

**IN THE INCOME TAX APPELLATE TRIBUNAL
BENCH : COCHIN**

**BEFORE SHRI N. V. VASUDEVAN, VICE PRESIDENT AND
MS. PADMAVATHY S, ACCOUNTANT MEMBER**

ITA No.32/Coch/2017 & CO No./15/2017
Assessment Year : 2008-09

M/s. Holiday Marketing Pvt. Ltd., HIG-5, Panampilly Nagar, Ernakulam – 682 036. PAN : AAACH 9819 F	Vs.	ACIT, Central Circle – 2, Ernakulam.
APPELLANT		RESPONDENT

Assessee by	:	Shri. Joseph Markose, Sr. Advocate Shri. Ramesh Cheriyan John, Advocate
Revenue by	:	Smt. Jamuna Devi, Sr. AR

Date of hearing	:	08.12.2022
Date of Pronouncement	:	02.01.2023

ORDER

Per Padmavathy S, Accountant Member

These cross appeals are filed against the order of the CIT(A), Kochi, dated 28.11.2016, for the Assessment Year 2008-09. Grounds raised by the revenue reads as under:

1. The CIT(A) erred in deleting the addition under the head short term capital gains holding that the Department did not have corroborative evidence to back the narration found in the parallel tally account seized during search.

2. The CIT(A) did not appreciate that entries in the books of accounts seized during a search are presumed to be true as per section 132(4A) of the Act.

3. The CIT(A) did not appreciate that the seized documents relied on by the Assessing Officer was the basis for admission of receipt of on-money by two other companies promoted by Shri C.C.Thampy in their dealings with M/s. Kent Constructions (P) Ltd. These companies approached the ITSC and proceedings have since become final. The CIT(A) also did not appreciate that several other businessmen who sold land to M/s. Kent Constructions (P) Ltd. admitted on money receipt and paid tax thereon on the basis of the impugned seized material. These persons include, Paul Alukkas and George Thomas of Arya Bhanga group.

4. The CIT(A) ought to have noted that adverse contents in seized material based on which addition was made was communicated to the assessee and the assessee should have given proper explanation before Assessing Officer.

5. The reasons pointed out by the CIT(A) for rejection of the relevant entry in the seized material are in fact without basis. The CIT(A) has mentioned that the relevant entry in the seized book refers to payment of Rs. 2.2 crores by cheque from the account of Kent Constructions. No such inference can be drawn from the concerned entry nor has Assessing Officer made such finding of any cheque payment in the assessment order. The decision of CIT(A) is therefore not based on any relevant material.

6. The CIT(A) has pointed out that there was a delay of six months between the payment of on-money as per the seized material and the date of the sale deed. The CIT(A) finds it improbable. The CIT(A) has overlooked that Sri.CC. Thampy the promoter of the assessee company, had a long standing business relationship with M/s. Kent Constructions (P) Ltd. stretching over several years. Hence delay in payment is perfectly reasonable and should not be held against the department and should not have gone by weaker presumption".

2. The assessee filed the return of income for Assessment Year 2008-09 on 29.11.2008 declaring a total income of Rs.11,14,991/-.

There was a search under section 132 of the Act in the case of one Kent Constructions Pvt. Ltd., and during the course of search, there was an entry found in the books of account of Kent Constructions Pvt. Ltd., with respect to sale of the assessee's land measuring 283.182 cents of land at Brahmapuram on 24.03.2008. For this reason, the assessment was reopened in the case of the assessee. A notice under section 148 of the Income Tax Act, 1961 (hereinafter called 'the Act') was served on the assessee on 05.03.2014 in response to which the assessee filed the return declaring the same income as in the original return of income. During the search an entry in the Tally Accounting Software of Kent Constructions Pvt Ltd was found whereby the consideration for the land sold by the assessee measuring 283.182 cents to Kent Construction was for a consideration of Rs.3 lakhs per cent and the total consideration of sale was Rs.8,49,54,600. Based on the information found during the course of search a survey u/s.133A was carried out at the business premises of the assessee. The AO from the material seized noticed that the assessee in the return of income has declared the consideration to be Rs.90,00,000 as per the documents of registration. The AO also called upon the assessee to submit the source of Rs.3,44,00,000 contributions received from Mr.Thampi director of the assessee. The assessee contended before the AO denied that the land was transferred @ Rs.3 lakh per cent and the contention that assessee has received only Rs. 9 lakhs as consideration towards the transfer of land. The assessee also submitted that the details amount received on various dates from Mr.Thampi by stating that Mr.Thampi is involved in various businesses

activities in Middle East for past many years and the source of funds are from these concerns.

3. The AO did not accept the contention on the ground that Mr.Thampi has approached the settlement commission in order to settle the discrepancies in the various transactions with Kent Constructions and therefore cannot take a different stand for this one transaction alone. Accordingly the AO and made an addition of Rs.7,59,54,600/- as short-term capital gain in the hands of the assessee. The AO also made the addition towards the amounts borrowed from Mr.Thampi for an amount of Rs.3,44,00,000/- as unexplained credits under section 68 of the Act in the hands of the assessee on the ground that the creditworthiness of Shri. C. C. Thampi was not properly established by the assessee.

4. Before the CIT(A), the assessee raised the legal contention that the assessment in the hands of the assessee ought to have been done u/s.153C r.w.s. 143(3) and not u/s.147. The CIT(A) accepted the contentions of the assessee with regard to this, but proceeded to adjudicate the appeal on merits also. With regard to the addition made towards capital gains the assessee submitted before the CIT(A) that the AO did not provide the alleged incriminating material to the assessee which is against the principles of natural justice. The assessee also submitted that the AO did not cross examine the assessee with respect to the seized material and there is no corroborative material evidence to prove that the material found during the course of search belongs to the assessee. The assessee relied on the following decisions in this regard –

(i) Mahindra B Bagdai, Rajkot vs DCIT (ITA No.1133/Ahd/2009 dated 30.06.2011)

(ii) Trident Creations Pvt Ltd vs DCIT (ITANo.1078/Ahd/2009 dated 01.09.2010)

5. The CIT(A) accepted the contentions of the assessee and deleted the addition by stating that:

“ In the instant case, the document was found containing entries at the premises of the buyer, during the course of search. Apart from this, there was not corroborating evidence to prove that "on money amounting to Rs.7,59,54,600/-, as alleged by the AO, was paid to the assessee. In fact, the AO contends that 2.2 crores were paid to the assessee company through bank and Rs.6,2,9,54,600/- was paid to Shri C.C. Thampi. The AO also contends that the appellant company recorded only Rs.90,00,000/- towards sales consideration of the land. In that case, what treatment has been given to balance 1.30 crores by the appellant company. The AO has no material comments on this. The AO has also stated that Shri C.C. Thampi was representing many other concerns also, in the capacity of Director, which entered into transaction with M/s.Kent Constructions Pvt. Ltd. Under these circumstances, the AO has not explained, as to what made him believe that the alleged amount of Rs.6.29,54,600/- was received by Shri C.C. Thampi on behalf of the assessee company only and not some other concern. In fact, apart from the entry in the tally package found at the premises of M/s. Kent Construction, there is no evidence corroborating the same, on record. During the course of appellate proceedings, the learned counsel of the appellant drew my attention to the seized copy of the alleged ledger account, which became the basis for addition in the hands of the appellant. The entry reads as under:

15.09.2008 Cr Vishnu loan

7

6,29,54,600.00

*Paid to Mr. Thampi towards balance
amount of mahal land cost — 283.182*

*Cents of land @ 3 lacs — 84954600
less paid from Kent 2.2 Cr*

When this entry is compared to the recorded transaction, many anomalies are noticed in this entry — raising doubt about the correctness and veracity of these entries. According to this entry, Rs.2.2 Crores has been paid in cheque by M/s. Kent Constructions to the appellant and the balance amount was Rs.6,29,54,000/- which was paid to Shri C.C. Thampi in cash on 15.09.2008. Therefore, the agreement for sale of land and the registration should have been done for an amount of Rs.2.2 Crores, whereas the agreement has been done for Rs. 90 lacs only. The cash component should have been Rs.6,29,54,600/-whereas the AO has worked out the cash component at Rs.7,59,54,600/-. Normally, the registration of sale would not be done by the seller until he has received entire sale consideration. As per this entry, the major component of sales consideration has been paid on 15.09.2008 and, therefore, the Registration should be done after that date. I have on my record, a copy of Deed of Sale relating to this land. The Deed has been signed by respective Directors of the two concerns, i.e. Shri C.C. Thampi and Shri F.M. Shamter Marickar. The Deed has been signed on 07.02.2008. At page No. 18 of this Deed, the consideration is mentioned, which is Rs.90,00,000/-. On page No.19, it is mentioned that entire sale consideration has been received.

"In pursuance of the said agreement and in consideration of a total sum of Rs.90,00,000/- (Rupees ninety lakhs only) paid by the purchaser to the vendqr, the receipt of which the vendor hereby admits and acknowledges the entire sale consideration thus fully satisfied ..

Now, as per the alleged entry in the ledger account, the balance money has been paid on 15.09.2008, i.e. after 7 months of execution of the Sale Deed. This is ironical and contradictory.

In view of these anomalies, in my opinion, the entries in the alleged ledger account are unreliable and the AO was not justified in basing his assessment on this entry alone, ignoring other authentic

records available to him. Thus, on the facts of this case and relying on the decision of Hon'ble Ahmedabad ITAT in the case Mahendra B. Bagadia vs. DCIT, entire addition of Rs.7,59.54 600/- is hereby deleted. This ground of appeal of the appellant is allowed.”

6. With regard to the addition made towards amount borrowed from Mr.Thampi the assessee submitted that the contributions are through proper banking channel which is supported by corresponding entries in the bank statement of Mr.Thampi. The assessee further submitted that the AO did not call for any further information to prove credit worthiness of Mr.Thampi and therefore the addition to be deleted.

7. The CIT(A) accepted the submissions of the assessee and deleted the addition by holding that –

“8.4. I have gone through the assessment order and submission of the appellant. Shri C.C. Thampi is a Director of the assessee company and he brought in loan amounting to Rs.3,44,00,000/- to the assessee company. The AO held that creditworthiness of Shri C.C. Thampi is not proved and, therefore, he added the entire amount in the hands of the appellant company and treated as appellant's income u/s.68 of the I.T. Act. Now, Shri C.C. Thampi is a Director of the company, he has brought in all the amount of loan through banking channels as foreign remittances. Earlier in the order, the AO has mentioned that Shri Thampi is a Director in many concerns. Case of a Director of a company, in my opinion, is different from an unrelated loan creditor. In the hands of the appellant company, the loan stands explained as the same has been brought in by a Director of the company. If at all, the amount is not explained, it is not explained in the hands of Shri C.C. Thampi. Shri C.C. Thampi has been working abroad for past 30 years and the AO has not doubted this fact. In view of the facts and discussion above. in my opinion, the AO was not justified in adding the amount of loan credit, brought in the Director of the company, Shri C.C. Thampi, amounting to Rs.3,44,00,000/-, in the hands of

the appellant company and the same is hereby deleted. This ground of appeal of the company is allowed accordingly.”

8. Aggrieved the revenue is in appeal.
9. The Id DR reiterated the submissions made through the grounds of appeal.
10. The learned AR submitted that the entry found in the books of Kent Constructions Pvt. Ltd., mentioning that an amount of Rs.6,29,54,600/- was paid to Shri. C. C. Thampy towards maha land cost cannot be considered as incriminating to make addition since there was no further enquiry conducted and there was no nexus established with the assessee to the entry. The learned AR submitted that the entire addition made by the AO is based on this entry whereas the assessee has submitted the actual sale deed wherein consideration paid of Rs.90 lakhs is substantiated which has been ignored by the AO. The learned AR submitted that the impugned entry found is dated 15.09.2008 whereas the actual sale took place in February, 2008, much before the date of the entry and no person would complete the transfer of an asset without receiving the consideration in full. The learned AR further submitted that there is no corroboration between the entry and the actual transaction that took place and the revenue has not brought anything on record to show that the entry has any nexus to the transaction of sale entered into by the assessee. The learned AR therefore prayed that the CIT(A) has rightly deleted the addition made.
11. With regard to the addition made on account of loans taken from the Director Shri. C. C. Thampy, the learned AR submitted that the

amounts were received through proper banking channel and the creditworthiness of Shri. C. C. Thampy was duly filed during the course of assessment. Learned AR further submitted that Shri. C. C. Thampy has been working abroad for past 30 years and therefore creditworthiness is properly explained.

12. We heard the rival submissions and perused the material on record. The main basis on which the AO has made the addition with respect to the capital gain is that the Mr. Thampi has approached Settlement Commission with regard to various land related transactions and that with regard to certain other entries when confronted the parties have agreed to offer the income and pay tax. However from the perusal of records and the order of assessment, we notice that the AO has not brought anything on record to show that the transaction actually happened for the amount as mentioned in the entry. It is also noticed that the AO has not recorded about any adverse finding with regard to the impugned transaction during the course of survey conducted u/s.133A. The assessee had not denied the fact that Mr.Thampi has approached the settlement commission with regard to other land related transactions involving other companies but has denied the impugned addition by stating that there was no “on-money” transaction with respect to this particular transaction. The CIT(A) has recorded a finding from the order of the AO that the amount of Rs.2.2 crores alleged to have been received by the assessee through checks should have been found in the books of the assessee and this fact has not been properly substantiated by the AO. The AO while making the addition did not

establish the nexus that the entry found during the course of search belongs to the assessee and how the amount mentioned therein as received by Mr.Thampi is indeed received on behalf of the assessee and not someone else. We also see merit in the argument that the assessee is not given proper opportunity to confront the allegations as the AO did not share furnish the actual details of material seized. The assessee has substantiated that the actual transaction happened for an amount of Rs.90,00,000 only by producing the sale deed which is registered much before the date of the entry found during the course of search. It is also noted that as per the registered sale deed the entire consideration is already been paid to the assessee. Given this, in our view the burden is now on the AO to prove that the assessee received some additional “on-money” payments and considering the facts circumstances of the case we are of the view that the AO has not brought sufficient material on record against the assessee warranting the addition. The addition made by the AO is based on the assumption that Mr.Thampi has admitted transactions relating to other concerns, and therefore the impugned transaction should have taken place for what he found in the entry. This cannot be the right approach for making an addition when no other corroborative evidence is brought on record to show that the transaction happened for a higher amount and there were “on-money” transactions. In our view the CIT(A) has looked into the facts and circumstances of the case and has given a clear finding while deleting the additions. We therefore see no reason to interfere with the order of the CIT(A) with regard to this issue.

13. With regard to the addition made on account of loans taken from the Director Shri. C. C. Thampi on the ground that the source is not properly explained, we notice that the AO has made the addition on the ground that the assessee had not furnish the relevant details to substantiate the source. However the AO has not considered the submissions of the assessee that all contributions are made through proper banking channel as a foreign remittance from abroad and that Mr.Thampi is working abroad for last 30 years having involved in many business ventures in middle east. We notice that the assessee had submitted the annual reports of various entities in which Mr.Thampi is involved and the AO has rejected these on the ground that the annual reports pertain year ended 31.03.2012 and cannot considered for contributions made during 2007. The AO has also alleged that the assessee is producing irrelevant details to divert the issue. We are unable to appreciate this stand of the AO for the reason that the assessee has submitted evidences in the form of bank statements where the entries of receipt on various dates are reflected and the annual reports are submitted to substantiate the various business interest of Mr.Thampi. These evidences cannot be rejected without verification and without any adverse finding to the contrary. The AO has not conducted any further enquiry but has made the addition by stating that the credit worthiness is not proved in the manner in which it ought to have been proved. The CIT(A) in our view has considered the facts and circumstances of the case correctly while deleting impugned addition and therefore we see no reason to interfere with the decision of the CIT(A).

14. The grounds filed by the revenue with regard to both the issues is hereby dismissed.

15. Before parting we want to mention that the decision with respect to both impugned issues is based on the records, facts and circumstances specific to this case for the year under consideration and therefore cannot be applied generally with regard to any other cases.

16. Since we have dismissed the appeal filed by the revenue, the cross objections raised by the assessee has become academic and does not warrant any separate adjudication.

17. In the result, appeal filed by the revenue is dismissed.

Pronounced in the open court on the date mentioned on the caption page.

Sd/-
(N. V. VASUDEVAN)
Vice President

Sd/-
(PADMAVATHY S)
Accountant Member

Bangalore,
Dated: 02.01.2023.
/NS/*

Copy to:

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| 1. Appellants | 2. Respondent |
| 3. CIT | 4. CIT(A) |
| 5. DR | 6. Guard file |

By order

Assistant Registrar,
ITAT, Bangalore.