

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "A", MUMBAI**

**BEFORE SHRI RAJESH KUMAR, ACCOUNTANT MEMBER AND
SHRI RAM LAL NEGI, JUDICIAL MEMBER**

**ITA Nos.1293, 1294, 1295 & 1296/M/2019
Assessment Years: 2012-13, 2013-14, 2014-15 & 2015-16**

M/s. Luxora Infrastructure Pvt. Ltd., 1207, 12 th Floor, A Wing, 02 Commercial Building, 23-24, Minerva Industrial Estate, Off. LBS Road, Mulund (W), Mumbai - 80 PAN: AABCL2854K	Vs.	DCIT, Central Circle -2(1), Pratishtha Bhavan, 8 th Floor, Mumbai
(Appellant)		(Respondent)

Present for:

Assessee by : Shri K.P. Dewani, A.R.
Revenue by : Shri Rajiv Harit, D.R.

Date of Hearing : 26.02.2020
Date of Pronouncement : 21.04.2020

ORDER

Per Rajesh Kumar, Accountant Member:

The above titled appeals have been preferred by the assessee against the order dated 24.12.2018 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2012-13, 2013-14, 2014-15 & 2015-16.

ITA No.1293/M/2019 A.Y. 2012-13

2. The various grounds raised by the assessee are as under:
 - "1. The addition made by A.O. at Rs.2,19,96,000/- u/s 69C of IT. Act 1961 is unjustified, unwarranted and bad in law.

2. The learned CIT(A) erred in upholding addition of Rs.2,19,96,000/- u/s 69C of IT. Act 1961.
3. The learned A.O. as well as CIT(A) ought to have telescoped the addition made with the income assessed/availability of funds in case of assessee in past assessment year as well as for the assessment year under consideration.
4. The addition made at Rs.2,19,96,000/- without giving benefit of telescoping is unjustified, unwarranted and excessive.
5. The learned A.O. erred in not setting off the addition made in the assessment framed at Rs.2,25,42,200/- with the net loss assessed in assessment framed at Rs.69,42,148/-.
6. The learned CIT(A) erred in upholding the action of A.O. in not setting off of income with loss determined in assessment framed.
7. The assessee denies liability to pay interest under section 234A, 234B and 234C of IT. Act 1961. Without prejudice, levy of interest under section 234A, 234B and 234C of IT. Act 1961 is unjustified, unwarranted and excessive.
8. Any other ground shall be prayed at the time of hearing.”

3. The issue raised in ground No.1 to 4 is against the confirmation of addition of Rs.2,19,96,000/- by Ld. CIT(A) as made by the AO under section 69C of the Act by not allowing the telescoping of the said addition out of the available of funds with assessee. The facts in brief are that the assessee is developing a township known as Ensara Metropark at Nagpur. The project was in progress during the year and the entire cost incurred was shown as work in progress. The expenses incurred on the said project were shown as work in progress till 31.03.2015 relevant to A.Y. 2015-16. The company has received certain advances for booking of residential units by various modes in cash as well as by cheques which were shown as advances from customers. Since the assessee has shown the entire expenses incurred with project as work in progress no revenue was recognized during the year. The assessee filed the return of income on 29.09.2012 declaring a loss of Rs.69,42,148/-. The case of the assessee was selected for scrutiny and assessment under section 143(3) was framed vide order dated 04.02.2015 accepting the returned loss on 19.03.2015. A search and seizure action under section 132

of the Act was conducted on the assessee and associate entities including the promoters and directors. During the course of search it was revealed that assessee was generating cash by over invoicing certain sub contractors and over pricing land deals and was also accepting on money. A notice under section 153A of the Act dated 03.10.2016 was issued and served upon the assessee which was complied with by the assessee by filing a return of income on 02.02.2017 declaring loss of Rs.69,42,148/-. During the course of search, a statement under section 132(4) of the Act was recorded of Shri Sanjay Kothari who admitted that assessee generates cash out of expenses booked in the course of its business activities. Shri Sanjay Kothari explained that the cash was generated through excess sub contract expenses booked by assessee and cash was received back and also by over pricing the purchase of lands. The quantum of inflation of expenditure was estimated at Rs.20 crores, the details whereof are as under:

	<u>2009-10/</u>	<u>2010-11</u>	<u>2011-12</u>	<u>2012-13</u>	<u>2013-11</u>	<u>2014-15</u>	<u>2015-16</u>	<u>Total</u>
Land Purchased	1013859020	0	0	564320808	250706440	0	71780920	1900667188
Contract	0	0	0	0	24198920	80018554	61064336	165270810
Total	<u>1013859020</u>	0	0	564320808	<u>274894360</u>	<u>80018554</u>	132845256	2065937998
Percentage	49.07	0	0	27.31	13.30	3.87	6.45	100
Over-Invoicing on land purchase and contract	98140000	0	0	54620000	26600000	7740000	12900000	200000000

For assessment year 2012-13 the quantum was estimated at Rs.5,46,20,000/-. Since the work was in progress in respect of the project undertaken by the assessee, the cash received of Rs.20 crore by way of over invoicing was reduced from work in progress without treating the same as assessable income in the hands of the assessee as the cost inflated was embedded in and was part of the work in progress. During the course of search an Excel sheet titled, cash expenses up to 31.10.2014 was found from Shri Sanjay Kothari. However, no corroborative evidences were found whether the assessee had incurred these expenses actually or not. As per the said excel sheets the cash expenses up to 31.10.2014 were Rs.6.03 crores and after considering certain notings recorded in the books of accounts of the assessee aggregating to 75.37 lakhs, the AO came to the conclusion that Rs.528.02 lakhs were not recorded in the books of accounts and are liable to be assessed under section 69C of the Act as unexplained in various sheets. However, out of the unrecorded expenses of Rs.528.02 crores, Rs.2,19,96,000/- pertained to A.Y. 2012-13. The assessee submitted before the AO that in case the so called unrecorded expenses of Rs.528.02 lakhs are added under section 69C of the Act then it would result in double taxation which is not permissible under the Act. First by way of deduction of Rs.20 crores which represents the cash generated through over invoicing and then again by treating the unrecorded expenses as unexplained expenditure under section 69C of the Act. The assessee submitted that in the search proceedings as well as in the assessment proceedings it was stated before the Revenue Authorities that the said expenditure was incurred out of cash generated through over

invoicing. However, the AO rejected the contentions of the assessee and added the same to the income of the assessee under section 69C of the Act as unexplained expenditure by holding that assessee could not prove that such expenditure of Rs.2,19,96,000/- was incurred out of the cash generated out of over invoicing.

4. In the appellate proceedings, the Ld. CIT(A) dismissed the appeal of the assessee by observing and holding as under:

“5.1.1 The plea of assessee is that reduction in work in progress on account of inflated value of land in contracts results in available cash with the assessee and such cash has been used by assessee to make the expenses for the various years which have been discussed in para-8 to 8.5 of the assessment orders for both the assessment years. Also it would be relevant to mention that inflation and over voicing of the expenses related to work in progress has been discussed/in para-6 of the assessment orders, which has direct nexus with this ground. Therefore, while disposing of this ground of appeal, the entire details discussed by assessing officer regarding over voicing of work in progress have been duly considered. After considering the overall facts of the case including all the statements recorded and the various seized documents, on the basis of which the issue has been unearthed by the Revenue Department as well as the submissions of assessee filed before the AO as well as in the appeal proceedings, the ground of appeal of assessee is dismissed in view of following:-

5.1.1 Onus of Linking the Availability of Cash due to Over Invoicing of Work in Progress Expenditure not Discharged by Assessee:-

The onus is exclusively on assessee to substantiate the availability of cash on a particular day to explain the various expenses. There cannot be general and blanket linking of cash generated through over voicing with certain specific expenses on particular days. Assessee has not done any exercise to explain the availability of the cash to explain the sources of the expenses. In view of this there is no anomaly in the orders of assessing officer, wherein, a separate addition of Rs.2,19,96,000/- and Rs.89,83,000/- is made on account of unexplained expenditure under section 69C.

5.1.2. Law Relating to Telescoping :-

Neither in assessment proceedings nor in appeal proceedings, assessee has submitted any cash flow chart to explain and show availability of cash (generated through over-invoicing) for various expenses, details of which were maintained by Shri Sanjay Kothari. Out of total such expenses Rs. 6.03 crores, assessee could verify an amount of Rs. 75.37 lakhs only with books of accounts. For remaining Rs. 5.28 crores, no sources could be explained. For claiming the benefit of telescoping, it is

the bounden duty of the appellant to furnish relevant details and documentary evidences. Hence, the claim of the Appellant for telescoping has been rightly rejected by the AO.

5.1.3.

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5.1.10. No Financial Year wise Breakup of Cash Generated out of Over Invoicing:-

Without prejudice to above discussion, in any case, assessee has not submitted any details of year wise cash generated out of over invoicing of the expenses of 20 crores, which were admitted time and again in the statements of Shri Sanjay Kothari, Shri Navneet Kothari and Shri Yogesh Vinod Agarwal, which have been brought out in detail in para-6 of the assessment orders pertaining to over voicing. Finally, assessing officer, after not having received any details from the assessee, has proportionately estimated such bogus expenditure due to over voicing for each of the financial years. Therefore, in the absence of assessee submitting specific details for the each year assessing officer has finally used the tool of estimation available-to him and has estimated this inflated expenditure on the basis of volume of the land purchased is year.

Therefore, in any case, this year wise allocation of cash generated out of over voicing is not the real value of cash available with assessee in that financial year as a whole. It is only a fair and logical estimation made by AO on proportionate basis. Such exercise was the only option available with the AO as assessee failed to provide year-wise break-up. Therefore, in view of these facts also, the argument of assessee to allow him the benefit of telescoping is not admissible at all.

5.1.11 In view of the above facts and various judicial pronouncements, the ground No. 1 of the assessee is dismissed for both the years.”

5. The Ld. A.R. vehemently submitted before us that it is not in dispute that assessee has generated cash of Rs.20 crores up to a period of 31.03.2015 by over invoicing the sub contracts and land purchases and it was also stated that the excel sheet titled, cash expenses up to 31.10.2014 of Rs.6.03 crores was found at the time of search from the assessee which after comparing with the noting in the books of accounts adjusted by Rs.75.37 lakhs and it was concluded by the AO that Rs.528.02 lakhs were unrecorded expenses and out of that Rs.2,19,96,000/- pertained to A.Y. 2012-13. The Ld. A.R.

submitted that at the time of search no corroborative evidences were found whether these expenses were actually incurred on the project. The Ld. A.R. also submitted that if at all it is presumed that these expenses were incurred for the purpose of business, the said expenses were incurred out of the cash generated through over invoicing, the details whereof are given year wise before the AO and the cash generation through over invoicing was Rs.5,46,20,000/- during the current year. The Ld. A.R., therefore, submitted that the benefit of telescoping should be allowed to the assessee as it has been maintained by Shri Sanjay Kothari all throughout that the cash was generated through over invoicing. It was also admitted by Shri Sanjay Kothari in his statement recorded under section 132(4) of the Act that the source of cash for incurring expenses was out of over invoicing of sub contracts and land purchases. The Ld. A.R. also referred to para 8.1 of the assessment order and submitted that there is a direct linkage and nexus between cash generation and expenses incurred. The Ld. A.R. also submitted before the Bench that neither the search party nor the AO during the assessment proceedings came across or brought any evidence that cash generated during the assessment year 2011-12 Rs.5,46,20,000/- was utilized elsewhere or invested on any other project. The Ld. A.R. therefore submitted that outgoings found during the course of search in the form of expenses incurred by the assessee have to be telescoped out of the cash generated through over invoicing. The Ld. A.R. referred to the following decisions in defence of his arguments :

- i) Shri Sewakram K. Gurbaxani ITA(SS) No.50/Nag/2006
- ii) CIT vs. K. Sreedharan (1993)201 ITR 1010 (Ker.)
- iii) Shri Rameshwar Lal Soni S/o Late Sh.Mangi Lal Soni ITA No.34/2007 vide order dated 07/03/2017. (Raj)

- iv) Rameshwar Lal Soni vs. ACIT (2004)91 ITD 0301 (TM)
- v) CIT vs. Jawanmal Gemaji Gandhi (1985) 151 ITR 0353 (Bom.)
- vi) CIT Vs M/s. Golani Brothers in ITA No. 17 of 2015 vide order dated 29/08/2017 (Bombay)
- vii) Lakhmichand D. Rohira in ITA No.1760 of 2016 vide order dated 26/02/2019 (Bombay).
- viii) M/s. Arth Housing Development Pvt. Ltd. ITA No. 166 of 2017 vide order dated 15/04/2019.(Bombay)
- ix) Arth Housing Development Pvt. Ltd. ITA No.6764/Mum/2010 vide order dated 30/10/2015(Mum Tribunal).
- x) Jawahar B. Purohit ITA No.7208/Mum/2013 vide order dated 20/09/2017(Mum Tri.).

The Ld. A.R., therefore, prayed that the order passed by the Ld. CIT(A) is blatantly wrong and against the facts on record as the CEO Shri Sanjay Kothari in his statement recorded under section 132(4) of the Act has candidly and explicitly stated that the source of such expenses were out of cash generated through over invoicing and prayed before the Bench that in view of the ratio laid down in various decisions referred to during the course of hearing the telescoping of Rs.2,19,96,000/- may be allowed out of the cash generated during the year and the addition made under section 69C of the Act may be deleted. The Ld. A.R. also distinguished the facts of those cases relied upon by Ld. CIT(A) by submitting that in the assessee's case a reasonable nexus was shown between the cash generated and expenses incurred and therefore justified telescoping of these expenses out of cash generated through over invoicing.

6. The Ld. D.R., on the other hand, heavily relied on the order of authorities below by submitting that though the assessee had admitted the generation of cash through over invoicing in sub contracts and also in land purchases but the fact remains that nowhere it has ever been proved by the assessee that the expenses incurred of Rs.2,19,96,000/- were incurred out of the

said cash generated during the year. The Ld. D.R., therefore, relied heavily on the order of Ld. CIT(A) and prayed before the Bench that the ground Nos.1 to 4 raised by the assessee deserved dismissal.

7. We have heard the rival submissions of both the parties and perused the material on record including the various case laws cited during the course of hearing. The undisputed facts are that the assessee is engaged in the business of developing township in Nagpur which was in progress and whatever expenditure was incurred on the said project was shown as work in progress till 31.03.2015. Consequently, during the year assessee has not shown any income from the said project. The assessee has also received some advances from customers by way of cash/cheques which was shown as advances from the customers in the balance sheet. A search was conducted on 19.03.2015 on the assessee and its related entities including promoters and directors. During the course of search, it was found that assessee has generated cash through over invoicing of its sub contracts and land purchases which has been admitted by the CEO of the project of Shri Sanjay Kothari. The total cash generated through the over invoicing was found at Rs.20 crores. During the assessment proceedings, the AO allowed the deduction of the said cash from work in progress as the same was generated through over invoicing and was not having any bearing on the income of the assessee during the year. During the course of search an excel sheet was also found titled cash expenses up to 31.10.2014 Rs.6.03 crore and after verifying the notings in the books of accounts, an adjustment was made to the tune of Rs.75.37 lakhs which was explained by

the assessee with the corresponding proofs of payment in the bank statement and thus an amount of Rs.528.02 crore was held to be unexplained expenditure in the hands of the assessee. Out of the said expenditure Rs.2,19,96,000/- related to the year under consideration. Now the issue before us is whether the assessee is entitled to benefit of telescoping or not. After analyzing and examining the facts on record, we observe that in this case the cash generated during the year out of over invoicing was Rs.5,46,20,000/- and it has been admitted by Shri Sanjay Kothari during the course of recording of statement under section 132(4) of the Act that the source of these expenses were out of the cash generated through over invoicing. We further note that the AO has failed to bring on record any evidence to the effect that these expenses of Rs.2,19,96,000/- were incurred out of some other source or the cash generated of Rs.5,46,20,000/- was invested or incurred on some other activity. Therefore, under these circumstances, the only possible presumption is that the expenditure was incurred out of the funds available with the assessee generated through over invoicing. This has been admitted by the CEO of the project Shri Sanjay Kothari in the statement recorded under section 132(4) and therefore we can reasonably held that assessee is entitled to benefit of telescoping of Rs.2,19,96,000/-. The case of the assessee finds support from the several decisions referred to by the assessee during the course of hearing. In the case of CIT vs. K. Sridhar (supra) the Hon'ble Kerala High Court has held that if a intangible addition made in the earlier year is as good as other disclosed income of the assessee and it would be treated as available for investment from the year in which such

addition was made. The Hon'ble Bombay High Court in the case of M/s. CIT vs. Gulani Brothers (supra) has observed as under:

“21. When it was disturbed and interfered with, the Tribunal found that there was indeed a justification for such interference. If the unaccounted expenditure is determined, then, necessarily the question which would arise for consideration before the Tribunal is whether the Assessing Officer was justified in making addition under Section 69C for the years under consideration. The Tribunal, in para 39 of the order under challenge, found that the explanation as derived from the records and placed by both can be traced to the 'on money'¹ received at the time of booking/sale of shops. The statement of the senior partner is referred. The senior partner admitted that the sums have been received as 'on money'¹ and at the stage aforesaid. Therefore, both the amounts, namely the 'on money'¹ as well as the unexplained 'expenditure cannot be brought to tax, according to the Tribunal. If the unaccounted expenditure so incurred was from the 'on money' received by the assessee, then, the question of making any addition under Section 69C does not arise because the source of the expenditure is duly explained. It is only the 'on money' which can be considered for the purpose of taxation. That is what the Tribunal therefore concluded and once the 'on money' is considered as revenue receipt, then any expenditure out of such money cannot be treated as unexplained expenditure, for that would amount to double addition in respect of the same amount.”

We, therefore, respectfully following the ratio laid down in the various decisions and also the fact that the assessee has available source with it to incur the cash expenses which was not in any way controverted by the AO by bringing on record any cogent and substantive materials or evidences and accordingly we set aside the order of Ld. CIT(A) and direct the AO to allow the telescoping and delete the addition of Rs.2,19,96,000/-. The grounds no.1 to 4 allowed.

8. The issue raised in ground No.5 to 7 is against the order of Ld. CIT(A) upholding the order of AO in not allowing the setting off the loss against the assessed deemed income under section 69C of the Act by observing and holding as under:-

“This ground is regarding not allowing set off of current year's loss against the addition u/s. 69C. The AO has discussed this issue in para 9 of the assessment orders and relied on the Hon'ble Gujarat High Court judgment in the case of Fakir Mohammed Haji Hasan (247 ITR 209).

5.2.1 This ground of appeal of assessee is **dismissed** in view of following position of law and facts of the case :-

a) The correct position of law as per various expositions by various high courts including Gujarat H.C.[in case of Fakir Mohammed Haji Hasan V/s CIT (2001) 247 ITR 290(Guj)] and Punjab & Haryana High Court[in case of Dulari Digital Photo Services P.Ltd V/s CIT (2013) 219 Taxman 216 (Punjab & Haryana)] is that additions made u/s 68 & 69C are 'deemed income' and do not fall under any specific head of income.

b) As per newly introduced section 115BBE introduced by Finance Act 2012, w.e.f. 01.04.2013, no deduction or allowance or loss can be allowed to be set off against the ; deemed income computed u/s 68 or 69A to 69D.

c) The section 115BBE is actually a clarificatory section and law was already accordingly propounded by High Courts.

d) Thus A.O. has correctly applied the provisions of law and thus rightly rejected the request of assessee.

5.2.2 In view of the above facts, it is held that the AO is right and there is no anomaly in the orders of AO. Hence ground No. 2 of the assessee is dismissed for both the years.”

9. The facts in brief are that AO assessed the loss at Rs.69.42 lakhs for assessment year under consideration. The assessee had carried forward unabsorbed business losses and unabsorbed depreciation of Rs.98.34 lakhs and Rs.8.80 lakhs respectively. The total business loss and depreciation loss available with the assessee for setting off was Rs.176.56 lakhs against the assessed income, if any. The AO did not allow the setting off the business loss against the addition made under section 69C of the Act on the ground that the addition under section 69C of the Act are head less addition and does not follow under any specific head by following the decision of Hon'ble Gujarat High Court in the case of Fakir Chand Haji HasariVs CIT (2001) 247 ITR 290 Guj. HC.

10. The Ld. CIT(A) also by following the same decision denied the set off of the loss against the assessed income.

11. The Ld. A.R. submitted that the order of Ld. CIT(A) is wrong as the decision of Hon'ble Gujarat High Court in the case of Fakir Chand Haji Hasari Vs CIT (supra) has been distinguished by the Hon'ble Gujrat High Court in the subsequent decisions in the case of Radhe Developer India Ltd. reported in 329 ITR 001 and Shilpa Dyeing and Printing Mills Ltd. reported in 291 taxmann 279 Gujarat and nothing adverse can be inferred from the decision of Fakir Chand Haji Hasari Vs CIT (supra) which has wrongly been followed. The Ld. A.R. also referred to circular No.11/2019 dated 19.06.2019 which permits the setting off of loss/depreciation against the income assessed under section 68 to 69C of the assessment years prior to assessment year 2017-18. The Ld. A.R., therefore, prayed that in view of the above, the loss/depreciation may kindly be allowed to be set off against the assessed income under section 68 to 69C. The Ld. A.R. relied on the following decisions:

- i) 219 taxman 279 (Gujarat) CIT-II vs. Shilpa Dyeing & Printing Miffs (P) Ltd.
- ii) (2007) 291 ITR 0258 (Madras) CIT vs. Chensing Ventures
- iii) ITAT order in ITA No.1972/Ahd/2012 in the case of M/s. K.R. Automobiles vide order dated 03/02/2014.
- iv) ITAT order in ITA No.1841/Del/2016 in the case of M/s. Godwin Resort & Hotel Pvt. Ltd. vide order dated 14/10/2019.

12. The Ld. A.R. also distinguished the decision of Hon'ble Punjab & Haryana High Court in the case of Dulari Digital Photo Services Ltd. vs. CIT 219 taxman 216 P&H by submitting that the same is not relating to set off of loss against the income assessed under section 68 of the Act. Finally, the Ld. A.R. prayed before the Bench that the unabsorbed losses/depreciation including the current year loss/depreciation

may kindly be allowed to be set off against the income under section 68/69C of the Act.

13. After hearing both the parties and perusing the material on record, we observe that the income assessed under section 68/69C is eligible to be adjusted against any brought forward loss or depreciation. The position is clarified by the board's circular No.11/2019 dated 19.06.2019 which provides for setting off of loss/depreciation against the income assessed under section 69C of the Act provided it relates to any assessment years prior to A.Y. 2017-18 and the same ratio has been laid down in the various decisions relied upon by the assessee. Accordingly, we hold that whatever income is assessed after giving effect to ITAT order is subject to set off against the loss/depreciation of the current year and also brought forward loss/brought forward depreciation of the earlier year. The grounds no. 5 to 7 are allowed.

14. The issue raised in ground No.1 to 4 in ITA No.1294/Mum/2019, ground No.3 to 6 in ITA No.1295/Mum/2019 and ground No.3 to 6 in ITA No.1296/Mum/2019 is as regards not allowing the benefit of telescoping out of the cash generated through over invoicing by the assessee which has been decided by us in ground No.1 to 4 in ITA No.1293/Mum/2019 A.Y. 2012-13, wherein we have held that assessee is entitled to the benefit of telescoping and the appeal of the assessee was allowed on this issue. Following the decision in ITA No.1293/Mum/2019, we set aside the order of Ld. CIT(A) on this issue and direct the AO to allow the benefit of

telescoping to the assessee. Resultantly, the addition made under section 69C of the Act is ordered to be deleted.

The grounds raised by the assessee in the appeals as stated above are allowed.

15. The issue raised in ground No.5 & 6 in ITA No.1294/Mum/2019 A.Y. 2013-14, ground No.7 & 8 in ITA No.1295/Mum/2019 A.Y. 2014-15 and ground No.7 to 9 in ITA No.1296/Mum/2019 A.Y. 2015-16 are same to one as decided by us in ground No.5 to 6 in ITA No.1293/Mum/2019 where we have directed the AO to allow the setting off of loss/depreciation of the current year as well as of brought forward unabsorbed loss/depreciation from earlier years against the income assessed under section 68/69C of the Act. Accordingly, all these grounds in the above appeals are allowed and the AO is directed accordingly.

16. The grounds 1&2 in ITA No.1295/Mum/2019 are reproduced as under:-

- “1. The addition made by A.O. at Rs.40,00,000/- on account of On money is unjustified, unwarranted and bad in law.
2. The learned CIT(A) erred in upholding addition made by A.O. at Rs.40 lacs on account of on money.”

17. The facts in brief are that the AO during the course of search, the site office of Ensaara Metropark was covered under survey under section 133A of the Act and statement of Shri Mahendra Takkre, general manager of the project was recorded. He was required to furnish the details of flats sold and booked till date along with the date of booking. It was observed by this survey party that there were discrepancies in the details furnished by Shri Mahendra Takkre qua the per square feet sale

price of flats sold as stated hereinabove that statement of Shri Sanjay Kothari, CEO of the assessee was also recorded under section 132(4) of the Act who admitted to have generated cash by accepting on money on sale of flats and other activities and also stated that the same was utilized for the purpose of the project only. Shri Sanjay Kothari also submitted that cash as well cheques were accepted from the buyers. However, all these payments received whether in cash or by cheque were recorded in the books of accounts of the assessee. However, the AO brushed aside the contentions as made by the assessee and came to the conclusion that during the period of financial year 2013-14 and 2014-15, the assessee has generated on money to the tune of Rs.1,03,65,000/- out of which Rs.40 lakhs pertained to F.Y. 2013-14 relevant to A.Y. 2014-15 and Rs.63.65 lakhs relates to F.Y. 2014-15 relevant to A.Y. 2015-16. The project at Ensara Metropark was at the development stage and there was work in progress at the close of the accounting year and consequently no income was offered as no part of the project is sold/transferred and whatever advances were received from the customers were shown as liability in the balance sheet as advance from customers and this position has been accepted by the AO. It was also shown to the AO during the course of assessment proceedings that the cash advances received from customers were duly recorded in the books of accounts and necessary evidences were also produced in the form of confirmations/ledger accounts. It was also stated that since these cash transactions were duly recorded in the books of accounts of the assessee there was no question of on money being received on the sale of land in para 8.9. The AO has not

disputed that the receipts issued by the assessee for on money has not been accounted for in the books of accounts. Therefore, assessee contended that no addition can be made in respect of on money when the transactions were duly recorded in the books of accounts. The assessee also filed before the AO, confirmations from the customers and also submitted that since the assessee has not returned any income on the sale of flats, the so called on money could not be assessed to tax during the year under consideration. It was also contended by the AO that the on money received was part of the sale of property made in A.Y 2014-15 and 2015-16 whereas as a matter of fact no sale of property was taken place in these years. Therefore, the on money received can at best be treated as booking advances and no income under consideration and whatever has been received is duly booked and shown as advance from customers.

18. In the appellate proceedings, the Ld. CIT(A) dismissed the appeal of the assessee on this issue by ignoring the fact that transactions of receipt of on money as evidenced by the receipts issued to the buyers were duly recorded in the books of accounts. The Ld. CIT(A) completely ignored the evidences filed by the assessee qua the transactions of Rs.103.65 lakhs in cash and recorded in the books of accounts.

19. After hearing the rival parties and perusing the material on record, we observe that in this case though some entries were found in the searched material aggregating to Rs.1,03,65,000/- being received in cash from various customers which were duly tallying with the persons to whom the flats were sold. Out of the said money received in cash Rs.40 lakhs pertained to A.Y. 2014-

15 and Rs.63.65 lakhs relates to A.Y. 2015-16. After perusing the material on record, we observe that the assessee has duly accounted for all the receipts issued to the customers from whom the said cash was received and duly recorded in the books of accounts of the assessee. Since the project "Ensara Metropark" was at the development stage and whatever explained was incurred was shown as work in progress at the year end and also no revenue was offered to tax. We find that assessee has duly accounted for all these entries in the books of accounts and thus the mere fact that the money has been received in cash by the assessee would not justify the order of Ld. CIT(A) confirming the order of AO wherein it has been held that money received by issuing various receipts represent the on money. The stand of the authorities below appears to be contrary to the facts on record as the money which has been alleged to be on money is duly recorded in the books of accounts. In such a scenario we are not in agreement with the conclusion drawn by the Ld. CIT(A) and accordingly we direct the AO to delete the addition.

ITA No.1296/M/2019

20. Ground No.1 & 2 in ITA No.1296/Mum/2019 are identical to the grounds in ITA No. 1295/Mum/2019 which have decided in favour of the assessee hereinabove. Therefore our decision in ITA No. 1295/Mum/2019 would, mutatis mutandis, apply to these grounds as well. Accordingly the ground no. 1 & 2 are allowed.

21. In the result, the appeals of the assessee are allowed.

Order pronounced in the open court on 21.04.2020.

Sd/-
(Ram Lal Negi)
JUDICIAL MEMBER

Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER

Mumbai, Dated: 21.04.2020.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.