

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

BEFORE SHRI ABY T. VARKEY, JM AND SHRI AMARJIT SINGH, AM

आयकर अपील सं/ I.T.A. Nos.820 & 819/Mum/2021
(निर्धारण वर्ष / Assessment Years: 2015-16 & 2016-17)

DCIT-CC-4(3) Air India Bldg Room No.1921, Nariman Point, Mumbai-400021.	बनाम / Vs.	M/s. Resonant Realtors Projects Pvt. Ltd.(erstwhile M/s. Omkar Realtors Projects Pvt. Ltd.) Omkar House Off Eastern Express Highway, Opp. Sion Chunnabhatti Signal, Sion (E), Mumbai- 400022.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AACCO0277C		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by:	Shri Dharmesh Shah/Akshay Jain/Mitali Gopani
Revenue by:	Shri Ajay Chandra (DR)

सुनवाई की तारीख / Date of Hearing: 09/12/2022
घोषणा की तारीख /Date of Pronouncement: 13 /02/2023

आदेश / ORDER

PER ABY T. VARKEY, JM:

These are appeals preferred by the revenue against the order of the Ld. CIT(A)-52, Mumbai dated 16.02.2021 for AY. 2015-16 and AY. 2016-17 respectively.

2. The grounds of appeal raised by the revenue for AY. 2015-16 reads as under: -

1. "Whether, on the facts and the circumstance of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs. 10,74,90,000/- on account of on money received by the assessee in cash in respect of one of the projects on which assessee has not produced any new



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evidence other than the material seized during the search, which has already been confronted to and accepted by the assessee in his statement on Oath.”

2. “Whether, on the facts and the circumstance of the case and in law, Ld. CIT(A) has erred in accepting assessee’s contention that the on-money received by the assessee was in-fact subsumed in the cash loans which were already offered by the main group company ORDPL before Settlement Commission, without any factual finding to the contrary.”

3. Thereafter, the revenue appeal for AY. 2016-17 is as under:

“1. “Whether, on the facts and the circumstance of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs. 1,15,00,000/- on account of on money received by the assessee in cash in respect of one of its projects on which assessee has not produced any new evidence other than the material seized during the search, which has already been confronted to and accepted by the assessee in his statement on Oath by presuming the said cash loan to be subsumed in the on-money declared by ORDPL before Settlement Commission, without any factual finding to the contrary.”

2. “Whether, on the facts and the circumstance of the case and in law, Ld. CIT(A) has erred in computing the income on balance unaccounted on-money receipts of Rs.7,26,46,400/- at a GP of 17.5% instead of treating the entire sum as on-money to be taxed as per relevant provisions of the Act.”



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3. “Whether, on the facts and the circumstance of the case and in law, Ld. CIT(A) has erred in accepting assessee’s contention that the on-money received by the assessee was in-fact subsumed in the cash loans which were already offered by the main group company ORDPL before Settlement Commission, without any factual finding to the contrary.”

4. “Whether, on the facts and the circumstance of the case and in law, Ld. CIT(A) has erred in allowing the setoff of current year loss which shall not be allowed against the unaccounted and unexplained income, in view of the specific provision u/s 115BBE of the Act.”

4. First of all, we will take up appeal for AY. 2015-16 wherein the revenue has raised ground nos. 1 & 2 regarding deletion of addition of Rs.10,74,90,000/- on account of ‘*on money*’ received by the assessee in cash in respect of one of its projects which was accepted by the assessee during the search and added by the AO which has been deleted by the Ld. CIT(A) by accepting the assessee’s contention that *on money* received got subsumed in the cash loans by main group company M/s. Omkar Realtors & Developers Pvt. Ltd. & Others (hereinafter “M/s. ORDPL”).

5. Brief facts noted by the AO are that search and seizure operation u/s 132 of the Income Tax Act, 1961 (hereinafter “the Act”) was carried out in the case of M/s. Omkar Realtors &



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Developers Pvt. Ltd. & Others (Omkar Group) on 03.06.2015 at their business premises and various residential premises of Directors and other key associates by DDIT (Inv.), Unit-4(2), Mumbai. M/s. Omkar Group was engaged in real estate development and construction activities in many parts of Mumbai with a focus on slum Redevelopment. The AO noted that the main entities of the group are (a) M/s. Omkar Realtor and Developer Pvt. Ltd. (b) M/s. Era Realtors Pvt. Ltd. (c) M/s. Guru Commodity Services Pvt. Ltd. and (d) M/s. Kargwal Products Pvt. Ltd. According to the AO, M/s. Omkar Realtors and Developers Pvt. Ltd. (M/s. ORDPL) is the flagship company of the “Omkar Group”. And the promoters and directors of the group are Shri Kamal Kishore Gupta, Shri Babulal Verma, Shri Gaurav Gupta, Shri Tarachand Verma, Shri Kaushik More, Shri Rajendra Verma and Shri Vikas Gupta. The main allegation against the group was that it was indulging in the practice of taking “*on money*” against sale of its residential as well as commercial units. During the search action, details regarding evidence of “*on money*” generation, cash loans and details of unaccounted cash expenses as well as accommodation entries were found and seized. According to AO, when confronted with the evidences, the Directors of the group admitted to have taken *on-money* for sale of units in its projects.



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6. In the present assessee's case, notice u/s 153C of the Act was issued on 25.07.2016 to the erstwhile assessee M/s. Omkar Realtors Projects Pvt. Ltd. now M/s. Resonant Realtors Pvt. Ltd. and the assessee replied to it by filing the copy of return of income on 02.07.2016 reiterating the return income filed originally on 25.06.2016 declaring total income of Rs.12,58,150/- and current year loss at Rs. Nil. The AO acknowledged that assessee participated in the assessment proceedings and the AO further noted that Shri Kamal Kishore Gupta on behalf of Omkar Group had admitted during the search proceedings to have incurred cash expenses amounting to Rs.81.22 crores and the AO reproduced in the assessment order of assessee the statement of Shri Kamal Kishore Gupta from page no. 3 to 15; and according to the AO from the statement given by Shri Kamal Kishore Gupta it was evident that total cash expenditure was to the tune of Rs.81.26 crores which were not recorded in the books of account. Thereafter, the AO noted that there was certain unaccounted expenditure incurred by the assessee to the tune of Rs.15,82,62,000/- and even though the assessee asserted that the same was offered to tax in the hands of flagship company (M/s. ORDPL) before the Settlement Commission, the AO brushed aside the objection and added the same on protective basis because the Settlement Commission has not passed any order in assessee's own case (refer assessment order dated 26.12.2017 passed u/s 143(3) r.w.s. 153C of the Act).



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7. Thereafter, the AO noted that the assessee was in the habit of accepting *on money/cash* from customers against the sale of residential flats in various projects, over and above the sale consideration booked (by the assessee group concerns) in their respective books of accounts. This fact according to him was evident from seized loose papers, cash vouchers, found at the office/residences premises of the group and of Whatsapp/SMS messages of key employees. According to AO, during the course of search, relevant whatsapp/SMS messages could be retrieved which facts revealed that *cash/on-money* was being taken against sale of units and subsequently they were brought into the books of account of the group concerns by taking accommodation entries. According to AO, the *on-money* received was not recorded in the regular books of accounts maintained for statutory purposes. And the assessee only recorded in its books the cheque amount which is shown in the registered agreement as value for sale of flats/shops; and further according to AO, the documents found and other evidence gathered were confronted to the concerned employees and they accepted that *on-money* in cash was generated from the sale of flats in different projects of M/s. Omkar Group. According to the AO, the statement of employees and documents seized were again confronted to Shri Kamal Kishore Gupta (Chairman and promotor) in the presence of other promoters wherein he accepted that the seized documents reveals



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details of transactions in which on-money in the sale of flats had been taken, and also stated that due to business exigency they had to spend money in cash which was also evident from the vouchers and document seized in search action. Thereafter, the AO reproduced some selective portion of the statement recorded of the director and other key employees especially question no. 35 which is reproduced as under: -

“Q.35 It has been 4 hour since you asked to give time to give the details about the on money payment flat-wise which is part of your director discount in many of the cases as confirmed by many of your employee also. Please submit the details?”

Ans. Sir. Here I want to reiterate it again that director discount is an actual discount which we have to give as a business compulsion. But on some occasion cash received also become part of director discount when we have to go for the deal and we don't have any notice, I am submitting the name of the client as follow:

Sr. No.	Name of the client	Amount (Rs. in crores)	Sr. No.	Name of the client	Amount (Rs. in crores)
1	Shantaben Patel	2.75	23	Sadashiv Bombla	0.76
2	Sanjay Mittal	1.8	24	Rupa Sangay Kothari	3.71
3	Kavita Aswani	0.9	25	Dilip C Gandhi	0.9
4	Sunil Bhandari	2.48	26	Milan Mehta	1.9
5	Naresh Parekh	2.55	27	Shailesh Jogani	0.9
6	Vishal Sharma	1.43	28	Ketan Shah	4.45
7	Nebhanani	3.38	29	Samit Mehta	3.76
8	Nebhanani	3.38	30	Nishit Shah	2.11
9	Viren Radia	3.38	31	Suresh Shah	6.04
10	Manohar Kothari	1.79	32	Jayawanti Shah	1.66
11	Ritesh Agarwal	1.65	33	Ashish Thakur	3.25
12	Pratish P Mehta	2.48	34	Manoj Mundre	0.8
13	Shah Impex (Nimesh Shah)	4.29	35	Anand Modi	0.19
14	Mahesh Saraf HUF	1.08	36	SS Patel	2.09
15	Vinay Kumar K Desai	0.92	37	Rushi Memani	0.82
16	Mahesh C Garag	0.45	38	Anil Goel	4.00
17	Kashyap P Modi (HUF)	0.33	39	Chetan Bhai	1.21
18	Kashtao O Nidu	1.04	40	Sandeep Nankan	1.21
19	Nilesh Joshi/Neena D Joshi	0.31	41	Rigger House	0.08
20	Sagar Maniar	0.65	42	Kesha P. Jhaveri	0.27
21	Abdul Munaf Khaan	1	43	Goving Singh Mehta	0.10
22	Nilesh Gore	0.15		Total	81.30



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The flat details as well as the project details will be submitted in 15 days time.....

Q.39 I am showing you the statement of Shri Jignesh Hirani, Broker recorded on oath u/s. 132(4) of the income Tax Act, 1961] during the course of search action u/s 132 of the Income Tax Act, 1961 in the case of MA. Omkar Group of companies 03/06/2015. Relevant extract at the statement are as under:

Q 15= Please furnish details of name, addresses, consideration and brokerage in respect of sale of flats of in the project “1973, Worli” of M/s Omkar Realtors & Developers P Ltd?

Ans: In this project of “1973, Worli” of M/s Omkar Realtors & Developers Pvt Ltd.”, [have introduced the following persons in respect of sale at flats.

S. No.	Name of the party	Total consideration
1	Dilip C.Gandhi	10,45,50,780
2	Sanjay Rupa Kothart	19,62,07,400
3	Pratish Mehta	22,54,23,991
4	Suresh Shah	19,51,00,000
5	Jayvantiben Shah	20,54,90,400
6	Samith Mehta	18,71,15,600
7	Birjee Shah	18,81,25,800
		130,20,13,971

M/s Omkar Realtors and Developers Pvt. Ltd. has made sale of flats in 20%: 80%

scheme i.e. the flat owners have to pay 20% (5% in cash and 15% In cheque) at the time of booking and 80% at the time of possession of the flat. Till date, the above intending flat purchasers have paid only booking amount of 20% thus, M/s Omkar Realtors and Developers Pvt. Lid



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has received a sum of Rs. 65/00699/being 5% of the total sale consideration in cash on sale of above mentioned flats to the persons mentioned at si.nus.1 to 7 of above On sale of these flats, I was in receipt of Rs. 11,00,000 in April 2015 and Rs.1 99 crores through RTGS in the month of May '2015 out of the total brokerage of Rs. 2.60,40,279/- In this connection, I would also like to submit that on sale consideration of Rs.6,51,00,699/- received in cash by M/s Omkar Realtors and Developers Pvt, Ltd. has agreed to pay brokerage of Rs.13,02,013/- in cash (being 2% of above sale consideration received in cash) and out of this, I had already received Rs.11,00,000 in cash as stated above.

Ans. we have already given the cash component which we have accepted from this person in question no. 35.

Q.66 I am giving you a table showing various amounts of cash receipts, on money from the sale of flat, cash loan, advances, cash expenses as extracted out from the above facts and figures in the statement?

S. No.	Nature of information found	Amount (In)
1	On money evidence found regarding cash part in the sale of flat	81.30
2	Accommodation entry in the form of share capital in Guru Commodity Services P. Ltd and Kargwal Product Pvt. Ltd	25.30
3	Cash receipts of cash loan and advances against future projects.	14.94
4	Cash expenses vouchers and other paper found at 6" floor, Runwal & Omkar Esquare, Sion Chunabhaiti Road. Sion, Mumbai	40.94
5	Cash expenses details found with Rajiv Agrawal at basement of Runwal & Omkar Esquare, Sion Chunabhaiti Road, Sion, Mumbai.	40.32
	1. Cash Receipt	121.54
	2 Cash Expense	81.26
	Total	202.8

Please confirm and explain the same?



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Ans: Sir, I confirm the same I want to state here that there may be repetition or overlapping. The same will be reconciled and will be submitted in due course. Sir, I promise whatever taxes will be due on the above undisclosed amounts as stated in this question will be paid in due course.

Q.67 Do you have to say anything else?

Ans: I want to say that there are many paper and documents found and seized from various premises of our Omkar Group and from various employees as well as directors. In this regard, I have to say that there are various transactions of cash inflow and outflow which are at present difficult to reconcile. Sir, I want to say that we have received part of sale consideration in cash, only on a few occasions and under compelling circumstances for which evidence is found which is not recorded in regular books of account and it is requested that this may be treated as part of sale consideration and consequential effect of the same may be allowed in my balance sheet. Further, the amount of unaccounted income offered is subject to reconciliation and verification with seized papers etc. I want to further state that there are many vouchers found where the employees might have written/mentioned in their statements recorded as cash loans, however, the fact is that most of these amounts are received as advance towards our future launch of project at Dhubhi Ghat. It is also noticed that there is duplication/overlapping of entries relating to same transaction / amount in different employees' statements/papers which should not be treated separately.



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also want to say that we have declared the aforesaid amount in good faith and hence, no penalty and prosecution proceedings be initiate against the group.”

8. Taking note of the aforesaid admission made by the promoters-director/broker, the AO observed that it is proved that M/s. Omkar Group has been accepting ‘On Money’ in its various real estate deals. And that Shri Kamal Kishore Promoter director have accepted the fact that they collected as ‘On-Money’ Rs.81,30,00,000/- which has not been recorded in books of accounts and had not been offered for tax in different financial years. He has disclosed this amount of Rs.81,30,00,000/- on account of unrecorded ‘On-Money’ receipts and also mentioned that this disclosure is over and above the regular income shown in the books of accounts of the companies. The AO observed that during the course of post search proceedings, entity wise and financial year wise undisclosed income has been worked out by the assessee. Further, when all the data was collated and examined, the *on-money* amount taken in various projects by M/s. Omkar group was re-submitted at Rs. 105,41,65,564/- as below:

SUMMARY OF ON-MONEY RECEIVED (in Rs.)					
Name of Company	AY 2013-14	AY 2014-15	AY 2015-16	AY 2016-17	Grand Total
ERA Realtors Pvt. Ltd.	-	-	-	2,02,74,400	2,02,74,000
Omkar Realtors & Developers Pvt. Ltd.	-	1,04,63,200	38,52,49,814	30,43,60,900	70,00,73,914
Omkar Realtors	-		10,74,90,000	10,91,46,400	21,66,36,400



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Projects Pvt. Ltd.					
Omkar Venture Pvt. Ltd.	5,47,80,750	5,47,80,750	-	70,00,000	11,61,81,250
VGS Realty Construction Pvt. Ltd.	-	-	-	10,00,000	10,00,000
Grand Total	5,47,80,750	6,48,63,700	49,27,39,814	44,17,81,300	105,41,65,56

9. Taking note of the above chart, wherein the director of assessee has offered in its hand Rs.10,74,90,000/- for AY. 2015-16 and Rs.10,91,46,400/- for AY. 2016-17, the AO gave a show cause notice to assessee as to why the same should not be added as income of assessee. Pursuant to the show-cause notice, the assessee company submitted its reply as under:-

“2. In the notice your goods self has called upon us to explain why addition on account of alleged on money in guise of director discount of Rs.10,74,90,000/- and Rs. 10,91,46,400/- for AY. 2015-16 and 2016-17 respectively Should not be made.

3. We submit that during the course of search proceedings on 03.06.2015 at Omkar group the directors and employees have interalia, on account of on-money from the sale of constructed premises in the Projects undertaken by us.

4 On the basis of these documents and the statements of various parties, Shri Kamal Kishore Gupta Chairman of Omkar group was asked to make declaration of income Accordingly in response to Q.66 of his statement recorded from 03.06.2015 to 06.06.2015, to buy peace of mind, he made aggregate declaration of Rs. 202.8 crores in respect of various items, including the declaration of ‘on money’



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received on sale of units totaling to Rs. 94.74 crores. Since, the declaration was subject to some repetition and overlapping, within the given constraints of time and resources, the amount of 'on-money' was reconciled and revised from 94.74 crores to Rs. 105.42 crores, out of the same 'on money' alleged to have been received by us was Rs. 21,66,36,400/- breakup which is as under:

Assessment Year	Amount
2015-16	10,74,90,000/-
2016-17	10,91,46,400/-
Total	21,66,36,400/-

5. we submit that the above figures of 'on money' were determined on the basis of seized materials and other information. The initial declaration was made within the constraint of time and resources and at the time when search action was ongoing. This declaration, as replied in the statement, was subject to re-verification and reconciliation. Although, it was reconciled later, yet, due to shortage of time, some errors remained in the working and could not be corrected Subsequently, at the time of filing of the return in response as. 153A/C of the Act, we had once again perused the seized materials to ascertain the correct amount of 'on money' received in the project.

6. On verification, it was transpired that the amount of Rs. 10,74,90,000/- stated to be received in A.Y. 2015-16 in respect of our Dhobighat project was infact the amount received by other group concern. M/s Omkar Realtors and Developers Pvt. Ltd (ORDPL) These were never collected received by us nor did it pertain to any projects undertaken



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by us. This is evident from the seized material at Annexure A-1 0-2 from page no 62 to 70 and 73 to 74 which represents Bills of Exchange executed by ORDPL for accepting loans taken on various dates totaling to Rs. 10,74,90,000/-.

7. Under these circumstances, the amount of Rs. 10,74,90,000/- for AY. 2015-16 does not represent any income belonging to the assessee company.”

10. The AO did not accept the aforesaid contention put forth by the assessee. According to AO, the Group Chairman Sh. Kamal Kishore Gupta and the various relevant employees of the group when confronted with the material seized i.e. A-1/0-2 from page no. 62 to 70 and 73 to 74 had confirmed that the amount reflected in the receipts are the monies received in cash against the project ‘Dhobi ghat’. Since assessee did not bring on record any new evidence other than the material seized during the search and which has already been confronted to the assessee and explained by the assessee in his statement on oath u/s 132 of the Act, the monies received to the tune of Rs.10,74,90,000/- was treated as unexplained and brought to tax in the hands of the assessee.

11. And thereafter, the AO made an addition of Rs.10,74,90,000/-. Aggrieved, the assessee preferred an appeal before the Ld. CIT(A) who was pleased to delete the same by taking note that this amount (on-money) was part of the loan taken



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by parent company (M/s. ORDPL) and offered the same before the Settlement Commission; and the Settlement Commission has accepted the offer made by the assessee and since it became a part of the income from undisclosed income of the parent company (M/s. ORDPL), the Ld. CIT(A) was pleased to delete the addition by holding as under: -

“7.3 The submission made by the assessee has been examined. It is claimed that the amounts represent a loan taken by a group concern ORDPL and not on-money received by the assessee with respect to a project executed by it. In support of its claim, the assessee has filed copy of 9 bills of exchange totaling to Rs 10,74,90,000/- wherein money has been received from one Arun Jain. It is claimed by the assessee at these amounts represent debts / loans accepted from Arun Jain and hence do not represent sales consideration received in cash.

7.4 The assessee has cited Rule 9 report of the Commissioner filed before Settlement Commission in support of its claim that even the Department has accepted that the amounts represent loan in the hands of ORDPL and the matter has been dealt with accordingly by the Settlement Commission. In this regard, the report filed by the CIT before Settlement Commission vide letter dated 28.12.2017 has been examined and relevant portion is reproduced below:

As called for, a report under Rule 9 of the Income Tax Settlement Commission (Procedure) Rules 1997 (i.e. Rule 9 Report), is submitted herewith. The issues on which the applicant has made offer of undisclosed Department, the



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applicant has not made any offer, but ought to have made, are discussed in the successive paras of the report.

Issue of Unexplained “Cash Loans” and “Advances”

1. During the course of search action, evidence gathered revealed that the assessee group has taken certain amounts in cash. In his statement recorded on oath, Shri Kamal Kishore Gupta, Chairman of Omkar Group has admitted that Omkar group has taken cash loans. On perusal of seized material and cash payment vouchers, cash receipt vouchers, whatsapp messages and information gathered till date, the details of the parties from whom Omkar Group has accepted cash are as under: -

Sr. No	Name of the party	Amount received in cash
1	ML Singhania	20000000
2	ML Singhania	30000000
3	Dilip Patel	29900000
4	Ritesh Lunkar CB	12500000
5	Sunil Dalal	50000000
6	Arun Jain	10000000
7	Arun Jain	10000000
8	Arun Jain	74900000
9	Vikash Sharma	20000000
10	Ganesh Keshvan	11200000
11	Kale CB	10000000
12	Arun Jain	20000000
13	Arun Jain	20000000
14	Arun Jain	20000000
15	Arun Jain	10000000
16	Arun Jain	12500000
17	Arun Jain	75000000
18	Rajni Finance	25000000
19	Samita Vazirani	20000000
20	Ramesh Jogani	15000000
21	Deshmukh	70000000
22	Sunil Mithu Ji	10000000
23	Pravin Bhai	75000000
24	Manoj Singhania	50000000
25	Rajaram	20000000
26	Sandeep Saraf	15000000
27	Iqbal Bhai	15000000
28	Vikas Sharma	10000000
29	Bipin Patel	30000000
30	Zuber	5000
31	Sadeep Saraf	20000000
32	Hunuman Jain	20000000
33	Ramratan Khandelwal	50000000
34	Ramratan Khandelwal/Sitaram Khandelval	25000000
35	Mukesh Jain	200000000
36	Rajendra Kale	250000000
37	Rajendra Kale	250000000
38	Yogesh Chandgothia	250000000
39	Kishore Agarwal	4500000
40	Kishore Agarwal	3000000



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Total	31,39,45,000
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1. Further, it was also found that the Omkar Group has made cash payments to the following parties:

Sr. No	Name of the party	Amount Received in cash
1	Manohar lal singhania	20000000
2	Manohar lal singhania	8000000
3	Manohar lal singhania	2000000
4	Manohar lal singhania	5000000
5	Manohar lal singhania	5600000
6	Manohar lal singhania	9400000
7	Zuber	5000
8	Pravin Bhai	7500000
9	Bharatbhai	5000000
10	Ramesh Jogani	1500000
11	Deshmukh	1900000
12	Dilip Patel	1900000
13	Shantaben Patel	2800000
14	Kale	1000000
15	Ganesh Kashvan	1150000
16	Kale	1000000
17	Deshmukh	5000000
18	Rajni Finance	2500000
	Total	10,40,55,000

10.3 Objection of the Revenue

(i) Though the assessee has claimed the above transactions as cash loans and advances, it may be treated as cash receipts of the assessee for the relevant period and addition of the above amounts to its income may be considered. Since the cash loan received by the assessee from A.Y.2010-11 to A.Y. 2016-17 is in clear violation of the provisions of Section 269SS of the I.T. Act, 1961, applicant is liable for penalty proceedings u/s 271D of the Act.

7.5 The decision of the Settlement Commission on this issue is reproduced below:

11.7 The Sixth issue is regarding treatment of cash loan. The issue in this regard has been discussed in para 6.2 para 7.11



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and para 8.11 of this order. In this regard the Pr.CIT vide her letter dated 17.12.2018 has submitted further that.

“The assessee has submitted the year-wise peak working of the cash loans as per Annexure III. It is humbly submitted that the applicant has received cash loans from various parties. The assessee has not submitted complete Name, Address and PAN of the parties from whom assessee has claimed to have taken cash loans Hence, the identity of the loan giver; genuineness and creditworthiness of these parties could not be verified. Thus, it is prayed that the Hon'ble Settlement Commission may consider treating entire cash loans as income of the assessee and penalty u/s. 271D of the IT Act may be levied.”

11.7.1 The applicant against this observation has submitted that it has given its reply to the Rule 9 report in the rejoinder to Rule 9 report filed on 01.02.2018. Further, the Applicant wishes to clarify that the amount of loans of Rs. 31.39 crore taken by the department does not cover all the loans taken by the Applicant during the aforementioned period. It is submitted that the total loans taken by the Applicant on its own account and in the name of its group concerns and also other parties over the various years covered in the application is amounting to Rs. 51,67,45,000/-. These amounts represents loans only and are not cash receipts. In fact, these loans have also been repaid back by the Applicant to various parties subsequently. The fact that the amounts collected are loans is supported by the evidences and documents in the seized materials which clearly shows that these amounts represents loans taken by the Applicant. Further, they also clarify that the Applicant has not taken benefit of such cash loans in the fund flow statement filed before Hon'ble Settlement Commission.

11.7.2 Without prejudice, even presuming that the aforesaid amounts are cash receipts as alleged by the department, it is submitted that the Applicant has worked out peak credit for each of the year in respect of aforesaid receipts. The peak credit for all the years in aggregate comes to Rs. 34,86,95,000/-. The effect of yearly peak Credit on the fund flow statement is also worked out. The working of peak and revised fund flow statement in also filed before the Ld. PCIT vide letter dated 12.12.2018. On perusal of the working and its



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effect on the fund flow Statement, it can be seen that the additional income is arising in A.Y. 2011-12 and A.Y. 2016-17 and that in other years, cash balance is much more than the peak amount of loan determined for each year. In view the above, even #f the prayer of the Applicant that loans are genuine is not accepted, the peak balance of receipts may kindly be considered and that after granting telescoping of the cash balance available, the shortage of cash, if any, at the most be treated as additional income of the Applicant.

11.7.3 From the above, it is clear that the Pr.CIT is in agreement with the working of peak credit of cash loan as submitted by the applicant. As regards treating the same as income of the applicant, the applicant during the subsequent hearing agreed for the peak credit of cash loan to be treated as its own money in the spirit of settlement and has submitted in this regard vide its letter dated 12.03.2019 is as under:

“9. In the SOF, the applicant has submitted that cash loans were accepted by the applicant in its own name or in the names of various other group concerns during A.Y. 2010-11 to 2016-17. The seized materials placed on record before the Hon'ble Settlement Commission also. reveals the receipt of cash loans. The Department in its report dated 28.12.2017 in Rule 9 has also confirmed the receipt of cash loans by the applicant to the tune of Rs. 31,39,45,000/-. Subsequently, during the course of hearing before the Hon'ble Settlement Commission, the details of loans taken and repaid were also submitted showing aggregate loans taken to the tune of Rs. 51,67,45,000/- and repayment of loans to the extent of Rs. 16,80,50,000/-.

10. The applicant submits that with a view to settle the case, it has treated the said transactions as its own money. The peak working of the said amount of loans works out to Rs, 34,87,95,000/-. The detailed working of the cash loans with peak working was submitted before the Ld. PCIT, Central-2 vide letter dated 13.12.2018 and the same is also filed on 21.12.2018 before the Hon'ble Settlement Commission at Page 3308-3312 of APB-14,

11. The applicant has considered the said peak as application of unaccounted income offered and included in the fund flow



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statement. The revised fund flow statement duly incorporating the peak loan is enclosed herewith at Page 3758. Since, the peak of loan is explained by the income offered and no separate addition is called for.”

11.7.4 We have considered the facts mentioned above and the offer of the applicant as submitted vide its letter dated 12.03.2019 and reproduced above. We find the offer of the applicant in order. The Id. CIT DR and AO present during the hearing could not find fault against such offer. The said offer is therefore accepted accordingly.

7.6 It is noted that the entire amount of Rs 10,74,90,000/- relates to amounts accepted by ORDPL from one Arun Jain. Mr Arun Jain has not taken any flat in any of the appellant's projects. As such, the AO's inference that the amount represents on-money in the hands of the assessee is not found correct. It is also noted that the entire amount of Rs.10,74,90,000/- taken from 'run Jain lbeen accepted as loan taken by ORDPL and the CIT has accepted as such in the Rule 9 report. The Settlement Commission has accepted this offer. Hence, the same amount cannot be added as income in the hands of the assessee.

7.7 In light of the above discussion, the amount, having been already included in the Settlement Petition filed by ORDPL before the Settlement Commission, cannot be once again a matter of discussion in the hands of the appellant. The AO is directed to delete the addition.

7.8 The ground of appeal raised by the assessee stands allowed.

8. In the result, the present appeal is partly allowed.”



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12. Aggrieved by the aforesaid action of the Ld. CIT(A) deleting the addition based on the offer made by the assessee before the Settlement Commission, the revenue is before us.

13. Assailing the action of the Ld. CIT(A), the Ld. CIT-DR drew our attention to question no. 35 (supra) wherein the assessee when confronted by search party that the key employees of the company has accepted the fact of the assessee was receiving on-money payment and has given the details of such money collected flat-wise. And that the assessee's director has admitted to have received cash of Rs.81.30 crores as on-money; and drew our attention to the chart given below question no. 35 wherein the list of customers who gave 'on money' is given. And thereafter he drew our attention to question no. 66 (supra) at page no. 25 of the assessment order wherein item no. 3 in the chart Rs.14.94 crores have been shown which according to the Ld. DR was cash receipt of cash loans and advances against future projects; and it has nothing to do with on-money collected by assessee on the sale of flats to the tune of Rs.81.30 crores as given under question no. 35 (supra). Further, the Ld. DR drew our attention to the question no. 67 (supra) wherein the assessee's director has admitted that during search many vouchers have been recovered from the assessee's premises which shows cash loans etc (written by employees as to the nature of transaction) but actually most of the same was amounts received as advance towards future launch of



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project at Dhobhi Ghat. Therefore, according to the Ld. CIT-DR, this amount of Rs.10,74,90,000/- has nothing to do with the on-money transaction accepted by the assessee. According to the Ld. CIT-DR, the aforestated statement given has not been retracted by the director of the assessee company. Therefore, according to him, the Ld. CIT(A)'s findings that this amount is also a part of the loan transaction shown by the parent company (M/s. ORDPL) is erroneous and this amount (Rs.10,74,90,000/-) doesn't get subsumed in the Settlement Commission order which was rightly added by the AO (Rs.10,74,90,000/-). Therefore, according to the Ld. CIT-DR, the decision of the Ld. CIT(A) is erroneous and therefore, it has to be reversed and the action of the AO need to be upheld.

14. Per contra, the Ld. AR drew our attention to the page no. 13 to 21 of the PB which is the seized material A-1/0-2 (referred by AO in the assessment order as page no. 62 to 70 & 70-73) which was the basis of addition of Rs.10,74,90,000/-; and our attention was drawn to page no. 14 which is a bill of exchange and a perusal of it reveals that the recipient of amount is shown as assessee's parent company M/s. Omkar Realtors & Developers Pvt. Ltd. & Others (M/s. ORDPL) which has received Rs.100,00,000/- @ 18% from Shri Arun Jain The Ld. AR also drew our attention to page no. 13 to 21 of the PB wherein we note that identical bill of exchange acknowledges receipt of different



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sum of amount (figures) by M/s. ORDPL from Shri Arun Jain; the specific details money on interest received from Shri Arun Jain is noted from perusal of page 13 of PB which reveals that Rs.1 crores has been received by (M/s. ORDPL); and similarly perusal of page 14 it is noted that Rs. 1 crores @ 18% has been received by M/s. ORDPL; and at page no. 15 it is noted that M/s. ORDPL received Rs.74,90,000/- @ 18%; and at page no. 16 it is noted that M/s. ORDPL has received Rs. two (2) crores @ 18%; and perusal of page no. 17 of PB reveals that Rs.one (1) crores has been received by M/s. ORDPL @ 18%; and perusal of page no. 18 reveals a bill of exchange of Rs.one (1) crores @ 18% received by (M/s. ORDPL) is found placed; and page no. 19 reveals that M/s. ORDPL received Rs.two (2) crores and perusal of page no. 20 reveals a bill of exchange of Rs. 1.25 crores received by M/s. ORDPL @ 18%; and at page no. 21 another bill of exchange of Rs.75 lakhs received by M/s. ORDPL is found placed therein. Thus according to the Ld. AR, these bills of exchange of total sum of Rs.10.74 crores is nothing but loan received from Arun Jain by the parent company M/s. ORDPL which has been duly offered for taxation/settlement before Ld. Settlement Commission. For buttressing this fact the Ld. AR drew our attention to page no. 31 to 57 of the PB which is the report filed by the Commissioner of Income Tax under Rule 9 of the Income Tax Settlement Commission (Procedure) Rules 1997 in the case of M/s. Omkar Realtors & Developers Pvt. Ltd. (M/s.



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ORDPL). The Ld. AR drew our attention especially to page no. 52 of the PB wherein he drew our attention to the para no. 10.2 wherein the following chart is reproduced as under: -

Sr. No	Name of the party	Amount received in cash
1	ML Singhania	20000000
2	ML Singhania	30000000
3	Dilip Patel	29900000
4	Ritesh Lunkar CB	12500000
5	Sunil Dalal	50000000
6	Arun Jain	10000000
7	Arun Jain	10000000
8	Arun Jain	74900000
9	Vikash Sharma	20000000
10	Ganesh Keshvan	11200000
11	Kale CB	10000000
12	Arun Jain	20000000
13	Arun Jain	20000000
14	Arun Jain	20000000
15	Arun Jain	10000000
16	Arun Jain	12500000
17	Arun Jain	75000000
18	Rajni Finance	25000000
19	Samita Vazirani	20000000
20	Ramesh Jogani	15000000
21	Deshmukh	70000000
22	Sunil Mithu Ji	10000000
23	Pravin Bhai	75000000
24	Manoj Singhania	50000000
25	Rajaram	20000000
26	Sandeep Saraf	15000000
27	Iqbal Bhai	15000000
28	Vikas Sharma	10000000
29	Bipin Patel	30000000
30	Zuber	5000
31	Sadeep Saraf	20000000
32	Hunuman Jain	20000000
33	Ramratan Khandelwal	50000000
34	Ramratan Khandelwal/Sitaram Khandelval	25000000
35	Mukesh Jain	200000000
36	Rajendra Kale	250000000
37	Rajendra Kale	250000000
38	Yogesh Chandgothia	250000000
39	Kishore Agarwal	4500000
40	Kishore Agarwal	3000000
	Total	31,39,45,000



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15. The Ld. AR drew our attention to item no. 6, 7, 8, & 12 to 17 (supra) which duly reflect the amount of loan given by Shri Arun Jain to M/s. ORDPL which has been discussed at para 14 (supra) and therefore it shows total amount/loan of Rs.10.74 crores; and has been settled/offered along with total amount of Rs.31,39,45,000/- in the hands of M/s. ORDPL; and this amount has been accepted by the Ld. Settlement Commission. Our attention was drawn to page no. 55 of PB wherein the objection of the revenue has been reproduced at 10.3 (i) to (ii) of the PB as under.

“10.3 Objection of the Revenue

(i) Though the assessee has claimed the above transactions as cash loans and advances, it may be treated as cash receipts of the assessee for the relevant period and addition of the above amounts to its income may be considered. Since the cash loan received by the assessee from A.Y.2010-11 to A.Y. 2016-17 is in clear violation of the provisions of Section 269SS of the I.T. Act, 1961, applicant is liable for penalty proceedings u/s 271D of the Act.

(ii) In view of the discussion of various issues above covered in the petition, it is submitted that the disclosure made by the applicant is less and may kindly be increased to an appropriate and correct level as stated above to arrive at true and fair settlement of issues covered in the application filed before the Hon'ble Settlement Commission.”



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16. And thereafter, the Ld. Settlement Commission by order dated 29.03.2019 u/s 245D (4) of the Act has taken note of the offer/additional offer made by M/s. ORDPL wherein an amount of Rs.31.39 crores (which subsumed Rs.10.74 crores) received by (M/s. ORDPL) from Arun Jain [which we note were the bill of exchange showing that M/s ORDPL received loan from Arun Jain and the relevant bill of exchange was seen placed at page no. 13 to 21 of the PB (supra) and which has been taken note at para 14 (supra)]. And the Ld. AR drew our attention to the order of Settlement Commission which is found at page no. 61 at para no. 11.7 to 11.7.4 which is as under: -

“11.7. The Sixth issue is regarding treatment of cash loan. The issue in this regard has been discussed in para 6.2 para 7.11. and para 8.11 of this order. In this regard the Pr. CIT vide her letter dated 17.12.2018 has submitted further that:

“The assessee has submitted the year-wise peak working of the cash loans as per Annexure III. It is humbly submitted that the applicant has received cash loans from various parties. The assessee has not submitted complete Name, Address and PAN of the parties from whom assessee has claimed to have taken cash loans. Hence, the identity of the loan giver, genuineness and creditworthiness of these parties could not be verified, it is prayed that the Hon'ble Settlement Commission may consider treating entire cash loans as income of the assessee and penalty u/s. 271D of the IT Act may be levied.”



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11.7.1. The applicant against this observation has submitted that it has given its reply to the Rule 9 report in the rejoinder to Rule 9 report filed on 01.02.2018. Further, the Applicant wishes to clarify that the amount of loans of Rs.31.39 crore taken by the department does not over -II the loans taken by the Applicant during the aforementioned period. It is submitted that the total loans taken by the Applicant on its own account and in the name of its group concerns and also other parties over the various years covered in the application is amounting to Rs. 51,67,45,000/-. These amounts represent loans only and are not cash receipts. In fact, these loans have also been repaid back by the Applicant to various parties subsequently. The fact that the amounts collected are loans is supported by the evidences and documents in the seized materials which clearly shows that these amounts represents loans taken by the Applicant. Further, they also clarify that the Applicant has not taken benefit of such cash loans in the fund flow statement filed before Hon'ble Settlement Commission.

11.7.2. Without prejudice, even presuming that the aforesaid amounts are cash receipts as alleged by the department, it is submitted that the Applicant has worked out peak credit for each of the year in respect of aforesaid receipts. The peak credit for all the years in aggregate comes to Rs.34,86,95,000/-. The effect of yearly peak credit on the fund flow statement is also worked out. The working of peak and revised fund flow statement is also filed before the Ld. PCIT vide letter dated 12.12.2018. On perusal of the working and its effect on the fund flow



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statement, it can be seen that the additional income is arising in A.Y. 2011-12 and A.Y. 2016-17 and that in other years, cash balance is much more than the peak amount of loan determined for each year. In view the above, even if the prayer of the Applicant that loans are genuine is not accepted, the peak balance of receipts may kindly be considered and that after granting telescoping of the cash balance available, the shortage of cash, if any, at the most be treated as additional income of the Applicant.

11.7.3. From the above, it is clear that the Pr.CIT is in agreement with the working of peak credit of cash loan as submitted by the applicant. As regards treating the same as income of the applicant, the applicant during the subsequent hearing agreed for the peak credit of cash loan to be treated as its own money in the spirit of settlement and has submitted in this regard vide its letter dated 12.03.2019 is as under:

“9. In the SOF, the applicant has submitted that cash loans were accepted by the applicant in its own name or in the names of various other group concerns during A.Y. 2010-11 to 2016-17. The seized materials placed on record before the Hon'ble Settlement Commission also reveals the receipt of cash loans. The Department in its report dated 28.12.2017 in Rule 9 has also confirmed the receipt of cash loans by the applicant to the tune of Rs. 31,39,45,000/-. Subsequently, during the course of hearing before the Hon'ble Settlement Commission, the details of loans taken and repaid were also submitted showing aggregate loans taken to the tune of Rs. 51,67,45,000/- and repayment of loans to the extent of Rs. 16,80,50,000/-.



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10. The applicant submits that with a view to settle the case, it has treated the said transactions as its own money. The peak working of the said amount of loans works out to Rs. 34,87,95,000/-. The detailed working of the cash loans with peak working was submitted before the Ld. PCIT, Central-2 vide letter dated 13.12.2018 and the same is also filed on 21.12.2018 before the Hon'ble Settlement Commission at Page 3308 - 3312 of APB-14.

11. The applicant has considered the said peak as application of unaccounted income Offered and included in the fund flow statement. The revised fund flow statement duly incorporating the peak loan is enclosed herewith at Page 3758. Since, the peak of loan is explained by the income offered and no separate addition is called for.”

11.7.4. We have considered the facts mentioned above and the offer of the applicant as submitted vide its letter dated 12.03.2019 and reproduced above. We find the offer of the applicant in order. The Id. CIT DR and AO present during the hearing could not find fault against such offer. The said offer is therefore accepted accordingly.”

17. In the light of the Ld. Settlement Commission finding (supra) the amount of Rs.10.74 crores got subsumed in the Ld. Settlement Commission order of M/s. ORDPL. Therefore, according to the Ld. AR, the Ld. CIT(A) has correctly given relief to assessee, which does not require any interference from our side.



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18. We have heard both the parties and perused the records. We note that the assessee is a subsidiary of (M/s. ORDPL) and is engaged in the business of real estate development and construction in many parts of Mumbai with a focus on slum redevelopment. Based on the search in Omkar Group on 03.06.2015 and on recovery of loose papers as well as materials seized and the statement recorded u/s 132(4) of the Act, of the employees as well as that of the director of the M/s. Omkar Group/assessee company, additions were made in the hands of the five (5) companies which includes the assessee company wherein total addition in the hands of the five (5) companies were made upto Rs.105,41,66,564/-; And in the assessee's hand an amount of Rs.21,66,36,400/- was made which included addition of Rs.10,74,90,000/- for AY. 2015-16 and Rs.10,91,46,400/- for AY. 2016-17/- and protective assessment was Rs.15,82,62,000/- was made which is not an issue before us as no ground has been preferred by the revenue against the protective assessment. We further note that the assessee's parent company M/s. ORDPL before the Ld. Settlement Commission and had offered the i.e. Rs.10,74,90,000/- as their income which is clear from perusal of page no. 52-53 of the PB which reflects the unexplained cash loans and advances received inter-alia from Arun Jain which was also offered along with Rs. Rs.31,39,45,000/- which was accepted by the Settlement Commission by order dated 29.03.2019 (supra). A perusal of chart below para-11 (supra) wherein the amount



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received from Arun Jain is shown an item 6,7 & 8; as well as item no. 12 to 17 which sums up to Rs.10,74,90,000/- which stand corroborated with the PB page 13-21 which are bills of exchange evidencing loan taken from Arun Jain which is the seized documents A-1/0-2 page no. 62 to 69 (on the basis of which addition was made in the hands of assessee). Therefore, the Ld. CIT(A) taking note of this crucial fact that the amount of Rs.10,74,90,000/- which was added in the hands of assessee, was in fact offered for taxation before the Ld. Settlement Commission while submitting the details of loan received from Arun Jain by M/s. ORDPL as discussed supra. The AO has made the addition based on the chart given by Omkar Group at para 8 (supra) which was the summary of on-money received in the hands of five (5) group entities and wherein the amount of Rs.10,74,90,000/- and Rs.10,91,46,400/- has been shown to have been received by the company for AY. 2015-16 & AY. 2016-17 respectively. However, we note that this amount of Rs.10,74,90,000/- as discussed (supra) has been received by M/s. ORDPL from Shri Arun Jain. Therefore, even though it was shown in the chart as “on-money” of assessee company, in the light of the evidence brought on record (seized documents) it has been offered by M/s. ORDPL and accepted by Settlement Commission and the same amount has been again added in the hands of the assessee company. Therefore, the action of Ld. CIT(A) cannot be faulted for deleting the addition. Therefore, we confirm the impugned



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action of the Ld. CIT(A) and dismiss the revenue appeal for AY. 2015-16.

19. For AY 2016-17, Ground no. 1 & 3 of revenue is against the action of the Ld. CIT(A) accepting assessee's company's contention regarding 'on-money' received to the tune of Rs.1.15 crores and holding it as subsumed in the income accepted by the Ld. Settlement Commission in the case of M/s. ORDPL. Brief facts is that the AO after discussing about the search operation and the statement recorded during search operation based on material seized, was of the opinion that the assessee was regularly receiving on-money for flats which are sold. According to him, Shri Kamal Kishore Gupta chairman and promoter of Omkar Group has admitted and confirmed to have received on-money of more than eighty one (81) crores which are not recorded in the books of accounts. Thereafter, the AO noted that when the data were collected and examined, the *on-money* amount taken in various projects by Omkar Group were re-submitted to the tune of Rs.105,41,65,564/- allocated in the hands five entities; and in the hands of the assessee company for AY. 2016-17 offered of Rs.10,91,46,400/-. According to the AO, he issued show cause notice to the assessee as to why the cash receipt of Rs.10,91,46,400/- should not be considered as unexplained and brought to tax in its hands; and the assessee pursuant to it filed



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the reply which has been reproduced by AO at page 27 to 28 of his order. However, the AO did not accept the contention of the assessee that out of this amount i.e. Rs.10,91,46,400/- even though admitted by the chairman Shri Kamal Kishore Gupta, the correct amount of on-money received by the assessee was only to the tune of Rs.6,76,46,400/- which is corroborated by the material unearthed during search as under:

Sr. No.	Amount	Annexure/Page No
1	65,46,400/-	A-1/0-2/pg.37
2	4,00,00,000	1-2/R-7/pg.2
3	1,21,00,000	A-2/R-7/pg.113
4	90,00,000	A-2/R-7/pg 116 and 158
	6,76,46,400/-	

20. However, the AO did not accept the contention of the assessee and demonstrated in the assessment order by way of chart that assessee company had received cash against the project Dhobi Ghat Rs.10,91,46,400/- but out of which the AO noted that Rs.2.50 crores had been taxed in the hands of M/s.Vedaramb Properties LLP. So he reduced the same, therefore, he added Rs.8,41,46,400/- in the hands of the assessee on account of *on-money* receipt by holding as under: -

“8.6 The contention put forth by the assessee is not accepted as the Group Chairman Sh. Kamal Kishore Gupta and the various relevant employees of the group was confirmed the facts when confronted with the material seized, the details of the same are tabulated as under: -



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Sr. No.	Company	Document Description	Identification of seized Document	Name of the project	Name of the person	Purpose	On money
1	Omkar Realtors Projects Pvt. Ltd.	Cash Receipt voucher	02/A1/Pg. 37	Saat Rasta-Dhobigh	Sagar Maniar	Advance for project to be launched	6,546,400
2	Omkar Realtors projects Pvt. Ltd.	Cash Receipt voucher	R7-A2/pg/113	Saat Rasta-Dhobigh	Anil Goel	Advance for project to be launched	40,000,000
3	Omkar Realtors Projects Pvt. Ltd.	Cash Receipt voucher	R7-A2/pg. 113	Saat Rasta-Dhobigh	Chetanbhal	Advance for project to be launched	12,100,000
4	Omkar Realtors Projects Pvt. Ltd.	Cash Receipt voucher	R7-A2/Pg.116 & 158	Saat Rasta-Dhobigh	Kesha P Jhaveri	Advance for project to be launched	9,000,000
5	Omkar Realtors Projects Pvt. Ltd.	Cash Receipt voucher	R7/A2/Pg. 128 & 132	Saat Rasta-Dhobigh	Girija Agarwal (Director) Prateek	Advance for project to be launched	25,000,000
6	Omkar Realtors Project Pvt. Ltd.	Cash Receipt voucher	02/A1/Pg52 & 53	Saat Rasta-Dhobigh	SV Shah	Advance for project to be launched	2,500,000
7	Omkar Realtors Project Pvt. Ltd.	Cash Receipt voucher	R7-A2/pg.134 & 136	Saat Rasta-Dhobigh	Ramratan Khandelwal Shiv	Advance for project to be launched	10,000,000
8	Omkar Realtors Project Pvt. Ltd.	Cash Receipt voucher	02/A1/pg. 50	Saat Rasta-Dhobigh	Mukesh Jain	Advance for project to be launched	2,000,000
9	Omkar Realtors Project Pvt. Ltd.	Cash Receipt voucher	R-7-A2/pg. 133	Saat Rasta-Dhobigh	Hanuman Jain	Advance for project to be launched	2,000,000

8.7 From the aforesaid confirmation carried out during the search and post search proceedings, it is clear that the amount reflected in the receipts are the monies received in cash against the project “Dhobighat”. It is worth mention here that the statements of various persons recorded during the search proceedings u/s 132 of the I. T. Act have not been retracted by anyone. During the search assessment proceedings the assessee the flip-flopped and his contention cannot be accepted under such circumstances



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without cogent documentary evidence. As assessee has not brought any new evidence other than the material seized during the search and which has already confronted and explained by the assessee in his statement on oath u/s 132 of the IT Act. On further verification it was revealed that the addition of Rs.2,50 cr. Which is reflected at Sl. No. 5 of above table is basis of seized.

8.8 In the above document, it is clearly mentioned that cash receipt is in the name of M/s. Vedaramb Properties LLP and the same has been brought to tax in the hands of M/s. Vedarambh Properties LLP. Thus to avoid the double addition, Rs.2,50 cr. Is reduced to the total cash receipt. In the light of above facts and the discussion made in foregoing paragraphs the monies received to the tune of Rs.8,41,46,400/- (10,91,46,400 – 2,50,00,000) is treated as unexplained and brought to tax in the hands of the assessee. Penalty proceedings u/s 271(1)(c) of the I. T. Act are initiated separately for furnishing inaccurate particulars of income, thereby concealment of income chargeable to tax.

(Addition Rs.8,41,46,400/).

21. Aggrieved, the assessee preferred an appeal before the Ld. CIT(A) who noted that out of aforesaid amount of Rs.8,41,46,400/-; an amount of Rs.1,15,00,000/- has already been offered as loan/cash in the hands of M/s. ORDPL; and the Ld. CIT(A) referred to the Ld. Settlement Commission order wherein the Ld. Settlement Commission has taken note of the Rule 9



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report submitted by PCIT before the Ld. Settlement Commission (supra) and noted that M/s. ORDPL had submitted a chart which showed serial number, name of party and amount received in cash, wherein it showed that it received an amount of Rs.31,39,45,000/- which included the following transactions which was being added by the AO as that of the assessee.

Sl No.	Person	Amount in Rs.
32	Hanuman Jain	20,00,000
33	Ramratan Khandelwal	50,00,000
34	Ramratan Khandelwal/Sitaram Khandelwal	25,00,000
35	Mukesh Jain	20,00,000
	Total	1,15,00,000

22. The Ld. CIT(A) rightly took note that the Ld. Settlement Commission has accepted the offer made by the M/s. ORDPL wherein it was noted that M/s. ORDPL received cash loans to the tune of Rs.31,39,45,000/- (confirmed by Rule 9 by Ld. PCIT) and the fact that the aggregate loan taken was to the tune of Rs.51,67,45,000/- from which the re-payment of loan was to the tune of Rs.16,89,50,000/-; and thus balance loan was to the tune of Rs.34,87,95,000/-. In the spirit of settlement of M/s. ORDPL offered to settle the dispute by offering to treat the said transaction as its on-money i.e. Rs.34,87,95,000/- being the peak amount M/s. ORDPL considered the said peak as application of unaccounted income which was offered and included in the fund flow statement. And the revised fund flow statement duly incorporating the peak amount/loan was enclosed in its letter dated 12.03.2019 at page no. 3758. The Ld. Settlement Commission accepted the offer, since the Ld. PCIT-DR and the



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AO present before the Ld. Settlement Commission during the hearing could not find fault against such an offer made by the M/s. ORDPL. Taking note of this action of the Ld. Settlement Commission, the Ld. CIT(A) noted that Rs.1,15,00,000/- did not pertain to four (4) parties who have not invested in flats. So the Ld. CIT(A) held that Rs.1.15 crores cannot be characterized as *on-money* on sale of flats. He also rightly noted that the amount of Rs.1.15 crores has been accepted in the hands of M/s. ORDPL, after calling for Rule 9 report from the Ld. PCIT. Therefore, the Ld. CIT(A) rightly held that Rs.1.15 crores cannot be again added in the hands of the assessee which does not require any interference from our side and we confirm it.

23. Next ground of appeal of the revenue is against the action of the Ld. CIT(A) restricting the addition only to the gross profit (GP) rate 17.5% of Rs.7,26,46,400/- (ie. balance addition made by AO Rs.8,41,46,400/- minus Rs.1,15,00,000/-) without taxing the entire sum as *on money* to be taxed as per the relevant provisions of the Act. We note that the Ld. CIT(A) has deleted the addition by holding as under: -

“7.8 The remaining amount of Rs.7,26,46,400/- (8,41,400/- - 1,15,00,000/-) does not form part of the Settlement Petition and is required to be brought to tax in the hands of the appellant. The assessee has offered an income being 15% of Rs 6,76,46,400/- claiming that the entire receipt cannot be brought tax as income in face of



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clear evidences that significant expenditure was being made cash looking at the nature of the group's activities. The assessee has relied on the order of the Settlement Commission wherein a GP rate of 17.5% has been accepted by the Commission. It has also relied on another group case where a GP rate of 25% has been adopted by the CIT(A) although not accepted by the assessee. It is assessee's claim that in light of clear evidences of expenses which the appellant is required to make in cash, a reasonable GP rate needs to be adopted to arrive at the correct income of the assessee rather than adopting the entire receipt as income of the appellant. Reliance has also been placed by the appellant on the decision of the Settlement Commission in group cases on this issue.

7. 9 The claim of the assessee that the entire on-money receipt cannot be adopted as its income in face of clear evidences of cash expenses incurred by the group is accepted. There are sufficient evidences of expenditure related to business having been incurred which has not been reflected in regular accounts. It is also noted that ORDPL, the lead company of the group had approached Settlement Commission with an offer of treating 15% of such receipts as income of the assessee, The Settlement Commission accepted an enhanced rate of GP of 17.5% as a rational offer. The observations of the Settlement Commission on this issue are as reproduced below:

“11.4.5 We have considered the facts very carefully. The applicant could very successfully demonstrate the existence of evidences of cash expenses for the purpose of business, the source of which obviously has to be the



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unaccounted cash receipts. As mentioned in para 5.1 of this order, Shri Kamal Kishore Gupta while declaring undisclosed income of Rs 202.80 crore during the course of search has admitted the unaccounted cash expenses of Rs 1.26 crore. Thus the existence of cash expenses for the purpose of business cannot be denied. The Pr. CIT has also not denied the existence of such expenses which is evident from the fact that he / she herself has requested to estimate profit at the rate of 38%. We have considered the evidences regarding expenses in cash found during the course of search. We have also considered the fact that the applicant is mainly engaged in SRA projects and various factors associated with this type of project which require lot of expenditure in cash in various processes such as negotiation with slum dwellers, additional compensation to slum dwellers for their extended premises, compensation to the committee members for liasoning with the slum dwellers, payment to other intermediaries, construction cost for Rehab building, etc which has 'been very clearly mentioned by the applicant in its SOF and subsequent submissions as well as during hearing. We have also considered. the fact that even though evidence of on-money found the case of applicant is only to the extent of approximately Rs 70 crore but it has offered, on-money of more than Rs 530 crore in the allocation and finally offered to Rs 600 crore... The analysis of expenses incurred in cash for the purpose of business as mentioned in SOF and summarized in para 6.1(i)(G) above clearly demonstrate that profit percentage in th case of applicant cannot be as high as 38% as proposed by Pr. CIT. The facts of the present case cannot be compared with the facts of cases mentioned by Pr CIT as o SRA project were involved in those cases. Further the facts of each case are different and the same cannot be compared. The perusal of



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revised fund flow statement submitted by the applicant vide its letter dated 12.03.2019 reveals that the application of income is far below the income so estimated at the rate of 17.5% of unaccounted gross receipts offered by the applicant vide its letter dated 12.03.2019. This fund flow statement has been perused by CIT DR and AO present during the hearing also and they did not object against estimation of profits out of unaccounted gross receipts at the rate of 17.5%. We therefore direct to adopt the profit rate at 17.5% of unaccounted gross receipts as against 15% offered in SOF by the applicant.”

7.9 It is noted that the assessee is a group company handled by the same promoters and is also engaged in developing SRA projects. As such, the facts of the appellant company are exactly similar to that of the flagship company. In my view, the rate of 17.5% represents a reasonable rate of GP for the assessee and has also been accepted by the Settlement Commission in the case of the flagship company of the group. The AO is directed to adopt an enhanced GP rate of 17.5% for computing the profits with respect to the above amount of Rs 7,26,46,400/-. While computing the unaccounted income, credit may be given to the assessee with respect to the income to the extent of 15% of Rs 6,76,46,400/- already offered by the assessee. The ground is decided accordingly.

7.7 For statistical purpose, the ground is treated as partly allowed.”



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24. Aggrieved by the aforesaid action of Ld. CIT(A) directing AO for adopting 17.5% for computing profit of Rs.7,26,46,400/- the revenue is before us.

25. We have heard both the parties and perused the records. The Ld. AR brought to our notice the judgment of the various Hon'ble High Courts including the Hon'ble Madhya Pradesh High Court in the case of Man Mohan Sadani Vs. CIT (304 ITR 52) and the decision of the Hon'ble Gujarat High Court in the case of Jay Builder Vs. ACIT (33 Taxmann.com 62) to substantiate that in case wherein '*on-money*' has been received by the assessee, and if it is shown by assessee has incurred cash expenses which were not recorded in the books of the assessee (as revealed in this case due to seizure of material which shows expenses in cash also not recorded in books) in such an event, only profit embedded in the *on-money* can only be brought to tax. It is not the case of the AO that the *on-money* has been used by the assessee for making any undisclosed investment (which has been un-earthed by search operation) in either form of immovable or movable property. So the on-money it received as rightly noted by Ld. CIT(A) has been expended for the building project (Slum Re- development Project) and its common knowledge that in the line of such business, lot of cash expenditure is incurred and we fully concur with the observation made by Ld. CIT(A) "*various factors associated with this type of*



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project which require lot of expenditure in cash in various processes such as negotiation with slum dwellers, additional compensation to slum dwellers for their extended premises, compensation to the committee members for liasoning with the slum dwellers, payment to other intermediaries, construction cost for Rehab building, etc which has 'been very clearly mentioned by the applicant in its SOF' and therefore the Gross Profit (GP) rate adopted by the Ld. Settlement Commission in the case of M/s. ORDPL i.e. 17.5 % has been rightly adopted by the Ld. CIT(A), which doesn't require any interference from our side. So we confirm the impugned action of Ld. CIT(A) and dismiss this ground of revenue.

26. Ground no. 4 is against the action of the Ld. CIT(A) in allowing the setoff of current year loss which according to the revenue could not have been allowed in view of the specific provisions u/s 115BBE of the Act.

27. The fact has been discussed by the Ld. CIT(A) at page no. 26 of his order reads as under: -

“8. The Ground no. 5 raised by the assessee relates to the action of the AO in not setting off the loss for the current year while determining the total income. The AO appears to have adopted the total additions made by him as total taxable income of the appellant rather than computing the



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taxable income based on income offered in return of income filed by the assessee.

1. The assessee has made following submissions on this issue:

4.1. In the assessment order, the Assessing Officer has determined the amount of additions made at Rs.20,56,46,362/-. It is submitted that Assessing Officer has not set off the current year business loss against the additions made during the year under consideration.

4.2. It is submitted that the additions made in the year under consideration has to be added to the income shown in the return filed by the appellant and the net income has to be considered as a total income for the year under appeal. There is no provision which permits the Assessing Officer to ignore the current year loss as determined as per the return of income.

4.3. In light of the above, the appellant humbly prays that the additions of Rs. 20, 56,46,362/- may kindly be allowed to be set-off against the returned loss of Rs. 3,75,36,991/- and the net income after set off may be treated as the total income of the year under appeal.

8.2 The submission made by the assessee has been examined. In the assessment order, the AO has adopted total income as per return of income at Nil. The assessment has returned a loss of Rs.3,75,36,991/-. No reason has been provided by the AO for adopting a nil figure of returned income. The AO should have started with the income shown by the assessee for computing the taxable income of the assessee for arriving at the correct assessment income. The action of the AO is not found to be correct. He is directed to adopt the correct returned income while computing the taxable income. The ground is decided accordingly.”



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28. The Ld. AR drew our attention to notification issued by the CBDT Circular no. 11/2019 dated 19th June, 2019. According to the Ld. AR as per section 115BBE, set-off losses should be allowed for AY. 2016-17 and from a perusal of the circular it is clarified that set off of losses was not allowable deduction from next assessment year i.e. AY. 2017-18 because no deduction of “set off of any loss” was inserted in sub-section (2) of section 115BBE by Finance Act, 2016 w.e.f. 01.04.2017 and so applicable from AY. 2017-18 from next year for 2017-18 and not for this assessment year.

29. We have heard both the parties and perused the records. We note that revenue’s main grievance is that Ld. CIT(A) erred in directing AO to allow “*set off current year loss*” against the unaccounted and unexplained income in view of specific provision u/s 115BBE of the Act. We note that the term “*or set off of any loss*” was specifically inserted by Finance Act, 2016, w.e.f 01.04.2017 i.e. AY. 2017-18. So an assessee is entitled to claim set-off of loss against income determined u/s 115BBE of the Act till AY. 2016-17. This issue has been clarified by the CBDT vide Circular 11/2019 dated 19.06.2019, wherein the CBDT Circular states as under:

Government of India
Ministry of Finance
Department of Revenue Central Board of Direct Taxes



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North-Block, New Delhi, dated the 19th of June, 2019

Subject: Clarification regarding non-allowability of set-off of losses against the deemed income under section 115BBE of the Income-Tax Act, 1961 prior to assessment year 2017-18-reg.

With effect from 01.04.2017, sub-section (2) of section 115BBE of the Income-tax Act, 1961 (Act) provides that where total income of an assessee includes any income referred to in section(s) 68/69/69A/69B/69C/69D of the Act, no deduction in respect of any expenditure or allowance or set off of any loss shall be allowed to the assessee under any provisions of the Act in computing the income referred to in section 115BBE(1) of the Act.

2. In this regard, it has been brought to the notice of the Central Board of Direct Taxes (the Board) that in assessments prior to assessment year 2017-18, while some of the Assessing Officers have allowed set off of losses against the additions made by them under Section(s) 68/69/69A/69B/69C/69D, in some cases, set off of losses against the additions made under Section 115BBE (1) of the Act have not been allowed. As the amendment inserting the words 'or set off of any loss is applicable with effect from 1st of April, 2017 and applies from assessment year 2017-18 onwards, conflicting views have been taken by the Assessing Officers in assessments for years prior to assessment year 2017-18. The matter has been referred to the Board so that a consistent approach is adopted by the Assessing Officers while applying provision of section 115BBE in assessments for period prior to the assessment year 2017-18.

3. The Board has examined the matter. The Circular No. 3/2017 of the Board dated 20th January, 2017 which contains Explanatory notes to the provisions of the Finance Act, 2016, AY 2016-17 at para 46.2, regarding amendment made in section 115BBE(2) of the Act mentions that currently there is uncertainty on the issue of set-off of losses against income referred to in section 115BBE. It also further mentions that the pre-amended provision of section 115BBE of the Act did not convey the intention that losses shall not be allowed to be set-off against income referred to in section 115BBE of the Act and hence, the amendment was made vide the Finance Act, 2016.

4. Thus keeping the legislative intent behind amendment in section 115BBE (2) vide the Finance Act, 2016 to remove any ambiguity of interpretation, the Board is of the



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view that since the term ‘or set off of any loss’ was specifically inserted only vide the Finance Act 2016, w.e.f. 01.04.2017, an assessee is entitled to claim set-off of loss against income determined under section 115BBE of the Act till the assessment year 2016-17.

5. The contents of this Circular may be circulated may be widely for information of all stakeholders and departmental officers. The pending assessments and litigations on this issue may be handled accordingly.”

Rajarajeswari R.)

Under Secretary (ITA. II), CBDT

(F. No.225/45/2019-ITA.II)

30. In the light of the CBDT clarification (supra) which is binding on Income Tax Authorities, we uphold the action of Ld. CIT(A) on the strength of the above circular and as the law stood in AY. 2016-17. Amendment made as seen brought in by Finance Act, 2016 wherein the term “*or set off any losses*” was inserted w.e.f. 01.4.2017, so will be applicable from AY. 2017-18; and not for AY. 2016-17. Therefore, the Ld. CIT(A) rightly directed the AO to allow the losses for AY. 2016-17. Therefore, we dismiss this ground of revenue.

31. In the result, the appeals of the revenue stands dismissed.

Order pronounced in the open court on this 13/02/2023.

Sd/-

(AMARJIT SINGH)
ACCOUNTANT MEMBER

Sd/

(ABY T. VARKEY)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 13/02/2023.
Vijay Pal Singh, (Sr. PS)



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आदेश की प्रतिलिपि ँ ग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

**उप/सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**