,000	-	-	-	-
3.	2008-09	-	-	-	-	-
4.	2009-10	-	8,70,00,000	-	8,70,00,000	-
5.	2010-11	3,92,90,000	10,50,00,000	-	10,50,00,000	-
6.	2011-12	2,71,50,000	-	-	2,71,50,000	-
7.	2012-13	3,37,00,000	2,00,00,000	-	3,37,00,000	-
8.	2013-14	-	-	11,54,00,000	11,54,00,000	11,54,00,000

13. It was submitted that in assessment year 2011-12, the Assessing Officer has accepted the additional income on account of on-money offered by the assessee even though no bogus loan was taken in the said year. Similarly, in assessment year 2012-13 also, Assessing Officer has

accepted the additional income of Rs.3,37,00,000/- on account of on-money offered by the assessee. It is pertinent to note that in assessment year 2012-13, the assessee has also obtained accommodation loan of Rs. 2,00,00,000/-. The Assessing Officer has accepted the fact that on money was utilized to obtain accommodation entries since no addition has been made on account of accommodation loans in assessment year 2012-13 by the Assessing Officer. It was further submitted that the seized paper reflecting on-money received by the assessee has also been accepted by the Assessing Officer since income offered of Rs. 3,37,00,000/- on account of on money has been accepted by him.

14. It was further pointed out that the Assessing Officer's contention is that on money received in assessment years 2006-07 and 2007-08 was utilized for some other purpose since no person would keep cash for so much time. Therefore, he was of the view that the source of accommodation entries for Assessment Year 2009-10 and 2010-11 remains unexplained. In this regard, it was submitted that once the seized document at pages 71 of the Paper Book clearly shows that the on money has been used for obtaining accommodation entries, then the onus is heavily on the Department to disprove the said fact. The Assessing Officer has not brought any evidence on record to disprove the fact that on-money was utilized for obtaining accommodation entry.

15. The Ld.Representative only reason for not accepting the fact that on money received in assessment years 2006-07 and 2007-08 was not utilized for obtaining bogus loans seemed to be that the returns for assessment years 2006-07 and 2007-08 could not be filed since the same were not

covered in the period of search and as a result, on money received in assessment years 2006-07 and 2007-08 could not be offered to tax. In this regard, it was submitted that merely because an amount could not be taxed does not mean that the seized paper which clearly shows that on money was utilized for obtaining accommodation entries, should be disbelieved.

16. The Assessing Officer has also alleged that it is beyond probability to believe that in assessment years 2008-09 and 2009-10, the assessee has not received any on money. In this regard, it was submitted that director of assessee, in his statement, had disposed that assessee has received on money only in some years. Further, it is evident from the seized paper found in the survey conducted in the premises of the assessee that on money has been received only in some years.

17. We have carefully considered the rival submissions and perused the relevant record. Notably, the controversy before us primarily revolves around whether the income admitted by the assessee in the statement recorded u/s 132(4) of the Act in the course of search, which is also supported by the incriminating material found during the course of search, is liable to be taxed in the year in which the income was earned or is liable to be taxed in the year in which such income was utilised in the form of taking unsecured loans. At the outset, we shall consider the manner in which the CIT(A) has dealt with the issue.

18. The CIT(A) noted that on money received by the assessee has been accepted by the Assessing Officer on the basis of the same seized

document that reflects that on-money was used for obtaining bogus loans. The CIT(A), thus, held that the Assessing Officer cannot accept one part of the seized material and ignore the other part of the same material. He relied on the decisions in the case of Pepsico India Holdings Pvt. Ltd. 349 ITR 85 (Del.); Indeo Airways Pvt. Ltd. 349 ITR 85 (Del.); T.S. Kumaraswamy 65 ITD 188 (Mad); Vatika Greenfield Ltd. 121 TTJ 208 and held that Assessing Officer cannot accept the impounded material on selective basis and consider some part of evidence as true while rejecting the evidence which is in favour of assessee, without bringing anything on record.

19. With respect to conclusion of the Assessing Officer that no reasonable person would keep on money received in assessment years 2006-07 and 2007-08 for so much time, the CIT(A) held that the onus to prove that money was used somewhere else was on the Assessing Officer since the notings on the seized documents demonstrated that on-money received by assessee was used for obtaining bogus loans. He further held that the statements recorded during the search and survey proceedings also support the contention of the assessee that on money was used for obtaining bogus loans. The CIT(A) further noted that the dates of receipt of cash are mentioned in the seized documents as such the observation of the Assessing Officer that there is no date of receipt of on money in the loose papers, is factually incorrect.

20. As regard Assessing Officer's contention that assessee did not provide any reason for non-acceptance of on-money in assessment years 2008-09 and 2009-10, he held that during the recording of statements (Q-5, statement dated 11.12.2015) (Page no 56 of Paper Book), assessee was

asked whether on-money was received in all the years to which it was replied on-money was received only in some of the years; and pertinently no further questions were asked by the department.

21. As regards Assessing Officers objection that assessee failed to file any confirmation from parties for payment of huge amounts of cash against booking of flats, the CIT(A) held that the provisions of Section 292C of the Act raise a presumption that the contents of books of accounts/documents impounded in the course of search/survey are true. Accordingly, he held that Assessing Officer was required to prove with sufficient evidence that the documents impounded during search are not reliable, an onus which was not discharged by the Assessing Officer.

22. The CIT(A) further agreed with the contention of the assessee that as per section 4 and 5 of the Act, the income should get assessed in the year in which it is generated/earned. He further held that section 68 is not applicable since source of such money is evidenced in the impounded papers. He relied on the decisions in the case of [CIT .P Mohanakala (2007) 291 ITR 278 (SC)]I1Hindusthan Tea Trading Co. Ltd. v .CIT (2003) 263 ITR 289, 293 (Cal). [Sreelekha Banerjee v. CIT, (1963) 49 ITR (SC) 112, 120, 121, D. YasodammaGudur v. CIT, (1968) 70 ITR (AP): Anil Kumar Singh v. CIT, (1972) 84 ITR 307 (Cal); Abu Bucker Sait v CIT, (1970) 76 ITR 362 (Mad).In this background, the CIT(A) deleted the addition made by the Assessing Officer u/s 68 of the Act.

23. In the above paras, we have noted the findings of the CIT(A) in some detail, only to show that the CIT(A) has appropriately dealt with the

various objections raised by the Assessing Officer and deleted the addition made u/s 68 of the Act only after a thorough examination of the facts, material on record and judicial pronouncements. Before us, Revenue has not been able to controvert the findings recorded by the CIT(A) on the basis of any cogent material or reasoning except merely relying on the order of Assessing Officer.

24. In our considered opinion undisputedly, the director of the assessee-company had admitted earning of on-money in various years to the extent of Rs. 33,05,10,000/- in his statement recorded u/s 132(4) of the Act. The said admission was supported by the documentary evidence, a copy of which is placed at pages 63 to 67 of Paper Book in the form of 'Excel Sheet' recovered at the time of search wherein date of receipt, name of person, etc. is clearly mentioned. Thus, the year in which the on-money was received by the assessee can be clearly established from these details. In the statement recorded u/s 132(4) of the Act, it was further admitted that this on-money was used to introduce funds in the books of account in the form of unsecured loans. The loose paper found during the search provided the utilisation of on-money received by the assessee for the purpose of taking unsecured loans, copies of which are placed at pages 63 to 67 of Paper Book. In the return of income filed u/s 153A of the Act for assessment year 2009-10, since no on-money was received by it during the relevant assessment year, no income on account of on-money was declared. The Assessing Officer noted that though no on-money was received by the assessee, unsecured loans of Rs. 8,70,00,000/- was received by the assessee during assessment year 2009-10 which was not offered to tax and accordingly, made addition of Rs. 8,70,00,000 u/s 68 of

the Act as assessee failed to explain the source of the same. Contrary to this, in assessment year 2012-13, the Assessing Officer himself accepted the income offered by the assessee based on documents seized and taxed on-money received by the assessee during that year. It was pointed out by the assessee in the statement recorded u/s 132(4) of the Act that the source of unsecured loans was on-money received by the assessee which was further substantiated by the loose paper recovered at the time of search wherein utilisation of on-money was explained. The Assessing Officer rejected the claim of the assessee on the ground that on-money received by the assessee in assessment years 2006-07 and 2007-08 must have been used for other expenses and cannot be said to be available for utilisation for paying to the person from whom unsecured loan and thus was raised, proceeded to tax the unsecured loan received by the assessee in assessment year 2009-10.

25. It is pertinent here to refer to Section 292C of the Act, which reads as under:

“Presumption as to assets, books of account, etc.

*292C. (1) Where any books of account, other documents, money, bullion, jewellery or other valuable article or thing are or is found in the possession or control of any person in the course of a search under section 132 or survey under section 133A, it may, in any proceeding under this Act, **be presumed**—*

(i) that such books of account, other documents, money, bullion, jewellery or other valuable article or thing belong or belongs to such person;

*(ii) **that the contents of such books of account and other documents are true;** and*

....”

(underlined for emphasis by us)

Section 292C of the Act proscribes a presumption that the contents of the books of account and other documents found in the course of search and survey shall be presumed to be true. The Assessing Officer has not rebutted this presumption with any cogent evidence except stating that assessee had various other expenses and therefore the on money earned by the assessee in assessment years 2006-07 and 2007-08 was not available for availing unsecured loans; rather in assessment year 2012-13, the Assessing Officer himself accepted the income offered by the assessee based on documents seized and taxed on-money received by the assessee during that year.

26. The next moot question which arises is as to whether income is to be taxed in the year in which the same was earned or it should be taxed in the year of its application. In this context, we find no error in the decision of the CIT(A) that in terms of sections 4 and 5 of the Act, the income be assessed in the year in which it is generated/earned.

27. We further refer to the Q. 29 of the statement recorded u/s 131 of the Act on 06.10.2015 in the course of proceedings u/s 133A of the Act wherein the director was asked to summarize the additional income offered by him. The relevant portion is reproduced hereunder:

“Q.29 To summerise, you are offering following year wise income as additional income over and above the regular income of the respective F.Yrs. in the hands of M/s. Dev Land and Housing Pvt. Ltd.

Sr. No	A.Y.	Amount in Rs.
1.	2009-10	3,92,90,000
2.	2010-11	2,71,50,000
3.	2011-12	3,37,00,000
4.	2015-16	2,20,00,000

Kindly confirm the same.

Ans: Yes Sir, I confirm that I offer the above mentioned income as additional income over and above the regular income in the hands of M/s Dev Land and Housing Pvt. Ltd.”

The above further supports the conclusion of the CIT(A) with respect to the income offered by the assessee and the year in which the same is offered to tax. Thus, on this aspect, we uphold the stand of CIT(A).

28. In so far as decision relied upon by the Id DR in the case of B. Kishore Kumar vs. DCIT ITA No. 738 of 744 of 2014 is concerned, we find that on the basis of said decision Id. DR seeks to support the assessment order to say that on-money received by the assessee in assessment years 2006-07 and 2007-08 must have been used for other expenses and was available for utilisation for the purpose of unsecured loans while on the other hand he relies on the decision of B. Kishore Kumar vs. DCIT (supra) wherein the Hon'ble High Court has held that the where there is a clear and categorical admission of the undisclosed income by the assessee himself, there is no necessity to scrutinize the documents. The Assessing Officer by making a presumption that on-money received by the assessee in assessment years 2006-07 and 2007-08 must have been used for other expenses travelled beyond the admission of undisclosed income made by the assessee, which is quite contrary to the ratio laid down in the decision cited by the Id.DR.

especially considering the absence of any corroborative evidence to support the stand of the Assessing Officer. Accordingly, decision relied upon by the Id DR does not support the Revenue in the instant case.

29. Further, the Assessing Officer has invoked Section 68 of the Act to conclude that source of unsecured loans have not been explained by the assessee. In this regards, as noted by the CIT(A), source of unsecured loan was very much evidenced in the impounded papers to be the on-money earned by the assessee, and there is no justification to support the stand of the Assessing Officer. Thus, we find no justifiable reasons to interfere with the conclusion drawn by the CIT(A). We hold so.

30. Thus, in view of the aforesaid discussion, we hereby affirm the decision of CIT(A) and Revenue fails in its appeal.

ITA No. 7178/M/2016

31. This appeal pertains to assessment year 2010-11 wherein Grounds raised by the Revenue are similar to those raised in assessment year 2009-10. Since we have already adjudicated the appeal for assessment year 2009-10, as above, our decision there shall *mutatis mutandis* apply to assessment year 2010-11 also.

32. Thus, in view of the aforesaid discussion, we hereby affirm the decision of CIT(A) and Revenue fails in its appeal.

ITA No. 7179/M/2016

33. This appeal pertains to assessment year 2013-14 wherein Grounds raised by the Revenue are slightly different as compared to assessment years 2009-10 and 2010-11. In the present year, the addition is made u/s 68 of the Act in the hands of assessee on protective basis and substantive addition is made in the hands of its group concern M/s. Mars Realtors Pvt. Ltd. as the unsecured loans are reflected in the books of the M/s. Mars Realtors Pvt. Ltd.

34. The facts in this year are different to the limited extent that in earlier year the assessee admitted the undisclosed income earned by it from on-money and the same was stated to be introduced in its account books by way unsecured loans, whereas in the year under consideration, being assessment year 2013-14, the income earned by the assessee from on-money was introduced as unsecured loan in its group company M/s. Mars Realtors Pvt. Ltd.

35. The Assessing Officer held that assessee and M/s. Mars Realtors Pvt. Ltd. are two separate entities and on-money earned by one entity cannot be used to explain the unsecured loans taken in other entities. Since the credits of Rs. 11,54,00,0000/- were reflected in the books of account of M/s. Mars Realtors Pvt. Ltd, the Assessing Officer made substantive addition u/s 68 of the Act in the hands of M/s. Mars Realtors Pvt. Ltd and a protective addition of the same amount in the hands of the assessee.

36. On appeal, the CIT(A) deleted the addition in the hands of the assessee holding that the M/s. Mars Realtors Pvt. Ltd was merely a pass through entity to introduce the funds in the assessee company and the funds in fact were generated out of the business operations of the assessee. The relevant findings are given in para 8.19 to 8.21 of the CIT(A) order which is reproduced hereunder:

“8.19 Above entries clearly reflect that an amount of Rs. 34.44 Cr was taken as accommodation entries out of which Rs. 5.2 cr was reduced/ returned. Now let us examine as to where and in whose books these accommodation entries are reflected. As submitted by the assessee total accommodation entries taken in DLH amounted to Rs. 21.2 cr out of which Rs. 5.2 cr was returned in AY 14-15. An amount of Rs. 11.54 and Rs. 1.7 Cr was taken in Mars Realtors in AY 13-14 and 14-15 respectively. Thus total bogus loans taken works out to Rs. 34.44 cr (21.2+11.54+1.7). This is the figures reflected in impounded paper as tabulated in above para (29.24=34.44-5.2). Therefore it is clear that accommodation entries are taken both in Mars and DLH and the source of money for the same is on money received in DLH. It is also observed that AO in AY accepted the income returned in Mars as well as DLH which is based on explanation regarding on money generation submitted by assessee. It can be seen that at the end of AY 2012-13 the entire accumulated on-money got utilised in routing into the books as accommodation entries. In AY 2014-15, it is out of Rs. 5.2 crore returned from DLH as amount of Rs. 1.7 cr is sourced into Mars.

...

8.20 Further, on perusal of ledger account of DLH in the books of Mars it is observed that the amount received in Mars is almost immediately transferred to DLH. It strengthens assessee's arguments that Mars is only a pass through entity. On observing balance sheet of Mars it becomes clear that it does not have any business of its own to justify generation of an amount of Rs 11.54 cr. This makes it obvious that on money generated in DLH is also routed through Mars into DLH besides directly taking accommodation entries in DLH. AO also accepted this by accepting returned income of Mars and DLH in AY 14-15. It is also observed that AO has not brought out any evidence on record to show that it was not the on-money received by DLH during A.Y.s 2006-07, 2007-08, 2010-11, 2011-12 and 2012-13, which was utilized for obtaining entries to the extent of Rs. 11.54 crores in the hands of Mars Realtors for A.Y. 2013-14; as evidenced in impounded papers. I also find that AO relied upon impounded documents on selective basis but failed to believe

evidence arising from documents impounded by the Department which supported the case of the appellant.

*8.21 To sum up, it is held that, in view of the evidence emerging from the impounded documents which are part of the records, assessing officer is not justified in treating the income of A.Y. 2006-07, 2007-08, 2010-11, 2011-12 and 2012-13 as income of A.Y 2013-14. It is further held that AO erred in bringing to tax the application of income of earlier years by invoking provision of section 68 of the Act. In view of evidence available, facts and circumstances of the case, I hold that it is the on money receipt, which being the income of DLH in respective years of generation, that needs to be brought to tax in those years and not the subsequent application of such income, in form of bogus loans in later years, either on substantive basis or on protective basis; only because the AYs in which such income is generated are out of time limit for assessment. **In view of above discussion, AO is directed to delete the addition amounting to Rs 11.54 cr made on protective basis in the hands of assessee u/s 68 of the Act. In the result grounds no 2 to 4 of assessee's appeal are allowed.***

(Underlined for emphasis by us)

From the findings of the CIT(A), it clearly emerges that the unsecured loan reflected in the account books of M/s. Mars Realtors Pvt. Ltd is sourced through the on-money earned by the assessee in earlier years which has been admitted in the course of search. The Assessing Officer has invoked section 68 of the Act to tax the unsecured loan taken by M/s. Mars Realtors Pvt. Ltd. However, as discussed in the order of CIT(A), the source of unsecured loans stood fully explained being on-money earned by the assessee. In our view, invoking of Section 68 of the Act was not justified in the present case.

37. Further, in assessment year 2013-14, there is merely an application of the income earned by the assessee in earlier year, as discussed in earlier part of this order. Since we have already held that income is to be taxed in the year in which the same is earned and not at the time of its application,

we concur with the findings in the order of CIT(A) and hold that the addition has been rightly deleted.

38. Thus, in view of the aforesaid discussion, we hereby affirm the decision of CIT(A) and Revenue fails in its appeal.

M/s. Mars Realtors Pvt. Ltd (ITA No. 7180/M/2016)
(assessment year 2013-14)

39. The facts of the present appeal are same as facts discussed in ITA No. 7179/M/2016, above. In this case, the addition of unsecured loans of Rs. 11,54,00,000/- was made by u/s 68 of the Act on substantive basis whereas the addition of the same amount was made in the hands of its group concern M/s. Dev land and Housing Pvt. Ltd., (ITA No.7179/Mum/2016) on protective basis.

40. The CIT(A) has deleted the addition made in the hands of the assessee observing that the unsecured loan was sourced from the undisclosed income of the assessee's group concern M/s. Dev land and Housing Pvt. Ltd and assessee was merely acting as pass through entity. While adjudicating the appeal in ITA No. 7179/M/2016, we have upheld the proposition of CIT(A) that Rs. 11,54,00,000/- introduced as unsecured loans in the account books of the assessee was income of its group concern M/s. Dev land and Housing Pvt. Ltd and assessee was acting merely as a pass-through entity to introduce funds in the group concerns.

41. Thus, once it is admitted that money in-fact belonged to another group-assessee, and the instant assessee was merely acting as a pass-

through entity, no addition can be made in the hands of the assessee. In such cases, the source of credit stands fully explained being income of the other assessee and as such, no addition can be made u/s 68 of the Act. In this manner, the order of the CIT(A) is liable to be affirmed.

42. Thus, in view of the aforesaid discussion, we hereby affirm the decision of CIT(A) and Revenue fails in its appeal.

43. Resultantly, the captioned appeals of the Revenue are dismissed.

Order pronounced in the open court on 05/04/2019

Sd/-

(AMARJIT SINGH)
JUDICIAL MEMBER

sd/-

(G.S. PANNU)
VICE PRESIDENT

Mumbai, Date : 05 - 04 -2019

SSL

Copy to :

- 1) The Appellant
- 2) The Respondent
- 3) The CIT(A) concerned
- 4) The CIT concerned
- 5) The D.R, Mumbai
- 6) Guard file

By Order

Dy./Asstt. Registrar
I.T.A.T,

Mumbai8/