

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

BEFORE SHRI BR BASKARAN, AM & SHRI ABY T. VARKEY, JM

आयकर अपील सं/ I.T.A. No. 3025/Mum/2023
(निर्धारण वर्ष / Assessment Year: 2017-18)

Konark Infrastructure Ltd Ground Floor, Sapna Talkies, Konark Plaza, Near Sapna Garden, Ulhasnagar 42100.	बनाम / Vs.	DCIT, Central Circle – 4 6 th Floor, Ashar IT park, 16Z, Waghle Estate, Thane (W)
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AABCK6745L		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

आयकर अपील सं/ I.T.A. No. 3088/Mum/2023
(निर्धारण वर्ष / Assessment Year: 2017-18)

DCIT, Central Circle – 4 6 th Floor, Ashar IT park, 16Z, Waghle Estate, Thane (W)	बनाम / Vs.	Konark Infrastructure Ltd Ground Floor, Sapna Talkies, Konark Plaza, Near Sapna Garden, Ulhasnagar 42100.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AABCK6745L		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by:	Shri Vijay Mehta
Revenue by:	Shri Biswanant Das, CIT DR

सुनवाई की तारीख / Date of Hearing: 14/02/2024
घोषणा की तारीख /Date of Pronouncement: 27/02/2024

आदेश / ORDER

PER ABY T. VARKEY, JM:

These are appeals preferred by the Revenue and the assessee against the order of the Ld. CIT(A), Pune-11 dated 30.06.2023 for AY. 2017-18.



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2. We first take up the appeal of the assessee. The sole grievance of the assessee relates to the Ld. CIT(A)'s action of confirming the addition of Rs.1,48,50,000/- on account of alleged cash on-monies received on sale of shop. Brief facts of the case are that, a search and seizure operation u/s 132 of the Income Tax Act, 1961 (hereinafter "the Act") was carried out on 23.01.2018 on Konark Group and its associate concerns including the assessee which are engaged in diversified business such as Octroi & toll collection, steel industry, real estate projects, government civil contracts, etc. Subsequently, notice u/s 153A of the Act was issued to the assessee on 10.09.2018. In response to this notice, the assessee filed its return of income on 31.03.2019 by declaring total income of Rs.2,12,29,380/-. The AO, in the course of assessment, noted that Page no. 1 of the Bundle No.1 contains certain cash transactions indicating that the assessee received cash monies towards sale of Shop Nos. 22 and 23 at Konark Arcade. The relevant extract of the seized document [*typed version*] is reproduced below:-

Konark Arcade

24.10.2011

For Shop No. 22 and 23 with Separate 3

Phase Elect Metr

25/- Given

25/- Cash today

25/- Cheque today Chq No.555147 Dena Bank

25/- On 5th Nov

Rem 73.5 upto 15th Dec or Before

On or before-30.11.2016.



3. When this Page was confronted to Shri Sanjay Gupta, CEO of the assessee, he accepted that the signature dated 03/11/2016 mentioned on this page belongs to him and also confirmed that the expression “on or before 30/11/2016” was written by him in his hand writing. The relevant portion of his statement has been extracted by the AO at Page 9 of the assessment order. Relying on this statement, the AO held that, the contents of this document was true and correct. He further noted that, the total amount mentioned at the top portion of this page comes to Rs. 1,73,50,000/- out of which only Rs. 25,00,000/- were received by cheque. He accordingly presumed that the assessee has received balance of Rs. 1,48,50,000/- in cash towards on-monies for sale of shops at Konark Arcade and thus added the same as unaccounted income of the assessee. On appeal, the Ld. CIT(A) confirmed the order of the AO. Being aggrieved, the assessee is now in appeal before us.

4. Assailing the action of the Ld. CIT(A), the Ld. AR for the assessee pointed out that, the seized Page contained five amounts of which two were recorded in the books of accounts, only one noting denoted cash received and the other two were futuristic i.e. to be received in future. He pointed out that the two remaining amounts were to be paid in December 2016 but since demonetization happened with effect 09.11.2016, the transaction never took place as it was not possible to accept old currency in cash. The Ld. AR further showed us that, the assessee had provided the names of the persons i.e., Mr & Mrs Aswani who had given the cheques towards the intended purchase of the said shops at Konark Arcade,



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Dombivali. He further submitted that, since the completion/occupation certificate was not granted to the project due to litigations with the local authorities and MIDC, these persons cancelled the deal and the cash was returned and the cheques of Rs.25,00,000/-, which was received previously, had been adjusted against sale of different property purchased by them. According to the Ld. AR therefore, when the contemporaneous facts showed that the deal never happened, then it was wholly incorrect on the part of the lower authorities to hold that the assessee had received cash upon sale of shops. The Ld. AR argued that, despite providing the details of the persons and their confirmations, the lower authorities did not cross verify with them nor did they try to ascertain the true facts viz., the intended sale never took place. The Ld. AR thus pleaded that the impugned addition was unjustified and thus deserves to be struck down. The Ld. AR further pleaded that, in case the explanation given regarding the cash noting of Rs.25,00,000/- is not accepted, then in the alternate only the profit component embedded in the purported on-monies ought to be taxed. For this, the Ld. AR relied upon a plethora of decisions rendered by the coordinate Benches of this Tribunal.

5. Per contra, the Ld. DR supported the order of the lower authorities. He argued that the seized Page No. 1 had been counter signed, which suggested that the entire cash had been received by the assessee. According to him, the explanation put forth by the Ld. AR was an after-thought and deserves to be rejected.



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6. We have heard both the parties and perused the material placed before us. It is noted that Page No.1 of Bundle No. 1 contains reference to Shop Nos. 22 & 23 of Konark Arcade, Dombivali. It is further observed that, Mr. Sanjay Gupta, the CEO of the assessee, had admitted that certain noting's were made by him on this Page and therefore this loose page is noted to be pertaining to the assessee. On perusal of the contents of this Page, it is noted that, there is no name mentioned. Instead, there are following five noting's on this Page dated 24.10.2016: -

1.	25/-	Given
2.	25	Cash Today
3.	25	Cheque today
4.	25	On 5 th Nov
5.	Rem 73.5	up to 15 th Dec or before On or before 30/11/2016 (hand written)

7. The Ld. AR had explained that the above noting's pertained to a proposed deal with Mr. & Mrs. Aswani. It was shown that, Mr. Nilesh Aswani along with his wife, Mrs. Bhavna Aswani had initially proposed to acquire shop nos. 22 & 23 at Konark Arcade, Dombivali towards which they had made payments of Rs.25 lacs each. It is noted that Mr. Nilesh Aswani had given cheque of Rs.25,00,000/- on 24.10.2016 bearing cheque no. 555147. Similarly, Ms. Bhavna Aswani had also issued two cheques aggregating to Rs.25,00,000/- on 26.09.2016 & 04.10.2016. The copies of their respective ledgers are found placed at Pages 69 & 70 of Paper Book. Having perused the same, we note that the noting found on Sl No. 3 (*the date and cheque no.*) of the seized Page No. 1 [dated 24.10.2016] fully reconciles with the ledger of Mr. Nilesh



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Aswani. We thus find merit in the contention of the Ld. AR that the explanation given by the assessee that the details of these noting's pertained to Mr. & Mrs. Aswani is tenable. Accordingly, the findings given by the lower authorities that the assessee did not identify the counter-party to these noting's is held to be factually erroneous. We also note that, the noting at Sl No. 1 of 25 did not state as to whether it was a cash payment or cheque payment. From the facts placed before us, it is evident that Mr. & Mrs. Aswani intended to buy the shops and had therefore paid Rs.25 lacs each. Since the third noting on 24.10.2016 reconciles with the ledger of Mr. Aswani, it can be reasonably presumed that the first noting of Rs.25 [*with remark 'given'*] relates to the payment received earlier from Mrs. Bhavna Aswani on 26.09.2016 & 04.10.2016. According to us therefore the first and third noting represents payment in cheque.

8. Now we come to the Sl No. 4 & Sl No. 5 noting's of Rs.25 and Rs.73.5 respectively on the seized Page No. 1. These two noting's clearly suggests that the payments are to be made in future. There is no mention of cash or cheque against these noting's. The Ld. AR has rightly pointed out that, even the first noting of Rs.25 did not state cash or cheque and that the assessee has demonstrated that this noting represent payment in cheque. According to us therefore, the assumption of the lower authorities that these two noting's ought to suggest payment of cash on-monies need not be correct, unless there is any tangible material available to infer these noting's as cash payments, which in this case was not available.



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9. To buttress his contention, the Ld. AR had further submitted that the dates qua the fourth and fifth noting fell during the demonetization period. According to him, the parties could not have foreseen demonetization and thus even if the AO's version is taken at its face value, the cash payments could not have been possibly made in the demonetization period, because Rs 1000/- & Rs 500/ were not legal tenders and the dates mentioned therein were in the midst of demonetization. This explanation given by the assessee regarding fourth and fifth noting is found to be plausible in the light of attending circumstances of demonetization.

10. It is further noted that, the shops which were ultimately sold to Mr & Mrs. Aswani were located in Market Building Bhiwandi and not the Konark Arcade at Dombiwali. This contemporaneous fact further lends credence to the submission of the Ld. AR that the proposed deal which was found noted on this seized page had been subsequently cancelled due to *lis-pendens* at the Dombiwali property and that two different shops were ultimately sold to these intending buyers. Accordingly, one can reasonably infer that the promised payments of Rs.25 & 73.5 in future would not have been made by the intending buyers as they were never allotted the shops for which they had dealt for [Konark Arcade at Dombiwali].

11. As far as the noting found at SI No. 2 is concerned, it is noted that it is abundantly clear that the assessee had received cash on monies of Rs.25,00,000/-. The argument of the Ld. AR that this



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cash was returned when the deal was cancelled cannot be accepted at its face value and hence is rejected.

12. For the various reasons discussed above only the noting at Sl No. 2 of Rs.25,00,000/- which could be said to have represented receipt of cash. Hence, addition of on-monies to the extent of Rs.123.5 lacs (148.5 – 25) is held to be unsustainable on the given facts as discussed in the foregoing.

13. Having held so above, we further note that, in the cases of receipt of on-monies, the coordinate Benches of this Tribunal at Mumbai has held that only profit element embedded therein is to be brought to tax. The relevant citations are as follows:-

- a) Ekta Housing Pvt Ltd Vs CIT (ITA No.1732-1733/Mum/2019)
- b) ACIT Vs Om Construction (ITA No. 6234/Mum/2022)
- c) Tulip Land & Developer Vs ACIT (ITA No. 2980/Mum/2019)
- d) Platinum Properties Vs DCIT (ITA No. 2600/Mum/2012)
- e) DCIT Vs S B Developers (ITA No. 2889/Mum/2019)
- f) Shree Ahuja Properties & Developers Vs DCIT (ITA No. 2965/Mum/2019)

14. Following the ratio laid down in the above decisions and having regard to the facts, according to us, only the profit element embedded in the noting's of purported on-monies of Rs.25 lacs as the income of the assessee for the relevant AY 2017-18. During the course of hearing, we asked the Ld. AR to apprise us about the profitability percentage from the afore-referred project as per the books of the assessee. But, the Ld. AR could not inform us the profitability of this project for the reason that assessee has multiple activities (toll/infrastructural/real-estate etc) and the audited P & L account do not reflect project wise profitability. Faced with such a



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situation, we feel it appropriate to estimate profit of 15% which is higher than the 8% prescribed u/s 44AD of the Act. The AO is accordingly directed to restrict the addition to the extent of 15% of Rs.25 lacs which works out to Rs 3.75 lakhs.

15. Now we take up the appeal of the Revenue. The only issue involved in this appeal relates to the Ld. CIT(A)'s action of deleting the addition of Rs.3,00,00,000/- made by the AO on account of unexplained cash investment. The facts relating to this impugned addition are that, the AO had found that there was a cash noting of Rs.3,00,00,000/- on Page Nos. 20 & 21 under the nomenclature 'INVT in Cash' in the name of the assessee. According to the AO, these pages contained the noting's regarding the actual state of affairs relating to Konark Infrastructure (Water Supply) ('J/V') in which the assessee was the majority JV partner. The AO inferred that these cash investments denoted the cash infused by the assessee into the JV to undertake the water pipeline project. Since the date on these pages was 25.08.2016, the AO presumed that the cash investment was made on this date and accordingly added the impugned sum in the hands of the assessee in AY 2017-18 and similarly made protective addition in the hands of the J/V as well.

16. Aggrieved by this action of the AO, the assessee preferred an appeal before the Ld. CIT(A). Having regard to the cumulative facts of the case, the Ld. CIT(A) noted that, M/s Konark Infrastructure (Water Supply) (J/V) had already declared additional income of Rs.9.50 crores *inter alia* including Rs.4.50 crores qua KIL in AY



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2013-14. The Ld. CIT(A) further noted that additional sum of Rs.3,36,55,357/- had been offered by way of additional income by M/s Konark Infrastructure (Water Supply) (J/V) across AYs 2014-15 to 2016-17. Applying the principle of telescoping, the Ld. CIT(A) held that such additional income of Rs.12.86 crores [Rs. 9.50 crs + Rs.3.36 crs] assessed in earlier years were sufficient enough to be set-off against the cash investment of Rs.3 crores unearthed in Page Nos. 20 & 21 relating to AY 2017-18. The Ld. CIT(A) accordingly held that, no separate addition on account of cash investment was warranted since it was fully covered by additional income offered in earlier years. Being aggrieved by this appellate order of the Ld. CIT(A), the Revenue is in appeal before us.

17. Heard both the parties. We note that the impugned issue has stands squarely covered by the decision of this coordinate Bench in the case of Konark Infrastructure (Water Supply) (J/V) in ITA Nos.3024 & 3059/Mum/2023 for AY 2017-18. In the instant case, it was found that Konark Infrastructure (Water Supply) (J/V) had disclosed income of Rs.9,50,56,072/- in AY 2013-14 before the ITSC, Mumbai. It was noted that the said J/V had specifically declared the additional income to represent the sum available for investment by the JV partners towards the water pipeline project and the sum attributable to the assessee was Rs.4,50,56,072/-. It was accordingly held that, this undisclosed income offered by the J/V and reflected as sum available with the JV partner i.e. the assessee, was available to be telescoped against the noting of cash



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investment of Rs.3,00,00,000/- found on Page Nos. 20 & 21. Accordingly, the separate addition made by the AO on account of unexplained cash credit / cash investment in AY 2017-18 was held to be unsustainable. The relevant findings of this Tribunal are noted to be as follows :-

“54. Heard both the parties. Before advertng to the facts of the case, we first take note of the principle of telescoping which has since been judicially approved by the Hon’ble Supreme Court in the case of **Anantharam Veerasinghaiah & Co. Vs CIT (123 ITR 457)**. In the decided case, it was held that where the assessee offers any income on adhoc basis, then such income is commonly described as intangible addition; but it is very much a part of assessee’s real income as disclosed in his account books and has the same concrete existence. The Hon’ble Court held that the secret profits or undisclosed income of an assessee earned in the same or an earlier assessment year may constitute a secret fund, even though concealed, from which the assessee may draw subsequently for meeting expenditure or introducing amounts in his account books. The intangible additions were held to be available to the assessee as the regular book profits could be. The Apex Court thus held when the unexplained cash deficits and the cash credits can be reasonably attributed to a pre-existing fund of concealed profits or by reference to concealed income earned in that very year then no addition is warranted on account of such cash deficits or cash credits.

55. Similar view was expressed by Hon’ble Madras High Court in the case of **CIT v. K. S. M Guruswamy Nadar and Sons, [1984] 149 ITR 127**. In the decided case, it was held that when there are two separate additions viz., one on account of



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suppression of profit and another on account of cash credit, then it is open to the assessee to explain that, the suppressed profits had been brought in as cash credits and has to be telescoped into the other.

56. Gainful reference may also be made to the decision of the Hon'ble jurisdictional Bombay High Court in the case of **CIT vs J.J. Gandhi (39 CTR 127)**. In this judgment also, the Hon'ble High Court had approved the theory of telescoping and held that it could be applied in cases where additions in relation of unexplained money/investment are sought to be made in the hands of the assessee. The Hon'ble Court explained that if an addition towards undisclosed income was made and the AO also seeks to make certain addition in relation to unexplained investment then, it can be treated by the assessee that the unexplained investment is sourced out of the undisclosed income already taxed.

57. The principle which emerges from the above is that, the same income should not be taxed twice i.e. once at the time of generation and thereafter at the time of application for routing back into the business. The said principle would equally apply where the cash generated by business concerns are routed through partners/directors. Having regard to this settled legal position, we now come back to the facts of the case. It is not in dispute that the assessee had declared additional income of Rs.9,50,56,072/- before the ITSC, Mumbai in AY 2013-14. It is noted that the assessee had also filed a letter dated 28.10.2014 before the ITSC wherein it was specifically clarified that this income was utilized by way of investment in the on-going work of water pipeline project at Ulhasnagar. The details of utilization inter alia comprised of sum of Rs.4,50,56,072/- and



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Rs.5,00,00,000/- by KIL and Eagle Infra Limited, represented by Shri U.M. Rupchandani, respectively. It is therefore evident that the JV partners had disclosed income in the hands of the assessee JV before the ITSC, Mumbai and such additional income of Rs.9,50,56,072/- represented the intangible addition / secret profit, which applying the judicially approved principle of telescoping, could be set off against any unexplained money/investment found by the Revenue.

58.The Ld. CIT(A) is noted to have rightly observed that the AO had erred in considering the cash investment aggregating to Rs.8,00,00,000/- to have been made in AY 2017-18 only because these pages were dated 25.08.2016. The Ld. CIT(A) had rightly analyzed the contents of the seized pages and inferred that the entries therein do not suggest that these transactions were undertaken only in FY 2016-17. Instead, the notings as well as the surrounding circumstances relating to the water pipeline project suggests that the said investment would have been made by the JV partners earlier viz., when the project was ongoing and most likely in 2015 when the major work was completed.

59.However, irrespective whether the investment was made in 2015 or in FY 2016-17, the admitted facts show that the assessee JV had disclosed income of Rs.9,50,56,072/- in AY 2013-14 and had specifically declared the same to be the sum available for investment by the JV partners towards the water pipeline project. Further, the assessee JV had also declared additional income aggregating to Rs. 3,36,55,357/- in AYs 2014-15 to 2016-17, which was also available to be set off against any unexplained money/ investment of Rs.8,00,00,000/- added by the AO in AY 2017-18. On these facts, we thus uphold



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the Ld. CIT(A)'s action of allowing the telescoping benefit and set-off of the amount of undisclosed income aggregating to Rs.12,87,11,429/- (Rs. 9,50,56,072 + Rs.3,36,55,357), towards the cash investment of Rs.8,00,00,000/- found mentioned on seized pages 20 & 21. Hence, having regard to the judicially approved principle of telescoping, according to us, since the additional income offered to tax in earlier years was sufficient to cover such cash investment alleged to have been made by JV partners, no separate protective addition was required to be made in the hands of assessee JV. Accordingly, the appeal of the Revenue is dismissed.”

18. Following the above, we see no reason to interfere with the order of Ld. CIT(A) deleting the addition of Rs.3,00,00,000/-. Hence, the appeal of the Revenue is dismissed.

19. In the result, the appeal of the assessee is partly allowed and the appeal of the Revenue is dismissed.

Order pronounced in the open court on this 27/02/2024.

Sd/-
(BR BASKARAN)
(ACCOUNTANT MEMBER)

Sd/-
(ABY T. VARKEY)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 27/02/2024.
Vijay Pal Singh, (Sr. PS)



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

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

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